The Criminalisation Approach in Malaysia's Counter-Terrorism Strategy

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The candidate confirms that the work submitted is his own and that appropriate credit has been given where reference has been made to the work of others.

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Abstract

This research is intended to critically analyse the criminalisation approach as a primary legal response to terrorism in Malaysia. The approach encapsulates the use of criminal law within the existing criminal justice system. It is hypothesised that the criminalisation approach provides the most fair and effective response, which also embodies legitimacy and upholds constitutionalism, and should be given priority over other counter-terrorism approaches. The potential approaches are categorised into three modes: the normal criminalisation mode (NCM), which embodies the elements of 'normalcy' and consistency; the special criminalisation mode (SCM) which involves modification and manipulation such as the invention of special terrorism-related offences and alteration to normal criminal procedures; and the avoidance of criminalisation mode (ACM) which works outside the criminal justice system and might arise in exceptional situations where the NCM and SCM cannot produce fair and effective outcomes. The preferred NCM utilises ordinary criminal law and existing processes in dealing with terrorism. In order to explore and test the proposition, this thesis first examines and evaluates the conception of terrorism and counter-terrorism in Malaysia. The assessment covers the existing definitions of terrorism and factors that shape the formulation of Malaysia's counter-terrorism strategy. That is followed by an analysis of the concept of the criminalisation approach. The thesis then assesses the workings and dynamics of the criminalisation approach within Malaysia's counter-terrorism strategy. The explorations and assessments involve a socio-legal approach which incorporates a doctrinal study of legal aspects as well as an empirical, interview-based study of how the law is operated in practice. Additionally, policy transfer framework is adopted in this thesis in order to draw lessons from the UK's counter-terrorism policy, particularly its prosecution-based policy. This thesis eventually recommends potential improvements that can be made to the present criminalisation approach as well as counter-terrorism strategy in Malaysia. The thesis stance and the methodologies represent original studies of Malaysian counter-terrorism laws.

List of Abbreviations and Acronyms

ACCT	ASEAN Convention on Counter-Terrorism (ACCT) 2007
ACM	Avoidance Criminalisation Mode
AMLATFPUA	Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2011 [Act 613]
ASEAN	Association of Southeast Asian Nations
ASG	Abu Sayyaf Group (ASG)
BN	Barisan Nasional (National Front)
CLJ	Current Law Journal
CONTEST	Counter-Terrorism Strategy (United Kingdom)
ESCAR	Essential (Security Cases) Regulations 1975
ISA	Internal Security Act 1960 [Act 82]
ISIS	Islamic State of Iraq and As-Sham
JI	Jemaah Islamiyah
KMM	Kumpulan Militan Malaysia
LNS	Legal Network Series
MILF	Moro Islamic Liberation Front
MLJ	Malayan Law Journal
NCM	Normal Criminalisation Mode
NSC	National Security Council
OIC	Organisation of Islamic Cooperation
PAS	Parti Islam Se-Malaysia (Islamic Party of Malaysia)
PH	Pakatan Harapan (Alliance of Hope)
POCA	Prevention of Crime Act 1959 [Act 297]
POTA	Prevention of Terrorism Act 2015 [Act 769]
SCM	Special Criminalisation Mode
SOSMA	Security Offences (Special Measures) Act 2012 [Act 747]
SUARAM	Suara Rakyat Malaysia (Voice of Malaysian People)
SUHAKAM	Suruhanjaya Hak Asasi Manusia Malaysia (Human Rights Commission of Malaysia)
TA	Terrorism Act 2000 (United Kingdom)
UDHR	Universal Declaration of Human Rights
UMNO	United Malays National Organisation
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council

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Special Measures against Terrorism in Foreign Countries Act 2015 [Act 770]

Terengganu Enactment No 6 (1933)

Universities and University Colleges (Amendment) Act 2019 [Act A1582]

United Kingdom

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UN Economic and Social Council, Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty Resolution 1984/50 (1984)

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Universal Declaration of Human Rights 1948

Chapter 1 - Introduction

1.1 Statement of Thesis

This research examines and assesses the criminalisation approach in Malaysia's counter-terrorism strategy. It is hypothesised that the criminalisation approach should be prioritised as the legal response to terrorism in Malaysia. The approach is posited as an effective and fair legal measure in Malaysia's counter-terrorism strategy. It operates within the regular criminal justice system and gives precedence to the use of existing criminal laws. Accordingly, the approach entails the prosecution of terrorist suspects in court, a prospect arguably less appealing to the Malaysian authorities in the past when executive-based measures were the key elements within Malaysia's counter-terrorism strategy. Amongst the historical preferred measures were detention without trial and restrictions of movement that functioned through executive orders rather than the criminal justice system. It is important to underline that this research does not present the criminalisation approach as the sole panacea to phenomenon of terrorism. The approach, therefore, should operate with other components within a comprehensive counter-terrorism strategy.

1.2 Research Background

Malaysia is a federal constitutional monarchy comprising 13 states and three federal territories, which was founded in 1963. Before the formation of Malaysia, the majority of the states were part of the Federation of Malaya and then gained independence from the British in 1957. Sabah and Sarawak obtained independence after joining Malaya and Singapore to form Malaysia in 1963.

The supreme law is the Federal Constitution of 1957.[1] Accordingly, any law passed by the Parliament so far as it is inconsistent with the Constitution 1957, will be

1 See Karam Vohrah, Philip Koh, Peter Ling, *Sheridan & Groves The Constitution of Malaysia* (5th edn, Malayan Law Journal Sdn. Bhd., Kuala Lumpur, 2004) 36-51; also, Mohamed Suffian Hashim, *An Introduction to the Constitution of Malaysia* (2nd edn, Government of Malaysia, 1976) 17.

void.[2] Apart from setting out the fundamental rights of the citizen, the Federal Constitution 1957 stipulates powers of the executive, legislative and judiciary, as well as federal and state governments. Malaysia's political system fundamentally upholds constitutional supremacy, even though the Westminster system of government is extensively adopted in other aspects.[3] The Constitution 1957 also stipulates the powers of federal and state governments, the authority of the head of state, the Yang di-Pertuan Agong, and other vital institutions such as the Election Commission. Based on the Constitution 1957, the Federal government has the power to govern criminal law and procedure and the administration of justice, as well as internal security, which includes 'police, criminal investigation and public order'.[4] With regards to the administration of justice, Malaysia adopts the Common Law and adversarial criminal justice system. The Malaysian judiciary consists of three tiers of superior and lower courts.

Turning to Malaysia's response to terrorism phenomenon. Malaysia's counter-terrorism strategy has its roots within the 12-year campaign against the Communist insurgency between 1948 and 1960, which is known as the Malayan Emergency.[5] During the emergency period, the 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.[6] The state executive body and its agents had a wide range of powers at its disposal, including indefinite detention without trial and restriction of residence against terrorist suspects.[7] The executive-based approach was maintained through various laws, even after the

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2 Article 4(1), Federal Constitution 1957. See also Wu Min Aun, *The Malaysian Legal System* (2nd edn, Longman, Kuala Lumpur,2000) 73.

3 Andrew Harding, *Law Government and the Constitution in Malaysia* (Kluwer Law International, Hague, 1996) 47-49.

4 Item 3 & 4, Ninth Schedule, Federal Constitution 1957.

5 On the Malayan Emergency see, Robert Jackson, *The Malayan Emergency: The Commonwealth's War, 1948-1966* (Routledge, London, 1991); Richard Clutterbuck, *The Long, Long War: The Malayan Emergency 1948-1960* (Cassell, London, 1966); Riley Sunderland, *Organizing Counterinsurgency in Malaya, 1947-1960 (Memorandum RM-4171-ISA)* (RAND Corporation, Santa Monica, 1964).

6 On 'Hearts and Minds' see, Richard Stubbs, *Hearts and Minds in Guerrilla Warfare: The Malayan Emergency 1948-1960* (Oxford University Press, Singapore, 1989); Paul Dixon, '"Hearts and minds"? British Counter-insurgency from Malaya to Iraq' (2009) 32 *Journal of Strategic Studies* 353.

7 Karl Hack, 'The Malayan Emergency as counter-insurgency paradigm' (2009) 32 *Journal of Strategic Studies* 383-414; Hew Bennett, 'A very salutary effect': The Counter-Terror Strategy in the Early Malayan Emergency, June 1948 to December 1949' (2009) 32 *Journal of Strategic Studies* 415.

country gained independence in 1957.[8] The most infamous legislation was the Internal Security Act (ISA) 1960, the implementation of which was highly criticised.[9] The use of the ISA 1960 and the preservation of emergency legislation reflected the prevailing post-independence culture of control and authoritarianism, as well as previous colonial policies against insurgency.[10] Apart from terrorist suspects, the ISA 1960 was also used against political dissidents and social activists.[11] In the aftermath of 9/11, the rise of global terrorism became another justification for the government to retain the security legislation.[12] However, on 15 September 2011, the then Prime Minister Najib Razak announced that the government would repeal the ISA 1960 and existing Emergency Ordinances.[13] The government move is arguably a significant shift away from the previous executive-based approach and towards the criminalisation approach.[14] The shift is mainly due to the political weaknesses of the ruling party, National Front or Barisan Nasional (BN) at that time, along with other internal and external factors.[15] No documented government policy statement explicitly states the change of approach, but it is perceptible from the following four aspects.

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8 On the primacy of the executive power and measures in Malaysia, see Rais Yatim, *The Rule of Law and Executive Power in Malaysia: A Study of Executive Supremacy* (PhD Thesis, King's College, 1994). See also, David Bonner, *Executive Measures, Terrorism and National Security : Have the Rules of the Game Changed?* (Ashgate Publishing, Farnham, 2007) 138.

9 Internal Security Act 1960 [Act 82]; see Human Rights Watch publications: *Malaysia's Internal Security Act and Suppression of Political Dissent* (2002); *In the name of security* (2004); *Detained Without Trial: Abuse of Internal Security Act Detainees in Malaysia* (2005); *Convicted before trial* (2006); *Creating a culture of fear* (2015), all at <https://www.hrw.org/publications?country[0]=9555>. See also, Human Rights Commission of Malaysia, *Report of The Public Inquiry into the Conditions of Detention Under the Internal Security Act 1960* (2013) <http://www.suhakam.org.my/wp-content/uploads/2013/11/Report-Of-The-Public-Inquiry-Into-The-Conditions-Of-Detention-Under-The-Internal-Security-Act-1960.pdf> ;*Review of the ISA 1960* (2003) <http://www.suhakam.org.my/wp-content/uploads/2013/12/review-of-the-ISA-1960.pdf> accessed 5 March 2019.

10 See Anne Munro-Kua, *Authoritarian Populism in Malaysia* (Suaram, Kuala Lumpur, 2017).

11 See Koh Swe Yong, *Malaysia - 45 Years Under the Internal Security Act* (Strategic Information Research Development, Selangor, 2004); Noor Hishmuddian Rahim, *Human Rights And Internal Security In Malaysia: Rhetoric And Reality* (Master's thesis, Naval Postgraduate School, 2006) 51.

12 Therese Lee, 'Malaysia and the Internal Security Act: The Insecurity of Human Rights after September 11' (2002) 1 *Singapore Journal of Legal Studies* 56.

13 Najib Tun Abdul Razak, The Prime Minister's Malaysia Day Speech (15 September 2011) <https://www.pmo.gov.my/ucapan/?m=p&p=najib&id=4104 > accessed 5 March 2019.

14 Abdul Razak, Javaid Rehman, Joshua Skoczylis, '"Prevent" Policies and Laws: A Comparative Survey of the UK, Malaysia and Pakistan' in Genevieve Lennon and Clive Walker (eds), *Routledge Handbook of Law and Terrorism* (Routledge, Abingdon, 2015) 383.

15 See section 4.3.5, Chapter 4.

First, the ISA 1969 was wholly repealed by the Security Offences (Special Measures) Act (SOSMA) 2012, which was approved by the Parliament in 2012.[16] The legislation is intended 'to provide for special measures relating to security offences for the purpose of maintaining public order and security and for connected matters'.[17]

Second, the introduction of the SOSMA 2012 paves the way to 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 offences.[18] Even though the number includes persons allegedly involved in human trafficking and organised activities, the majority of the arrests during the period are related to terrorism.[19] The increasing number of prosecutions arguably sets a new trend because, during the ISA 1960 era, most terrorist suspects were detained without trial.[20]

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.[21] Among the new offences are committing terrorist acts, supporting terrorist groups, promoting terrorism activities and concealing information related to terrorist acts.[22] The new Chapter also provides definitions of 'terrorist', 'terrorist group' and 'terrorist act'.[23] Additionally, in 2015, more terrorism-related offences were created including 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'.[24] Arguably, the 2012 and 2015 legislation has effectively facilitated prosecution and allowed for early intervention. There were a significant number of reported cases in

16 See section 32 Security Offences (Special Measures) Act 2012 [Act 747]. See also, Dewan Rakyat Hansard, 17 April 2012, no 20, 64.

17 Preamble, Security Offences (Special Measures) Act 2012 [Act 747].

18 Deputy Home Minister, Dewan Rakyat Hansard, 4 April 2017, 193.

19 See Home Ministry, Statistics of Arrests Related to Daesh Under Security Offences (Special Measures) Act 2012 (SOSMA), <http://www.data.gov.my/data/ms_MY/dataset/statistik-tangkapan-elemen-daesh-dibawah-sosma-2014-2017> accessed 10 March 2019.

20 See Table 6.1: The number of ISA detainees from 2000 to 2009 in Chapter 3.

21 Penal Code (Amendment) Act 2012 [Act A1430].

22 See Sections 130c, 130g, 130j, 130m, Penal Code 1936 [Act 574].

23 Section 130B(1), Penal Code 1936 [Act 574].

24 Sections 130JA and 130JB, Penal Code (Amendment) Act 2015 [Act A1483].

which the accused persons were charged with possession of items linked to terrorism, such as books, photographs, and video recordings.[25]

Fourth, the establishment of a special court to hear cases related to terrorism and national security also indicates the change of policy, which was in turn welcomed by the judiciary.[26] The special courts are presided over by High Court judges who have been trained to hear terrorism-related cases.[27] During the ISA 1960 period, the role of the judiciary was minimal within Malaysia's counter-terrorism strategy.[28] The judiciary could only interfere with an executive decision if there was a defect in the detention order.[29] The 1988 amendment of the ISA 1960 explicitly stipulated that no judicial review can 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'.[30] Criminal prosecution of terrorism-related cases in court at that time was uncommon.[31]

Overall, the introduction of the SOSMA 2012 facilitates the criminalisation approach in Malaysia's counter-terrorism strategy. In view of constitutionalism and the rule of law, the legislation is arguably a better national security law as compared to the ISA 1960.[32] More safeguards are nevertheless required to ensure it can operate fairly and effectively.[33] It also remains uncertain as to how far the government is committed to the criminalisation approach as the primary legal response in countering terrorism. This doubt is primarily based on the following two reasons.

First, as mentioned earlier, the moves to repeal the ISA 1960 and replace it by the SOSMA 2012 were arguably driven by political instability at that time, instead of

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25 For example, *Mohamad Nasuha bin Abdul Razak v Public Prosecutor* [2019] MLJU 27; *Siti Noor Aishah Atam v. Public Prosecutor* [2018] 5 CLJ 44; *Public Prosecutor v. Muhammad Hakimin Azman* [2017] 1 LNS *1017; Public Prosecutor v. Azizi Abdullah* [2017] 1 LNS 562; *Public Prosecutor v. Muhammad Sani Mahdi Sahar* [2016] 1 LNS 1150.

26 Chief Justice Ariffin Zakaria, 'Speech at the Ceremonial Opening of the Legal Year 2016' (13 January 2017) <http://www.kehakiman.gov.my/sites/default/files/oly-2017-7.pdf> accessed on 10 March 2019.

27 Malaysian Judiciary, *Yearbook 2016* (Percetakan Nasional Malaysia Berhad, Kuala Lumpur 2017) 79.

28 See *Theresa Lim Chin Chin v Inspector-General of Police* [1988] 1 MLJ 293. See also John D Ciorciari, 'A Half-Way Challenge to Malaysia's Internal Security Act (Mohamad Ezam Bin Mohd Nor v Ketua Polis Negara)' (2003) 3:2 *Oxford University Commonwealth Law Journal*, 237.

29 Andrew Harding, *The Constitution of Malaysia* (Hart Publishing, Oxford, 2012) 174.

30 Section 8B, Internal Security (Amendment) Act 1988 Act [A705].

31 One notable case is *Mohd Amin Bin Mohd Razali & Ors v Public Prosecutor* [2003] 4 MLJ 129, where the accused persons were charged with waging war against the king, Yang di-Pertuan Agong under section 121 of the Penal Code 1936 [Act 574].

32 Clive Walker and Mukhriz Mat Rus, 'Legislating for National Security' in Nuraisyah Chua Abdullah (ed.), *Developments in Malaysian Law* (Sweet & Maxwell, Subang Jaya, 2018) 1.

33 See Saroja Dhanapal and Johan Shamsuddin Sabaruddin, 'Rule Of Law: An Initial Analysis Of Security Offences (Special Measures) Act (SOSMA) 2012' (2015) 23 *IIUM Law Journal* 1.

any genuine desire for legal reform.[34] In the 2008 General Elections, the BN government failed to obtain a two-thirds majority in the Parliament due to what was widely termed as 'political tsunami'.[35] The ISA 1960 was officially abolished in the Parliament in June 2012, which was several months before the 2013 General Elections.[36] Hence some were not convinced about the 'reform'.[37] The subsequent use of the SOSMA 2012 against political dissidents and activists solidified the scepticism.[38]

Second, the enactment of the Prevention of Terrorism Act (POTA) 2015 illustrated further the government's faltering attitude towards the executive-based approach.[39] The law provides preventive detention without trial and other executive measures such as control orders to be imposed on terrorist suspects.[40] The detention order is not subjected to judicial scrutiny; hence it is detrimental to the rule of law and open to abuse.[41] These circumstances prompted the impression that the law is the 'reincarnation' of the ISA 1969.[42] Further, the Prevention of Crime Act (POCA) 1959 was also amended in 2014 to include executive detention for an indefinite period.[43] Another amendment was made in 2015 to insert the word 'terrorists' into the long title of the Act. [44] 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.[45] 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 are

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34 Graham K Brown, 'Malaysia in 2012: Promises of Reform; Promises Met?' (2013) *Southeast Asian Affairs*, 153.

35 Ying Hooi Khoo, 'Malaysia's 13th General Elections and the Rise of Electoral Reform Movement' (2016) 8:3 *Asian Politics & Policy*, 418; Chin-Huat Wong , James Chin and Norani Othman Malaysia –Towards a Topology of an Electoral One-Party State, (2010) 17:5 *Democratization*, 920.

36 Dewan Rakyat Hansard, 17 April 2012, 3.

37 Mickey Spiegel, 'Smoke and Mirrors: Malaysia's "New" Internal Security Act' (*Asia Pacific Bulletin*, 14 June 2012) no. 167; Suara Rakyat Malaysia, *Malaysia Human Rights Report 2012: Civil and Political Rights* (Suaram, Petaling Jaya, 2012) 16, 40.

38 See *Public Prosecutor v. Khairuddin Abu Hassan & Anor* [2017] 4 CLJ 701-717, *Maria Chin Abdullah v Supt Tham Lai Kuan & Others* [2016] 1 LNS 1653.

39 Prevention of Terrorism Act (POTA) 2015 [Act 769].

40 ibid, section 13.

41 ibid, section 19.

42 Safia Naz and M. Ehteshamul Bari, 'The Enactment of the Prevention of Terrorism Act, 2015, in Pursuance of the Constitution of Malaysia: Reincarnation of the Notorious Internal Security Act, 1960' (2018) 41 *Suffolk Transnational Law Review* 1.

43 Prevention of Crime (Amendment and Extension) Act 2014 [Act A1459].

44 Prevention of Crime (Amendment) Act 2015 [Act A1484].

45 See Home Ministry, Statistic of Arrests Related to Daesh Under Prevention of Crime Act 1959 (SOSMA), < http://www.data.gov.my/data/ms_MY/dataset/statistik-tangkapan-elemen-daesh-dibawah-poca-2014-2017/resource/55d199c7-9e29-4273-8c56-2a9731668aa2 > accessed 10 March 2019.

accustomed to wide and unchallenged powers.[46] Additionally, after the ISA 1960 and Emergency Ordinances had been repealed, there was likely an attempt to cause 'moral panic' among the population linked to the rise of violent and organised crime.[47] For example, the Home 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.[48] In addition to the residual favourable attitude toward the previous executive-based approach, there are also concerns that it is now more difficult to obtain a conviction.[49] This 'change' of attitude will be further discussed and accessed in Chapter 3.

Another significant development that potentially affects the direction of Malaysia's counter-terrorism strategy is the rise of 'Malaysia Baharu'. The term, which means 'new Malaysia', is widely used to describe the country after 2018 General Elections. Mention was made earlier that the BN government began to lose support, particularly in the 2008 General Election.[50] A decade later, for the first time since independence, the ruling BN government lost power.[51] A coalition of political parties, Pakatan Harapan (PH) or Alliance of Hope formed a new government. The following Table 1.1 enumerates reforms promised by the PH government that may impact on the criminalisation approach and the counter-terrorism strategy.[52]

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46 Andrew Harding (n 29) 178.

47 Amanda Whiting, 'Emerging from Emergency Rule? Malaysian Law "Reform" 2011-2013' (2013) 14:2:9 *Australian Journal of Asian Law* 1, 20.

48 Zurairi AR, Zahid Hamidi: EO replacement may still allow for detention without trial (The Malay Mail, 7 July 2013) < https://www.malaymail.com/news/malaysia/2013/07/07/zahid-hamidi-eo-replacement-may-still-allow-for-detention-without-trial/491821> accessed 10 March 2019.

49 Suara Rakyat Malaysia, *Malaysia Human Rights Report 2016: Civil and Political Rights* (Suaram, Petaling Jaya 2017) 11.

50 Abdul Rashid Moten, '2008 General Elections in Malaysia: Democracy at Work' (2009) 10:1 *Japanese Journal of Political Science* 21.

51 Tsu Chong Chan, 'Democratic Breakthrough in Malaysia – Political Opportunities and the Role of Bersih'(2018) 37:3 *Journal of Current Southeast Asian Affairs*, 109. See also, Muhamad M. N. Nadzri, 'The 14th General Election, the Fall of Barisan Nasional, and Political Development in Malaysia, 1957–2018' (2018) 37:3 *Journal of Current Southeast Asian Affairs*, 139.

52 Pakatan Harapan*, Buku Harapan: Rebuilding Our Nation, Fulfilling Our Hope* (Pakatan Harapan, Putrajaya, 2018).

Table 1.1: Pakatan Harapan's Promises About Legal and Institutional Reforms

	Promises	**Details**	**Implementation (within first year of administration)**
1	Promise 15: Separating the Office of Attorney General from Public Prosecutor.[53]	The government promise to appoint the Attorney General from amongst qualified Members of Parliament. The person will be a Minister who can continue the role as the first legal advisor to the Government. Another independent individual will be appointed as the Public Prosecutor who can act without partisan interest. The person will lead the Public Prosecutor Office, who has autonomy to exercise his or her prosecutorial powers.	The government has carried out a study to look into the proposal.[54] In November 2018, the Prime Minister announced that the move has to be postponed, as it requires an amendment to the Federal Constitution. For that reason, the government contends that it needs a two-third majority in the Parliament.[55]
2	Promise 19: Restore public trust in the judicial and legal institutions.[56]	The power of the Prime Minister to influence the appointment of judges will be removed so that there can be no abuse of power. A Parliamentary Select Committee will decide the	To implement this promise, the government must amend the existing legislation, especially the Judicial Appointments Commission Act 2009 [Act 695].[57] A special committee, namely

53 Pakatan Harapan (n 52) 43.

54 Dewan Rakyat Hansard, 26 March 2019, Oral Answer no 6.

55 New Straits Times, 'Separation of powers between AG and public prosecutors postponed for now' (8 July 2019) <https://www.nst.com.my/news/nation/2018/11/433330/separation-powers-between-ag-and-public-prosecutors-postponed-now> accessed 1 July 2019.

56 Pakatan Harapan (n 52) 50.

57 Chief Justice of Federal Court, The Opening the Legal Year 2019 Speech (11 January 2019) <http://www.kehakiman.gov.my/sites/default/files/OLY%202019%20CJ%27s%20Speech%20-%20Final_0.pdf> accessed 1 July 2019.

		membership of the Judicial Appointments Commission.	Institutional Reforms Committee, was tasked to study the implementation. A full report was then submitted to the government.[58] To date, no amendment has been made to the related legislation.
3	Promise 26: Make our human rights record respected by the world.[59]	SUHAKAM's Annual Report will be debated in Parliament so that proposals receive the proper attention. The appointment of SUHAKAM Commissioners will be made through a parliamentary committee.[60] The PH has also promised to ratify suitable international conventions that are not yet ratified as soon as possible, including the UN International Convention on Civil and Political Rights 1966.	This promise also requires an amendment to the Human Rights Commission of Malaysia Act 1999 [Act 597], especially on the appointment of SUHAKAM Commissioners. In June 2016, the government appointed new Commissioners based on the existing law.[61] The members of the Human Rights Commission are appointed by the Yang di-Pertuan Agong on the recommendation of the Prime Minister.[62] On the ratification of international conventions, the government had declared its intention to ratify International Convention on the Elimination of All Forms of Racial Discrimination 1969, and The

58 Malay Mail, 'Institutional Reforms Committee submits seven immediate proposals' (19 June 2018) <https://www.malaymail.com/news/malaysia/2018/06/19/institutional-reforms-committee-submits-seven-immediate-proposals/1643313> accessed 1 July 2019.

59 Pakatan Harapan (n 52) 60.

60 SUHAKAM stands for Suruhanjaya Hak Asasi Manusia or the Human Rights Commission of Malaysia (SUHAKAM) which is the national human rights institution of Malaysia. It was established by the Parliament under the Human Rights Commission of Malaysia Act 1999 [Act 597].

61 Human Rights Commission of Malaysia (SUHAKAM), 'Appointment of new SUHAKAM Commissioners' (Press Statement no 17 of 2019)<https://docs.google.com/viewerng/viewer?url=https://www.suhakam.org.my/wp-content/uploads/2019/06/Press-Statement-No.-17-of-2019-Appointment-of-new-SUHAKAM-Commissioners.pdf> accessed 8 July 2019.

62 Sections 5(2) and 11A(1), Human Rights Commission of Malaysia Act 1999 [Act 597].

			Rome Statute of the International Criminal Court 2002, but retracted later because of public objection.[63]
4.	Promise 27: Abolish oppressive laws revoke all clauses that prevent the Court from reviewing decisions of the Government or the laws introduced by the Government.[64]	The following laws will be repealed: i. Sedition Act 1948 [Act 15] ii. Prevention of Crime Act 1959 [Act 297] iii. Universities and University Colleges Act 1971 [Act 30] iv. Printing Presses and Publications Act 1984 [Act 301] v. National Security Council Act 2016 [Act 776] vi. Anti-Fake News Act 2018 [Act 803] vii. Mandatory death by hanging in all Acts. The draconian provisions in the following Acts will be abolished: i. Penal Code 1936 [Act 574] especially on peaceful assembly and	Thus far, the government had repealed the Anti-Fake News Act 2018.[65] The government has tabled the amendments for the following laws: i. Universities and University Colleges Act 1971[66] ii. National Security Council Act 2016[67] iii. Peaceful Assembly Act 2012[68] The government has also conducted a study to abolish the mandatory death penalty. The intention is not to abolish the death penalty completely, but rather to provide options to judges. The reform will affect nine offences under the Penal Code 1936, and two offences under the Firearms (Increased Penalties) Act 1971[Act 37].[69]

63 Geoffrey Pakiam, 'Malaysia in 2018: The Year of Voting Dangerously' (2019) 1 *Southeast Asian Affairs* 195.

64 Pakatan Harapan (n 52) 61.

65 Anti-Fake News (Repeal) Bill 2018 [D.R.14/2018].

66 Universities and University Colleges (Amendment) Act 2019 [Act A1582].

67 National Security Council (Amendment) Bill 2019 [D.R 9/2019].

68 Peaceful Assembly (Amendment) Bill 2019 [D.R.13/2019].

69 Dewan Rakyat Hansard, 13 March 2019, Oral Answer no 14.

		activities harmful to democracy ii. Communications and Multimedia Act 1998 [Act 588] iii. Security Offences (special measures) Act 2012 (SOSMA) iv. Peaceful Assembly Act 2012 [Act 736] v. Prevention of Terrorism Act (POTA) 2015 [Act 769]	

The proposed reforms are wide-ranging and will require considerable time and resources, mainly to fix 'the skewed institutions BN created over decades in power'.[70] Some changes involve constitutional amendments, as well as institutional overhauls. Without holding a two-thirds majority in the Parliament, it is difficult for the PH government to fulfil all promises. Additionally, the Dewan Negara, the upper house of the Parliament is still dominated by the senators who were appointed by the previous regime.[71] The new government's attempt to repeal the Anti-Fake News Act 2018, for instance, was blocked by a majority vote of senators at the Dewan Negara.[72]

Apart from external political limits, the government coalition consists of component parties, which have different ideologies and agendas. On one side, many of the leaders of PH's component parties are human rights activists and former ISA-detainees.[73] However, on the other side, the victory of the PH also means the return of Mahathir Mohamad into power.[74] The former Prime Minister is known for

70 Sebastian Dettman & Meredith L. Weiss, 'Has Patronage Lost Its Punch in Malaysia?' (2018) 107:6 *The Round Table*, 739.

71 The term of office for a senator is 3 years, he or she can be re-appointed once, see Article 45(3), Federal Constitution 1957.

72 Anti-Fake News Act 2018 [Act 803], see Dewan Negara Hansard, 12 September 2018, 50.

73 Maria Chin Abdullah, 'Bringing the Reform Agenda from the Streets into Malaysia's Parliament', (2018) 107:6 *The Round Table* 817.

74 James Chin and Bridget Welsh, 'Special Issue Introduction: The 2018 Malaysian General Elections: The Return of Mahathir and the Exit of UMNO' (2018) 37:3 *Journal of Current Southeast Asian Affairs* 3. See also, Walid Jumblatt Abdullah, 'The Mahathir Effect in Malaysia's 2018 Election: The Role of Credible Personalities in Regime Transitions' (2018) 26:3 *Democratization* 521; James Chin, The Comeback Kid: Mahathir and the 2018 Malaysian General Elections (2018) 107:4 *The Round Table* 535.

'Mahathirism', an approach that was associated with authoritarianism and hostility towards the rule of law and human rights when he was in power as BN Prime Minister from 1981 to 2003.[75] Further, his present party, Parti Pribumi Bersatu Malaysia or Malaysian United Indigenous Party also advocates Malay privileges, which is a similar policy to the United Malays National Organisation (UMNO), the leading component party of BN.[76]

The discord within the ruling coalition can be seen from how the government handled the objection to the ratification of the UN International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) 1965.[77] The government withdrew its intention to ratify the Convention as some quarters within PH, as well as opposition parties, contended it could affect the special rights of the Malays.[78] Because the support of Malay voters highly contributed to the PH success, the government seems cautious in dealing with issues related to Islam and Malay privileges, even at the expense of the promised reforms.[79] Arguably, the potential cooperation between UMNO and Parti Islam Se-Malaysia (Islamic Party of Malaysia) or PAS influences the government's responses to these matters.[80] Even so, for the first time since independence, two top positions in the Malaysian legal system have been filled by non-Malays/Muslims, though the appointment of Richard Malanjum as

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75 On 'Mahathirism', see Boo Teik Khoo, *Paradoxes of Mahathirism: An Intellectual Biography of Mahathir Mohamad* (Oxford University Press, New York, 1995); John Hilley, *Contesting the Vision : Mahathirism, the Power Bloc and The Crisis of Hegemony in Malaysia* (PhD Thesis, University of Glasgow, 2000); see also, Hwang In-Won, *Personalized Politics: the Malaysian state under Mahathir* (Institute of South-East Asian Studies, Singapore, 2003).

76 Article 6, Constitution of Parti Pribumi Bersatu Malaysia.

77 Kamilia Khairul Anuar, 'Analysing Malaysia's refusal to ratify the ICERD' (*OxHRH Blog*, 7 January 2019) <http://ohrh.law.ox.ac.uk/analysing-malaysias-refusal-to-ratify-the-icerd> accessed 16 March 2019 .

78 See The Star Online, 'Government not ratifying ICERD' (24 November 2018) <https://www.thestar.com.my/news/nation/2018/11/24/govt-not-ratifying-icerd-we-will-continue-to-defend-federal-constitution-says-pms-office/> accessed 1 July 2019. See also, Prashant Waikar, 'ICERD and Old Politics: New Twists in Post-Election Malaysia?' (*RSIS Commentary*, 21 December 2018) <https://www.rsis.edu.sg/wp-content/uploads/2018/12/CO18214.pdf> accessed 1 July 2019; Human Rights Commission of Malaysia, 'Accession to ICERD' (Press Statement No. 45 of 2018, 31 October 2018) <https://docs.google.com/viewerng/viewer?url=http://www.suhakam.org.my/wp-content/uploads/2018/11/Press-Statement-No.-45-of-2018-ICERD.pdf> accessed 1 July 2019.

79 Amanda Whiting, 'Human Rights in Post-Transition Malaysia' (2018) 107:6 *The Round Table* 811-813; On the Malay voters as a key success factor see, Chin Tong Liew, 'How I Could See the Malay Tsunami Coming' (2018) 107:6 *The Round Table* 787; Serina Rahman, 'Was It a Malay Tsunami? Deconstructing the Malay Vote in Malaysia's 2018 Election' (2018) 107:6 *The Round Table* 669.

80 Chin-Huat Wong, 'The Rise, Resilience and Demise of Malaysia's Dominant Coalition' (2018) 107:6 *The Round Table* 755. See also, Ahmad Fauzi Abdul Hamid, 'The Islamist Factor in Malaysia's Fourteenth General Election' (2018) 107:6 *The Round Table* 683.

the Chief Justice and Tommy Thomas as the Attorney General 'touched a raw nerve in Malaysia's communal politics'.[81]

The political uncertainty and weakness in government at present may also hinder or frustrate the promised reforms on counter-terrorism. Nonetheless, there remains an opportunity to enhance the criminalisation approach. With the spirit of 'Malaysia Baru', the political landscape and law-making process appear more progressive in this 'period of openness and access'.[82] Democratisation is taking place, 'despite some bumps in the road'.[83] Similarly, the government appears to be more accountable and committed to embracing democratic values and the rule of law.[84] Accordingly, Malaysian lawmakers, security services and the public must be well informed and assess whether the criminalisation approach could operate effectively and fairly as a prioritised response to terrorism in Malaysia.

Against this backdrop, Malaysia's counter-terrorism strategy essentially interconnects with other legal, social and political aspects of the society. For that reason, it is important to outline the scope and limitation of the thesis in order to explain its objective. The next section clarifies these two essentials

1.3 Research Objectives and Questions

This research aims to achieve five fundamental objectives. Firstly, it seeks to understand the conception of terrorism in Malaysia and how the state formulates its counter-terrorism policies. Secondly, this research aims to critically analyse the concept of the criminalisation approach as a legitimate and effective strategy within Malaysia's counter-terrorism arrangements. Thirdly, this research seeks to examine and evaluate the practical and theoretical dimensions of criminalisation approach within Malaysia's counter-terrorism strategy based on doctrinal and empirical assessments. Fourthly, this study aims to learn from the United Kingdom's (UK) strategy and experience in ways that could benefit Malaysia's counter-terrorism arrangements. Finally, the fifth objective of this research is to propose improvements to the present strategy for fair and effective counter-terrorism laws within the criminalisation approach. Each goal is formulated in the form of research questions,

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81 Hanipa Maidin, 'The Appointment of Malaysia's First Minority Attorney-General and the Communal Discontent against It' (2018) 107:6 *The Round Table*, 809.

82 Thomas Fann, Challenges and Opportunities Facing Civil Society Organisations in the New Malaysia (2018) 107:6 *The Round Table*, 819, 820.

83 Sophie Lemière, 'The Downfall of Malaysia's Ruling Party' (2018) 29:4 *Journal of Democracy* 114.

84 Nurul Izzah Anwar, 'Malaysia's Reformasi Has Just Begun' (2018) 107:6 *The Round Table* 821.

which are designed to specify important research quests that link to the research objectives.[85] The questions are also important because they shape the design of research methods that will be used in this study.[86] The questions are mostly explanatory (causal), normative and methodological, which are designed to develop good practice outcomes.[87]

As mentioned earlier, the first objective is concerned with the conception and legal definition of terrorism in Malaysia. Accordingly, the main research question here is, how does the state construct 'terrorism' and its definition, which is then translated into counter-terrorism laws and policies? This problem leads to several sub-questions. First, what are the factors that shape the definition of terrorism and counter-terrorism strategy? Second, what is the significance of definition to the counter-terrorism strategy, in particular, the criminalisation approach? Third, is the existing legal definition fair and effective and how can it be improved?

The second research objective deals with the concept of the criminalisation approach in countering terrorism. The key questions are what are the essential values and elements of the approach, and how can it operate fairly and effectively as a primary legal response to terrorism in Malaysia? This thesis will analyse the appropriate roles, functions and position of criminal justice as the most legitimate and viable response to terrorism in Malaysia. Comparisons between the criminalisation approach and earlier executive-based approaches will be drawn in the context of Malaysia. The discussion will also include the advantages and benefits of the criminalisation project for legitimate, rational and effective legal responses against terrorism. Also, the possible costs to the values of criminal justice as well as to the effectiveness of a counter-terrorism strategy will be investigated. Additionally, this research will attempt to answer the question of how far criminal law may push its legitimate boundaries to facilitate a counter-terrorism strategy.

The third objective of this thesis requires an evaluative investigation of the anti-terrorism law, along with its interpretation and implementation within the Malaysian criminal justice system. The critical question is: can the present criminal law and legal setting encapsulate a fair and effective criminalisation approach within Malaysia's counter-terrorism strategy? To answer this important question, the researcher will

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85 Martyn Denscombe, *Ground Rules for Social Research: Guidelines for Good Practice* (Open University Press, Buckingham, 2010) 15.

86 Fran L. Leeuw and Hans Schmeets, *Empirical Legal Research: A Guidance Book for Lawyers, Legislators and Regulators* (Edward Elgar Publishing, Cheltenham, 2016) 46.

87 Patrick White, *Developing Research Questions* (Macmillan Education- Palgrave, London, 2017) 59. See also Martyn Denscombe, *Ground Rules For Good Research : A 10 Point Guide For Social Researchers* (Open University, Buckingham, 2002) 26.

categorise the criminalisation approach into three different modes. The first mode is the Normal Criminalisation Mode (NCM), where the ordinary criminal law and process are used to deal with terrorist threats. The second mode is the Special Criminalisation Mode (SCM) that involves the enactment and utilisation of special criminal law and procedure in terrorism-related cases. The third mode is the Avoidance of Criminalisation Mode (ACM), which fundamentally is not a criminalisation approach, but comprises mostly executive based measures such as detention without trial and restrictions on movement. The research will focus on the NCM and SCM, which are presented in Chapter 5 and Chapter 6, respectively. The ACM is more briefly explained in Chapter 4. In addition, this research will also examine the limits and the drawbacks of this criminalisation project in Malaysia.

The fourth objective is related to the UK's counter-terrorism strategy and how it can benefit Malaysia's strategy based on the method of policy transfer. This thesis seeks to answer three essential evaluative research questions which can lead to the development of good practice. How did policy transfer take place in the past, and how did the imported policy work in Malaysia? What can be learnt from the UK's present counter-terrorism strategy and its prosecution based-policy? What factors constrain or facilitate such policy transfer?[88] There are three main reasons for the researcher to refer to the UK's policy and practice. First, Malaysia is a predominantly common-law jurisdiction and adopts a Westminster parliamentary system. Despite having its own written Constitution and codified criminal law, terrorism legislation was devised based on established principles of English law. Second, Malaysia inherited a robust and extensive colonial legacy, specifically in counterinsurgency, and the country continues to seek lessons from the contemporary British responses against terrorism. Thus, Roach lists an index of 'migrating counter-terrorism laws' that have travelled from the United Kingdom to Malaysia.[89] Third, as the central focus of the thesis is the criminalisation approach, the United Kingdom is a leading proponent of criminalisation after 1972, when it has been asserted that 'prosecution - first, second and third - the government's preferred approach when dealing with suspected terrorists'.[90]

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88 David P. Dolowitz, 'Policy Transfer: A new Framework of policy Analysis' in David P. Dolowitz (eds), *Policy Transfer and British Social Policy: Learning from the USA*? (Open University Press, Buckingham, 2000) 37.

89 Kent Roach, 'The Migration and Derivation of Counter-terrorism' in Genevieve Lennon and Clive Walker (eds), *Routledge Handbook of Law and Terrorism* (Routledge, Abingdon, 2015) 68.

90 Tony McNulty , Hansard HC vol 472 col 561 (21 February 2008), <http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm080221/debtext/80221-0010.htm> accessed 9 January 2016. See also, *Report of the Commission to Consider Legal Procedures to Deal with Terrorist Activities in Northern Ireland* (Cm 3420, 1972).

As one of the research objectives seeks to propose enhancements to the present arrangements toward a comprehensive and inclusive response, this research will investigate and examine critically the United Kingdom's comprehensive counter-terrorism strategy, namely CONTEST.[91] Specific attention will be given to the element of Pursue within CONTEST, which aims 'to detect and understand terrorist activity, to investigate terrorist activity, and to disrupt terrorist activity, including through prosecutions'.[92] Apart from the state reactions, the critical assessments of the counter-terrorism strategy and legislation produced by other stakeholders, including the Independent Reviewer of Terrorism Legislation, will be considered.[93] The UK Government's multitudinous proposals and reports on matters related to counter-terrorism are also important materials for this thesis.

The fifth objective of this research is to propose necessary improvements in existing Malaysia's counter-terrorism arrangements. Hence, what are the changes that should be made to the existing law and policy in order to improve the working of the criminalisation approach? The proposed enhancements cover how to situate the criminalisation approach to work with other measures without losing its primacy or legitimacy as the best legal response to terrorism in Malaysia.

1.4 The Scope and Limitation of the Research

The conception of the criminalisation approach in countering terrorism covers a broad area, which involves many actors and stages within the criminal justice system. Hence it is crucial to set an outlined scope of this research so that its objectives can be successfully achieved. There are elements within criminal justice that fall outside the purview of this research, even though they are undeniably crucial to the operation of the criminalisation approach. For example, this research will not delve in the investigation and sentencing processes. The scope of the research perhaps can be better explained based on the following three aspects.

Firstly, this research emphasises legal responses to terrorism, particularly the criminalisation approach and related government policies. Accordingly, social and

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91 See Home Office, *Countering International Terrorism: The United Kingdom's Strategy* (Cm 6888, 2006); Home Office, *Pursue Prevent Protect Prepare: The United Kingdom's Strategy for Countering International Terrorism* (Cm 7547, 2009); Home Office, *CONTEST: The United Kingdom's Strategy for Countering Terrorism* (Cm 8123, 2011); Home Office, *CONTEST: The United Kingdom's Strategy for Countering Terrorism* (Cm 9608, 2018).

92 Home Office, *CONTEST: The United Kingdom's Strategy for Countering Terrorism* (Cm 9608, 2018) 43.

93 Reports produced by the Independent Reviewer of Terrorism Legislation are available at <https://terrorismlegislationreviewer.independent.gov.uk/category/reports/> accessed 9 January 2016.

economic responses to the phenomenon are not the focus of this project. Secondly, the subject matter of this research is the manipulation of the criminal law and criminal justice system in countering terrorism. Thus, other types of legal responses to terrorism will not be examined in detail, such as, administrative detention, control orders and counter-terrorist finance sanctions. Also, the prosecution of individuals linked to terrorism or 'extremism' in Syariah courts is not within the scope of this research.[94] Thirdly, this research will not thoroughly delve into specific criminal processes and rules of evidence, which deserve more specific attention and equally thorough studies. That includes investigation, policing and sentencing of terrorism-related cases.

In terms of chronological scope, it must be noted that this research is carried out in what appears to be a 'transitional' political period in Malaysia. The 2018 General Election, to a certain extent, has changed the Malaysian politics and government direction. As mentioned earlier, the new government has promised a relatively radical reform, which significantly affects the existing counter-terrorism policy and legislation. Although it is still questionable as to how far the government is capable of delivering its election manifesto, this is arguably a momentous period in which to examine the government policy in countering terrorism. However, due to limited time and resources, it is not feasible for the researcher to prolong this project.

1.5 The Originality and Significance of the Research

The originality and significance of this research predominantly derive from three aspects, which are its subject matter, methodologies, and the policy transfer approach.

With regards to the significance, this research will be contributing new materials about the potential on-going paradigm shift in the conception of Malaysia's counter-terrorism strategy by considering the effectiveness and fairness of the criminalisation approach. The study of the approach is significant mainly for two reasons. First, the criminalisation policy in countering terrorism in Malaysia has

94 The Federal Constitution 1957 gives power to every state to establish its own Syariah court that has jurisdiction over Islamic criminal offences. The offences are stipulated in Syariah Criminal Offences Enactment of each Malaysian state.

received little attention, as compared to the executive-based approach.[95] Many works have concentrated on the utilisation of executive-based measures in Malaysia, especially detention without trial.[96] This attention arguably reflects the government attitude that prioritised the executive-based measures in the past. Second, this study is timely and essential in the light of the change of attitude showed by the government towards the criminalisation approach, as well as the emergence of 'New Malaysia', as discussed earlier. So, this study examines the 'installation' of the criminalisation approach as a critical response to terrorism during a key transitional period in Malaysia. Hence, this dissertation will investigate and contribute to the body of knowledge of criminalisation and advance the Malaysia counter-terrorism strategy in Malaysia.

In terms of the originality of this research, it derives from the research objectives and methodologies. First, the originality of this research also connects to the first research objective, which deals with the conception of terrorism in Malaysia. Accordingly, this study seeks to understand the present threats of terrorism, which comprises different types of terrorists and tactics as compared to the previous generations. The majority of the previous works and studies mainly examine threats coming from the Communist terrorists, which had ceased to exist as a significant threat by the 1970s.[97] The Communist Party of Malaysia officially ended its armed struggle in late 1989.[98] The contemporary risks are no longer coming from Communists' resistance but from Islamist militant groups and individuals who engage in terrorist activities under the influence of radical ideology and utilise modern

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95 Some notable works include: Saroja Dhanapal, Johan Shamsuddin Sabaruddin, 'Rule Of Law: An Initial Analysis Of Security Offences (Special Measures) Act (SOSMA) 2012 (2015) *23 IIUM Law Journal* 1; Norbani Mohamed Nazeri, 'Criminal Law Codification And Reform In Malaysia: An Overview' [2010] *Sing. J. Legal Stud* 375; Aishat Abdul-Qadir Zubair, Umar A. Oseni, Norhashimah Mohd. Yasin, 'Anti-Terrorism Financing Laws in Malaysia: Current Trends and Developments' (2015) *23 IIUM Law Journal* 153.

96 For example: Koh Swee Yong, *Malaysia: 45 Years Under The Internal Security Act* (SIRD, Petaling Jaya Malaysia, 2004); Nicole Fritz and Martin Flaherty, 'Unjust Order: Malaysia's Internal Security Act – Special Report' (2003) 26 *Fordham International Law Journal* 1345.

97 For example: Riley Sunderland, *Anti-guerrilla intelligence in Malaya*, 1948-1960 (Santa Monica, RAND Corporation, 1964); Riley Sunderland, *Army Operations in Malaya, 1947 1960* (Memorandum RM-4170 ISA) Santa Monica, RAND Corporation, 1964; Riley Sunderland, *Organizing Counterinsurgency in Malaya*, 1947-1960 (Memorandum RM-4171-ISA) (Santa Monica, RAND Corporation, 1964); Kumar Ramakrishna, *A Matter of Confidence: Propaganda of Word and Deed in Malayan Emergency June 1948-December 1958* (PhD Dissertation, Royal Holloway University of London, 1999); Kumar Ramakrishna, *Emergency propaganda: The Winning of Malayan Hearts and Minds, 1948-1958* (Curzon Press, Richmond, 2002); Karl Hack, 'British Intelligence and Counter-Insurgency in the Era of Decolonisation: The Example of Malaya, (1999) 14:2 *Intelligence and National Security* 124.

98 K.S.Nathan, 'Malaysia in 1989, Communists End armed Struggle' (1990) 30:2 *Asian Survey* 210.

technology in realising their political ends.[99] The threats are also coming from separatists and nationalist groups such as the so-called 'Royal Sulu Sultanate Army' in Sabah.[100] This present research seeks to understand the contemporary threats of terrorism in Malaysia and attempts to propose legitimate and practical responses. This focus is an original feature of this thesis, as it differs from the previous works that mainly address the past threats and tactics of terrorism.

Second, the fourth objective of the thesis is to learn lessons from the UK's strategy by evaluating its effectiveness and analysing whether such a model might be effective and workable in Malaysia. Roach, among others, has compared and identified links between Malaysian counter-terrorism laws and its UK's counterparts.[101] But unlike the previous works, this research is not a comparative study. The researcher uses the policy transfer approach as a heuristic method to facilitate drawing lessons and transfer alternatives, where appropriate. [102] In short, the policy transfer approach used in this research is an exploratory exercise of the UK's successful policies from her counter-terrorism strategy with the aim to achieve similar advancement within the Malaysian context. This task is original since Marsh and Sharman observe that there is limited research that examines the experiences of policymakers to receive Western models in developing nations, including the South East Asian.[103] Hence this thesis attempts to contribute to developing the body of knowledge regarding policy transfer.

Third, this research gains its originality from its adopted methodologies. It is not claimed to be the first time where the socio-legal approach has been adopted for empirical legal research to investigate and evaluate Malaysian law.[104] However, unlike previous research studies, this research examines specifically the criminalisation

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99 Abdul Razak, Javaid Rehman, Joshua Skoczylis (n 23) 387; Nicholas Chan, 'The Malaysian "Islamic" State versus the Islamic State (IS): evolving definitions of "terror" in an "Islamising" nation-state'(2018) 11:3 *Critical Studies on Terrorism* 415.

100 Abdul Gani Patail, 'SOSMA 2012: Its Implications On Defence And Security' Malaysian Institute of Defence and Security (MiDAS) Talk 6/2013, speech text available at <http://midas.mod.gov.my/2015-03-02-15-07-07/speeches?download=21:sosma-2012-its-implications-on-defence-and-security-18-dec-2013> accessed 25 April 2016.

101 See Kent Roach (n 89) 74; Kent Roach, 'Comparative Counter-Terrorism Law Comes of Age' in Kent Roach (ed), *Comparative Counter-Terrorism Law* (Cambridge University Press, New York, 2015) 24.

102 Richard Rose, 'What is Lesson-Drawing?' (1991) 11 *Journal of Public Policy* 4.

103 David Marsh and J.C Sharman, 'Policy Diffusion and Policy Transfer' (2009) 30:3 *Policy Studies*, 269.

104 For example: Ummi Hani Binti Masood, *Countering Cyber Attacks in Malaysian Law : Assessing the Concept of Cyber Attacks and the Countermeasures* (PhD Thesis, University of Leeds, 2017); Mohd Norhisyam Bin Mohd Yusof, *Human Trafficking Law in Malaysia as Reflected in Policies and Practices* (PhD Thesis, University of Leeds, 2017); Asmah Othman, *The Community Service Order (CSO) in Malaysia: An Exploration of The Perceptions and Experiences of the Youthful Offenders and Supervisors* (PhD Thesis, University of Salford, 2013).

approach in countering terrorism in Malaysia and uses fieldwork in that task.[105] The socio-legal framework allows the researcher to investigate the counter-terrorism agenda from the legal texts and government papers, while also considering the historical, social and political aspects. In addition, the originality of this research derives from the interview data collected in the fieldwork, which was carried out in Malaysia. The researcher interviewed individuals involved directly or indirectly in Malaysia's counter-terrorism strategy. Accordingly, the 'raw' interview data is used and analysed in this project. Several researchers have used fieldwork-based interviews to study terrorism phenomenon in Malaysia.[106] For example, Kirsten E. Schulze and Joseph Chinyong Liow interviewed Islamists, police, and government officials to examine the Islamic State of Iraq and As-Sham (ISIS) phenomenon in Indonesia and Malaysia.[107] Maszlee Malik interviewed SOSMA detainees to understand what motivates individuals to join terrorism.[108] But to date, no previous study used fieldwork to examine and assess the criminalisation policy within Malaysia's counter-terrorism strategy.

1.6 Thesis Outline

This thesis is comprised of seven chapters, which, aside from this introductory chapter, comprise the following.

Chapter Two: Researching Counter-Terrorism in Malaysia

The chapter will explain the research methods used in this research to accomplish the research objectives. It begins with the justifications for adopting the socio-legal approach and explains how the framework helps the researcher in achieving the research objectives. Accordingly, the application of legal doctrinal and empirical methods is fully described. The latter involves several processes including data

105 cf Abdul Razak Ahmad, *Terrorism and the Rule of Law: Rethinking the 'ASEAN Ways' and Responses* (PhD Thesis, University of Leeds, 2012); Yusramizza Binti Md Isa*, Harm Reduction in the Context of Drug Use in Malaysia: A Critical Analysis of Its Justification and Its Compatibility with the Criminal Justice Approach* (PhD Thesis, Lancaster University, 2012)

106 See Mohd Mizan Mohammad Aslam, *A Critical Study of Kumpulan Militant Malaysia, its Wider Connections in the Region and the Implications of Radical Islam for the Stability of Southeast Asia*(PhD Thesis, Victoria University of Wellington, 2009); Mohamed Shah Hussain Shah, *Terrorism In Malaysia: An Investigation Into Jemaah Islamiah* (PhD dissertation, University of Exeter, 2006).

107 Kirsten E. Schulze & Joseph Chinyong Liow, 'Making Jihadis, Waging Jihad: Transnational and Local Dimensions of the ISIS Phenomenon in Indonesia and Malaysia' (2019) 15:2 *Asian Security* 122.

108 Maszlee Malik, 'Dāʿish in Malaysia: A Case Study' (2018) 2:3 *Al-Itqan: Journal of Islamic Sciences and Comparative Studies* 109.

collection and analysis. The ethical issues involved and the limitations faced by the researcher are also addressed.

Chapter Three – The Conception of Terrorism and Counter-Terrorism in Malaysia

This chapter deals with two integral parts, which are the conception of terrorism and counter-terrorism in Malaysia. The first part will examine the existing and previous definitions of terrorism in Malaysia, derived from legislation and government policy papers. Based on the definition of terrorism, the second part of this chapter will assess Malaysia's counter-terrorism strategy with an emphasis on legal responses, along with its shaping factors.

Chapter Four- The Criminalisation Approach as Primary Response to Terrorism in Malaysia

Chapter Four covers the discussion of the concept of the criminalisation approach in the service of counter-terrorism. The normative values and essential functions of the approach will be analysed within this chapter. The foreseeable impacts of criminalisation policy in countering terrorism will also be examined in this part of the thesis. Possible impacts on the values of criminal justice, as well as on the counter-terrorism arrangements are also investigated.

Chapter Five- The Normal Criminalisation Mode (NCM) in Malaysia's Counter-terrorism Strategy

This chapter focuses on the NCM, which mainly concerns the use of the criminal law and processes in its 'normal' form in the service of counter-terrorism. The critical benefits and the working of the NCM as the within the criminalisation approach will be explained. Then it followed by an assessment of the existing legal setting and application of the NCM in Malaysia.

Chapter Six - The Special Criminalisation Mode (SCM) in Malaysia's Counter-terrorism Strategy

This chapter deals with the SCM, or the use of special law and processes within the criminalisation approach in Malaysia's counter-terrorism strategy. It will examine and assess whether the existing special anti-terrorism law can operate fairly and effective in countering terrorism.

Chapter Seven - Conclusion

As a conclusion, Chapter Seven will provide overall findings and outcomes concerning the objectives of this research. All suggestions for the enhancement of Malaysia's counter-terrorism agenda towards a comprehensive and multidimensional strategy will be presented.

Chapter 2 - Researching the Counter-Terrorism Strategy and Criminalisation Approach in Malaysia

This research 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 is operated in practice. This chapter will address four essential aspects of conducting this research. Section 2.1 mainly will explain the socio-legal approach and why the researcher adopted it for this project. Reflecting the approach, doctrinal and empirical methods were chosen and are elaborated in section 2.2 and 2.3 of this chapter. The empirical method involves conducting face-to-face qualitative interviews. The analysing process of the interview data is described in detail in section 2.3.6. The ethical issues involved in this research will be addressed in section 2.4.

2.1 Socio-legal Approach

The researcher chose the socio-legal approach for conducting this study in order to achieve the designed objectives. There is no unanimously agreed definition of 'socio-legal study', but perhaps it can be liberally understood as a 'study of the law and legal institutions from the perspectives of the social sciences (viz all the social sciences - not only sociology)'.[1] Its scope, according to the UK's Socio-Legal Studies Association, comprises:

> [d]isciplines and subjects concerned with law as a social institution, with the social effects of the law, legal processes, institutions and services and with the influence of social, political and economic factors on the law and legal institutions.[2]

This study also canvasses the surrounding social, political, and economic backgrounds of legislation making and procedure, along with the functions of law and

1 D.R Harris, 'The Development of Socio-Legal Studies in The United Kingdom' (1983) 3:3 *Legal Studies* 315, 315.

2 The UK Socio-Legal Studies Association (SLSA), Statement Of Principles Of Ethical Research Practice (January 2009), <https://www.slsa.ac.uk/images/slsadownloads/ethicalstatement/slsa%20ethics%20statement%20_final_%5B1%5D.pdf> accessed 22 February 2019.

its results.[3] The nature and scope of the socio-legal approach are reflected in the following three main reasons for adopting it in this project.

First, the objectives of this research concern not only the anti-terrorism law in Malaysia but also its fairness and effectiveness in countering the phenomenon. Accordingly, as this study is evaluative in nature, the socio-legal approach facilitates the researcher in three ways. Firstly, the approach helps the researcher to assess the law and its workings, by enabling the researcher to move beyond legal texts in favour of analysis of the processes of law, such as enforcement, investigation and prosecution.[4] It prevents the researcher from analysing the legal text in isolation from the social situation in which the legislation in force, which would amount to 'de-contextualisation'.[5] The approach is useful as this research seeks to evaluate the existing counter-terrorism law and policy in Malaysia. Secondly, the socio-legal approach guides the researcher to appraise the existing law, based on internal and external perspectives. As proposed by Dworkin, law and legal practice can be studied from these two points of view.[6] One is the internal perspective, which comes from the lawmakers and legal practitioners who debate about what law permits or forbids. The other is the external perspective, which belongs to the 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.[7] Therefore, the socio-legal framework, which has strong connections to empirical work and social science methodologies, is an appropriate approach to be adopted for this thesis.[8] Thirdly, the socio-legal framework helps the researcher to propose improvements based on comprehensive assessments to the criminalisation approach and counterterrorism strategy in Malaysia.

Second, Malaysia's counter-terrorism strategy, as explained earlier in Chapter 1, is profoundly shaped by various factors, including the struggle against the Communist insurgency and authoritarian tendencies of the government after

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3 Alan Bradshaw, 'Sense and Sensibility: Debates and Developments in Social-Legal Research' in Philip A. Thomas (eds), *Social Legal Studies* (Aldershot, Dartmouth, 1997) 99.

4 Robert Lee, 'Socio-Legal Research- What's the Use?' in Philip A. Thomas (eds), *Social Legal Studies* (Aldershot, Dartmouth, 1997) 83.

5 Lorie Charlesworth, 'On Historical Contextualisation: Some Critical Socio-Legal Reflections' (2007) 1:1 *Crimes and Misdemeanours* 1.

6 Ronald Dworkin, *Law's Empire* (Hart Publishing, Oxford, 1998) 13.

7 ibid, 13.

8 Fiona Cownie, *Legal Academics: Culture and Identities* (Hurt Publishing, Oxford, 2004) 57; Jessica Guth and Chris Ashford, 'The Legal Education and Training Review: Regulating Socio-legal and Liberal Legal Education?' (2014) 48:1 *The Law Teacher*, 5.

independence.[9] Moreover, terrorism itself is always political and has links with other social phenomena such as war and crime.[10] Hence, a state's counter-terrorism arrangements inevitably comprise diverse measures and initiatives.[11] The adopted socio-legal method in this study allows the researcher to analyse the social, political, economic and cultural influences in the formulation of the Malaysian counter-terrorism agenda. In terms of criminalisation context, Chadwick and Scraton assert that the process 'is influenced by contemporary politics, economic conditions and dominant ideologies'.[12] The socio-legal research does not restrict itself to legal administration only; it also enables the researcher to examine the whole process of criminalisation of terrorism and its impacts from various aspects in a critical way. This objective is not achievable if the researcher examines only pure doctrinal legal research that strictly confines itself to the content of legal rules and principles as set out in texts.[13] Within the socio-legal approach, the analysis of law and the analysis of the social condition where the law is formulated and enforced should be conducted holistically and linked together.[14] Positioning the criminalisation project in Malaysia's counter-terrorism arrangements requires a deep understanding of its legal, social and political environments.

Third, adopting a socio-legal approach reflects the research objective to learn lessons from the UK's counter-terrorism strategy, and contextualise them in Malaysia's arrangements. Accordingly, the researcher also utilises a policy transfer framework in this research. Dolowitz describes policy transfer as 'a process by which knowledge of policies, administrative arrangement, institutions and idea in one political system (past or present)'.[15] Evan puts it as a process to 'make sense of cross-cultural transfer of knowledge about institutions, policies or delivery systems from one sector or level of governance to another level of governance in a different country'.[16] It is also analogous

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9 See section 1.4, Chapter 1; further discussion in section 3.4.1, Chapter 3.

10 Richard English, *Terrorism: How to Respond* (Oxford University Press, Oxford, 2009) 24.

11 Ronald Crelinsten, *Counterterrorism* (Polity Press, Cambridge, 2009) 235.

12 Kathryn Chadwick and Phil Scraton, 'Criminalisation', in Eugene McLaughlin & John Muncie (eds), *The SAGE Dictionary of Criminology* (SAGE, London,2006) 95.

13 Andrew Sanders, 'Criminal Justice: The Development of Criminal Justice Research in Britain' in Philip A. Thomas (eds), *Social Legal Studies* (Aldershot, Dartmouth, 1997) 185.

14 David N. Schiff, 'Socio-Legal Theory: Social Structure and Law'(1976) 39 *Modern Law Review* 287.

15 David P.Dolowitz and David Marsh, 'Learning from Abroad: The Role of Policy Transfer in Contemporary Policy Making' (2000) 13:1 *Governance: An International Journal of Policy and Administration* 5. See also, Mauricio I.Dussauge-Laguna, 'On the Past and Future of Policy Transfer Research: Benson and Jordan Revisited (2012) 10 *Political Studies Review* 313.

16 Mark Evans, 'Policy Transfer in Critical Perspective' (2009) 30:3 *Policy Studies* 243.

to the notions of 'policy borrowing' mentioned by Robertson and Waltman.[17] The policy transfer process requires the researcher to use dual understanding to find the real reasons why a policy works or fails in the original jurisdiction and how it may affect the receiving jurisdiction.[18] Dolowitz and Marsh emphasise that the policy transfer framework operates as a useful heuristic to understand and explain the components of the policy-making process.[19] Policy transfer research is also 'a means to guide and even stimulate policy innovation'.[20] Policy innovation may involve one or more elements invented by the state to work along with the borrowed policy.[21] Accordingly, the researcher has examined how legislation in Malaysia has been transferred, either before or after independence. Apart from that, the policy transfer framework helps the researcher to identify and examine the elements of the UK's legislation and policy, which can be potentially adopted in Malaysia.

Embracing the socio-legal approach, the researcher selected doctrinal and empirical methods to achieve the research objectives. Both methods will be now discussed respectively.

2.2 The Doctrinal Method

Doctrinal legal study is sometimes considered as the antithesis to socio-legal study.[22] However, it should be noted that there are also legal-interdisciplinary research methodologies within doctrinal studies.[23] Similarly, the scope of socio-legal approach also covers a 'range of theoretical perspectives'.[24] In this thesis, the research applies techniques that derive from the doctrinal method to reinforce the 'legal' element within the adopted socio-legal approach. The doctrinal method emphasises 'a critical conceptual analysis of all relevant legislation and case law to reveal a statement of the

17 David Brian Robertson and Jerold L Waltman,'The Politics of Policy Borrowing' in David Finegold, Laurel McFarland, William Richardson (eds), *Something Borrowed, Something Learned* (Brookings Institution Press, Washington DC, 1993) 21.

18 David P. Dolowitz, 'A Policy-maker's Guide to Policy Transfer' (2003) 74:1 *The Political Quarterly* 106.

19 David P.Dolowitz and David Marsh, 'The Future of Policy Transfer Research' (2012) 10 *Political Studies Review* 339.

20 David Benson and Andrew Jordan, 'What Have We learned from Policy Transfer Research? Dolowitz and Marsh Revisited'(2011) 9 *Political Studies Review* 366.

21 Peter Carroll, 'Policy Transfer Over Time: A case of Growing Complexity'(2012) 35:10 *International Journal of Public Administration*, 658.

22 Fiona Cownie, (n 8) 54.

23 Andria Naude Fourie, 'Expounding the Place of Legal Doctrinal Methods in Legal-Interdisciplinary Research' (2015) 8 *Erasmus Law Review* 95; Matyas Bodig, Legal 'Doctrinal Scholarship and Interdisciplinary Engagement' (2015) 8 *Erasmus Law Review* 43.

24 The UK Socio-Legal Studies Association (SLSA) (n2) para 1.2.2.

law relevant to the matter under investigation'.[25] For this thesis, the method is essentially utilised to examine the 'internal perspective', which was mentioned earlier.[26] However, the researcher also occasionally makes references to the 'external perspective', particularly when analysing Malaysian political, social and historical aspects.

There are three main reasons for using the doctrinal method in this research. First, the doctrinal method allows the researcher to identify and understand the existing constitutional and normative values in Malaysia. It is essential to examine the conception of these values and how they are translated to the present settings. The criminalisation approach must embrace the values to retain its legitimacy. Thus, the researcher uses the doctrinal method to inspect the values in the Federal Constitution 1957 and the established principles within the existing criminal justice system, which arguably take their origins from the English Common Law system.[27] Accordingly, fundamental constitutional values have been analysed to substantiate and contextualise the criminalisation approach. That includes rules of law, separation of powers, fundamental liberties and due process in Malaysia.[28] The researcher also uses the doctrinal method to examine the impact of international law on Malaysian anti-terrorism legislation.

The second reason concerns the interpretation of the legislation and policy papers. The researcher aims to analyse two critical concepts in the formulation of such legislation: 'the intention of a particular statute and or statutory clause'; and, second, 'the principles that are embedded'.[29] Besides looking at the literal meaning of the statutory words and structures, the researcher has also inspected parliamentary debates and judicial precedents that discussed the particular statutory provision. At this point, the content of government policy papers and official reports are also pertinent and must be given proper consideration. The researcher has also looked into historical records and external policy papers that have influenced the counter-terrorism legislation in Malaysia. The doctrinal method guides the researcher finding a way to comprehend the interpretation and reasoning underpinning the legal statutes. It is also crucial to look into how judges interpret or re-interpret the existing rules, or even occasionally implicitly or explicitly make new law. The interpretation often consists of

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25 Terry Hutchinson, 'Valé Bunny Watson? Law Librarians, Law Libraries, and Legal Research in the Post-Internet Era (2014) 106:4 *Law Library Journal* 106(4) 579, 584.

26 Ronald Dworkin (n 6) 13.

27 Further discussion in section 4.2, Chapter 4.

28 See section 4.4, Chapter 4.

29 Ronald Dworkin, *Taking Rights Seriously* (Duckworth, London, 1987) 105.

'arguments of policy' and 'arguments of principle', both of which, according to Dworkin, aim to justify political and legal decisions.[30] The former concern the protection of some collective goal of the community as a whole, whilst the latter defend some individual or group right.[31] This is an example of how the doctrinal method can assist the researcher to investigate the rationale underlying judicial interpretation. Also, the researcher has referred to the rules of interpretation under the English Common Law such as the literal rule, the golden rule, mischief rule and the purposive rule.[32] The statutory interpretation rules and principles have also been adopted in Malaysia, including in cases related to terrorism and national security.[33]

The third reason is related to one of the objectives of this research, which is to assess Malaysia's counter-terrorism strategy. The doctrinal method assists the researcher to evaluate government policies based on various viewpoints and sources. Cohen highlighted several standards within legal doctrine that can be utilised by the researcher in this thesis, such as the valuation of law based on its aesthetical element or its purpose, or in terms of peace, or liberty, or social interests, or justice, or natural law.[34] Each standard has its limitations, but it can provide a valuable guide for this research. The relevant legislation will be analysed based on standards and ethically based on legal principles and criticism.

Accordingly, based on the doctrinal method, the researcher has analysed the relevant legislation to determine how far the values which are inherent within the legal system have been translated into the anti-terrorism laws by the legislature, as well as by the judiciary in specific terrorism-related cases. Equally, the researcher has examined how the constitutional values and their details can be fairly limited or altered to serve effectively and fairly the purpose of counter terrorism effectively through the criminalisation approach.

2.2.1 The Sources for Doctrinal Method

The sources can be categorised into two types: the primary and secondary sources. The primary sources for the doctrinal method in this research essentially are domestic

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30 Ronald Dworkin, (n 29) 105.

31 ibid 106.

32 JW Harris, *Legal Philosophies* (Butterworths, London, 1997) 157.

33 See *Jimmy Seah Thian Heng & Ors v. Public Prosecutor & Other Applications* [2018] 9 CLJ 769, *Ragupathi Dharman v. Chairman, Prevention of Crime Board & Ors* [2018] 1 LNS 1038.

34 Felix. S Cohen, *Ethical Systems and Legal Ideals: An Essay on the Foundations of Legal Criticism* (first published 1933, Greenwood Press, Connecticut, 1976) 54-11.

legislation, parliamentary debates, court judgments, government policy papers and official reports, and international law.

International conventions and domestic laws relating to counter-terrorism are obtained online as well as from books.[35] The primary online source for Malaysian legislation is LawNet, which is maintained by Percetakan Nasional Malaysia Berhad (PNMB), a company authorised by the government to print laws in Malaysia.[36] As for the parliamentary debates in Malaysia and the UK, the national Hansard in both jurisdictions is accessible online for both upper and lower houses.[37] The Malaysian law reports referred in this thesis are mostly derived from the Malayan Law Journal (MLJ) and Current Law Journal (CLJ).

Getting access to the Malaysian government's policy papers and official statistics relating to counter-terrorism efforts is more difficult as compared to the UK's situation. The information is barely published or made accessible even on request. It is often not clear as to whether the documents are classified or in existence in the first place. Accordingly, the researcher asked research participants about this matter and managed to acquire some relevant documents. By contrast, the UK government's policy papers on the counter-terrorism strategy are generally available online.[38] The researcher also visited The National Archives, the British Library and the Commonwealth Secretariat's Library and Archives in London to inspect several related documents. For example, the Emergency Regulations 1948-1960, as well as reports and meeting notes related to the formulation of the Commonwealth's Model Legislative Provisions on Measures to Combat Terrorism 2002. Additionally, a digital collection hosted by the Institute of Commonwealth Studies at the School of Advanced Study, University of London provides valuable sources. That includes documents about British Policy in Malaya from the British Documents on the End of Empire (BDEEP) collection.[39]

The secondary sources related to the doctrinal method in this thesis mainly comprise books, journal articles and theses. The researcher also searched theses

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35 For example: United Nations, Office of Counter-Terrorism, International Legal Instruments <http://www.un.org/en/counterterrorism/legal-instruments.shtml> accessed on 8 February 2019. See also Ben Saul, *Terrorism: Documents in International Law* (Hart Publishing, Oxford, 2012)

36 PNMB-LawNet, <http://www.lawnet.com.my.eserv.uum.edu.my/LawNet/Default.aspx> accessed 8 February 2019.

37 Malaysia, The Official Portal of Parliament of Malaysia <http://www.parlimen.gov.my/index.php?lang=en>; United Kingdom, UK Parliament: Hansard <https://hansard.parliament.uk/> accessed 8 February 2019.

38 The UK Government, Collection: Counter-terrorism strategy (CONTEST) <https://www.gov.uk/government/collections/contest> accessed 8 February 2019.

39 Institute of Commonwealth Studies at School of Advanced Study, The British Documents on the End of Empire Project (BDEEP), available at <https://bdeep.org/2015/vb3-malaya/> accessed 19 February 2019.

from multiple countries as well as published academic literature. Apart from the British Library EThOS, the researcher found relevant dissertations in Malaysia, Singapore and Australia respectively through Malaysian Theses Online (MyTO), 'Scholarbank@NUS' website, and the 'Trevo'.

2.3 Empirical Method: Qualitative Interview

The adopted qualitative approach enhances the study of meaning and enables the researcher 'to examine social processes and cases in their social context, and look at the interpretations or the creation of meaning in specific settings'.[40] The qualitative technique also emphasises understanding and practices and their meanings, rather than quantification. Thus, the researcher strives to investigate the socio-legal context of counter-terrorism and its actors beyond the formation of legislation, including how the state and counter-terrorism practitioners perceive the terrorism phenomenon and justify their actions against it.

The researcher did not deploy in the field any quantitative method to collect data. The main reason for this forbearance is that the research questions of the thesis need answers that involve the exploration of meanings and reflection of contexts. Hence, the qualitative method is more suitable. Quantitative data would not directly address the research questions. The quantitative method, such as survey and questionnaire, require a more extended period of collecting data and a higher number of participants. The absence of relevant raw data to the research questions requires the researcher to conduct and develop it from scratch. The only available statistical data are mainly from the government and human rights organisations. However, the data are often too general or do not directly address the research questions. The Malaysian government's Open Data portal, for instance, only provides the number of detainees at the administrative detention camp under the Prevention of Terrorism Act (2015).[41] Whereas, this thesis is more concerned about the prosecution of terrorist suspects in court. Nevertheless, the researcher has carefully considered the limited

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40 W.Lawrence Neuman, *Social Research Methods: Qualitative and Quantitative Approaches* (5th edn, Allyn and Bacon, Boston, 2003) 146.

41 See, Statistic of Arrest Related to Daesh under Prevention of Terrorism Act 2015 (POTA), <http://www.data.gov.my/data/en_US/dataset/statistik-tangkapan-elemen-daesh-dibawah-pota-2014-2017> accessed 25 February 2019; Statistic of Detention Order Issued under Prevention of Terrorism Act 2015 (POTA) <http://www.data.gov.my/data/en_US/dataset/statistik-perintah-tahanan-di-bawah-seksyen-13-1-akta-pencegahan-keganasan-2015-akta-769> accessed 25 February 2019.

official statistical information deriving from governmental sources, parliamentary debates and newspaper reports.

2.3.1 In-depth Interview

The researcher has conducted in-depth interviews to collect qualitative data that can provide deep and rich insights into the meaning as required by the research objectives. The in-depth interviews allow the researcher to inspect the meanings people make of their lives from their perspective. It also allows participants to describe their experiences and to share their information and feelings in their own words. The intention is to maximise the chance of gaining new ideas or inputs, which are not available in documentary sources or even anticipated.[42] For example, prosecutors and defence counsel revealed predicaments and issues faced by them in handling terrorism-related cases. The qualitative interviews could allow room for more insights, as compared to the structured and quantitative methods. Therefore, the researcher preferred to use the in-depth qualitative interview for this fieldwork.

The researcher organised individual face-to-face interviews with all the participants due to two main reasons. Firstly, the sampling in this thesis involves participants from dissimilar backgrounds, and most of them play different roles in the counter-terrorism strategy in Malaysia. For example, it is not practical to have a collective interview session with judges, prosecutors and private lawyers, even though the researcher may ask each of them a similar theme of questions. Each of them has a perspective and the professional hierarchy, which may prevent them from giving a frank input. Secondly, it is more manageable to conduct the interview separately and, importantly, convenient for the participants. Brown suggests that logistical factors are the critical consideration for a researcher to choose individual interview rather than in a group to accomplish the research agenda.[43]

In selecting appropriate modes of data collection, the researcher also considered and rejected other methods. Observation is one of the potential methods to be used in this research, such as to observe proceedings at court where a terrorism case is being tried. In theory, the researcher could play a role as 'complete observer'

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42 Roger Sapford, 'Reading Qualitative Research' in Roger Sapford (eds), *Researching Crime and Criminal Justice* (The Open University 1996) 182.

43 Judith Belle Brown, 'The Use of Focus Group in Clinical Research', in Benjamin F Crabtree and William L Miller *Doing Qualitative Research* (Sage Publication, California, 1999) 121.

without influencing the respondents or participants in the courtroom.[44] However, the qualitative observation method requires the researcher to set a time frame that relies completely on the intensity of the targeted activity.[45] Hence, the researcher rejected this method due to the time limitation and the indeterminate frequency of terrorism-related trials and hearings in Malaysia. Further, the lack of researcher's control might make the observation technique less valuable to the research objectives. However, during the fieldwork, the researcher had the opportunity to attend segments of three terrorism-related trials at the High Court in Kuala Lumpur, as well as at the Court of Appeal and the Federal Court in Putrajaya. These were not planned from the outset of the fieldwork but arose from invitations from interviewed participants. The sessions of 'observation' in the courtroom are admittedly insufficient to capture the whole picture of the process.[46] Further, the previous experience of the reseacher as a prosecutor prevents the researcher from becoming a 'complete observer'.[47] It may have been difficult for the researcher to remain detached and objective while viewing a process that he is already familiar with.[48] Nonetheless, the researcher took the chance to meet potential participants and to observe court facilities, which were to accommodate terrorism-related trials. The researcher does not consider this exercise as a principal method of collecting data, but rather as a useful 'doorway' to identify potential participants and gain preliminary information.

Equally, the researcher did not choose the focus group method to collect data mainly because it is not practical here. Conducting focus group interview is a time-consuming process and involves a hard task to manage and control the participants and logistics.[49] As for this research, the sampling data, which will be discussed in the next section, comprises respondents who are from different backgrounds and places of work. Thus, it may not be practical for the participants to travel and assemble at the

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44 Barbara Kawulich, Participant Observation as a Data Collection Method.(2005) 6:2 *Forum Qualitative Sozialforschung* at: <http://www.qualitative-research.net/index.php/fqs/article/view/466/996> accessed: 18 December 2019.

45 Carol McNaughton Nicholls, Lisa Mills and Mehul Kotecha, 'Observation', in Jane Ritchie, Jane Lewis, Carol McNaughton Nicholls and Rachel Ormston (eds), *Qualitative Research Practice: A Guide for Social Science Students and Researchers* (SAGE, London, 2014).

46 Elizabeth Callaghan, 'What They Learn in Court: Student Observations of Legal Proceedings' (2005) 33:2 *Teaching Sociology, 213*.

47 Ronet Bachman and Russell K Schutt, *Fundamentals of Research in Criminology and Criminal Justice* (Sage Publications, California, 2015) 175.

48 Kathleen DeWalt and Billie DeWalt, *Participant Observation: a Guide for Fieldworkers* (AltaMira Press Walnut Creek, 2002) 23.

49 Rosanna Breen, 'A Practical Guide to Focus-Group Research'(2006) 30:3 *Journal of Geography in Higher Education*, 463, see also, Janet Smithson, Using and Analysing Focus Groups: Limitations and Possibilities (2000) 3:2 *International Journal Social Research Methodology*, 103.

same time and place, or to leave their workstations even if the participants hold the same position and work in the same place, such as the judges who were interviewed by the researcher on different days for this project. Moreover, in some situations, it seems better to meet the participants individually at their own office or convenience. Some participants offered to the researcher to have a look at relevant documents and materials during the session.

2.3.2 Semi-Structured Interviews

The researcher has conducted 32 face-to-face semi-structured interviews in order to gain data to achieve the research objectives. The details about the research participants will be elaborated in the following section. The reasons for choosing the semi-structured style of interview link to three main fundamental aspects of data, which are authenticity, depth and comparability.

The semi-structured interviews provide space to participant and researcher to engage naturally in a conversation and to avoid a more rigid 'question and answer' session. The mode of interview encourages the participants to give deep authentic responses. It arguably creates a more welcoming exchange, as well as acknowledges the expertise and experience possessed by the participants. It must be noted that some of the participants are high-ranking officials and individuals who have been in their fields for a significant period. The researcher indeed found that conducting interviews of government and security officials offers experiential knowledge of 'practice', unique insights and understanding and personal expertise in countering terrorism which might not be found in any book or publication.[50] The additional related explanations can reveal 'an understanding of how interviewees generate and deploy the meaning of social life'.[51] It is essential to investigate what are in the minds of the participants, including those who are vested with authority and discretionary power. Also, it is also imperative to comprehend their understanding of terrorism and counter-terrorism, and how they would respond to the problems in discharging their power and duty.

In addition, there is a possibility that the researcher may overlook certain issues due to the lack of published information before going to the fieldwork. Some information, even it is not classified, has never been publicised or documented due to

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50 Lindsay Clutterbuck and Richard Warnes, 'Interviewing government and official sources- An Introductory guide' in Adam Dolnik (eds), *Conducting Terrorism Field Research: A Guide* (Routledge, Abingdon, 2013) 17.

51 Tim May, *Social Research: Issues, Methods and Process* (Open University Press, London, 2011) 135.

various reasons. For example, a senior government official who was interviewed asserted that some information might cause 'unnecessary alarm' if it is revealed to the public.[52] Similarly, there are documents, known to a limited group of people. One example is The Integrated Rehabilitation Module for Detainees under the Prevention of Terrorism Act 2015. Therefore, the researcher rejected modes that merely require the participants to reply to preconceived questionnaires or questions that are generated based on the researcher's knowledge, such as a fully structured interview.

The topic of terrorism arguably can be a stimulating subject to discuss. Accordingly, the researcher must ensure that the participants provide relevant information and knowledge to the research objectives. For that reason, the researcher rejected the unstructured or non-standardised interview for this research. The adopted semi-structured interview model provides a certain degree of control so that data would be partly comparable. Given that the sampling comprises groups of people with different backgrounds and roles, it was expected that some of the interview data would not be fully generalizable. However, by having an interview schedule, the comparability of data is preserved since all participants of diverse backgrounds have to answer the same questions in sections 1 to 4 of the Interview Schedule.[53] In addition, the researcher can still draw a comparison since most of the sample groups consist of more than one participant. The process of selecting and categorising samples is explained in the following sections.

2.3.3 Purposive Sampling

The researcher selected potential participants based on the purposive sampling method, which according to Denzin and Lincoln is commonly employed by qualitative researchers.[54] The purposive sampling strategy, which is also referred to as judgement sampling, requires a researcher to use his or her own judgement in selecting the sample 'rather than drawing sample elements randomly'.[55] It is based on the idea that certain groups of individuals 'may have a unique, different or important perspective on the phenomenon in question and their presence in the sample should

52 Participant No.12.

53 See Appendix D.

54 Norman K. Denzin and Yvonna S. Lincoln*, Handbook of Qualitative Research* (Sage Publications, London, 1994) 202.

55 Ronet Bachman and Russell K. Schutt, (n 45) 102.

be ensured'.[56] This approach is similar to expert sampling that involves selecting a sample of individuals based on their expertise and experience.[57]

The researcher adopts a purposive sampling technique for two main reasons. First, the researcher has a clear agenda from the beginning based on the research questions and objectives, as well as a preconceived interview schedule. Second, the purposive sampling method allows the researcher to sample participants strategically to ensure that those selected are knowledgeable, experienced and relevant to the research objectives.[58]

Silverman suggests that purposive sampling requires the researcher to decide critically the parameters of the relevant population and select sample case based on the preconceived agenda.[59] Accordingly, the researcher initially identified the relevant criteria and possible categories of participants before going to the fieldwork. At this point, the objective is not to generalise the population, but rather to gain deeper understanding, useful information and insights into the terrorism phenomenon, counter-terrorism agenda and criminalisation process in Malaysia. For this reason, the researcher did not choose to interview terrorists or convicts as the individuals might not be able to answer predetermined questions, which are mainly related to law and policy.

To enhance the credibility and reliability of the interview data, Rubin and Rubin propose that the participants should be knowledgeable and experienced in the area being studied.[60] In this research, the researcher selected participants based on their experience, exposure and expertise in counter-terrorism strategy and the criminalisation approach in Malaysia. The interviewed participants can be considered as experts or belong to an epistemic community which is involved directly or indirectly in Malaysia's counter-terrorism arrangements. Additionally, having a clear target group also facilitates the fieldwork to run smoothly. It allows the researcher to recruit potential participants before going to Malaysia and to identify a suitable replacement for those who decline to take part.

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56 Oliver C. Robinson, 'Sampling in Interview-Based Qualitative Research: A Theoretical and Practical Guide'(2014) 11:1 *Qualitative Research in Psychology* 25, 32.

57 Kultar Singh, *Quantitative Social Research Methods* (Sage Publications, New Delhi, 2007) 108.

58 Alan Bryman, *Social Research Methods* (Oxford University Press, Oxford, 2016) 408.

59 David Silverman, *Interpreting Qualitative Data* (Sage Publications, London, 2014) 61.

60 Herbert J. Rubin and Irene S. Rubin, *Qualitative Interviewing: The Art of Hearing Data* (2nd edn, Sage Publications, California, 2005) 66.

As the purposive sampling approach is not a convenience sample, the participants are not simply picked by chance.[61] However, the researcher was ready to consider any nomination coming from the participants or 'gate-keeper' to interview other persons, provided that he or she can offer relevant and useful information to this research.[62] This resembles snowball sampling. There are two reasons for the researcher to be flexible at that stage. First, fieldwork deals with participants who work in organisations or inter-connected networks. Each organisation has its structure and way to delegate tasks. This information may not be available to the researcher before going to the field. Thus, a proposal given by the gatekeeper can be very helpful. Second, there is a possibility that the research will encounter new relevant and pertinent issues while doing fieldwork, which can only be explained further by other persons. During the fieldwork, the researcher was introduced by five participants to other individuals from other organisations who work together with them. These include terrorism experts who have been called to give evidence in terrorism-related trials.

2.3.4 The Sampling of Participants

The researcher interviewed 32 participants who can be divided into nine categories. They are judges, prosecutors, private lawyers, police, and officials at the Home Affairs Ministry and the Foreign Affairs Ministry, terrorism experts, Members of Parliament, and representatives of Non-governmental and Government-funded organisations. In terms of number, there is a slight difference between the initial plan and the implementation. The main reason was the unavailability of the potential participants to be interviewed during the fieldwork period, which is from 7 July 2017 to 7 October 2017. The total of the participants is shaped by four main factors. Firstly, the available time for research. Secondly, relevant cohorts to be covered. Thirdly, the need for stratification within the cohorts. Fourthly, the comparability of the sampling. The following table shows the categories, the projected and actual numbers of participants involved in this research.

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61 Bruce L. Berg and Howard Lune, *Qualitative Research Methods for the Social Sciences* (Pearson, London, 2014) 50.

62 Monique Hennic, Inge Hutter, Ajay Bailey, *Qualitative Research Method* (Sage Publication, London, 2011) 92.

Table 2.1 - The Groups of Interview Participants

	Participants	Number of Projected Participants	Number of Interviewed Participants
1.	Judges	3	2
2.	Prosecutors	3	6
3.	Private Lawyers	4	8
4.	Police	3	1
5.	Officers at the Ministry of Home Affairs and the Ministry of Foreign Affairs	4	3
6.	Terrorism Experts	-	3
7.	Members of Parliament	6	2
8.	Representatives of Non-governmental Organisations	7	5
9.	Representatives of Government-Funded Organisations	3	2
	Total	33	32

The first category is judges who are assigned to preside trial at special courts for terrorism and national security cases. The special courts are established to try cases based on an exceptional procedure under Security Offences (Special Measures) Act 2012.[63] The researcher interviewed two specialised judges whose names are provided by the Office of the Chief Justice.

The second category is prosecutors at the Attorney General's Chambers, who are individually known as Deputy Public Prosecutors. As mentioned in Chapter 1, the Public Prosecutor, and the Deputies are public officials who represent the state in criminal trials. Private practitioners only act on behalf of the state on rare occasions. For this project, the researcher interviewed six prosecutors, who have been in the prosecution division for a period between 7 to 30 years. All of them have experience in the prosecution of terrorism-related cases at different stages and courts. The researcher also interviewed a 'state prosecutor', who is stationed in an outlying state and not at the main office in Putrajaya. The rationale is the state prosecutors often deal with few other legal matters such as pre-trial and remand proceedings, compared to the headquarters' prosecutors who peruse investigation papers and attend the hearings.

The third category is eight private legal practitioners, who have handled terrorism-related proceedings. These include representing terrorist suspects in trials

63 Tun Arifin Bin Zakaria, 'Speech by YAA Tun Arifin Bin Zakaria, Chief Justice of Malaysia at the Opening of the Legal Year 2016'(2016) *Malayan Law Journal Articles* i.

and appeal proceedings, as well as challenging the legality of executive orders in court. This group comprises both senior and junior private lawyers. In Malaysia, junior lawyers are often referred to those who have practised or been called to the Bar for less than seven years, as they are qualified to train new lawyers during pupillage.[64]

The fourth category is police officers. The researcher interviewed a senior police officer at the Counter-Terrorism Division. The department is currently placed under the Special Branch, the intelligence agency of the Royal Malaysian Police.[65] The initial plan was to interview three officials, but the researcher was only allowed to interview a senior officer. The reason given was there was an on-going big scale operation at that time which required the unit's personnel outside the office.[66]

The fifth category comprises government officials at the Ministry of Home Affairs and the Ministry of Foreign Affairs. The participants include members of the Prevention of Terrorism Board, established under Section 8 of POTA (2015). The researcher also interviewed a senior officer at the Foreign Affairs Ministry who is in charge of matters relating to national security.

The sixth category consists of terrorism experts. These individuals were suggested to the researcher by other research participants. All of them have experience giving their opinion and findings as expert witnesses in terrorism-related trials. In most cases, they inspected materials allegedly linked to terrorism such as books and images. Several pertinent documents were provided by the participants, including a copy of Terrorism Expert Report, which was used as evidence in a trial. Also, one of the experts is often consulted by the police for guidance and training of their personnel. Two of these experts have also been involved in the rehabilitation program for terrorist suspects.

The seventh category involves members of Parliament. They represent different political parties. The intention is to understand the political will and aspiration in combating terrorism among the lawmakers and how they perceive the phenomenon and react to its threats. The interviews were done before the 2018 General Election. One of the lawmakers was appointed as a cabinet minister after the new government took power.

The eighth category is the representatives of non-governmental organisations (NGOs) and civil societies. Two of the participants work with a human rights organisation, namely Suara Rakyat Malaysia (SUARAM). The group closely monitors

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64 Section 13, Legal Profession Act 1976 [Act 166].

65 On the role of the Special Branch in countering terrorism in Malaysia, see Leon Comber, *Malaya's Secret Police 1945-60: The Role of the Special Branch in the Malayan Emergency* (Institute of Southeast Asian Studies Publishing, Singapore, 2008)

66 Participant No.30.

the use of the SOSMA 2012 and other security legislation and publishes periodical reports that focus on the human rights violation. The researcher also approached a representative from the Malaysian Bar for an interview. The invitation was rejected, but its official suggested several names of private lawyers who could provide more information and insights related to this research.

Finally the ninth category, the researcher interviewed representatives of government-funded organisations, including a commissioner of the Human Right Commission of Malaysia (SUHAKAM), a statutory body established by Parliament under the Human Rights Commission of Malaysia Act (1999).

The participants come from different backgrounds and positions. They play different roles and are involved either directly or indirectly in Malaysia's counter-terrorism arrangements and the criminalisation approach. The sampling selection reflects the purposive approach adopted in this research as discussed earlier. Accordingly, the participants during the interview sessions provided important information and insights to the researcher. Their perspectives are seemingly shaped by their educational backgrounds and work experiences. The categorisation also facilitates the researcher in designing the interview questions, which will now be discussed.

2.3.5 Interview Structure

Based on the literature review and discussion with research supervisors, a set of preconceived questions was developed before going to the fieldwork.[67]

The interview schedule consists of a series of questions and prompts related to the research questions and objectives. It allows the researcher to ascertain the participants' understandings and, at the same time, seek clarification or elaboration when necessary. Additionally, the interview schedule assists the researcher to maintain consistency in the line of questioning, which encompasses all the research objectives and key themes. Apart from that, pre-structuring reduces the amount of irrelevant data that the researcher has to manage. It also helps the researcher to estimate how long an interview session lasts and notify participants accordingly. During the fieldwork, several participants informed beforehand that they could only allocate a specific period for an interview session. The typical time spent is one and a half hours.

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67 See Appendix I.

In the interview schedule, questions are divided into five sections.[68] Section 1 comprises questions about the participant's background and experience. Sections 2 to 4 of the Schedule comprise general questions connected to the fundamental research themes. These questions were posed to all participants during the fieldwork. Accordingly, the participants' answers to the questions are arguably comparable. By contrast, specific questions form section 5 of the Interview Schedule, which correspond with the roles and backgrounds of the participants. Within Section 5, there are six sets of questions. Each set is designed for different categories of participants, as mentioned earlier in Table 2.1.

Having a preconceived interview schedule, which is structured corresponding to the research themes and participants, facilitates the researcher in analysing data. The analysis process will be now elaborated.

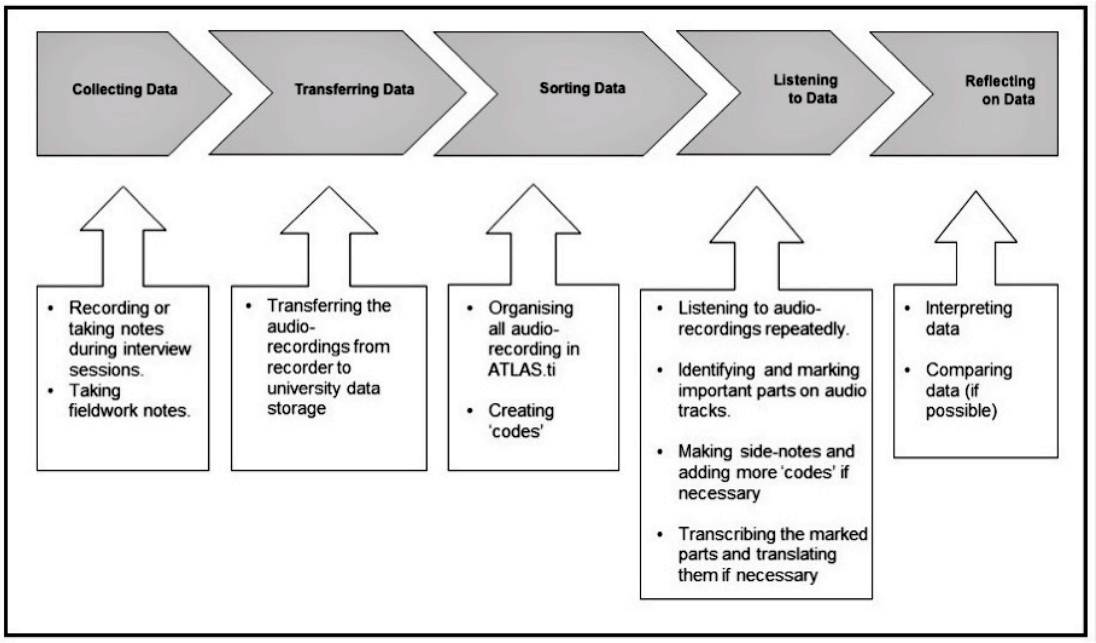
2.3.6 Analysing the Interview Data

Data analysis and the drawing of conclusions and findings from the obtained qualitative data are a critical part of this thesis. Considering the nature of the analysis of qualitative data that are diverse and less standardised, the researcher adopted several stages in analysing the collected data.[69] The following diagram demonstrates the process, which was carried out in analysing interview data.

68 See Appendix D.

69 W.Lawrence Neuman, (n 41) 447. See also, Matthew B. Miles, 'Qualitative Data as an Attractive Nuisance: The Problem of Analysis'(1979) 24 *Administrative Science Quarterly*, 590.

Diagram 2.2: The Data Analysing Process



In general, the process can be generally divided into five stages. The first three stages involve technical skills, as well as ethical issues. With regards to data analyses, the most critical parts are the last two stages, which are to listen to and reflect on the data. These two stages comprise deconstruction, interpretation, and reconstruction.[70] The deconstruction requires the researcher to break data into component parts in order to explore its content. This process, which involves listening, and re-listening and breaking down data into codes, will be explained in section 2.3.6.4. It is followed by the interpretation process that encompasses comparing data and categories based on codes. Then the reconstruction process that involves contextualising the findings or repackaging the prominent codes and themes in order to highlight the relationships and insights emerged during interpretation phase.[71] This interpretation and reconstruction processes will be further described in section 2.3.6.5

2.3.6.1 Collecting Interview Data

The researcher gathered data by way of questioning the participants, listening to answers given and observing their behaviours. The researcher took notes and used an electronic audio recorder to record the conversation if the participant allowed. In this

70 Matthew Miles and Micheal Huberman, *Qualitative Data Analys*is (Sage Publications, Thousand Oaks, 1994) 8.

71 Joan Sargeant, 'Qualitative Research Part II: Participants, Analysis, and Quality Assurance' (2012) *Journal of Graduate Medical Education*, 1.

project, only 4 participants refused to be recorded. Besides recording and jotting down the words uttered by the participant, the researcher noted his or her expressions and body language. All the notes were later used together with sound recording to analyse the data. An interview session lasted around 30 minutes to 2 hours.

2.3.6.2 Transferring Data

The researcher used an electronic audio recorder to record conversations with the participants. From the device, the interview data was transferred and stored in the University M: drive. The storage was also used to keep scanned field notes and other fieldworks documents such as Consent Forms. The transferring of interview data to the storage was done through Desktop Anywhere, which allows the researcher access to the university server from anywhere when a stable Internet connection is available.

2.3.6.3 Sorting data

The researcher decided to use ATLAS.ti software in managing the interview data. Like other software programs available to qualitative researchers, ATLAS.ti is not designed 'to automatize the process of text analysis' but rather to assist the 'human interpreter, especially in the handling of complex informational structures'.[72] The software offers some functions that can be a useful tool for content analysis. However, for this project, the researcher only utilised ATLAS.ti in order to organise the interview data and facilitate the interpretation process. There are at least three advantages of using the program to this project.

First, ATLAS.ti allows the researcher access to all voice recordings that derive from M: storage in one created 'Project'. The researcher can easily play a file selected from the list of audio files and rename them without changing the original name of the files. Additionally, the speed of playing audio can be controlled.

Second, the researcher can mark to highlight a specific part on the audio track when using ATLAS.ti. The segment then can be linked to notes and intended codes. For this project, the function is used to identify and transcribe pertinent quotes.

Third, ATLAS.ti facilitates the comparing or triangulating processes of the data. The researcher can key in pre-conceived codes or create new ones while listening to the data. A code can be attached to specific parts on the audio tracks. Accordingly, the

72 Thomas Muhr, 'ATLAS/ti--A Prototype for the Support of Text Interpretation' (1991) 14:4 *Qualitative Sociology* 349.

researcher can track all the coded quotations when interpreting the data on a specific theme that comes from different participants.

It must be noted that ATLAS.ti operates off-line and does not modify the original files. Hence, the interview data remains intact in the university storage system.

2.3.6.4 Listening to Data

Conventionally, if the interview data is entirely transcribed, Leeuw and Schmeets assert that 'read, read, read' is the formula.[73] According to Taylor-Powell and Renner, the qualitative analysis entails reading and re-reading the transcript and identifying coherent categories.[74] However, for this project, the researcher only transcribed and translated quotes which are necessary to be mentioned in the thesis. The main reason is that the interview sessions generated a vast amount of data and large volumes of information.[75] A one-hour interview approximately may generate up to 25 pages of single-spaced text.[76] Applying the estimation, there would possibly more than 750 pages of interview transcript for this project.

The use of ATLAS.ti helps the researcher to overcome the voluminous interview data. As described by Hutchinson, who used the software to analyse digital audio recordings without transcribing all the data, the program 'negates the need for expensive and time-intensive transcription of recorded' data.[77] Accordingly, it is more practical to adopt a 'Listen, listen, listen' and then 'Reflect, reflect, reflect' approach. The researcher repeatedly listened to the recorded conversations in order to pull out emerging themes and critical terms, attempting to make them as specific as possible by analysing how they are used, what are the scope of their use, the context within which they appear. The transcription of field notes and other documents depends on their relevance to the solidified code.

With regards to code-making process, the researcher initially identified and prepared a list of codes, which represent themes and concepts. These codes are derived from literature reviews and the researcher's own knowledge related to the

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73 Frans L. Leeuw and Hans Schmeets, *Empirical Legal Research: A Guidance Book for Lawyers, Legislator and Regulators* (Edward Elgar Publishing, Cheltenham,2016) 201.

74 Ellen Taylor-Powell & Marcus Renner, 'Analyzing Qualitative Data (2003) G3658-12 *Program Development & Evaluation*, 2.

75 Frans L. Leeuw and Hans Schmeets (n 67) 201.

76 Stainer Kvale*, Interviews: An Introduction to Qualitative Research Interviewing* (SAGE Publication, London 1996) 169.

77 Alison M. Hutchinson, 'Analysing Audio-Recorded Data: Using Computer Software Applications' (2005) 12:3 *Nurse Researcher* 20, 20. See also; Jennifer R. Gray, Susan K. Grove, Nancy Burns, *The Practice of Nursing Research: Appraisal, Synthesis, and Generation of Evidence* (Elsevier Sauders, Missouri, 2013) 279.

study. This technique is often described as a deductive content analysis.[78] The codes are also tailored to correspond with the Interview Schedule. The codes are based on commonalities, differences, patterns and structures in the data.[79] Some codes are descriptive, and some are conceptual. Apart from predetermined codes, the researcher also created new codes when encountering emerging themes during listening to the produced data. Appendix E shows the coding framework that guides the researcher.

During the data analysis process, the researcher identified specific segments that are related to the codes and made markings on the track. The codified segments were then transcribed. Roulston highlights that there are 'transcription practices that focus only on the topic of talk invariably omit features of talk that have important implication for how talk is understood'.[80] To overcome this problem, the researcher included the necessary descriptive information in the transcription in order to indicate the relevant feature of how the talk transpired.

Some transcribed quotes are in the Malay language, hence they required translation. The researcher is proficient in English and Malay and has experience in translating. [81] Also, personal experience in legal practice enables the researcher to understand jargon or terms that are commonly used with specific meaning by practitioners in Malaysia. For example, the word 'remand' often refers to the investigatory arrest by the police with judicial sanction which may last up to 14 days, while 'detention' always connotes an executive-based measure where the arrested person will not be prosecuted in court. The ability to empathise and understand what the participants were saying is crucial to preserve the authenticity of the data.

2.3.6.5 Reflecting and Interpreting Data

The researcher analysed the participants' response in two ways. The first way is by comparing the answers in order to look for patterns or trends or common perception, as well as to identify the commonalities and disparities. Accordingly, the

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78 Catherine Marshall and Gretchen B Rossman, *Designing Qualitative Research* (Sage Publications, London. 1995) 2.

79 Amanda Coffrey and Paul Atkinson, *Making Sense of Qualitative Data: Complementary Research Design* (SAGE Publications 1996) 24.

80 Kathryn Roulston, 'Analysing Interviews' in in Uwe Flick, *The SAGE Handbook of Qualitative Data Analysis* (SAGE Publication, London, 2014) 299.

81 The researcher translated, Jonathan Steinberg, *Bismarck: A Life* (Oxford University Press, Oxford, 2012) into Bahasa Melayu, Jonathan Steinberg, *Otto von Bismarck 1815-1898* (Mukhriz Mat Rus tr, Institut Kajian Dasar & Konrad Adenauer Foundation, Kuala Lumpur, 2017). Also, Muhammad Asad, *Road to Mecca* (Simon and Schuster, New York, 1954), translated to Muhamad Asad, *Jalan Ke Mekah* (Mukhriz Mat Rus & Ahmad Nabil Amir trs, Islamic Renaissance Front, Kuala Lumpur, 2018).

researcher compared all responses given, particularly in answering questions in Section 2 to 4 of the Interview Schedule. These parts comprise general questions on terrorism, counter-terrorism strategy and the criminalisation approach. Answers to questions in Section 5 of the Interview Schedule were mostly compared with responses given by participants of the same category. At this stage, the ATLAS.ti significantly helps the researcher to quickly gather relevant segments of audio recordings, which were coded earlier based on themes and concepts.

The second way, which is the main one, embodies an interpretivist approach in analysing the content of the interview data. Interpretivism facilitates the researcher to seek and deal with data that have subjective reality, which is found in the understandings, perceptions, beliefs, values, and attitudes of the research participants.[82] The focus is on how the participants give meaning and justify their roles, actions and the legal parameters within which they operate. Also, the interpretative approach offers a sociological strategy that enables the researcher to interpret the meanings and actions of participants according to their subjective frame of reference.[83] For this project, the interpretivist approach is utilised to obtain the most significant value from the fieldwork. However, the pursuit is not purely inductive as this research starts with a hypothesis and propositions. In addition, the use of the interpretivist approach reflects the socio-legal nature of this research, as mentioned earlier in section 2.1. Its tenet is based on the need to understand the law based on the societal and moral elements, which are not necessarily legal. As contended by Dworkin, interpretivism declares:

> [T]hat the law includes not only the specific rules enacted in accordance with the community's accepted practices but also the principles that provide the best moral justification for those enacted rules.[84]

Within this research project, the researcher attempts to interpret words and texts, which mainly derive from the interviews, referred documents and also actions displayed by the various groups in counter-terrorism strategy. For example, there are reasons why the state prefers a particular measure in counter-terrorism, but those are not expressly spelt out in any legislation or official document. Another example is the

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82 Tim May (n 48) 13. See also, Norman Blaikie, 'Interpretivism' in Michael S. Lewis-Beck, Alan Bryman and Tim Futing Liao (eds), *The SAGE Encyclopaedia of Social Science Research Methods* (Sage Publications, California, 2004) 509.

83 Charles Taylor, 'Interpretation and the Science of Man'(1971)25:1 *The Review of Metaphysics*, 3.

84 Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press, Cambridge, 2011) 402.

use of words by a participant in replying to questions, which possibly may indicate his feeling and preference towards laws or policy or his perception against terrorism threats.

The interpretative approach also facilitates the researcher to deal with data from the participants who are selected based on the purposive sampling method. The researcher is aware that it is not appropriate to exercise many generalisations on the data obtained due to the nature of the sampling. Hence, the interpretative approach guides the researcher to keep 'level of generality' at the right point in the interpreting process.[85] Williams explains that the interpretivists 'often maintain that rather than making empirical generalisations, they are making theoretical inferences, that is they draw conclusions from their data about the necessary relationship that exist amongst categories of phenomena'.[86] This process of analysis can be called a purposive analysis, where the researcher begins with a set agenda and to a certain extent is able to expect a focused outcome from the data. Correspondingly, the data obtained from fieldwork generally map onto the initial thesis. The additional information gained is most valuable when applied to the details of the implementation of the criminalisation approach in Malaysia.

2.4 Ethical Issues

As elaborated in section 2.3.4, this research involves 'living human participants' and 'the personal data of living human'.[87] Accordingly, the researcher sought and then obtained approval and guidance from the University Research Ethics Committee (UREC) to ensure the research is 'conducted according to appropriate ethical, legal and professional frameworks, obligations and standards'.[88] The researcher also made sure that all the processing of personal data complied with the requirements in the General Data Protection Regulation (EU) 2016/679, as well as, the UK's Data Protection Act 2018. Both became enforceable in May 2018.[89]

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85 Raoul Berger, 'Some Reflection of Interpretivism'(1986) 55:1 *The George Washington Law Review* 1.

86 Malcolm Williams, 'Interpretivism and Generalisation'(2000) 34:2 *Sociology* 209, 218.

87 University of Leeds, Research Ethics Policy (September 2018) 1.0,
<http://ris.leeds.ac.uk/downloads/download/443/research_ethics_policy> accessed on 22 February 2019.

88 ibid. see Appendix II for the letter from Research Ethics Committee, 5 July 2017 (Ethics Reference: AREA 16-147).

89 See Regulation (Eu) 2016/679 of the European Parliament and Of the Council of 27 April 2016 < https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679&from=EN> accessed 4 December 2019.

In research that involves human participants, the following four ethical issues are commonly emphasised.[90]

2.4.1 Voluntary Informed Consent

There are two fundamental principles of informed consent.[91] First, the participants must understand the nature and objectives of the research. Second, based on the knowledge, they can freely give their consent to participating in the research.

No covert element or deception was involved in this research. The researcher obtained informed consent from all participants in this project. A Participant Information Sheet that describes the research and its objectives was provided to all participants before interviews were carried out.[92] The document explains the project in plain language. Technical words are explained — for example, the term, 'criminalisation', which is used in this thesis, including its title. The researcher also translated the Sheet into Malay for participants who preferred that language. The Sheet is also written in an invitational and not coercive tone. The participants were assured that their interests would be protected when contributing to this project. The researcher also explained that the participants are not obliged to answer any question if it is classified information, especially under the Official Secret Act 1972.[93]

The researcher gave two weeks for the participants to decide before taking part in the project. Within that period, the participant can consider the implication of being interviewed and seek further clarification from the researcher. Once the participants understood the research, the researcher requested the participant to sign the Participant Consent Form before the interview begins. [94] All participants signed the form. In the research, the participant was allowed to withdraw from the project within 10 days after the interview session. This restriction is explained clearly to the participants from the beginning of the session, as explicitly stated in the consent form.

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90 Rose Wiles, *What Are Qualitative Research Ethics?* (Bloomsbury, London,2013) 18.

91 Clive Norris, 'Some Ethical Considerations on Field-Work with the Police', in Dick Hobbs & Tim May (eds), *Interpreting the Field* (Oxford University Press, Oxford,2002) 128.

92 See Appendix IV.

93 Official Secret Act 1972 [Act 88].

94 For a sample of Consent Form, see Appendix B.

2.4.2 Confidentiality

Oliver asserts that 'a cornerstone of research ethics is that the respondents should be offered the opportunity to have their identity hidden in a research report'.[95] So the principle of anonymity applies to study participants. Confidentiality also relates to the principle of privacy and respect for autonomy.[96] Terrorism and counter-terrorism research may also touch delicate issues. The researcher may not gain useful insights and critical views without full assurances of confidentiality. Hence, research participants were routinely given assurances of confidentiality in this project. In order to preserve confidentiality, the researcher used pseudonyms in the form of a number to all participants. Those pseudonyms were used to label the audio files stored in the university M: drive. Any publication of a direct quotation from any participants will be anonymised. This undertaking was given to all participants in the consent form. The researcher gave an assurance to each of the participants that all information and views given would not be revealed except for research purposes in the thesis. The private information of the participants is solely stored by the researcher.

2.4.3 Storage and Security of Data

The researcher takes full responsibility to keep all the obtained data and information safe and secured, including the personal details of the research participants, and digital audio recordings and notes taken during the interviews.

No document or material collected during the fieldwork is stored in hard-copy form. All personal information, consent forms and field notes were scanned and kept in data form, which is in PDF format and held on the University M: digital storage platform. The papers were destroyed after the process was completed, including several documents and reports provided by the participants. The same storage is also used to keep audio-recordings, as explained earlier in section 2.3.6.2 and 2.3.6.3. This practice is following the Ethics Committee recommendation that 'All data should be immediately uploaded and stored on the University M drive as soon as is feasible, and deleted from the laptop when this is done'.[97]

All data will only be retained for three years after the PhD assessment and examination have been completed. There is no necessity to keep such data after it has been analysed and reported in the thesis. The period mentioned above is allowed for

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95 Paul Oliver, *The Student's Guide to Research Ethics* (Open University Press, Berkshire, 2010) 78.

96 Rose Wiles (n 85) 42.

97 See Appendix A.

investigation of any allegation of academic fraud or wrongdoing and for publication. Oliver finds no necessity, in general, to keep all of the raw data from research, especially when the research has been prepared entirely as a thesis or a journal article.[98] If the data are qualitative, the practice is to use the suitably anonymised and selective extracts in any writing to support arguments.

2.4.4 Potential Conflict of Interest

Another pertinent ethical issue is about potential 'conflict of interest' in undertaking this research. The researcher is funded by the Government of Malaysia for PhD study, and this project is probing the government's response against terrorism. As an academic member of a public university, namely Universiti Utara Malaysia, the researcher is also a government official. However, any conflict of interest has been minimised. The main reason is that the Malaysian government does not have control over the content and assessment of this thesis. Based on the scholarship agreement, the government only supervises the overall progress of the study and welfare of the researcher but does not interfere in the research activities as well as its findings. This research has been supervised independently and will be evaluated by an impartial panel of examiners appointed by the university.

Another potential conflict is related to the 'power relationship' or 'power imbalance' between participants and the researcher, who is a former public prosecutor. The issue arguably did not affect the data collection and its authenticity. The main reason is that the researcher resigned from the position in early 2015 and then joined Universiti Utara Malaysia as a lecturer. The fieldwork took placed in 2017. The researcher portrayed and positioned himself as an academic, as well as a PhD student, who has no link with the government. It must also be noted that the judges, prosecutors and private practitioners, who were interviewed, are all more senior and experienced than the researcher. Hence, it is unlikely that their opinion was influenced by the researcher's background.

2.5 Summary

The decision to adopt the socio-legal approach fundamentally is reflected by the objectives of the research. Accordingly, the researcher chose both doctrinal and

98 Paul Oliver (n 90) 90.

empirical methods in conducting this project. The legal doctrinal method helps the researcher to identify and understand the values and accepted principles within Malaysian legal system and administration of justice. These aspects are essential in order to situate and contextualise a fair and effective criminalisation approach in Malaysia, which will be specifically relevant to Chapter 4, 5 and 6. The empirical method by way of qualitative interview provides valuable insights and perspectives that articulate what is happening on the ground. Despite several constraints, the researcher managed to interview a significant number of participants, which is 32 in total. The data provided, which are useful and pertinent to the research, were then analysed and interpreted carefully. Overall, the adopted multiple methodologies facilitated the researcher getting authentic, valid and deep data, which are required by the research objectives. For the sake of credibility and reliability of this research, the researcher fully dealt with ethical issues following the established principles and academic standards. Based on the research methodology, the discussion and outcome of the research are presented in chapters 3, 4, 5 and 6. The following Chapter 3 will begin with the conception of terrorism and counter-terrorism policies in Malaysia.

Chapter 3 - Conception of Terrorism and Counter-Terrorism Policies in Malaysia

3.1 Introduction

To understand the conception of terrorism and counter-terrorism in Malaysia is the first objective of this research. It is insufficient to investigate or contemplate effective responses within a counter-terrorism strategy without having prior knowledge of the integral aspects of terrorism. This chapter seeks to answer how the state constructs 'terrorism' and its definition, which is then translated into counter-terrorism laws and policies. This question also entails another important question, namely, what is the significance of the definition of terrorism, especially for the criminalisation approach?

This chapter begins with a survey of the threats and typologies of terrorism in Malaysia in the past and present. Section 3.2 will delve into the historical context that gave foundation to the conception of terrorism, as well as the counter-terrorism strategy in Malaysia. Section 3.3 will first examine the definability of terrorism in theory and practice at national and international level. The adopted legal definition of terrorism in Malaysia is the focus of section 3.4. The section puts forward an assessment of the definitions of terrorism that derives from different legislation and policy papers. The discussion will also focus on how the definitions of terrorism can be effectively and strategically translated into the laws of Malaysia within the 'accepted legitimate boundaries of criminal process and law'.[1] The intention is to ensure the criminalisation project retains its value in confronting terrorism without being condemned as manipulative and illegitimate. This part of the discussion connects with the second and third objectives of the thesis, which emphasise the conception and implementation of the criminalisation approach, respectively. Turning to the conception of counter-terrorism in Malaysia, section 3.5 will canvass factors that influence Malaysia's counter-terrorism policy. Based on the factors, section 3.5.2 will underline the key features of the Malaysian approach in countering terrorism. As posited in Chapter 1, there was a significant change of approach in Malaysia's counter-terrorism strategy; section 3.6 will then evaluate this proposition.

1 Clive Walker, 'The Legal Definition of "terrorism" in United Kingdom Law and Beyond' (2007) *Public Law* 331.

3.2 The Threats and Typologies of Terrorism in Malaysia

In May 1952, the British administration in Malaya was directed to use the word, 'terrorists', to describe Communist insurgents in Malaya.[2] An order was made by the British Ministry of Defence to replace the designation 'bandits' and 'insurgents' that were constantly used earlier.[3] Deer argues that it was part of psychological war propaganda aimed to demonise and deny the legitimacy of the Malaysian Communist Party (MCP).[4] Nevertheless, it is incorrect to designate the tactical move as the dawn of counter-terrorism in Malaya. It must be noted that the definition of 'terrorist' had been inserted in Emergency Regulations since 1950.[5]

Additionally, Caruthers points out that a series of events, which she construes as 'terrorism activities', had taken place much earlier than 1952, especially at the beginning of Malayan Emergency.[6] In October 1951, the MCP had in fact decided to make a substantial change to their strategy, with the aim to gain popular support.[7] A directive was issued prohibiting its members from launching any indiscriminate attacks that would harm innocent people, while attacks on government officials and security forces, as well as infiltration of the trade unions, would be continued.[8] According to Carruthers, the decision to label the guerrillas as terrorists was not just because of internal factors, but also based on the government's apprehension over 'how audience outside Malaya perceived the insurgents'.[9] The move also reflected international politics at that time, as Britain

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2, Memorandum from the Minister for Defence, 'Official designation of the Communist forces', (Executive Committee Paper No. 15/17/52, PRO, CO 1022/48.)

3 Noel Barber, *Malaya 1848-1960: The War of the Running Dogs* (Fontana Books, Glasgow, 1972) 10.

4 Phillip Deery, 'The Terminology of Terrorism: Malaya, 1948-52' (2003) 34:2 *Journal of Southeast Asian Studies*, 231.

5 Regulation No.32, Vol.III L.N. 302, Emergency Regulations (Amendment No.12) 1950, as in Federation of Malaya Government Gazette (TNA, CO 537/5984, 13 July 1950). Further discussion see section 3.7.1: 'Terrorism' in the Emergency Regulations 1950 and Internal Security Act 1960.

6 Susan L. Carruthers, *Winning Hearts and Minds: British Government, the Media and Colonial Counter-Insurgency 1944-1960* (Leicester University Press, London, 1995) 85.

7 Anthony Short, *The Communist Insurrection in Malaya: 1948-1960* (Crane Russak & Company, New York, 1975) 309.

8 Richard Clutterbuck, *The Long-Long War: The Emergency in Malaya 1848-1860* (Cassel, London, 1966) 63.

9 Susan L. Carruthers, (n 7) 85.

believed in the existence of a grand design, planned by Moscow, in which the MCP was expected to play a role.[10]

Historically, there were notable incidents before the emergency period 1948-1960, which involved political violence infused with anti-colonialism and national liberation sentiments, which might have been called 'terrorism'. For instance, Ball cites a political assassination in Sarawak where a Malay youth, Rosli Dhobi had killed a newly appointed British Governor, Sir Duncan Stewart in front of large crowds in 1949.[11] It was an act of protest against the British attempts to govern Sarawak as a Crown colony, taking over from the 'White Rajahs' that ruled the state from 1841 to 1946.[12] Besides, Ahmad Fauzi pointed out several anti-colonial and political violence activities had occurred in earlier days of British presence before the Second World War.[13] These include the murder of J.W.W. Birch, the British Resident of Perak, together with his Sikh armed guards and boatmen on the Perak River, due to dissatisfaction with British policy and attitude towards local culture.[14] Following the incident, British forces from India and Hong Kong were sent to Perak to end the local resistance, also known as the Perak War.[15] Another significant event was the rising in Kelantan led by To' Janggut in 1915, where the rebels attacked a district office and some European bungalows in Pasir Puteh.[16] The attack prompted the British to bring troops from Singapore to confront the Malay armed

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10 See Harry Miller, *Jungle War in Malaya: The Campaign Against Communism 1948-1960* (Arthur Barker Ltd, London,1972) 27; Victor Purcell, *Malaya: Communist or Free?* (Stanford University Press, California, 1954) 60; Robert Jackson, *The Malayan Emergency: The Commonwealth's Wars 1948-1966* (Routledge, Abingdon, 1991)7; Cheah Boon Kheng, 'The Communist Insurgency in Malaysia, 1848-1989: Was It Due to the Cold War?' in Malcom H. Murfett (eds) in *Cold War: South Asia* (Marshall Cavendish Editions, Singapore, 2012) 33. See also Frank Furedi, 'Britain's Colonial Wars: Playing the Ethnic Card' (1990) 28:1 *The Journal of Commonwealth and Comparative Politics* 70; Frank Ferudi, *Colonial Wars and the Politic of Third World Nationalism* (I.B Tauris, London,1994) 143. Chin Peng, Ian Ward and Norma Miraflor, My Side of Story (Media Masters, Singapore, 2003) 247. Commonwealth Office Report, *Malaya: Political Developments; Monthly Summaries* (CO 537/3755, 1948); A.J. Stockwell, 'A widespread and long-concocted plot to overthrow government in Malaya'? the origins of the Malayan emergency' (1993) 21:3 *Journal of Imperial and Commonwealth History* 66.

11 Simon Ball, 'The Assassination Culture of Imperial Britain, 1909-1979' (2013) 56:1 *The Historical Journal*, 231.

12 On the White Rajah dynasty, see, Steven Runciman, *The White Rajah: A History of Sarawak from 1841 to 1946* (Cambridge University Press, Cambridge, 2011).

13 Ahmad Fauzi Abdul Hamid, 'Malay Anti-Colonialism in British Malaya: A Re-appraisal of Independence Fighters of Peninsular Malaysia'(2007) 42:5 *Journal of Asian and African Studies* 371.

14 Frank Athestane Swettenham, *Malay Sketches* (John Lane, London, 1903) 227.

15 Special Supplement in the London Gazette Issue No. 24298 published on the 23 February 1876.

16 Robert Haussler, *British Rule in Malaya: The Malayan Civil Service and Its Predecessors*, 1867-1942 (Clio Press, Oxford,1981) 207. See also, Nik Ibrahim Nik Mahmood, 'The To' Janggut Rebellion in 1915', in William R. Roff (eds), *Kelantan — Religion, Society and Politics in a Malay State* (Oxford University Press, Kuala Lumpur, 1974) 62.

group whose numbers were more than 200.[17] To' Janggut was killed and his corpse was displayed in public in the state capital, Kota Bharu, for four days.[18] The 1915 Kelantan Rising is also an early example of where the concept of 'jihad' has been used in anti-colonialism resistance in Malaysia. Calling for a war against 'infidels', a term applied to the British, can also be found in a movement led by Che Salleh 1946, who was described as 'a preacher of Holy Wars'.[19]

Like many other states in the world, terrorism is not an alien phenomenon to Malaysia, but its forms, tactics and some other features keep changing. Although the nature of terrorism in Malaysia is an important topic to be explored, it is not the intention of this research to examine the phenomenon comprehensively in all ages, but rather to understand its present nature in order to propose effective and fair responses to its threats. Accordingly, the following section will briefly look into the typologies of present terrorism in Malaysia.

3.2.1 Typologies of Terrorism in Malaysia

Terrorism in Malaysia can be categorized into three types: domestic terrorism, international terrorism, and dissent terrorism. The first category deals with violence or terror that are confined to national boundaries and do not directly involve foreign victims, but the perpetrators can be foreigners. By contrast, international terrorism blurs the political borderlines between the sovereign states. The third classification is substantively not terrorism within conventional definitions, but rather a situation whereby the conception of terrorism and counter-terrorism has been used by the state to suppress dissent. Arguably it can be placed under the heading of 'state terrorism' too, where the 'states and their leaders can and do unleash terrorist violence against their own civilians'.[20]

3.2.2 National or Domestic Terrorism

From 1946 to 1989, a Communist insurgency was dedicated to using terrorism to overthrow British colonial rule, and then the democratically elected government of

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17 J. De V. Allen, 'The Kelantan Rising Of 1915: Some Thought on the Concept of Resistance in British Malayan History'(1968) 9 *Journal of Southeast Asian History,* 241.

18 Chaeh Boon Kheng, *To' Janggut: Legends, Histories and Perceptions of the 1915 Rebellion in Kelantan* (Singapore University Press, Singapore, 2006) 15.

19 Cheah Boon Kheng, *Red Star Over Malaya: Resistance and Social Conflict During and After the Japanese Occupation of Malaya, 1941-46* (NUS Press, Singapore, 1983) 194, see also WO 172/9773 WIR No.31, 'Che Salleh and His Red Bands', up to 11 June 1946.

20 Jessica Stern, *The Ultimate Terrorist* (Harvard University Press, Cambridge, 1999) 14.

independent Malaya.[21] The Communist terrorists in Malaysia had ceased to exist as a significant threat by the 1970s.[22] The MCP officially ended its armed struggle in 1989.[23] The present threats are no longer coming from Communists' resistance but from Islamist militant groups and young people who engage in terrorist activities under the influence of radical religious ideology and utilise modern technology in realising their political ends.[24] Similar to the Communist insurgents in the past, the Islamic militants are not solely domestic in nature. One example is Jemaah Islamiah (JI) group, which aims to establish an Islamic state in the Malay Archipelago comprising Malaysia, Indonesia, Brunei and Singapore.[25] Another small Islamic militant group, which can be considered as a local terrorist group, is Al-Maunah.[26] The group infiltrated into army camp and stole weapons from the armoury in 2000. During the standoff, 19 members of the group were arrested, after two non-Muslim hostages, out of four, had been executed.[27] It is no longer active as its leader, Mohamed Amin Razali, has been found guilty in court for waging war against the King (Yang Di-Pertuan Agong) and sentenced to death.[28] Amin was a former Afghanistan fighter, and his movement claimed to fight on behalf of suppressed Muslims and to establish a 'pure' Islamic state.[29] The terrorism or political violence in Malaysia inspired by the religious concept of 'jihad' and establishing an Islamic state or caliphate has previously affected Malaysia. Cheah asserted that the first known Malay rebellion that was associated with the ideology was the anti-British resistance of 1928 in Terengganu.[30]

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21 John Chynoweth, *Hunting Terrorist in the Jungle* (Tempus Publishing, Stroud, 2005) 149.

22 Some of related works are; Anthony Short, *The Communist Insurrection in Malaya: 1948-1960* (Crane Russak & Company, New York, 1975); Cheah Boon Kheng, *Red Star Over Malaya: Resistance and Social Conflict During and After the Japanese Occupation of Malaya, 1941-46* (NUS Press, Singapore, 1983) 194; Victor Purcell, *Malaya: Communist or Free?* (Stanford University Press, California, 1954); A.J. Stockwell (eds), *Malaya. Part.2, The Communist insurrection, 1948-1953* (Institute of Commonwealth Studies, London, 1995); C.C. Chin and Karl Hack, ed., *Dialogues with Chin Peng: New Light on the Malayan Communist Party* (Singapore University Press, Singapore, 2004).

23 K.S.Nathan, 'Malaysia in 1989, Communists End armed Struggle' (1990) 30:2 *Asian Survey* 210.

24 Abdul Razak, Javaid Rehman, Joshua Skoczylis '"Prevent" Policies and Laws: A Comparative Survey of the UK, Malaysia and Pakistan' in Genevieve Lennon and Clive Walker (eds), *Routledge Handbook of Law and Terrorism* (Routledge, Abingdon, 2015) 387.

25 Mohamed Shah Hussain Shah, *Terrorism In Malaysia: An Investigation Into Jemaah Islamiah* (PhD dissertation, University of Exeter, 2006).

26 Elina Noor, 'Al- Mau'nah and KMM in Malaysia' in Andrew T.H. Tan (ed), *A Handbook of Terrorism and Insurgency in Southeast Asia* (Edward Elgar Publishing, Cheltenham, 2007) 167.

27 Joseph Chinyong Liow, 'The Mahathir Administration's War Against Islamic Militancy: Operational and Ideological Challenges', (2004) 58:2 *Australian Journal of International Affairs* 241.

28 *Public Prosecutor v. Mohd Amin Mohd Razali & Ors* [2002] 5 CLJ 281.

29 Zachary Abuza, *Militant Islam in Southeast Asia* (Lynne Rinner Publishers, Boulder, 2003) 125.

30 Cheah Boon Kheng (n 19) 204.

Other threats are coming from separatists and nationalist groups such as Kumpulan Muhajidin Malaysia or Mujahidin Group Malaysia (KMM) and Royal Sulu Sultanate Army in Sabah.[31] Strictly speaking, both groups do not fall under this category, given the former has links with Al-Qaeda and operates as a network throughout South East Asia, and the latter is based in Sulu, in the Philippines. KMM also has personal, spiritual, and organisational links with the transnational JI.[32] Helfstein suggests that the attacks conducted by KMM are motivated by regional and international issues, as Malaysia Muslims are not facing grievances as a minority and there is no domestic insurgency at present, as compared to those in Thailand and the Philippines.[33]

3.2.3 International and Transnational Terrorism

The `internationalisation' of terror is not a novel aspect of political violence. As Jenkins observes, 'Europeans fought on the American side in their revolutionary war. Englishmen died for Greek Independence, and the Italian Garibaldi marched with the Argentine rebels before his adventures in Italy'.[34] Similarly, there were Muslims from throughout the world who travelled to Afghanistan to help their Afghan brothers to defend their country against the Soviets.[35] Wilkinson contends that 'terrorists can also be accurately designated "international" if they are committed as a result of connivance, colouration or alliance between terrorists and the government, terrorist movements or factions of foreign states'.[36] Whittaker notes that Peter Sederberg's definition of international terrorism is 'the threat of use of violence for political purposes when (i) such action is intended to influence the attitude and behaviour of a target group wider than its immediate victim, and (ii) its ramifications transcend national boundaries'.[37] In other words, the determining factors are essentially related to the aim, base and activities of a terrorist group.

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31 Abdul Gani Patail, 'SOSMA 2012: Its Implications On Defence And Security' Malaysian Institute of Defence and Security (MiDAS) Talk 6/2013, <http://midas.mod.gov.my/2015-03-02-15-07-07/speeches?download=21:sosma-2012-its-implications-on-defence-and-security-18-dec-2013> accessed 25 April 2016

32 Kamarulnizam Abdullah, 'Kumpulan Mujahidin Malaysia (KMM) and Jemaah Islamiyah (JI): The Links' (2009) 4:1 *Journal of Policing, Intelligence and Counter Terrorism* 29.

33 Scott Helfstein, 'The Landscape of Jihadism in Southeast Asia' in Scott Helfstein (eds) *Radical Islamic Ideology in Southeast Asia*, (Combating Terrorism Center, West Point, 2009) 4.

34 Brian Micheal Jenkins, *High Technology Terrorism and Surrogate War: The impact of New Technology on Low - Level Violence* (RAND Corporation, Santa Monica, 1975) 22.

35 See Thomas Hegghammer, 'The Rise of Muslim Foreign Fighters: Islam and the Globalization of Jihad' (2010) 35:3 *International Security* 53.

36 Paul Wilkinson, *Terrorism and the Liberal State* (Macmillan Press, London, 1977) 174.

37 David J. Whittaker, *The Terrorism Reader* (Routledge, Abingdon, 2001) 4.

More recently, Malaysia has been alleged as a meeting place for Al-Qaeda members and other terrorist organisations. The 9/11 Commission Report reveals that a meeting of several high-level al-Qaeda members was held in Kuala Lumpur in 2000, and its agenda was alleged to include plans for future attacks.[38] The current eminent threats of international terrorism in Malaysia are coming from the Islamic State (IS) group.[39] From 2014 to 2017, 394 individuals who allegedly have links to IS were arrested under the SOSMA 2012 and POTA 2015.[40] According to the authorities, by early 2017 95 Malaysians left for Syria to join ISIS; 30 have been reported killed.[41] The Movida nightclub bombing on 28 June 2016 marked the first IS attack in Malaysia.[42]

Another typology, often cited to describe cross-border terrorism, is 'transnational terrorism'. The terms `international' and `transnational' have become confused, and there is disagreement due to unclear conceptual boundaries over the terms. According to Wilkinson, the Japanese United Red Army may fall into this category considering their 'long-term aim of global or establishing a revolutionary supranational world order revolution'.[43] In 1975, the group took more than 50 hostages at a building in Kuala Lumpur, where several foreign embassies were located.[44]

The criteria for qualifying as `international' and 'transnational' terrorism are hard to determine. Many `domestic' terrorist groups are involved in cross-national boundary operations. For example, the Abu Sayyaf Group (ASG), a Philippine-based terrorist organisation that is known for its active engagement in criminal activities, especially kidnapping for ransom.[45] The ASG, along with another local Muslim insurgent group in Southern Philippines, the Moro Islamic Liberation Front

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38 National Commission on Terrorist Attacks Upon the United States, *Final Report of the National Commission on Terrorist Attacks Upon the United States* (July 22, 2004) 159, 355.

39 Thomas Koruth Samuel, *Radicalisation In Southeast Asia: A Selected Case Study of Daesh In Indonesia, Malaysia And The Philippines* (The Southeast Asia Regional Centre for Counter-Terrorism (SEARCCT), Kuala Lumpur, 2016) 61.

40 See Home Ministry, Statistics of Arrests Related to Daesh Under Security Offences (Special Measures) Act 2012 (SOSMA), <http://www.data.gov.my/data/ms_MY/dataset/statistik-tangkapan-elemen-daesh-dibawah-sosma-2014-2017>; Statistics of Arrests Related to Daesh Under Prevention of Terrorism Act 2015 (POTA), <http://www.data.gov.my/data/ms_MY/dataset/statistik-tangkapan-elemen-daesh-dibawah-pota-2014-2017> accessed 10 March 2019.

41 Joseph Chinyong Liow and Aida Arosoaie, 'The Sound of Silence: Nuancing Religiopolitical Legitimacy and Conceptualizing the Appeal of ISIS in Malaysia' (2019) 41:1 *Contemporary Southeast Asia: A Journal of International and Strategic Affairs* 86.

42 M .Kumar, 'Cops confirm Movida bombing first ever IS attack in Malaysia', The Star (Kuala Lumpur, 4 July 2016)

43 Paul Wilkinson (n 36) 174.

44 William Regis Farrell, *Blood and Rage: The Story of the Japanese Red Army* (Lexington Books, Lexington, 1990) 165.

45 Zachary Abuza, *Balik-Terrorism: The Return of the Abu Sayyaf* (Strategic Studies Institute, Carlisle, 2005) 2.

(MILF), have links with Al-Qaeda and JI.[46] Banlaoi describes the ASG as a 'symbol of the complexities of armed violence in the southern Philippines that interact with issues of banditry, terrorism, rebellion, separatism, clan conflict, ethnic conflict and warlordism.'[47] On the 23 April 2000, 21 people were abducted from the Sipadan resort of Malaysia and taken to an Abu Sayyaf base in Jolo, Sulu.[48]

Another terrorist group that is based in the area and posed real threats to Malaysia is the 'Royal Sulu Army', led by Jamalul Kiram III, a self-proclaimed Sultan of Sulu. Kiram seeks to 'reclaim' Sabah, a state within Malaysia, as part of his ancestral homeland. On 11 February 2013, about 200 armed-insurgents, invaded Lahad Datu, Sabah. The Malaysian security forces attempted to negotiate with the insurgents in order to end the incursion peacefully, and the governments of Malaysia and the Philippines remained in close contact. Nevertheless, negotiations failed after a few weeks; fighting broke out on 1 March, which caused the deaths of nine Malaysian police officers, six civilians, and 72 insurgents.[49] Following the incidents, 30 suspects have been charged with waging war against Yang Di-Pertuan Agong and other terrorism-related offences.[50] The incursion was a wake-up call for the Malaysian government to pay attention to the severe threats posed by a relatively small transnational terrorist group and to strengthen the relationship with its counterpart in the Philippines.[51]

3.2.4 Dissent 'Terrorism'

Wilkinson observes the tendency of several governments to perceive all violent acts committed or threats posed by their political opponents as terrorists.[52] Labelling dissenters as 'terrorists' is deemed to be 'a powerful contextualised political choice'.[53] The label, 'terrorism', is strong in the sense that it attaches with

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46 Daljit Singh, 'Trends in Terrorism in Southeast Asia' in Daljit Singh (eds) *Terrorism in South and Southeast Asia in the Coming Decade* (Institute of Southeast Asian Studies, Singapore, 2009) 83.

47 Rommel C. Banlaoi, 'The Sources of the Abu Sayyaf's Resilience in the Southern Philippines (2010) 3:5 *CTC Sentinel* 17, 17.

48 McKenzie O'Brien, 'Fluctuations Between Crime and Terror: The Case of Abu Sayyaf's Kidnapping Activities' (2012) 24:2 *Terrorism and Political Violence* 320.

49 The Star Online, 'A year after: Lahad Datu Intrusion Revisited' (13 February 2014), <http://www.thestar.com.my/news/nation/2014/02/13/a-year-after-the-lahad-datu-attacks-revisited/> accessed 10 November 2016.

50 *Public Prosecutor v Atik Hussin bin Abu Bakar and Ors* [2016] MLJU 968.

51 Jasmine Jawhar and Kennimrod Sariburaja, *The Lahad Datu Incursion and Its Impact on Malaysia's Security* (The Southeast Asia Regional Centre for Counter-Terrorism, Kuala Lumpur, 2016) 57.

52 Paul Wilkinson, *Political Terrorism* (Macmillan, London, 2003) 13.

53 André Barrinha, 'The Political Importance of Labelling: Terrorism and Turkey's Discourse on the PKK' (2011) 4:*2 Critical Studies on Terrorism* 163.

'metaphysical punch' and 'disciplinary power' under the name of security.[54] Jackson argues that any 'deployment of language by politicians is an exercise of power' as the definition of terrorism is often linked to obtaining a political goal, that makes it easier for the state to label to any political opposition or dissenters as terrorists.[55] The term may also deter them from gaining popular support because it ascribes a lack of legitimacy.

The former counter-terrorism legislation, the Internal Security Act (ISA) 1960, had been often deployed by the Malaysian government to silence dissenters, who included politicians, labour leaders and student activists.[56] The Coalition for Clean and Fair Elections (BERSIH) and the Hindu Rights Action Force (HINDRAF) have been dubbed as 'terrorist' for being critical and organising peaceful protests against the government.[57] The previous BN government had played the Islamic extremist 'card' to justify a crackdown on a mainstream Muslim opposition party by linking the Islamist opposition party, PAS with a local terrorist group namely, Kumpulan Mujahidin Malaysia.[58]

At this point, the government is prone to make use of the subjective nature of the term 'terrorism' for condemnatory purposes.[59] It operates as a tool of self-preservation or even domination by the state. However, the term can also be ascribed positivistically by the passage of the law to protect people from its physical threats. For example, the government may officially and *bona fide* 'label' or proscribe an alleged terrorist group, provided that their constitutional rights are duly preserved. Anderson argues that proscription is a form of condemnation by a state against the terrorist organisation, and it can have useful propaganda value and be a preventive instrument.[60]

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54 James Der Derian, 'The value of security: Hobbes, Marx, Nietsche, and Baudrillard', in Ronnie D. Lipschutz (eds) *On Security* (Columbia University Press, New York, 1995) 24.

55 Jackson, Richard, 'Language, Power, and Politics: Critical Discourse Analysis and the War on Terrorism' (2005) 15 *49th Parallel: An Interdisciplinary Journal of North American Studies* 1.

56 Human Rights Watch, *In the name of Security: Counterterrorism and Human Rights Abuses Under Malaysia's Internal Security Act* (New York, 2004) 16:7(c).

57 Anantha Raman Govindasamy, 'Social Movements in Contemporary Malaysia' in Meredith L. Weiss (eds) , Routledge *Handbook of Contemporary Malaysia* (Routledge, Abingdon, 2015) 119.

58 Peter Chalk, 'Militant Islamic Extremism in Southeast Asia' in Paul J. Smith (eds), *Terrorism and Violence in Southeast Asia: Transnational Challenges to States and Regional Stability* (M.E Sharpe, New York, 2005) 24.

59 Brian Michael Jenkins, *International Terrorism: A New Kind of Warfare* (1974) RAND Paper Series 1.

60 David Anderson, 'Shielding The Compass: How To Fight Terrorism Without Defeating The Law' (2013) 3 *EHRLR* 233.

3.3 Defining Terrorism

Countless attempts to define terrorism have been made by experts, scholars, and practitioners.[61] Drawing on 16 of 22 elements identified from 109 definitions of terrorism provided by acknowledged terrorism experts, Schmid and Jongman attempt to devise a comprehensive definition as follows:

> Terrorism is an anxiety-inspiring method of repeated violent action, employed by (semi-) clandestine individual, group or State actors, for idiosyncratic, criminal or political reasons, whereby—in contrast to assassination—the direct targets of violence are not the main targets. The immediate human victims of violence are generally chosen randomly (targets of opportunity) or selectively (representative or symbolic targets) from a target population, and serve as message generators. Threat- and violence-based communication processes between terrorist (organization), (imperilled) victims, and main targets are used to manipulate the main target [audience(s)], turning it into a target of terror, a target of demands, or a target of attention, depending on whether intimidation, coercion, or propaganda is primarily sought.[62]

The above often-cited definition of terrorism widens the spectrum of terrorist motivations, while also acknowledging the idiosyncratic and criminal factors, along with political ones.[63] Another significant feature of Schmid and Jongman's definition is the possibility of a state becoming a terrorist, which is absent in other definitions. However, the inclination to include the state as a possible perpetrator is not entirely novel. In 1980 Jenkins argued that governments, their armies and their secret polices might also be terrorists.[64] Nevertheless, this format can hardly be found in the official definitions of terrorism at domestic and international level.[65] Exceptionally, concerns about 'state terrorism' can be found in the UN Ad Hoc

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61 Alex Schmid, 'The Revised Academic Consensus Definition of Terrorism' in Alex .P .Schmid (eds). *Handbook of Terrorism Research* (Routledge, Abingdon, 2011) 86-87. See also, Burleigh Taylor Wilkins, *Terrorism and Collective Responsibility* (Routledge, Abingdon, 1992) 2.

62 Albert Jongman and Alex Schmid, *Political Terrorism: A New Guide to Actors, Authors, Concepts, Data Bases, Theories, and Literature* (North-Holland Publishing Company, Amsterdam, 1988) 28.

63 Laura Zahra Mc Donald, Basia Spalek, Philip Daniel Silk, Raquel Da Silva and Zubeds Limbada, 'Counter-terrorism as Conflict Transformation' in Lee Jarvis and Michael Lister (eds), *Critical Perspectives on Counter-Terrorism* (Routledge, Abingdon, 2015) 79.

64 Brian Micheal Jenkins, 'The Study of Terrorism: Definitional Problem' (1980) *RAND Paper Series* 3.

65 Ruth Blakeley, 'Bringing the State Back into Terrorism Studies (2007) 6 *European Political Science* 228.

Committee meetings established by General Assembly Resolution 51/210 (1996), where some delegations described it 'the most horrendous' and 'most dangerous' form of terrorism.[66]

In 2002, the Malaysian Prime Minister, Mahathir Mohamed proposed a definition to the Organisation of Islamic Cooperation that also includes the notion of state-terrorism. According to him, any:

> [A]rmed attacks or other forms of attack against civilians must be regarded as acts of terror and the perpetrators regarded as terrorists. Whether the attackers are acting on their own or on the orders of their Governments, whether they are regulars or irregulars, if the attack is against civilians, then they must be considered as terrorists.[67]

This victim-based definition, however, failed to gain the consensus of the OIC members as it would also denounce Palestinian suicide bombers as terrorists.[68] From a national legal perspective, Lord Carlile depicts the state terrorism notion as a non-definitional issue, but rather a jurisdictional one that engages with diplomatic immunity.[69] Walker argues that the notion of state terrorism should be included as part of the definition of terrorism in national legislation in order to comply with the rule of law doctrine.[70]

The definitional debate around the term 'terrorism' also flourishes among state organs and legislative bodies in the course of producing new legislation. The outcomes of the exercise often reflect the roles, positions, and backgrounds of the definers, as well as the purpose of formulating such definitions. Schmid distinguishes four arenas of discourse in order to appreciate the diversity of definition: academic discourse, state discourse, public discourse, and the discourse

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66 Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996 Fifteenth session (11 to 15 April 2011) 5. See also, Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996 Fourth session (14-18 February 2000) 2.

67 Suzanne McIntire and William E. Burns, Speeches in World History (Infobase Publishing, New York, 2009) 573.

68 Andrew Humphreys, 'Malaysia's Post-9/11 Security Strategy: Winning "Hearts and Minds" or Legitimising the Political Status Quo?'(2010) 28 *Kajian Malaysia* 1, See also, Elina Noor, 'Terrorism in Malaysia: Situation and Response' in Rohan Gunaratna (ed), *Terrorism in the Asia-Pacific: Threat and Response* (Eastern University Press, Singapore, 2003) 161.

69 Lord Carlile, 'The Definition of Terrorism: A Report by Lord Carlile of Berriew Q.C. Independent Reviewer of Terrorism Legislation' (Cm 7052, 2007) 46.

70 Clive Walker, 'Annex 3: Note on the Definition of Terrorism under the Terrorism Act 2000, Section 1, In the Light of the Salisbury Incident' in Max Hill, The Terrorism Acts In 2017: Report of The Independent Reviewer Of Terrorism Legislation On The Operation of the Terrorism Acts 2000 and 2006, The Terrorism Prevention and Investigation Measures Act 2011, and The Terrorist Asset Freezing etc. Act 2010 (October 2018) 145, <https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2018/10/The_Terrorism_Acts_in_2017.pdf> accessed 1 July 2019.

of 'terrorists' and their sympathisers.[71] However, Blackbourn, Davis and Taylor find the legislative definitions are not so wildly divergent, and the significant differences in defining terrorism between the scholars and lawmakers are explicable. Those definitions serve different purposes. For the state, it is desired to proscribe and accommodate prosecution, and, for the scholars, the purpose is to identify and categorise.[72] The definition will be further varied if we consider how a terrorist perceives the phenomenon.[73]

Despite the existing diverse definitions, Walker points out three common denominators that can be used as 'parameters for any legal formulation of "terrorism"'.[74] The elements are relating to method, purpose and target. First, the method associates the phenomenon with violent acts, which are capable of causing harm against humans and instil fear in the public. For some scholars, violence against property may similarly amount to terrorism if it has been done to create fear, intimidate and coerce.[75] The UK Terrorism Act 2000 includes 'serious damage to property' and serious disruption to electronic system.[76]

Second, terrorism involves acts with aims to achieve political ends, which make it different from any ordinary crimes. This is, however, not conclusive. According to Wilkinson, terrorism may not be politically motivated but rather committed by criminals for their own personal gain embedded with political slogans of justification, which he describes as criminal terrorism, as opposed to political terrorism.[77] Nevertheless, one may perceive terrorism as analogous to political violence if linked with other two aspects: target and method.[78] Ross categorises terrorism as a violent oppositional political crime, along with political assassination, sabotage and subversion, as opposed to nonviolent political crimes like sedition and espionage.[79] The political element of terrorism may also bring us to the thin line

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71 Alex P. Schmid, 'The Response Problem as a Definition Problem' (1992) 4:4 *Terrorism and Political Violence* 7.

72 Fergal F. Davis Jessie Blackbourn Natasha C. Taylor, 'Academic Consensus and Legislative Definitions of Terrorism: Applying Schmid and Jongman (2012) 34:3 *Statute Law Review* 239.

73 Christopher C. Harmon, 'The Word Terrorist, What Terrorists Say about It'(2016) 6.2 *CTX Journal* <https://globalecco.org/that-word-terrorist62 > accessed 17 January 2017.

74 Clive Walker, 'The Legal Definition of "Terrorism" in United Kingdom Law and Beyond' [2007] *Public Law* 331.

75 Anne Schwenkenbecher, *Terrorism: A Philosophical Enquiry* (Palgrave Macmillan, London, 2012) 20. See also; Anthony Richards, *Conceptualizing Terrorism* (Oxford University Press, Oxford, 2015) 104.

76 Section 1(2) of the Terrorism Act 2000.

77 Paul Wilkinson, *Terrorism and the Liberal State* (Macmillan Press, London, 1977) 49.

78 Paul Wilkinson, 'Terrorism' in Myriam Dunn Cavelty and Victor Mauer (eds) *The Routledge Handbook of Security Studies* (Routledge, Abingdon, 2010) 129.

79 Jeffrey Ian Ross, *An Introduction to Political Crime* (The Policy Press, Bristol, 2012) 35.

between terrorists and freedom fighters, and between terrorism and the legitimate struggle of peoples fighting for their right to self-determination.[80]

Third, the target of terrorism is not confined to the direct victims of the attack but instead seeks to impact on a greater audience by generating widespread terror. According to Walzer, terrorism involves the random murder of innocent victims.[81] However, his contention has been criticized as the terrorists often select their targets carefully as representative, whether the precise victims are known to them or not, reflecting their objectives.[82] Arguing against Walzer's point, Meisels points to the 9/11 attack, where the terrorist chose the Twin Towers deliberately as 'a symbol of American financial might'.[83] As Jenkins rightly puts it, 'terrorists want a lot of people watching, not a lot of people dead'.[84] In the Bali bombings of 2002, the Sari Club and Paddy's Pub in Bali were chosen by the perpetrators as they were crowded with Australians and their allies, as also they saw 'a lot of foreigners there engaged in immoral acts; and that place is the biggest centre of immoral activities in Bali, compared to other places'.[85] Overall, terrorism in the twenty-first century is 'a synthesis of war and theatre'.[86] Fletcher argues the theatrical nature is the only common denominator of all terrorist acts.[87]

As the criminalisation approach is the focal area of this thesis, it is pertinent to consider how far the definitions position terrorism as a crime. At least 4 out of 22 elements of the definition proposed by Schmid are related to crime: violence, coercion/extortion, intimidation and criminal. Wattad suggests that terrorism is nothing but crimes, which includes murder, or arson, or the malicious destruction of property, with an added motivation to instil fear into public.[88] Fletcher admits that terrorism is a type of crime but 'a different dimension of crime' or 'a kind of super-

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80 *R v Gul* [2013] UKSC 64 16.

81 Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (Basic Books, New York 1977) 197.

82 Igor Primoratz, '*Terrorism – the Philosophical Issues'* (Palgrave Macmillan, London & New York, 2004) 17.

83 Tamar Meisels, 'Defining terrorism – a Typology'(2009) 12:3 *Critical Review of International Social and Political Philosophy* 331.

84 Brian Michael Jenkins, *Unconquerable Nation Knowing Our Enemy, Strengthening Ourselves* (RAND Corporation, Santa Monica, 2006) 8.

85 Muhammad Haniff Bin Hassan, 'Imam Samudra's Justification for Bali Bombing'(2007) 30:12 *Studies in Conflict & Terrorism* 1033. See also Matt Cianflone, Jason Cull, John Fisher, Dave Holt, Amanda Krause, Julie Moore, Anita Wadhwani, Jared Yancey, *Anatomy of a Terrorist Attack: An In-depth Investigation into the 2002 Bali, Indonesia, Bombings* (Matthew B Ridgway Center for International Security Studies, Pittsburgh, 2007).

86 Cynthia C. Combs, *Terrorism in the Twenty-first Century* (Routledge, Abingdon, 2016) 5.

87 George P. Fletcher, 'The Indefinable Concept of Terrorism' (2006) 4:5 *Journal of International Criminal Justice* 1.

88 Mohammed Saif-Alden Wattad, 'Is Terrorism a Crime or an Aggravating Factor in Sentencing?' (2006) 4 *Journal of International Criminal Justice* 1017.

crime' as it incorporates some characteristics of warfare.[89] However, his view is contested; Majoran insisted that terrorism is purely crime, and 'all attempts to combat it fall into the law enforcement paradigm, making the 'war on terror' nothing more than an embellishment of the criminal justice response to terror'.[90] Another perspective is to relate terrorism to the legal conception of political crime, which has existed for ages.[91] Identifying terrorism as a crime, or type of crimes would provide a substantial justification to prioritise the use of ordinary criminal law and criminal justice system in the service of counter-terrorism.[92]

3.3.1 'Terrorism' and International Law

Similarly, there is no all-inclusive international law definition of terrorism, which has been unanimously accepted by all state actors and global players.[93] Different definitions shape the way governments and others believe success can be achieved in counter-terrorism.[94] In 1972, the United Nations General Assembly established an Ad Hoc Committee on Terrorism with the aim, among others, to define terrorism.[95] However, the attempt did not achieve its objective as it failed to propose a single definition that satisfied every member of the Committee. Some of the delegates called for the exclusion of national liberation and anti-colonial uprisings from the definition, while others emphasised the notion of state-terrorism or the exclusion of state armed forces.[96]

Prior to 9/11, actions taken by the international organisations, particularly the United Nations Security Council (UNSC) were focusing on specific terrorist acts such as by creating a sanctions regime against members of Al Qaida and the Taliban in Afghanistan.[97] By contrast, a general definition of terrorism was

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89 George P Fletcher (n 87) 900.

90 Andrew Majoran, 'The illusion of War: Is Terrorism a Criminal Act or an Act of War?' (2015) 3 *International Politics Reviews* 19.

91 Karl Härter, 'Legal Concepts of Terrorism as Political Crime and International Criminal Law in Eighteenth and Nineteenth Century Europe' in Aniceto Masferrer (eds), *Post 9/11 and the State of Permanent Legal Emergency: Security and Human Rights in Countering Terrorism* (Springer, Dordrecht, 2012) 53.

92 Clive Walker, 'Terrorism and Criminal justice: Past, Present and Future'(2004) *Criminal Law Review* 1.

93 Harvey W. Kushner, *The Future of Terrorism: Violence in the New Millennium* (Sage Publication, California, 1998) 164.

94 Paul Gilbert, *New Terror, New War* (Edinburgh University Press, Edinburgh, 2003) 4.

95 Yonah Alexander, Marjorie A. Browne and Allan S. Nanes, *Control of Terrorism International Documents* (Crane, Russak & Company, New York, 1979) 133-142.

96 Sudha Setty, 'What's in a Name? How Nations Define Terrorism Ten Years After 9/11' (2011) 33 *U. Pa. J. Int'l L.* 1.

97 Ben Saul, 'Terrorism as a Legal Concept' in Genevieve Lennon and Clive Walker (eds), *Routledge Handbook of Law and Terrorism* (Routledge, Abingdon, 2015) 32; see also United Nations Security Council, Resolution No. 1267 (1999) and United Nations Security Council, Resolution No. 1333 (2000).

unattainable. 9/11 marked a radical and drastic change in the UN's determination in countering or preventing terrorism.[98] A day after 9/11, UNSC issued Resolution No. 1368 to condemn and declare it as a 'terrorist attack' and a threat to international peace and security.[99] The momentum not only created new declarations or decrees but also reinforced the determination to enforce previous counter-terrorism measures. For example, the United Nations Security Council called on all state members to criminalise terrorism by Resolution 1373 (2001). Despite being regarded as 'the boldest resolution, it does not provide a clear definition of terrorism, particularly a working definition that would facilitate the criminalisation process at national level'.[100] Failure to do so, among other reasons, has affected the significance of the United Nations in confronting terrorism and maintaining international security.[101]

The 59th United Nations General Assembly adopted a definition of terrorism proposed by Security Council Resolution No. 1566 (2004):

> Criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and calls upon all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature.[102]

Nevertheless, from the beginning, the above quote was not accepted by all UN members as a conclusive definition. The Brazilian representative contended that the proposed 'definition' 'was not an attempt to define the concept of terrorism', but

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98 Ben Saul, (n 97) 32.

99 United Nations Security Council, Resolution No. 1368 (2001) para 1.

100 Kim Lane Scheppele, 'Global Security Law and the Challenge to Constitutionalism after 9/11'(2011) *Public Law* 360.

101 Surya P.Subedi, 'The UN Response to International Terrorism in the Aftermath of the Terrorist Attacks in America and the Problem of the Definition of Terrorism in International Law' (2002) 4 *International aw FORUM du droit international* 159.

102 United Nations Security Council, Resolution No.1566 (2004), para 3.

rather 'reflected compromise language that contained a clear political message'.[103] Furthermore, the United States' Ambassador strongly implied in his speech that the above paragraph is not exhaustive and further added that 'nothing in operative paragraph 3 should be construed as indicating anything to the contrary -- acts covered by existing conventions by which an element of intent was not required'.[104] Although it was a significant step taken by the UN Security Council filling the gap left by Resolution 1373, it cannot be viewed as singular or conclusive.[105] No subsequent instrument of international law is built solely upon it. However, specific definitions proposed by the UN agencies can be a useful guideline for states in countering terrorism.[106]

Another important source of international law is customary international law. The evidence of the existence of customary international law on a particular issue, it is often said, can be found in the decisions of international tribunals.[107] Could this source provide the missing definition of terrorism? In January 2011, the Special Tribunal for Lebanon took an opportunity to conclude what amounts to 'terrorism' under customary international law.[108] In view of the definition that has gradually emerged and based on its review of state practice and indicators of *opinio juris*, the Appeals Chamber declared that the customary international law definition of terrorism consists of:

> [T]he following three key elements: (i) the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act; (ii) the intent to spread fear among the population (which would generally entail the creation of public danger) or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it; (iii) when the act involves a transnational element.[109]

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103 United Nations Security Council, Press Release: Security Council Acts Unanimously to Adopt Resolution Strongly Condemning Terrorism as One of Most Serious Threats to Peace (8 October 2004) <http://www.un.org/press/en/2004/sc8214.doc.htm> accessed 12 December 2016.

104 United Nations Security Council (n 103).

105 Reuven Young, 'Defining Terrorism: The Evolution of Terrorism as a Legal Concept in the International Law and Its Influence on Definition in Domestic Legislation' (2006) 29:23 *Boston College International & Comparative Law Review* 46.

106 For example see Martin Scheinin, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism* (A/HRC/16/51, 22 December 2010)

107 Paul B. Stephan, 'Disaggregating Customary International Law' (2010) 21 *Duke J. Comp. & Int'l L*. 191.

108 Special Tribunal for Lebanon, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Case No. STL-11-01/I (6 February 2011) <https://www.stl-tsl.org/en/2015-06-15-152250/download/2565_9f56caa0701334523deb63736a46b4c9> accessed 15 November 2016.

109 Special Tribunal for Lebanon, (n 118) 49.

The third limb is relatively new to the definitional debate of term, given it will exclude the domestic or national terrorism that operates within a state boundary. The novel approach adopted by the Appeals Chamber has been criticised as unsustainable.[110] Nevertheless, Saul sees it as 'a wake-up call to states to finalize the negotiation of the UN Draft Comprehensive Convention so that further human-rights abuses from over-eager judicial law-making do not ensue'.[111] The responsibility of formulating an international definition of terrorism remains on the shoulders of the international community, whereby each state should negotiate and compromise in order to look for a common understanding on the meaning of terrorism.[112]

At the regional level, the Association of Southeast Asian Nations (ASEAN), with Malaysia as one of its members, produced the ASEAN Convention on Counter-Terrorism (ACCT) 2007.[113] It is a response to United Nations Security Council Resolution No.1373.[114] The ACCT 2007, however, does not define terrorism, but rather specifies what amounts to a 'criminal act of terrorism', by consolidating 'offences' which are 'within the scope of and as defined in' 13 specific international conventions and protocols.[115] That list includes the International Convention for the Suppression of Terrorist Bombings 1997, the International Convention for the Suppression of the Financing of Terrorism 1999, and the International Convention for the Suppression of Acts of Nuclear Terrorism 2005. Abdul Razak describes the approach as pragmatic since any attempt to define the term would cause disagreement due to different legal systems and political stances of ASEAN member states.[116] Equally, Acharya and Acharya contend that the approach reflects sovereignty concerns among the ASEAN members, as all the treaties date back to the 1970s, and stress the principle of non-interference.[117] Nevertheless, it must be emphasised that the ACCT 2007 also states under the heading of General Provisions that:

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110 Ben Saul, 'Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism' (2011) 24 *Leiden Journal of International Law*, 677. See also Matthew Gillett and Matthias Schuster, 'Fast-track Justice: The Special Tribunal for Lebanon Defines Terrorism'(2011) 9 *J. Int'l Crim. Just*. 989.

111 Ben Saul, (n 110) 700.

112 Prakash Puchooa, 'Defining Terrorism at the Special Tribunal for Lebanon' (2011) 2 *Journal of Terrorism Research* 3.

113 ASEAN Convention on Counter-Terrorism (ACCT) 2007, <https://asean.org/wp-content/uploads/2012/05/ACCT.pdf> accessed 2 February 2018.

114 Abdul Razak Ahmad, *Terrorism and the Rule of Law: Rethinking the 'ASEAN Ways' and Responses* (PhD Thesis, School of Law, University of Leeds, 2012) 72.

115 ASEAN Convention on Counter Terrorism (2007) Article II,

116 Abdul Razak Ahmad, 'The ASEAN Convention On Counter-Terrorism 2007' (2013) 1:2 *Asia-Pacific Journal on Human Rights and the Law* 93.

117 Amitav Acharya and Arabinda Acharya, 'The Myth of the Second Front: Localizing the "War on Terror" in Southeast Asia' (2007) 30:4 *The Washington Quarterly* 75.

> The Parties shall adopt such measures as may be necessary, including, where appropriate, national legislation, to ensure that offences covered in Article II of this Convention, especially when it is intended to intimidate a population, or to compel a government or an international organisation to do or to abstain from doing any act, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.[118]

Even though this is not a definition section, the ACCT 2007 indirectly defines terrorism by underlining the often-cited objectives and motives of the phenomenon. These elements partly correspond with the definition of terrorism proposed by United Nations Security Council, which was mentioned earlier. The same elements can also be traced in the definition of 'terrorist act' in the Malaysian Penal Code 1936, which will be discussed later.

The ACCT 2007 reflects the cautious approach of the ASEAN members. However, it also provides an outline for a legal definition and determines a specified scope of criminal acts of terrorism, which would facilitate the criminalisation process of terrorism. With diverse legal systems, ASEAN had no choice but to endorse the universally-accepted legal regime concerning terrorism as set forth in the UN Security Council Resolution No. 1373 (2001). Furthermore, the treaties, which were referred to, were undeniably important, with more than half of the international protocols and conventions promulgated from the late 1980s until 2005.[119] It must be noted that most of the conventions and protocols included in the ACCT 2007 have already been ratified or acceded or signed by the ASEAN members. For example, Malaysia and Thailand have recognised all the conventions except the Convention on the Physical Protection of Nuclear Material 1979, the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1988, and Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf 1988. Considering the political and legal constraints of each ASEAN member, the initiatives taken by the organisation have been argued to be 'norm internalisation', rather than the extraterritorial imposition of legal obligation.[120] The 'slow and soft approach' to counter-terrorism and gradual

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118 ASEAN Convention on Counter Terrorism (2007) Article IX, section 1.

119 Tatik S Hafidz, 'A Long Row to Hoe: A Critical Assessment of ASEAN Cooperation on Counter- Terrorism' (2009) *Kyoto Review of Southeast Asia* 11.

120 See Seng Tan and Hitoshi Nasu, 'ASEAN and the Development of Counter-Terrorism Law and Policy in Southeast Asia' (2016) 39 *U.N.S.W.Law Journal* 1219, 1238.

development of regional counter-terrorism have assisted its member states, particularly those with less experience dealing with the issue.[121] However, some argue that ASEAN should move further to facilitate and coordinate its members to fulfil the international obligations in the course of countering terrorism. Such responsibilities must include the preservation and protection of human rights and fundamental freedoms.[122] The ASEAN Comprehensive Plan of Action on Counter Terrorism 2017 emphasises explicitly that all states must:

> [E]nsure that all counter terrorism measures should respect and promote applicable provisions of international law, in particular international human rights, and humanitarian law.[123]

The values in the ASEAN Human Rights Declaration 2012, particularly with regards to the preservation of civil and political rights must therefore also be upheld in countering terrorism in Southeast Asian countries.

3.3.2 The National Legal Definition of Terrorism and Its Significance

Though the general concept of terrorism is not uncontested, because of international obligations, many states encounter the need to define it for specific legal purposes.[124] Lord Carlile asserts that a definition is useful in a special law which is legislated 'to assist prevention, disruption and detection' of terrorism.[125] Walker emphasises the need for considering what are the significant roles that any definition could play in countering terrorism, before agonising over the term.[126] The following two points must be addressed in relation to the legal definition of terrorism. First, it should operate within the 'accepted legitimate boundaries of criminal law and process'.[127] Anti-terrorism legislation arguably would be less controversial if it were

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121 Seng Tan and Hitoshi Nasu (n 120), 1237.

122 UNGA Resolution No. 2005/80 (2005) ; UN Security Council Resolution No. 1457 (2003); UNGA Resolution No. 50/186 (1995)

123 ASEAN Comprehensive Plan of Action on Counter Terrorism 2017, <https://asean.org/wp-content/uploads/2012/05/ACPoA-on-CT-Adopted-by-11th-AMMTC.pdf> accessed 12 June 2018.

124 Jeremy Waldron, 'Terrorism and the uses of terror' (2004) 8 *The Journal of Ethics* 5.

125 Lord Carlile, (n 69) 47.

126 Clive Walker, *Terrorism and the Law* (Oxford University Press, Oxford, 2011) 7.

127 Clive Walker, *The Anti-Terrorism Legislation* (Oxford University Press, Oxford, 2009) 8.

kept closer to ordinary crimes like murder and causing hurt intentionally.[128] Second, the term 'terrorism' could be more useful to the police and security officials in their tasking related to anticipatory aspects of criminal justice, rather than in criminal offences and trials.[129] Saul identifies various further functions of legal definitions, both within and outside the criminal law domain:

> Special investigative and preventive police powers; intelligence gathering; administrative, preventive, or extended detention; control orders; civil powers to freeze or seize asset and disrupt financing; victim's compensation; immigration controls, exclusion from refugee status; exceptions to foreign state immunity for state-sponsors of terrorism; jurisdictional considerations; modifying procedural rules; transnational legal cooperation; insurance and private regulatory regimes; triggering institutional safeguards or human rights supervision; or for budgetary or administrative purposes.[130]

An overbroad legal definition of terrorism is counter-productive not only in condemning terrorism as a legitimate label but also in protecting citizen rights.[131] That is due to the nature of terrorism, which is capable of undermining fundamental human rights and threatening national and international security.[132]

In the context of Malaysia, different definitions of terrorism which are constructed to serve different purposes can be found in the Penal Code 1936 and the National Security Council (NSC) directive issued in 2003, as well as the Internal Security Act 1960 and the Emergency Regulations in the past. The definitions will be further discussed in the latter part of this chapter.

In sum, the roles and construction of a legal definition of terrorism depend on the purpose intended by the state. Politically, a legal definition could serve as a denunciatory tool to delegitimise terrorism and its actors. For criminal and other legal processes, the definition is necessary, as no one can be prosecuted, tried, or convicted for an offence that has not been defined in a criminal code or law. As the fundamental principle in criminal law states, '*Nullum crimen, nulla poena sine lege'*. Apart from criminal law, legal definitions of terrorism are also significant for

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128 Kent Roach, 'The Case for Defining Terrorism with Restraint and Without Reference to Political or Religious Motive' in Andrew Lynch, Edwina MacDonald and George Williams (ends), *Law and Liberty in the War on Terror* (The Federation Press, Sydney, 2007) 48.

129 Clive Walker, (n 127) 8.

130 Ben Saul, (n 97) 34.

131 Kent Roach, (n 128) 48.

132 Ben Saul, *Defining Terrorism in International Law* (Oxford University Press, Oxford 2006) 8.

administrative purposes, including policing or ministerial powers which may need to respond to anticipatory risk well before the commission of any crime. With different purposes, it is therefore to be expected for a state to have diverse legal definitions of terrorism.

3.4 Malaysia's Definition of Terrorism

To date, there is no single and comprehensive definition of 'terrorism' offered by any written law in Malaysia.[133] But terms such as 'terrorist', 'terrorist acts 'and 'terrorist entity' can be found in several legislation and policy papers. As mentioned earlier in Chapter 1, the present counter-terrorism strategy in Malaysia has been fundamentally influenced by the earlier experience of countering Communist terrorists. It is thus relevant to look into the concepts of terrorism in the previous approach.

3.4.1 'Terrorism' in the Emergency Regulations 1950 and Internal Security Act (ISA) 1960

One of the earliest documented legal definitions was introduced during the 1948-1960 Emergency involving Communist insurgents. The Emergency Regulation No.32 defines a 'terrorist' as any person who:

> (a) by the use of any firearms, explosives or ammunition acts in a manner, prejudicial to the public safety or to the maintenance of public order;
> (b) incites to violence or counsels disobedience to the law or to any lawful order by the use of firearms, explosives, or ammunition;
> (c) carries or has in his possession or under his control any ammunition or explosive without lawful authority therefor;
> (d) demands, collects or receives any supplies for the use of any person who intends or is about to act, or has recently acted, in a manner prejudicial to public safety for the maintenance of public order; and 'terrorism' shall have a corresponding meaning.[134]

133 *Public Prosecutor v Atik Hussin bin Abu Bakar & Ors* (n 50), 41.

134 Regulation No.32, Vol.III L.N. 302, Emergency Regulations (Amendment No.12) 1950, as in Federation of Malaya Government Gazette, 13th July 1950, TNA, CO 537/5984.

The then British High Commissioner, Henry Gurney, had instructed Malayan Chief Secretary, M.V. del Tufo, 'to publish a broad definition of terrorism that could be used in legal proceedings against those convicted under emergency regulations'.[135]

After the Emergency ended in 1960, the Malaysian government included the same definition in Section 2 of the ISA 1960. The adoption portrays a clear legislative intention to combat the remaining Communist insurgents and reflected how well-informed the government was about the terrorist movement and its operations. The government contended that there were still 583 armed-terrorists near Malaysia-Thailand borders who aimed 'to revive their so-called "armed struggle" against the people of this country'.[136] But later on after its first two decades, the ISA (1960) was largely used against individuals and groups with very little resemblance to the Communist insurgents.[137]

There are at least three significant features of the definitions in the Emergency Regulations 1950 and the ISA 1960. First, the definitions were designed with the aim to preserve public order and to counter insurgency and anti-colonial uprisings. The definitions arguably address directly the mode utilised by the insurgents at the time, which often 'were equipped mostly with rifles, pistols and light automatic weapons' and 'few mortars'.[138] In this way, they were paramilitary rather than criminal.

Second, the element of prevention is apparent from the definitions of both preventive measures. This can be seen from the insertion of inchoate terrorism-related acts, particularly in paragraph (c) of both definitions. Roach's view is that the provision 'indicates some of the antecedents to the modern terrorism financing laws'.[139] The aim was to contain and emasculate terrorism. This approach reflects an effect of formal or informal policy transfer, which was a common practice during the colonial period in countering insurgency.[140] Notably, before Henry Gurney was appointed as the High Commissioner in Malaya in the end of 1948, he was the

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135 Benjamin Grob-Fitzgibbon, *Imperial Endgame: Britain's Dirty Wars and the End of Empire* (Palgrave Macmillan, Hampshire, 2011) 137.

136 Dewan Ra'ayat Hansard, 21 June 1960, 1185.

137 Amnesty International, *Malaysia: Human Rights Undermined: Restrictive Laws In A Parliamentary Democracy* (31 August 1999), 21, <https://www.amnesty.org/en/documents/ASA28/006/1999/en/> accessed 10 December 2016,

138 Robert W. Komer, *The Malayan Emergency in Retrospect: Organization of A Successful Counterinsurgency Effort* (RAND, Santa Monica, 1972) 8.

139 Kent Roach, 'Comparative Terrorism Law Comes of Age' in Kent Roach (ed) *Comparative Counter-Terrorism Law* (Cambridge University Press, New York, 2015) 25.

140 See Paul Dixon, *The British Approach to Counterinsurgency: From Malaya and Northern Ireland to Iraq and Afghanistan* (Palgrave Macmillan, Hampshire, 2012).

British Chief Secretary to Palestine since 1946.[141] For instance, the act 'collecting money or articles for the benefit of a terrorist organisation or activities' can also be found in the definition of 'member of terrorist organisation' in Palestine's Prevention of Terrorism Ordinance 1948.[142]

Third, the definition of 'terrorist' in the Emergency Regulation and the ISA 1960 disregards political motivation, which is often inserted in the definition of terrorism. Chan argues that the aim here was to deny 'an important aspect of their identity: an armed rebellion striving for an anti-colonial, anti-capitalist state'.[143] But that is only correct to describe the policy adopted by the British in Malaya before 1950 since in 1948 the Colonial Office directed that any:

> [C]riminal elements engaged in acts of violence in Malaya should be referred to as 'bandits'. On no account should the term 'insurgents', which might suggest a genuine popular uprising, be used.[144]

Nevertheless, the approach seems to have changed, as the state itself through the Emergency Regulation 1950 labelled the criminals as 'terrorists', a term that arguably embodies political and ideological elements. Hence, it is posited that the definition in the Emergency Regulations 1950 was designed without a political dimension purposely to facilitate a wider prevention agenda and effective 'population control'.[145] The 'terrorist' label therefore could be expanded to individuals who involve indirectly or take passive participation in terrorist activities, albeit in the absence of ideological motive. 'Collective punishment' was not uncommon during the Emergency too.[146]

In sum, the two definitions reflect the nature of terrorist threats, which involved armed conflict at that time, as well as the approach taken by the government that relied heavily on the executive-based measures and military power. Although the definitions equate terrorism with a number of criminal activities, be it complete or precursor acts, prosecuting terrorist suspects was not the primary

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141 Motl Golani and Henry Gurney, *The End of the British Mandate for Palestine, 1948: the Diary of Sir Henry Gurney* (Palgrave Macmillan, London, 2009) 2.

142 Section 1, Prevention of Terrorism Ordinance No. 33 of 5708-1948.

143 Nicholas Chan, 'The Malaysian "Islamic" State versus the Islamic State (IS): Evolving Definitions of "Terror" in an "Islamising" Nation-state, (2018) 11:3 *Critical Studies on Terrorism* 415, 418.

144'Designation of bandits in Malaya', Minute, J. D. Higham to K. Blackburne, 12 Nov. 1948. PRO, CO 534/4762.

145 Karl Hack 'Everyone Lived in Fear: Malaya and the British Way of Counterinsurgency' (2012) 23:4-5 *Small Wars & Insurgencies* 671.

146 Karl Hack, 'The Malayan Emergency as Counter-Insurgency Paradigm'(2009) 32:3 *Journal of Strategic Studies* 383.

response to terrorism.[147] The definitions in effect justified and facilitated the primary use of executive measures like resettlement, detention, or deportation, particularly applied to those who had been convicted for the criminal acts stated in the legislation.[148]

3.4.2 The National Security Council's Definition of Terrorism

The second terrorism-related definition can be found in a directive issued by the National Security Council (NSC). The NSC was established in 1971, following the 1969 racial riots, initially as an agency of the Prime Minister's Office.[149] In 2015, the government introduced the National Security Council Bill 2015 that upgrades the Council to become a statutory body and 'empowers the Prime Minister, upon advice by the Council, to declare certain area in Malaysia as a security area'.[150] The security forces will take control with special power over the 'security area'. The move raises serious concern because its constitutional validity is questionable.[151] A legal challenge was initially struck out by the High Court and the Court of Appeal due to a preliminary objection raised by the government, but the case was remitted after the Federal Court reviewed the earlier decisions.[152] To date, the hearing of the application for the revision is still pending. Be that as it may, a directive issued by the NSC is essentially not a law, but rather a government policy paper since the Council comprises the Prime Minister, several ministers, the chief of defence forces, and the Inspector General of Police.[153] According to a directive issued by the NSC in 2003, 'terrorism' is:

> [U]nlawful use of threat or the use of force or terror or any other attack by person, group or state regardless of objective or justification aim at other

147 On precursor offences, see 6.4.2, Chapter 6.

148 Karl Hack Detention, Deportation and Resettlement: British Counterinsurgency and Malaya's Rural Chinese, 1948–60 (2015) 43:4 *Journal of Imperial and Commonwealth History* 611.

149 see The Official Web of The National Security Council <https://www.mkn.gov.my/page/sejarah> accessed 5 December 2018.

150 Explanatory Statement, National Security Council Bill 2015 [D.R.38/2015].

151 Hoon Phun Lee, Constitutional Conflicts in Contemporary Malaysia (2nd edn, Oxford University Press, Oxford, 2017) 183. See also, Malik Imtiaz Sarwar, The National Security Council Bill: A Colorable Exercise of Power [2016] 2 Malayan Law Journal cxix

152 *Datuk Seri Anwar Ibrahim v Government of Malaysia & Anor Datuk Seri Anwar Ibrahim v Government of Malaysia & Anor* [2017] MLJU 338 [2018] MLJU 289. See also, Maizatul Nazlina, Anwar's Challenge of NSC Act to be Heard Next Year (The Star Online, 21 November 2018), < https://www.thestar.com.my/news/nation/2018/11/21/anwars-challenge-of-nsc-act-to-be-heard-next-year/ >accessed 22 November 2018.

153 Section 6, National Security Council Act 2016 [Act 776].

> state, its citizens or their properties and its vital services with the intention of creating fear, intimidation and thus forcing government or organisation to follow their impressed will including those act in support directly or indirectly.[154]

The definition seems broad and does not specify acts that amount to 'terrorist acts'. An interviewed senior officer at the Ministry of Foreign Affairs contended that the NSC definition is 'guided by the United Nations definition of terrorism, and there are several similarities between the two'.[155] Perhaps, there are at least two reasons as to why the NSC endorsed and adopted the definition.

First, the definition reflects a core function of the NSC, which is 'to formulate policies and strategic measures on national security, including sovereignty, territorial integrity, defence'.[156] This is arguably the reason why the notion of state-terrorism was incorporated in the definition. As discussed earlier, the insertion of 'state-terrorism' in the proposed definitions of terrorism is not common.[157] Furthermore, as argued by Tan, historical events, such as the confrontation with Indonesia, has influenced the conception of Malaysia's national security.[158] The Indonesia-Malaysia confrontation or 'Konfrontasi', which happened from 1962 to 1966, stemmed from Indonesia's objection to the creation of Malaysia.[159] Drawing lessons from the past, it is plausible why the notion of state-terrorism is accepted here. Apart from that, the existing territorial disputes also affect the national security policy, as the NSC asserts that 'overlapping territorial claims can spark the risk of armed conflict leading to regional collateral ramifications'.[160] The recognition of state-terrorism arguably becomes more significant due to two recent incidents that were allegedly orchestrated by foreign states. The United States asserted that North Korea used a banned chemical weapon to assassinate the half-brother of leader Kim Jong-un in

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154 National Security Council of Malaysia, Management and Controlling of Terrorism, Directive no. 18 (Kuala Lumpur: Prime Minister Department, 2003) 1.

155 Participant No.25.

156 Section 4(a), National Security Council Act 2016 [Act 776].

157 See section 3.3, Chapter 3.

158 Andrew T.H Tan, Security Perspectives of Malay Archipelago: Security Linkages in the Second Front in the War on Terrorism (Edward Elgar, Cheltenham,2004) 110.

159 See; Greg Poulgrain, *The Genesis of Konfrontasi: Malaysia, Brunei, Indonesia, 1945-1965* (C.Hurst & Co., London, 1998); Van der Bijl, Nicholas, *Confrontation : The War with Indonesia, 1962-1966* (Pen & Sword Military, Barnsley, 2007)

160 National Security Council, *National Security Policy* (Enthral Art Design Enterprise, Kuala Lumpur, 2017) 8.

Malaysia in 2017.[161] In addition, the suspects of the killing of a Palestinian academic and Hamas member, Fadi al-Batsh, are believed to have links 'to a foreign intelligence agency'.[162] Israel and Palestine denied their involvement in the assassination.[163] From a broader perspective, a senior prosecutor who has been interviewed asserted that:

> Terrorism is so wide, to a certain extent, you may say the US is terrorist too, because invaded other countries, causing destruction and death of innocent people.[164]

Second, the NSC's definition also reflects the role of the Council as a coordinator of the security services, including armed forces. Thus, the NSC's definition was meant to be an instrument that can bring all security forces to work together by acknowledging their ordinary job scope. Nevertheless, in reality, according to a senior security official, the role of NSC is very limited as each force is relatively reluctant to co-operate, particularly in intelligence sharing.[165] The combined scope of works would arguably give an impression of an enormous task, and hence justifies the significant allocation of resources.

The NSC's definition of terrorism reflects a broad government stance that has shaped its responses to terrorism.[166] It is about policy, resources and tasking. Hence the wide breadth of the definition gives the government more leverage in setting up comprehensive and inclusive counter-terrorism arrangements. The NSC's definition was issued in the same year as when the government inserted the provisions that define terrorism in the Penal Code 1936. The move indicates that it

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161 The US Depart of State, Press Statement: Imposition of Chemical and Biological Weapons Control and Warfare Elimination Act Sanctions on North Korea (6 March 2018) <https://www.state.gov/r/pa/prs/ps/2018/03/279079.htm> accessed 7 December 2018.

162 The Star Online, 'Ahmad Zahid: Killers of Lecturer Linked to Foreign Intelligence Organisation' (21 April 2018) <https://www.thestar.com.my/news/nation/2018/04/21/ahmad-zahid-killers-of-lecturer-linked-to-foreign-intelligence-organisation/#dI8FZMSRSGvAPzTi.99 > accessed 7 December 2018.

163 Channel News Asia, Israel Dismisses Claims Mossad behind Malaysia Assassination (22 April 2018) <https://www.channelnewsasia.com/news/world/israel-dismisses-claims-mossad-behind-malaysia-assassination-10163108> accessed 7 December 2018; Aljazeera, 'Palestinian Embassy Denies Involvement in Scholar's assassination (7 May 2018) <https://www.aljazeera.com/news/2018/05/palestinian-embassy-denies-involvement-scholar-assassination-180507102253923.html> accessed 7 December 2018.

164 Participant No.7.

165 Participant No.30.

166 Ahmad Zahid Hamidi, 'Malaysia's Policy on Counter Terrorism and De-radicalisation Strategy' (2016) 2:6 *Journal of Public Security and Safety* 1.

was not intended to be a legal instrument as the Penal Code was made to perform that task.

3.4.3 'Terrorism' in the Penal Code 1936

The Penal Code 1936 codifies most of the criminal offences and general defences in Malaysia within 23 chapters.[167] In 2003, a new section, namely Chapter IVA: Offences Relating to Terrorism was inserted into the Penal Code 1936.[168] According to the government, the new provisions are required in order for Malaysia to be a party to the International Convention for the Suppression of the Financing of Terrorism 1999 and International Convention against the Taking of Hostages 1979.[169] It was also contended that the amendment is in line with obligations imposed on Malaysia by virtue of the UN Security Council Resolution 1373.[170] In an interview conducted by the researcher, a Member of Parliament contended that:

> Malaysia is always with the world community in countering terrorism. It is a global phenomenon. We therefore must show our commitment to bring out new legal provisions and policies under the name of counter-terrorism.[171]

Akin to the Emergency Regulations 1950 and the ISA 1960, the new Chapter does not provide a direct definition of 'terrorism'. The minister who tabled the bill defended the approach by saying that a 'conceptual definition' is unnecessary as long as judges are able to know its general meaning and intended meaning.[172] However a senior prosecutor, who was interviewed argued that it is crucial to have a specific definition of terrorism in the Penal Code 1936. The participant further explained that:

> [T]here is no clear definition in the Penal Code about terrorism, I think there should be a clear definition of terrorism under the Penal Code, it has not been defined, we have only to refer to certain Gazettes.[173]

The prosecutor was referring to Federal Gazette notices that declare specific groups or individuals as a terrorist entity under section 66B or 66C of the Anti-Money

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167 Penal Code 1936 [Act 574].

168 Penal Code (Amendment) Act 2003 [Act A1210].

169 Dewan Negara Hansard, 19 November 2003, 64.

170 Dewan Rakyat Hansard, 6 November 2003, 48.

171 Participant No.3.

172 ibid, 64.

173 Participant No.5.

Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001.[174] However, for an interviewed High Court judge, the absence of a more precisely defined terrorism is not a problem as 'no country manages to define "terrorism" perfectly', so it is sufficient if the law defines as to what is 'terrorist act'.[175] Chapter IVA of the Penal Code 1936 offers definitions of 'terrorist', 'terrorist group', 'terrorist entity', 'terrorist property' and 'terrorist act'. Section 130B of the chapter defines 'terrorist', 'terrorist group', 'terrorist entity' and 'terrorist acts' as:

> "[T]errorist" any person who—
> (a) commits, or attempts to commit, any terrorist act; or
> (b) participates in or facilitates the commission of any terrorist act, and
> includes a specified entity under section 66B or 66C of the *Anti Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 [Act 613];
>
> "terrorist entity" means any entity owned or controlled by any terrorist or terrorist group and includes an association of such entities;
>
> "terrorist group" means—
> (a) an entity that has as one of its activities and purposes the committing of, or the facilitation of the commission of, a terrorist act; or
> (b) a specified entity under section 66B or 66C of the *Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001;
>
> "terrorist act" means an act or threat of action within or beyond Malaysia where—
>
> (a) the act or threat falls within subsection (3) and does not fall within subsection (4);
> (b) the act is done or the threat is made with the intention of advancing a political, religious or ideological cause; and
> (c) the act or threat is intended or may reasonably be regarded as being intended to—
>
> (i) intimidate the public or a section of the public; or
> (ii) influence or compel the Government of Malaysia or the Government of any State in Malaysia, any other government,

174 Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 [Act 613].

175 Participant No.28.

or any international organization to do or refrain from doing any act.

(3) An act or threat of action falls within this subsection if it—

(a) involves serious bodily injury to a person;
(b) endangers a person's life;
(c) causes a person's death;
(d) creates a serious risk to the health or the safety of the public or a section of the public;
(e) involves serious damage to property;
(f) involves the use of firearms, explosives or other lethal devices;
(g) involves releasing into the environment or any part of the environment or distributing or exposing the public or a section of the public to—
(i) any dangerous, hazardous, radioactive or harmful substance;
(ii) any toxic chemical; or
(iii) any microbial or other biological agent or toxin;
(h) is designed or intended to disrupt or seriously interfere with, any computer systems or the provision of any services directly related to communications infrastructure, banking or financial services, utilities, transportation or other essential infrastructure;
(i) is designed or intended to disrupt, or seriously interfere with, the provision of essential emergency services such as police, civil defence or medical services;
(j) involves prejudice to national security or public safety;
(k) involves any combination of any of the acts specified in paragraphs (a) to (j),

and includes any act or omission constituting an offence under the Aviation Offences Act 1984 [Act 307].

(4) An act or threat of action falls within this subsection if it—
(a) is advocacy, protest, dissent or industrial action; and
(b) is not intended—
(i) to cause serious bodily injury to a person;
(ii) to endanger the life of a person;
(iii) to cause a person's death; or

(iv) to create a serious risk to the health or safety of the public or a section of the public.

(5) For the purposes of subsection (2)—

(a) a reference to any person or property is a reference to any person or property wherever situated, within or outside Malaysia; and
(b) a reference to the public includes a reference to the public of a country or territory other than Malaysia.

According to Chapter IVA, a terrorist can be identified based on either one of these elements: first, the acts or threats described in the code, second, the association with any proscribed group under Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001.

Roach argues that the 2003 amendment brings a definition which was made 'in a manner that closely mirrored' the UK definition in the Terrorism Act 2000 and was also influenced by the existing Internal Security Act 1960 which was still in force at the time.[176] That included defining terrorist acts as acts or threats involving the use of firearms or explosives, or 'in a manner prejudicial to public safety or the maintenance of public order'.[177] As a consequence, the fusion of modern British counter-terrorism approach and colonial counter-insurgency strategy has created an even broader definition of terrorism.[178]

Nonetheless, there is a more compelling explanation for the origin of the definitions in Chapter IVA and the links with the UK's legislation. The definition of 'terrorist act' in the 2003 Penal Code Amendment is identical word by word to the 'Model Legislative Provisions on Measures to Combat Terrorism' proposed by the Commonwealth Secretariat in 2002.[179] The sample 'provisions were developed to assist countries with the implementation of United Nations Security Council Resolution 1373'.[180] This provenance was in fact admitted by the minister, who tabled the bill at the Parliament, that:

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176 Kent Roach,(n 139) 25.

177 Section 2, Internal Security Act 1960 [Act 82].

178 Kent Roach, (n 139) 26.

179 Office of Civil and Criminal Justice Reform, Model Legislative Provisions on Measures to Combat Terrorism (Commonwealth Secretariat, September 2002) <http://thecommonwealth.org/sites/default/files/key_reform_pdfs/P153470_21_ROL_Model_Terrorism_Provisions.pdf> accessed 5 December 2018.

180 Office of Civil and Criminal Justice Reform, Model Legislative Provisions on Measures to Combat Terrorism (Commonwealth Secretariat, September 2002) i

> [T]he use of term in accordance with, among others, the International Convention for the Suppression of Terrorist Bombings, which is Article 1.3 and the Commonwealth Model Legislative Provisions, 2002.[181]

Apparently, the definition was drafted in view of international obligations and presumably the Common Law system too.[182] Nevertheless, it must be noted that the members of the Expert Working Group who devised the definition emphasised that:

> [T]hey were not in any way attempting to arrive at an acceptable international definition of terrorism, recognising that this was a serious and complex question, which was still under the consideration by the United Nations. Further in the domestic context, it is for each country to decide upon the sensitive and complex policy considerations relating to a definition and to adopt a legislative provision appropriate for the country.[183]

Singapore and Brunei are other neighbouring Commonwealth countries that adopt the same definition of 'terrorist act'.[184] But unlike Malaysia, both countries do not include it in their Penal Codes, but rather in specific anti-terrorism legislation that concerns financing terrorism.

3.4.4 Judicial Interpretation of Terrorism

The broad definition of 'terrorist act' in the Penal Code 1936 entails wider judicial discretion in determining who is a 'terrorist' and what actions amount to a 'terrorist act'. Hence, it is vital to examine the approaches adopted by the Malaysian judges in order to interpret definitional issues in terrorism-related trials. In *Public Prosecutor v Atik Hussin bin Abu Bakar & Ors* (2016), the trial judge acknowledged that there is no direct definition of 'terrorism' in the Penal Code 1936 or other legislation in

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181 Dewan Rakyat Hansard, 6 November 2003, 67.

182 For comparison see, United Nations Office on Drugs and Crime, Model Legislative Provisions Against Terrorism (February, 2009) < https://www.un.org/sc/ctc/news/document/unodc-model-legislative-provisions-against-terrorism/> accessed 5 December 2018.

183 Commonwealth Secretariat, *Report of Expert Working Group on Legislative and Administrative Measures to Combat Terrorism* (Commonwealth Secretariat, London, 2002) 4.

184 See Section 2(1), Anti-Terrorism (Financial And Other Measures) Act 2008 [Chapter 197] of Brunei; and Section 2(2) Terrorism (Suppression of Financing) Act 2003 [Chapter 325] of Singapore.

Malaysia.[185] An attempt was made by the defence lawyers to refer to definitions from other jurisdictions. The court, however, held that 'the parallel provisions in the Australian, UK and Indian legislations referred to above are not in *pari materia* to those in Chapter VIA' of the Penal Code 1936.[186] Based on the previous decisions, the courts appear to adopt two approaches in dealing with definitional issues in terrorism-related cases.

The first approach emphasises what an individual has done. Hence, an act is considered as a terrorist act if the Penal Code explicitly states it. Perhaps this is what has been observed by Levitt as a deductive approach.[187] The deductive approach definitions typically comprise of three parts: first, a substantive element, stipulating the prohibited conduct. The second is the requirement of intent or motive, and the third is a jurisdictional element. In *Public Prosecutor v Hassan bin Hj Basari*, the presiding judge merely recited sub-section (3) of section 130 (b) of the Penal Code in his judgment as to what is 'terrorism' and concluded that an armed intrusion by a group of foreigners from the Philippines into Kampung Tanduo, Sabah is a 'terrorist act'.[188] The accused in this case, who was a Corporal attached to the Special Branch of the Royal Malaysian Police Force, was charged with an intentional omission to give information relating to a terrorist act. Two police personnel died during the incident, which led to a greater clash a few days later. At the end of the standoff, around 56 militants, six civilians and 10 Malaysia[189]n security forces were killed.[190] The court held that the intrusion was a terrorist act considering the casualties involved as testified by the witnesses.[191] The approach is entirely based on what amounts to a 'terrorist act' as stated in the Penal Code 1936. The judge did not venture further to decide whether the Royal Sulu Army is a terrorist group or not.[192] The group was at the time of the attack not listed or proscribed as a terrorist organisation.

A similar approach, but with further judicial analysis in the judgment, was adopted in the case of *Public Prosecutor v Atik Hussin bin Abu Bakar* (2016).[193] The

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185 *Public Prosecutor v Atik Hussin bin Abu Bakar & Ors* (n 50) 41.

186 ibid.

187 Geoffrey Levitt, 'Is "Terrorism" Worth Defining?' (1986) 13 *Ohio Northern University Law Review* 97.

188 *Public Prosecutor v Hassan bin Hj Ali Basari* [2013] MLJU 833.

189 Suhaili Abdul Rahman and Kamarulnizam Abdullah, 'The Securitization of Sabah's Threat Challenges' (2019) 4:2 *International Journal of Arts Humanities and Social Sciences* 28.

190 See Jasmine Jawhar and Kennimbrod Sariburaja, The Lahad Datu Incursion & It's Impact on Malaysia's Security (The Southeast Asia Regional Centre for Counter-Terrorism, Kuala Lumpur, 2016)

191 *Public Prosecutor v Hassan bin Hj Ali Basari* [2013] 1 LNS 717, 19

192 See also, *Hassan Ali Basari v Public Prosecutor* [2019] 1 MLJ 390.

193 *Public Prosecutor v Atik Hussin bin Abu Bakar & Ors* (n 50) 42.

High Court found that the prosecution did not tender any evidence of order, declaration or gazette that the Royal Sulu Army was, or is, a terrorist group.[194] Therefore, the court had to examine the adduced evidence in court concerning the status of the Royal Sulu Army. It was accordingly held that the group is a terrorist group based on the following findings of fact.[195] First, the group comprised armed intruders who had occupied Kg. Tanduo by force. Second, the unlawful occupation was for a political cause to claim Sabah as a possession of the Sultanate of Sulu by force. Third, the skirmishes between police and the group in using their firearms in furthering their political cause and demands had caused the deaths of, and injured, many police officers and other personnel. Based on this approach, it is less important as to whether the perpetrator belongs to any particular terrorist group, but the fundamental question is whether the nature of his criminal acts can be construed as terrorist acts. The emphasis can also be seen in the case of *Public Prosecutor v Murad Halimuddin Hassan & Others* (2016), where the trial judge placed less emphasis on the ideological aspect of all the accused persons or their affiliation, but rather was concerned with the planned criminal acts which are detrimental to the national security.[196]

The second approach adopted by the Malaysian courts is by drawing links between a criminal act and a terrorist group. This approach, which reflects the vague definitions in the Penal Code 1936, would prompt a question about how to determine whether a particular group is a terrorist group or not? For this purpose, the courts appear to rely on the following four primary sources, which are the ministerial order, judicial notice, expert opinion and United Nations resolutions.

The use of the ministerial notices is based on the definition of a terrorist group under section 130B of the Penal Code 1936, which reads as follows:

> "terrorist group" means—
> (a)…
> (b) a specified entity under section 66B or 66C of the *Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001; [197]

194 High Court of Sabah Sarawak, Note of Proceeding: Public Prosecutor v Atik Hussin & Ors [BKI-45SO-1/3-2013].

195 *Public Prosecutor v Atik Hussin bin Abu Bakar & Ors* (n 50) 42; see also *Public Prosecutor v Mahadi bin Ibrahim* [2019] 1 LNS 991

196 *Public Prosecutor v Murad Halimuddin Hassan & Others* [2016] 1 LNS 554; cf, *Murad Halimuddin Hassan & Anor v Public Prosecutor* [2018] 1 LNS 992.

197 Section 130B, Penal Code [Act 574].

A ministerial order is issued pursuant to sections 66B and 66D of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001. Section 66B states:

> Where the Minister of Home Affairs is satisfied on information given to him by a police officer that—
> (a) an entity has knowingly committed, attempted to commit, participated in committing or facilitated the commission of, a terrorist act; or
> (b) an entity is knowingly acting on behalf of, at the direction of, or in association with, an entity referred to in paragraph (a),
> the Minister of Home Affairs may, by order published in the Gazette, declare the entity to be a specified entity.

All ministerial orders are published in the Federal Gazette. Although the ministerial orders were meant for countering the financing of terrorism, their application is also extended to other kinds of terrorism offence. In the above case, the accused, a university student, was charged with possession of items related to terrorism. In *Public Prosecutor v Siti Noor Aishah Binti Atam* (2016), the court accepted the Ministerial Order which declared the Islamic State, Al-Qaeda and Jemaah Islamiah to be terrorist groups.[198]

This ulterior application of ministerial orders has been disputed. The defence in *Public Prosecutor v Ummi Kalsom Bahak* (2016) raised a preliminary objection based on a technical issue.[199] The accused person in the case was arrested before the notice that declares the Islamic State group as a terrorist organisation was issued by the government.[200] The High Court rejected the contention and consequently held that the organisation is a terrorist group based on the evidential rule of judicial notice and the United Nations Security Council Resolution. The doctrine of judicial notice as a rule of evidence is governed by sections 56 and 57 of the Evidence Act 1950.[201] Invoking the doctrine could be an alternative for the court to determine the status of a group if the issue is undisputed. The courts seem to cite judicial notice in their judgment in cases whereby the accused pleaded guilty to the charge.[202] In *Ong Boon Hua @ Chin Peng v Government of Malaysia* (2008), the

198 *Public Prosecutor v Siti Noor Aishah Binti Atam* [2016] MLJU 895.

199 *Public Prosecutor v Umi Kalsom bt Bahak* [2016] 6 MLJ 407.

200 Anti-Money Laundering, Anti-Terrorism Financing And Proceeds Of Unlawful Activities (Declaration Of Specified Entities And Reporting Requirements) (Amendment) Order 2014 PU(A) 301/2014.

201 Evidence Act 1950 [Act 56], Section 56 states, 'No fact of which the court will take judicial notice need be proved'.

202 See *Public Prosecutor v Muhammad Fadhil Ibrahim* [2016] 2 CLJ 848.

High Court clarified that the judicial notice applied based on the historical fact of the atrocities committed by the Malaysian Communist Party.[203] Regarding the use of the United Nations Security Council Resolution as an authority, the courts appear to merely invoke the mechanism generally in their judgment without referring to any specific resolution.[204]

In terrorism-related trials, the courts also take into consideration expert opinion. The general rule of the admissibility of expert testimony is governed by section 45 of the Evidence Act (1950), along with Common Law precedents.[205] The established principle is that 'expert evidence is to be used by the court for the purpose of assisting rather than compelling the formulation of the ultimate judgements', with exception to 'purely scientific issues'.[206] In *Junaidi v Public Prosecutor* (1993), the judge laid down the test on the application of expert opinion by saying:

> First, does the nature of the evidence require special skill? Second, if so, has the witness acquired the necessary skill either by academic qualification or experience so that he has adequate knowledge to express an opinion on the matter under the inquiry?[207]

The experts assist the court to decide on whether a particular entity, person or object relates to terrorism. According to an interviewed senior prosecutor, the role of an expert is:

> [Q]uite significant because we rely on the expert opinion to define terrorist activities or terrorist organisation as well as the threats of terrorist groups, and then to know the existence of the terrorist group.[208]

In trials involving possession of terrorism-related materials, the offending items were referred to the experts in order to identify the links.

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203 *Ong Boon Hua @ Chin Peng v Government of Malaysia* [2008] 3 MLJ 625.

204 See *Public Prosecutor v Mohd Syafrein Rasid* [2015] 1 LNS 943; *Public Prosecutor v Muhammad Sani Mahdi Bin Sahar* [2016] 1 LNS 1150.

205 Evidence Act 1950 [Act 56], Section 45 states, '(1) When the court has to form an opinion upon a point of foreign law or of science or art, or as to identity or genuineness of handwriting or finger impressions, the opinions upon that point of persons specially skilled in that foreign law, science or art, or in questions as to identity or genuineness of handwriting or finger impressions, are relevant facts.(2) Such persons are called experts.

206 *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212, 214.

207 *Junaidi v Public Prosecutor* [1993] 3 MLJ 217, 229.

208 Participant No.5.

There are at least two contentious issues pertaining to the role of the expert opinion in terrorism-related trials. The first one concerns the capability of the experts to provide an independent and impartial opinion. At present, several individuals are frequently called by the prosecution to give their opinion in trials. They are, according to an interviewed prosecutor, 'local and international experts of terrorism'.[209] An academic, who also has experience giving testimony in terrorism-related trials, explained that the selection is mainly based on the following factors:

> The number one, trust, they trusted the person. The number two, the expertise or the fieldwork that the person involves, the research that he conducts. From here, we can see the police do not approach just like anyone.[210]

The close relationship between the 'experts' and the authorities raises concerns about the impartiality of the given opinion evidence. An interviewed private lawyer considered the 'experts' are actually 'trained and created by the police'.[211] Furthermore in most cases, the forensic science 'experts' are police officials. In *Public Prosecutor v Mohd Anwar Azmi* (2016), for instance, the 'expert', who examined explosive materials in the case was a police officer at Bomb Disposal Unit.[212]

The second issue relates to the ability and skill of the experts to assess the forensic issues. The evidence given by two witnesses was rejected because the judge was not satisfied with the way they examined the items and testified in court. In *Public Prosecutor v Siti Noor Aishah Binti Atam* (2016), the prosecution called three expert witnesses to give their opinion evidence on the links between books possessed by the accused with terrorist organisations.[213] Further, the accessibility of the defence lawyers to the materials in order to consider seeking alternative expert opinion is also imperative. In *Public Prosecutor v Mustaza Abdul Rahman* (2018), the defence counsel challenged the credibility and the testimony given by the expert witness called by the prosecution.[214] The defence lawyer contended the expert witness did not have sufficient expertise to assess the evidence and to determine the authenticity of '*baiah*' or oath of allegiance uttered by the accused on

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209 Participant No.5.

210 Participant No.27.

211 Participant No.13.

212 *Public Prosecutor v Mohd Anwar Azmi* [2016] 7 CLJ 604.

213 *Public Prosecutor v Siti Noor Aishah Binti Atam* (n 204).

214 *Public Prosecutor v Mustaza Abdul Rahman* [2018] 9 CLJ 101.

the WhatsApp Messenger.[215] Accordingly, the defence lawyer called another expert to rebut the prosecution witness. This situation might be helpful for the defence, but not always available to everyone due to limited resources. Further, according to an interviewed private practitioner, it is difficult to find any expert who is willing to give rebuttal evidence against a government-endorsed expert.[216]

Given the significant role of the expert witness, the lack of expertise, impartiality and independence would affect the fairness of a terrorism-related trial directly. For this reason, it is imperative to consider the significance of having a code of practice and conduct for the expert witnesses, including other relevant practitioners, such as explosives or identification, who are called to give evidence in court. One precedent is the Codes of Practice and Conduct issued by the UK's Forensic Science Regulator, which provides a clear statement to 'individual practitioners, academics, public or private sector forensic science providers' in fulfilling their expected obligations.[217] According to two research participants who have experienced giving evidence in terrorism-related trials, no guideline or code was provided to them in performing their task.[218] As a result, a research participant complained that he once had a problem to fulfil the expectation of the judge and prosecutors.[219] At this point, the code of practice and conduct would also assist the expert to be more objective while maintaining impartiality and professionalism.

3.4.5 Assessing the Penal Code Definition

There are two key aspects of the Penal Code's definition that should be first examined, particularly in considering its impact on the criminalisation approach. One is the broad definition of 'terrorist act' that covers wide-ranging criminal activities, which are related to the actus reus conception in criminal law. The second is the element of the intention of advancing a political, religious or ideological cause in 'terrorist acts', linked to the mens rea conception.

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215 Trial observation, 11 August 2017

216 Participants No.2 & No.13

217 The Forensic Science Regulator, *Codes of Practice and Conduct for Forensic Science Providers and Practitioners in the Criminal Justice System* (Issue 4, October 2017), 13

218 Participants No.26 & No.27

219 Participant No.26.

3.4.5.1 A Catch-all Category of 'Terrorism Acts'

The Penal Code 1936 definition deals with a broad spectrum for terrorist acts and threats posed or harms committed or intended.[220] It is far more extensive than the ISA 1960 as to what can be regarded as 'terrorist acts'. According to a senior legal practitioner, who has been handling cases related to the ISA 1960:

> This definition basically was tailored to deal with the situation that has been going around (at present)…the scope of the definition is no longer limited to arm struggle, as in the past.[221]

The definition covers all acts of causing harm to persons, property, environment, communications infrastructure, banking or financial services, utilities, transportation or other essential infrastructure. It also describes a terrorist act based on how it is carried out, for instance, by the use of any firearms, explosives or other lethal devices. All offences criminalised under Aviation Offences Act 1984 fall under the purview of this section too.[222] An experienced prosecutor, who has ten years of experience at the prosecution service, emphasised that:

> The (definitional) provision has attempted to be comprehensive to cover necessary acts or actions that relate to terrorism, however I believe that these provisions rather new it is subject to be tested in the court of law, to be interpreted and applied according to the fact of the case by the court.[223]

For a private practitioner who has handled many terrorism-related cases, the Penal Code's definition is:

> [V]ague and general, designed to facilitate police and the prosecution. With the wide definition, the authorities can make use the provision to arrest almost everyone, with no intention to charge in court.[224]

It must be noted that if a suspect is arrested for committing a 'terrorist act', the police have the power to detain the person for a maximum period of 28 days under the

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220 Section 130B(3), Penal Code 1936 [Act 574].

221 Participant No.1.

222 Aviation Offences Act 1984 {Act 30].

223 Participant No.19.

224 Participant No.2.

SOSMA 2012.[225] No judicial approval is required for that investigatory or pre-charge detention.

The broad definition of 'terrorist act' is problematic and counter-productive in countering terrorism, at least for three reasons. First, the broad definition could possibly undermine the constitutional and fundamental rights of the people. For instance, it includes any 'advocacy, protest, dissent or industrial action' to be treated as terrorist acts, if 'it is intended to create serious risk to the health or safety of the public or a section of the public'.[226] An interviewed senior lawyer argued that:

> [T]he definition is wide and can always be susceptible to abuse. It was drafted based on a very liberal interpretation (terrorism) as compared to what we often consider as terrorism or terrorism act.[227]

Accordingly, the Malaysian Trade Union Congress (MTUC) voiced its alarm as to whether pickets and strikes by workers or unions might, thereby, come under acts of terrorism.[228] Its concern was later backed by the Human Rights Commission of Malaysia (SUHAKAM).[229] Edmund Bon argues that its broad definitions 'may lead to a clampdown of legitimate political dissent in the name of terrorism'.[230] A group of NGOs namely, Joint Action Group Against Violence Against Women (JAG), presented a memorandum urging the government to repeal sections 130B(2)(i) and (bb).[231] They contended that the wide definition would criminalise a wide range of NGO's non-violent activities which are 'intended to influence or compel the Government to do or refrain from doing any act' to be considered as 'terrorist acts'. Another private lawyer, who was a prosecutor before setting up his own practice, expressed his concern about the inadequate existing safeguards to counter the broad definition, by saying that:

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225 Section 4(5) Security Offences (Special Measures) Act 2012 [Act 747].

226 Section 130B(4)(b)(iv), Penal Code 1936 [Act 574]

227 Participant No.1

228 Neil Hicks and Michael McClintock, 'Defending Security: the Right to Defend Rights in an Age of Terrorism', Excerpt produced for the 60th Session of the United Nations Commission on Human Rights March 15 to April 23, 2004, Geneva.

229 Human Rights Commission of Malaysia, Annual Report 2014, 92.

230 Edmund Bon Soon Tai, 'Impact of Terrorism and Anti-Terrorism Measures in Asia: Malaysia', Malaysian Bar, 2004, <http://www.malaysianbar.org.my/human_rights/impact_of_terrorism_and_anti_terrorism_measures_in_asiamalaysia.htm> accessed 6 October 2016.

231 Joint Action Group Against Violence Against Women (JAG), Memorandum to the Special Select Committee On Penal Code (Amendment) 2004 and Criminal Procedure Code (Amendment) 2004, 28 October 2004, 3.

> When I read the definition, although it is necessary to define, I felt that it was a bit wide and a bit loose, whereby the consequences can be so grave. Because in remote association or sympathising even under attempt, that will automatically activate the definition. I think in view of the consequences are very heavy, the definition is too large, and there is an inadequate safeguard.[232]

Second, the operation of the definition is very far-reaching within the national counter-terrorism strategy, and so its imprecision could jeopardise the whole agenda. A prosecutor elucidated this concern clearly by saying:

> [T]hat if we try to list down all possible scenarios whereby any particular act or action will become an act of terrorism, then there is the danger of making it to become too complicated for the investigating authorities like the police, legal practitioners like the prosecutors and defence counsels, the court in the process of interpretation, and also for the benefit of the understanding of public.[233]

The Penal Code 1936 definition also is applicable within other existing counter-terrorism legislation in Malaysia. Both subsequent laws, the Prevention of Terrorism Act 2015 and the Special Measures Against Terrorism in Foreign Countries Act 2015 define 'terrorist act' as having the same meaning as in the Penal Code.[234] A similar reference can be found in Section 66 Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001. The Security Offences (Special Measures) 2012, which provides for a special procedure for the police force to deal with terrorist acts, defines 'security offences' as all terrorism-related offences stipulated in Chapter IVA. The broad definition of 'security offence' includes committing acts 'prejudicial to national security and public safety' and so allows the authority to consider, for instance, the BERSIH 2.0 rally, possession of Che Guevara t-shirts and Seksualiti Merdeka (a sexuality rights festival) as national security threats.[235]

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232 Participant No.16.

233 Participant No.19.

234 Section 2, Prevention of Terrorism Act 2015, United Kingdom.

235 Saroja Dhanapal, Johan Shamsuddin Sabaruddin, 'Rule Of Law: An Initial Analysis Of Security Offences (Special Measures) Act (SOSMA) 2012 (2015) 23 *IIUM Law Journal* 1

Third, the broad Penal Code definition of 'terrorist acts' causes more difficulty when the Code criminalises 'terrorist act' simpliciter with a severe penalty, including the death penalty. Section 130C states that:

> Whoever, by any means, directly or indirectly, commits a terrorist act shall be punished—
>
> (a) if the act results in death, with death; and
>
> (b) in any other case, with imprisonment for a term of not less than seven years but not exceeding thirty years, and shall also be liable to fine.

This means that anyone who has committed any of the large-scale acts could be charged with committing 'terrorist act', either directly or indirectly. Further discussion of the 'terrorist act' offence can be found in Chapter 6 under the heading of 'Terrorist Act Simpliciter'.[236] It is also highly notable that the fact that the definition of 'terrorist acts' is a compilation of existing criminal acts shows that terrorism can be dealt with under ordinary criminal law, which will be discussed in Chapter 5.

3.4.5.2 Intention of Advancing Political, Religious or Ideological Cause

When tabling the 2003 Penal Code Amendment, which comprises the definition of 'terrorist act', the minister in charge also cited the definition of terrorism proposed by Mahathir Mohamad before the OIC, as mentioned earlier.[237] Aside from the inclusion of 'state-terrorism' and emphasis on terrorism victims, the definition also excludes any political or ideological dimension. Nevertheless, the Penal Code definition, which was in the proposed Bill, explicitly states that a 'terrorist act' must be 'made for the purpose of advancing a political, ideological, or religious cause'.[238] This provision is similar to Option 2 of the definition of 'terrorist act' in Model Legislative Provision on Measures to Combat Terrorism, which is recommended by the Commonwealth Secretariat.[239] Compared to Malaysia, the neighbouring Singapore and Brunei adopted Option 2 of the same model, which excludes the motivation elements.[240] The Penal Code definition on the 'political, religious or

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236 See 6.4.2.1 Terrorist Act Simpliciter, Chapter 6.

237 See 3.2.2, Chapter 3.

238 Section 130B(2)(b) Penal Code 1936 [Act 574]

239 See Office of Civil and Criminal Justice Reform, Model Legislative Provisions on Measures to Combat Terrorism (Commonwealth Secretariat, September 2002) 6.

240 Section 2(1)(b), Anti-Terrorism (Financial And Other Measures) Act 2008 [Chapter 197] of Brunei; and Section 2(2)(b) Terrorism (Suppression Of Financing) Act 2003 [Chapter 325] of Singapore.

ideological cause' resembles the definition of terrorism under Section 1 (b) and (c) of the UK Terrorism Act 2000, with the exception of the racial cause. The element was added later in the UK's version in 2008.[241]

The inclusion of political, ideological and religious dimensions into the definition of terrorism is arguably a departure from the past approach.[242] Nevertheless, even in the past, these elements are contested. As asserted by an interviewed Member of Parliament,

> Since before independence and even until now, we will always assume that terrorists are those like the Communist…I don't think that we can consider all of them are terrorists, as at that time, it was a war (against colonial power), some of them were fighting for the independence…If you want to define terrorist group, we can't just simply put that (they are terrorists) because they have some kind of 'idealism' or political ideology, even political party have the same thing. So, it's only the means and (it depends on) how they use it.[243]

Based on his experience as an opposition politician, the lawmaker also contends that the Penal Code definition that consists of 'political, religious and ideological elements are vague open to abuse'.[244] In another interview session, a senior private lawyer contended that the element is unnecessary by saying:

> The scope should be limited to these group (based on the political, religious, ideological cause). Threats to Federation (of Malaysia) can come in various forms and organisations. Some could be purely motivated by personal gain, for example. As long as the key elements (of crime) are there, that should fulfil the ambit or scope as to what can be considered as 'terrorist'; then the law should be applied.[245]

The above view seems to suggest a broader approach to define terrorism including other type of crimes. The lawyer also mentioned acts perpetrated by triads and

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241 Section 75, Counter Terrorism Act 2008, See Clive Walker, The Anti-Terrorism Legislation (Oxford University Press, Oxford,2009) 10.

242 Nicholas Chan (n 151)

243 Participant No.32.

244 ibid.

245 Participant No.1.

'underground groups' as examples.[246] However, from another angle, this view to a certain extent supports the application of the Normal Criminal Mode (NCM), which means terrorists should be dealt with in the same manner as any other criminals when they pose threats to Federation. At the same time, inserting motivation into the definition would regulate or limit the use of 'terrorist' label to other criminals. As pointed out by a human rights activist, there must be a strict definition, otherwise, it will be like the broad term of 'national security' whereby:

> Individuals like Jamal Yunos (politician), Maria Chin (rights activist), SUARAM (human rights organisation) are considered as threats to 'national security', similar to terrorism. So, the question of whether they are security threats as in terrorism sense, the answer is no. But all are lumped together. So, it is a dangerous definition, especially when our government has history of adopting overzealous interpretation of certain concepts.[247]

Maria Chin was arrested under SOSMA 2012 in 2016 one day before BERSIH 5, a movement that she led, held a rally calling for clean elections.[248] Nevertheless, there was no prosecution mounted against her. It is important to emphasis that the Penal Code 1936 definition excludes acts of 'advocacy, protest, dissent or industrial action' as 'terrorist acts' if is not intended:

> (i) to cause serious bodily injury to a person;
> (ii) to endanger the life of a person;
> (iii) to cause a person's death; or
> (iv) to create a serious risk to the health or safety of the public or a section of the public.[249]

The exceptions seem reasonable, except subsection (iv) which deals with risk rather than crime or threat.

Further, minority groups would possibly become vulnerable when the law magnifies the element of religion and ideology. In the past, the ISA 1960 was used to detain, for example, the leaders of Hindu Rights Action Force' (HINDRAF).[250] In 2007, the Inspector General of Police made a public statement that the group has

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246 Participant No.1.

247 Participant No.11.

248 *Maria Chin Abdullah v. Public Prosecutor* [2016] 5 CLJ 428.

249 Section 130B(4), Penal Code 1936 [Act 574].

250 *Manoharan Malayalam & Anor v Dato' Seri Hj Mohd Najib bin Tun Abdul Razak & Ors* [2013] 2 MLJ 725.

links to an international terrorist group, an allegation denied by HINDRAF's leader.[251] Minor groups within the Muslim community might also be at risk to be smeared by the terrorist label.[252] In 1994, eight leaders of Darul Arqam, a banned Islamic mystic group were arrested under the ISA 1960 after a major clampdown.[253] With these past instances, the susceptibility of a definition of terrorism that includes religious element should not be discounted.[254]

There are at least three possible legal impacts of the political, religious and ideological dimension in the definition of terrorism to the criminalisation approach in Malaysia. Firstly, the politicisation of criminal trial can arise by being manipulated by the state or terrorist suspects. This risk be will be discussed in Chapter 4.[255] Secondly, motive is made as part of *mens rea* element in a criminal offence, which will be elaborated in Chapter 5. Thirdly, the spectrum of admissible or relevant evidence, including the mind-set evidence and the opinion of terrorism experts is broadened. However, defining terrorism by its links to political and ideological provides a justification for the proponents of executive detention for de-radicalisation agenda. Further discussion can be found in Chapter 4.[256]

3.5 Counter-Terrorism Policy in Malaysia

Just as the conception of terrorism in Malaysia is influenced by historical, political and social factors, so is the way the state responds to the phenomenon. Malaysia's counter-terrorism policy finds its historical roots in the colonial period.[257] However, the counter-terrorism policy does not remain static but rather evolves as the threats are no longer coming from the Malayan Communist Party.[258] The Malayan Communist Party was officially dissolved in 1989 following the Peace Agreement of Hat Yai.[259] In order to examine and assess Malaysia's counter-terrorism policy, it is

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251 *Tan Sri Musa bin Dato' Hj Hassan & Ors v Uthayakumar a/l Ponnusamy* [2012] 1 MLJ 68.

252 *Siti Sakinah bt Meor Omar Baki v Zamihan Mat Zin & Anor* [2018] 7 MLJ 487.

253 Ahmad Fauzi Abdul Hamid, 'Inter-Movement Tension among Resurgent Muslims In Malaysia: Response to The State Clampdown on Darul Arqam In 1994' (2003) 27:3 *Asian Studies Review* 361.

254 See Kent Roach, National Security, Multiculturalism And Muslim Minorities (2006) *Singapore Journal of Legal Studies* 405.

255 See, 4.5.1, Chapter 4

256 See, 4.9.1.2, Chapter 4.

257 Muhammad Bakashmar, 'Winning the Battles, Losing the War? An Assessment of Counterterrorism in Malaysia' (2008) 20:4 *Terrorism and Political Violence* 480.

258 Thomas Mockaitis, 'Counter-Terrorism' in Andrew T.H. Tan (eds), *The Politics of Terrorism* (Routledge, Abingdon, 2006) 103.

259 Mohd Azzam Bin Hanif Ghows, Reminiscences of Insurrection: Malaysia's Battle against Terrorism 1960 (Wangsa Zam, Kuala Lumpur, 2014) 274.

crucial to first look into factors that have shaped the way the state responds to terrorism.

3.5.1 Key Factors that Shape Malaysia Counter-Terrorism Policy

Historical, social and political elements have constructed Malaysia's counter-terrorism strategy. The historical events in some ways explain the reasons why the government finds the administrative and executive-based measures as preferable and practicable.

3.5.1.1 Pre-Independence Counter-Insurgency

Substantial numbers of historians and researchers point out that the success of British counter-insurgency in Malaya was generated by multi-faceted arrangements, including the famous 'hearts and minds' approach.[260] Gerald Templer, the then British High Commissioner in Malaya, clarified that 'the answer (to the uprising) lies not in pouring more troops into the jungle, but in the hearts and minds of the people'.[261] Templer intended to portray that the government was a 'benevolent Provider and a friend'.[262] Dixon noted that the approach is often perceived 'to imply minimum force or a very low level of coercion to win over the active consent of the population'.[263] The idea can be seen in the implementation of resettlement programs, the central part of the 'Briggs Plan'. The primary aim was to undermine the Communist terrorists by resettling the half a million population into designated areas, which were named as 'New Villages'.[264] The plan coordinated both police and military operations together and increased the administrative control of the populated areas. Miller elucidated that:

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260 Kumar Ramakrishna, 'The Southeast Asian Approach to Counter-Terrorism: Learning from Indonesia and Malaysia' (2005) *Journal of Conflict Studies* 27. See also Phillip Deery, 'Malaya,1948: Britain's Asian Cold War?'(2007) 9:1 *Journal of Cold War Studies* 29; Huw Bennet, '"A Very Salutary Effect": The Counter-Terror Strategy in the Early Emergency, June 1948 to December 1949' (2009) 32:3 *Journal of Strategic Studies* 415.

261 John Cloake, Templer, *Tiger of Malaya: The Life of Field Marshal Sir Gerald Templer* (Harrap, London, 1985) 477.

262 Kumar Ramakrishna, "Transmogrifying' Malaya: the impact of Sir Gerald Templer (1952–54)'(2001) 32:1 *Journal of Southeast Asian Studies* 79.

263 Paul Dixon, 'The British Approach to Counterinsurgency: 'Hearts and Minds' from Malaya to Afghanistan' in Paul Dixon (eds) *The British Approach to Counterinsurgency: From Malaya and Northen Ireland to Iraq and Afghanistan* (Palgrave Macmillan, London 2012) 8.

264 Karl Hack, '"The Claws on Malaya": The Historiography of the Malayan Emergency'(1999) 30:1 *Journal of Southeast Asian Studies* 99.

> [R]esettlement was one of the greatest social experiments ever carried out by any government in the world. Therefore, all officers who had anything to do with new villages were carefully selected, because they had to make friends with unfriendly and sullen people, they had to have imagination and zeal, and above all they had to be dedicated…They represented a new type of administrative pioneer in Asia in the second half of the twentieth century.[265]

According to an official report in 1954, the Briggs-Templer 'steady squeeze' plan was contended to be successful as its four-year implementation:

> [H]as resulted in a reduction of the monthly incident rate from about 500 less than 100 and has reduced interference with the commercial and civic life of the community to tolerable proportions.[266]

The plan also managed to mobilise the people to actively assist the security forces in prosecuting the Emergency, for instance, by the establishment of the Home Guard unit throughout Malaya. The intention was clarified by Harold Briggs himself, who was the Director of Operations against Communist insurgents. He said that, 'We have to get rid of the common impression that the emergency is something that concerns the government and its forces only'.[267]

Despite all successful stories, the approach has also been criticised as a highly coercive and oppressive campaign in fighting terrorism. Dixon lists several incidents where repression was used by the British, which included the 'detention without trial for up to two years, between 1948 and 1957 a total of 34,000 people was held without trial for more than 28 days'.[268] Collective punishment, an old concept within the British counter-insurgency catalogue, was also implemented during that period. For example, Templer ordered schools to close down, rice rations to be halved, and a 22-hour curfew imposed against villagers in Tanjung Malim, after 12 government officials were killed by the terrorists in an ambush.[269] Rigden observes:

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265 Harry Miller, *Jungle War in Malaya: The Campaign Against Communism 1948-60* (Arthur Barker Ltd, London, 1972) 74.

266 Director of Operations, Malaya, 'Review of the Emergency Situation in Malaya at the End of 1954' (Cabinet Paper, C (55) 94, April 1955) Para 19.

267 The Manchester Guardian, 'Home Guard for Malaya: To Fight Terrorists' (Manchester, 1 July 1950) 7.

268 Paul Dixon, '"Hearts and Minds"? British Counter-Insurgency from Malaya to Iraq'(2009) 32:3 *Journal of Strategic Studies* 353, 368.

269 Thomas R. Mockaitis, *British Counterinsurgency, 1919-60* (St. Martin's Press, New York, 1990) 122.

> 'Hearts and minds' is often mistaken to mean taking a soft approach when dealing with the civilian population, but this is a misnomer. The key is changing the mind-set of the target audience and, sometimes, this requires tough measures and a hard approach i.e., mass movement of the population, curfews and direct military action (riot control).[270]

It appears that the executive-based measures and the repressive side of the 'Hearts and Minds' approach are more preserved by the Malaysian government, compared to other strategies in countering terrorism. Such preference is elucidated by the words of the then Prime Minister, Mahathir Mohamad, who stated in 2001 that:

> [T]o bring these terrorists through normal court procedures would have entailed adducing proper evidence which would have been difficult to obtain.[271]

Bakashmar summarises that the British colonial strategy has left three primary policy threads in confronting security threats. The key elements are first, the institutionalisation of "state exceptionalism", which enables the executive to enact special regulations beyond the purview of the judicial system. Second, the judiciary is allowed to play their roles in less serious cases, or merely to punish suspected terrorists after the event occurred. Third, the use of economic development and socio-economic distribution becomes an official strategy in order to weaken public support for the insurgency.[272]

3.5.1.2 Independence During Emergency

Malaysia gained independence from British rule on 31 August 1957. The proclamation of emergency, which was declared in 1948, was still in force at that time until 1960. The effect of the emergency to the formation of Malaya can be seen in the Merdeka Constitution 1957. The Constitution was designed in a way that could facilitate the existing Emergency legislation and measures, particularly

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270 .A Rigden, *The British Approach To Counter-Insurgency: Myths, Realities, And Strategic Challenges* (US Army War College, Carlisle Barrack, 2008) 12.

271 Utusan Online, 'ISA effective tool to combat terrorism: PM'(25 October 2001) <http://ww1.utusan.com.my/utusan/info.asp?y=2001&dt=1025&pub=Utusan_Express&sec=Front_Page&pg=fp_05.htm> accessed 23 April 2016.

272 Muhammad Bakashmar, (n 257) 481.

preventive detention.[273] While acknowledging the condition of the existing emergency, the Constitutional Commission, led by Lord William Reid, responded as follows:

> We do not regard the existing emergency legislation as wholly satisfactory and we shall recommend specific provisions with regard to preventive detention. But any attempt to remodel existing legislation during the emergency might create great difficulties. We therefore recommend that emergency legislation existing when the new Constitution comes into force should be continued in force for one year with power to amend or repeal any part of it.[274]

Accordingly, the Federal Constitution 1957 explicitly addresses the state's power to declare a national state of emergency (under Article 150), to authorise the enactment of a special law (under Article 149) and preventive detention (under Article 151) to counter threats to national security.[275] So when the colonial Emergency ended, the Emergency regulations were replaced by several laws including the infamous ISA 1960. It was enacted based on Articles 149 and 151 of the Constitution 1957.[276] The law was then justified with two primary objectives, which are 'to counter subversion throughout the country, and to enable the necessary measures to be taken on the border area to counter terrorism'.[277] Then the ISA 1960 was replaced by the SOSMA 2012, which was also enacted by virtue of Article 149 of the Constitution 1957. The articles arguably facilitate the normalisation of emergency or exceptional measures in Malaysia, especially when perpetual and overlapping states of emergencies were proclaimed since 1948 and officially ended only in 2011.[278] Before then, the 1948-1960 Emergency was followed by the 1964-1969 Emergency, which was due to the Indonesian–Malaysian

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273 See Malaya Department, Constitution Effect Upon Detention Under Emergency Regulations (MAL 40/25, TNA DO 35/9832, 1958).

274 Federation of Malaya Constitutional Commission, *Report of the Federation of Malaya Constitutional Commission* (Colonial No. 330, 1957) para 172.

275 See Articles 149, 150, 151, Federal Constitution 1957.

276 Internal Security Act 1960 [Act 82] The preamble reads 'An Act to provide for the internal security of Malaysia, preventive detention, the prevention of subversion, the suppression of organized violence against persons and property in specified areas of Malaysia, and for matters incidental thereto'.

277 Dewan Ra'yat Hansard, 21 June 1960, vol 1, no 11, col 1175.

278 Further discussion in section 4.3.1.2, Chapter 4.

confrontation.[279] Then, another state of emergency was declared in 1969 that links to the next event that shaped Malaysia's counter-terrorism policy.

3.5.1.3 The 1969 Racial Riots

The 1969 Emergency was proclaimed because of the 13 May 1969 racial riots. They occurred soon after the 1969 General Election in which the ruling Alliance (Perikatan) coalition, headed by the United Malays National Organisation (UMNO), suffered a setback in the polls.[280] The incident which is described by Horowitz as 'massive amok' led to a declaration of a state of national emergency.[281] The official report claimed the numbers of deaths involved was 196, with 52 of them killed by gunshots.[282] Slimming challenged the number, and estimated roughly that some 800 people were killed in the riots.[283] As a result, the Parliament was suspended, and the National Operations Council (NOC) was established by the Yang di-Pertuan Agong as a caretaker government by virtue of Article 150 of the Federal Constitution. The Director of NOC did not only possess executive power, but also, he may extend any law or subsidiary legislation without the approval of the Parliament.[284] The NOC implemented security measures to restore law and order in the country.

Similar to the earlier 1948-1960 Emergency period, this Emergency produced significant executive-based preventive legislation in Malaysia. The Emergency (Public Order and Crime Prevention) Ordinance (EO) 1969 was passed during the period. This law allowed the government to detain for an indefinite period without being charged in court if the Home Minister believes that 'it is necessary for the suppression of violence or the prevention of crimes involving violence that that person should be detained'.[285] Human Rights Watch in 2006 reported that more than 700 individuals were arrested, and some of the detainees had been detained for more than eight years.[286] The law was finally repealed in 2013, but the government amended the Prevention of Crime Act (POCA) 1959 in 2015 to include Section 19A preventive detention without trial 'in the interest of public order, public

279 See Table 4.2, Chapter 4.

280 K.J Ratnam and R.S Milne, 'The 1969 Parliamentary Election in West Malaysia' (1970) 43:2 *Pacific Affairs* 203.

281 Donald L. Horowitz*, The Deadly Ethnic Riot* (University of California Press, London, 2002) 108.

282 The National Operations Council, *The May 13 Tragedy* (Kuala Lumpur, 1969), 88.

283 John Slimming, *Malaysia: The Death of a Democracy* (Camelot Press, London, 1969), 48.

284 See Section 2, Emergency (Essential Powers) (1969) Ordinance No. 2.

285 Section 4 (1) Emergency (Public Order and Crime Prevention) Ordinance, 1969, Ordinance 5 Emergency Law No. 64(4).

286 The Human Rights Watch, *Convicted Before Trial: Indefinite Detention Under Malaysia's Emergency Ordinance* (New York, 2006) <https://www.hrw.org/report/2006/08/23/convicted-trial/indefinite-detention-under-malaysias-emergency-ordinance> accessed 15 July 2019.

security or prevention of crime'.[287] Based on the government report, 47 individuals allegedly involved with the Islamic State group were detained under the POCA 1959 from 2014 to 2017.[288]

The effects of the 1969 riots remain visible in Malaysia, according to Soong as 'the ruling political elite of Malaysia continues to invoke the spectre of racial conflict to justify its own control of power, its use of censorship and detention without trial, and the "special privileges" it accords to its own section of society'.[289]

3.5.2 An Electoral One-Party State for 61 Years

Case describes Malaysia as 'electoral authoritarianism' and 'semi-democracy'.[290] Means and Doolittle term its state of democracy as 'soft-authoritarianism' and 'pseudo-democracy' respectively.[291] The labels are mainly due to the disapproval of election system and practices, and the absence of ruling party alternation.[292]

From 1955 until 2018, Malaysia was ruled by a single party, which was the Alliance Party (Perikatan) and later became known as National Front or Barisan Nasional (BN). BN is a coalition of political parties, mostly based on ethnicity, led by the United Malays National Organisation (UMNO). Arguably, BN's domination in the parliamentary system for more than sixty years has undermined the perception of democracy itself. The political dominance of BN in Malaysia, according to Abuza, accommodates anti-democratic behaviour in the government including 'the tyranny of repeated legislative majorities and unlikelihood of losing them'.[293] This kind of situation creates a 'conducive' environment for the state authority to enact easily any legislation without strong objection.[294] 'National security' and 'public protection' are among the often-cited grounds to comfort the majority when passing the new

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287 Section 19A, Part IVA, Prevention of Crime Act 1959 [Act 297].

288 See Home Ministry, Statistics of Arrests Related to Daesh Under Security Offences (Special Measures) Act 2012 (SOSMA), <http://www.data.gov.my/data/ms_MY/dataset/statistik-tangkapan-elemen-daesh-dibawah-poca-2014-2017> accessed 15 July 2018.

289 Kua Kia Soong, 'Racial Conflict in Malaysia: Against the Official History'(2007) 49:3 *Race and Class* 33.

290 William Case, 'Electoral Authoritarianism in Malaysia: Trajectory Shift' (2009) 23:3 *Pacific Review* 311.

291. See William Case, 'Malaysia's General Election in 1999: a Consolidated and High-Quality Semi-Democracy'(2001) 25:1 *Asian Studies* 33; Gordon P. Means, 'Soft Authoritarianism in Malaysia and Singapore'(1996) 7:4 *Journal of Democracy* 103; Amity A. Doolittle, 'Native Land Tenure, Conservation, and Development in a Pseudo-Democracy: Sabah, Malaysia' (2007) 34:3-4 *Journal of Peasant Studies* 474.

292 Chin-Huat Wong , James Chin and Noraini Othman, 'Malaysia: Towards a Topology of An electoral One-party State' (2010) 17:5 *Democratization* 920.

.293 Zachary Abuza, *Militant Islam in Southeast Asia* (Lynne Rinner Publishers, Boulder, 2003) 51

.294 See Andrew Harding, *The Constitution of Malaysia: A Contextual Analysis* (Hart Publishing, Portland, 2012) 110.

restrictive and repressive laws, which actually broaden the power and immunity of the executive body.[295]

The ruling party managed to secure a two-thirds majority in every election, except after 2008. The constitutional checks and balances are weak, especially under Mahathir Mohamad, the fourth and longest-serving Prime Minister who served from 1981 to 2003 and was reappointed in 2018 after he stepped out from BN and joined Pakatan Harapan (PH), an opposition coalition at that time.[296] With such a majority retained by BN, the government could easily legislate or amend any laws, including the supreme law of the land, the Federal Constitution.[297] Before stepping into power, Mahathir describes the Parliament in his book, *The Malay Dilemma* as follows:

> In the main, Parliamentary sittings were regarded as a pleasant formality which afforded members opportunities to be heard and quoted, but which would have absolutely no effect on the course of the Government.[298]

Rather than to play a role in the checks and balances process, the Parliament turned into a 'safe outlet for the grievances of backbenchers or opposition members,' and mainly expected to affirm the ruling party's aspiration.[299] During the first Mahathir era, there were two common justifications for the government to normalise the use of repressive and executive measures.

The first justification was to preserve 'the right of the majority', which can be seen from the way Mahathir himself criticised 'democracy in the west' as 'to include the protection of neo-fascists or the empowering of a vocal minority of political activists over the silent majority of ordinary citizens'.[300] As regards to the 'right of the majority', Mahathir contended that the community should take priority over individuals, and that 'the majority comes first. The individual and minority must have their rights but not at the unreasonable expense of the majority. The individuals and the majority must conform to the mores of society'.[301]

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295 Anne Munro-Kua, *Autocrats vs The People: Authoritarian Populism in Malaysia* (Suaram, Kuala Lumpur, 2017) 39.

296 Michael Leigh and Belinda Lip 'Transition in Malaysia Society and Politic: Towards Centralizing Power', in James Rolfe (eds), *The Asia-Pacific: A Region in Transition* (HI: Asia-Pacific Centre for Security Studies, Honolulu, 2004) 320.

297 Article 159(3), Federal Constitution 1957.

298 Mahathir Mohammad, *The Malay Dilemma* (Asia Pacific Press, Singapore, 1970) 11.

299 John Funston, 'Conclusion' in John Funston (eds), *Government and Politics in Southeast Asia* (Institute of Southeast Asian Studies, Singapore, 2001) 415.

300 Michael Leigh and Belinda Lip, (n 297) 320.

301 Mahathir Mohamad*, Human Rights: Views of Dr.Mahathir Mohamad* (World Youth Foundation, Melaka 1999) 105

Another justification for the Malaysian government to invoke arbitrary executive measures is to protect racial harmony among citizens and preserve national security. The notion of 'national security' tends to be broad and ambiguous in Malaysia. Bonner views that the concept of 'national security' is amorphous, hence conveniently left to the judgement of the decision-maker in the executive or in the court in interpreting it in particular contexts or activities.[302] The notion comprises public order, racial and religious harmony, economic strength, social welfare, political stability, and strong government.[303] The 'national security', according to Hari Singh, not only 'assumes concrete manifestation in terms of actual and potential threats to the values regarded as sacrosanct by a socio-polity' but also a 'facade to minimize the vulnerabilities faced by the national leadership'.[304] It is also designed to protect the 'dominion space' of the Malay elite groups in maintaining control.[305] This is the space where the politics of fear comes into play. The politics of fear, according to Furedi, 'contains the implication that politicians self-consciously manipulate people's anxieties in order to realize their objectives'.[306] Hence, fear becomes a crucial resource to control people and encounter public dissent. For example, Human Rights Watch released an extensive report in 2004 about the use of ISA (1960) during the Mahathir era in countering 'fear' and preserving national security.[307] The approach continues under the administrations of Prime Ministers Abdullah Ahmad Badawi (2003-2009) and Najib Razak (2009-2018). In 2015, an opposition member of Parliament and lawyer, N. Surendran explained to Human Rights Watch:

> They say the [sedition] law is needed for ethnic relations, but the people are fine. They are using it against people who are not doing anything to do with religion and race. They are creating fear of an ethnic explosion to justify laws to keep the people down.[308]

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302 David Bonner, *Executive Measures, Terrorism and National Security: Have the Rules of the Game Changed?* (Ashgate Publishing, Hampshire, 2007) 14.

303 Mohd Azizuddin Mohd Sani, 'Freedom of Speech and National Security in Malaysia' (2013) 5:4 *Asian Politics & Policy* 585.

304 Hari Singh, 'Malaysia's National Security: Rhetoric and Substance'(2004) 26:1 *Contemporary Southeast Asia* 1.

305 Michael Magcamit, 'A Costly Affirmation: Exploring Malaysia's One Sided Domestic Security Dilemma (2015) 42:1 *Asian Affairs: An American Review*, 22.

306 Frank Furedi, *Politics of Fear* (Continuum, London, 2005) 123.

307 Human Rights Watch, 'In the name of Security: Counterterrorism and Human Rights Abuses Under Malaysia's Internal Security Act' (2004) 16:7(c).

308 ibid.

The government standpoint remained static on favouring the use of executive security measures until UMNO-BN failed to obtain a strong majority in the 2008 election. Malaysia had by then witnessed the raising of opposition votes and critical parliamentarians in both the 2008 and 2013 general elections. The two-thirds majority was denied to the BN, and several state governments, Selangor, Perak, Penang and Kedah were taken over from BN. This development shapes the new Malaysia political landscape and culture directly and indirectly. The prompt reaction from the ruling party can be seen from the Government Transformation Programme (GTP), which was unveiled on 28 January 2010.[309] The primary goal is 'to radically transform the way the Government worked so we could better serve the *rakyat* (people), regardless of race, religion or social status', and with the promise 'to listen more effectively, speak more openly, see things for what they really are, develop a positive course of action and deliver tangible solutions'.[310] At this point, more changes were proposed, which includes the repeal of the ISA 1960 and so facilitating the criminalisation approach in Malaysia's counter-terrorism strategy.

3.5.2.1 Post 9/11

Following the 9/11 attacks, the United Nations Security Council (UNSC) passed Resolution 1373, which encompasses multiple responses against terrorism and imposes international obligation on each member state to take action.[311] The resolution urges UN member states to take measures to prevent, criminalise and suppress all acts of terrorism within their jurisdiction.[312] Saul asserts that Resolution 1373 authorises member states 'to enact international terrorism offences in domestic law and to establish extraterritorial jurisdiction over them'.[313] The resolution also calls for various counter-terrorism measures, including controls upon

309 Prime Minister's Department, 'Government Transformation Programme: The Road Map – Executive Summary' (2010), <https://www.pemandu.gov.my/assets/publications/roadmaps/GTP_1.0_Roadmap_Executive%20Summary.pdf > accessed 2 April 2016.

310 Prime Minister's Department, 'Government Transformation Programme: Annual Report 2010' (2010) <http://www.pemandu.gov.my/gtp/upload/GTP_AR2010_Eng.pdf > accessed 2 April 2016.

311 United Nations Security Council, Resolution 1373 (2001) <https://www.unodc.org/pdf/crime/terrorism/res_1373_english.pdf> accessed 17 July 2018.

312 Eric Rosand, 'Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight against Terrorism' (2003) 97:*2 American Journal of International Law* 333; Stefano Betti, 'The Duty to Bring Terrorists to Justice and Discretionary Prosecution' (2006) 4 *Journal of International Criminal Justice* 1104.

313 Ben Saul*, Terrorism: Documents in International Law* (Hart Publishing, Portland, 2012) 1xxv.

terrorist financing and weapons transfers, criminalisation of specific acts, improving inter-state cooperation for the border and immigration control.[314]

As a response to the international appeal, the criminalisation process in Malaysia took place within a narrow path through the introduction of new laws and series of amendments made to the existing legislation, which incorporated terrorism-related offences.[315] That includes the insertion of the definition of 'terrorist act' and the criminalisation of terrorism-related offences in Chapter IVA, Penal Code 1936, which was discussed earlier in this Chapter.[316] It must be noted that the definition of 'terrorist act', which was proposed the Commonwealth Secretariat and adopted by Malaysia in 2003, was devised with the aim to implement UNSC Resolution 1373. Nevertheless, the criminalisation approach was not centre stage at that time because the ISA 1960 was still in force. The criminalisation process was still curtailed, at least until 2012 when the ISA 1960 was repealed. The earliest reported prosecution involving a terrorism-related offence under Chapter IVA is *Public Prosecutor v Yazid Sufaat & Others* (2014), where the accused persons were charged with promoting acts of terrorism.[317]

Apart from criminalisation, the United Nations' preventive measures take the form of sanctions and embargoes, to be imposed on a terrorist suspect or entity. These measures are well received in Malaysia and in line with the government policy. For example, as a non-permanent state member of UNSC in 1999 against the Taliban, Malaysia voted for Resolution 1267 (1999). Then Malaysia again, after being re-appointed in 2014 as a non-permanent state member of the Security Council, endorsed Resolution 2178 (2014) and Resolution 2255 (2015).[318] The former resolution is meant to combat threats coming from Islamic State in Iraq and the Levant (ISIL), Al-Nusra Front (ANL) and other affiliates or splinter groups of Al-Qaida, while the latter deals individuals or entities affiliated with the Taliban.

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314 Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press 2011) 44.

315 Dewan Rakyat Hansard, 6 November 2003, 48.

316 See section 3.4.3, Chapter 3.

317 *Public Prosecutor v Yazid Sufaat & Ors* [2014] 2 CLJ 670.

318 United Nations Security Council, 'Security Council Unanimously Adopts Resolution Condemning Violent Extremism, Underscoring Need to Prevent Travel, Support for Foreign Terrorist Fighters' (Meeting Coverage SC/11580, 24 September 2014) <http://www.un.org/press/en/2014/sc11580.doc.htm> 26 April 2016; United Nations Security Council, 'Security Council Adopts Text Extending, Adjusting Sanctions Regime against Taliban Affiliates Ahead of Debate on Afghanistan (Meeting Coverage SC/12175, 24 December 2015) <http://www.un.org/press/en/2015/sc12175.doc.htm> accessed 26 April 2016.

The obligations derived from the resolutions were then incorporated within the domestic law in Malaysia.[319] For example, the sanctions under the UNSC Resolution 1267 (1999) and 1988 (2015) were incorporated in the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001.[320] Section 66C(1) states that:

> [W]here the Security Council of the United Nations decides, in pursuance of Article 41 of the Charter of the United Nations, on the measures to be employed to give effect to any of its decisions and calls upon the Government of Malaysia to apply those measures, the Minister of Home Affairs may, by order published in the Gazette, make such provision as may appear to him to be necessary or expedient to enable those measures to be effectively applied.

The above section demonstrates the significant role of the UNSC resolution in Malaysia's counter-terrorism strategy, albeit its operation seems contrary to Malaysia's dualist disposition regarding international law.

3.5.2.2 Emergence of Organised Crime and the Calls for New Legislation

Historically, Comber suggested that organised crime in Malaysia is related to the rise of secret societies, especially after the arrival of Chinese immigrants.[321] He further asserted that the Chinese triad societies played destructive roles in several chaotic events in the Malayan history, and 'each gang had its own sphere of operations in which it claimed unto itself the exclusive right to organise criminal "rackets", levy tolls, and collect protection money'.[322] As mentioned previously, the triad societies are also linked to the brutal racial clashes in 1969.

After the repeal of the controversial laws in 2012, particularly the ISA 1960, the EO 1969, and the Restricted Residence Act (RRA) 1933, factions in Malaysia society began to express their anxiety and fear against the alleged increasing rate of

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319 See Zaiton Hamin, Rohana Othman, Normah Omar, and Hayyum Suleikha Selamat, 'Conceptualizing Terrorist Financing in the Age of Uncertainty' (2016) 19:4 *Journal of Money Laundering Control* 397; Zaiton Hamin, Normah Omar and Wan Rosalili Wan Rosli, 'Airing Dirty Laundry: Reforming the Anti-Money Laundering and Anti-Terrorism Financing Regime in Malaysia' (2016) 16:1 *Global Jurist* 127.

320 Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 [Act 613].

321 Leon Comber, *Chinese Secret Societies in Malaysia: A survey of the Triad Society from 1800 to 1900* (J.J Augustin Incorporated Publisher, New York 1959) 32.

322 ibid, 270.

crime and emergence of organised crime. Though their sentiments were not supported by empirical data, the concerns appeared to be 'credible' when they came from some influential individuals in society. For example in 2013, Home Minister speculated that around 260,000 possible criminals were roaming the streets because of the release of detainees who were previously held under the EO 1969. The minister clarified later that the actual ex-detainees were only 2,600 persons, and the earlier figure was an estimate based on the number of ex-detainees and their supporters.[323] Thus, basically he was referring to the threats posed by organised crime, led by the former detainees who, according to him, were all 'hard-core' criminals. They were allegedly involved in organised crime activities, extortion, kidnapping, gaming, and executing the daily operations for crime bosses.[324]

Those alarmist remarks, together with the daily crime reports in the media, can be construed as 'warning signs' and 'signal crimes' which may be 'disproportionately influential in terms of de-stabilizing a sense of social order, generating fear and anxiety by undermining 'organic mechanisms of community based social control'.[325] Those crimes stimulate in the people's mind support for preventive action as a reaction to that form of perception. However, the fear of crime often does not reflect the actual number of crimes. For example, the government's report states that the crime number reduced by an average of 6.6% per year and the crime index came down by 40% from 2009 to 2014.[326] According to the Home Minister, only 0.26% of EO (1969) former detainees were back in crime.[327] Therefore, it appears that the crime rate and the types of criminal at that particular time were not extraordinary.

Garland observes that 'fear of crime has come to be regarded as a problem in and of itself, quite distinct from actual crime and victimization, and distinctive policies have been developed that aim to reduce fear levels, rather than reduce

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323 The Malaymail Online, 'Zahid Hamidi: No need for praise, just appreciation' (1 September 2013), <http://www.themalaymailonline.com/malaysia/article/zahid-hamidi-no-need-for-praise-just-appreciation#sthash.FJQ8CGTO.dpuf> accessed 1 April 2016.

324 P. Sundramoorthy, 'What cost crime prevention' (The Sun Daily, 24 June 2013), <http://www.thesundaily.my/news/751718> accessed 2 April 2016.

325 Martin Innes and Nigel Fielding, 'From Community To Communicative Policing: 'Signal Crimes' and the Problem of Public Reassurance'(2002) 7:2 *Sociological Research Online* 1.

326 Prime Minister's Department, 'Government Transformation Programme: Annual Report 2014' (2014), <http://www.pemandu.gov.my/gtp/annualreport2014/ > accessed 2 April 2016.

327 Nigel Aw, 'Hisham Denies EO Abolition Cause of Recent Crimes' (Malaysiakini, 19 July 2012) <https://www.malaysiakini.com/news/204108> accessed 1 April 2016.

crime'.[328] At this point, the fear of crime, which is triggered from signal crimes, had brought the attention of the government to the need for new laws to lessen the fear, which are probably more preventive in nature. Cohen points out '"something should be done" is the identical sentiment that lies behind all moral panics'.[329] In this case, the Malaysian Parliament passed the SOSMA 2012 in April 2014, which is meant 'to provide for special measures relating to security offences for the purpose of maintaining public order and security and for connected matters'.[330]

The strategy adopted by the state against organised crime activities implicitly reflects the approach taken in counter-terrorism strategy, given the government tends to perceive these two occurrences as interconnected. For example, the preamble of POCA 1959 plainly stipulates that the Act was legislated to 'provide for the more effectual prevention of crime throughout Malaysia and for the control of criminals, members of secret societies, terrorists and other undesirable persons'.[331] The government also employs the SOSMA 2012 to confront both terrorism and organised crime.[332] That similar approach can also be seen in the UK. For example, the UK government released in October 2013 the *Serious and Organised Crime Strategy*, which contains the counter-terrorism elements of Pursue, Prevent, Protect, Prepare.[333]

3.6 Drawing Key Features of Malaysia's Counter-Terrorism Policy

From the above discussion, we can identify several key features of Malaysia's counter-terrorism policy.

First, Malaysia's counter-terrorism policy embodies the institutionalisation of 'state exceptionalism' that provides broad powers to the executive. That feature originated from the colonial period and was later maintained by the authoritarian tendencies of the successive governments. Accordingly, the executive power broadened beyond legislative and judicial scrutiny, hence it undermined the rule of

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328 David Garland, The Culture of Control; Crime and Social Order in Contemporary Society, (Oxford University Press, Oxford, 2001) 10.

329 Stanley Cohen, 'Moral Panics and Folk Concepts' (1999) 35:3 *Paedagogica Historica* 589.

330 Preamble, Security Offences (Special Measures) Act 2012 [Act 747].

331 Preamble, Prevention of Crime Act 1959 [Act 297].

332 Rohani Abdul Rahim, Muhammad Afiq bin Ahmad Tajuddin and Kamaruddin bin Hj. Abu Bakar, 'Combating Smuggling in Persons: A Malaysia Experience' (2015) 18 SHS Web of Conferences.

333 Serious and Organised Crime Strategy 2013 (Cm 8715) <https://www.gov.uk/government/publications/serious-organised-crime-strategy> accessed 22 April 2016.

law. The situation enabled executive-based measures to be the preferred tools in countering terrorism, at least until 2012.

Second, Malaysia's counter-terrorism policy signifies the normalisation of emergency powers and measures in Malaysia. 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.[334] That was how the ISA 1960 gained its constitutional legitimacy. Besides, as mentioned previously, the overlapping and continuous emergency proclamations from 1948 to 2011 have also 'normalised' the emergency legislation.[335] Such laws have been perceived by some factions in society as a fundamental part of the counter-terrorism strategy.[336]

Third, Malaysia's counter-terrorism policy exemplifies 'pre-crime' frameworks, that involve 'calculation, risk and uncertainty, surveillance, precaution, prudentialism, moral hazard, prevention and, arching over all these, there is the pursuit of security'.[337] The elements of prevention and pre-emption can be seen from the over-reliance on preventive detention without trial and the construct of definitions of 'terrorist act' under the Penal Code 1936 and the repealed ISA 1960, as discussed earlier in section 3.4.1 and 3.4.3. Further discussion on this feature can be found in section 4.7 of Chapter 4, as well as in Section 6.4 of Chapter 6.

Fourth, Malaysia's counter-terrorism policy lingers around the ambiguous notion of 'national security'. As discussed earlier, the notion is often problematic in Malaysia mainly because it is a political and social construct and does not necessarily reflect the genuine physical threat. Further, constitutional rights are also at risk because national security is always construed as a prerequisite for liberty.[338]

Fifth, the impact of international law on Malaysia's counter-terrorism policy is visible through the enactments of special anti-terrorism legislation. However, the implementation of the adopted policy depends entirely on the government deliberation and attitude. As mentioned earlier, the authorities began to charge terrorist suspects with special terrorism-related offences only ten years after the

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334 Further discussion in section 4.3.1.2, Chapter 4.

335 ibid.

336 Further discussion in section 4.4, Chapter 4.

337 Lucia Zedner, 'Pre-Crime and Post-Criminology?' (2007) 11 *Theoretical Criminology* 261, 262.

338 see Stuart Macdonald, 'Understanding Anti-Terrorism Policy: Values, Rationales and Principles' (2012) 34 *Sydney Law Review* 317.

criminalisation of the acts. Further discussion on this topic with specific reference to the criminalisation approach can be found in Chapter 4.[339]

3.7 Assessing the Change from the Executive-based Approach to the Criminalisation Approach

It has been posited earlier that the then Prime Minister Najib Razak made some drastic 'reforms' after the 2018 General Election. They include 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.[340] 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 political theatre.[341] The announcement to repeal those laws was made when Malaysians were expecting the 13th General Election in 2013. The support for the BN, however, did not much change, as it won with a reduced majority of 133 parliamentary seats, down from 140 seats in the previous election in 2008.[342]

After the 2008 and 2013 elections, the opposition was growing stronger. Their call for reform made impacts on government policy and direction. For example, the opposition leader, Anwar Ibrahim, was calling for a stronger effort in fighting corruption, which later could be found clearly in the Government Transformation Programme. In fact, the pledge to repeal the ISA 1960 and other oppressive laws was not included in the ruling party's election manifesto in 2008.[343] However, the Malaysian main opposition parties such as Parti Keadilan Rakyat (PKR), Islamic Party of Malaysia (PAS) and Democratic Action Party (DAP) constantly vowed to abolish such legislation, which was described as draconian.[344] It is therefore correct

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339 see section 4.3.4, Chapter 4.

340 Mohd Najib Tun Abdul Razak, 'Perutusan Hari Malaysia'(2011), <http://www.mampu.gov.my/documents/10228/101029/Perutusan+Hari+Malaysia_15+September+2011.pdf/c25f11f5-2e2c-4d5e-ae12-96347204892> accessed 2 April 2016.

341 Michael O'Shannassy, 'More Talk than Walk? UMNO,"New Politic "and Legitimation in Contemporary Malaysia'[2013] 43:3 *Journal of Contemporary Asia* 428.

342 Mohd Azizuddin Mohd Sani, (n 303).

343 Barisan Nasional, *Malaysia 2008: Laporan Kemajuan dan Manifesto* (Kuala Lumpur, 2008).

344 Parti Keadilan Rakyat, *Manifesto Keadilan Rakyat 2008: Harapan Baru untuk Malaysia* (Kuala Lumpur, 2008) 5; Islamic Party of Malaysia, *Manifesto of the Islamic Party of Malaysia: A Trustworthy, Just & Clean Government* (Kuala Lumpur, 2008) 10; Democratic Action Party, DAP 2008 Election Manifesto: Malaysia can do better! (Kuala Lumpur, 2008).

to assert that the opposition played a significant role to push the government to abolish the repressive laws, along with civil society movements.[345]

The repeal of the ISA 1960 and the introduction of the SOSMA 2012 arguably indicate a shift of the government's policy in countering terrorism. Based on the official statement, only 92 out of 445 individuals linked with terrorism were detained.[346] SUARAM, a human rights group, however, reported that 114 suspects had been detained without trial.[347] Both numbers are still smaller if compared with the numbers of suspects who were charged in court. The following table shows the number of prosecutions, release, deportation and detention of terrorist suspects after the introduction of the SOSMA 2012, which is based on the police statement to the media.[348]

Table 3.1: Number of terrorism-related arrests and measures taken from 2013-November 2018

	Measures taken			**Number of individuals (Percentage of the total arrests)**
1	Prosecution	Conviction: 161 (85.2%)	Acquittal: 28 (14.8%)	189 (42.5 %)
2	Release			114 (25.6%)
3	Deportation			50 (11.2%)
4	Detention			92 (20.7%)
	Total	Local: 317 (71.2%)	Foreign: 128 (28.8%)	**445**

Based on Table 3.1, 42.5 % of suspects were prosecuted, with 85.2% conviction rate. Since the available information only provides a total of prosecutions from 2013 to 2018, we are not able to see the trend within the six years. The following Figure 3.2 perhaps may shed some light on the progress of terrorism-related prosecutions

345 Maszlee Malik, 'Islamic movement and human rights: Pertubuhan Jamaah Islah Malaysia's involvement in the "Abolish Internal Security Act Movement, 2000-2012'(2014) 22:2 *Intellectual Discourse* 139.

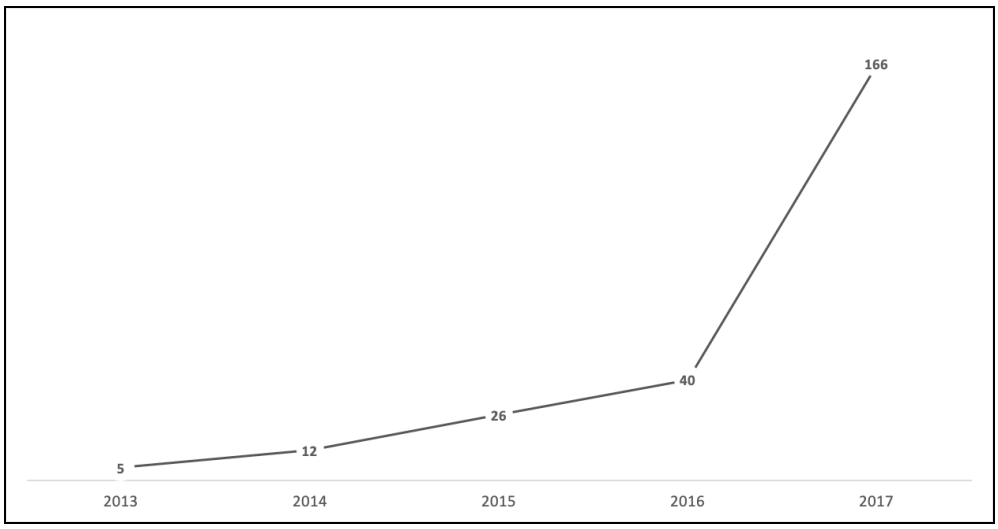
346 Amy Chew, 'Easy for them to blend in': Foreign terror suspects pose security challenges for Malaysian authorities' (Channel News Asia, 21 November 2018) <https://www.channelnewsasia.com/news/asia/malaysia-foreign-terror-suspects-al-qaeda-militants-10915678> assessed 19 January 2019.

347 SUARAM, 'Human Rights Report Overview 2016: Civil and Political Right', 7 <http://www.suaram.net/wordpress/wp-content/uploads/2016/12/Overview-2016-Digital-Edition.pdf > accessed 8 December 2016.

348 Amy Chew, (n 347).

in Malaysia. Figure 3.2 comprises the number of terrorism-related cases under the SOSMA 2012 at all High Courts in Malaysia from 2013 to 2017. The chart is developed based on the information provided by an interviewed judge.[349]

Figure 3.2: Number of registered terrorism-related cases (under SOSMA 2012) at the High Courts from 2013 to 2017



The numbers in Figure 3.2 cannot be directly compared with those in Table 3.1. Figure 3.2 is based on the number of cases, but Table 3.1 comprises the number of terrorist suspects. More than one accused person may be prosecuted in a 'case'. However, Figure 3.2 demonstrates the increasing numbers of prosecution under the SOSMA 2012, especially in 2017. The judge, who provides 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. So still, based on Figure 3.2, there was also an increase in the prosecution of terrorism-related cases within the five years.

Despite the above statistics, some private practitioners, civil society activists and opposition Members of Parliament expressed their scepticism towards the government's move. Their attitude, in general, is based on two factors. First, the SOSMA 2012 is perceived as being as oppressive as the ISA and 'too lopsided' in favour of the prosecution and security services.[350] As put by an interviewed private practitioner that:

349 Participant No.28.

350 Participant No.1.

> [T]he differences between the ISA and SOSMA is that, the former provides detention without trial, the latter gives detention with a trial.[351]

The lawyer was referring to the fact that a suspect can be detained under the SOSMA 2012 for 28-day pre-charge arrest and open-ended period which only ends when the trial proceeding completes 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. Further discussion on the operation of the SOSMA 2012 in terrorism-related trials will be presented in Chapter 6.[352]

Second, the POTA 2015 shares the same features with the ISA 1960, particularly the device of preventive detention.[353] Further, 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' to a secure conviction.[354] According to an interviewed private lawyer, his client was arrested under the POTA 2015 after being acquitted by the court at the end of the trial.[355] The use of preventive detention in Malaysia's counter-terrorism strategy will be further elaborated in Chapter 4.[356]

Apart from the above perceptions, a favourable attitude is shown by the government and security officials towards the executive-based measures. A terrorism advisor to the Royal Police Malaysian, who is often invited to give his opinion in terrorism trials, believes that the repeal of the ISA 1960 was a mistake:[357]

> In my view, based on my involvement (in counter-terrorism programme), I believe that the ISA is the most effective (law) in containing the threats of terrorism in Malaysia. In term of effectiveness, it is effective. That is why in the past twenty years, we can contain the problem. We do not face serious terrorism threat, in the form of actual bombing, like in Bali and Jakarta…In term of fairness, it (the ISA) is fair because it is flexible, you (the terrorist suspect) will be treated according to your level of involvement. If you involve

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351 Participant No.2.

352 See section 6.4.3, Chapter 6.

353 Naz, S. and Bari, M.E., 'The Enactment of the Prevention of Terrorism Act, 2015 in the pursuance of the Constitution of Malaysia: Reincarnation of the notorious Internal Security Act, 1960' (2018) 41 *Suffolk Transnational Law Review* 1.

354 Participant No.14

355 Participant No.9

356 See section 4.4, Chapter 4.

357 Participant No.27.

> deeply, then you will stay longer if you cooperate, your stay will be shorter, so no fixed term…Specifically, for the terrorism cases, the ISA should be maintained for the benefit of the families, the subjects (suspects) and the benefit of the society. The ISA is (therefore) useful.[358]

The government's advisor also cast doubt over the effectiveness of the SOSMA 2012 and POTA 2015 to prevent terrorism and reform the terrorist suspects.[359] Besides him, a senior prosecutor thinks that the ISA 1960 is still a better option that could provide a prompt response to terrorism threats.[360] According to the prosecutor who has served the legal service for more than 25 years:

> When you are confronting terrorism, you must act immediately, and 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 it (the threat), you need to straightaway detain them (terrorists), put them inside for two years, then another two years…it is not easy to charge them. It will take a long process…Then, in matters relating to terrorism, do you think they will easily leave the evidence behind. It is not easy.[361]

The prosecutor further suggested that the suspects of the Lahad Datu intrusion could have been better detained under the ISA 1960, rather than prosecuted in court. The above two views arguably represent the favourable attitude towards the primacy of executive-based measures in countering terrorism. Both participants are familiar with the criminal justice system but believe that the executive-based action is more effective and appropriate as the first response to terrorism. But as mentioned earlier, some interviewed government officials took the view that executive-based measures should be also available in parallel with the criminalisation approach.[362]

In the 'New Malaysia' era, as mentioned earlier, Pakatan Harapan (PH)'s manifesto promised to carry out reforms to the legal system, as well as to review and repeal 'oppressive and draconian' laws, including the SOSMA 2012. To date,

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358 ibid.

359 Participant No.27.

360 Participant No.23.

361 ibid.

362 Participants No.12 & 14.

the PH government has only tabled the motion to repeal the Anti-Fake News Act 2018, but then it has been blocked by the Senate or Dewan Negara, which is dominated by Senators appointed by the previous government.[363] Thus, the PH government may not be able to carry out radical changes, as the coalition does not hold a two-thirds majority of the Parliament. Further, there is a significant difference among the parties within PH in terms of ideology and political viewpoints, particularly on civil rights and social equality. For instance, the Parti Keadilan Rakyat (PKR) and Democratic Action Party (DAP) consistently advocated against the use of the ISA 1960 whereas the Parti Bersatu Bumi Malaysia (PBBM) or Malaysian United Indigenous Party is led by Mahathir Mohamad. He is known as a 'defender' of the ISA 1960 and other controversial legislation in the past.

3.8 Conclusion

This chapter has looked into two foundations of Malaysia's counter-terrorism strategy: the conception of terrorism and the policies of counter-terrorism in Malaysia.

Sections 3.2 to 3.4 deal with the formulation of the definition of terrorism in Malaysia, as well as its important roles and workings within counter-terrorism arrangements. The terrorist threats in Malaysia often involve terrorist groups that operate beyond national borders and have links with other international organisations. Though some groups, such as JI, KMM and Al-Qaeda, seem to be declining in recent years, the emergence of IS has been alarming. Malaysian authorities claimed that more than 23 plots planned by the group had been thwarted from 2013 to 2018.[364] Historically, even though the threats come from different groups, the nature is relatively constant. The groups are ideologically driven and commonly involved in criminal activities such as causing damage to property, kidnapping and robbery. This facet highlights the importance of the criminalisation approach that prioritises the use of the established criminal law and justice system. Terrorist attacks in Malaysia, so far, are not large scale, save for the 2013 Lahad Datu incursion. However, Malaysia has been identified as a meeting and recruiting ground for various terrorist organisations. Also, a significant number of Malaysians travelled abroad to join terrorist groups. So, Malaysia is expected by the international community to take effective action to curb the activities.

363 Dewan Negara Hansard, 12 September 2018, 49.

364 Amrizan Madian and Muhammad Afiq Mohd Asri, 'Remember What Happened After ISA Repeal, ex-IGP says on Sosma', (Malaysiakini, 28 July 2018) <https://malaysiakini.com/news/436290> accessed 12 July 2019.

Notwithstanding the need to counter terrorism comprehensively, there are also well-grounded concerns over the abuse of 'terrorism' as a label. That risk justifies the formulation of a clear definition that can provide safeguards for the constitutional rights of citizens.

There is 'no single definition of terrorism that commands full international approval'.[365] It is perhaps right to equate the struggle of finding a legal definition with the quest for the Holy Grail by King Arthur's Knights of the Round Table, in which 'periodically eager souls set out, full of purpose, energy and self-confidence, to succeed where so many others have failed'.[366] Some argue that the lack of common definition has become a constant obstacle to formulate comprehensive and effective counter-terrorism measures and operations.[367] Others contend that the lack of uniform and universally agreed definition may open the door for potential state abuse by demeaning human rights and universal values against its 'political dissenters with the apparent endorsement of the Security Council'.[368] Both concerns are well founded. However, the absence of an internationally accepted definition does not mean that terrorism is something 'beyond comprehension' or mystifying too.[369] Saul asserts that 'certain effective measures can be taken to counter-terrorism even whilst the concept remains ambiguous'.[370] Wilkinson argues that terrorism should not be comprehended in terms of its label, but rather as a relative concept and tool of analysis.[371].

The definitions of terrorism in Malaysia are influenced by internal and external factors, including historical and present events. It has been argued that the definitions are to some extent policy transfer products, either through formal or informal channels. The Penal Code 1936 definition, for instance, is an exact copy of the model recommended by the Commonwealth Secretariat. At this juncture, it is important to look as to how the definition fits with the existing legal, social and political settings, as well as the current terrorism threats. This includes to align the definition of 'terrorist act' in the Penal Code 1936 with the existing established

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365 Lord Carlile, *The Definition of Terrorism: A Report by Lord Carlile of Berriew Q.C. Independent Reviewer of Terrorism Legislation* (Cm 7052, 2007) 47.

366 Geoffrey Levitt, 'Is "Terrorism" Worth Defining?'(1986) 13 *Ohio Northern University Law Review* 97.

367 Sudha Setty, 'What's in a Name? How Nations Define Terrorism Ten Years After 9/11' (2011) 33 *U. Pa. J. Int'l L*. 1.

368 Ben Emmerson, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism* (A/HRC/29/51, 16 June 2015) 14.

369 Frank Furedi, *Invitation to Terror: The Expanding Empire of the Unknown*(Continuum, London,2007) xix

370 Ben Saul, 'Civilising the Exception: Universally Defining Terrorism' in Aniceto Masferrer (eds), *Post 9/11 and the State of Permanent Legal Emergency: Security and Human Rights in Countering Terrorism* (Springer, New York & London, 2012) 97.

371 Paul Wilkinson, *Terrorism versus Democracy: The Liberal State Response* (Routledge, Abingdon, 2006) 2.

offences in the Code. The essential elements of *mens rea* and *actus reus* in the criminal law, along with general defences must be preserved.

With regards to the definition of terrorism in the Penal Code 1936, two checks are proposed. Firstly, as the definition is a product of policy transfer, it is crucial that its interpretation must align with existing established principles in criminal law. Secondly, as the definition is broad and open to abuse, the courts must play a more protective role 'against any unwarranted intrusions of the individual rights of suspects and detainees and against resultant miscarriages of justice'.[372] The opinion evidence on terrorism should only be accepted from impartial and independent experts.

Sections 3.5 and 3.6 have presented the evaluation of Malaysia's counter-terrorism policy, which is constructed by 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. Harper argues that 'modern Malaya' politic was formed against a backdrop of war and insurgency, in which he plainly describes:

> In the shadow of the Communist insurgency the state became more ruthless and authoritarian instrument of political power. It embedded a powerful rationale of anti-subversion in the official mind and it carved out restrains on political contest. This was a central feature of the mind-set of the post-colonial bureaucracy.[373]

However, it has been argued that the repeal of the ISA 1960, along with other Emergency Ordinances is a significant step towards the criminalisation approach, which provides a broader room for criminal justice and processes to be deployed in countering terrorism. Correspondingly, we can see significant changes and greater roles to be played by prosecutors and courts rather than police or other executive organs. However, for the time being, the government has not yet presented a clear documented extensive counter-terrorism strategy. General guidelines and framework could synchronise various efforts taken by different organs and facilitate the public in working together with the government in confronting terrorism. So far, the shifting stance of the government to widening the use of criminal law is merely based on inferences, deriving from the number of cases prosecuted in court and the criminalisation of terrorism-related activities. Nonetheless, the enactment of a set of executive-based legislation recently may also connote the conflicted attitude of the

372 Clive Walker, (n 96) 252.

373 T.N Harper, *The End of Empire and the Making of Malaysia* (University Press, Cambridge, 1999) 378.

government towards the criminalisation approach. The new government is yet to present a clear and decisive stand in dealing with the existing anti-terrorism legislation. Apart from that, 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. The pertinent question is whether there can be an accompanying change in the legal culture amongst enforcement officers, policymakers, and politicians who are used to enjoying broad and unchallenged powers. Accordingly, based on the settings and backgrounds, the following Chapter 4 will examine in detail whether the criminalisation approach can operate as a primary response to terrorism in Malaysia.

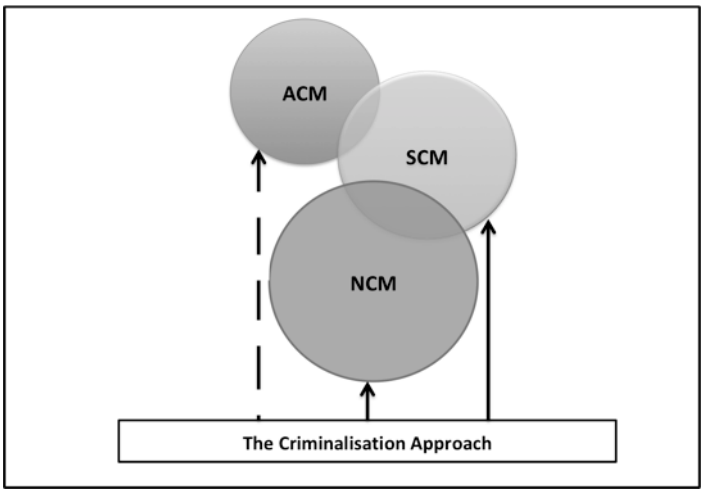
Chapter 4 - The Criminalisation Approach as Primary Response to Terrorism in Malaysia

4.1 Introduction

This chapter primarily deals with the second objective of the thesis that seeks to analyse the criminalisation approach in the service of the counter-terrorism strategy in Malaysia. The viability of the criminalisation approach, its parameters and claims to legitimacy within counter-terrorism arrangements will be examined in this chapter based on background normative values, and norms derived from national legislation and international laws. The foreseeable impacts of criminalisation policy in the service of counter-terrorism will also be analysed here. The discussion will include the advantages of the criminalisation project for legitimate, rational and effective legal responses against terrorism, as well as the potential dangers posed by the approach. Possible impacts of the criminalisation approach on the values of criminal justice and the counter-terrorism arrangements will also be assessed in this chapter.

The criminalisation approach in this chapter, as well as throughout the thesis, is categorised into three modes. The first two modes are the primary subjects of this research. The first mode is the 'Normal Criminalisation Mode' (NCM) that involves the use of regular criminal law within the existing criminal justice system in Malaysia. The second mode is the 'Special Criminalisation Mode' (SCM) that deals with the utilisation and invention of the adaptive type of criminal law and processes in the service of counter-terrorism. The third mode is the 'Avoidance of Criminalisation Mode' (ACM) that operates when the utilisation of criminal law, in its traditional or adaptive forms, would inevitably fail to provide any satisfying outcome, due to its limitations and boundaries. Each mode interconnects and overlaps with another within the framework of the criminalisation approach. The following diagram shows the relationship of the criminalisation modes in general.

Diagram 4.1 The Relationship Between the NCM, SCM and ACM within the Criminalisation Approach



The NCM is arguably the primary mode of criminalisation approach. The mode will be discussed at length in Chapter 5. There is an overlapping area between the NCM and SCM, as the latter retains fundamental elements of the criminal law but alters its details. Chapter 6 will discuss specifically the theoretical concept and workings of the SCM. It must be noted that in this thesis, the NCM and the SCM are intended to be theoretical constructs, as well as descriptions of empirical realities. The distinction operates as a heuristic devide to understand and examine the criminalisation approach, and how it can work fairly and effectively. Therefore the discussion and analysis about the NCM and SCM cover both potential and actual practices. The ACM plays a lesser role within the criminalisation approach. Unlike other modes, the mode does not necessarily operate within the criminal justice system. Therefore, the ACM will only be examined briefly in section 4.8 of this chapter. The focus will be given on whether and how the ACM-based measures can strengthen the criminalisation project as whole. The section will highlight situations when the ACM should be appropriately considered as an alternative to the NCM and SCM.

4.2 The Criminal Justice System in Malaysia

Before the colonial period, the criminal justice system in Malaysia was based on Malay customs with strong influences from Islamic law and Hinduism.[1] The Malay customs at that time were not only merely 'the habit, usage and the tradition of the Malay people' but rather 'the institution whose laws and usage regulated the social, political and constitutional pattern of the government of the day'.[2] Then, the proclamation of the Royal Charter of Justice in 1807 marked the beginning of the statutory introduction of English law in the Malay Peninsula.[3] The Charter established the Court of Judicature of Prince of Wales Island in Penang, which was a 'court of Oyer and Terminer and to try and determine indictments and offences' that administer criminal justice and other functions as performed by Courts of Oyer and Terminer and Gaol delivery in England'.[4] Since then, the administration of criminal justice has been conducted based on English Common Law principles.[5]

The English law began to take a stronger position in the Malay States after the Pangkor Treaty 1874, which paved the way for the British Residential system.[6] Under the system, all sultans were obliged to seek advice from the local 'British Resident' in all matters except those pertaining to Islam and Malay customs. Purcell contended that the real power was vested in the British Resident and his staff of civil servants, albeit that the feudal system of the Malay States was maintained.[7] British officials in the Malay States played a vital role in reforming the criminal justice system, with some of them exercising judicial functions as well.[8] The Penal Code of the Straits Settlements

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1 Richard Winstedt, 'Old Malay Legal Digests and Malay Customary Law' (1945) *1 Journal of the Royal Asiatic Society of Great Britain and Ireland* 17.See also, John Leyden, *Malay Annals: Translated from the Malay Language* (Longman, Hurst, Rees, Orme, and Brown, London,1821) 118, 262; Yock Fang Liaw, Manuscript of Undang-Undang Melaka: An Overview (2007) *International Journal of Malay World Studies* 25.

2 Haji Mohd. Din bin Ali, 'Malay Customary Law/Family' (1963) 2:4 *Malaysian Sociological Research Institute*, 34.

3 *In the Goods of Abdullah* [1835] 2 Ky. Ecc. 8, 9, Malkin R held: I expressed my opinion that I was bound by the uniform course of authority to hold that the introduction of the King's Charter into these Settlements had introduced the existing law of England.

4 The Royal Charter of Justice (1807); see also: W. Napier, 'An Introduction to the Study of the Law Administered in the Colony of the Straits Settlements' (1974) 16:1 *Malaya Law Review* 4.

5 See *Kamoo v Thomas Turner Bassett [*1808] 1 *Ky.* 1; *Ong Cheng Neo v Yeap Cheah Neo & Ors* [1872] 1 *Ky*. 326 (PC); *R. v. Willans,* 3 *Ky*. [1858] 16.

6 Iza Hussin, 'The Pursuit of the Perak Regalia: Islam, Law, and the Politics of Authority in the Colonial State' (2007) 32:3 Law & Social Inquiry 759.

7 Victor Purcell, *Malaya: Communist or Free?* (Victor Gollancz Ltd, London, 1954) 35

8 Abdul Hamid Omar, Administration of Justice in Malaysia (1987) 2:1 *The Denning Law Journal*, 22.

1871 became a model for other Malay states in the early 20th century.[9] The Code is identical to the Indian Penal Code 1860, except for a few revisions.[10] Accordingly, the English Common Law and rules of equity gained prominence and became a source of law even after Malaysia gained independence in 1957. The Federal Constitution 1957 defines 'law' as including:

> [T]he Common Law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof.[11]

The 'Common Law' is defined by Section 66 of the Consolidated Interpretation Acts 1948 and 1967 as the 'common law of England'.

After independence in 1957, the Common Law system remains in Malaysia, along with the Westminster parliamentary democracy. However, unlike the UK and other Commonwealth jurisdictions, Malaysia completely abolished its jury system in 1995.[12] The government contended that:

> [T]rials by jury and assessor often prolong the hearing due to the difficulty to get persons who are qualified to be jury and assessor. One of the reasons why the public are reluctant to take that responsibility is because they are afraid of getting revenge, and refuse to take onus sending accused persons to gallows. Trials (capital cases) often involve technical issues, which are hard to be understood by the juries.[13]

Accordingly, Chapter XXI, XXII and XXIII of the Criminal Procedure Code were deleted.[14] Historically, trial by jury and assessors was part of the Malaysian criminal

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9 Perak Enactment No 8 (1909), Selangor Enactment No 18 (1905), Negeri Sembilan Enactment No 18(1905), Pahang Enactment No 12 (1909), Johore Enactment No 17(1920), Kelantan Enactment No 7(1930), Terengganu Enactment No 6 (1933), Kedah Enactment No 13 (1945), Perlis Enactment No 13 (1954).

10 Stanley Yeo, 'Revitalising The Penal Code With A General Part Singapore'(2004) *Journal of Legal Studies* 1.

11 Article 160(2) of the Federal Constitution 1957.

12 Criminal Procedure Code (Amendment) Act 1995 [Act A908].

13 Hansard Dewan Rakyat, 21 December 1994, vol 4, no 66, col 10778.

14 Criminal Procedure Code (Amendment) Act 1995 [Act A908].

justice system since the introduction of English law in Penang in 1807.[15] It is interesting to note that trial by jury had been abolished in 1954, but reintroduced in 1958 only for capital cases.[16] The 1954 repeal was triggered by the controversial case of Lee Meng, a Communist Party member who was charged with having a hand grenade in her possession and sentenced to death.[17] However, the verdict of the trial judge, who sat with two assessors, was set-aside during appeal.[18] A committee was formed to review the jury system at the time.[19] Apart from highlighting the difficulty of empanelling a qualified jury, the committee also concluded that the operation of the jury system in the Malay states would cause a large number of acquittals.[20] It was reported that the Attorney General of Malaya viewed that trial by jury 'was not opportune, and that it was possible that jurors could be intimidated'.[21] The abolition of the jury system in Malaysian criminal justice was based mainly on existing limitations at that time. Intimidation might be a valid reason for the first abolition in 1954, but not in 1995.[22] One may argue that what had happened in both 1954 and 1995 is 'the normalisation of the emergency' whereby emergency powers started to fuse into the ordinary criminal justice system.[23]

In sum, the Malaysian criminal justice system is shaped by existing societal values, historical occurrences and political powers. From another perspective, the system mirrors the heterogeneous character of the Malaysian society. Diversity of populations and variety of religions makes it impossible for Malaysians to accept a criminal law system based on one religion. Accordingly, the English Common Law framework that is arguably more secular in nature became more prominent and

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15 Chandra Mohan Shunmugam and Sukumaran Ramankutty, 'The Introduction and Development of Trial By Jury in Malaysia and Singapore' (1966) 8:2 *Malaya Law Review* 270.

16 Criminal Procedure Codes (Amendment) Ordinance (1954) (F.M. Ord 8/1954); Criminal Procedure Codes (Amendment) Ordinance (1958) (F.M. Ord 73/1958)

17 Colonial Office*, Representations about the sentence of death passed on Lee Ten Tai, or Lee Meng, by a Malayan court for unlawful possession of arms: report of commuting of death sentence* 1953 (CO 1022/6).

18 UK Parliament Hansard, HC Deb 19 November 1952, vol 507, cols 166W.

19 Shunmugam, Chandra Mohan, and Sukumaran Ramankutty, The Introduction and Development of Trial by Jury in Malaysia and Singapore' (1966) 8:2 *Malaya Law Review* 270.

20 Colonial Office, *Federal Legislative Council Minutes and Papers 1953 Mar-1954 Jan* (CO 941/15) 6th Session, No 59 of 1953.

21 The Manchester Guardian, 'Controversy Bill Passed in Malaya: No Trial by Jury' (29 January 1954) *ProQuest Historical Newspapers: The Guardian and The Observer*, 7.

22 Andrew Phang Boon Leong, 'Jury Trial in Singapore and Malaysia: The Unmaking of a Legal Institution (1983) 25:1 *Malaya Law Review* 50.

23 John Jackson, 'Vicious and Virtuous Cycles in Prosecuting Terrorism: The Diplock Court Experience', in Fionnuala Ni Aolain & Oren Gross (eds), *Guantanamo and Beyond: Exceptional Courts and Military Commissions in Comparative Perspective* (Cambridge University Press, New York, 2013) 227.

institutionalised constitutionally.[24] In other words, it is not just an aspect of post-colonialism but perceived as a neutral and widely accepted standard.

4.3 The Criminalisation Approach as a Primary Response to Terrorism

The term 'criminalisation' carries various meanings depending on the perspective from which it is conceived and depending on different research disciplines. It is often referred to as a state action to denounce a specific act that should not be done by its citizens, and 'to deploy desert-based sanctions as supplementary reasons not to do it'.[25] The notion is also considered as an institutionalised process that reflects the intention of the state to regulate, control and punish selectively.[26] The idea of criminalisation is also about holding an individual accountable for his or her own choices.[27] At this point, the principle of individual autonomy is reflected.[28] From here, we can gather that the notion of criminalisation covers extensive and various domains, and involves a range of actors and institutions.[29]

The criminalisation approach in the service of counter-terrorism denotes the use of criminal law and justice as the first and preferred response against terrorism threats.[30] 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 criminal justice approach that treats terrorism primarily as crimes, and treats terrorists like other criminals within the existing criminal justice system and processes.[31] The United Kingdom is a consistent proponent of 'prosecution-first, second and third the government's preferred approach when dealing with suspected

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24 Tommy Thomas, Abuse of Power: Selected Works on the Law and the Constitution (SIRD, Petaling Jaya, 2016) 200.

25 Andrew P.Simester and Andreas von Hirsch, *Crime, Harms and Wrong: On the Principles of Criminalisation* (Hart Publishing, Oxford, 2011) 6.

26 Kathryn Chadwick and Phil Scraton, 'Criminalization' in Eugene Mc Laughlin & John Muncie (eds), *The SAGE Dictionary of Criminology* (SAGE Publication Ltd, London, 2009) 95.

27 Dennis J. Baker, *The Right Not to be Criminalised: Demarcating Criminal Law's Authority* (Ashgate, Surrey, 2011) 22.

28 Andrew Ashworth and Jeremy Horder, *The Principle of Criminal Law* (Oxford University Press, Oxford, 2009) 17.

29 Nicola Lacey, 'Historicising Criminalisation: Conceptual and Empirical Issues' (2009), 72:6, *The Modern Law Review*, 936.

30 Clive Walker, *Terrorism and The Law* (Oxford University Press, Oxford, 2011) 203.

31 Ronald Crelinsten, *Counterterrorism* (Polity Press, Cambridge, 2009) 52.

terrorist'.[32] In terms of the prevention of terrorism, the British government firmly contends that 'conviction in court is the most effective way to stop terrorists'.[33] Giving priority to the use of the criminal justice system in confronting terrorism can also be found in other European states.[34] It is often mentioned in opposition to the 'war model' or 'war on terrorism' adopted by the United States.[35] Saul encapsulates the approach as follows:

> [T]he criminal law offers the promise of restraint: individual rather than collective responsibility, a presumption of innocence; no detention without charge; proof of guilt beyond reasonable doubt; due process; the right to prepare and present an adequate defence; independent adjudication; and rational and proportionate punishment.[36]

The use of criminal law and criminal justice system to counter terrorism is not alien to Malaysia. As discussed in the previous chapter, the criminal justice system was deployed by the government during the emergency period to prosecute the Communist terrorists. However, it operated mainly as ancillary to the preferred executive-based approach. For example, existing criminal procedures were applicable in respect of any breach of regulations made under the Emergency Regulations Ordinance 1948.[37] Some modifications were crafted for the substantive and procedural laws in facilitating the counter-terrorism agenda at that time. A notable example is that confessions made at any time during investigations into offences against Emergency Regulation were admissible in court.[38] However, the primacy of executive measures remained after the country gained independence in 1957. In defending the ISA (1960), the Malaysian

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32 Clive Walker, *Blackstone's Guide to: The Anti-Terrorism Legislation* (Oxford University Press, Oxford, 2002) 181; See also, Hansard HC vol 472 col 561 (21 February 2008), Tony McNulty , <http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm080221/debtext/80221-0010.htm> accessed 9 January 2016.

33 Secretary of State for the Home Department, *CONTEST The United Kingdom's Strategy for Countering Terrorism: Annual Report for 2015* (Cm 9310, July 2016) 10.

34 Elies van Sliedregt, 'European Approaches to Fighting Terrorism'(2010)20 *Duke Journal of Comparative & International Law*, 413.

35 Clive Walker, 'The United Kingdom's Anti-Terrorism Laws: Lessons for Australia', in Andrew Lynch, Edwina MacDonald, George William (eds), *Law and the Liberty: In the War on Terror* (Federation Press, Sydney, 2007) 189.

36 Ben Saul, *Defining Terrorism in International Law* (Oxford University Press, Oxford, 2008) 318.

37 Section 4, Emergency Regulations Ordinance, 1948 En. 10/1948. cf, Section 26, Evidence Act 1950 [Act 56]. See also section 113 Criminal Procedure Code 1935 [Act 593].

38 Director of Operations, Malaya*, The Conduct of Anti-Terrorist Operations in Malaya* (Malaya, 1958) chapter iv,1.

Prime Minister from 1981 to 2003 and from 2018 to present, Mahathir Mohamad, explained that 'to bring these terrorists through normal court procedures would have entailed adducing proper evidence which would have been difficult to obtain'.[39]

4.4 The Benefits and Values of the Criminalisation Approach

The criminalisation approach offers various potential benefits and values to a counter-terrorism strategy. Above all, the criminalisation approach carries an appeal to legitimacy. It embodies a fair, appropriate and sustainable response to terrorism, which is 'guided by a normative legal framework and embedded in the core principles of the rule of law, due process and respect for human rights'.[40] The benefits and values of criminalisation can be gathered by looking into its links with rule of law, right to fair trial and international norms.

4.4.1 The Criminalisation Approach and the Rule of Law

Wilkinson contended that the protection of liberal democracy and the rule of law must be the ultimate aim of any counter-terrorism strategy.[41] When state agents violate those principles in the name of counter-terrorism, the state is exposed to the commission of state-terrorism.[42] With that, it becomes even more blameworthy than terrorists since states are bound by legal duties and control resources not applicable to terrorists. The United Nations (UN) General Assembly in 2006 reiterated that 'promoting the rule of law, respect for human rights and effective criminal justice systems' should be the fundamental basis of all counter-terrorism efforts.[43] An action plan was produced as a guideline to all UN members for preventing and combating terrorism.[44] Debates and works surrounding the idea of the rule of law in the past and

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39 Utusan Online, 'ISA effective tool to combat terrorism: PM', (October 2001) <http://ww1.utusan.com.my/utusan/info.asp?y=2001&dt=1025&pub=Utusan_Express&sec=Front_Page&pg=fp_05.htm> accessed 23 April 2016.

40 UN Office on Drugs and Crime, Handbook on Criminal Justice Responses to Terrorism (New York, 2009) 3.

41 Paul Wilkinson, Terrorism and The Liberal State (The Macmillan Press Ltd, London, 1977) 121.

42 Ronald Crelinsten (n 29), 51.

43 United Nations General Assembly Resolution No 60/288 (8 September 2006) IV (5).

44 See UN Action to Counter Terrorism, United Nations Global Counter-Terrorism Strategy 2006 <https://www.un.org/counterterrorism/ctitf/en/un-global-counter-terrorism-strategy> accessed 16 January 2017.

present are profound and prolific.[45] Principally, the notion emphasises that no one is above the law, be it the government or the governed, as proposed by John Locke:

> For all the power the government has, being only for the good of the society, as it ought not to be arbitrary and at pleasure, so it ought to be exercised by established and promulgated laws, that both the people may know their duty, and be safe and secure within the limits of the law, and the rulers, too, kept within their due bound…[46]

According to Dicey, it means the 'supremacy and predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government'.[47] The rule of law comprises the idea that a certain quality of interaction between a state and its subjects, should take account of what should be defended and preserved persistently.[48] Allan expressed his doubt over the possibility to formulate a theory of the rule of law that is universally accepted.[49] Nevertheless, a number of international treaties and instruments insert references to the notion of the rule of law. For instance, the preamble of the Universal Declaration of Human Rights 1948 states that:

> Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.[50]

As for ASEAN, the Bangkok Declaration of 1967 stated that:

> [T]he aims and purposes of the Association shall be to promote regional peace and stability through abiding respect for justice and the rule of law in the

45 See Paul P. Craig, 'Formal and substantive conceptions of the rule of law: an analytical framework' (1997) *Public Law* 1.

46 John Locke, *Two Treatises of Government* (Printed for R. Butler, etc., London, 1821) 137.

47 A.V. Dicey, *Introduction to The Study of The Law of The Constitution* (Universal Law, Delhi, 1985) 188.

48 John M. Finnis, *Natural Law And Natural Rights* (Clarendon Press, Oxford, 1980) 273.

49 T.R.S Allan, *Law Liberty, and Justice: The Legal Foundation of British Constitutionalism* (Clarendon Press, Oxford, 1993) 21.

50 Universal Declaration of Human Rights 1948, <https://www.un.org/en/universal-declaration-human-rights/> accessed 16 January 2017.

relationship among countries of the region and adherence to the principles of the United Nations Charter.[51]

The rule of law is universally accepted, but the idea is open to interpretation. A non-democratic legal system country that violates human rights, practices racial segregation and racial persecution might be considered as conforming to one version of the rule of law if such action is done in accordance with its law of the land.[52] This interpretation, or 'thin definition', reduces the idea of the rule of law to a mere body of statutory law that governs the manner for a state to pursue its aims. No substantive content limits to the law are specified. Criticising that view, Bingham identified fundamental elements that have flourished within the notion of the rule of law. The elements include the accessibility and clarity of the law, the priority of the application of law over the exercise of discretion, equality before the law, the protection of human rights and the right to fair trial.[53]

Although the rule of law has never become subject to wide-ranging public debates or rigorous analysis in Malaysia, the notion does occupy a place in the legal and political system in Malaysia.[54] The adoption of a Westminster form of government and the legacy of British colonial rule fostered this idea. Hickling contended that the British officials who came to Malaya in particular after 1874 were familiar with the idea of the rule of law, as described by Dicey in that year.[55]

To examine the rule of law in Malaysia, it is important to look into the supreme law of the land, which is the Federal Constitution of Malaysia 1957.[56] On a literal reading, the term 'rule of law' is absent from the document, just like other fundamental words like 'democracy' and 'secular'. Yet the idea of the rule of law permeates the constitutional framework, which provides the foundations of Malaysia, or previously Malaya.[57] It can be seen in the form of Article 4(1) that declares the supremacy of the Constitution.

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51 See ASEAN Declaration (Bangkok Declaration), 8 August 1967, ASEAN Document Series 1967-88 (3rd edn, ASEAN Secretariat, Jakarta), 27.

52 Joseph Raz, 'The Rule of Law and its Virtue' (1977) 93 *L.Q.R.* 197.

53 Tom Bingham, *The Rule of Law* (Penguin Books, London,2010) 37-110.

54 H.P Lee, 'Competing Conceptions of Rule of Law in Malaysia' in Randall P. Peerenboom (eds), *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the U.S.* (Routledge, London,2004) 225.

55 R.H Hickling, *Malaysian Law: An Introduction to the Concept of Law in Malaysia* (Pelanduk Publications, Selangor, 2001) 57.

56 Article 4 of the Federal Constitution states: (1) This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

57 Ahmad Masum, The Rule Of Law Under The Malaysian Federal Constitution [2009] 6 MLJ c.

The rule of law in Malaysia infuses into the broader concept of constitutionalism, deriving from the Federal Constitution 1957.[58] It is manifest in Part II of the Constitution, which sets out most of the fundamental liberties.[59] The provisions contained in this Part are meant to protect individual rights by ensuring that the power of the State, including its enforcement machineries, is not exercised erratically or arbitrarily.[60] In the case *Lob Kooi Choon v Government of Malaysia* (1977), Raja Azlan Shah held that the Constitution embodies three basic concepts; namely, the rule of law; Federalism; and the separation of powers:

> The Constitution is not a mere collection of pious platitudes. It is the supreme law of the land embodying three basic concepts: One of them is that the individual has certain fundamental rights upon which not even the power of the State may encroach. The second is the distribution of sovereign power between the States and the Federation, that the 13 States shall exercise sovereign power in local matters and the nation in matters affecting the country at large. The third is that no single man or body shall exercise complete sovereign power, but that it shall be distributed among the Executive, Legislative and Judicial branches of government, compendiously expressed in modern terms that we are a government of laws, not of men.[61]

The above interpretation encapsulates the fundamental components within the notion of the rule of law. Looking into history, the interpretation also reflects recommendations made by the Federation of Malaya Constitutional Commission, known as the Reid Commission, in 1956, particularly pertaining to the form of state, separation of powers among state branches and fundamental rights of citizens.[62] This independent commission was established 'to make recommendations for a form of constitution for a fully self-governing and independent Federation of Malaya within the Commonwealth',

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58 Cyrus Das, 'The Basic Law Approach to Constitutionalism: Malaysia's Experience Fifty Years On' (2007) 15:2 *Asia Pacific Law Review*, 219.

59 Priscilla Shasha Devi and Matthew Jerome van Huizen Thomas Aquinas and the Fundamental Liberties of the Federal Constitution [2017] 2 MLJ cxxvii.

60 Joseph Fernando, and Shahtiah Rajagopal, 'Fundamental Liberties in the Malayan Constitution and the Search for a Balance, 1956–1957 (2007) 13:1 *International Journal of Asia Pacific Studies* 1.

61 *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187; see also *Pathmanathan a/l Krishnan (also known as Muhammad Riduan bin Abdullah) v Indira Gandhi a/p Mutho and other appeals* [2016] 4 MLJ 455.

62 Colonial Office, *Report of the Federation of Malaya Constitutional Commission* (Colonial No.330, 1957).

pursuant to the proposal made in the Federation of Malaya Constitutional Conference in the same year.[63]

As mentioned earlier, the Constitution does not mention the rule of law explicitly, but the Federation of Malaya Independence Act 1957 and Malaysia Act 1963, passed by the UK's Parliament acknowledge clearly its notable position.[64] Both laws include the rule of law within the definition of 'existing law', which should remain enforceable after the independence of Malaya in 1957, as well as, after the formation of Malaysia in 1963.[65] The documents clarify that the rule of law retains its prominence in Malaysia as fully as before independence.

Just as the Federal Constitution 1957 embodies some values based on the rule of law, the document itself also contains several provisions that may jeopardise the notion. This is due to the past history of Malaya. It is important to note that the Constitution was drafted when the country was under a state of emergency, which was from 1948 to 1960. Existing needs at that time in combating Communist armed insurgents were taken into consideration. For example, concerns from Malaya were raised by British officials about the effects of the coming constitution upon detention under Emergency Regulations.[66] Accordingly, some enabling provisions were crafted to save the operation of the Emergency ordinances and regulations. Article 150 of the Constitution, for instance, gives power to the executive body to make any laws, which are inconsistent with any other existing legislation including the Constitution itself when a proclamation of emergency is in force. The Constitution also allows the existence of preventive detention, which is stipulated under Article 151. With regards to security and terrorism offences, the SOSMA 2012 is enacted pursuant to Article 149 of the Constitution.[67] In *Public Prosecutor v. Khairuddin Abu Hassan* (2017), the Court of Appeal held that:

> [T]he preamble of SOSMA as set out above shows that SOSMA was enacted to deal with four out of the six categories of action under art. 149(1). The scheme and the provisions of SOSMA were designed to limit the fundamental liberties under arts. 5, 9, 10, and 13 of the Federal Constitution and to depart from the

63 Ibid 4; see also: Colonial Office, *Memorandum by the Secretary of State for the Colonies: Report of the Federation of Malaya Constitutional Conference* (C.P.(56) 47, 1956).

64 The Federation of Malaya Independence Act 1957 (chapter 60 5 and 6 Eliz 2); Malaysia Act 1963 (chapter 35).

65 Section 4 The Federation of Malaya Independence Act 1957; Section 3 Malaysia Act 1963.

66 Dominions Office, *Malayan constitution: effect upon detention under Emergency Regulations* (DO 35/9832, 1958).

67 Preamble, Security Offences (Special Measures) 2012 [Act 747].

> procedures laid down under the Criminal Procedure Code, the law which governs the conduct of criminal cases.[68]

From here, it is correct to contend that the Constitution 1957 also sanctions the enactment of laws that would curtail the application of the rule of law. The exceptional features of the SOSMA 2012 with regards to terrorism cases will be dealt with in Chapter 6.

Aside from the legal setting, Malaysian politicians have also paid due attention to the rule of law. Upholding the rule of law can be found in the major political parties' constitutions.[69] The government includes the rule of law in the Rukunegara which became 'a five-point national philosophy' to promote national unity following the racial riots in 1969.[70] The other principles are belief in God, loyalty to the King and country, upholding the Constitution, and good behaviour and morality. However, Rais Yatim, a former cabinet minister, in his PhD thesis contends that:

> The Rule of Law in the *Rukunegara* did not necessarily mean the same as the rule of law conceived by Dicey or the various ICJ congresses. It was not particularly concerned with the checks and balances necessary in the popular notion under a modern democratic system. It was proclaimed to mean no more than that the rules and regulations made by the government must be followed.[71]

Along the same line, Rais also clarifies that the executive has acquired a supreme position that renders the other branches of government, the Parliament and the judiciary, subservient to it.[72] Owing to the fact that the same political party has ruled Malaysia for more than six decades, the executive has been the dominant actor in the country.[73] The separation of powers with checks and balances, which is closely allied

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68 *Public Prosecutor v Khairuddin Abu Hassan & Anor* [2017] 4 CLJ 701, 702.

69 For example, Clause 5.3 People's Justice Party Constitution ; Clause 2(15), Democratic Action Party Constitution.

70 The Rukunegara was proclaimed by the Agong on 31 August 1970 in a speech delivered in Parliament. The 13 May 1969 racial riots, resulting in the death of thousands was caused by economic, political and social differences after Merdeka. The Rukunegara has no direct legal backing. This has prompted a proposal to the Government to incorporate Rukunegara into the Federal Constitution as its Preamble. See Shad Saleem Faruqi, 'Rukun Negara as the Constitution's Preamble' (The Star Online, 5 January 2017) <http://www.thestar.com.my/opinion/columnists/reflecting-on-the-law/2017/01/05/rukun-negara-as-the-constitutions-preamble-the-rukun-negara-distils-the-essence-of-our-constitution/> accessed 10 February 2017.

71 Rais Yatim, *The Rule of Law and Executive Power in Malaysia : A Study of Executive Supremacy* (Ph.D. Thesis, Kings College University of London, 1994) 48.

72 Rais Yatim, (n 71) 362.

73 Hari Singh, 'Tradition, UMNO and political succession in Malaysia' (1998) 19:2 *Third World Quarterly*, 241,

and interdependent with the rule of law, is often at risk.[74] When replying to a question in the Parliament in 2000 as to how far Malaysia observes the rule of law, Rais maintained his view that government practices the rule of law with some modifications made to suit the needs of the nation.[75] But, this version of rule of law and its implementation has received criticisms.[76] The modified form of the rule of law reflects the thin or formal understanding of the notion as discussed before. For some, it could not be considered as the rule of law, but rather the rule by law.[77]

The perpetual and overlapping states of emergencies proclaimed since 1948 have also shaped the rule of law in Malaysia.[78] The following table lists the emergency periods that took place in Malaysia from 1948 until 2011.

Table 4.2: States of Emergency from 1948 to 2011

Reasons for Emergency Proclamation	**Period**	**Revocation**
Communist insurgency	1948-1960	Parliament
Indonesian–Malaysian confrontation	1964-1969	Impliedly revoked by 1969 Emergency Proclamation[79]
Sarawak constitutional crisis	1966-2011	Parliament
Kelantan constitutional crisis	1977-2011	Parliament
Racial riots	1969-2011	Parliament

This series of emergency proclamations caused undesirable effects upon Malaysian legal institutions and the conception of the rule of law in Malaysia. Though the rule of law can still be observed during a state of emergency, successive states of emergency could be said to normalise the use of special powers and laws which render fundamental liberties and constitutional values prone to be infringed. Gross and Ní Aoláin observe that the normalization of the exception could change people's

74 Richard Foo and Amber Tan, 'Separation of Powers in New Malaysia: Hope and Expectations' (2018) 5 *J Int'l & Comp L* 529.

75 Hansard Dewan Rakyat, 14 November 2000, 4.

76 See Michael Kirby, 'The Rule of Law and the Law of Rules: A Semisceptical Perspective' (2010) Malaysian Bar Association 15th Malaysian Law Conference, <https://www.michaelkirby.com.au/images/stories/speeches/2000s/2010_Speeches/2470-MALAYSIAN-LAW-CONFERENCE-JULY-2010.pdf> accessed 15 May 2017.

77 Ratna Rueban Balasubramaniam, 'Has Rule by Law Killed the Rule of Law in Malaysia?'(2008) 8:2 *Oxford University Commonwealth Law Journal*, 211.

78 Wilson Tay Tze Vern, 'Subversion and Emergency Powers' (2019) 4 MLJ lxxiii.

79 *Teh Cheng Poh v Public Prosecutor* [1979] 2 MLJ 23; [1980] AC. 58 (Privy Council).

perception towards exceptional emergency actions and consider them as normal and ordinary practices.[80] Even if the emergency measures are deployed in accordance with democratic constitutions, a systematic and frequent use of exceptional powers may lead to the 'liquidation of democracy'.[81] The states of emergency in Malaysia also allowed the executive to make use of arbitrary power without proper checks and balances.[82] Perhaps, this is one of the reasons as to why the criminalisation approach was not preferred at that time.

However, it must be noted that a state of emergency is 'different from anarchy and chaos, order in the juristic sense still prevails even if it is not of the ordinary kind'.[83] Despite the perpetual emergency status, the proclamations did not suspend the entire existing order. During overlapping emergency periods, the Parliament sat as usual, except from 1969 to 1971 due to the racial riots.[84] In addition, the state of emergency was predominantly felt only in the law and order domain. Das observed:

> The fact of an emergency government, however, is not manifest, and an observer may well be excused for thinking that the country is in a state of normalcy. There is no outward manifestation of troop movement or of the army being on alert or of roadblocks and curfews. The country continues to prosper under an impressive 8% economic growth rate. The confidence in the political stability of the country-by both the foreign and local investor belies the legal state of affairs. It is the Government's position that the prevailing calm and peace is the product of emergency rule.[85]

Until 2011, the emergency legislation endured and the executive continued to enjoy the exceptional powers, but at the same time, the Parliament retained its law-making

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80 Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency in Theory and Practice* (Cambridge University Press, Cambridge, 2006) 228.

81 Giogio Agamben, *State of Exception* (The University of Chicago Press, Chicago and London, 2005) 7.

82 Rueban Balasubramaniam, 'Hobbism and the Problem of Authoritarian Rule in Malaysia' (2012) 4. *Hague J Rule,* 211.

83 Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (The University of Chicago Press, Chicago and London, 2005) 12.

84 Lloyd Musolf and J. Fred Springer, 'Legislatures and Divided Societies: The Malaysian Parliament and Multi-Ethnicity' (1977) 2:2 Legislative Studies Quarterly, 113.

85 Cyrus Vimalakumar Das, *Emergency Powers and Parliamentary Government in Malaysia: Constitutionalism in A New Democracy* (Ph.D Thesis, Brunel University London, 1994) 354.

power.[86] These two legal regimes operated simultaneously and offered an option to the Government in office at any time to act under one or the other.

Whiting contends that 'emergency is not an exception to the rule of law established and secured by the Federal Constitution; rather, the exception is foreseen and enabled by the notion of the "rule of law" that Malaysian Constitution enshrines'.[87] Admittedly, the application of the rule of law in Malaysia does not portray the ideal version of the principle described by legal jurists. However, the foundations of the rule of law within the Malaysian legal system are overwhelming and can be traced from various sources. Historical occurrences, social conditions and political culture, nevertheless, have impinged upon the understandings towards the rule of law and reduced its impact.

A drastic change of attitude was shown by the government in 2011, causing it to revoke all existing emergency proclamations and abolish several 'draconian' laws. The government motion to annul all three emergency proclamations had received full support from all members of the Parliament including the opposition representatives.[88] After winning the 2018 General Election, Mahathir who leads the subsequent government pledged that: 'We are not seeking revenge, we just want to restore the rule of law'.[89] This development brings some hope for the attainment of higher standards of observance of the rule of law in Malaysia. Nevertheless, scepticism towards Mahathir remains, considering his record of accomplishments that were detrimental to the rule of law in the past.[90]

A vibrant application of the rule of law is important to the progress of the criminalisation approach in Malaysia. In fact, the relationship between the criminalisation project and the rule of law is symbiotic. The rule of law would be strengthened with the utilisation of the criminal justice approach, provided that the latter is not manipulated and driven out from its normative boundaries. In this way, the criminal justice approach can only serve its purpose only if the rule of law is well functioning.

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86 Anthony Reid, The Kuala Lumpur Riots and the Malaysian Political System' (1969) 23:3 *Australian Outlook*, 258; Peter Wicks, 'The New Realism: Malaysia since 13 May, 1969.' (1971) 43:2 *The Australian Quarterly* 17.

87 Amanda Whiting, 'Emerging from Emergency Rule? Malaysian Law "Reform" 2011-2013' (2013) 14:2 *Australian Journal of Asian Law* 3.

88 Hansard Dewan Rakyat, 24 November 2011, 61.

89 Mohd Faizal Hassan, May 9, 2018: the day Malaysia shook (Bernama, 8 May 2018) <http://www.bernama.com/en/news.php?id=1724517> 16 September 2018.

90 See, Hwang In-Won, *Personalized politics : the Malaysian state under Mahathir* (Institute of South-East Asian Studies, Singapore, 2003).

4.4.2 The Criminalisation Approach and the Right to a Fair Trial

The criminalisation approach, which gives priority to the use of the criminal justice system, upholds the right to a fair trial. Based on the right to a fair trial, 'everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'[91] The right to a fair trial is also a cardinal requirement of the rule of law and one of the basic human rights.[92] The right has emerged as a fundamental principle of English Common Law. Its historical roots can be traced back to the proclamation of Magna Carta in 1215.[93] As discussed earlier, the right to a fair trial in Malaysia has its origin from the English Common Law.[94] In *Yong Joo Lin v Fung Poi Fong* (1941), the judge held that 'principles of English Law have for many years been accepted in the Federated Malay States where no other provision has been made by statute'.[95]

The Federal Constitution 1957 does not state the right to a fair trial explicitly. However, the principle can be inferred from Articles 5 (1) and 8(1) of the Constitution, which state that 'no person shall be deprived of his life or personal liberty save in accordance with law', and 'all persons are equal before the law and entitled to the equal protection of the law' respectively.[96] In a Privy Council appeal case, *Ong Ah Chuan v Public Prosecutor* (1941), Lord Diplock asserted that the term 'law' in both articles means 'a system of law that incorporates those fundamental rules of natural justice that had formed part and parcel of the Common Law of England' which was in operation there at that time.[97] In *Motor Emporium v Arumugam* (1933), the court held that the principle of natural justice embodies the right to be heard, by declaring:

> If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been

91 Brown v Stott (Procurator Fiscal, Dunfermline) and another [2003] 1 AC 681.

92 Article 6,7,8,11 and 10 of the Universal Declaration of Human Rights (UDHR).

93 James Clarke Holt, *Magna Carta* (Cambridge University Press, Cambridge, 1992) 94.

94 Abdul Hamid Mohamad and Adnan Trakic, 'The Reception of English law in Malaysia and Development of the Malaysian Common Law' (2015) 44:2 *Common Law World Review* 123.

95 *Yong Joo Lin v Fung Poi Fong* [1941] 1 MLJ 63.

96 Federal Constitution 1957.

97 *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64.

> made affecting him: and then he must be given a fair opportunity to correct or contradict them.[98]

The Federal Court in *Lee Kwan Woh v Public Prosecutor* (2009) adopted the same interpretation and added that an accused person is entitled to acquittal if his constitutionally guaranteed right to receive a fair trial has been violated.[99] The court, in that case, found that the right of the accused to a fair trial had been infringed, as he was not allowed to submit 'no case to answer' at the close of the prosecution's case. The decision has made it clear that the rule of law, which derived from the English Common Law, covers substantive and procedural dimensions that are vital in preserving the right to a fair trial in the criminal justice system.

Other than the Constitution and the Common Law, it is unlikely that the right of a fair trial in Malaysia has developed further based on international law and conventions.[100] This is due to the dualist approach to international law and the state's poor ratification record of international conventions.[101] However, recent developments show that global pressure and influence from the international community and local civil society have brought significant impact over government policies and judicial interpretation in embracing international norms and values.[102] The Human Rights Commission of Malaysia (SUHAKAM) noted that the government had formed a technical committee to study the feasibility of becoming a party to several international human rights treaties including the International Covenant on Civil and Political Rights 1966.[103] The Covenant is pertinent to the right to a fair trial, as it emphasises that:

> All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at

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98 *Motor Emporium v Arumugam* [1933] MLJ 276.

99 *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301. See also *Public Prosecutor v Choo Chuan Wang* [1992] 2 CLJ 1242.

100 Abdul Ghafur Hamid @ Khin Maung Sein, 'Judicial Application of International Law in Malaysia: An Analysis' (2005) 1 *Asia-Pacific Yearbook of International Humanitarian Law,* 196

101 Out of the seven core rights instruments , Malaysia has only signed two conventions, which are Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and Convention on the Rights of the Child (CRC). These two conventions were ratified in 1995 with 21 reservations.

102 See, Abdul Ghafur Hamid @ Khin Maung Sein, *Public International Law: A Practical Approach* (3rd ed., Thomson Reuters, Petaling Jaya, 2011) 61.

103 Human Rights Commission of Malaysia (Suhakam), Statement in conjunction with the High-Level Panel on the 50th Anniversary of Human Rights Covenants 31st Session of the Human Rights Council Palais des Nations, Geneva, March 2016.

> law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.[104]

The Malaysian courts in recent times also seem to be adopting a more liberal approach towards the interpretation of national laws with reference to international law concerning the rights of citizens. In *Nik Nazmi Nik Ahmad v Public Prosecutor* (2014), the Court of Appeal asserted that any principles contained in an international convention which do not contradict the provisions in the Federal Constitution 1957 can be accepted and be used to further interpret the rights enshrined in the constitution.[105] In *Muhammad Hilman Idham & Ors v Kerajaan Malaysia & Ors* (2010), the High Court declared that freedom of expression is a basic right, not only based on the Federal Constitution 1957 but also the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.[106] In *Noorfadilla Ahmad Saikin v Chayed Basirun* (2012) the Court applied Articles 1 and 11 of the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) in its interpretation of Article 8(2) of the Federal Constitution 1957.[107] The above instances indicate the emergence of international law and treaties as a 'soft law' or source of law in Malaysia. This would strengthen the foundation of the right to a fair trial in Malaysia, and benefit the criminalisation approach that claims to uphold such right.

To uphold the right to a fair trial, the criminalisation approach should embody the following two essential elements. First, the trial must be conducted before an independent and impartial tribunal established by law. Weissbrodt and Hansen contend

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104 Article 14 (1) International Covenant on Civil and Political Rights 1966.

105 *Nik Nazmi Nik Ahmad v Public Prosecutor* [2014] 4 CLJ 944.

106 *Muhammad Hilman Idham & Ors v. Kerajaan Malaysia & Ors* [2010] 8 CLJ 869.

107 *Noorfadilla Ahmad Saikin v. Chayed Basirun & Ors* [2012] 1 CLJ 769.

that independence and impartiality are two distinct concepts.[108] The former deals with the structure and condition of judicial service, and the latter refers to the biases of a particular judge. 'The right to a fair hearing within a reasonable time by an impartial court' was held in *Public Prosecutor v Choo Chuan Wang* (1992) as a constitutional right under the Federal Constitution.[109] The criminalisation approach demands the government should prosecute terror suspects in court and present the available evidence, so that liability can be weighed by an independent institution.[110] This feature makes the criminalisation approach different from the executive-based measures.[111]

Second, criminal trials should be held and judgment given in public, saving for some valid exceptions. Protecting vulnerable witnesses is a classic justification for having a closed trial.[112] In principle, the criminalisation approach promotes the principle of normalcy that gives priority to try terror suspects like any other criminal offenders. From here, the right of the suspects to a fair trial is protected. However, there are narrow situations where a terrorism-related prosecution requires in-camera proceedings, which render the implementation of the closed trial, partly or entirely, difficult to avoid.[113]

As a corollary to the right to a fair trial, attention should be given to other rights such as the right to be presumed innocent; the privilege against self-incrimination; the right of silence; the right to a speedy trial, the right to disclosure of documents; and the right to be tried on evidence not obtained by violation of fundamental rights. These rights are or should be preserved in the criminalisation approach, as they are core values. Nevertheless, it is anticipated that these rights might be compromised to facilitate the prosecution of terror suspects. That will be dealt with in a later section of Chapter 6 when the special criminal law and process in the service of counter-terrorism is discussed.

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108 David S Weissbrodt and Joseph C.Hansen, 'The Right to a Fair Trialin an Extraordinary Court' in Fionnuala Ní Aoláin & Oren Gross (eds) *Guantanamo and Beyond: Exceptional Courts and Military Commissions in Comparative Perspective* (Cambridge University Press, New York, 2013) 310.

109 *Public Prosecutor v Choo Chuan Wang* [1992] 2 CLJ 1242.

110 Fionnuala Ní Aoláin and Oren Gross, ' The Trial of Terrorism: National Security Courts and Beyond' in Genevieve Lennon and Clive Walker, *Routledge Handbook of Law and Terrorism* (Routledge, Abingdon, 2017) 206.

111 See Clive Walker, 'The Reshaping of Control Orders in the United Kingdom: Time for a Fairer Go, Australia' (2013) 37 *Melb U L Rev* 143; Fiona De Londras and Fergal F. Davis, 'Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanisms' (2010) 30:1 *Oxford Journal of Legal Studies*, 19; Daphne Barak-Erez, 'Terrorism Law between the Executive and Legislative Models' (2009) 57:4 *The American Journal of Comparative Law*, 896.

112 For example, see Part II of Evidence of Child Witness Act 2007 [Act 676].

113 See *Guardian News and Media Ltd v Incedal* [2016] EWCA Crim 11.

4.4.3 The Criminalisation Approach and International Law

International law and its proponents have long been promoting the criminalisation approach as one of vital responses to terrorism.[114] The main reason is that the criminalisation approach or criminal justice response corresponds to the rule of law and respects fundamental rights, which are discussed in previous sections.[115] The Universal Declaration of Human Rights, for instance, emphasises that:

> [E]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.[116]

These are the core values uphold by the criminalisation approach. The approach also rejects the practice of arbitrary arrest and detention, which is also denounced in the Declaration.[117]

For several decades, even before the 9/11 attacks, the international community has produced a significant number of conventions and protocols, which are designed to confront and prevent various types of terrorist activities.[118] The acts include aircraft hijacking, aviation sabotage, and violence on flights and at airports, hostage-taking, civilian bombings, financing and possession of nuclear material. The UN and its specialised organs such as the International Civil Aviation Organisation (ICAO), the International Maritime Organisation (IMO), and the International Atomic Energy Agency (IAEA), are the drafters and depositories of these universal instruments.[119] These legal instruments promote the criminalisation approach to countering terrorism-related activities unequivocally. Most of the documents demand the member states to criminalise offences, which are common in terrorist activities, and urge those that have

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114 United Nations Office on Drugs and Crime, Handbook on Criminal Justice Responses to Terrorism (New York, 2009); see also, Zdzislaw Galicki, 'International Law and Terrorism' (2005) 48:6:2 *The American Behavioral Scientist*, 743.

115 United Nations Office on Drugs and Crime, *Handbook on Criminal Justice Responses to Terrorism* (United Nations, New York 2009) 6.

116 Article 10, Universal Declaration of Human Rights 1948.

117 Article 9, Universal Declaration of Human Rights 1948.

118 See United Nations Office on Drugs and Crime, *International Law Aspects of Countering Terrorism* (United Nations, New York, 2009) 27

119 See Arvinder Sambei, Anton du Plessis, and Martin Polaine, *Counter-Terrorism Law and Practice: An International Handbook* (Oxford University Press, Oxford, 2009) 25.

custody of the offenders to either prosecute or extradite the offender to another state. The Convention on Offences and Certain Other Acts Committed on Board Aircraft 1963, for instance, urges the contracting parties to take action against offences, committed on board and determine criminal jurisdiction based on the state of registration. The Convention for the Suppression of Unlawful Seizure of Aircraft 1970 requires the state parties to criminalise certain acts and make hijackings punishable by 'severe penalties'.[120] Other examples of important instruments that promote criminal justice responses to terrorism are the International Convention against the Taking of Hostage 1979 and the International Convention for the Suppression of Terrorist Bombings 1997.

In the aftermath of 9/11, the United Nations Security Council (UNSC) adopted Resolution 1373, which calls on UN member states to implement measures to prevent, criminalise and suppress all acts of terrorism within their jurisdiction.[121] The resolution covers various counter-terrorism measures, including controls upon terrorist financing and weapons transfers, criminalisation of specific acts, improving inter-state cooperation for border and immigration control.[122] Then, UNSC Resolution 2178, which was adopted in 2014, describes further the obligation of every member state to prevent and counter terrorism activities locally and globally, particularly related to the Islamic State group and foreign fighters.[123]

It is mentioned earlier in Chapter 3 that the international law does not make a great impact on Malaysia's counter-terrorism legislation mainly due to the state's poor ratification record of international treaties. But several moves made by the government recently may bring some hope, albeit the progress is slow. In 2007, Malaysia acceded to the International Convention against the Taking of Hostage 1979 and the International Convention for the Suppression of the Financing of Terrorism.[124] Before acceding to the conventions, the government amended the Penal Code 1936 by inserting new provisions to criminalise and extend jurisdiction with regards to hostage

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120 Article 2, Convention for the Suppression of Unlawful Seizure of Aircraft 1970.

121 Eric Rosand, 'Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight against Terrorism' (2003) 97 *American Journal of International Law*, 333.

122 Clementine Olivier, 'Human Rights Law and International Fight against Terrorism: How Do Security Council Resolutions Impact on States' Obligations under International Human Rights Law (Revisiting Security Council Resolution 1373)' (2004) 73 *Nordic Journal of International Law*, 399.

123 Cian Murphy, 'Transnational Counter-Terrorism Law: Law, Power And Legitimacy In The 'Wars On Terror'(2015) 6:1 *Transnational Legal Theory*, 31.

124 Dewan Rakyat Hansards, 10 November 2003, 58.

taking and funding for terrorism.[125] Other than fulfilling obligations under selective international conventions, the government also looked into the legal responses of other jurisdictions as a guideline in enacting anti-terrorism legislation, including the laws in the UK and Australia, as well as the Commonwealth Secretariat recommendations.[126] This perhaps could be construed as an indirect influence of international law on Malaysia's counter-terrorism law.

4.5 Possible Risks and Dangers of the Criminalisation Approach

Although it has been argued that the criminalisation approach preserves the right to a fair trial and other values guaranteed under the rules of law, it is also prone to be manipulated. One may point the blame to the government, but then again, the criminal justice system can also be harmed by the terrorist.

4.5.1 Risks of Being Politicised

Aside from the denunciatory role performed by criminal law, criminal trials are capable of being powerful communicative instruments to convey messages or even political propaganda. Thus, criminal trials can be a perfect tool to be used or abused, either by state or its opponents, in pursuing their political agenda or claiming legitimacy within the framework of the law and legal procedures.

Looking from the concept of performativity within terrorism trials, de Graaf asserts that parties may take advantage from the criminal justice system 'to persuade their target audience(s) in (and outside) the courtroom of the justice of their narrative(s) and injustice of the one on the opposite side of the bar'.[127] At this point, criminal trials turn into 'places of lawfare', where the law and legal system are abused for communicative and strategic objects.[128] This enhances the classical meaning of lawfare which Kennedy described as 'the art of managing law and war altogether'.[129] From here, it is crucial to discuss how the state and terrorist suspects could or might manipulate the criminal trials, hence diminishing the value of criminalisation approach.

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125 Penal Code (Amendment) Act 2003 [Act A1210].

126 The Prime Minister's Department, *Kertas Putih: Ke Arah Menanggani Ancaman Kumpulan Islamic State* (2014) 76.

127 Beatrice de Graaf, 'Conclusion', in Beatrice de Graaf & Alex P. Schmid, *Terrorists on Trial: A Performative Perspective* (Leiden University Press, Leiden, 2011), 510.

128 Wouter G. Werner, 'The Curious Career of Lawfare' (2010) 43:1 *Case Western Reserve Journal of International Law*, 61.

129 David Kennedy, *Of War and Law* (Princeton University Press, Princeton, 2006) 5.

4.5.1.1 Prosecuting Political Dissidents

With reference to European and United States cases, Kirchheimer categorised political trials into three types, which are as follows:

> First, the trial involving a common crime committed for political purposes and conducted with a view to the political benefits which might ultimately accrue from successful prosecution;
>
> Second, the classic political trial: a regime's attempt to incriminate its foe's public behaviour with a view to evicting him from the political scene; and
>
> Third, the derivative political trial: where the weapons of defamation, perjury, and contempt are manipulated in effort to bring disrepute upon a political foe.[130]

To assess the possible risks posed by criminal trials in Malaysia, it is useful to identify some significant past trials that illustrate the above characterisations.

The first category perhaps can be seen in the case of Mohd Rafizi Ramli (2013). The accused, who is an opposition politician, was charged with disclosing to the public confidential documents under section 97(1) of the Banking and Financial Institutions Act 1989.[131] He allegedly committed to the offence in order to expose corrupt practices linked to the then Prime Minister, Najib Razak. The prosecution and conviction arguably fit the narrative that the government was trying to conceal the issue. Accordingly, it gave political benefits to the Opposition.

Two sodomy trials of Anwar Ibrahim in 1998 and 2008 perhaps are related to the second category. It has been contended that the criminal law was used by the government as a political instrument.[132] Anwar was Deputy Prime Minister of Malaysia from 1993 to 1998 and a member of parliament since 1982.[133] In both cases, he was charged with committing carnal intercourse against the order of nature.[134] The offence might not fall under the category of 'common crime' underlined by Kirchheimer, but it

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130 Otto Kirchheimer, *Political Justice: The Use of Legal Procedure for Political Ends* (Princeton University Press, New Jersey, 1961) 46.

131 *Mohd Rafizi Ramli v Public Prosecutor* [2014] 4 CLJ 1.

132 Kanishka Jayasuriya, The Exception Becomes the Norm: Law and Regimes of Exception in East Asia (2001) 2:1 *Asian-Pacific Law & Policy Journal*, 108, 111.

133 Wu Min Aun, 'Anwar Ibrahim: The Fall and Fall of A Favoured Son' (2000-2001) *Law Asia Journal* 46.

134 An offence under section 377A of the Penal Code 1936 [Act 574]

carries a sort of pejorative trait that can be used to attract public attention. The 1998 prosecution took place after he had been removed from the government.[135] He was also charged with abusing power by ordering police to obtain retractions of allegations of sexual misconduct against himself.[136] In 2002, Anwar lost his final appeal against the corruption conviction when the Federal Court upheld the finding of the trial court.[137] However later in 2004, the apex court of Malaysia overturned his sodomy conviction.[138] Again, Anwar was brought to the court in 2008 to be tried for another sodomy charge. He was the Leader of the Opposition at that time. He was initially acquitted by the trial judge at the High Court, but the finding was overturned by the Court of Appeal in 2014. The Federal Court affirmed the decision and sentenced Anwar to five years of imprisonment.[139] However, he later obtained a full pardon from the Yang di-Pertuan Agong soon after the BN government collapsed after the 2018 General Election.[140]

Both trials received criticisms, including the abuse of the criminal justice system against a political opponent.[141] The impartiality and independence of the judiciary, along with the credibility and integrity of the prosecution service led by the Attorney General came into question. In both trials, Anwar maintained his political conspiracy defence and, in his unsworn statement from the dock, Anwar claimed that the 'trial is for all intents and purposes a show trial'.[142]

There are at least two common goals in political trials or politically-motivated prosecutions.[143] The first goal is to eliminate or remove domestic political foes in the arena, and the second is to destroy their reputation and moral image. In Anwar's cases, both objects seem to have been achieved. He was disqualified as a Member of

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135 *Public Prosecutor v Dato' Seri Anwar bin Ibrahim & Anor* [2001] 3 MLJ 193.

136 *Public Prosecutor v Dato' Seri Anwar Bin Ibrahim* [1999] 2 MLJ 1.

137 *Dato' Seri Anwar Bin Ibrahim v. Public Prosecutor* [2002] 3 MLJ 193.

138 *Dato' Seri Anwar Ibrahim v. Public Prosecutor* [2004] 3 CLJ 737.

139 *Dato' Seri Anwar bin Ibrahim v Public Prosecutor and another appeal* [2015] 2 MLJ 293.

140 Comptroller of the Royal Household, Media Statement: Full Pardon of Y.Bhg Dato' Seri Anwar Ibrahim (14 May 2018).

141 See Amnesty International, 'Malaysia: Opposition Leader Anwar Faces 'Show Trial''(29 January 2010) <https://www.amnesty.org/en/press-releases/2010/01/malaysia-opposition-leader-anwar-faces-e28098show-triale28099-20100129/>. See also Human Right Watch, *Malaysia: Anwar's Conviction Sets Back Rights* (10 February 2015) <https://www.hrw.org/news/2015/02/10/malaysia-anwars-conviction-sets-back-rights>; International Commission of Jurists, 'Federal Court judgment on Anwar Ibrahim's 'sodomy II' appeal a blow to human rights in Malaysia'(10 February 2015) <https://www.icj.org/federal-court-judgment-on-anwar-ibrahims-sodomy-ii-appeal-a-blow-to-human-rights-in-malaysia/> all accessed 10 May 2017.

142 Keadilan Daily, 'Kenyataan Anwar dari kandang tertuduh: Statement From The Dock' (22 August 2011) <http://www.keadilandaily.com/kenyataan-anwar-dari-kandang-tertuduh/> accessed 10 May 2017.

143 Otto Kirchheimer (n 109) 63.

Parliament twice and barred from contesting or standing in elections for a period of time because of his criminal convictions.[144] Prosecuting a Muslim politician for illegal sexual behaviour that is associated with homosexuality in a Muslim majority country would meet the second objective.[145]

The second category of political trials also deals with the use of criminal law to suppress political opponents in exercising their public duty. The victims are not necessarily politicians, but coming from other factions of society who are critical of the government's policies or its leaders. Mohd. Sani claims that the Malaysian government has abused law for 'its own security and stability, to strengthen its hold on power, to restrain the opposition and to control public opinion'.[146] A series of trials, in which the accused persons were charged with offences under the Sedition Act 1948 for criticizing the government are notable examples of political trials in Malaysia under this category.[147] Politicians, lawyers, community and religious leaders, academics and student activists are among the accused who have been prosecuted for exercising their rights.[148] National security and counter-terrorism laws are thus prone to be used against government dissidents in Malaysia too.[149] In the past, emergency regulations and ordinances, which were legislated to counter Communist terrorism, were invoked to the extent of changing the administration of the criminal justice system fundamentally.[150] It must be noted that, apart from being detained under the ISA 1960, Anwar Ibrahim was also charged with an offence of abusing power under the

144 Under Article 48 (e) of Federal Constitution 1957, a person is disqualified for being a member of either House of Parliament if he has been convicted of an offence and sentenced to imprisonment for a term of not less than one year or to a fine of not less than two thousand ringgit and has not received a free pardon.

145 Junaid B. Jahangir and Hussein Abdul-latif, 'Investigating the Islamic Perspective on Homosexuality'(2016) 63:7 *Journal of Homosexuality* 925.

146 Mohd Azizuddin Mohd Sani, 'Free Speech in Malaysia: From Feudal and Colonial Periods to the Present' (2011) 100:416 *The Commonwealth Journal of International Affairs* 531.

147 Human Right Watch, 'Creating a Culture of Fear: The Criminalization of Peaceful Expression in Malaysia' (2015) <https://www.hrw.org/sites/default/files/report_pdf/malaysia1015_4up_0_0.pdf> accessed 11 May 2017.

148 Some examples; *Mat Shuhaimi Shafiei v. Public Prosecutor* [2014] 5 CLJ 22; *Public Prosecutor v Chua Tian Chang* [2016] 1 *LNS* 102; *Public Prosecutor v Mohamed Ezam Mohd Nor* [2001] 8 CLJ 558*; Public Prosecutor v Mark Koding* [1982] 1 LNS 96, *N Surendran K Nagarajan v Public Prosecutor* [2016] 1 LNS 725; *Karpal Singh Ram Singh v Public Prosecutor & Another Appeal* [2016] 8 CLJ 15, *Hishamuddin Md Rais v. Public Prosecutor* [2016] 3 CLJ 256; *Public Prosecutor v Azmi Sharom* [2015] 8 CLJ 921; *Muhammad Safwan Anang v Public Prosecutor* [2017] 4 CLJ 91.

149 See *Public Prosecutor v Khairuddin Abu Hassan & Anor* (n 66) 701.

150 Michael Hor, 'Law and Terror: Singapore Stories and Malaysian Dillemas' in Victor V. Ramraj, Michael Hor, Kent Roach (eds), *Global Anti-Terrorism Law and Policy* (Cambridge University Press, Cambridge, 2005) 273.

Emergency Ordinance 1970, albeit the same act is also an offence under the Anti-Corruption Act 1997.[151]

The third category of political trials proposed by Kirchheimer emphasizes the abuse of trials and proceedings within a justice system in general. It highlights manipulations of civil and quasi-criminal litigations in order to bring disrepute upon political opponents. Existing laws governing defamation, libel and contempt are manipulated as political weapons. Walker and Weaver contend that libel litigation in Malaysia and Singapore 'can affect not only personal reputations but also financial viability, political careers, public policy and personal liberty of the implicated individuals'.[152] Although this kind of political trial in most cases occurs outside the criminal justice system, it is imperative to observe how the practice and structure of the administration of justice in Malaysia are prone to be abused.

Kirchheimer's categorisation underlines the characteristics of political trials orchestrated by regimes or those who are in power to attack their vulnerable opponents. At this point, criminal trials offer legal validity, albeit legality does not always come along with legitimacy. Moreover, it is often uncertain that a political trial conducted under a constitutional regime would bring political advantages or drawbacks to its instigators and their election campaign.[153] This may trigger a question as to how trials can also be used by the 'victims' of state action to present the alternative narrative, as well as to reclaim legitimacy. Through terrorism trials, the criminalisation approach could possibly be at stake if the terrorist suspects abuse the legal system for tactical victories.

4.5.1.2 Exploiting Criminal Trials and Processes

Punishing criminals is not the only goal for holding a trial; rather, it is fundamentally a place to record and discover 'the truth' and declare it to the world.[154] For Arendt, a trial is more than just a trial, but rather a place to tell a story, reveal buried history and

151 Emergency (Essential Powers) Ordinance 1970 [No.22]; Anti-Corruption Act 1997 [Act 575]. See also *Dato' Seri Anwar Ibrahim v Public Prosecutor (2000)* 2 CLJ 695.

152 Clive Walker and Russell L. Weaver, 'Libelocracy' (2014) 41:1 *Journal of Malaysian and Comparative Law* 69, 73.

153 Otto Kirchheimer (n 109) 117.

154 Martti Koskenniemi, 'Between Impunity and Show Trials' (2002) 6 *Max Planck* UNYB, 1.

shape the terms of collective memory.[155] The Nuremberg trials, for instance, were described as 'the greatest history seminar ever held in the courtroom'.[156]

Trials can also be a platform to mobilise people to stand for and against the state. If a regime intends to destroy the credibility of its opponents by exposing their misconduct during the trial, the 'victims' can also make use of the same platform to challenge the state narratives and even propagate their political agenda. At this instant, the outcome of trials, be it conviction or acquittal, is no longer the primary object. Standing in court and defending against all charges would give a greater impact, particularly outside the courtroom. Anwar Ibrahim, for instance, chose to deliver a lengthy speech from the dock after being called to enter his defence. His deliberate act to testify without oath seems to be symbolic as it is an unusual move in criminal trials. An unsworn statement carries much less weight, as opposed to testifying under oath in the witness box.[157] In the Anwar case, the court did:

> [N]ot give much weight to what an accused has said in his unsworn statement as he is not subject to cross-examination by the prosecution nor can he be questioned by the trial judge.[158]

The tactic depicts Anwar's protest against the legitimacy of the trial, therefore in line with his defence of political conspiracy staged by the government. The aim is to retaliate against the government and gain people's support. The intended audience of the 'show trial' is neither the presiding judge, nor the prosecutor, but rather the public at large. According to N. Surendran, his party's Vice President who acted as his defence counsel too, the decision echoed the act of Nelson Mandela in the Rivonia trial, which aimed to 'expose the evils of the apartheid regime to the scrutiny of the world'.[159] Therefore, both the accused and the government are actually on trial before the judge and the court of public opinion.[160] A similar approach seems to have been adopted in

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155 Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (The Viking Press, New York, 1963) 8.

156 Lawrence Douglas, *The Memory of Judgement: Making Law and History in the Trials of the Holocaust* (Yale University Press, New Haven & London, 2005) 2.

157 See, *Shackle v Hodgson* (1962) *Crim. LR* 248; *Public Prosecutor v Shariff Kadir* (1997) 5 CLJ 463.

158 Dato' Seri Anwar bin Ibrahim v Public Prosecutor (n 113) 202.

159 N.Surendran, 'Press Release: Why Anwar Ibrahim Made an Unsworn Statement From The Dock' (23 August 2011) <http://anwaribrahimblog.com/2011/08/23/why-anwar-ibrahim-made-an-unsworn-statement-from-the-dock/> accessed on 13 July 2018.

160 Kenneth S.Broun, Saving Nelson Mandela: The Rivonia Trial and the Fate of South Africa (Oxford University Press, New York, 2012) 69.

the trial of Marwan Barghouti, where his trials were used to political gain support.[161] For even greater dramatic effect, Marwan's defence counsel had invited Nelson Mandela to attend the trial proceeding.[162]

The abuse of the criminal trial and process for political ends could bring damaging loss to the criminalisation approach. These implications may shape public perception towards the use of criminal justice system in countering terrorism. The legitimacy of the whole legal system will be threatened if people accept the narrative of injustice presented during trials, regardless of what is the final decision made by the court. Equally, the government would become more sceptical towards the criminalisation approach if its outcomes are costly and counter-productive.

As compared to Marwan and Mandela case, the Anwar trials are also classic examples of political trials, which Kirchheimer defines as 'a regime's attempt to incriminate its foe's public behaviour with a view to evicting him from the political scene', but Anwar survives.[163] One may argue that not all terrorism trials would be at risk of being politicised. Nevertheless, based on the above trials, we should not discount the susceptibility of a terrorism trial to be political and converted into a 'show trial', due to the nature and settings of the criminal justice system and the strong links between terrorism and politics. As Schmid suggests:

> The terrorist trials will almost be 'political' because terrorism is inherently a form of political violence. That the trials of those accused of terrorism are political despite the independence and impartiality of the judiciary does not mean that they are necessarily unfair.[164]

The question as to whether a trial is political or not seems to be less important, compared to whether or not the benefits from the trials are worth the risks involved. The focus should be given as to adequate safeguards to ensure political trials, including terrorism-related trials, can deliver fair and effective outcomes, or at least by preserving the minimum requirement of the judicial process. At this point, the courts should play a major role.[165] The supremacy of the Constitution and the rule of law

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161 Awol Allo, 'Marwan Barghouti in Tel Aviv: Occupation, Terrorism, and Resistance in the Courtroom' (2017) 26:1 *Social & Legal Studies* 47.

162 Lisa Hajjar, 'The making of a political trial: The Marwan Barghouti case' (2002) 225 *Middle East Report* 31.

163 Otto Kirchheimer, (n 109) 46.

164 Alex P. Schmid, 'Terrorism, Political Crime and Political Justice' in Beatrice de Graaf & Alex P. Schmid, *Terrorists on Trial: A Performative Perspective* (Leiden University Press, Leiden, 2011) 43.

165 Clive Walker, (n 29) 252.

should be upheld all the time. From there, the judiciary is able to defend itself against encroachments by other government branches, the executive and legislative.[166] However, this ability is affected by the idea of separation of powers, along with how the Constitution has been interpreted, and how the rule of law has been perceived in Malaysia.[167]

4.5.2 Possible Dangers to the Criminal Law in Malaysia

The normative values of the criminal law and justice system can also be at risk caused by the criminalisation approach, or to be exact an 'unprincipled criminalization' approach.[168] This happens when the criminal law has been abused or deployed without adhering to its established principles and pushed beyond its limits.

With regards to the criminalisation approach in Malaysia's counter-terrorism strategy, two interconnected circumstances deserve careful attention. The first situation links to the invention of special criminal offences and procedures that depart from the well-established principles and standards. These include criminalising conduct, which is not moral wrongdoing or causing harm, by creating precursor and inchoate offences, which are too remote from established and ordinary crimes, and enacting absolute liability offences. However, this special criminalisation process is not always detrimental to the criminal law and in fact important, particularly to 'nip in the bud' in the prevention of terrorism.[169] A senior prosecutor who was interviewed explained that the criminalisation of the acts is:

> [a]ctually an address on the socio-cultural and socio-economic aspects of terrorism. This essentially (means), we have recognised terrorism has come beyond just normal dissatisfaction. Terrorism, unlike normal crimes, for most parts are ideological driven.[170]

Another interviewed prosecutor further elaborated that:

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166 Alex P. Schmid (n 142) 40.

167 See Andrew Harding, *The Constitution of Malaysia: A Contextual Analysis* (Hart Publishing, Oxford, 2012) 196.

168 Dennis Baker, *The Right Not to be Criminalized: Demarcating Criminal Law's Authority* (Ashgate, Surrey, 2011) 2.

169 Participant No.1.

170 Participant No.6.

> We need to have such offences as a mean of prevention because the law needs to nip the possible terrorism acts in the bud, but we must be very cautious, we must ensure (that there are) proper safeguards also in the same provision. If we need to have the presumption, it must be a rebuttable presumption, and if we are going to have expert witness to testify as to what is considered terrorism, accessible to defence, authorities must have proper complete intelligence.[171]

Further discussion about the special offences relating to terrorism can be found in Chapter 6 of the thesis. Apart from substantive law, adjective law and rules of evidence are also subject to modification in order to facilitate the prosecution of terrorist suspects in courts. Justice and fairness in a criminal trial could be possibly reduced by these deviations. Further discussion concerning the use of special criminal law and procedure within Malaysia's counter-terrorism strategy will be presented in Chapter 6.

The second situation that would be detrimental to the criminal law and justice system is when the normalisation of special law and procedures prevails. It could happen when the government expands the use of special criminal law and procedures, which was enacted to counter terrorism, to other types of crime involving non-terrorist actors. The government, for instance, has attempted to deploy special procedures provided under the SOSMA 2012 in *Public Prosecutor v Khairuddin Abu Hassan and Matthias Chang Weng Chieh* (2017).[172] Both were arrested under the SOSMA 2012 and later charged with attempting to commit sabotage under section 124L of the Penal Code 1936.[173] The prosecution argued that the offence falls within the definition of 'security offence' under the SOSMA 2012; hence, special procedures were applicable. The Court of Appeal rejected the contention and held that 'SOSMA is intended by the Parliament to combat terrorism'.[174] The accused persons were charged with attempting to sabotage domestic banking and financial services. According to the court, this particular act falls under paragraph (e) under Article 149(1) of the Constitution, hence outside the ambit of the SOSMA 2012.[175] It must be noted that some view the prosecution as politically motivated since the duo had been constantly criticising the

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171 Participant No.19.

172 *Public Prosecutor v. Khairuddin Abu Hassan* & Anor (n 62), 701.

173 Section 124L reads: Whoever attempts to commit sabotage or does any act preparatory thereto shall be punished with imprisonment for a term which may extend to fifteen years.

174 *Public Prosecutor v Khairuddin Abu Hassan & Anor* (n 62) 702.

175 Under para (e) of Article 149(1), the Parliament can make special law when it 'is prejudicial to the maintenance or the functioning of any supply or service to the public or any class of the public in the Federation or any part thereof'.

government, particularly the then Prime Minister, Najib Razak.[176] With regards to the normalisation of special laws, the action can be argued to be an attempt to extend the operation of special criminal procedures governing terrorism to other types of crime. The normalisation of special law could also happen when the government imports exceptional law into ordinary legislation, especially the general code that governs normal criminal law. For example, in 2015, the government amended the Criminal Procedure Code by inserting a provision that allows the court to order a person to be attached with an electronic monitoring device upon releasing him on bail.[177] The use of the device on suspects was first introduced in Malaysia's criminal justice system through the SOSMA 2012.[178]

These risks, nevertheless, should not rule out embarking on the criminalisation project. All the dangers arise when the state departs from constitutionalism and the rule of law. If all state branches play their roles and observe the limit of their powers strictly, the criminalisation project arguably can operate fairly and effectively at the very least fulfilling the 'minimum requirements of a judicial process'.[179]

4.6 The Factors Favouring and Hindering the Criminalisation Approach as Primary Legal Response in Malaysia

It has been argued that the repeal of the ISA 1960 and the introduction of the SOSMA 2015 mark a paradigm shift in Malaysia's counter-terrorism strategy. The criminalisation approach has become more prominent as compared to the past when the government relied heavily on the use of the ACM.[180] The factors favouring the criminalisation can be explained from several viewpoints.

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176 See European Parliament resolution on Malaysia (2015/3018(RSP)); The Malaysian Bar, 'Press Release: Respect the Rule of Law and Release Dato' Sri Khairuddin and Matthias Chang' (15 October 2015) <http://www.malaysianbar.org.my/press_statements/press_release_%7C_respect_the_rule_of_law_and_release_dato_sri_khairuddin_and_matthias_chang.html> accessed 13 May 2017.

177 Section 19, Criminal Procedure Code (Amendment) Act 2016 [Act 1521].

178 Section 7, Security Offences (Special Measures) Act 2012 [Act 747].

179 The Committee chaired by Lord Diplock developed the concept based on the European Convention for the Protection of Human Rights and Fundamental Freedom, where the UK is a party, see, *Report of the Commission to Consider Legal Procedures to Deal with Terrorist activities in Northern Ireland 1972* (Cmd 5185) 8.

180 Clive Walker and Mukhriz Mat Rus, 'Legislating for National Security' in Nuraisyah Chua Abdullah (ed.), *Developments in Malaysian Law* (Sweet & Maxwell, Subang Jaya, 2018) 1.

The first factor reflects the change of attitude of the previous BN government towards the criminalisation approach.[181] As mentioned before, the replacement of the ISA 1960 with the SOSMA 2012 is a significant move, albeit some construe it as a 'political stunt'.[182] For a senior prosecutor, it is also a 'policy call'.[183] 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'.[184] Another judge also welcomed the introduction of the SOSMA 2012 by highlighting the right of the accused to defend himself.[185] The prospect of the criminalisation approach is amplified with the commitment to uphold the rule of law and carry out law reforms by the new PH government.[186] Three PH lawmakers, who have been interviewed, expressed their strong disapproval over the use of the executive-based ACM under the repealed ISA 1960, as well as under the POTA 2015 and POCA 1959.[187] It must be noted that a number of PH cabinet ministers and members of Parliament had been detained under the ISA 1960 in the past. Yet, the present Prime Minister Mahathir Mohamad, who currently leads the PH government, was a staunch defender of the legislation when he served as Prime Minister from 1981 to 2003.[188]

The second factor derives from the enactment of special criminal law and procedures relating to terrorism. The move paves the way for more prosecutions of terrorist suspects in court. Within the first five years of the SOSMA 2012 from 22 June

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181 Abdul Razak, Javaid Rehman, Joshua Skoczylis, '"Prevent" Policies and Laws: A Comparative Survey of the UK, Malaysia and Pakistan' in Genevieve Lennon and Clive Walker (eds), Routledge Handbook of Law and Terrorism (Routledge, Abingdon, 2015) 383.

182 Participants No.1 & No.3; see also, Graham Brown, 'Malaysia in 2012: Promises of Reform; Promises Met?' (2013) *Southeast Asian Affairs*, 153; Bonn Juego, 'The Institutions of Authoritarian Neoliberalism in Malaysia: A Critical Review of the Development Agendas Under the Regimes of Mahathir, Abdullah, and Najib. (2018) 11:1 *Austrian Journal of South-East Asian Studies,* 53.

183 Participant No.7; see also Ahmad Zahid Hamidi, Malaysia's Policy on Counter-Terrorism and Deradicalisation Strategy (2016) 6:2 *Journal of Public Security and Safety* 1.

184 Participant No.28; see also Amanda Whiting, 'Emerging from Emergency Rule? Malaysian Law 'Reform' 2011-2013 (2013) 14:2 Australian Journal of Asian Law, 1, at page 20; SUHAKAM 'Press Statement: Repeal of the ISA is Commendable, Review of the New Bill is Required' (16 September 2012) <http://www.suhakam.org.my/wp-content/uploads/2013/12/REPEAL-OF-THE-ISA-IS-COMMENDABLE-REVIEW-OF-THE-NEW-BILL-IS-REQUIRED.pdf> accessed on 26 December 2019.

185 Participant No.31; see also Abdul Gani Patail, 'Keynote Speech: Transforming the Legal Landscape: Public Safety Initiative' (2013), Midas Talk 6/2013, <http://www.ilkap.gov.my/nlc2013/download/Nota/D1KeynoteTSAG.pdf> accessed 29 December 29, 2013.

186 See Table 1.1, Chapter 1.

187 Participants No.3, 29 & 32; see also Maria Chin Abdullah, 'Bringing the Reform Agenda from the Streets into Malaysia's Parliament' (2018) 106:6 *The Round Table*, 107:6, 817.

188 See R.S. Milne and Diane K. Mauzy, *Malaysian Politics under Mahathir* (Routledge, Abingdon,1999) 106.

2012 to 28 February 2017, 989 individuals were arrested under the law, and 641 of them were prosecuted in court.[189] More discussions of the creation of new special criminal laws and their implementation are presented in Chapter 6.

The third factor can be inferred from the level of acceptance towards the criminalisation approach among counter-terrorism actors, particularly the government and security officials.[190] An interviewed senior officer at the Attorney General Chambers 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 judex 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.[191]

The similar tone comes from another interviewed prosecutor who has been assigned to handle terrorism-related cases. According to him:

> Some people thought that the repeal of the ISA is bad for the country, but I personally think it is good, then now we are having SOSMA, in a way it is procedural law where the respective detainees still have access to legal recourse. They can air their grievances through the legal channel in court, and....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.[192]

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 drug the Emergency or the Communist insurgency was well recognised,

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189 Deputy Home Minister, Dewan Rakyat Hansard, 4 April 2017, 193.

190 See Saroja Dhanapal and Johan Shamsuddin Sabaruddin, 'Rule Of Law: An Initial Analysis Of Security Offences (Special Measures) Act (Sosma) 2012 23 (1) 2015 IIUMLJ 1, at page 23.

191 Participant No.6.

192 Participant No.5.

> 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.[193]

The same prosecutor also observed that the introduction of the SOSMA 'to a limited extent changes the mind-set of the prosecutors, enforcement agency and investigating authorities' in performing their duty.[194]

The positive views of the above-mentioned prosecutors towards the criminalisation approach could be attributable to their professional status.[195] But, it should be noted that other participants, who play different roles within counter-terrorism strategy, also applaud the criminalisation approach. An interviewed senior police officer at the Counter-Terrorism Unit asserted that the police is 'ready to implement the SOSMA' even though it is 'something new'.[196] The officer explained that it would not be a burden for the police because the 'new approach' also deploys the 'same framework' used in dealing with ordinary crimes. He also acknowledges that the approach brings more transparency.[197] The same point was also shared by a representative of the Human Rights Commission of Malaysia or *Suruhanjaya Hak Asasi Manusia Malaysia* (SUHAKAM). The representative welcomes the move by emphasising that the:

> Society needs to know who, why and what the (terrorist) networks. Society gets more confidence if it is done in a more confident manner. Bring them (terrorist suspects) to court is a breath of fresh air.[198]

Transparency is also a pivotal factor to prioritise the criminalisation approach according to another interviewed senior prosecutor, as he said:

> I will choose prosecution (over executive-based measures) because that would be transparent, and I think that so far in Malaysia, most of the cases we have been prosecuting.[199]

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193 Participant No.19.

194 ibid.

195 Mirjam Knapik, 'The Qualitative Research Interview: Participants' Responsive Participation in Knowledge Making' (2006) *International Journal of Qualitative Methods* 77; see also Loretto Quinney , Trudy Dwyer, and Ysanne Chapman, 'Who, Where, and How of Interviewing Peers: Implications for a Phenomenological Study' (2016) *SAGE Open*, 1.

196 Participant No.30.

197 Abdul Razak, Javaid Rehman, Joshua Skoczylis (n 181) 394.

198 Participant No.4.

199 Participant No.6.

From another perspective, a senior legal officer who has been assigned to oversee the preventive detention process under the POTA 2015 prefers the prosecution to executive-based detention when 'a person has committed an offence which causes death, injury and damage'.[200] According to the officer, prosecuting a terrorist suspect in court under the SOSMA 2012 offers more deterrent effect as compared to preventive detention without trial.[201]

Another factor favouring the criminalisation approach in Malaysia arises from the readiness and capability of the judiciary to try terrorism-related offences.[202] 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.[203] A High Court judge contended that the judiciary is ready to embrace the 'new approach' and develop the related law.[204] Some judges have been specifically trained to hear terrorism-related cases, along with the establishment of 'SOSMA courts'.[205] From an outsider's perspective, a representative of SUHAKAM 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.[206]

Additionally, an interviewed senior private practitioner shared the same view and added that:

> [T]he 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,

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200 Participant No.12.

201 See judgment, *Public Prosecutor v. Mohd Shaiful Mohd Jaafar* [2019] 3 CLJ 838

202 Chief Justice Ariffin Zakaria, 'Speech at the Ceremonial Opening of the Legal Year 2016' (13 January 2017) <http://www.kehakiman.gov.my/sites/default/files/oly-2017-7.pdf> accessed on 10 March 2019.

203 Malaysian Judiciary, Yearbook 2016 (Percetakan Nasional Malaysia Berhad, Kuala Lumpur 2017) 79.

204 Participant No.28.

205 ibid.

206 Participant No.4.

> 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…[207]

Other complaints are related to the existing facilities and 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.[208]

At the same time, the following are the challenges faced by the criminalisation in Malaysia, which may jeopardise its working and prevent it from becoming the primary legal response to terrorism.

The first hindrance derives from the introduction of laws, which are considered by some as a 're-incarnation' of the ISA 1960, namely the POTA 2015 and POCA 1959.[209] These laws provide indefinite detention without trial and operate beyond the criminal justice system. No judicial review is allowed to challenge the action taken by the authorities under the laws.[210] From April 2014 to October 2017, 3,641 individuals have been detained under the POCA 1959; and from September 2015 to October 2017, 27 have been detained under POTA 2015.[211] This accordingly shakes the impression that the criminalisation approach is the most preferred approach by the authorities unless the new government repeals or reviews the laws.[212]

The second challenge links to the behaviour and competency of the state's counter-terrorism actors who are not familiar with the criminalisation approach or the application of court proceedings to the terrorists. An interviewed human rights organisation representative contended that the 'short-cut approach' must be stopped, and 'deeper criminal investigation, forensic, and intelligence, background checks need to be done [sic]'.[213] The criminalisation approach requires the police to gather evidence

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207 Participant No.1.

208 Participant No.7.

209 Safia Naz and Estheshamul M.Bari, 'The Enactment of the Prevention of Terrorism Act, 2015 in the Pursuance of the Constitution of Malaysia: Reincarnation of the Notorious Internal Security Act, 1960' (2018) 41 *Suffolk Transnational Law Review* 1.

210 See, Section 19, Prevention of Terrorism Act 2015 [Act 769]; section 15A, Prevention of Crime Act 1959 [Act 297]; see also, Ho Peng Kwang, Johan Shamsuddin Sabaruddin, Saroja Dhanapal, Judicial Review In Security Offence Cases: The Malaysian Experience (2017) 10 Current Law Journal (Article) i.

211 Parliamentary Written Reply by the Deputy Home Minister to Dato' Seri Dr. Wan Azizah Ismail (Permatang Pauh MP) October 2017, Question No.506, Reference No.10443.

212 Saroja Dhanapal and Johan Shamsuddin Sabaruddin, 'Prevention of Terrorism: An Initial Exploration of Malaysia's POTA 2015 (2017) 25:2 Pertanika J. Soc. Sci. & Hum,783.

213 Participant No.4.

to a higher threshold than under executive orders in order to present cases in court.[214] Five interviewed prosecutors complained that police need to improve the quality of the evidence and the investigation.[215] One of them addressed the complaint that the lack of funding affects the investigations.[216] A limitation that is not unique to Malaysia.[217] Another three prosecutors underlined the importance of utilising up-to-date technology in terrorism-related investigations.[218] In terms of developing skills, a senior police officer at the Counter-terrorism Unit confirmed that the department provides special training to its officers in conducting terrorism-related investigations.[219] However, a judge proposed that special training should be given to the police in giving testimony during trial.[220] Most of the police personnel involved in terrorism-related cases are from Special Branch Division (SB), which is the intelligence agency of the Royal Malaysian Police. According to the judge who had presided over a number of terrorism-related trials:

> Most of them are SBs who come to court and give evidence for the first time…(they) are not familiar with the court process…and quite reluctant to reveal information. (Hence) training is required.[221]

Although the state counter-terrorism actors seem to accept the prosecution of terrorists as the government's new approach, not all of them approved the primacy of the criminalisation approach in Malaysia, as discussed in section 3.6 of Chapter 3.

Another challenge to the criminalisation approach links to the capability of the new government to deliver its ambitious promises concerning law and institutional reforms in Table 1.1. As mentioned earlier, the reforms would substantially benefit the criminalisation approach. Nevertheless, there are promises stated in the PH's

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214 Francesca Galli, Valsamis Mitsilegas and Clive Walker, 'Terrorism Investigations and Prosecutions in Comparative Law' (2016) 20:5 *The International Journal of Human Rights*, 593.

215 Participants No.5, No.7, No.19, No.23, No.24.

216 Participant No.7.

217 Christopher Banks, 'Security and Freedom After September 11: The Institutional Limits and Ethical Costs of Terrorism Prosecutions' (2010) 13:1 *Public Integrity*, 5.

218 Participants No.7, No.19, No.23; see also Niken Dwi Wahyu Cahyani, Nurul Hidayah Ab Rahman, William Bradley Glisson, Kim-Kwang Raymond Choo, 'The Role of Mobile Forensics in Terrorism Investigations Involving the Use of Cloud Storage Service and Communication Apps'(2017) 22 Mobile Netw Appl 240.

219 Participant No.30; see also Clive Walker and Russell Stockdale, 'Forensic Evidence and Terrorist Trials in the United Kingdom' (1995) 54 *Cambridge Law Journal* 69.

220 Participant No.28.

221 ibid.

manifesto at Table 1.1 that require amendments to be made to the Federal Constitution 1957, such as, the separation of the Attorney General's and Public Prosecutor's offices and the creation of a new mechanism for appointing judges.[222] Such constitutional amendments can only be done with the support of a two-thirds majority in Parliament. At present, the PH government hold a simple majority (just 112 seats out of 222). That means some of the reforms arguably are currently unattainable.[223]

4.7 The Avoidance of Criminalisation Mode (ACM)

As emphasised in section 4.1, the ACM is not fundamentally based on criminal justice values and standards like the NCM and the SCM, but rather represents a conditional mode of criminalisation. It more often than not works beyond the criminal justice system and its normative standards. But the ACM arguably provides measures that connect with the workings of the criminalisation project. The links can be gathered from two aspects. Firstly, the ACM provides ancillary measures to the operations of the NCM and SCM in certain situations. It nevertheless should not override the primacy of those two modes within the criminalisation approach. Secondly, there are legal measures which are not based on the NCM and SCM that work entirely or partly within the criminal justice system. This includes quasi-criminal proceedings in which selected standards and values of criminal justice are retained.

The above two aspects can be found in a number of legal measures that are widely used in many jurisdictions. Some notable examples are executive detention and personal restriction orders, proscription, suppression of terrorism funding and property, and deportation. Most of the measures are not exclusively meant to confront terrorism, but also other 'special' types of crime such as organised and drug-related activities. The following table lists the measures and legislation in Malaysia which contribute to the ACM.

Table 4.3: The ACM-type of Measures in Malaysia's Counter-Terrorism Strategy

	Measures	Legislation
1	Detention without trial	i. s.13, Prevention of Terrorism Act 2015 [Act 769] – POTA 2015

222 Richard Foo and Amber Tan, 'Separation of Powers in New Malaysia: Hope and Expectations' (2018) 5 J *Int'l & Comp L* 529.

223 Thomas Fann, 'Challenges and Opportunities Facing Civil Society Organisations in the New Malaysia' (2018) 107:6 *The Round Table*, 819.

		ii. s.19A, Prevention of Crime Act 1959 [Act 297] – POCA 1959 iii. s.6(1), Dangerous Drugs (Special Preventive Measures) Act 1985 [Act 316] – DDA(SPM) 1985
2	Restriction and Control orders	i. Chapter VII, Criminal Procedure Code [Act 593] 1935 ii. s.6 & 13, POTA 2015 iii. s.4, SOSMA 2012 iv. s.7A & 15, POCA 2015 v. s.6(3), DDA(SPM) 1985
3	Proscription	i. s.5, Societies Act 1966 [A335] ii. s.66B & s.66c, Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2011 [Act 613] – AMLATFPUA 2011 iii. s.130KA, Penal Code 1936 [Act 574]
4	Confiscation and freezing of assets linked to terrorism	Part VIA (s.66A-66F), AMLATFPUA 2011
5	Immigration and nationality controls	s.5-s.7, Special Measures Against Terrorism in Foreign Countries Act 2015 [Act 770]

These measures have been in place since the colonial era, but derive from different pieces of legislation. There were slight changes made to the details of the detention, but the fundamental aspects remain. The authorities are given great powers to detain a person for a period that can be indefinite without any need to disclose the 'evidence' to the detainee or the court. Under the POTA 2015, the power is vested in the Prevention of Terrorism Board. An interviewed member of the Board asserted that the body is independent and competent to conduct fair process by saying that:

> [T]he current board is comprised of three very senior lawyers. No issue that we are going to abuse the power…Our discussions are lengthy and thorough. If you attend our discussion, you can even see opposing views…Because we

> want the best (for the detainees). There's no direction from minister…. All board members will be asked to address their view. [224]

The chairman of the Board 'must be legally qualified person with at least fifteen years of experience in the legal field'.[225] Based on the information obtained from a member of the Board, the present Chairman is a former High Court judge and the Deputy Chairman is a senior private practitioner with vast legal experience.[226]

The scepticism towards the Board is mainly based on two factors. First, any decisions made by the Board are not subject to judicial review, which includes any proceedings instituted by the way of a writ of habeas corpus.[227] The same applied to the Prevention of Crime Board, following an amendment made to the POCA 1959 in 2014.[228] The ouster clauses in the legislation are also detrimental to the rule of law. Second, the members of both Boards are deemed to be 'public servants', even though they are appointed by the king, Yang di-Pertuan Agong.[229]

As the executive detention operates instead of the normal criminal justice system and without judicial scrutiny, it could override the criminalisation project. In *Public Prosecutor v Siti Noor Aishah bt Atam* (2017), the accused was acquitted at the end of the trial after the prosecution failed to prove the offence of possession linked to terrorism.[230] But she was subsequently detained under the POCA 1959.[231]

Another type of executive measure, which is not alien to Malaysia's counter-terrorism strategy, are restriction orders. The measures had been arbitrarily used during the Emergency 1948-60, not just against terrorist suspects but also members of public who may support their objectives. The restrictions which were imposed are not just preventive in nature, but also 'protective and punitive'.[232] For instance, a village in Tanjong Malim was subjected to a 22-hour curfew after a British District Officer was

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224 Participant No.12.

225 Section 8 (1)(a), Prevention of Terrorism Act 2015 [769].

226 Participant No.12.

227 Section 19, Prevention of Terrorism Act 2015 [769].

228 Section 15A, Prevention of Crime Act 1959 [Act 297]; also Section 19, Prevention of Crime Act (Amendment and Extension) 2014 [Act A1459].

229 Section 8(1)&(7), Prevention of Terrorism Act 2015 [769].

230 *Public Prosecutor v Siti Noor Aishah bt Atam* [2017] 7 MLJ 461.

231 SUARAM, *Malaysia Human Rights Report 2016: Civil and Political Rights* (Suara Inisiatif Sdn Bhd, Petaling Jaya, 2017) 11.

232 Karl Hack, 'Everyone Lived in Fear: Malaya and the British Way of Counterinsurgency' (2012) 23:4 *Small Wars & Insurgencies*, 671, 689.

killed by the Communists in 1952.[233] The Secretary of State for Commonwealth Relations admitted that the restrictions in Tanjong Malim such as:

> [T]he curfew and the closing of schools, of course, contain an element of punishment…They are designed to make clear to the villagers that they cannot with impunity condone or assist cold-blooded murder.[234]

Hence, it is clear that the notion of prevention within restriction orders was stretched to include activities and individuals that are not directly linked to terrorism or insurgency. In the past, restriction orders were a tool for the authorities to curb criminal and subversive activities after independence. For example, a 10-year home confinement was imposed against Ashaari Muhammad, the supreme leader of a banned Islamic movement, namely Al-Arqam.[235]

In general, the present restriction measures in Malaysia can be categorised into two types, which are 'ordinary' and 'special' restriction orders. The first category derives from the 'normal' criminal procedure, which is applicable to all kinds of crimes and has its roots in the English Common Law. One example is the order to keep the peace and be of good behaviour with a bond under the Criminal Procedure Code 1935.[236] But it has never been used in terrorism-related cases in Malaysia.[237] Another category of restriction orders deals with exceptional prevention measures in confronting specific types of crimes such as the prevention measures under the POCA 1959.[238] Apart from that, other restrictions that can be imposed on terrorist suspects are provided under the POTA 2015. A restriction order under the legislation may require a person to reside at a specified place or area, or to observe a curfew, or to present at the nearest police station within a specified period, or to be attached with an electronic monitoring device, or to use only approved communications equipment.[239]

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233 Victor Purcell, *Malaya: Communist or Free?* (Stanford University Press, London,1954) 92.

234 HL Deb 07 April 1952 vol 176 cc15-32.

235 Ahmad Fauzi Abdul Hamid, 'Patterns of State Interaction with Islamic Movements in Malaysia during the Formative Years of Islamic Resurgence'(2007) 44 *Southeast Asian Studies*, 4.

236 See Chapter VII: Security for Keeping the Peace and for Good Behaviour, Criminal Procedure Code [Act 593].

237 cf, it is used in Canada, see section 810.011 of the Criminal Code. RSC 1985, c C-46; Craig Forcese, Antiterror Peace Bonds In A Nutshell <http://craigforcese.squarespace.com/national-security-law-blog/2016/4/1/antiterror-peace-bonds-in-a-nutshell.html> accessed 28 August 2019.

238 Preamble, Prevention of Crime Act 1959 [Act 297].

239 See section 6, Prevention of Terrorism Act 2015 [Act 769], section 6(3) Dangerous Drugs (Special Preventive Measures) Act 1985 [Act 316].

Under the POTA 2015, restrictions are an alternative to detention when the Prevention of Terrorism Board is satisfied that 'it is necessary that control and supervision should be exercised over any person or that restrictions and conditions should be imposed upon that person in respect of his activities, freedom of movement or places of residence or employment, but for that purpose it is unnecessary to detain him'.[240] An interviewed member of the Board informed that there are cases where detainees have been released earlier, that is less than two years and restrictions were then imposed.[241] According to him:

> We (the Board) had imposed restrictions because of few reasons, looking at his/her young age, still studying at university. We considered his/her psychological condition. We released him/her (from detention), but we did not let her/him free.[242]

Similar to detention orders under the POTA 2015, any decision made by the Board to impose restriction orders cannot be reviewed in court.

Another available measure within the ACM is the proscription of groups linked to terrorism. Arguably, it has also been an effective means for the authorities to confront terrorist organisations and pre-empt terrorism. In the past, the British proscribed the Malayan Communist Party to pre-empt their plots 'for full-scale up-raising'.[243] At present, the Societies Act 1966 gives power to a:

> Minister in his absolute discretion by order to declare unlawful any society or branch or class or description of any societies which in his opinion, is or is being used for purposes prejudicial to or incompatible with the interest of the security of Malaysia or any part thereof, public order or morality.[244]

It must be noted as well that an organisation is deemed to be an unlawful society if it is not registered under the Act.[245] The legislation also criminalises a number of acts related to unlawful societies, such as becoming office-bearer or member, inciting a

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240 Section 13 (3), Prevention of Terrorism Act 2015 [Act 769].

241 Participant No.12

242 ibid.

243 Cheah Boon Kheng, 'The Communist Insurgency In Malaysia, 1948-90: Contesting the Nation-State And Social Change (2009) 11:1 *New Zealand Journal Of Asian Studies* 132.

244 Section 5(1), Societies Act 1966 [Act 335].

245 Section 41(1)(b), Societies Act 1966 [Act 335].

person to become a member and publishing propaganda.[246] At this point, the Society Act 1966 operates within the criminal justice system, but it is founded in executive action as in the olden days.[247] The executive is given 'absolute discretion' to curtail the constitutional right of association. Hence, it might demean the rule of law, and jeopardise the criminalisation approach.

As for terrorism-related organisations, another way of proscription can be executed through a Ministerial declaration under the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act (AMLATFPUA) 2011.[248] A terrorist organisation can be declared as a 'specified entity' under the Act if:

> The Minister of Home Affairs 'is satisfied on information given to him by a police officer that -
> (a) an entity has knowingly committed, attempted to commit, participated in committing or facilitated the commission of, a terrorist act; or
> (b) an entity is knowingly acting on behalf of, at the direction of, or in association with, an entity referred to in paragraph (a),
> the Minister of Home Affairs may, by order published in the Gazette, declare the entity to be a specified entity.[249]

The above provisions were added into the Act 2007, and since then, a number of terrorist organisations have been proscribed.[250] That includes international organisations such as Islamic State (IS), Al-Qaeda, Al-Shabab, and Boko Haram, as well as regional and local-based organisations, like Katibah Nusantara and the Abu Sayyaf group and Darul Islam Malaysia.[251] It is imperative to note that, although the listing under the AMLATFPUA 2011 is principally meant to confront financial improprieties, it plays a significant role in trying terrorism-related offences too. The main reason is that the Penal Code 1936 also defines 'terrorist' and 'terrorist group' to include any 'specified entity under section 66B or 66C' the AMLATFPUA 2011.[252]

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246 Sections 42 to 48, Societies Act 1966 [Act 335]

247 Sections 55 to 58, Societies Act 1966 [Act 335].

248 Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2011 [Act 613].

249 Section section 66B (1), Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2011 [Act 613].

250 Anti-Money Laundering and Anti-Terrorism Financing (Amendment) Act 2003 [Act A1208], in force from 6 March 2007.

251 Federal Government Gazette (5 September 2016) P.U.(A) 234; also, Federal Government Gazette (12 November 2014) P.U.(A) 301.

252 Section 130B(1), Penal Code 1936 [Act 574].

Accordingly, judges in a number of cases have referred to the declarations in order to determine the status of an organisation in terrorism-related trials.[253] So if a person is charged with possession of an 'item associated with any terrorist group' under the Penal Code 1936 for instance, the proscription under the AMLATFPUA 2011 provides a straightforward answer on the legal status of the group.[254] If the group is not in the list, the court has to take a longer road as discussed in Chapter 3.[255]

Another counter-terrorism measure that gains much attention particularly from the international community after the 9/11 attacks is related to the funding of terrorism.[256] The anti-terrorism financing often consists of two important types of legal devices.[257] The first type deals with the criminalisation of 'the wilful provision or collection, by any means, directly or indirectly, of funds' which are intended or possibly used to carry out terrorist acts.[258] The offence falls within the SCM, when suspects will be prosecuted in court for offences such as providing and collecting funds for terrorism, or dealing with terrorist property.[259] Whilst, the second type involves proactive 'regulatory measures to prevent and counteract movements of funds suspected to be intended for terrorist purposes'.[260] This type of anti-terrorism financing measure is not based on criminal justice and is categorised as an ACM measure in this thesis. In the context of Malaysia, the ACM's anti-terrorism financing measures include freezing, seizure and forfeiture of property suspected to be involved with terrorist entities or terrorism activities.[261] These measures were incorporated in 2003 into the existing legislation, namely the Anti-Money Laundering Act 2001, and now known as

253 *Public Prosecutor v Siti Noor Aishah bt Atam* [2017] 7 MLJ 461.

254 Section 130JB(1)(a), Penal Code 1936 [Act 574].

255 Section 3.4.4, Chapter 3.

256 Clive Walker, 'Terrorism Financing and the Policing of Charities: Who Pays the Price' in Colin King and Clive Walker (eds), Dirty Assets: Emerging Issues in the Regulation of Criminal and Terrorist Assets (Routledge, Abingdon, 2014).

257 Clive Walker, Terrorism and The Law (Oxford University Press, Oxford, 2011) Chapter 9.

258 United Nations Security Council Resolution No.1373 (2001).

259 See, sections 130N and 130Q, Penal Code 1936 [Act 574]. See also *Public Prosecutor v Mohamad Nasuha Abdul Razak* [2017] MLJU 1476; *Public Prosecutor v Mohd. Haniffa Bin Syedul Abbar* [2016] LNS 1654; *Public Prosecutor v Mohamed Danny bin Mohamed Jedi* [2018] MLJ 53.

260 United Nations General Assembly Resolution no. 54/10: International Convention for the Suppression of the Financing of Terrorism (2000).

261 See Part VIA, the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001[Act 613]. See also, Aishat Abdul-Qadir Zubair, Umar A. Oseni, Norhashimah Mohd. Yasin, 'Anti-Terrorism Financing Laws In Malaysia: Current Trends And Developments' (2015) 23 *IIUMLJ* 153.

AMLATFPUA 2001.[262] The amendments were made to give effect to the United Nations Security Council Resolution 1373 (2001).[263]

The argument for the ACM often reflects two main objectives, which are prevention and rehabilitation.

4.7.1 Pre-emption and Prevention

As proposed by Zedner, we are transforming from a 'post-crime' society, in which crime is taken primarily as harm or wrong caused to a 'pre-crime' society in which the outlook is changing to predict and prevent that which has yet to happen.[264] Further, the policy-making process is often shaped by the risk management perspective, 'which seeks to respond by pre-emptively managing risk rather than responding to events in the traditional criminal justice mode'.[265] In the context of Malaysia, the use of extra-ordinary preventive measures in managing risks is not new. Arguably, the preventive detention in Malaysia has worked effectively 'in disrupting terrorist plots and preventing attack.'[266] Although the preventive detention under the ISA 1960 had arguably accomplished its objective set by the Parliament, the legislation became notorious when the safeguards were gradually removed.[267] It is now replaced with POTA 2015, which is equally lacking in safeguards and detrimental to the criminalisation approach too.[268] Detention without trial can be counter-productive to the counter-terrorism strategy too.[269]

4.7.2 Prioritising Rehabilitation

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262 Zaiton Hamin, 'Recent Changes to the AML/CFT Law in Malaysia' (2017) 20: 1 *Journal of Money Laundering Control* 5.

263 See UN Security Council, Letter dated 24 September 2004 from the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, enclosed with Note verbale dated 17 September 2004 from the Permanent Mission of Malaysia to the United Nations addressed to the Chairman of the Counter-Terrorism Committee, (S/2004/778), available at <http://www.refworld.org/pdfid/46dc1ed3d.pdf> as accessed on 1 September 2018.

264 Lucia Zedner 'Pre-crime and Post-criminology?' (2007) 11:2 *Theoretical Criminology* 261.

265 Clive Walker, 'Terrorism and Criminal Justice: Past, Present and Future' (2004) 50 *Criminal Law Revie*w 311.

266 Andrew Tan, 'Evaluating Counter-Terrorism Strategies in Asia'(2018) 13:2 *Journal of Policing, Intelligence and Counter-Terrorism* 155 166.

267 Safia Naz and Johan Shamsuddin Bin Sabaruddin, 'Malaysian Preventive Detention Laws: Old Preventive Detention Provisions Wrapped in New Packages' (2016) 43:2 *Journal of Malaysian and Comparative Law* 59.

268 Safia Naz and Estheshamul M.Bari (n 178); Ho Peng Kwang, Johan Shamsuddin Sabaruddin, Saroja Dhanapal, 'The Impact Of Anti-Terrorism Law And Policy On Criminal Justice System: A Case Study Of Malaysia' [2017] 5 *Malayan Law Journal Articles* lxxxvi

269 Andrew Ashworth and Lucia Zedner, *Preventive Justice* (Oxford University Press, Oxford, 2014) 190.

Rehabilitation and de-radicalisation is another often-cited reason to have ACM, particularly executive detention and restriction orders. In the past, the government claimed that the ISA managed to rehabilitate and 'neutralise' individuals suspected involvement in terrorism activities.[270] Nevertheless there is no available evidence and data to substantiate the claim except government reports.[271] The program was run exclusively by the authorities behind closed doors. In addition, there are other factors that deter the detainees from re-engagement. Beside post-release programs, strict surveillance is placed on former detainees as well as their families.[272] There were also allegations that they have been warned and threatened with severe punishment if they re-engage in terrorism activities.[273]

The approach seems to slightly change and becomes less discreet under the POTA 2015. The government now reveals the rehabilitation modules, namely 'Integrated Rehabilitation Module for Detainees – Prevention of Terrorism Act (POTA) 2015'. The program covers a two-year period and comprises 4 phases implemented by the Ministry of Home Affairs, Prison Department, and Royal Malaysia Police.[274] As put by a member of the Prevention of Terrorism Board:

> The POTA detention is not just preventive detention, but also a rehabilitative detention…to ensure that the detainees are ready to re-integrate in society once released.[275]

The proponents for 'preventive rehabilitative detention' also argue that the custodial sentence within the criminal justice system is not effective in countering terrorism or eliminating potential risks.[276] The contention is conceivable in the context of Malaysia, as the rehabilitation and reform agenda seems to gain less attention in prison. The primary aim of sentencing is always the public interest.[277] Hence, a prison sentence is to a certain degree primarily meant to keep terrorists behind bars with the intention to

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270 Participant No.27. See also Abdul Razak Ahmad, *Terrorism and the Rule Of Law : Rethinking the 'ASEAN Ways" And Responses* (PhD thesis, University of Leeds, 2012) 275.

271 Abdul Razak, Javaid Rehman, and Joshua Skoczylis, (n 159).

272 Participants No.12 & 30.

273 Zachary Abuza, 'The Rehabilitation of Jemaah Islamiyah Detainees in Southeast Asia – a Preliminary Assessment' in T Bjorgo and J Horgan (eds), *Leaving Terrorism Behind: Individual and Collective Disengagement* (Routledge, Abingdon, 2008) 208.

274 Participants No. 12 ,14 & 30.

275 Participant No.12.

276 Participant No.27.

277 Participants No. 28 & 31.

protect the public. This can be seen from the call to detain a convict, Yazid Sufaat once he completed the imprisonment sentence in 2019, as the police believe that the 'Al-Qaida scientist' remains a security risk.[278] Based on the available information, there is a special program for individuals who are serving a sentence in prison. But it is less organised as compared to the integrated module designed for detainees under the POTA 2015.

4.7.3 Assessment of the ACM

The ACM in Malaysia embodies executive-based measures that originate from the emergency periods, before and after independence. It used to be the primary mode, at least before the repeal of the ISA 1960 and Emergency Ordinances in 2012. Although the government introduced the POTA 2015, which is perceived as the reincarnation of the ISA 1960, the reliance on executive-based measures has significantly declined, as shown by Table 3.1.[279] There are at least three main concerns about the implementation of the ACM in prevention efforts. Firstly, the lack of competent people to execute the agenda. It is worse when there have been allegations of abusive treatment.[280] Secondly, the threshold and burden of proof are lower as compared to the criminal justice system, and so the treatment seems less legitimate.[281] Thirdly, the prevention measures within the ACM are often carried out in secret, which may impact not only on the suspect but also his community and the democratic process.[282]

In sum, the ACM comprises various measures that operate in different ways largely outside the criminalisation approach. For that reason, this thesis, which focuses on the criminalisation approach, cannot do justice in explaining and examining those measures. The ACM remains intertwined with the criminalisation approach and counter-terrorism strategy in Malaysia.

However, the main concern is the lack of safeguards in the measures, which derive from ill-crafted laws as well as ineffectual constitutional institutions. Leaving the ACM unchecked may not only jeopardise the criminalisation project but also demean the rule of law as well as accelerate the normalisation of exceptional measures in

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278 Amy Chew, 'Malaysian Al Qaeda scientist who tried to produce WMD to be released from jail next year' (Channel News Asia, 29 August 2018), <https://www.channelnewsasia.com/news/asia/malaysian-al-qaeda-scientist-who-tried-to-produce-wmd-to-be-10658914> accessed 2 September 2018.

279 Table 3.1: Number of terrorism-related arrests and measures taken from 2013-November 2018, Chapter 3.

280 Participants No.10, 11, 13.

281 Participants No.12, 13, 14.

282 Participant No.29.

peacetime. All these consequences are vividly illustrated in the history of the ISA 1960. The legislation that, according to the first Prime Minister Tunku Abdul Rahman, was initially meant to confront Communist insurgents and would not be used to suppress legitimate opposition.[283] The very legislation, which according to its drafter, H.R. Hickling, 'will not be regarded as a permanent feature of the legal and political landscape of Malaya'.[284] Accordingly, it is recommended that all ouster clauses in the POTA 2015 and POCA 1959 that remove the courts' authority to review executive orders must be repealed.

4.8 Conclusion

The criminal justice system in Malaysia has a long history and has evolved responding to the changing social and political needs. Although it originates from the English Common Law, it has been developed with some modifications such as the jury-less trial. But it has been argued that the established fundamental principles, such as the rule of law and the right to a fair trial, have persisted as ideals. This is despite the 'normalisation' of emergency powers and other political occurrences. The shift of attitude by the government after around 2012 towards the criminalisation approach arguably will strengthen the rule of law and preserve the constitutional right of citizens to a fair trial. The approach, which is also compatible with international law, however, is not a self-evident good to the government, professional experts, the media or even the public. There are potential risks within the criminalisation approach to the counter-terrorism strategy, criminal law and the criminal justice system. Therefore, adequate constitutional, legal and parliamentary safeguards and a more vibrant clamour in favour of the rule of law are necessary. Further discussion on the safeguards can be found in Chapter 6.[285] If not attended to, the primacy and working of the criminalisation approach might be compromised and even reversed if more comfortable executive-based measures are not kept in check. The following chapters 5 and 6 will examine the main components of the criminalisation approach, the NCM and SCM and how these two modes can operate fairly and effectively within Malaysia's counter-terrorism strategy.

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283 Human Rights Watch, *Abdication of Responsibility: The Commonwealth and Human Rights* (Human Rights Watch, New York, 1991) 37.

284 Hugh R. Hickling, 'The First Five Years of the Federation of Malaya Constitution' (1962) *Malayan Law Review* 183.

285 Section 6.3.2, Chapter 6.

Chapter 5 - The Normal Criminalisation Mode (NCM) in Malaysia's Counter-Terrorism Strategy

5.1 Introduction

The Normal Criminalisation Mode (NCM) arguably should be the primary mode within the criminalisation approach, which was described in Chapter 4. This mode embodies the utilisation of the criminal law and processes in its 'normal' form in the service of counter-terrorism. Unlike the Avoidance of the Criminalisation Mode (ACM), which has been discussed in Chapter 4, the NCM upholds the primacy of the criminal justice system in responding to terrorism. As opposed to the Special Criminalisation Mode (SCM), which will be dealt with later in Chapter 6, the NCM represents the 'business as usual' model. Instead of making modifications to the ordinary substantive and adjective criminal law, the NCM offers the element of regularity and commitment to existing legal norms. This chapter examines how NCM can operate effectively and fairly and play a primary role in the service of Malaysia's counter-terrorism strategy. That is followed by a discussion on the possible risks posed by the NCM to the criminal law and counter-terrorism strategy. Towards the end of this chapter, there will be an assessment of the present setting and application of the NCM in Malaysia.

As compared to the SCM, which will be discussed in Chapter 6, the sample of decided cases for the NCM is very limited. No official information is available that can provide an exact number of cases where the ordinary criminal law was used to prosecute terrorist suspects. Therefore, the analysis on the NCM and its workings is primarily based on selected cases in law reports as well as interview data.

5.2 The Basis of the NCM in Malaysia

As mentioned earlier in Chapter 4, the development of criminal law in Malaysia is significantly moulded by the gradual introduction of the Penal Code 1936 throughout Malay states, as well as Sabah and Sarawak during the colonial era.[1] In substance, the Malaysian Code is identical to the Indian Penal Code 1860.[2] The Indian Code was

1 Norbani Mohamed Nazeri, 'Criminal Law Codification and Reform in Malaysia' (2010) *Singapore Journal of Legal Studies* 375.

2 See *Teh Ah Kuay v Public Prosecutor* [1953] 1 MLJ 12; *Public Prosecutor v Dato Kee Yong Wee & Ors* [1988] 2 MLJ 198.

indeed formulated to suit Indian political, social and cultural contexts at that time.[3] However, the British administration possibly believed the 'diversity of native legal traditions, forms of authority, and religious customs' in India was in some way or another resembled the existing social and political conditions in Malaya and Borneo.[4] The implant can be posited as 'direct coercive policy transfer' where one government forces another to adopt a policy.[5] Stone notes 'significant coercive transfers of legal codes, parliamentary institutions, currencies, and bureaucratic happened in imperialism era'.[6] Nevertheless, it should also be emphasised that before the introduction of the Penal Code 1936, its predecessors had been accepted by the state rulers separately.[7] After the British introduced the Penal Code 1871 for the Strait Settlements of Penang, Malacca and Singapore, which were under its direct control, several Malay states which were ruled by Sultans later followed the move. For instance, Perak and Johor introduced the Penal Code Enactment 1884 and 1920 based on the Strait Settlement's Code. Matson contends that:

> The outmoded cruelty of the criminal law, and the discrepancy, especially in the rules of evidence, between Malay custom and the Sharia made it easier for the Sultans to follow the lead of Muslim states such as Turkey and Egypt in adopting Western codes (in this case taken from India). Much of the statutory law was adopted from the Straits Settlements or from the old Federated Malay States.[8]

The British, according to Harper 'rarely possessed the capacity to intervene decisively in social and economic life' of the people in Malay states, and the authority of the British 'rested on treaty relationships with the Malay Rulers and was exercised through the Malay State administrations'.[9] Therefore, although the Penal Code 1936 can be

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3 Barry Wright, 'Codification, Macaulay and the Indian Penal Code' in Cheong-Wing Chan, Barry Wright and Stanley Yeo (eds), *Codification, Macaulay and the Indian Penal Code: The Legacies and Modern Challenges of Criminal Law Reform* (Routledge, Abingdon, 2016) 25.

4 Renisa Mawani and Iza Hussin, The Travels of Law: Indian Ocean Itineraries (2014) 32:4 *Law and History Review* 733, 741.

5 Mark Evans, 'Policy Transfer in Critical Perspective' (2009) 30:3 Policy Studies 243. See also David Dolowitz and David Marsh, 'Who Learns What from Whom: a Review of the Policy Transfer Literature Political Studies (1996) *XLIV* 343.

6 Diane Stone, 'Learning Lesson and Transferring Policy Across Time, Space, and Disciplines' (1999) 19:5 *Politics* 1, 55.

7 Mohd Baharudin Harun*, Criminal Responsibility Under The Malaysian Penal Code* (PhD Thesis, University of Edinburg, 1996) 2.

8 J.N Matson, 'The Conflict of Legal Systems in the Federation of Malaya and Singapore (1957) 6:2 *International and Comparative Law Quarterly* 243, 258.

9 Tim N. Harper, *The End of Empire and the Making of Malaya* (Cambridge University Press, 1999) 14,18.

considered as a product of direct colonial policy, there was a certain level of acceptance and preference of local wishes represented by native rulers.

The impacts of the introduction of the Penal Code 1936 can be seen in at least three aspects. The first aspect links to the changing of the social fabric in the late nineteenth century in the Malay Peninsula, Sabah and Sarawak. The introduction of the Penal Code 1936 was a timely response to the emergence of a plural society that became more visible in the late nineteenth century.[10] The main factor is the rapid flow of migrations from outside the region due to colonialism and economic expansion.[11] At one point, particularly before World War II, the number of Chinese and Indian immigrants outnumbered the Malays in the Peninsula Malaysia and Singapore.[12] By 1947, more than half of the 'immigrant' population were those who were born in Malaya.[13] Imposing 'unsystematic and fragmentary' digests of Malay customs and uncodified Islamic law to everyone was impracticable, as much as applying each community their own criminal law that would work separately. As argued by Thomas:

> Diversity of races and variety of religions have characterised Malaya for centuries…In that circumstance, it is impossible for members of one religion to persuade members of other religions, atheists and non-believers to accept a criminal law system based on one religion.[14]

A unified criminal law that has universal values and an appearance of 'neutrality' was therefore required. In other words, the introduction of the Penal Code 1936 is part of rationalisation and secularisation of law in Malaya that is often attributed to colonialism.[15] Accordingly, the authority of Islamic law and Malay customs were

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10 On the emergence and development of a plural society in Malaysia, see Mohamed Mustafa Bin Ishak, *From Plural Society To Bangsa Malaysia: Ethnicity And Nationalism in the Politics of Nation-Building in Malaysia* (PhD Thesis, University of Leeds, 1999) 52-60.

11 See Colonial Office, *Report of Brigadier-General Sir Samuel Wilson, Permanent Under-Secretary of State for the Colonies on His Visit to Malaya 1932* (Cmd 4276, 1933).

12 Micheal Ardizzone, *A Nation is Born* (Forum Books, London 1946) 34.

13 Federation of Malaya, *A Report on the 1947 Census of Population by M.V. Del Tufo* (Kuala Lumpur: The Government Printer, 1948), 47.

14 Tommy Thomas, *Abuse of Power: Selected Works on the Law and Constitution* (SIRD, Petaling Jaya, 2016) 198.

15 See A.B. Shamsul, Making Sense of the Plural Religious Past and the Modern Secular Present of the Islamic Malay World and Malaysia (2005) 33:3 *Asian Journal of Social Science* 363.

reduced to personal matters. Suffian L.P., in the case of *Che Omar bin Che Soh v. Public Prosecutor* (1988) observed:

> [T]hat during the British colonial period, through their system of indirect rule and establishment of secular institutions, Islamic law was rendered isolated in a narrow confinement of the law of marriage, divorce, and inheritance only.[16]

The introduction of the Penal Code 1936 is arguably one of the 'secular institutions' pursued by the British administration.[17]

The second aspect of impact related to the political and societal reforms. The Penal Code 1936 embodies the element of modernity, which is not only desired by the colonial power, but by the existing local rulers to depart from their feudal practices. For instance, in 1895, the Sultan of Johor employed English lawyers to draft the Constitution of Johor, the first constitution in Malaya, which according to some represents the birth of the "modern state" in the Malay Peninsula'.[18] The change of attitude was arguably politically driven, as pointed out by Iza Hussin:

> Malay elites used the presence of the British for their own political advantage, while at the same time relying upon Islam and Malay custom for their own legitimacy. Law, as code and treaty, represented the negotiation of important political interests, but as a set of symbols and social relations, it also established a new kind of relationship between state, society, and subject in Malaya…who themselves became more embedded within the institutional hierarchy of the colonial state.[19]

The introduction of 1860 Indian-based Penal and Criminal Procedure Codes in Malay was indeed a significant move to draw a clear line limiting the vast, but vague and

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16 *Che Omar bin Che Soh v. Public Prosecutor* (1988) 2 MLJ 55.

17 On the transformation of Islamic law during and after colonial periods, see Iza R. Hussin, *The Politics of Islamic Law: Local Elites, Colonial Authority, and the Making of the Muslim State* (The University of Chicago Press, Chicago, 2016). See also Tamir Moustafa, *Constituting Religion: Islam, Liberal Rights, and the Malaysian State* (Cambridge University Press, Cambridge, 2018).

18 Iza Hussin, 'Textual Trajectories: Re-reading the Constitution and Majalah in 1890s Johor' (2013) 41:120 *Indonesia and the Malay World* 255, 255. See also, Anthony Milner, 'How traditional is the Malay monarchy?' in Norani Othman and Virginia Matheson Hooker (eds), *Malaysia: Islam, Society and Politics* (ISEAS, Singapore, 2003) 169.

19 Iza Hussin, 'The Pursuit of the Perak Regalia: Islam, Law, and the Politics of Authority in the Colonial State' (2007) 32:3 *Law & Social Inquiry* 759, 784.

fragmented power of Sultans over criminal matters. But at the same time, it was also an important move for the Sultans to consolidate their authority, backed by the British to overcome 'their competitors - the chiefs and nobles' in the less-centralised Malaya at that time.[20] Previously, the Malay chiefs had autonomous and arbitrary powers, which were often justified as 'Malay customs', albeit some were in fact their own will rules.[21]

The significant impact of the introduction of Penal Code 1936 corresponds with the guiding principle of the drafter of the Indian Penal Code 1860, Thomas Macaulay, that aimed for 'uniformity when you can have it; diversity when you must have it, in all cases, certainty'.[22] The introduction of the Code provided certainty through two angles. Firstly, the certainty of criminal law was increased in general, which was categorically important at that time. For instance, the British administrators earlier administered justice differently as they were uncertain as to which principles or types of law prevailed.[23] There was one officer who applied Islamic law along with English, while another one tried to promote the use of the Indian Penal Code.[24] Secondly, the certainty and clarity of criminal offences and their blameworthy elements in the Penal Code 1936 seemed fair and culturally compatible. As emphasised by the drafter of the Indian Penal Code 1860, Lord Macaulay, a good law:

> [S]hould be as far as possible precise; the other that they should be easily understood…That a law, and especially a penal law, should be drawn in words which convey no meaning to the people who are to obey it, is an evil. On the other hand, a loosely worded is no law, and to whatever extent a legislature uses vague expression, to that extent it abdicates its functions, and resigns the power of making law to the Court of Justice.[25]

Accordingly, the Macaulay's Penal Code, emulated by the Penal Code 1936, provides the qualities of precision. The Penal Code 1936 eventually became the principal legislation that governs criminal offences. As mentioned earlier, the introduction of the Code embodies 'modernity', which can be inferred from three aspects. Firstly, it was

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20 ibid, 766.

21 Isabella Bird, *The Golden Chersonese and the Way Thither* (G.P.Putnam's Son, New York, 1883) 302.

22 Thomas Babington Macaulay, HC Deb 10 July 1833 vol 19 col 532.

23 Thomas R. Metcalf, *Imperial Connections: India in the Indian Ocean Arena 1860-1920* (University of California Press, California, 2007) 22.

24 ibid, 22.

25 Indian Law Commission, *A Penal Code* (Pelham Richardson Cornhill, London, 1838) v.

an introduction of a rational code that overrode personal preference authority of Sultans. Secondly, it fostered centralisation and uniformity of law. Thirdly, it established a better-structured institution to administer criminal justice.

A series of amendments were made to the Penal Code 1936, even within the same year, it was introduced.[26] For example, there were seven amendments made of the Code within ten years from 2007 to 2016.[27] These amendments include the creation of new special chapters and provisions to cover offences relating to terrorism, organised crime and activities deemed to be detrimental to parliamentary democracy.[28] The discussion on Chapter VIA: Offences Relating to Terrorism of the Penal Code can be found in Chapter 6, which specifically deals with the special offences within the SCM.

The reforms of the Penal Code 1936 have been influenced by external and internal factors. The external factors are mainly due to the obligations derived from international law. Although Malaysia has been very slow to ratify international treaties, as discussed earlier in Chapter 4, there are instances where the Penal Code 1936 was amended principally for that reason. For instance, an amendment was made in 2003 to the Code before Malaysia acceded to the International Convention against Taking of Hostage 1979 and the International Convention for the Suppression of the Financing of Terrorism 1999.[29] Apart from that, the development in English law also influenced the reform of Penal Code 1936, particularly in the pre-independence days. Simester notes one of the early amendments made to the Macaulay's Penal Code, which is related to the intoxication rules.[30] The revision was made to the existing Penal Code enactments in Malaya and Singapore in 1935, following the decision in English case, *Director of Public Prosecutions v. Beard* (1920).[31]

The internal factors affect the reforms of the Penal Code 1936 on a larger scale as compared to the external ones. Arguably the reforms were made responding to genuine current needs and public demands. For instance, the amendments made to enhance the punishment for committing rape and incest, which were described to

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26 Penal Code (Amendment) Enactment 1936, F.M.S. En. 41/1936.

27 The amendments are: Amendment 2007 [Act A1273]; Amendment 2007 [Act A1303]; Amendment 2007 [Act A1210]; Amendment 2012 [Act A1430]; Amendment 2012 [Act A1471]; Amendment 2012 [Act A1483].

28 Chapter VIA: Offences Relating to Terrorism; Chapter VIB: Organised Crime; Section 124B, Activity Detrimental to Parliamentary Democracy.

29 Dewan Rakyat Hansards, 10 November 2003, 58; Penal Code (Amendment) Act 2003 [Act A1210].

30 Andrew P. Simester, 'Getting Drunk In Singapore and Malaysia' (2012) *Singapore Journal of Legal Studies* 76.

31 Director of Public Prosecution v Beard [1920] AC 479; cf the Penal Code of Brunei (16/1951) which retains the original provision as in the Indian Penal Code (1860).

'become more rampant' then.[32] The offences are now punishable by whipping along with the prescribed minimum period of imprisonment.[33] However, the reforms of the Penal Code 1936 are often associated with at least two inter-connected factors.

First, there is emergence of the 'authoritarian populism' in the post-independence era, in which a single party had ruled the country for more than 60 years.[34] This is noticeable in the amendment in 2012 to criminalise 'activities detrimental to parliamentary democracy'.[35] Despite the name, the authorities used the new law against opposition members and individuals who criticised the government and organised protests.[36]

Second, the evolving of 'Islamisation' endeavours was pursued mainly by the two major parties, the United Malays National Organisation (UMNO) that ruled Malaysia from 1955 to 2018, and Parti Islam Se-Malaysia or Islamic Party of Malaysia (PAS), an Islamist party which has managed to gain significant Malay-Muslim supports.[37] The agenda, which is supported by a number of Muslim groups, became more visible in the 1980s and 'more prominent today as Islamisation has permeated almost every aspect of society'.[38] The project attempts to 'Islamise' public law in order to make it in line with Islamic norms, which is somehow a form of delayed response to the secularisation that was discussed earlier.[39] Unlike the UMNO led government, PAS seeks a radical change in the criminal law and justice system by its own version of 'Islamic' criminal law or '*hudud'* law.[40] Its efforts so far have proved fruitless.[41]

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32 Jal Zabdi Mohd Yusoff, Zulazhar Tahir, & Norbani Mohamed Nazeri, 'Developments in the Law Relating to Rape and Incest in Malaysia' (2015) in Proceedings of the Inaugural University of Malaya Law Conference: Selected Issues in the Development of Malaysian Law, Faculty of Law, University of Malaya.

33 Section 375 of the Penal Code 1936 [Act 574], pursuant to the Penal Code (Amendment) Act 1989 [Act A727] and Penal Code (Amendment) Act 2007 [Act A1273].

34 Anne Muno-Kua, *Authoritarian Populism in Malaysia: Autocrats v. the People* (Suaram, Kuala Lumpur, 2017) 182.

35 See sections 124B-124N of the Penal Code 1936, pursuant to Penal Code (Amendment) Act 2012 [Act A1430].

36 *Public Prosecutor v Khairuddin bin Abu Hassan & Anor* [2017] MLJU 188; *Pua Kiam Wee v Ketua Pengarah Imigresen Malaysia & Anor* [2017] *MLJU* 902. See also Suara Rakyat Malaysia (SUARAM), *Human Right Report: Civil and Political Right* (Suaram, Petaling Jaya, 2013) 31,56

37 See, Mohd Azizuddin Mohd Sani, *Trends in Southeast Asia: Islamization Policy And Islamic Bureaucracy In Malaysia* (Institute of Southeast Asian Studies, Singapore, 2015); Maznah Mohamad, 'The Ascendance of Bureaucratic Islam and the Secularization of the Sharia in Malaysia' (2010) 83:3 *Pacific Affairs* 505.

38 Jason P. Abbott & Sophie Gregorios-Pippas, 'Islamization in Malaysia: Processes and Dynamics' (2010) 16:2 *Contemporary Politi*cs 135.

39 Farid S. Shuaib, 'The Islamic Legal System in Malaysia '(2012) 21 *Pacific Rim Law & Policy Journal* 85.

40 Jan Stark, 'Constructing an Islamic Model in Two Malaysian States: PAS Rule in Kelantan and Terengganu' (2004) 19:1 *SOJOURN* 51.

However, PAS somehow has instigated the federal government to do more in order to win the 'Islamisation race' and retain Muslim support.[42]

The government's reaction arguably focuses more on the reforms of the Penal Code 1936. An example is the 1983 amendment of section 298A of the Code, which was declared to be null and void by the Supreme Court in 1989.[43] The provision, which was essentially designed to preserve law and order and to maintain harmony between persons professing the same or different religions, was used by the government to control Muslims specifically and to counter individuals who declared the ruling party, UMNO as *kafir* (infidel).[44] The indirect effects of Islamisation can also be traced in the government's refusal to reform or revise draconian provisions within the Penal Code 1936, which associate with religious justifications. That includes the proposals related to criminalising marital rape and child marriage.[45] For instance, the 1989 amendment of the Penal Code 1936 that increases the age to 16 years for statutory rape exempted cases where parties involved are married under Islamic law.[46]

In sum, the Penal Code 1936 is a product of policy transfer that arguably has provided fairness in confronting crimes within a plural society. The notion of fairness nevertheless is broad and shaped by local and universal norms, as well as cultural and liberal values. It is posited that the criminal law, encapsulated within the Penal Code 1936, is accepted as 'normal' to a certain extent, with exception to newly added provisions. In other words, some offences in the Code are 'normal', and some are not. The following section examines the pertinent issue.

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41 Farish A. Noor, 'Blood, Sweat and Jihad: The Radicalization of the Political Discourse of the Pan-Malaysian Islamic Party (PAS) from 1982 Onwards (2003) 25:2 *Contemporary Southeast Asia,* 200.

42 Joseph Chinyong Liow, 'Political Islam in Malaysia: Problematising Discourse and practice in the UMNO–PAS "Islamisation race" (2004) 42:2*Commonwealth & Comparative Politics*, 184.

43 *Mamat Bin Daud & Ors v Government Of Malaysia* [1988] 1 MLJ 119, 119.

44 Dewan Rakyat Hansard, 7 November 1984, 6902.

45 Norbani Mohamed Nazeri (n 1). See also Shamrahayu A Aziz, 'Some Thoughts On The Relationship Between Law And Religion In Malaysia' [2009] 1 *Current Law Journal Article* xix.

46 Section 375, Penal Code 1936 [Act 574] pursuant to the Penal Code (Amendment) Act 1989 [Act A727]. See also, Mehrun Siraj, 'Women and the Law: Significant Developments in Malaysia' (1994) 28:3 *Law and Society in Southeast Asia* 561.

5.3 The Normalcy of the NCM

Something is described as 'normal' when it is 'constituting, or not deviating from an established norm, rule, or principle'.[47] So what is a 'normal crime' or 'normal offence', which is the subject matter of the NCM? The following three tests perhaps can provide some guidance, albeit inconclusive.

The first test is based on 'harm principle', in which the 'State is justified in criminalizing any conduct that causes harm to others or creates unacceptable risk of harm to others'.[48] As asserted by John Stuart Mill:

> The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.[49]

So, based on this test, crimes like murder, causing hurt or destruction to the property are normal or ordinary offences. The emphasis is often placed on physical and direct harm. But certainly, it is not always the case as the meaning of "harm" itself is 'morally loaded (and essentially contested)'.[50] If the concept of harm is to include the violations of other legitimate interests of people, 'we must remain conscious of the moral, cultural and political nature of such interests recognised in a particular system'. Apart from that controversy, there are other considerations with regards to the harm principle which are often discussed, such as the degree of probability, gravity of the possible harm and the social value of the dangerous act.[51].

If the first test concerns 'harm doing', the second test is about wrongdoing.[52] It is based on the notion that the wrongfulness can justify the criminalisation, or at least

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47 Henry C. Black, Nolan, J. M., and Nolan-Haley, J. M, *Black's Law Dictionar*y (6th ed., West Publishing & Co, Minnesota, 1990) 1059.

48 Andrew Ashworth & Jeremy Horder, *Principles of Criminal Law* (7th edn, Oxford University Press, Oxford, 2013) 28.

49 John Stewart Mill, *On Liberty* (2nd edn, Ticknor and Fields, Boston, 1863) 23.

50 Neil MacCormick, *Legal Right and Social Democracy: Essays in Legal and Political Philosophy*(Oxford University Press, Oxford 1982) 29.

51 Bernard E. Harcourt, 'The Collapse of the Harm Principle' (1999) 90:1 *Journal or Criminal Law and Criminology* 109. See also Joel Feinberg, *Harm to Others* (Oxford University Press, Oxford, 1984) 187.

52 See Lucia Zedner, *Criminal Justice* (Oxford University Press, Oxford, 2004) 47.

along with other legitimate reasons.[53] At this juncture, a normal offence represents mala in se crime, that:

> [I]s inherently and essentially evil, that is, immoral in its nature and injurious in its consequence, without any regard to the fact of its being noticed or punished by the law of the state.[54]

The normal offence perhaps belongs to a type of crimes which is classically described as 'those which nature dictates in all ages to all men, for the maintenance of that justice which she hath implanted in our heart'.[55]

Nonetheless, the moral wrongfulness then is also associated with the underlying societal values as well as religious and cultural norms in a society. This moral wrong argument is often used in opposing decriminalisation of homosexual acts which are considered as 'against the order of nature' and Islam in Malaysia.[56] As put by the Prime Minister, Mahathir Mohamad:

> We are a Muslim nation, and we do not tolerate sodomy. The rest of the world may tolerate it, but we cannot. That is against our religion.[57]

However, a distinction between constitutional morality and social morality was made by the Indian Supreme Court in examining homosexual-related offences in the Indian Penal Code 1860.[58] The court emphasised that it has an obligation to protect and uphold the constitutional morality over social morality, by stating that:

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53 Andrew P. Simester & Andrew von Hirsch, Andrew Von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Hart Publishing, Oxford, 2011) Chapter 2.

54 Henry C. Black, Nolan, J. M., & Nolan-Haley, J. M, *Black's Law Dictionary* (6th ed., West Publishing & Co, Minnesota, 1990) 959.

55 Cesare Bonesana di Beccaria, *An Essay on Crimes and Punishments* (W. C. Little & Co., New York, 1764) 202.

56 Section 377A-377C, Penal Code 1936 [Act 574].

57 Ida Lim, Dr M: Malaysia won't repeal sodomy law, goes against Islam (Malay Mail, 29 September 2018), <https://www.malaymail.com/s/1677646/dr-m-malaysia-wont-repeal-sodomy-law-goes-against-islam> accessed 1 November 2018.

58 *Navtej Singh Johar & Ors. v. Union of India* (2018) W. P.(Criminal.) No. 76 of 2016.

> The conception of constitutional morality is different from that of public or societal morality. Under a regime of public morality, the conduct of society is determined by popular perceptions existent in society…Constitutional morality determines the mental attitude towards individuals and issues by the text and spirit of the Constitution. It requires that the rights of an individual ought not to be prejudiced by popular notions of society.[59]

Accordingly, the court, among other reasons, declared that Section 377 of the Indian Penal Code (1860) which criminalises consensual homosexual acts violates fundamental liberties guaranteed by the Constitution of India 1950.[60] From this result, a written constitution not only operates as a supreme law but also seemingly provides a superior standard of morality.

Apart from moral wrong, a 'public' wrong is another type of act that is said to be suitable for criminalisation, given 'the victim is not an individual but the community as a whole'.[61] The idea of 'public wrong' as a basis for criminalisation can be problematic as the concern is no longer about the wrong itself but rather how the public evaluates the wrong. Duff suggests that:

> We should interpret a 'public' wrong, not as wrong that injures public, but as one that properly concerns the public, i.e. the polity as a whole... A public wrong is thus a wrong against the polity as the whole, not just against individual victim: given our identification with the victim as a fellow citizen, and our shared commitment to the values that the rapist violates, we must see the victim's wrong as also being our wrong, but this does not replace the idea that the wrong is directly done to the individual victim: it is a way of understanding that wrong, as one that concerns all of us.[62]

The 'public' wrong argument is indeed relevant in the criminalisation of terrorism activities that cause fear and pose a danger to the society, including its common values and social order. At this point, however, the notion of criminalising 'public'

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59 *Navtej Singh Johar & Ors. v. Union of India* (n 58), 169.

60 cf, *Suresh Kumar Koushal and another v NAZ Foundation and others* (2013) Civil Appeal No. 10972 of 2013.

61 Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (7th edn, Oxford University Press, Oxford, 2013) 30.

62 Robin A. Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Hart Publishing, Oxford, 2007) 142.

wrongs not only justifies normal offences, but also special offences in countering terrorism. This is related to the positive obligation of a state to protect, which will be discussed in Chapter 6. So, for this second test, the normal offences are expected to embody the elements of moral and cultural wrong, but not necessarily public wrong.

The third test is derived from the nature of the criminal law itself that emphasises culpability and responsibility of a person for the harm which has been committed. This can be seen from the requirement to prove the blameworthy mind, that is mens rea, along with the harmful act, actus reus. If someone is labelled as a 'criminal', it is understood that he has committed a crime. So, criminal law is fundamentally a post hoc implement as opposed to the pre-crime framework, which 'shifts the temporal perspective to anticipate and forestall that which has not yet occurred and may never do so'.[63] Therefore, for the normal offences, the focus is on the harmful and culpable act, which has been done or at least attempted, rather than possible risks of harm or 'future crime'.[64] But this does not necessarily mean that the normal offences lack any preventive function, which will be discussed later in this Chapter.

The above tests are not conclusive but can be useful guides in identifying the elements of normalcy in terrorism-related offences. Further, it must be noted that there are possible conflicts between the tests. Based on the above tests, there are a number of the normal offences in the Penal Code 1936 and other legislation that can be utilised in countering terrorism. The offences include common criminal acts committed by terrorists such as hostage-taking, homicide, and 'blowing up things'.[65] Some of the key offences in the Penal Code 1936 are listed in the following Table 5.1.

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63 Lucia Zedner, 'Pre-crime and post-criminology?' (2007) 11:2 *Theoretical Criminology* 261, 262.

64 See Jude McCulloch and Sharon Pickering, 'Pre-Crime and Counter-Terrorism: Imagining Future Crime in the "War on Terror"' (2009) 49:5 *The British Journal of Criminology* 628.

65 Brian Jenkins, 'Future Trends in International Terrorism' in Robert O.Slater & Micheal Stohl (eds), *Current Perspectives on International Terrorism* (Macmillan Press, London, 1988) 257.

Table 5.1: Normal Offences Related to Terrorist Activities

	Type of Offence	**Offences**	**Provision**
1	Offences affecting human life and body	Murder	s.300, Penal Code 1936
		Culpable homicide	s.299, Penal Code 1936
		Causing grievous hurt	s.320 Penal Code 1936
		Causing hurt	s.319 Penal Code 1936
		Abduction	s.362 Penal Code 1936
		Extortion	s.383, Penal Code 1936
		Kidnapping	s.359, Penal Code, and offences under the Kidnapping Act 1961
		Hostage-taking	s.374, Penal Code 1936
		Criminal intimidation	s.503, Penal Code 1936
2	Offences against Property	Mischief (against public property)	s.425, Penal Code 1936

However, as illustrated in Diagram 4.1 in Chapter 4, there is some overlap between the NCM and SCM spheres. With regards to the typology of criminal offences, the area represents a type of offence which has the quality of both normal and special offences. There are at least two explanations for the overlap.

Firstly, the hybrid normal-special offences embody a significant degree of quality of 'normalness' based on the three tests, which were discussed earlier. For instance, the offence of waging war against the king or the Yang di-Pertuan Agong in the Penal Code 1936, which derives from the English Treason Act 1351, which is comparable to the present terrorism-related offences.[66] In fact, the law was used to prosecute terrorist groups in Malaysia, such as the Al-Maunah group and Sultan Sulu Army.[67] Even though treason can be classified as a special type of offence that also involves a political motive, it 'has always been amongst the most serious crimes on the

66 *Public Prosecutor v Mohd Amin Bin Mohd Razali & Ors* [2002] 5 MLJ 406.

67 *Mohd Amin Bin Mohd Razali & Ors v Public Prosecutor* [2003] 4 MLJ 129; *Public Prosecutor v Atik Hussin bin Abu Bakar and other cases* [2016] MLJU 968.

statute book' in the UK.[68] Accordingly, treason, as it is typically considered as a mala in se crime, often punishable with a severe sentence, including life imprisonment and the death penalty.[69] The post-hoc element also within the treason also highlights its normalness. The Penal Code 1936 that criminalises treason maintains the established principle of criminal law on inchoate acts, by stating:

> Whoever wages war against the Yang di-Pertuan Agong or against any of the Rulers or Yang di-Pertua Negeri, or attempts to wage such war, or abets the waging of such war, shall be punished with death or imprisonment for life, and if not sentenced to death shall also be liable to fine.[70]

In comparison with the 'pre-crime' oriented terrorism offences, the offence does not explicitly criminalise preparation or passive participation, albeit some judicial interpretations later treat certain forms of preparation as a part of 'waging of war'.[71] Nonetheless, there are some treason-related offences in the Penal Code 1936 that is difficult to be considered as 'normal' due to their nonconformity with the established principles of criminal law.[72] For example, 'whoever compasses, imagines, invents, devises or intends the death of or hurt to or imprisonment or restraint of the Yang di-Pertuan Agong or any of the Rulers or Yang di-Pertua Negeri, their heirs or successors, shall be punished with death and shall also be liable to fine'.[73] These offences exclude an actus reus element in determining the liability of the offenders.

The second explanation for the recognition of the hybrid type of offence is related to the notion of normalisation of special measures, which will be discussed in Chapter 6. Briefly, there are instances where special laws, which were enacted with specific purpose reflecting current needs, are maintained in normal time and subsequently perceived as 'normal'. The authorities might see these laws are effective to deal with other crimes and should be retained. The laws for some reason gain a certain level of acceptance by society, even though it might not equal the level as for the normal offences. Take explosives and firearms offences for example, which

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68 Richard Ekins, Patrick Hennessey, Khalid Mahmood and Tom Tugendhat, *Aiding the Enemy: How and Why to Restore the Law of Treason* (Policy Exchange, London, 2018) 41.

69 Mark S. Davis, 'Crimes Mala in Se: An Equity-Based Definition' (2006) 17: 3 *Criminal Justice Policy Review* 270.

70 See section 121, Penal Code 1936 [Act 574].

71 *Public Prosecutor v Mohd Amin Bin Mohd Razali & Ors* [2002] 5 MLJ 406.

72 See sections 121A, 121D, 123, Penal Code 1936 [Act 574]

73 Section 121A, Penal Code 1936 [Act 574].

Walker includes as one example of established offences that should be given priority in the criminalisation approach.[74] The legislation pertaining to firearms and dangerous weapons in Malaysia, which mostly have their origins in the Emergency periods, appears to the government to be useful in contemporary crime prevention.[75] The laws that prohibit the possession of firearms are often used in countering drug trafficking and organised crime activities.[76] It is hard to see any objection coming from the civil society to the use of such laws against ordinary criminals, at least if we were to compare with the Sedition Act 1948. In addition, such laws in a way conform to the harm principle test, albeit the link to possible harms is not direct. This is perhaps a clear distinction between these laws and the special law in the SCM that punishes a person for having a flag belonging to a terrorist group.[77]

Some hybrid-type of normal-special offences, which can be utilised in the service of counter-terrorism in Malaysia, are listed in the following Table 5.2.

Table 5.2: The Hybrid Normal-Special Offences in Malaysia

	Type of Offence	**Offences**	**Provision**
1	Offences related to treason	Waging of war against the Yang di-Pertuan Agong, a Ruler or Yang di-Pertua Negeri	s.121 Penal Code 1936 [Act 574]
2	Offences related to firearms and explosive materials.	Using a firearm, a corrosive or explosive substance or other offensive weapons	• s.3, Firearms (Increased Penalties) 1971 [Act 37] • s.32, Arm Act 1960 [Act 206] • s.4 Corrosive and Explosive Substance and Offences Weapons Act 1958 [Act 357]
		Exhibiting a firearm	s.6, Firearms (Increased Penalties) 1971 [Act 37]
		Trafficking firearms	s.7, Firearms (Increased Penalties) 1971 [Act 37]

74 Clive Walker, *Terrorism and the Law* (Oxford University Press, Oxford, 2011) 203.

75 Some related Emergency era cases, *Chin Choy v Public Prosecutor* [1955] 1 MLJ 236; *Chai Wooi v Public Prosecutor* [1957] 1 MLJ 234; *Hai Man v Public Prosecutor* [1952] 1 MLJ 216; *Subramaniam v Public Prosecutor* [1956] 1 MLJ 220.

76 For example see, *Prabhagaran Kegobalu v Public Prosecutor* [2019] 1 LNS 673; *Tang Teck Seng & Anor v Public Prosecutor* [2018] 10 CLJ 315; *Jallow Cherno v Public Prosecutor* [2018] 1 LNS 594.

77 *Public Prosecutor v Muhammad Hakimi Azman* [2017] 1 LNS 1017.

		Unlawful possession of firearms	• s.3, Firearms (Increased Penalties) 1971 [Act 37] • s.3, s.33, Arm Act 1960 [Act 206]
		Manufacturing arms	s.3, Arm Act 1960 [Act 206]
		Carrying offensive weapons in public places	s.6 Corrosive and Explosive Substance and Offences Weapons Act 1958 [Act 357]

Apart from the normal offences, the normalcy of the NCM also derives from the normal criminal process applied to those offences. The normal criminal process corresponds to the normal offences, as it is 'the mechanism by which the State applies substantive criminal to its citizen'[78]. The Criminal Procedure Code, which was introduced in 1935, is essentially based on English criminal process. Moreover, section 5 of the Code 1935 states that 'the law relating to criminal procedure for the time being in force in England shall be applied'. Like the Penal Code 1936, not all processes in the Code can be considered as 'normal'. Provisions relating to the protected witness and the use of electronic monitoring device, which were inserted in 2016, are arguably imported from the SOSMA 2015.[79] Hence, it is admittedly hard to draw a clear line between normal and special processes within Malaysia's criminal justice system.[80] It is therefore important to examine the special process under the SOSMA 2015, and how far the specific processes deviate from the established ones. Further discussion can be found in Chapter 6.[81] In addition, Appendix F shows differences between normal and special processes on selected aspects within terrorism-related trials.[82]

78 Andrew Ashworth and Mike Redmayne, *The Criminal Process* (Oxford University Press, Oxford, 1998) 2.

79 Sections 165A & 388A, Criminal Procedure Code (Amendment) Act 2016 [Act 1521].

80 See Jayanth K. Krishnan and Viplav Sharma, 'Exceptional or Not? An Examination of India's Special Courts in the National Security Context' in Fionnuala Ni Aolain & Oren Gross (eds), *Guantanamo and Beyond: Exceptional Courts and Military Commissions in Comparative Perspective* (Cambridge University Press, New York, 2013) 283.

81 See Section 6.4.3, Chapter 6;

82 Appendix F.

5.4 The Use of the Normal Criminal Law as Primary Response to Terrorism

The values of the criminalisation approach in countering terrorism generally have been discussed in Chapter 4. The NCM, which is contended as the primary mode of the criminalisation approach, can offer the following benefits to a counter-terrorism strategy.

5.4.1 Delegitimising Terrorism and Fair Labelling

The first benefit of the NCM is related to the capability of the ordinary law to delegitimise terrorism by focusing on its criminal nature and stigmatising terrorism objectives.[83] Terrorists are depicted as criminals, and so their aims can no longer be legitimate. Therefore, NCM, in principle, treats terrorism as 'normal' crime. The approach demands that terrorist suspects be prosecuted and punished as any other criminals. To quote Margaret Thatcher, 'a crime is a crime is a crime, it is not political, it is crime', and 'there is only criminal murder, criminal bombing and criminal violence…There will be no political status.'[84] Apart from avoiding acknowledgement of the political aims and claims of the terrorists, another pertinent reason is that large numbers of the terrorism-related activities are defined within domestic criminal codes. Conversely, definitions of terrorism often comprise one or a series of criminal acts.[85] A number of crimes like causing death, bodily injury and damage to property are within the concept of 'terrorist acts' in the Penal Code 1936.[86] In this way, criminal law can be a useful tool to mobilise the population in confronting terrorism.[87] Roach contends that the attractiveness of ordinary criminal law is 'to condemn acts of terrorism on the basis that murder is murder and nothing excuses the commission of murder should not be underestimated'.[88] This relates to the earlier discussion on how the normal offences embody wrongfulness that derives from moral and cultural values of a society. When

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83 Ronald Crelinsten, *Counterterrorism* (Polity, Cambridge, 2009) 52.

84 Margaret Thatcher, Speech in Belfast, 5th March 1981, <http://www.margaretthatcher.org/document/104589> accessed 10 April 2017.

85 A.P. Schmid, 'The Revised Academic Consensus Definition of Terrorism' (2012) 6:2 *Perspectives on Terrorism*,158.

86 See Section 130B(3) Penal Code 1936 [Act 574].

87 Clive Walker, The Impact of Contemporary Security Agendas Against Terrorism on the Substantive Criminal Law' in Aniceto Masferrer, (eds), *Post 9/11 and the State of Permanent Legal Emergency* (Springer, Dordrecht, 2012) 138.

88 Kent Roach, The Case for Defining Terrorism with Restraint and Without Reference to Political Motive' in Andrew Lynch, Edwina MacDonald, George William (eds), *Law and the Liberty: In the War on Terror* (The Federation Press, Sydney, 2007) 40.

asked about the use of ordinary criminal law in countering terrorism, a private legal practitioner asserted in the interview that:

> [W]e should (make use of normal criminal law and process) so that the public can see that if people charged with murder if they are convicted, they are murderer…[89]

Hence, at this point, the ordinary criminal law is not only used to denounce the political objective of the terrorists but also their moral status. Apart from that, the participant emphasised the principle of fair labelling, that reflects the seriousness of the offence and guides the court to pass sentence fairly and appropriately.[90] The principle of fair labelling means that 'the criminal law speaks to society as well as wrongdoers when it convicts them, and it should communicate its judgement with precision, by accurately naming the crime of which they are convicted.'[91]

5.4.2 Preventive Elements of the NCM

The second benefit of the NCM concerns the preventive elements of ordinary criminal law. Although 'the criminal law has traditionally been post crime in its focus', its prevention function is inherently deep-seated too.[92] As argued by Duff,

> [a] law that condemned and punished actually harm-causing conduct as wrong, but was utterly silent on attempts to cause such harms, and on reckless risk-taking with respect to such harms, would speak with a strange moral voice.[93]

Accordingly, the preventive elements have developed within the criminal law in various forms including the enactment of inchoate offences, substantive offences defined in

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89 Participant No.16.

90 Andrew Ashworth, *Action and Value in Criminal Law* (Clarendon Press, Oxford,1993) 114.

91 AP Simester, JR Spences, GR Sullivan & GJ Virgo, *Simester and Sullivan's Criminal Law: Theory and Doctrine* (Hart Publishing, Oxford, 2013) 31.

92 Jude McCulloch and Sharon Pickering, 'Future Threat: Pre-Crime, State Terror, and Dystopia in the 21st Century' (2010) 81:1 *Criminal Justice Matters* 32.

93 Antony Duff, Criminal Attempt (Oxford University Press, New York, 1996) 134.

the inchoate mode, crimes of possession and crimes of endangerments.[94] In the context of Malaysia, the Penal Code 1936 criminalises inchoate acts like trespass, house-trespass, lurking house-trespass, even though such acts may not cause any physical loss or harm.[95] As pointed out earlier, an attempt to wage war against the king is similar to the actual act itself.[96] On criminalising possession to prevent crime, it is a crime, for instance, to be in possession of a counterfeit seal and forged banknotes with intent to commit a forgery.[97] Apart from that, the Penal Code 1936 also criminalises any act which endangers life or personal safety in general, as well as specific conduct like driving or riding on a public way and handling explosives or poisonous substances in a rash and negligent manner that are likely to cause harm or injury to others.[98]

5.4.2.1 Criminal Attempt and the NCM

The Penal Code 1936 and other criminal statutes offer a wide range of inchoate 'normal' or 'hybrid normal-special' offences. Other legislation includes the Minor Offences Act 1955 and Corrosive and Explosive Substance and Offences Weapons Act 1958.[99] The Penal Code 1936 criminalises all attempts to commit offences within the Code and other legislation in three different ways.

The first way is when the Code states both the commission of a crime and the attempt to commit it within one section. Therefore, the actual act and the attempt to commit it are punishable by a same degree of the sentence. For instance, the act of waging of war against the king in the Penal Code 1936. A person who attempts to commit the offence can be punished with a death sentence.[100] The second way is when an act of attempt to commit an offence is designed in a specific section, with different punishment as compared to its principal offence. A notable example is Section 307, which criminalises an act attempting to commit murder. The third way is operated by a general provision that governs all acts of attempt to commit offences falling outside the above two modes. Section 511 of the Penal Code 1936 reads:

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94 Andrew Ashworth and Lucia Zedner, 'Prevention and Criminalization: Justification and Limits' (2012) 15 *New Criminal Law Review* 542.

95 Sections 441,442,443, Penal Code 1936 [Act 874].

96 Section 121, Penal Code 1936 [Act 874].

97 Sections 472 & 489, Penal Code 1936 [Act 874].

98 Sections 279, 336, 284, 286 Penal Code 1936 [Act 874].

99 [Act 336] and [Act 357].

100 Section 121, Penal Code 1936 [Act 874].

> Whoever attempts to commit an offence punishable by this Code or by any other written law with imprisonment or fine or with a combination of such punishments, or attempts to cause such an offence to be committed, and in such attempt, does any act towards the commission of such offence, shall, where no express provision is made by this Code or by such other written law, as the case may be, for the punishment of such attempt, be punished with such punishment as is provided for the offence.

Accordingly, attempts to commit any offences are themselves offences under the law. These include attempts to possess explosive material or to threaten someone with criminal intimidation.

To a certain degree, the implications can be more far-reaching as compared to specific terrorism offences. However, it must also be noted that no law prevents the special inchoate terrorism-related offences to be read together with the above section 511 of the Code, which accordingly would create an offence of attempting to attempt, attempting to prepare. This issue was considered in *State of Israel v Mahmoud Eyed* (2017), where the accused was charged with attempting to prepare for an act of terrorism. [101] It is slightly different in *Public Prosecutor v Ummi Kalsom Bahak* (2015) where section 511 of criminal attempt, was coupled with a terrorism offence under section 130J(1)(a) of the Code, that is giving support to a terrorist group.[102] The accused was arrested at Kuala Lumpur International Airport on her way to Syria. Accordingly, the charge states that she:

> [h]as made an attempt to give support to a terrorist group, that is Islamic State, by trying to enter Syria through Brunei and Istanbul and to get married with Muhammad Aqif Huesen bin Rahizat for the benefit of the Islamic State group.[103]

Arguably this is an example of an attempt to commit an inchoate offence too. The charge even failed to mention any actual terrorist act. Nevertheless, the point was

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101 *State of Israel v Mahmoud Iyad, Tafah* (Jerusalem) 55227-01-17.

102 *Public Prosecutor v Ummi Kalsom Bahak* [2015] 7 CLJ 503.

103 *Public Prosecutor v Ummi Kalsom Bahak* (n 97), 505.

never raised as the accused pleaded guilty to the charge.[104] Further discussion on inchoate offences within special legislation are discussed in Section 6.2.2.2 of Chapter 6.

The Malaysian law on attempting the impossible can be another preventive aspect of criminal law. Under English Common Law, 'impossibility was capable of being a defence to attempt, conspiracy and incitement'.[105] A person is not guilty of attempting to handle stolen goods if there is no evidence to suggest that goods were stolen.[106] The Penal Code does not define an attempt but rather provides clear illustrations to section 511, which reads:

(a) A makes an attempt to steal some jewels by breaking open a box, and finds after so opening the box that there is no jewel in it. He has done an act towards the commission of theft, and therefore is guilty under this section.
(b) A makes an attempt to pick the pocket of Z by thrusting his hand into Z's pocket. A fails in the attempt in consequence of Z's having nothing in his pocket. A is guilty under this section.

At this point, the law relating to attempts in Malaysia take a different position compared to English Common Law, but in line with section 1(2) of the UK's Criminal Attempts Act 1981.[107] The facts and judgment in *Munah b Ali v PP* (1958) elucidate further that legal impossibility is not a defence.[108] The accused was charged with attempting to cause a woman to have a miscarriage, which is contrary to section 312 of the Penal Code 1936. However, there was no evidence that the woman was pregnant at that time. Whyatt CJ and Good J, who held the majority view, observed thus:

> The evidence clearly showed that it was the intention of to bring about a miscarriage and could not have made the attempt unless she believed the complainant to be pregnant. If the complainant was not pregnant, the failure of the attempt was due to a factor independent of herself. Her attempt was

104 *Public Prosecutor v Ummi Kalsom Bahak* [2015] 1 LNS 1493.

105 The Law Commission*, Inchoate Liability for Assisting and Encouraging Crime* (July 2006) Cm 6878.

106 *Haughton v. Smith* (1975) AC 476, see also*, Anderton v Ryan* (1985) 2 W.L.R 968, cf *Shivpuri* (1985) 2 WLR 29.

107 Section 1(2) of Criminal Attempt Act 1981 (Chapter 47) reads: A person may be guilty of attempting to commit an offence to which this section applies even though the facts are such that the commission of the offence is impossible.

108 *Munah b Ali v Public Prosecutor* [1958] MLJ 159.

> prevented of frustrated by the non-existence of the circumstances which she believed to exist.[109]

The decision is in line with earlier findings in some Indian cases, including *Asgarali Pradhania v Emperor* (1933), which has almost the same facts.[110]

Based on these reflections, the ordinary criminal law could play a significant preventive role. Arguably, a person for instance can be charged with attempting to manufacture a weapon even if it seems impossible to build one by looking at the material and knowledge he possesses. A person can be charged with attempting murder or causing hurt for having defective hand-grenade, as long as he believes that the device could work well according to his plan. These two instances are common in the present terrorism phenomenon which involves lone-actor and less-skilled amateur actors using homemade explosives and non-sophisticated weapons. For instance, in *Public Prosecutor v Mohd Anwar Azmi and others* (2016), the five accused persons, including a minor, were arrested while they were mixing chemicals to make the explosives.[111]

However, there is a thin line between preparation for, and an attempt to commit, an offence. In general, normal criminal law does not criminalise preparation, due to its lack of proximity to the completion of a crime.[112] By contrast, this principle is relatively dim in special terrorism offences.[113] Whether an act is an attempt or not is a question of fact, which depends on the nature of the offence and the necessary steps to commit it.[114] So, a suspect may not be liable for attempting to commit murder or causing damage to the property if he has downloaded a manual book on how to make a bomb, or received instructions from a terrorist group. The court must determine where the preparation to commit an offence ends, and where the attempt to commit that offence begins. But it must be noted that the words in section 511 of the Penal Code, 'whoever attempts...and in such attempt, does any act towards the commission of such offence'

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109 See also dissenting judgement by Thompson CJ.

110 *Asgarali Pradhania vs Emperor* (1933) AIR Cal 893. See also B Tewari, 'Criminal Attempt' in K N Chandrasekharan Pillai & Shabistan Aquil (eds), *Essays on the Indian Penal Code*, (Indian Law Institute, New Delhi, 2005) 217.

111 *Public Prosecutor v Mohd Anwar Azmi and others* [2016] 7 CLJ 604.

112 Molly Cheang, *Criminal Law of Malaysia & Singapore Principles of Liability* (Professional Law Books Publishers, Kuala Lumpur, 1990) 261.

113 See section 5, Terrorism Act 2006 (UK).

114 See *Public Prosecutor v Kee Ah Bah* [1979] 1 MLJ 26; *Li Ah Chew v Penang Tramways Co*. [1887] 4 Ky 250.

indicate clearly that it is not necessary for the accused to have done an overt act towards the commission.

5.4.2.2 Mode of Participation and the NCM

Terrorism is often associated with a group of actors who work collectively or within a network until lately, the lone-actor phenomenon has begun to gain attention. Yet, a lone-actor terrorist does not necessarily act alone. A person might be receiving support directly or indirectly, or at least motivation and inspiration from others.[115] As discussed earlier in Chapter 4 on proscription, it is common for a state to create special legislation to ban certain groups that pose threats, and criminalise membership of such organisations. On the other hand, the NCM takes a different approach by focusing on the act committed by individuals and possible connections with others who might not directly be involved in the crime. The links between the principal offenders can be established by modes of participation, which may implicate other individuals to be equally or partly liable for the committed offence.

The Penal Code 1936 contains several provisions laying down the principle of joint and constructive liability. These provisions embody the doctrines of common intention, abetment, and conspiracy, which represent a different degree and kind of participation in a crime. For example, section 34 requires the prosecution to prove the existence of common intention among the accused persons to commit a criminal act.[116] It must also be shown the act has been done by one or more of the accused in furtherance of that common intention.[117] If these elements are satisfied, each accused person shall be held liable as if the criminal act was done by him alone. This provision could be an effective tool to bring a group of terrorists to court after one criminal act is committed, by possibly one person. Cheang argues that word 'intention' within section 34 should not be confused with the concept of intention that is an ingredient of many offences in the Code. The former is:

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115 Marc Sageman, *Leaderless Jihad: Terror Networks in the Twenty-First Century* (University of Pennsylvania Press, Philadelphia 2011) 125-146.

116 See *Mahbub Shah v Emperor* [1945] LR 721 IA 148, 153; *Sir Madhavan Nair in Mahbub Shah v Emperor* [1945] AIR PC 118, 120.

117 See *Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232, 267; *Juraimi bin Husin v Public Prosecutor* [1998] 1 MLJ 537.

> [T]he intention immediately behind the act done by the doer. On the other hand, common intention is the common design or common intent of two or more persons acting together. It is more akin to motive or object.[118]

Accordingly, the doctrine of common intention under section 34 can be a useful tool in prosecuting terrorism-related cases where suspects committed different acts in pursuing a pre-arranged plan or common objective. Further, physical presence of all suspects at the time of the commission of the crime is not always necessary.[119]

The doctrine of criminal conspiracy is another available instrument provided by criminal law with regards to collective liability. It is governed by section 120A of the Penal Code, which reads:

> 120A. When two or more persons agree to do, or cause to be done—
>
> (a) an illegal act; or
>
> (b) an act, which is not illegal, by illegal means,
>
> such an agreement is designated a criminal conspiracy

This provision was only inserted in the Code in 1948, which was during the 1948-1960 Emergency.[120] Nevertheless, the general concept of conspiracy can be found in other sections within the Code related to abetment.[121] Criminal conspiracy is also an established doctrine under the Common Law.[122] An amendment was made in 2012 to insert two explanatory provisions and several illustrations of criminal conspiracy.[123] The following two illustrations are very relevant to terrorism cases:

> (a) If A and B agree to embark on a bombing campaign throughout Malaysia, and either one of them commits an act in furtherance of the agreement such as acquiring Ammonium Nitrate fertilizer or other bomb making components, they

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118 Molly Cheang, (n 107) 221.

119 *Mahadzir bin Yusof & Anor v Public Prosecutor* [2011] 1 MLJ 297.

120 Penal Code (Amendment and Extended Application) Ordinance 1948 (F.M. Ord. 32/1948).

121 See Chapter V, Penal Code 1936 [Act 574].

122 *R. v Ayres* (1984) 2 W.L.R. 257; 48 J.C.L. 152.

123 Section 120A, Penal Code (Amendment) Act 2012 [Act A1430].

> will each be guilty of conspiracy to cause explosions even though no bombing targets were identified and no bombing was actually attempted.
>
> (b) A wilfully and knowingly joins an enterprise of persons consisting of B, C and D where they share a common criminal purpose to commit certain offences such as attacking civilian objects, murder and terrorism, and at least one of them acts on the plan by surveilling targets or securing a weapon to be used in the attacks. All four are guilty of conspiracy to attack civilian objects, and commit murder and terrorism the moment any one of them acts on the plan

The concept of criminal conspiracy, after the 2012 amendment, has been elucidated clearly to cover terrorism cases.[124] On the one hand, the illustrations arguably demonstrate the impact of counter-terrorism strategy on ordinary criminal law, with regards to joint liability.[125] On the other hand, the illustrations highlight the practicability of the criminal conspiracy principle within the NCM in dealing with terrorism-related cases. It must be noted that there is another provision, section 130L, that specifically deals with the criminal conspiracy of terrorism-related offences.

5.4.3 The Clarity, Precision and Consistency of the NCM

The third advantage of the NCM derives from the clarity of the substantive criminal law. The NCM provides well-accepted definitions of criminal offences. In the context of Malaysia, the ingredients of an offence are described in the Penal Code 1936. The clear and precise words in the Code mirror its drafter's objective, which was to produce a piece of legislation that is understandable by all. A good law, according to Lord Macaulay, must embody the following qualities:

> They should be as far as possible precise; the other that they should be easily understood…That a law, and especially a penal law, should be drawn in words which convey no meaning to the people who are to obey it, is an evil. On the

124 Penal Code (Amendment) Act 2012 [Act 1430].

125 Ho Peng Kwang, Johan Shamsuddin Sabaruddin, Saroja Dhanapal 'The Impact of Anti-Terrorism Law and Policy on Criminal Justice System: A Case Study of Malaysia' [2017] 5 *Malayan Law Journal Article* lxxxvi.

> other hand, a loosely worded is no law, and to whatever extent a legislature uses vague expression, to that extent it abdicates its functions, and resigns the power of making law to the Court of Justice.[126]

Judicial interpretations and decisions of Common Law jurisdictions are of assistance if there is any ambiguity on the elements of the offences. According to a senior lawyer who was also a prosecutor, the ordinary offences in the Penal Code 1936 are 'tried and tested' and for that reason should be used in countering terrorism.[127]

Having a clear and illustrated codified law is undoubtedly helpful to prosecutors, judges and defence counsel, as well as the public. The Code clearly describes in detail various states of mind in order to convict someone for committing murder. For example, Section 300 of the Code states:

> Except in the cases hereinafter excepted, culpable homicide is murder (d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

The provision is further clarified by this illustration:

> (d) A, without any excuse, fires a loaded cannon into a crowd of persons and kills one of them. A is guilty of murder, although he may not have had a premeditated design to kill any particular individual

The above provisions could also cover throwing a hand-grenade or explosive device into a crowded place.[128]

The clarity and precision of the ordinary criminal law in general offer three significant advantages. Firstly, the clarity of law is one of the fundamental principles

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126 Indian Law Commission, *A Penal Code* (Pelham Richardson Cornhill, London, 1838) v.

127 Participant No.16.

128 See *Public Prosecutor v Imam Wahyudin bin Karjono & Anor* [2017] MLJU 513.

and values of the rule of law.[129] Secondly, the right of the accused to rely on the defences provided under the Chapter IV (General Exceptions) of the Penal Code 1936 and the Common Law principles is strictly preserved. Further, the normal criminal offences stipulate clearly the mens rea element, as compared to some strict liability special terrorism offences. Thirdly, the use of established criminal offences, as compared to the contentious concept of 'terrorist act', arguably can keep the definitional debates on terrorism at bay. Even a High Judge, who claimed that the definition of the 'terrorist act' under the Penal Code is 'clear', admitted that 'there is no country that manages to define terrorism and terrorism acts'.[130] Further, the terms like 'terrorist group' and 'terrorist activity' within special criminal law create conceptual and definitional problems, particularly issues relating to motive.[131] By contrast, 'motive' under the ordinary criminal law, 'has no place in the concept mens rea' and 'usually does not affect criminal liability'.[132] As contended by an interviewed prosecutor at the Attorney General's Chambers in supporting the NCM:

> It would be better that if we treat murder as murder, so that people understand the clear message from the working of legal system, that a murder is wrong regardless of the motivation.[133]

The absence of motive, particularly the political and religious motivations, is also related to the next benefit of the NCM.

5.4.4 The Neutrality of the NCM

Another benefit of the NCM is related to the 'neutrality' of the ordinary criminal law. Firstly, the absence of the political and ideological elements within normal criminal offences is vital as the criminalisation approach is prone to be politicised, as discussed earlier in Chapter 4. The state, therefore, cannot manipulate the substantive law for its political agenda, as well as terrorists are prevented from claiming 'special' status. As

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129 Geert Keil and Ralf Poscher, *Vagueness and Law: Philosophical and Legal Perspectives* (Oxford University Press, Oxford, 2016) 9.

130 Participant No.28.

131 Victor V. Ramraj, Terrorism, Security, and Rights: A New Dialogue (2002) 1 *Singapore Journal Legal Studies* 1.

132 Molly Cheang, *Criminal Law of Malaysia & Singapore Principles of Liability* (Professional Books Publishers, Kuala Lumpur, 1990) 23.

133 Participant No.19.

according to a legal practitioner, the special law can 'be counter-productive as some party may be cast as martyrs and heroes'.[134] The neutrality of the criminal law to a certain extent, can prevent the politics and religion of the accused terrorists from becoming the highlights of their trials.[135]

The absence of the motive requirement in the NCM can be relatable to the idea of fairness too. Accepting motive as an ingredient of an offence would widen the scope of admissibility of evidence, which is mainly based on relevancy principle.[136] That includes 'the evidence of mind-set', which can possibly derive from classified information.[137] Consequently, it would lower the threshold for conviction in terrorism-related trials.[138]

From another perspective, the absence of motive is also an advantage to the prosecution and the court too. The prosecution is not required to prove 'the act is done or the threat is made with the intention of advancing a political, religious or ideological cause'.[139] Accordingly, the court needs not to occupy its time with opinion evidence on those matters, which sometimes can be problematic and involve more time and resources. For instance, in *Siti Noor Aishah Atam v Public Prosecutor* (2018), three expert witnesses, including one from outside Malaysia, were called to give an opinion on whether the books possessed by the accused are related to terrorism.[140]

In sum, the NCM embodies delegitimising effect and preventive elements, which are imperative in countering terrorism. The legal certainty and neutrality within the NCM uphold the rule of law and preserve substantive fairness in terrorism-related trials.

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134 Interview Participant No.16.

135 Kent Roach, Canada's New Anti-Terrorism Law (2002) 1 *Singapore Journal of Legal Studies* 1,128.

136 See Chapter 2, Evidence Act 1950 [Act 56].

137 See Max Hill, *R v Daniel Creagh: A Note by Independent Reviewer of Terrorism Legislation* (October 2018) <https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2018/10/R-v-Daniel-Creagh-MHQC.pdf> accessed 2 May 2019.

138 See Joint Committee on Human Rights, *Legislative Scrutiny: Counter-Terrorism and Border Security Bill* (July 2018) HC 1208 HL Paper 167, 13 <https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/1208/1208.pdf> accessed 2 May 2019.

139 This is part of the definition of 'terrorist act' in section 130B(2)(b), Penal Code 1936 [Act 574].

140 *Siti Noor Aishah Atam v. Public Prosecutor* [2018] 5 CLJ 44.

5.5 The Possible Risks Caused by the NCM

There are significant possible risks posed by the NCM to the criminal law as well as the counter-terrorism strategy. The dangers to criminal law arise possibly from the clash of security and criminal justice paradigms, which embody distinct values and seek different objectives.[141] That arguably involves potential perversion of criminal justice values, including over-criminalisation, erosion of procedural protections, compromised trials and disproportionate punishment.[142] The effects possibly emanate from the conduct of key players in court, particularly judges who control the trial and have the final say. There are potential influences posed to the criminal trial by the authorities as well as public expectation. The security service would certainly try to convey to the judges the level of terrorist threats so that it will be well reflected in their judgment and sentencing. The effort can be properly done by the prosecutors in court, particularly during the sentencing process, but it is not always the case. For instance, a private criminal practitioner, who was interviewed, complained that:

> In a terrorism-related trial at High Court, the judge mentioned that 'we (judges) have already attended special briefing organised by the E8 (Police Counter-Terrorism Unit), it is very terrifying'. For us, it is prejudicial. The Police want to portray that terrorism is so great, and something must be done.[143]

A High Court judge who has been tasked to hear terrorism-related cases confirmed the existence of such briefing.[144] Besides the pressure that comes from the security services, judges are pushed to consider public expectation, particularly in terrorism cases that gain great attention. Supposedly, there can be potential impacts especially to the standards for conviction, sentencing and the admissibility of evidence. Moreover, as mentioned earlier in the previous Chapter 4, all criminal trials in Malaysia are presided by a judge sitting alone.[145]

The risks to the counter-terrorism agenda can be understood from the government and security service perspectives. The NCM might not fulfil the 'something

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141 Clive Walker, Terrorism and Criminal Justice: Past, Present and Future (2004) *Criminal Law Review* 311. See also Manuel Cancio Meliá and Anneke Petzsche, 'Terrorism As a Criminal Offence' in Aniceto Masferrer and Clive Walker (eds), *Counter-Terrorism, Human Rights and the Rule of Law* (Edward Elgar Publishing, Cheltenham, 2013) 87.

142 Lucia Zedner, Terrorising Criminal Law (2014) 8:99 *Criminal Law and Philosophy* 99.

143 Participant No.13.

144 Participant No.31.

145 Section 4.2, Chapter 4.

should be done' expectation put on the government in responding to terrorism. Failure to do so may lead people to take the law into their own hands.[146] On the other hand, it is understandable if the security services are not convinced with the preventive input of the NCM, due to its post-hoc nature. So, they are expected to act quickly and decisively, and preventive detention becomes another available option. The alternative is always kept in mind by the police. In *Public Prosecutor v Siti Noor Aishah Atam* (2017), the court acquitted the accused after the prosecution failed to prove a prima facie case against her for possession of books linked to terrorism.[147] She was immediately re-arrested to undergo 60 days POCA 1959 detention and a subsequent two years of house arrest upon release.[148] According to a senior police officer at the counter-terrorism unit, the action taken by the police after the accused's family made a report that she was then about to leave for Syria.[149] Although *Siti Aishah* case does not involve any normal offence, as she was charged under special terrorism offences, the case shows that the police can always without hesitation disregard the criminalisation approach when it comes to prevention. There is also concern over 'hard-core' terrorists that remain a security threat after serving their sentence. For instance, individuals like Anjem Choudary in the UK and Yazid Sufaat in Malaysia.[150] At this juncture, it is worth considering the use of a peace bond in dealing with former terrorist convicts.[151] A convict will be ordered to sign a peace bond, which is a recognizance to keep the peace for a stipulated period. As discussed earlier in Chapter 4, this is an example where an ACM measure should play its role.[152]

5.6 Contextualising the NCM in Malaysia

As mentioned earlier, there is little known about the prosecutions of terrorist suspects based on the normal criminal law in Malaysia. Two notable cases are the Movida Bar grenade attack 2016 and the assassination of Kim Jong-nam, half-brother of current

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146 Stanley Cohen, 'Moral Panics and Folk Concepts' (1999) 35:3 *Paedagogica Histor*ica 589.

147 *Public Prosecutor v Siti Noor Aishah Binti Atam* [2016] MLJU 895.

148 Suara Rakyat Malaysia, *Malaysia Human Rights Report 2016: Civil and Political Rights* (Suaram, Petaling Jaya, 2017) 11.

149 Participant No.30.

150 Amy Chew, Malaysian Al Qaeda Scientist Who Tried to Produce WMD to be Released from Jail Next Year (Channel New Asia, 29 August 2018) <https://www.channelnewsasia.com/news/asia/malaysian-al-qaeda-scientist-who-tried-to-produce-wmd-to-be-10658914> accessed 23 October 2018.

151 See Chapter VII Security for Keeping the Peace and for Good Behaviour, Criminal Procedure Code 1935 [Act 593]. For the UK, see Part IV Counter-Terrorism Act 2008 (Chapter 28); Justices of the Peace Act 1361 (Chapter 1 34 Edw 3).

152 Section 4.7, Chapter 4.

North Korean leader Kim Jong-un in 2017. Due to the limited sample, these two cases are worthy of attention.

The first case is the Movida Bar Attack in 2016, where two individuals were charged with attempting to commit murder and conducting terrorist acts of throwing and blowing up hand grenades at the Movida Bar in Puchong, Selangor.[153] The prosecution, however, withdrew the charge of attempting murder, when the accused persons pleaded guilty for a special terrorism offence under section 130C(1)(b) of the Penal Code. Commenting on the case, an interviewed senior prosecutor explained:

> At first, we charged them with so many offences. Firstly, we charged them under section 130c (of the Penal Code), which is to commit a terrorist act, by way of throwing off a hand grenade and caused eight people to be hurt, that is the first charge.
>
> And then we charged them accordingly for attempting to commit murder, attempted murder, because eight people were injured, these eight people would be dead if the bomb blasts in a certain way, so it was an attempted murder.[154]

The reason for withdrawing the attempted murder charge was explained by another senior prosecutor, who was interviewed at the Attorney General's Chamber. According to him:

> In the Movida (Bar) case, we withdrew the murder charge because we cannot conduct the trial together, (that would require) different procedures. The murder case (is subject to) the Criminal Procedure Code, Movida case involves section 130 (of the Penal Code, so we withdrew the first charge (that is the attempted murder charge). We only concentrated (the charge under) section 130 and above (special terrorism offences). We did not concentrate section 307 (attempted murder), or section 302 (murder).[155]

153 *Public Prosecutor v Imam Wahyudin bin Karjono and anon* [2017] 10 MLJ 582.

154 Participant No.5.

155 Participant No.7.

The Movida case was the first terrorist attack in Malaysia perpetrated by individuals linked to Islamic State (IS).[156] As it gained wide public attention, it is worth examining on how the state immediately responded. With regards to the criminalisation approach and the NCM in particular, the consideration of the prosecution to charge the accused with ordinary offences, along with special terrorism offences is somehow interesting. According to an interviewed senior prosecutor, the attempted murder charge was:

> [P]ut in because we think about the livelihood or the safety of these victim, because we want them to be given equal justice because each of them were hurt in some way or the other.[157]

So, based on the explanation, the normal criminal law was used to express solidarity with victims of terrorism. This perhaps links to the profound retributive element of the criminal law.

The second case is the assassination of Kim Jong-nam, a half-brother of North Korea's leader Kim Jong-un, in Kuala Lumpur International Airport in February 2017.[158] Two foreign nationals were charged with murder under section 302 of the Penal Code 1936. The trial, according to an interviewed prosecutor, was conducted in accordance with the normal procedure under the Criminal Procedure Code 1935.[159] No specific reason is given as to why the prosecution decided not to use the special terrorism law and procedure. Hypothetically, on the one hand, the act of killing in public at an airport using a chemical substance certainly can fit the wide definition of ‘terrorist act’ under the law. But on the other hand, the prosecution also had to prove the political motive or objective that motivated the two female suspects of Indonesian and Vietnamese nationality to take part in the alleged assassination. So, future research needs to look into the reasons as to why the prosecution adopted the NCM. The move also possibly reflects the government policy that disregards this type of attack as ‘terrorism’.

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156 M.Kumar, Cops Confirm Movida Bombing First Ever IS Attack in Malaysia (The Star Online, 4 July 2016) <https://www.thestar.com.my/news/nation/2016/07/04/movida-igp-confirm-is-attack#VKu6YJuepKK8jPre.99> accessed 8 August 2016.

157 Participant No.5.

158 Khairah N. Karim, Kim Killing: Two Female Suspects Charged With Murder (New Straits Times, 1 March 2017) <https://www.nst.com.my/news/nation/2017/08/216278/kim-killing-two-female-suspects-charged-murder-video> accessed 2 May 2017.

159 Participant No.7.

However, the on-going trial ended abruptly, as the prosecution dropped the murder charges against both accused.[160] A lesser charge of voluntarily causing hurt by dangerous weapons or means was offered only to one of the accused and she pleaded guilty.[161]

5.7 Critical Perceptions of Application of the NCM

Exclusively based on the interview data collected, opinions towards the application of the NCM can be divided based on the following three categories of research participants.

First, some participants believed that ordinary criminal law and process alone are sufficient in countering terrorism without any need for special laws. A private practitioner, who has handled terrorism-related cases, contended that 'the Penal Code and Criminal Procedure Code are good enough and cover all important aspects' in countering terrorism.[162] A similar view was also expressed by another lawyer who asserted that the real problem is that the poor implementation of the processes and the lack of integrity render the ordinary law ineffective.[163]

Second, some participants believe that ordinary criminal law and procedure should be given priority over the special legislation. For instance, an interviewed prosecutor at the Attorney General's Chambers elucidated his stance by saying:

> I think we have to approach each individual case based on the facts and circumstances. I would agree that there are instances that it would be better to approach a particular act which is motivated or related to certain ideologies that could be classified related to terrorism. But it may not benefit the public at large if we always try to find a link between, like murder, always we want to link to certain motivation ideological motivation behind it. It would be better that we treat murder as murder, so that people understand so that the message is clear

160 Hannah Ellis-Petersen, Kim Jong-nam death: suspect Siti Aisyah released after charge dropped (11 March 2019) <https://www.theguardian.com/world/2019/mar/11/kim-jong-nam-trial-siti-aisyah-released-after-charge-dropped> accessed 2 May 2019.

161 Kate Mayberry, Vietnamese Suspect in Kim Jong Nam Murder Handed Prison Term (1 April 2019) <https://www.aljazeera.com/news/2019/04/vietnamese-suspect-kim-jong-nam-murder-prison-sentence-190401025712711.html> accessed 2 May 2019.

162 Participant No.2.

163 Participant No.13.

> from the working of the legal system that murder is wrong regardless of the motivation. However, there are also instances where I would say that it would be very important for our criminal justice system to recognise that certain acts are motivated, especially when it is done by multiple persons in multiple locations, to show the nexus and links between all the acts, and also it could work to raise awareness. I think that's how we should deal with it. It could be beneficial and better if we treat it as normal crime first, but than if we really need to find the motivation behind it, and treat it as the act of terrorism.[164]

A senior criminal lawyer emphasised that the normal criminal process is sufficient and still effective in dealing with terrorism-related cases. According to him:

> In my opinion, the existing procedures and safeguards under the Criminal Procedure Code are adequate, we can still get convictions against alleged terrorists, who commit murder. We can still get convictions even if terrorists try to kidnap or frighten witnesses. (It is because) we have adequate safeguards, and police have enough power to protect. So, I believe that existing procedure adequate, but I would like to give a caveat. I might change my mind. It is just (as of now) I am not persuaded that all that is rampant as if witnesses are getting killed, identified, kidnapped. I don't see that.[165]

Third, some participants think that NCM is ineffective in dealing with terrorism-related acts. As put by a senior prosecutor who has vast experience in handling criminal cases:

> Terrorists usually use the loopholes in the law or in the generosity of the law in human rights protections to their advantage, by resulting to normal criminal, normal evidence rules, and normal procedural, they will have a field day. And we will have a greater danger in the country, which we can't afford to have. So, if they decided to isolate themselves from society, and deny others of their rights, by killing them mercilessly. Then, this type of people has, in my view, abrogated their right to normal procedures. They are up to their own evaluation, and they are not forced to. They themselves declared a war against the country, then therefore they cannot come back and say, 'ok I would like to

164 Participant No.19.

165 Participant No.16.

> have my right restored and my rights to be respected'. He would come to equity must come with clean hands. And these people are certain (to) have bloody hands.[166]

These three categories represent three different viewpoints towards the NCM. It is interesting to note that young participants have a more positive perception of the NCM. By contrast, the senior participants are more sceptical to the use of normal offences in countering terrorism. Further, not all government prosecutors dismissed the capability of the NCM to be the primary mode within the criminalisation approach.

5.8 Constraints to the Application of the NCM

In general, the application of the NCM in Malaysia is subjected to three major constraints.

5.8.1 Internal Culture and Attitude

The first constraint derives from the existing internal culture among authorities that used to work in arrangements dominated by executive-based and emergency measures.[167] Therefore, whenever there are options between the NCM and the SCM, the latter is always the preferred choice. It can be seen from a number of arrests and prosecutions made under the SOSMA 2012 in Figure 3.2 of Chapter 3. A criminal private lawyer asserted that the existing ordinary criminal law and procedures:

> [I]s enough…more than enough. The main problem is they don't know how to implement and enforce. That's why they need the SOSMA (that provides more power).[168]

The lack of powers is always perceived as an issue in the post-ISA era.[169] A Member of Parliament, who was a member of the state legislative council at the time of the interview, observed that

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166 Participant No.6.

167 Andrew Harding, The Constitution of Malaysia (Hart Publishing, Oxford, 2012) 174.

168 Participant No.13.

169 Safia Naz and Johan Shamsuddin Bin Sabaruddin, 'Malaysian Preventive Detention Laws: Old Preventive Detention Provisions Wrapped in New Packages' (2018) 43:2 *Journal of Malaysian and Comparative Law*, 59.

> [b]asically, the law that we already have, either under the Penal Code or firearms law, is enough to punish or take them to prison, the recent amendments (creating special anti-terrorism law) are more concerned about the power to investigate.[170]

It is important to note that the investigation of terrorism-related cases is conducted by the Counter-Terrorism Unit, under the Special Branch, which is responsible for matters of national security and intelligence.[171] It is not placed under the Criminal Investigation Division, which has more experience and expertise in collecting evidence for the prosecution purpose.[172] A senior police officer at Counter-terrorism Unit described the task as a 'new thing', but also clarified that there are seasoned investigators who were transferred to the unit.[173] A High Court judge, who has heard a number of terrorism-related cases, observed that a number of Special Branch personnel who are called to give testimony in court are 'quite reluctant to reveal' information.[174] Counter-terrorism actors with this kind of attitude or who used to work behind closed doors certainly favour a special process that allows them to keep information arbitrarily.[175] Accordingly, the normal procedures based on the Criminal Procedure Code 1935 are less favourable.

5.8.2 Legal Setting

The second constraint is related to the existing legal setting, and the desire for more power on the part of authorities as discussed above. The present 'Scheduled Offences' approach that replaced the certification approach in 2011 pushes the prosecution to an either-or dilemma.[176] This means the prosecution must choose either to deploy the ordinary criminal law along with normal procedures or to use special criminal law together with special processes.

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170 Participant No.32.

171 Participant No.30.

172 Zakaria Haji Ahmad, *The Police and Political Development in Malaysia: Change, Continuity and Institution-Building of A "Coercive" Apparatus in a Developing, Ethnically Divided Society* (PhD Thesis, Massachusetts Institute Of Technology, 1977)97, Appendix H.

173 Participant No.30.

174 Participant No.28.

175Muhammad Bakashmar, 'Winning the Battles, Losing the War? An Assessment of Counterterrorism in Malaysia' (2008) 20:4 *Terrorism and Political Violence,* 480.

176 See Section 6.4.3.1, in Chapter 6.

Before 2011, the prosecution might choose to charge terrorist suspects with terrorism offences along with normal procedures. For instance, in *Public Prosecutor v. Mohd Amin Mohd Razali (2002),* the accused persons were tried based on the normal procedure.[177] Even though the prosecution initially intended to utilise special procedures for security offences provided under Essential (Security Cases) Regulations (ESCAR) 1975, the Attorney General who led the team insisted:

> The prosecution although we have used ESCAR we will as far as possible endeavour to have an open trial without sticking to the stringent provisions of ESCAR.[178]

The Attorney General, who led the prosecution, further clarified to the court that the provision of ESCAR 1975 was invoked only as regards to the venue of the trial which was due to security reasons. Hence, the trial had been conducted based on the normal criminal procedure under the Criminal Procedure Code. The inclination of the prosecution towards the normal mode is glaring in the case. The prosecution decided to take the higher burden compared if the ESCAR 1975 was fully utilised. Under normal circumstances, the court must to be satisfied that the prosecution has made out a prima facie case before calling the accused to enter his or her defence.[179] But, ESCAR 1975 states that 'when the case for the prosecution is closed, the court shall call on the accused to enter on his defence'.[180] Abdul Malek Ahmad FCJ observed:

> Although the ESCAR was not used despite the certificate presented at the outset, it is my view that the appellants had not been prejudiced by the stance of the prosecution team in resorting to the normal rules of procedure and evidence. If at all, this concession is more to the advantage of the appellants (the accused).[181]

However, this option is no longer available to the prosecution. In *Lahad Datu* case (2017), the trial had to be conducted in accordance with special procedures under the

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177 *Public Prosecutor v. Mohd Amin Mohd Razali & Ors* [2002] 5 CLJ 281.

178 *Mohd Amin Mohd Razali & Ors v Public Prosecutor* [2002] 4 MLJ 129, 141.

179 Section 173 (f)(i) Criminal Procedure Code 1935 [Act 593].

180 Regulation 13, Essential (Security Cases) Regulations 1975.

181 *Mohd Amin Bin Mohd Razali & Ors v Public Prosecutor* [2003] 3 CLJ 425, 438.

SOSMA 2012 because the offence of waging war against the Yang di-Pertuan Agong is within the First Schedule of the Act.[182] This is similar to the *Movida* case, which was explained earlier. An interviewed senior prosecutor clarified:

> [O]ne thing you must remember, in the past we have the ESCAR, that gave power to Public Prosecutor to certify certain trials (to be treated as security-related trials). But now, the cases that fall under (the category of) security offences is clearly listed (in SOSMA 2012). It is stated clearly that (special offences) under Chapter 6, 6A and 6B (of the Penal Code, must be tried in accordance with the SOSMA 2012). So, we just can't (follow normal procedure).[183]

Thus, at this point, the present scheduled offence approach completely disallows any NCM-SCM fusion trials. The ordinary criminal offences and the NCM, in general, become more unappealing to the authorities. Accordingly, it is posited that the certification approach is more appropriate for the criminalisation approach in the pursuit of fair and effective measures.

5.8.3 The 'Specialness' of Terrorism

The third constraint links to the perception that terrorism is a special phenomenon and must be dealt with in a special way.[184] Thus, the NCM is perceived to be less capable in preventing and confronting terrorism. An interviewed prosecutor, who has handled a significant number of terrorism cases, emphasised the peculiarity of terrorism offences by saying:

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182 *Public Prosecutor v. Kadir Uyung & Anor & Other Appeals* [2017] 1 LNS 1403.

183 Participant No.23.

184 See Alex P. Schmid, 'Frameworks For Conceptualising Terrorism' (2004)16:2 *Terrorism and Political Violence*, 197; Ben Saul, 'Defining Terrorism: A Conceptual Minefield' in A. Gofas, R. English, S.N. Kalyvas, E. Chenoweth (eds*), The Oxford Handbook of Terrorism* (Oxford University Press, Oxford, 2017)

> The terrorism offences are special kinds of offences. Then, there are situations (where) we can get direct evidence as opposed to other types of crimes, and therefore we need special act (legislation) to admit certain evidence.[185]

In dismissing the application of the NCM, a senior private lawyer who has been practicing for more than 25 years asserted:

> Terrorism involves systematic activities, premeditated acts. They (terrorists) have their system, people, organisations, activities have been placed here and there. They are very well-organised. With the current criminal law like murder and causing hurts, I think it is not sufficient just to charge them with criminal offences because their crimes are very much premeditated, so in addition to punishment, we must have more other specific avenues.[186]

Another criminal lawyer expressed his scepticism towards the preventive value of the ordinary criminal law to deal with the 'special' feature of terrorism:

> As opposed to in normal criminal cases where you have attempt, I mean the attempt is normally in the course of doing of the offence but you are unable to complete it, therefore you will be charged for attempt. But when it comes to terrorism which is linked to a set of belief, it is always very difficult to find what would be the set of fact that would then amount to an offence, can a mere possession of prohibited items be considered as an offence.[187]

The senior lawyer, however, further explained that the issue is not the ordinary criminal law, but rather the lack of a comprehensive and effective counter-terrorism strategy.[188] Hence, the prevention agenda should not be left solely on criminal law.[189]

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185 Participant No.5; see also Kent Roach, 'The eroding distinction between intelligence and evidence in terrorism investigations' in Andrew Lynch, Nicola McGarrity, George Williams*, Counter-Terrorism and Beyond: The Culture of Law and Justice After 9/11* (Routledge, Abingdon, 2010) 48.

186 Participant No.22.

187 Participant No.1; see also Manuel Cancio Melia, 'Terrorism and Criminal Law: The Dream of Prevention, the Nightmare of the Rule of Law' (2011) 14 New Crim L Rev 108.

188 ibid.

5.9 Conclusion

It has been posited that the NCM should be the prioritised mode within the criminalisation approach. In the context of Malaysia, the NCM is represented by a number of specified offences in the Penal Code 1936. By contrast, the special offences, which are the nucleus of the SCM, are also placed in the Code under Chapter VIA. And there are in-between 'hybrid' offences, which have been proven useful to countering terrorism.

The pertinent question here is whether the NCM can operate alone for a fair and effective counter-terrorism strategy? The answer is no, mainly for two reasons. The strong element of the post-hoc operation in the NCM may not synchronise with the pre-crime expectation society. The notion of 'take it (criminal law) as it is or leave it' may push a state to become oppressive and authoritarian, and to resort the ACM. Criminalising preparatory acts under the SCM can be an alternative to preventive detention. Secondly, 'terrorism' is always perceived as a special type of offence due to its nature and impact. The perception indeed is not baseless. It is not uncommon too for criminal law to adapt to the specialness of certain types of crime, such as corruption and drug-related activities. Nevertheless, the NCM should always be pushed forward and given priority for its quality and values. Therefore, the following issues should be addressed and overcome.

First, the scheduled offence approach is a huge constraint to the NCM and should be discontinued. The prosecutors should be given more flexibility in conducting terrorism-related prosecution. But such discretion must be placed under court's scrutiny. It is recommended that the special processes can still be applied in a terrorism-related trial even though the suspect is charged with normal offence. For that purpose, the prosecution must make an application to the presiding judge, along with justifications for special procedures. At this point, the accused may object to the request made by the prosecution. The same practise should be applied to special offences trials. Accordingly, if there is no request from the prosecution to use a special process, the special offences trials must be conducted in accordance with normal procedures based on the Criminal Procedure Code 1935, rather than SOSMA 2012. At present, there is a huge difference between normal and special processes, as the latter is detrimental to the rights of the accused.

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189 Syed Mohammed Ad'ha Aljunied, 'Countering Terrorism in Maritime Southeast Asia: Soft and Hard Power Approaches' (2012) 47:6 *Journal of Asian and African Studies*, 652.

Second, there must be clear guidelines on choosing the suitable offences, and processes too if the scheduled offence approach is no longer applicable. As pointed out earlier, at present, each prosecutor has his or her own preference. This may not only hinder consistency but also is unfair to the accused persons. A guideline or code for prosecutors is also useful to the police to navigate their investigation.

Third, the hybrid special-normal offences should take priority over the special offences. As argued earlier, this type of offence is closer to the ordinary offences and has been tested. For that matter, some of the provisions that govern the offences should be revised to ensure they reflect the present society.

As argued earlier, the NCM is not capable of working alone in countering terrorism. So, the next following chapter will cover the additional concept of the SCM and its implementation within Malaysia's counter-terrorism strategy.

Chapter 6 - The Special Criminalisation Mode (SCM) in Malaysia's Counter-terrorism Strategy

6.1 Introduction

This chapter deals with the use of special law and processes within the criminalisation approach in Malaysia's counter-terrorism strategy. As explained in Chapter 1, the second and third objectives of this thesis aim to understand the concept of the criminalisation approach and its implementation in Malaysia. Correspondingly, this chapter will discuss the law and its workings with specific reference to the special criminalisation mode (SCM) in countering terrorism. The SCM encompasses the use of special anti-terrorism law and procedure within the Malaysian criminal justice system.

In view of the second research objective, the discussion will be focusing on how the SCM retains its legitimacy whilst certain aspects of the criminal justice system have to be altered in the service of counter-terrorism. The researcher examined how far the legitimate boundaries of criminal law may be pushed to facilitate the counter-terrorism agenda. The third objective will navigate the discussions in section 6.4 as to how the existing adaptive criminal law and procedures operate in Malaysia, particularly after the repeal of ISA 1960 in 2012. Section 6.2 will explore the meaning and justifications for the SCM, along with its drawbacks. The drawbacks of the SCM will be examined in section 6.3. Then, the features of the SCM in Malaysia will be discussed from two perspectives in section 6.4. The first is by looking into the structural outlook of the existing anti-terrorism legislation in Malaysia. The second part will concentrate on the substantive features of the SCM that differentiate it from the Normal Criminalisation Mode (NCM).

The primary focus of this Chapter is on the use of special criminal laws and criminal processes within or beyond anti-terrorism legislation in Malaysia. As the subject is important for this thesis and deserves full attention, other connected topics such as policing and sentencing will only be discussed briefly throughout the chapter. Such topics deserve more extended and specific treatment in future research projects.

6.2 Meanings and Justifications for the SCM

As discussed in the previous Chapter, the Normal Criminal Mode (NCM) preserves the primacy of criminal law and the criminal justice system, whereby terrorism-related offenders are processed through the existing criminal courts in accordance with established criminal processes. As compared to the NCM, the Special Criminal Mode (SCM) treats terrorism-related offences as a special kind of crime. Hence it qualifies for special and exceptional procedures and rules in order to achieve a fair but more effective outcome.[1] Both modes uphold the position of the existing criminal justice system, but the SCM make certain changes to the ordinary criminal law and procedure through the regular legislative process.[2] It makes the SCM different from the Avoidance of Criminalisation Mode (ACM) that utilises executive-based, or even extra-legal and emergency measures, in preventing and confronting terrorism.[3] The SCM is related to the approach described by Gross and In Aoláin as 'legislative accommodation', where 'the existing system is kept intact while some special adjustments are introduced through legislative measures'. [4] They divide it into two models. The first model involves certain modifications of ordinary law, and the second model embodies the use of special emergency legislation. The SCM falls under the first model. From this perspective, the SCM is not an emergency approach, which will be discussed later in this Chapter. The justifications for having a special type of legal response to terrorism within comprehensive counter-terrorism arrangements can be specified as follows.

6.2.1 The State's Duty to Protect

In general, a state has the right to defend its existence.[5] Equally, since a state, 'is an association of citizens in a constitution', the government must protect its citizens and

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1 See Gerard Hogan and Clive Walker, *Political Violence and the Law in Ireland* (Manchester University Press, Manchester, 1989) Chapter 4; Kent Roach, 'The Combatting Terrorism and the Via Terrorism Arrests: Two Steps Foreword, One Step Back' (2013) 60 *Crim LQ* 1.

2 See Clive Walker, *The Prevention of Terrorism in British Law* (Manchester University Press, Manchester,1992) Chapter7; Kent Roach, 'Canada's New Anti-Terrorism Law' (2002) 2002 *Singapore Journal of Legal Studies* 122.

3 Mark Neocleous, 'From Martial Law to the War on Terror' (2007) 10 *New Crim L Rev* 489; Clive Walker , 'The Governance of Emergency Arrangements' (2014) 18:2 *The International Journal of Human Rights*, 211.

4 Oren Gross and Fionnuala Ní Aoláin, *Law In Times Of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Press, Cambridge, 2006) 66.

5 Clive Walker, *Terrorism and the Law* (Oxford University Press, Oxford, 2011) 16.

civil order.[6] From there, the state has the right and duty to act to ensure the security of people. The UK's government often emphasises that protection is the first duty of the state.[7] Special and exceptional measures have been recognised as a legitimate state's response to real threats and dangers.[8] It has been contended that when a liberal democracy and its values are in danger, 'it must live up to the demands of the hour, and every possible effort must be made to rescue it, even at the risk and cost of violating fundamental principles'.[9] With regards to terrorism threats, apart from challenging humane values, the terrorist agenda is often associated with authoritarianism, which consequently undermines the state's constitutionalism.[10]

The state's duty to protect its citizens and ensure the security of the nation is also recognised under international law.[11] For the UK, such obligations derive, for example, from the European Convention on Human Rights (ECHR).[12] The state is required to act proportionately, corresponding with the possible or anticipated threats in protecting the public.[13] The Convention also provides clear guiding principles on the derogation of fundamental rights during an emergency period.[14] In the context of Malaysia, the ECHR was only applicable in the Federation of Malaya for a short period from 1953 until independence in 1957.[15] Other than the ECHR, other international conventions also uphold the duty of a state to protect its citizens, as well as to take extraordinary measures in times of emergency.[16] Article 51 of the UN Charter

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6 Aristotle, *Politics*, 3 III.

7 See *National Security Strategy and Strategic Defence and Security Review 2015* (Cm 9161, 2015) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/555607/2015_Strategic_Defence_and_Security_Review.pdf> accessed 5 June 2018. See also *R. (on the application of Abbasi (Feroz Ali) and Abbasi) v Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for the Home Department* [2002] EWCA Civ 1598.

8 See David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge University Press, Cambridge, 2006) 17-66; Oren Gloss, 'Chaos and rules: Should responses to violent crises always be Constitutional?' (2003) 112:5 *The Yale Law Journal*, 1011. See also Markus Thiel (eds), *The 'Militant Democracy' Principle in Modern Democracies* (Ashgate, Aldershot, 2009).

9 Karl Loewenstein, 'Militant Democracy and Fundamental Rights, I' (1937) 31 *American Political Science Review* 417.

10 Paul Wilkinson, *Terrorism and the Liberal State* (The Macmillan Press, London, 1977) 80.

11 United Nation General Assembly Resolution No.2625 (1970)

12 For example, Article 1, 2 and 3 European Convention on Human Rights 1950.

13 *McCann and Others v United Kingdom* [1995] 21 ECHR 97 GC, Application no. 18984/91.

14 Article 15, European Convention on Human Rights 1950.

15 *Keyu and others (Appellants) v Secretary of State for Foreign and Commonwealth Affairs and another (Respondents)* [2015] UKSC 69.

16 For example, Articles 4 and 6, International Covenant on Civil and Political Rights 1966; Article 3, Universal Declaration of Human Rights 1948.

recognises the right of self-defence of a state if an armed attack occurs.[17] The self-defence measures taken by a state must be based on the necessity and proportionality principles.[18] Another example of international treaties related to the duty of a state to protect is the Geneva Conventions. The Malaysian government ratified the Four Geneva Conventions for the Protection of the Victims of War (1949) in 1962, and Parliament passed the Geneva Conventions Act (1962) to give legal effect to the treaty.[19] However, due to the poor ratification record of Malaysia, it can be argued that the international covenants and rights conventions are not the main basis of the duty of the state to protect in Malaysia. Based on a large number of international treaties, the duty of a state to protect its citizens, as well as their fundamental rights, is arguably part of customary international law.[20] In theory, a treaty is only binding on state parties, whereby a rule established under the customary international law is binding on all states except those that remain persistent objectors.[21] In *Public Prosecutor v Oie Hee Koi* (1968), the Privy Council concluded that the status of the accused as a prisoner of war 'was covered prima facie by customary International Law'.[22] However, Abdul Ghafur Hamid views that the reception of the customary international law by the Malaysian courts is less consistent.[23] There were cases where the courts applied relevant rules of customary international law, often through the medium of English Common Law.[24] On the other hand, there were cases where the judges did not recognise an established rule of customary international law in the absence of a ratifying domestic statute.[25] As mentioned in Chapter 4, there are several cases where the courts made references to international treaties as a 'soft law' in interpreting national legislation, without explicitly mentioning customary international law.[26]

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17 Article 51, Chapter VII — Action with respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression, Charter of the United Nations.

18 International Court Of Justice, Reports Of Judgments, Advisory Opinions And Orders: Legality of the Threat or Use of Nuclear Weapons Advisory Opinion Of 8 July 1996, <http://www.icj-cij.org/files/case-related/95/095-19960708-ADV-01-00-EN.pdf> accessed 10 May 2018

19 Geneva Conventions Act 1962 (Revised 1993) [Act 512].

20 D'Amato, Anthony, 'Human Rights as Part of Customary International Law: A Plea for Change of Paradigms' (1995-1996) 25 *Ga. J. Int'l & Comp. L*. 47; Michael Wood, 'Customary International Law and Human Rights' (2016) 3 *EUI Working Paper* AEL.

21 Mark Villiger, *Customary International Law and Treaties: A Study of Their Interactions and Interrelations, with Special Consideration of the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers, Lancaster, 1985) 14.

22 *Public Prosecutor v. Oie Hee Koi and other Appeals* [1968] AC 829.

23 Abdul Ghafur Hamid @ Khin Maung Sein, 'Judicial Application of International Law in Malaysia: An Analysis' (2005) 1 *Asia Pacific Yearbook of the International Humanitarian Law* 196.

24 See *Olofsen v Government of Malaysia* [1966] 2 MLJ 300.

25 See *Public Prosecutor v Narogne Sookpavit* [1987] 2 MLJ 100.

26 Section 4.4.2, Chapter 4.

In terms of Malaysian law, the duty of the state to protect is recognised primarily from these two sources: The Federal Constitution 1957 and the English Common Law. Part II of the Constitution states the rights of the citizen that must be preserved, and Part XI grants special and emergency powers to the states to deal with subversion, organised violence, and acts and crimes which are prejudicial to the public.[27] The difference between special and emergency powers under Articles 149 and 150 of Part XI will be discussed later in this chapter. Under the Common Law, a state owes a legal and moral duty to its citizen to protect them.[28] Such duty can also be inferred from the criminalisation of offences that may cause harms to the citizens.[29]

Based on the duty of a state to protect its citizens, a government must act against terrorist attacks, as well as to prevent terrorist incidents from occurring. Considering the risks posed by terrorism, proportionate special laws are necessary 'to assist prevention, disruption and detection'.[30] Additional or extraordinary measures are justifiable, if the ordinary criminal law is insufficient to bring the terrorists to justice.[31] For instance, the government contended that it is 'imperative for Malaysia to quickly enact a separate preventive law that deals specifically with terrorism' in order to curb the Islamic State's threats.[32]

Besides, new laws could offer a 'necessary reassurance' function in the aftermath of terrorist attacks.[33] This state response might also become a reflective tribute to the victims. As observed by Garland:

> The new political imperative is that victims must be protected, their voices must be heard, their memory honoured, their anger expressed, their fear addressed.[34]

Therefore, at this point, enacting special laws can be a necessary gesture responding to terrorist attacks. However, any reaction must be proportionate and rational;

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27 See Andrew Harding, *The Constitution of Malaysia: A Contextual Analysis* (Hart Publishing, Oxford, 2012) 165-178.

28 *Mutasa v A.G.* [1980] Q.B.114. See also, *R (Abbasi) v Foreign Secretary* [2002] EWCA Civ 1598.

29 John Stuart Mill, *On Liberty* (Boston: Ticknor & Fields, Cambridge, 1863) 21.

30 Lord Carlile, *The Definition of Terrorism* (Cm 7052, March 2007) 47.

31 Lord Lloyd, *Inquiry Into Legislation Against Terrorism* (Cm 3420, 1996) para 30.

32 Ahmad Zahid Hamidi, 'Malaysia's Policy On Counter Terrorism And De-radicalisation Strategy' (2016) 6:2 *Journal Of Public Security and Safety* 1.

33 Bruce Ackerman*, Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism* (Yale University Press, New Haven, 2006) 44.

34 David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (University of Chicago Press, Chicago, 2001) 11.

otherwise it would lead to what has been described by Roach, as the 'criminalization of politics'.[35] It is a situation where criminal law reform has been offered as a symbolic and quite cheap response to broad range of social, economic and cultural problems.

In summary, the SCM is justifiable based on these two premises; a state in general has the responsibility to protect its citizens from harms, and in fulfilling such duty, there might be situations where special and exceptional measures are necessary beyond the existing criminal law.[36] These two limbs should not be construed separately in formulating a counter-terrorism strategy. Failure to do so may render the strategy to be illegitimate and measures taken to be disproportionate.

6.2.2 Terrorism as a Special Type of Crime

The second justification for the SCM emphasises the exceptional nature of terrorism itself, which deserves to be treated in different ways compared to other crimes. Even though terrorism can be construed as a kind of crime, its distinct features should not be denied. In *Public Prosecutor v Mohamed Danny bin Mohamed Jedi* (2018), the Court of Appeal observed that:

> Terrorism is a distinct category of criminal activity. It has no equal because it is motivated by rigid and intolerant ideologies, rather than financial gain, anger or revenge. It is far more insidious in that it attacks our very way of life and seeks to destroy the fundamental values to which we ascribe – values that form the essence of our constitutional democracy.[37]

Accordingly, the criminal justice response to the exceptional character of terrorism can be found in various aspects, including the creation of special offences, alterations to the ordinary process, as well as imposing severe punishment. The main reason to have special legislation is that terrorism is 'difficult to prove and often involves intricate questions of law'.[38] This is closely related to the nature of terrorism itself. Terrorism often involves transnational activities, and its ramifications transcend national boundaries. Thus, the evidence required might be located in more than one

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35 Kent Roach, *Due Process and Victims' Right* (University of Toronto Press, Toronto, 1999) 312.

36 For practical example in UK's context, see *Youssef v. Home Office* [2004] EWHC 1884 (QB); Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2017 SI 2017/1325.

37 *Public Prosecutor v Mohamed Danny Bin Mohamed Jedi* [2018] 1 LNS 50.

38 Lord Gardiner, *Report of a Committee to Consider, in the Context of Civil Liberties and Human Rights, Measures to Deal with Terrorism in Northern Ireland* (Cmnd. 5847, 1975) para 70.

jurisdiction. In *Public Prosecutor v Muhammad Kasyfullah bin Kassim* (2016), the court acknowledged the difficulty faced by the prosecution to obtain evidence from Syria and Istanbul.[39] Another problem is related to the clandestine quality of terrorism activities, which are often protected by tight group solidarity. This reflects in the following oath taken by the accused person in the case of *Public Prosecutor v Mohamad Nasuha Abdul Razak* (2017):

> I… (Name)…swear in the name of Allah, that I will not betray my brothers in *Anshar Daulah Islamiyah* (The Followers of Islamic State) in anywhere. I must prepare myself to accept the punishment of God, and not accepted by earth If I betrayed them or I provided important information to 'thaghut' (evil or tyrants) related to identity, strategy, or movement, either little or much information that may jeopardize the safety of other members. When I get caught or threatened to be killed, I will not give any information to God's enemies.[40]

Accordingly, an interviewed prosecutor who has been assigned with terrorism-related cases contended that 'it is harder to get direct evidence in such cases as opposed to other types of crimes'.[41] Moreover, the use of sophisticated and modern technique to execute a well-planned act of terror makes the evidence-gathering process more complicated and costly.

The exceptional characteristics of terrorism are discernible in other special crimes such as organised crime, human trafficking and corruption. From here, at least two trends emerge. Firstly, the creation of special law and process for each of these criminalities is seen as desirable, meaning that each special crime has its own SCM. Secondly, the use of a special strategy or law to deal with more than one special crime due to their common features. For instance, the special process provided under the SOSMA 2012 is also applicable to organised crime and human trafficking offences, apart from terrorism-related offences.[42] Suspects of these crimes will be brought to specific High Courts designated for security offence trials.[43] In the UK, the Serious and Organised Crime Strategy, which is adopted by its government, uses a framework which was first developed in the Counter-terrorism strategy (CONTEST).[44]

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39 *Public Prosecutor v Muhammad Kasyfullah bin Kassim* [2016] MLJU 241, para 29.

40 *Public Prosecutor v Mohamad Nasuha Abdul Razak* [2017] 1 LNS 1420.

41 Participant No.5.

42 First Schedule, Security Offences (Special Measures) 2012 [Act 747].

43 Participants No.28 and No.31.

44 Secretary of State for the Home Department, Serious and Organised Crime Strategy (Cm 8715 October 2013) 25.

6.2.3 Special Sentence for Special Crime

Owing to the dangerous and destructive nature of terrorism acts as compared to other crimes, the design of sentences must reflect the denunciatory function of criminal justice.[45] The capability of terrorists to cause greater harm to people, as well as the 'overriding motivation of imposing extreme fear' to the nation must be considered in sentencing.[46] In *Public Prosecutor v Abdul Halim Ishak and Others* (2013), the Court of Appeal observed that:

> Denunciation, in the context of sentencing, is achieved by the imposition of a sentence the severity of which makes a statement that the offence in question is not to be tolerated by society either in general or in a specific instance. The statement made may be directed at any combination of the public at large, victims, potential offenders and individual offenders. In part its aims are similar to that of deterrence, it has also been seen to be associated with retribution.[47]

The sentence for terrorism must embody deterrence and incapacitation, as well as rehabilitation.[48] Deterrence must not just have an impact on the accused, but also others.[49] According to a government official, who is involved in the rehabilitation arrangements, there is a special program for terrorism convicts sentenced with imprisonment.[50]

Imposing 'special' sentences against terrorists can be implemented in two ways. Firstly, a terror suspect can be charged with ordinary crimes like murder and causing hurt, as discussed in the previous chapter. The aggravating character of the

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45 Clive Walker, (n 2) 283; Sentencing Council, *Terrorism Guideline: Consultation* (London, October 2017), 4,<https://www.sentencingcouncil.org.uk/wp-content/uploads/Terrorism-guideline-consultation-final.pdf> accessed on 12 February 2018.

46 Mohammed Sail Alden-Wattad , 'Is Terrorism a Crime or an Aggravating Fact of in Sentencing.' (2006) 4:5 Journal of the International Criminal Justice, 1017; Kelly Berkell, 'Risk Reduction in Terrorism Cases: Sentencing and the Post-Conviction Environment' (2017) 13 *Journal for Deradicalization* 276.

47 *Public Prosecutor v Abdul Halim Ishak & Ors* [2013] 9 CLJ 559.

48 On rehabilitation, see Robert Diab, 'R v. Khawaja and the Fraught Question of Rehabilitation in Terrorism Sentencing' (2014) 39 *Queen's Law Journal* 587; Rohan Gunaratna, 'Terrorist Rehabilitation: a Global Imperative' (2011) 6:1 Journal of Policing, Intelligence and Counter Terrorism, 65; Malkanthi Hettiarachchi, 'Rehabilitation to Deradicalise Detainees and Inmates: A Counter-terrorism Strategy' (2018) 13:*2 Journal of Policing, Intelligence and Counter Terrorism*, 267.

49 *R v. Ball* [1952] 35 Cr App R 164; *Public Prosecutor v Wan Mohamad Nur Firdaus Abd Wahab* [2019] 5 CLJ 320; *Mohamad Nasuha Abdul Razak v. Public Prosecutor* [2019] 3 CLJ 612.

50 Participant No.12.

terror act committed would only be emphasised during the sentencing process to achieve deterrence and incapacitation effects.[51] So it is for judges to decide based on their judicial discretion. Secondly, the SCM approach where the legislature enacted different or harsher punishment that reflects the distinctiveness of the act of terrorism.[52] At this point, the judiciary is expected to follow the tone set by the legislature in passing sentence.[53] This can be inferred from provisions that contain a minimum period of imprisonment. For example, the act of providing or collecting property for terrorist acts is punishable with imprisonment for a term not less than seven years but not exceeding thirty years.[54] Besides, the Offenders Compulsory Act 1954 and sections 173A, 293 and 294 of the Criminal Procedure Code 1935 do not apply to all offences relating to terrorism in Chapter VIA of the Penal Code 1934.[55] Accordingly, judges must pass sentences strictly as stipulated. The judges no longer have the discretion to make alternative orders, to replace imprisonment sentence.[56] This arguably can standardise or retain consistency in sentencing cases related to terrorism. Alternatively, the objective can also be attained by providing sentencing guidelines for judges.[57]

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51 Mohammed Sail Alden-Wattad (n 46); see also Joanna Amirault and Martin Bouchard, 'Timing is Everything: The Role of Contextual and Terrorism-specific factors in the Sentencing Outcomes of Terrorist Offenders' (2017) 14:3 *European Journal of Criminology*, 269.

52 Mariaelisa Epifanio, 'Legislative Response to International Terrorism' (2011) 48:3 *Journal of Peace Research*, 399; see also, Elena Pokalova, 'Legislative Responses to Terrorism: What Drives States to Adopt New Counterterrorism Legislation?' (2015) 27:3 *Terrorism and Political Violence* 474.

53 See *Public Prosecutor v. Lee Tin Bau* [1984] 1 LNS 56; see also *Public Prosecutor v. Aszroy Achoi* [2018] 8 CLJ 762

54 Section 130N(b) of the Penal Code 1936 [Act 574], see also *Public Prosecutor v Mohamad Nasuha Abdul Razak* [2017] 1 LNS 1420.

55 Section 130TA of the Penal Code 1936 [Act 574], the amendment was made in 2015 by the Penal Code (Amendment) Act 2015 [Act 1483]

56 For example, s.173 gives power to the court to discharge an accused person conditionally or unconditionally, s.293 and s.294 give power to the court to discharge youth offenders or first offenders conditionally, such as to execute the bond to keep good conduct or to perform community service.

57 Sentencing Council, *Terrorism Guideline: Consultation* (London, October 2017), <https://www.sentencingcouncil.org.uk/wp-content/uploads/Terrorism-guideline-consultation-final.pdf> accessed on 12 February 2018. See also, Sentencing Council, *Sentencing Guidelines Council, Dangerous Offenders* (London, July 2008) <http://www.banksr.co.uk/images/Guidelines/Dangerous%20Offenders/Dangerous_Offenders_Guide_for_Sentencers_and_Practitioners.pdf> accessed 12 February 2018; see also Florence Lee, 'R. v Rahman: sentencing under the new terrorism offences definitive guideline' (2019) *Sentencing News* 2019, 9.

6.2.4 Political Assurance

Finally, the SCM could render the criminal justice approach more convincing and appealing to the government. The outcome would be desirable because the SCM provides a more practical outlook for the state as compared to NCM, particularly in striking a balance between liberty and security. Accordingly, the criminalisation approach should be given priority over other approaches. This aspect is imperative in the Malaysian context since the reliance on executive powers was prevalent in the past. From this perspective, the objective of the SCM is comparable to the task assigned to the Diplock Commission, which was to consider:

> [W]hat arrangements for the administration of justice in the Northern Ireland could be made in order to deal more effectively with terrorist organisations by bringing to book, otherwise than by internment by the Executive, individuals involved in terrorist activities, particularly those who plan and direct, but do not necessarily take part in, terrorist acts; and to make recommendations.[58]

The Commission produced its own version of SCM reflecting on the local circumstances and values, which the government implemented. Jackson argues that the Diplock system has proven that 'the criminal courts can provide a workable, reasonably proportionate and now largely human rights compliant solution to the threat of paramilitary violence and terrorism'.[59] Based on Northern Ireland's experience, it is almost right to say that the SCM has helped to preserve the supremacy of the criminal justice system in countering terrorism, but of course with a certain degree of compromise to the details of the criminal justice system.

6.3 The Drawbacks of the SCM

The manipulation of special criminal law and criminal process as a response to terrorism comes with potential dangers too. The drawbacks arise from the nature of special legislation, which is the crux of the SCM, along with the existing unconducive circumstances.

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58 Lord Diplock, *Report of the Commission to Consider Legal Procedures to Deal with Terrorist activities in Northern Ireland 1972* (Cmd 5185) 5.

59 John Jackson, 'Many Years in Northern Ireland: The Diplock Legacy' (2009) 60:2 *Northern Ireland Legal Quarterly* 225.

6.3.1 Reactive Measures

The first possible danger arises from the special laws enacted as a direct response to terrorist incidents. In general, reactive laws are not always deficient, since some are reflective of current needs.[60] The problem is when the reactive legislation is produced in crisis and under pressure, without adequate time for debate either in the legislative council or in civil society.[61] It would be worse if the legislature, as well as security services, were not well-informed about the real threats and lack a 'full understanding why the terrorists succeeded'.[62] For instance, Short noted that the policies which were made within the first six months of the Emergency 1948-1960 were essentially reactive due to uncertainties and constraints.[63]

In the post 9/11, the Malaysian government proposed a bill in 2003 to create a special chapter within the Penal Code dedicated to terrorism offences.[64] According to the minister who tabled the bill, the move to criminalise specific acts was necessary in order for Malaysia to fulfil its international obligations:

> Terrorism is a global issue; efforts to overcome it require the involvement and cooperation of all parties, at international and national level. Therefore, Malaysia intends to be a party to the International Convention for the Suppression of the Financing of Terrorism and International Convention against the Taking of Hostages. In order to enable Malaysia to take part in these conventions, domestic legislation must be amended to criminalise terrorism acts and provide appropriate punishments.[65]

The government was under pressure to show strength and creativity. It must be noted that the amendment came into force only after 6 March 2007, albeit it obtained Royal Assent on 25 December 2003.[66] The more interesting fact is that the prosecution

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60 Kimberley N. Trapp, 'The Potentialities and Limitations of Reactive Law Making: A Case Study in International Terrorism Suppression'(2016) 39 *The University of New South Wales Law Journal* 1191.

61 Kent Roach, 'The Criminal Law and Its Less Restrained Alternatives' in Victor V. Ramraj, Micheal Hor, Kent Roach and George Williams (eds), *Global Anti-Terrorism Law and Policy* (Cambridge University Press, Cambridge,2012) 93.

62 Kent Roach, 'The Criminal Law and Terrorism ' in Victor V. Ramraj, Micheal Hor, Kent Roach and Kent Roach (eds), *Global Anti-Terrorism Law and Policy* (Cambridge University Press, Cambridge, 2005) 132.

63 Anthony Short, 'The Malayan Emergency and the Batang Kali Incident'(2005) 41:3 *Asian Affairs* 337.

64 Penal Code (Amendment) Act 2003 [Act A1210].

65 Dewan Rakyat Hansard, 29 October 2003, 73.

66 His Majesty's Government Gazette [P.U.(B) 67/2007] 5 March 2007.

service only began to deploy the new legislation in 2013.[67] Several inferences can be drawn from this. First, the legislation was purely passed to give in to the international pressure or to satisfy political demand, rather than catering to the national need for useful legal reform. While commenting on the non-application of Chapter VIA, a Member of Parliament, Mohamed Azmin Ali contended that the government was not:

> [L]ooking into domestic and regional problems in handling the issue carefully, but rather to stuck in international politics to please superpowers, particularly the US administration.[68]

The argument seems to have force as the US in 2004 regarded Malaysia as 'a strong partner in the war on terrorism'.[69] However from a wider perspective, enacting or reviewing anti-terrorism law has become a global trend since the 9/11 attacks and later in confronting the Islamic State (IS) group. In the White Paper on IS's threats which was presented in the Parliament in 2014, the government asserted that the move to strengthen anti-terrorism legislation corresponds with other nations such as the US, Great Britain and Australia.[70] A similar reason was also given by the government when proposing the Prevention of Terrorism Act (POTA) 2015.[71] This global trend can be attributed to the UN and other international organisations, which has been discussed in Chapter 3.[72]

The second inference from the subsequent non-implementation of the new law is that the government itself was not ready to enforce the law. The 2003 amendment emphasises the criminalisation approach, whereby at that time the government was still relying heavily on the executive-based measures, especially detention without trial under the ISA 1960.[73] The following table shows the number of ISA detainees and their alleged involvement in 2003.[74]

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67 *Yazid Sufaat & Ors* [2014] 2 CLJ 670.

68 Dewan Rakyat Deb 16 April 2012, 92.

69 US Department of State (Office of the Coordinator for Counterterrorism), Country Reports on Terrorism 2004 (April 2005) 38.

70 The Prime Minister's Department, 'Kertas Putih: Ke Arah Menangani Ancaman Kumpulan Islamic State' (2014) 76.

71 Dewan Rakyat Hansard, 6 April 2015, 24.

72 Section 3.5.1.5, Chapter 3.

73 Nicole Fritz and Martin Flaherty, 'Unjust Order: Malaysia's Internal Security Act' (2003) 26 *Fordham Int'l L.J.* (2003). See also *Human Rights Commission of Malaysia, Review of the Internal Security Act 1960* (2003) (SUHAKAM, Kuala Lumpur, 2003) 6.

74 Noor Hishmuddin Rahim, *Human Rights and Internal Security in Malaysia: Rhetoric and Reality* (Master thesis, Naval Postgraduate School, 2006) 56.

Table 6.1: Number of the ISA 1960 detainees in 2003

Alleged involvement in:	June 2003	December 2003
Al-Ma'unah armed group	15	-
Currency counterfeiting	-	6
Malaysian Mujahidin Group	18	17
Jemaah Islamiah	58	66
Unknown	8	2
Total	99	91

The majority of the detainees were held because of their alleged involvement with terrorist organisations. It shows that the government was relying on the ISA 1960 for dealing with terrorist suspects. The 9/11 aftermath provided more opportunity for the government to defend executive-based measures in Malaysia.[75] The ISA 1960 was equated with the USA PATRIOT Act 2001.[76] Further, Roach observes that Western disapprovals as to how Malaysia and other developing countries handled security issues were almost inaudible after 9/11.[77]

The pressure for the Malaysian government to pass a new law as a response to terrorism still existed even in the absence of any major terrorist incidents. Kuala Lumpur was alleged to be the 'launch-pad' of al-Qaeda for the 9/11 attacks.[78] The 2002 Bali bombings in Indonesia and the revelation of transnational terrorist networks at the regional level also influenced Malaysia's security perspectives.[79] 'Pressure to respond quickly and decisively', according to Walker, could render the proposed law to be ill-considered 'panic legislation'.[80] The pressure that emerges from terrorist attacks at home is certainly different from the international pressure imposed on a government to respond to terrorist incidents abroad. However, both could push a state to respond

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75 James Bovard, *Terrorism and Tyranny: Trampling Freedom, Justice, and Peace to Rid the World of Evil* (Palgrave Macmillan, New York,2004) 214. See also; Human Rights Watch, *In the Name of Security: Counterterrorism and Human Rights Abuses Under Malaysia's Internal Security Act* (May 2004) Vol. 16, No. 7, 43.

76 Therese Lee, Malaysia and the Internal Security Act: The Insecurity of Human Rights after September 11 (2002) *Singapore Journal of Legal Studies* 56; Andrew Humphreys, 'Malaysia's Post-9/11 Security Strategy: Winning "Hearts And Minds" Or Legitimising The Political Status Quo?' (2010) 28:1 *Kajian Malaysia* 21.

77 Kent Roach, 'Anti-Terrorism and Militant Democracy: Some Western and Eastern Responses', in András Sajó (ed), *Militant Democracy* (Eleven International Publishing, Utrecht, 2004) 174. See also, Neil Hicks, 'The Impact of Counter Terror on the Promotion and Protection of Human Rights: A Global Perspective' in Richard Wilson (ed), *Human Rights in the 'War on Terror'* (Cambridge University Press, New York, 2006) 215.

78 Rohan Gunaratna, *Inside Al Qaeda: Global Network of Terror* (Columbia University Press, New York,2002) 194. See also, National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report* (2004) 156.

79 Andrew T.H. Tan, *Security Perspectives of Malay Archipelago: Security Linkages in the Second Front in the War of Terrorism* (Edward Elgar, Cheltenham, 2004) 87-109

80 Clive Walker, (n 2) 16.

disproportionately and inappropriately to real threats of terrorism. On the other hand, the pressure and threats posed by from the 'new terrorism' could also move the government to review its strategy towards a more comprehensive approach.[81] Although the notion of 'new terrorism' is contested, it arguably moves the government to review its responses and consider new potential policies including the criminalisation approach.[82]

Another salient point of reactive responses is related to excessive punishments within special anti-terrorism legislation. In the previous section, it has been argued that the exceptional nature of terrorism justifies a special approach to sentencing. The punishment must be adequate to reflect the seriousness of terrorism-related offences. However, reactive responses may undermine the principle of proportionality in punishing criminals. As argued by von Hirsch and Ashworth:

> Disproportionate punishments are unjust not because they possibly may be ineffectual or possibly counterproductive, but because they purport to condemn the actor for his conduct and yet visit more or less censure on him than the degree of blameworthiness of that conduct would warrant.[83]

Within the counter-terrorism regime, the use of capital punishment is often criticised mainly because it is against human rights principles.[84] In the context of Malaysia, several acts of terrorism are punishable with death penalty. Some of the offences are as stated in the Table 5.2.

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81 On the question of the 'newness' of 'new terrorism', see; Peter Neumann and Peter R. Neumann, *Old and New Terrorism: Late Modernity, Globalization and the Transformation of Political Violence* (Polity Press, London, 2009); Martha Crenshaw, 'The Debate over "New" vs. "Old" Terrorism' in Ibrahim A. Karawan, Wayne McCormack, Stephen E. Reynold (eds) *Values and Violence: Intangible Aspects of Terrorism* (Springer, Dordrecht, 2008) 117; Isabelle Duyvesteyn, 'How New Is the New Terrorism? (2004) 27:5 *Studies in Conflict & Terrorism*, 439; Jonny Burnett and Dave Whyte, 'Embedded Expertise and the New Terrorism' (2005) 1:4 *Journal for Crime, Conflict and the Media* 1; Ersun N. Kurtulus, 'The "New Terrorism" and its Critics' (2010) 34:6 *Studies in Conflict & Terrorism* 476; Frank Furedi, *Invitation to Terror: Expanding Empure of the Unknown* (Continuum, London, 2007) 23.

82 Prime Minister Najib Abdul Razak, 'U.S.-Malaysia Defence. Cooperation: A solid Success Story' (3 May 2002) The Heritage Foundation Lecture <http://www.heritage.org/research/lecture/us-malaysia- defense-cooperation> accessed 20 April 2018.

83 Andrew von Hirsch and Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford University Press, Oxford, 2005) 134.

84 UN Secretary General, Press Statement: Capital punishment does not reduce terrorism, Secretary-General says on World Day Against Death Penalty, urging respect for human rights in all security operations (SG/SM/18185-HR/5332-OBV/1669, 7 October 2016) <http://www.un.org/press/en/2016/sgsm18185.doc.htm> accessed 24 February 2018.

Table 6.2: Terrorism-related Offences which are Punishable by Death

Offences	**Penal Code 1936**
Waging war against the Yang di-Pertuan Agong	s.121
Committing a terrorist act that results in death	s.130C
Directing activities of a terrorist group that results in death	s.130I
Providing or collecting property for terrorist act that results in death	s.130N
Providing services for terrorist purpose that results in death	s.130O
Accepting gratification to facilitate terrorist act that results in death	s.130QA
Abetment of mutiny within Malaysian Armed Forces, if mutiny is committed in consequence thereof	s.132

Arguably, international human rights law reserves such punishment to be applied only to 'most serious crimes' in countries which have not abolished the death penalty.[85] The 'most serious crime' has been interpreted as 'intentional crimes with lethal or other extremely grave consequences' or 'intentional killing'.[86] Terrorism is often argued to be falling under this type of crime. It must also be noted that Malaysia retains capital punishment for other offences as well, including drug trafficking, which is punishable with mandatory death penalty upon conviction. Capital punishment is not unconstitutional in Malaysia.[87] Thus, the issue of whether the capital penalty is an excessive punishment or not for terrorism acts may lead to different conclusions. It is a contentious subject for the legislature, as well as the judiciary if the law does not stipulate a mandatory death penalty. In *the Lahad Datu* (2016) incursion case, for instance, the trial judge had the discretion to pass a death sentence or imprisonment for life upon conviction, but he did not mainly because:

> There was no evidence that any of these accused were personally involved in the skirmishes or had pulled the trigger in the exchanges of fire with the security forces which resulted in casualties in Kg. Tanduo or in Kg. Simunul. There was no evidence that any of them had killed the police and army personnel who were killed during the skirmishes. There was no evidence that they had done so in cold blood. There was no evidence that they had personally injured the personnel who were injured during the skirmishes.[88]

85 Article 6 (2), International Covenant on Civil and Political Rights 1966.

86 United Nations Economic and Social Council, Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty Resolution (25 May 1984) Resolution No. 1984/50.

87 *Public Prosecutor v Lau Kee Hoo* [1983] 1 MLJ 157.

88 *Public Prosecutor v Atik Hussin bin Abu Bakar and other case* [2016] MLJU 968, para 47.19-47.20.

The learned judge also acknowledged the existing 'debates that the death penalty should be abolished because it is cruel, degrading to human dignity and ineffective as deterrence in preventing serious crimes in the country'.[89] But the judge conceded that it is a matter for Parliament to decide. The Court of Appeal and the Federal Court, however, disagreed with the decision and replaced the initial sentence with the death penalty for the nine accused persons for waging war against Yang di-Pertuan Agong.[90] The Court of Appeal referred to the 'rarest of the rare' doctrine which has its origin in the Indian Supreme Court case of *Bachan Singh v. State of Punjab* (1980).[91] The death sentence should be used restrictively in very exceptional circumstances, by looking at the motive for, or the manner of commission of the crime, or the anti-social or abhorrent nature of the crime.[92] The Malaysian government contends that capital punishment is only applicable to the 'most serious crimes', as it is still perceived as 'the ultimate deterrence'.[93] It also reflects the majority public opinion in favour of the death sentence, particularly as a punishment for murderers.[94] Accordingly, the government asserted that it 'remains open and will continue the engagement and consultation with the public on this matter including on possible alternatives to the death penalty'.[95]

As for countries like Malaysia that retain capital punishment, there are at least two important conditions that must be observed in sentencing terrorist to death. Firstly, capital punishment must be the outcome of a fair trial that strictly observes the rule of law. Secondly, capital punishment can only be imposed on terrorist acts that involve intentional killing and cause death. Hence, it corresponds with the rationale of executing murderers. Nevertheless, imposing the death penalty can be counter-productive in confronting terrorism, as its execution might stimulate sympathy for

89 *Public Prosecutor v Atik Hussin bin Abu Bakar (n 88)* para 47.6.

90 *Public Prosecutor v Kadir bin Uyung & Anor and another appeal* [2017] MLJU 1692.

91 *Bachan Singh v. State of Punjab* [1980] AIR SC 898.

92 *Machhi Singh v State of Punjab* [1983] AIR 957.

93 UN Human Rights Council, Report of the Working Group on the Universal Periodic Review: Malaysia (Eleventh session 5 October 2009) A/HRC/11/30, para 55.

94 Roger Hood, *The Death Penalty in Malaysia Public Opinion on The Mandatory Death Penalty For Drug Trafficking, Murder And Firearms Offences* (The Death Penalty Project, London, 2013).

95 UN Human Rights Council, National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Malaysia Working Group on the Universal Periodic Review (Seventeenth session, 21 October–1 November 2013) A/HRC/WG.6/17/MYS/1, para 2.

persons convicted of terrorism offences.[96] Furthermore, the risk of a miscarriage of justice is also critical in terrorism prosecutions.[97] For that reason alone, the death penalty, therefore, is not an appropriate and fair reaction against terrorism.

In sum, reactive legislation is not necessarily defective. There are situations which require a proactive state to act promptly in fulfilling its duty owed to the people. However, the inevitable risks of having irrational and ill-designed legislation can be reduced if more room is given for accountability and transparency in the law-making and law-reviewing processes. Further discussion on the review mechanism in safeguarding the SCM will be continued in the following section.

6.3.2 Emergency Features

The second drawback relates to the exceptional or 'emergency' features within the SCM. Although the special laws are designed to operate in peacetime, the SCM embodies characteristics of the emergency law that allows the dilution of certain civil liberties. As discussed previously in Chapter 4, the overlapping emergency proclamations in Malaysia had normalised some special powers and laws.[98] There are provisions within the Security Offences and Special Measures Act or SOSMA 2012 that glaringly resemble the past Emergency regulations, particularly the Essential (Security Cases) Regulations 1975 or ESCAR 1975.[99] The following table highlights the similar procedural and evidential aspects between the legislation:

Table 6.3: Similar aspects between ESCAR 1975 and SOSMA 2012

	Similar aspects	**ESCAR 1975**	**SOSMA 2012**
1	Triable in High Court with a sitting alone judge.	Rule 7 (There is a special provision on non-jury trial since ordinary trials at that time were conducted before jury)	Section 12
2	No bail pending trial except in limited circumstances.	Rule 9	Section 13
3	Special manners in giving evidence for protected	Rule 19	Section 14 and 16

96 Gerard Hogan and Clive Walker, *Political Violence and the Law in Ireland* (Manchester University Press, Manchester, 1989) 264. See also, David Matthew Doyle, Republicans, Martyrology, and the Death Penalty in Britain and Ireland, 1939–1990 (2015) 54 *Journal of British Studies* 703.

97 Carole McCartney and Clive Walker , 'Enemies of the State and Miscarriages of Justice' (2013) XXXII *Delhi Law Review* 17.

98 Para 4.4.1, Chapter 4.

99 Essential (Security Cases) Regulations 1975 (P.U.(A) 320 75) was regulated pursuant to Section 2 of the Emergency (Essential Powers) Ordinance No. 1, 1969.

	witnesses		
4	Admissibility of any statement made by the accused in evidence	Rule 21(1)	Section 18A
5	Admissibility of the evidence of an accomplice or a person of tender age without corroboration	Rule 21(2)	Section 19 and 26
6	Admissibility of intercepted communications, with the authorization of the Public Prosecutor	Rule 23	Section 6 and 24
7	Protection for informants	Rule 24	Section 28

Considering the above comparisons, the continuation of emergency features from the past is apparent. The ESCAR 1975 itself mirrored past Emergency laws, which are the Essential (Criminal Trials) Regulations 1964 and the Emergency (Criminal Trials) Regulation 1948.[100] Due to its repressive nature, the Malaysian Bar at one point boycotted all trials conducted under the ESCAR 1975.[101] With similar features between the ESCAR 1975 and SOSMA 2012, it is understandable why the SCM is perceived as a new face of an emergency or 'quasi-emergency' approach that could demean the criminalisation project.

But the pertinent question is how far is it desirable to allow the normalisation of exceptional powers into national law in peacetime? The normalisation happens in at least four ways. Firstly, the emergency powers and law continue even though the threat ceased to exist. The exceptional measures are 'treated as permanent and all discussions of ordinary legislation assume that the exceptional measures will continue'.[102] The overreliance on the Emergency Ordinances and Regulations in the past is a good example. The government even had to table new law, namely Emergency (Essential Powers) Act 1979 in order to validate the ESCAR 1975, which was held invalid by the Privy Council in 1979.[103] The Council found that the regulations were made after the Emergency Proclamation of 15 May 1969 had

100 Essential (Criminal Trials) Regulations 1964 (L.N.286/64); see also Colonial Office, Emergency Legislation, Emergency (Criminal Trials) Regulation 1948 (CO 717/167/1).

101 Rahim Said, 'The October Boycott: Its Causes, Consequences And Implications For Legal Practice In Malaysia' (1981) XIV INSAF 1.

102 Paddy Hillyard, 'The Normalization of Special Power' in Nicola Lacey, *A Reader on Criminal Justice* (Oxford University Press, Oxford, 1994) 96.

103 Andrew Harding, *The Constitution of Malaysia: A Contextual Analysis* (Hart Publishing, Oxford, 2012) 168-170.

lapsed.[104] Secondly, the exceptional powers and measure are increasingly used in situations for which they were not intended. The use of the ISA 1960, for instance, was initially enacted for confronting communism. Thirdly, the de facto emergency measures absorb ordinary law.[105] The third scenario is the most problematic and contentious. In the context of Malaysia, the use of extraordinary measures, which arguably can be considered as a form of normalisation, is sanctioned by the Federal Constitution 1957. The supreme law makes distinctions between special measures that can be imposed in a normal time and emergency measures which can be deployed within a stipulated period. The former is the basis of the SCM.

Despite the dangers, there are significant differences between the SCM and emergency measures in the past. The first difference concerns how the measures come into force. As compared to the previous Emergency Ordinances, which were made by the Executive, all special anti-terrorism legislation was tabled and debated in both the Dewan Rakyat (House of Representatives) and the Dewan Negara (Senate). The SOSMA 2012 and the Penal Code Amendments with regards to terrorism offences went through the same process as any other ordinary legislation.

The second difference is that all emergency powers are special powers, but not vice versa. A distinct approach should be adopted in dealing with special laws made under Article 149 of the Constitution, as compared to Article 150 that governs emergency powers. The SOSMA 2012, being the key legislation for SCM in Malaysia, is enacted pursuant to Article 149, whereas Emergency Ordinances and Regulations were legislated under Article 150.[106] Article 149(1) of the Federal Constitution reads:

> If an Act of Parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation:
>
> > (a) to cause, or to cause a substantial number of citizens to fear, organised violence against persons or property; or
> > (b) to excite disaffection against the Yang di-Pertuan Agong or any Government in the Federation; or
> > (c) to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence; or

104 *Teh Cheng Poh v Public Prosecutor* [1979] 1 MLJ 50.

105 The United Nations Human Rights Office of High Commissioner, *Report of The Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism* (A/HRC/34/61,27 September 2017) para 11.

106 Article 150 (2B), Federal Constitution 1957.

> (d) to procure the alteration, otherwise than by lawful means, of anything by law established; or
> (e) which is prejudicial to the maintenance or the functioning of any supply or service to the public or any class of the public in the Federation or any part thereof; or
> (f) which is prejudicial to public order in, or the security of, the Federation or any part thereof,
>
> any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of Article 5, 9, 10 or 13, or would apart from this Article be outside the legislative power of Parliament; and Article 79 shall not apply to a Bill for such an Act or any amendment to such a Bill.

Article 149 is drafted to deal with anticipated threats in normal peaceful time. Lord Diplock, in *Teh Cheng Poh v Public Prosecutor* (1979), observed:

> The Article is quite independent of the existence of a state of emergency…The purpose of the Article is to enable Parliament, once subversion of any of the kinds described has occurred, to make laws providing not only for suppressing it but also for preventing its recurrence.[107]

So, the operation of Article 149 should be distinguished from the Emergency measures. The Article allows preventive measures against specific imminent threats in peacetime to operate for an indefinite period. Any laws enacted under Article 149 must comply with the rule of law and other normative values in the Constitution.

Even though the special laws like the SOSMA 2012 may involve curtailment of specific rights, the drafters of the Constitution gave a clear indication that Article 149 must uphold the rule of law by saying: 'Any person aggrieved by the enactment of a particular infringement can bring the matter to the court'.[108] According to an interviewed senior prosecutor, the SOSMA 2012:

> [W]as enacted under Article149, which is essentially a preventive law and Article 149 specifies that certain articles, Article 5, 7, 8, 9, 10, maybe not

107 *Teh Cheng Poh v Public Prosecutor* (n 104)

108 Colonial Office, *Report of the Federation of Malaya Constitutional Commission 1957* (Colonial No 330) para 174.

> abrogated, but rather put into backburner in order for the effectiveness of preventive law to take place.[109]

As the enacted law may infringe significant constitutional rights, the legislation passed under Article 149 must 'stipulate specifically the action that has been taken by the body of persons, which necessitates the promulgation of such a law'.[110]

On the other hand, Article 150 embodies the concept of 'emergency' that is often associated with 'temporal duration and exceptional nature of threats'.[111] The emergency powers should be limited and defined.[112] If Article 149 focuses on the preventive measures against anticipated threats, Article 150 emphasises measures to counter a threatening 'event' and its 'effects' in a long period.[113] In practice, the distinction line is admittedly thin and blurred. It is perhaps due to the use of vague and imprecise words in Articles 149 and 150, which are open to discretionary interpretations.[114]

Comparing to the UK, the Civil Contingencies Act 2004 defines 'emergency' and provides limits and scope of emergency regulations as well as available safeguards.[115] The law is in line with Article 15 of the European Convention on Human Rights with regards to the derogation in time of emergency.[116] Whereas in Malaysia, the executive has significant power to declare an emergency. Although Article 150(1) states that the Yang di-Pertuan Agong is the sole person to proclaim an emergency, it is settled law that the declaration by the monarch is merely a non-discretionary power to be exercised on the advice of the Cabinet.[117] Next, the implementation of measures

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109 Participant No.6.

110 *Public Prosecutor v. Khairuddin Abu Hassan & Anor* [2017] 4 CLJ 71.

111 Oren Gross and Fionnuala Ni Aolain, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Press, Cambridge, 2006) 172.

112 Colonial Office, *Report of the Federation of Malaya Constitutional Commission 1957* (Colonial No 330) para 172.

113 Cyrus Vimalakumar Das, *Emergency Powers And Parliamentary Government In Malaysia: Constitutionalism In A New Democracy* (PhD thesis, Brunel University, 1994) 231.

114 Safiz Naz and M.Ehteshamul Bari, 'The Enactment of the Prevention of Terrorism Act, 2015, in the Pursuance of the Constitution of Malaysia: Reincarnation of the Notorious Internal Security Act, 1960' (2018) 41:1 *Suffolk Transnational Law* Review 1.

115 Part 2, Civil Contingencies Act 2004 (Chapter 36).

116 Article 15 (Derogation in Time of Emergency), European Convention on Human Rights 1950

117 See *Madhavan Nair & Anor. v Public Prosecutor* [1975] 2 MLJ 264; *Teh Cheng Poh v. Public Prosecutor* [1979] 1 MLJ, 50; Stephen Kalong *Ningkan v Tun Abang Haji Openg & Tawi Sli* (No. 2) [1967] 1 MLJ 46; . *Stephen Kalong Ningkan v Government of Malaysia* [1968] 1 MLJ 119; *Balakrishnan v. Ketua Pengarah Perkhidmatan Awam* (1981] 2 MLJ 259 *Abdul Ghani bin Ali@ Ahmad & Ors v. Public Prosecutor* [2001] 3 MLJ 561.

under Article 149 in the past took place mostly during emergency periods.[118] The government had made full use of both kinds of exceptional powers under Article 149 and Article 150 simultaneously.[119] The repressive ISA 1960, for instance, which was enacted under Article 149, was used during both emergency and normal periods.[120] As these two Articles of the Constitution were drafted during the emergency period, Harding views that:

> Taken together, these special powers, already drawing human rights narrowly by 1957 standard, barely begin to fulfil present-day expectation. They also amount, to the entrusting of human rights to the mercy of executive power. It was inevitable that the rights set out in the Constitution would be eroded overtime as the developmental state increased its power.[121]

However, in terms of safeguards, the special measures under Article 149 seem to have more in Malaysia.

So, the third argument concerns the available safeguards within the SCM, as compared to the Emergency measures. Apart from the law-making process, there are other safeguards that can ensure the SCM serves its intended purposes. The checks and balances, at least in theory, may come from the principal state organs, namely the Parliament, the Judiciary and the Executive itself. Each safeguard will be now discussed in the following sections.

6.3.2.1 Parliamentary Safeguards

For parliamentary safeguards, creating a sunset clause in special legislation could ensure the existence of special laws corresponding to necessity and not lingering beyond their original purposes.[122] It is worth noting that the original Article 149 contained a sunset clause to govern all legislation enacted pursuant to it. The clause reads:

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118 For the emergency periods in Malaysia, refer Table 4.2, Chapter 4.

119 For extensive analysis see Cyrus Vimalakumar Das, *Emergency Powers and Parliamentary Government in Malaysia: Constitutionalism in New Democracy* (Phd Thesis, Brunel University, 1994).

120 See *Mohamad Ezam Mohd Noor V. Ketua Polis Negara & Other Appeals* [2002] 4 CLJ 309; *Ketua Polis Negara v. Abdul Ghani Haroon & Another Application* [2001] 3 CLJ 853.

121 Andrew Harding, *The Constitution of Malaysia: A Contextual Analysis* (Hart Publishing, Oxford, 2012) 164-165.

122 Ip John, 'Sunset clauses and counterterrorism legislation' [2013] *Public Law* 1.

> A law containing such a recital as is mentioned in clause (1) shall if not sooner repealed, ceased to have effect on the expiration of a period of one year from the date on which it comes into operation, without prejudice to the power of the Parliament to make a new law under this Article.[123]

This clause was amended in 1960, and the new provision grants power solely to Parliament to decide whether to revoke or review, or even to let the special laws made under Article 149 go on indefinitely.[124] So at present, this constitutional safeguard provided by the sunset clause in Article 149 is no longer available.

However with regards to the SOSMA 2012, the government acknowledged the need for due safeguards to the special law enacted pursuant to the Article 149. According to the Prime Minister:

> Since the bill (SOSMA 2012) is enacted under Article 149 and it allows the arrest of individuals by the police for investigation purposes beyond the norms of ordinary criminal procedure and rule of evidence, the government has decided to come out with several safeguards.[125]

One of the safeguards mentioned is the insertion of a 'sunset clause', which requires the provision on the 28-day police detention to be reviewed every five years.[126] The relevant subsections under s.4 of the SOSMA 2012 states:

> (5) Notwithstanding subsection(4), a police officer of or above the rank of Superintendent of Police may extend the period of detention for a period of not more than twenty-eight days for the purpose of investigation.
>
> (11) Subsection (5) shall be reviewed every five years and shall cease to have effect unless, upon review, a resolution is passed by both Houses of Parliament to extend the period of operation of the provision.

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123 This clause was substituted by Federal Constitution (Amendment) Act 10/1960 with the following clause: (2) A law containing such a recital as is mentioned in Clause (1) shall, if not sooner repealed, cease to have effect if resolutions are passed by both Houses of Parliament annulling such law, but without prejudice to anything previously done by virtue thereof or to the power of Parliament to make a new law under this Article.

124 *Phang Chin Hock v Public Prosecutor* (1980) 1 MLJ 70.

125 Dewan Rakyat Hansard, 16 April 2012, 6.

126 Section 4 (11), Security Offences (Special Measures) Act 2012.

This sunset clause, however, provides a minimal opportunity for the Parliament to review, as compared to what was required by the repealed Article 149. Apart from the five-year term, which is quite a long period, the scope of revision provided under s.4 is only limited to matters related to the period of police detention. Other special procedures provided under the SOSMA 2012 are not subject to the 'sunset-clause'. SUARAM called for annual parliamentary review of provisions related to remand and arrest under the SOSMA 2012.[127] SUHAKAM echoed the same view and proposed to the Home Ministry to submit an annual report to the Parliament every year on the application of the SOSMA 2012.[128]

Considering the present provision, the next crucial question is whether the parliamentary review can provide adequate safeguards to the SCM in Malaysia. Parliament seems to be an appropriate platform for the government to inform about the overall working of the SOSMA 2012 as well as for the opposition to raise their concerns. For example, during the first review in 2017, the government furnished information about current threats of terrorism and explained to Parliament about challenges faced by the security services.[129] The opposition also highlighted important issues related to the implementation of the special law, which included the abuse of power by the authorities and infringements of basic individual rights.

Nevertheless, it remains questionable as to how far the Malaysian Parliament can proceed beyond that, including resisting the will of the executive when necessary. The main reason is that the executive at that time had a majority in Parliament, and both Houses have often been dubbed a 'rubber stamp' for the executive.[130] Apart from the sunset clause, the government was criticised for not fulfilling its promise with regards to the safeguards mentioned earlier. When the SOSMA 2012 was tabled in the Parliament, the Prime Minister promised to set up a review committee comprising the representatives of the Human Rights Commission of Malaysia (SUHAKAM), the Malaysian Bar and related groups.[131] A committee could conduct a review with more focus and evidence, as compared to general debates in the Parliament. Historically, there were several ad hoc cross-party committees formed to examine specific laws

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127 SUARAM, *Malaysian Human Rights Report 2016* (Suaram, Kuala Lumpur, 2017),10

128 SUHAKAM, Press Statement: Extension of SOSMA (No.11, 5 April 2017).

129 Dewan Rakyat Hansard, 4 April 2017, 148-201.

130 Zainah Anwar, 'Government and Governance in Multi-Racial Malaysia' in John W. Langford & K. Lorne Brownsey (eds), *The Changing Shape of Government in the Asia-Pacific Region* (The Institute for Research on Public Policy, Nova Scotia, 1988) 105. See also Malte Kaßner, *The Influence of the Type of Dominant Party on Democracy: A Comparison Between South Africa and Malaysia* (Springer Science & Business Media, Bonn, 2013) 303.

131 Dewan Rakyat Hansard, 16 April 2012, 7.

and their implementation. Accordingly, it is recommended that a specific parliamentary review committee be established to look into terrorism-related legislation.

6.3.2.2 Judicial Safeguards

Other than constitutional and parliamentary safeguards, the SCM might next be brought under the rule of law by way of judicial scrutiny. Compared to the executive-based or legislature approach, the courts have more advantages.[132] As described by an interviewed prosecutor who has handled terrorism cases in Malaysia:

> We have relaxed the evidential (rules), the degree of proving some cases, the admissibility issue and all that, but yet we still leave it to court to determine the weight to be attached to such evidence, which is admitted through SOSMA, 2012. At the end of the day, if the courts do not satisfy with the evidence presented by the prosecution, they still have their avenue or the ability to throw out the case and these people can still be acquitted and discharged at the end of the trial, therefore the current mechanism much better compared to the one under the ISA.[133]

Hence, the vital question is whether the judiciary in Malaysia are ready to 'recognise that they are on their own path where their expertise exceeds that of the Minister' as well as prosecution and security services.[134]

In providing safeguards, the SCM requires the judiciary to expand its traditional role. The following two aspects of judicial function would determine the success of the criminalisation approach, particularly the SCM. The first is related to the attitude of courts in reviewing and interpreting special anti-terrorism law.[135] Another aspect

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132 See Marinella Marmo, 'Democratic States' Responses to Terrorism: A Comparative Reflection on the Perceived Role of the Judiciary in the Protection of Human Rights and Civil Liberties' in Aniceto Masferrer (ed), *Post 9/11 and the State of Permanent Legal Emergency: Security and Human Rights in Countering Terrorism* (Springer Netherlands, 2012) 241

133 Participant No.5.

134 Clive Walker, (n 2) 252.

135 Cora Chan, 'Business as Usual: Deference in Counter-Terrorism Judicial Review' in Fergal Davis and Fiona de Londras (eds), *Critical Debates on Counter-Terrorism Judicial Review* (Cambridge University Press, Cambridge, 2014) 229; Kent Roach, 'The Role and Capacities of Courts and Legislatures in Reviewing Canada's Anti-Terrorism Law' (2008) 24 *Windsor Rev Legal & Soc Issues* 5.

concerns the readiness of the court to be more active during trial beyond its traditional adversarial role.[136]

Several recent decisions perhaps may give indications as to the attitude of the present court in dealing with special legislation. In *Public Prosecutor v Khairuddin bin Abu Hassan & Anor* (2017), the High Court and the Court of Appeal firmly held that the application of special procedure provided under the SOSMA 2012, should not be extended to other offences, which are not intended by the Parliament.[137] The accused in this case was charged with attempt to commit sabotage under section 124L, within Chapter VI of the Penal Code 1936.[138] It must be noted that the SOSMA 2012 clearly states that all offences under Chapter VI and VIA are security offences, hence subject to SOSMA's special procedures.[139] However, both Courts disagreed. The decision brings significant impacts, particularly to the personal rights of the accused. For instance, no bail pending trial should be granted to the accused under the SOSMA 2012.[140]

Another significant case, which is *Lim Guan Eng v Public Prosecutor* (2017), involves special anti-corruption law.[141] A constitutional issue was raised about a special provision under the Malaysian Anti-Corruption Commission (MACC) Act 2009, which requires an accused person to submit a statement of defence before the commencement of the trial.[142] Such condition alters the well-recognised principle in which an accused person has no burden to answer before the prosecution proves a prima facie case.[143] Accordingly, the Court of Appeal declared the provision to be unconstitutional since it infringes the right of accused to a fair trial and the principle of

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136 See Stephen J Schulhofer, 'Prosecuting Suspected Terrorists: The Role of the Civilian Courts' (2008) 2 *Advance* 63; Clive Walker, 'Post-charge Questioning in UK Terrorism Cases: Straining the Adversarial Process' (2016) 20:5 *The International Journal of Human Rights*, 649.

137 *Public Prosecutor v. Khairuddin Abu Hassan & Anor* (n 110).

138 Section 124L, the Penal Code (Act 574) states: Whoever attempts to commit espionage or does any act preparatory thereto shall be punished with imprisonment for a term which may extend to fifteen years.

139 First Schedule (Section 3): Security Offences, Security Offences and Special Measures Act 2012 [Act 747].

140 Section 13, Security Offences and Special Measures Act 2012 [Act 747].

141 *Lim Guan Eng v Public Prosecutor* [2017] 1 LNS 1850.

142 Section 62, Malaysian Anti-Corruption Commission Act 2009 (Act 694) states: Once delivery of documents by the prosecution pursuant to section 51a of the criminal Procedure code has taken place, the accused shall, before commencement of the trial, deliver the following documents to the prosecution: (a) a defence statement setting out in general terms the nature of the defence and the matters on which the accused takes issue with the prosecution, with reasons; and (b) a copy of any document which would be tendered as part of the evidence for the defence.

143 See *Public Prosecutor v Yuvaraj* [1970] AC 913, [1970] 2 WLR 226, [1969] 2 MLJ 89; *Mat v Public Prosecutor* [1963] MLJ 263; *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 AMR 89; *Balachandran v Public Prosecutor* [2005] *1* CLJ 85; *Public Prosecutor v Mohd Radzi Bin Abu Bakar* [2006] 1 CLJ 457.

the 'equality of arms' under Articles 5 (1) and 8(1) of the Federal Constitution. In correcting the High Court's decision, the Court of Appeal thus observed:

> We found that one of the learned High Court Judge's grounds for dismissing the motions by comparing section 62 of the Act with that of the United Kingdom (U.K.) Criminal Procedure and Investigation Act 1996 as being of little help. This is because, unlike Malaysia, the U.K. does not have a written constitution. So where in Malaysia we subscribe to the concept of constitutional supremacy, the UK legal system is premised on the concept of parliamentary supremacy. We therefore agreed with the appellants' submission that, in Malaysia, any provision of law which has the effect of infringing any fundamental right guaranteed by the Constitution would entail the Courts of this country to examine and declare the same as unconstitutional whenever the need arises. We were very conscious of the fact that our decision on the unconstitutionality of section 62 was a weighty one. We had taken into account all the principles of law pertaining to the interpretation of the Constitution and statute law.[144]

The above cases, to a certain extent show the determination of judiciary to defy the will of the Executive, as well as to defend constitutionalism and the rule of law.[145] However, there are instances where the judges are not willing to make 'weighty' decisions or to engage judicial activism, but rather to show deferential attitude to the Executive.[146] An interviewed High Court judge contended that:

> The duty of a judge, as decided by Raja Azlan Shah (former Chief Justice) is to implement the law, whether the law is just or unjust, let the Parliament debate'.[147]

The judge was referring to the case of *Loh Kooi Choon v. Government of Malaysia* (1975), in which the judge asserted that:

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144 *Lim Guan Eng v Public Prosecutor* (n 141) para 31-32.

145 See also *Nik Nazmi Nik Ahmad v. Public Prosecution* (2014) 4 CLJ 944; Muhammad Hilman Idham & Ors v. Government of Malaysia & Ors [2011] 9 CLJ 50; *Raman a/l Shanmugan v Public Prosecutor* [2019] 1 LNS 896

146 See *Public Prosecutor v Siti Noor Aishah Atam* [2016] 1 LNS 1514; *Public Prosecutor v Siti Noor Aishah Atam* (No 2) [2017] 1 LNS 684.

147 Participant No.28.

> The question whether the impugned Act is 'harsh and unjust' is a question of policy to be debated and decided by Parliament, and therefore not meet for judicial determination. To sustain it would cut very deeply into the very being of Parliament. Our courts ought not to enter this political thicket, even in such a worthwhile cause as the fundamental rights guaranteed by the Constitution.[148]

The same approach can be found in a number of judgments, where the exact above quote was cited.[149] Most of the cases involve complaints about the violation of constitutional rights. A representative of The Human Rights Commission of Malaysia (SUHAKAM) has also observed the 'rule by law' approach:

> Malaysian court system has brilliant judges, (who) know the demand of balancing powers. There are enough cases to show that. We need to encourage the judiciary to stand up to the test. It is a tough job. But the present Malaysian judiciary, is not really up there to play the role of looking at natural justice as an important pillar. Too many judges look at law from rule by law perspective, rather the rule of law.[150]

Apart from interpreting and applying the law progressively and protectively, the SCM requires substantial modifications to the traditional role of a judge in hearing cases within the adversarial system. In the UK, for instance, the Diplock courts in Northern Ireland have altered the role of Common Law judges by introducing the non-jury trial.[151] The modification brings 'more interventions and questioning but without becoming inquisitorial; the tendency is also to focus more on legal issue rather than on advocacy'.[152] In Malaysia, where the jury trial has been completely abolished, the SCM would push the judges to be more active in a trial. This perhaps resembles the 'judicial-led model' or 'judicial umpired examination', which according to Walker, 'fits well with adversarialism, including judicial independence and equality of arms'.[153]

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148 *Loh Kooi Choon v Government of Malaysia* (1975) 1 *LNS* 90, 90.

149 *Ang Pok Hong & Anor v Public Prosecutor* (2018) 1 CLJ 347; *Lei Lin Thai v Public Prosecutor* [2016] 7 CLJ 222; *Nooralina Mohd Shah & Anor v Public Prosecutor* (2016) 4 CLJ 757; *Public Prosecutor v. Yuneswaran Ramaraj* [2015] 9 CLJ 873.

150 Participant No.4.

151 John Jackson, *Judge without Jury: Diplock Trials in the Adversary System* (Clarendon, Press,Oxford,1995). See also John D. Jackson, Katie Quinn and Tom O'Malley, 'The Jury System in Contemporary Ireland: In the Shadow of a Troubled Past Law and Contemporary Problems' (1999) 62:2 *The Common Law Jury* 203.

152 Clive Walker, (n 2) 503.

153 Clive Walker, 'Post-Charge Questioning in UK Terrorism Cases: Straining the Adversarial Process' (2016) 20:5 *The International Journal of Human Rights* 649, 660.

Further discussion on the role of judges within the SCM pertaining to evidence and its admissibility can be found in a later part of this chapter.

6.3.2.3 Executive Safeguards

In the context of Malaysia, the executive safeguards within the SCM involve at least two primary institutions, which are the Attorney General's Chambers and the Human Rights Commission of Malaysia (SUHAKAM).

Unlike in the UK, all criminal prosecutions in Malaysia are conducted by prosecutors who are government officers.[154] Private practitioners only appear on behalf of the Public Prosecutor in very rare cases.[155] The Prosecution Division is placed under the Attorney General Chambers since the Attorney General is also the Public Prosecutor. There are significant changes as to how a prosecutor handles terrorism-related cases particularly, at the investigation or pre-trial case. For example, a prosecutor at the Attorney General's Chambers explained that:

> [U]nder SOSMA, the investigating officers (police) must come to us one week before the expiry of 28 days, so in that sense, we monitor the development of investigation in some way.[156]

According to the prosecutor, the police will normally refer the case to a prosecutor when the remand period is near to an end. Hypothetically, if the prosecutor finds that there is no sufficient evidence to charge a suspect in court, the person will be released earlier than 28 days provided under the SOSMA 2012.[157] All prosecutors and police, who were interviewed, agreed that there is increasingly engagement between prosecution and investigation teams in dealing with terrorism-related cases.[158] Accordingly, the investigation is guided by legally-trained people that will direct the police to gather only relevant evidence to the case. The efficacy of the investigation can, therefore, be improved. In this regard, a prosecutor explained in detail when he was asked as what he will do if there is not enough evidence against suspects:

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154 Article 145, Federal Constitution 1957; section 376, Criminal Procedure Code 1935 [Act 593].

155 Section 379, Criminal Procedure Code 1935 [Act 593].

156 Participant No.5.

157 Section 4 (5), SOSMA 2012 [Act 747].

158 Participants No.5, 7,19, 23,24.

> Yes (suspects will be released), if we cannot prosecute. We know that some evidence it is not enough to charge them in court, even there is (recorded) statement (of suspects) available. But we hardly charge people based only on the statements, we must have presentable case, with all the evidence…
>
> If there is no case, I will just acquit (the suspects). I will just NFA (Not for Further Action). He will be free to go unless we have found compelling evidence. Normally it is not as easy as that, in deciding whether to charge or to release someone. We will think thoroughly and not by one person alone. We will discuss in group, with other senior prosecutors.[159]

The same practice was also described by another two prosecutors.[160] Apart from the practice, the SOSMA 2012 requires the police to obtain written consent from a prosecutor before conducting any telecommunication interceptions of terrorist suspects.[161] The same rule also applies to personal information from financial institutions. At this point, the prosecutors can provide an internal check and balance within the executive, including at the pre-charge stage.

When considering whether to prosecute, the prosecutors, in general, apply the '90%-conviction test'.[162] That requires a prosecutor to ensure all elements of the offences can be proved based on the available evidence. However, the threshold test is applied in some cases, and that paves the way for what is often referred to as 'tentative charge'[163]. The test is often used if not all the evidence is available at the time, whereas the suspect must be released from custody unless charged. Both tests are applicable in cases related to terrorism and triable under the SOSMA 2012. Accordingly, for the sake of uniformity and integrity, it is important to consider a more specific code of ethics that addresses pertinent issues related to terrorism-related prosecutions in Malaysia.[164] According to the interviewed prosecutors, there is no such code at present, except a series of general directives of the Public Prosecutor.[165]

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159 Participant No.5.

160 Participants No.7 & 19.

161 Section 6, SOSMA 2012 [Act 747].

162 Participants No.7, 24, 25.

163 Participants No. 24, 25, 19.

164 cf, Director of Public Prosecutions, The Code for Crown Prosecutors (2018) <https://www.cps.gov.uk/sites/default/files/documents/publications/Code-for-Crown-Prosecutors-October-2018.pdf> accessed 5 June 2019.

165 Participants No. 5, 6, 7, 19.

Another significant institution that could provide safeguards within the SCM is the Human Rights Commission of Malaysia or Suruhanjaya Hak Asasi Manusia (SUHAKAM). It was established by the Parliament under the Human Rights Commission of Malaysia Act or SUHAKAM Act 1999. At the beginning of its establishment, SUHAKAM received scepticism and was seen 'to be a creature of the Malaysian government', particularly by the civil society.[166] However, SUHAKAM has somehow played a vital role in improving the state of human rights in Malaysia.

The roles of SUHAKAM, in general, can be looked at from three aspects. Firstly, SUHAKAM could provide safeguards in its periodic assessment, particularly in the area where potential conflicts between state power and human rights are acute. For instance in 2003, SUHAKAM released 'A Review of the Internal Security Act' which opposed the ISA in general, but also provided interim recommendations in the course of repealing the Act.[167]

Secondly, SUHAKAM can raise the alarm where there are potential and possible abuses of power under the SOSMA 2012 and other anti-terrorism legislation. In 2016, SUHAKAM objected to the application of the SOSMA 2012 to Maria Chin Abdullah, the head of electoral reform group BERSIH 2.0.[168] SUHAKAM led a delegation to visit Maria when she was detained in solitary confinement.[169] Another example was illustrated by a private practitioner whose client was detained under the SOSMA 2012 and tortured by the police. According to him,

> A report was made to the SUHAKAM. Then, SUHAKAM called us, to make a press conference. So that we can expose everything. And then, starting from that, we get to know that the physical and sexual tortures have been stopped.

Thirdly, SUHAKAM can exercise its functions and powers pursuant to Sections 4(1)(d), 4(2)(b) and 4(2)(c) of the Human Rights Commission of Malaysia Act, read with Sections 4(4) and 12(1) of the same Act, to carry out an inquiry into any abuse of power that impinges human rights. For instance, BERSIH 2.0 submitted a memorandum calling upon SUHAKAM to set up an enquiry into the continued

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166 Catherine Renshaw, Andrew Byrnesy and Andrea Durbachz, 'Testing The Mettle of National Human Rights Institutions: A Case Study Of The Human Rights Commission Of Malaysia' (2011) 1 *Asian Journal Of International Law* 165, 197.

167 SUHAKAM, *Review of the Internal Security Act* 1960 (Watan, Kuala Lumpur 2003).

168 SUHAKAM, Press Statement No.31 of 2016 (The Security Offences (Special Measures) Act 2012), 21 November 2016.

169 SUHAKAM, Press Statement No.32 of 2016, (Visit to Maria Chin), 23 November 2016.

harassment of human rights defenders, including Maria Chin as mentioned earlier.[170] To date, SUHAKAM has investigated complaints on the infringements of fundamental rights and publicised the inquiry reports.[171]

Nevertheless, the role of SUHAKAM in providing safeguards for counter-terrorism legislation is also limited. It is mainly due to three factors. The first factor is linked to the original powers and functions stipulated by the SUHAKAM Act 1999. Section 4(1) of the Act states that the functions of SUHAKAM shall be:

> (a) to promote awareness of and provide education in relation to human rights;
> (b) to advise and assist the Government in formulating legislation and administrative directives and procedures and recommend the necessary measures to be taken;
> (c) to recommend to the Government with regard to the subscription or accession of treaties and other international instruments in the field of human rights; and
> (d) to inquire into complaints regarding infringements of human rights referred to in section 12.

Accordingly, SUHAKAM has limited access and power, and is often perceived as 'toothless'.[172] The second factor is related to funding. SUHAKAM is under-funded and under-resourced and struggles to maintain its routine tasks.[173] Finally, the wide scope of its functions, which is to oversee all matters relating to human rights, may hinder SUHAKAM from playing a more significant role in providing effective safeguards to the application of anti-terrorism legislation. This factor also connects to the impression that SUHAKAM does not have the expertise to advise the government on matters relating

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170 BERSIH 2.0, Memorandum to the Human Rights Commission of Malaysia (SUHAKAM) (8th June 2017), <https://www.bersih.org/bersih2-0s-memorandum-to-the-human-rights-commission-of-malaysia-suhakam/> accessed 15 May 2018.

171 For example, SUHAKAM, Report of the Public Inquiry Into the Conditions of Detention Under the Internal Security Act 1960 (SHM / ISA-INQUIRY / 06 / 03), Report of SUHAKAM Public Inquiry Into the Death in Custody of S.Hendry (17 & 18 February 2006) <http://www.suhakam.org.my/pusat-media/sumber/laporan-siasatan-awam/> accessed 15 May 2018.

172 Thio Li-ann, 'Panacea, Placebo, Or Pawn? The Teething Problems Of The Human Rights Commission Of Malaysia (Suhakam)' (2009) 40:1 *The George Washington International Law Review* 1271.

173 Amanda Whiting, 'Situating Suhakam: Human Rights Debates and Malaysia's National Human Rights Commission' (2003) 39 *Stanford Journal of International Law* 59.

to national security. This is an excuse given by the government not to consult SUHAKAM in the SOSMA 2012 review process in 2017.[174]

Due to the limitations of SUHAKAM, it is worth considering another potential executive mechanism; it comes from the office of an independent reviewer as adopted in the UK. In the past, appointments of terrorism law reviewers were more ad-hoc and involved several individuals who scrutinized different legislation.[175] The task of reviewing the terrorism-related laws is now handled more formally by the Independent Reviewer of Terrorism Legislation.[176] The Independent Reviewer carries out periodic review of terrorism legislation and matters related to the use of those laws.[177] There are three significant features that enable the Independent Reviewer to operate effectively.[178] First, the Reviewer is independent, despite the fact that the person is appointed by the government. Second, the Independent Reviewer is given unrestricted access to classified documents and national security personal. Third, his findings will be published, not only to the ministers but also to the Parliament and the public. This form of mechanism does not exist in Malaysia. Some of the roles are partly undertaken by SUHAKAM with limited access and attention given by the government.[179] The works of reviewing counter-terrorism legislation should be carried out with more focus and more proactivity, as well as more expertise and resource. So, the idea of having an independent reviewer in Malaysia should be supported.

6.3.3 Over-criminalisation

The third possible danger relates to the overlapping offences created through the implementation of the SCM. It happens when Parliament criminalises several acts by special legislation, especially where particular acts are already an offence. Each offence often carries different punishments. For instance, the act of waging war against Yang Di-Pertuan Agong is almost similar to the other terrorism offences, such as committing a terrorist act, which is also punishable by death.[180]

This over-criminalisation produces unnecessary offences. Consequently, this 'would give the prosecutors enormous powers to charge a defendant with multiple

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174 Participant No. 4.

175 Clive Walker, *The Anti-Terrorism Legislation* (3rd edition, Oxford University Press, Oxford, 2014) 301.

176 Jessie Blackbourn, 'Evaluating the Independent Reviewer of Terrorism Legislation' (2014) 67 *Parliamentary Affairs* 955.

177 Section 36, Terrorism Act 2006 (Chapter 11)

178 David Anderson, 'The Independent Review of UK Terrorism Law' (2014) 5 *New Journal of European Criminal Law* 432.

179 Participant No.4.

180 Section 121 and 130c, Penal Code 1936 [Act 574].

offences' and opens the possibility of abuse.[181] In the past, the discretionary power of the prosecution in dealing with overlapping offences was questioned several times. For instance in *Johnson Tan Han Seng v. Public Prosecutor* (1977), the court acknowledged that a person who is in possession of firearms may be charged under the Arms Act (1960), for which the maximum penalty is seven years, or under the Firearms (Increased Penalties) Act (37), for which the maximum penalty is 14 years, or under section 57 ISA, for which the penalty is death.[182] Several accused in the case were charged and convicted under the ISA 1960, then sentenced to death. The common argument for judicial scrutiny over the discretionary power of the Public Prosecutor is based on Article 8 of the Federal Constitution.[183] The provision promulgated that 'all persons are equal before the law and entitled to the equal protection of the law'.[184] However from the precedents, the court seems slow to disturb the power of the Public Prosecutor in selecting the preferred offence.[185] Lord Diplock, when delivering the advice of the Privy Council in *Teh Cheng Poh v Public Prosecutor* (1980), defended the right by saying:

> There are many factors which a prosecuting authority may properly take into account in exercising its discretion as to whether to charge a person at all, or, where the information available to it discloses the ingredients of a greater as well as a lesser offence, as to whether to charge the accused with the greater or the lesser. The existence of those factors to which the prosecuting authority may properly have regard and the relative weight to be attached to each of them may vary enormously between one case and another.[186]

The existence of overlapping offences certainly provides wider leeway in the plea-bargaining process in court. Further, the practice of offering an alternative charge is

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181 Douglas Husak*, Overcriminalization* (Oxford University Press, Oxford, 2008) 38.

182 *Johnson Tan Han Seng v Public Prosecutor*; *Soon Seng Sia Heng v Public Prosecutor Public Prosecutor v Chea Soon Hoong; Teh Cheng Poh v Public Prosecutor* [1977] 2 MLJ 66.

183 *Public Prosecutor v. Lau Kee Hoo* [1983] 1 MLJ 157; *Public Prosecutor v Khong Teng Khen & Anor* [1976] 2 MLJ 166.

184 Article 8(1), Federal Constitution 1957.

185 *Public Prosecutor v Chai Yee Ken* [1977] 1 MLJ 167; *Long bin Samat & Ors v Public Prosecutor* [1974] 2 MLJ 152; *Public Prosecutor v. Lau Kee Hoo* [1983] 1 MLJ 157; *Public Prosecutor v Lee Tin Bau* [1985] 1 MLJ 388.

186 *Teh Cheng Poh v. Public Prosecutor* [1980] *AIR SC* 898.

not illegal within the Malaysian criminal justice system.[187] For example, it has been a practise for the prosecution to offer the alternative charge of having possession of the stolen property to a person who is charged with theft.[188] The alternative charge can be framed either under the same or another law.[189] The practice has also extended to security cases too.[190] In 2006, Yazid Sufaat pleaded guilty to an alternative charge of omitting to disclose information relating to terrorist acts. The principal charge was promoting the commission of terrorist acts and being members of a terrorist group under Section 130G (a) of the Penal Code.[191] The accused had only been offered the new charge after the prosecution realised the difficulty of securing a conviction due to weak evidence given by their witnesses.[192]

Much as the overlapping offences may assist the prosecution to secure convictions, expedite trials in court, and provide options to the accused, the risk of having coercive plea-bargaining due to the overlapping legislation should not be discounted.[193] It is possible that a suspect might be easily persuaded to plead for a lesser charge even though he is innocent, and considering the prospect of the long difficult and costly process that he has to bear. This should also be contextualised in a criminal justice system where allegations of torture in custody are common, and a considerable number of accused are unrepresented. Two legal practitioners claimed that their clients were pressured to plead guilty or otherwise they would be charged with a different offence punishable with a higher sentence.[194] According to an interviewed practitioner, his clients always chose to plead guilty when an alternative charge is offered even when the prosecution case was not strong.[195] At this juncture,

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187 Section 166, Penal Code 1936 [Act 574], states: If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of those offences; and any number of the charges may be tried at once, or he may be charged in the alternative with having committed some one of the said offences

188 *Public Prosecutor v Foo Kim Lai* [2009] 1 MLJ 211.

189 *Lim Chee Lan* v Public Prosecutor [1948] 1 MLJ 71b; *Public Prosecutor v Ng Nee Tiak* [1962] 1 MLJ 421.

190 *Lee Yoon Choy & Ors v. Public Prosecutor* [1948-1949] supp MLJ 167.

191 The Malaymail Online, 'Ex-army captain gets seven years jail term after pleading to lesser terrorism info omission charge' (27 January 2017) <http://www.themalaymailonline.com/malaysia/article/ex-army-captain-gets-seven-years-jail-term-after-pleading-to-lesser-terrori#QzSw2hq4PfFJtztr.97> accessed 11 December 2017.

192 Participant No.1.

193 Michael Hor, 'Singapore's Anti-Terrorism Law' in Victor V. Ramraj, Micheal Hor, Kent Roach and George Williams (eds), *Global Anti-Terrorism Law and Policy* (Cambridge University Press, Cambridge, 2012) 285.

194 Participants No.2 & No.8.

195 Participant No.13.

the court must take a firm stance, especially in passing sentence, amid its reluctance to interfere with prosecutorial discretion.[196]

6.3.4 Glorifying Terrorism

Another possible danger is an unintended consequence of treating terrorist suspects differently from other ordinary criminal suspects and impliedly making terrorist a glorified category.[197] Apart from different procedures, the SCM also open the path to the creation of a special court and prison for terrorism-related trials and convicts. This, accordingly, grants a sort of special status to the terrorists, which can be featured in their narrative in order to claim legitimacy. While preferring the use of ordinary criminal law in countering terrorism, a private criminal lawyer contended:

> The intention of the government (to create special law, special process, special court) is to highlight (terrorism) as to how serious it is, or maybe to improve our tier (placements) according to the American standard. But (it) may be counterproductive, because some parties may be cast as martyrs or heroes.[198]

The susceptibility of terrorism trials to be used by the terrorist as a performance stage has been discussed in a previous chapter.[199]

6.4 The Application of the SCM in Malaysia

Moving to the details of the SCM and how the measures work as key components of the criminalisation approach in countering terrorism in Malaysia. Section 6.4.1 will explain briefly about the structural arrangement of special anti-terrorism law in Malaysia. Section 6.4.2 will examine three types of special offences in Malaysia and their implications to the existing criminal law, as well as the counter-terrorism strategy. Section 6.4.3 will look into the special criminal procedure within the SCM that makes terrorism-related trials in Malaysia different from other ordinary criminal hearings.

6.4.1 Structural Arrangement of Anti-Terrorism Law in Malaysia

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196 See *R v Mohammed Abdul Kahar* [2016] EWCA Crim 568.

197 Kevin Boyle, Tom Hadden, Paddy Hillyard, *Law and State: The Case of Northern Ireland* (Martin Robertson, London, 1975) 33.

198 Participant No.16.

199 Section 4.5.1.2, Chapter 4.

There is no single piece of legislation in Malaysia that is purposely designed to govern all terrorism offences and its special procedures, as compared to the UK's Terrorism Act 2000. The Malaysian government chose to incorporate terrorism-related offences in the Penal Code 1936 by creating Chapter VIA.[200]

It seems like the Malaysian legislature intends to treat terrorism like other existing ordinary crimes in one Code. By contrast, a different approach was taken by the government in dealing with crimes related to drugs and corruption. Specific legislation was enacted.[201] Apart from the Penal Code, other special anti-terrorism laws like the Prevention of Terrorism Act (POTA) 2015 and the Special Measures Against Terrorism in Foreign Countries Act (SMATFCA) 2015 do not criminalise any terrorism offences.[202] The former in general governs preventive detention of terrorist suspects, and the latter regulates extra-territorial measures against terrorism.

However, based on the following reasons, terrorism-related offences in Malaysia are in effect treated as a special type of crime. The first reason is related to the special processes involved. All terrorism-related offences in Chapter VIA fall under 'security offences' under the SOSMA 2012. Hence, all trials involving these offences must be carried out in accordance with the stipulated special procedures and rules of evidence. That means all terrorism offences must be tried before High Court Judges, even though the punishment provided might fall under the jurisdiction of lower courts in ordinary criminal cases. Secondly, Chapter VIA is like a statute within the statute. It has its own specific definition section which applies specifically to sections in the Chapter. For example, the term 'imprisonment for life' within the Chapter means 'imprisonment until the death of the person'.[203]

In sum, although there is no specific code against terrorism, in effect it is intended to be a special type of crime with special provisions scattered within ordinary criminal law statutes, as well as special legislation. However, the arrangement of anti-terrorism law does not affect much the workings of SCM, as compared to its content that embodies special offences, processes and evidential rules, which will now be discussed.

6.4.2 Special Offences

200 cf, Singaporean Penal Code (Chapter 224), the definitions of 'terrorist', 'terrorist entity' and other terms related to terrorism can be found in the Terrorism (Suppression Of Financing) Act (Chapter 325).

201 See, Dangerous Drugs Act 1952 (Revised 1980) Act 234, Malaysian Anti-Corruption Commission Act 2009 [Act 694].

202 [Act 769] and [Act 770].

203 Section 130B(1), Penal Code 1936 [Act 574].

In Malaysia, the special offences within the SCM can be categorised into three types. The first category is the special offence of 'terrorist act' per se, as provided by section 130C of the Penal Code. The second and third categories are respectively related to the precursor offences and extra-territorial offences.

6.4.2.1 Terrorist Act Simpliciter

Unlike in the UK, committing a 'terrorist act' per se is an offence in Malaysia.[204] It was proposed for the UK by Lord Gardiner in 1975 but resisted.[205] Criminalising terrorist acts, as a whole, is problematic mainly due to the difficulty of producing a clear legal definition of terrorism, as discussed in Chapter 3.[206] The criminal law requires precise and unambiguous definitions of crimes that work as fair warning, 'so that individuals can determine what is unlawful and make their decisions accordingly'.[207]

The Penal Code 1936 criminalises 'terrorist act' by section 130C(1), which states:

> Whoever, by any means, directly or indirectly, commits a terrorist act shall be punished- (a) if the act results in death, with death; and Penal Code (b) in any other case, with imprisonment for a term of not less than seven years but not exceeding thirty years, and shall also be liable to fine.

The offence of 'terrorist act' in the Penal Code 1936 is problematic due to at least three reasons. The first one is related to the broad definition of 'terrorist act'. The second reason derives from the unclear concept of criminal liability within the provision. The third reason is related to the effects of criminalising 'terrorist act' per se.

As discussed in Chapter 3, the Penal Code 1936 defines the term 'terrorist act' in a very loose and wide way.[208] In general, the definition comprises two components. The first component explains what can be regarded as the *actus reus* of 'terrorist

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204 Section 130C(1), Penal Code 1936 [Act 574].

205 Lord Gardiner, *Report of a Committee to Consider, in the Context of Civil Liberties and Human Rights, Measures to Deal with Terrorism in Northern Ireland* (Cmnd. 5847, 1975) para 70. See also: Clive Walker, 'The Impact of Contemporary Security Agendas Against Terrorism on Substantive Criminal Law', in Aniceto Masferrer (ed), *Post 9/11 and the State of Permanent Legal Emergency: Security and Human Rights in Countering Terrorism* (Springer Netherlands, 2012) 134.

206 Section 3.3, Chapter 3.

207 Andrew Ashworth & Lucia Zedner, *Preventive Justice* (Oxford University Press) 179.

208 Section 3.4, Chapter 3.

act'.[209] A considerable number of criminal acts are listed in sub-section (a) to (j) of s.130B (3). These include the acts of causing serious injury or death or damage to property. Some of the provisions describe plainly the nature of culpable acts, but some seem to expand the scope of 'terrorist acts' to uncertain limits. For instance, any act that 'involves prejudice to national security or public safety' can be regarded as a terrorist act.[210]

The second component of the offence comprises the motive and object of terrorist acts, which is arguably difficult to regard as *mens rea* elements of the offence. Mohammed Sail Alden-Wattad argues that the 'overriding motivation of imposing extreme fear' in terrorism acts cannot be equated with the element of guilt or *mens rea* in ordinary crimes.[211] In the Penal Code 1936, an act can only be considered as a 'terrorist act' if:

> (b) the act is done or the threat is made with the intention of advancing a political, religious or ideological cause; and
> (c) the act or threat is intended or may reasonably be regarded as being intended to:- (i) intimidate the public or a section of the public; or (ii) influence or compel the Government of Malaysia or the Government of any State in Malaysia, any other government, or any international organization to do or refrain from doing any act.

These are the key requirements that distinguish ordinary crimes from terrorism offences. Hypothetically, prosecutors have to bear the burden of proving terrorist motivation and object, in addition to the traditional intent necessary to prove murder or violent crimes, or offences related to firearms and national security. At this juncture, this special offence repudiates the established principle of criminal law with regards to the role of motive in committing a crime. Motive normally plays a minimal role in determining one's criminal liability in ordinary offences.[212] For example, the motive behind a political assassination fundamentally is irrelevant under ordinary circumstances in a murder case.

Apart from the broad definition of 'terrorist act', the scope of the offence widens as the offence includes any act of committing terrorist act 'indirectly'. This ambiguity

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209 Section 130B(3)(a)-(k), Penal Code 1936 [Act 574].

210 Section 130B(3)(j), Penal Code 1936 [Act 574].

211 Mohammed Sail Alden-Wattad, 'Is Terrorism a Crime or an Aggravating Fact of in Sentencing.' (2006) 4:5 *Journal of the International Criminal Justice* 1017.

212 *R v Ahlers* [1915] 1 KB 616.

can possibly be manipulated against non-terrorist individuals, who merely provide their services on a professional basis. Edmund Bon Tai Soon contends that:

> By its definition, this new section affects lawyers and accountants. However, the structure of the offence is loose and imprecise. When does the knowledge of benefiting any person to commit or facilitate a terrorist act come into play - at the time the lawyer or accountant was retained or at some subsequent time? Does the offence now make it obligatory for lawyers search out and uncover, at the outset, whether there are any reasonable grounds for believing that the services provided will end up benefiting a terrorist?[213]

It must be noted that the concept of 'directly or indirectly' committing an offence is a recent invention in the Malaysian Penal Code, and it can only be found in newly added provisions.[214] 'To commit a crime indirectly' is an unfamiliar concept in the jurisdictions of Common Law based criminal law, and also connotes an unclear limit. Criminal law addresses levels of participation in crime through established concepts like abetment, common intention and conspiracy.[215] In the context of Malaysia, the offence of waging war under section 121 of the Penal Code, which can be fairly considered as belonging to the same species as terrorist acts, is a good example of this point. The provision in section 121 plainly distinguishes levels of participation by making use of the established concept of attempt and abetment.[216] Furthermore, the Penal Code 1936 itself provides explanations as to what amounts to abetment, or common intention, or criminal conspiracy. In *Public Prosecutor v Imam Wahyudin bin Karjono & Anor* (2017), two accused were charged with committing a terrorist act, where one of them threw a hand grenade into a bar in Kuala Lumpur and injured eight people.[217] It is interesting to note that the prosecution still relied on section 34, the common intention provision, to implicate criminal liability against another accused who did not carry out

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213 Edmund Bon Tai Soon, 'Impact of Terrorism and Anti-Terrorism Measures in Asia: Malaysia' (2004), <http://www.malaysianbar.org.my/human_rights/impact_of_terrorism_and_anti_terrorism_measures_in_asia_malaysia.html> accessed 15 April 2018.

214 For example, s.124B, s.124D, s.124K, s.124M, which were created by the Penal Code (Amendment) 2012 [Act 1430]. See also s.130N, s.130O, s.130Q & s.130U, which were created by the Penal Code (Amendment) 2007 [Act 1210].

215 See Molly Cheang, *Criminal Law of Malaysia & Singapore: Principles of Liability* (Professional Law Books Publisher, Kuala Lumpur, 1990).

216 Section 121 of the Penal Code 1936 [Act 574] reads: Whoever wages war against the Yang di-Pertuan Agong or against any of the Rulers or Yang di-Pertua Negeri, or attempts to wage such war, or abets the waging of such war, shall be punished with death or imprisonment for life, and if not sentenced to death shall also be liable to fine.

217 *Public Prosecutor v Imam Wahyudin bin Karjono & Anor* [2017] MLJU 513.

the act. The fact that both accused went to the scene and fled together by motorcycle is somehow sufficient to prove their direct involvement.

Since committing 'terrorist act' is an offence in the Penal Code, arguably a person can be charged with inchoate offences relating to a 'terrorist act' such as attempting to commit terrorist act, based on the principle of criminal attempt.[218] Moreover, there is a specific provision that criminalises the act of preparation to commit terrorist acts. Section 130JD of Penal Code 1936,

> Whoever, with the intention of committing a terrorist act or assisting another to commit a terrorist act, engages in any conduct in preparation for giving effect to such intention shall be punished with imprisonment for a term not exceeding seven years, and shall also be liable to fine.[219]

The provision seems to encompass all sorts of preparatory acts of terrorism. This would probably amount to 'over-criminalisation' of terrorism offences as discussed in section 5.3.3 and cause overlapping with precursor offences, which will be explained in the next section.

In sum, the offence under section 130C of the Penal Code seems like a catch-all offence. The offence encapsulates violent and non-violent crimes and broadens its target so that it may include those who are not potential perpetrators and accessories. This renders the offence wide open to abuse and 'can lead to the criminalisation of innocent conduct and to the broadening of proscribed conduct in judicial interpretation'.[220] The offence of 'terrorist act' is contentious, as it reflects the definitional problem of terrorism itself. For that reason, the offence is fundamentally ambiguous and against the rule of law that requires clarity and certainty. With that, it is understandable why some nations avoid criminalising a terrorist act per se.

6.4.2.2 Precursor Offences

The second type of special offence is precursor offences, which is according to Walker, 'the most problematic offences' within anti-terrorism law in the UK.[221] This is mainly because such offences depart from the Millian harm principle by criminalising acts with more remote risks, as compared to ordinary crimes.[222] The precursor

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218 Section 511, Penal Code 1936 [Act 574].

219 Section 130JD(1), Penal Code 1936 [Act 574].

220 United Nations Human Rights Council, Report of The United Nations High Commissioner for Human Rights on The Protection Of Human Rights and Fundamental Freedoms while Countering Terrorism (19 December 2014) A/HRC/28/28, para 21.

offences cover pre-inchoate, preparatory, facilitative, associative acts of terrorism, such as training for terrorism, possession of items for a terrorist purpose, and directing a terrorist organisation.[223]

But the departure from the established principle of harm is not always unjustified.[224] The main objective of having the precursor offences is understandably to deploy criminal law as a preventive tool and 'to avert anticipatory risk from terrorism'.[225] The judge in *Public Prosecutor v Anuar bin AB Rawi* (2016) justified the enactment of a precursor offence by saying that:

> The preventive action is one of the ways to counter terrorism activities from becoming rampant in our Malaysian society, particularly among youngsters who can be easily influenced with extremist ideology propagated by the terrorist groups such as IS and Al-Qaeda.[226]

This also echoes the international law that demands 'additional measures to prevent and suppress, in their territories through all lawful means, the financing and preparation of any acts of terrorism'.[227]

Apart from providing early intervention, the precursor offences also focus on a broader range of individuals and penalise those who facilitate terrorist activities as well as potential perpetrators.[228] A High Court judge, who has presided over terrorism-related cases and a senior criminal lawyer described the rationale of having precursor offences as to 'nip in the bud' of terrorism.[229]

Another justification for enacting precursor offences reflects the nature of terrorism itself. As discussed in section 5.2.2, the prosecution faces more difficulties in

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221 Clive Walker,(n 2) 205.

222 Shlomit Wallerstein, 'Criminalising Remote Harm and the Case of Anti-Democratic Activity' (2007), 28 *Cardozo Law Review* 2697.

223 Clive Walker, Blackstone's Guide to the Anti-Terrorism Legislation (Oxford University Press, Oxford, 2002) 182; Andrew Goldsmith, 'Preparation for Terrorism: Catastrophic Risk and Precautionary Criminal Law', in Andrew Lynch, Edwina MacDonald, George Williams (eds), *Law and Liberty in the War on Terror* (Federation Press, New South Wales, 2007) 59.

224 Clive Walker, 'The Impact of Contemporary Security Agendas Against Terrorism on Substantive Criminal Law', in Aniceto Masferrer (ed), *Post 9/11 and the State of Permanent Legal Emergency: Security and Human Rights in Countering Terrorism* (Springer Netherlands, 2012) 135.

225 Ibid, 129.

226 *Public Prosecutor v Anuar bin AB Rawi* [2016] MLJU 533, para 13.

227 United Nations Security Council, Resolution 1373 (2001). See also United Nations Security Council, Resolution No.1269 (1999), United Nations Security Council Resolution 1368 (2001); ASEAN Declaration on Joint Action to Counter Terrorism (2001).

228 Lucia Zedner, Terrorizing Criminal Law (2014) 8 *Criminal Law and Philosophy* (2014) 99.

229 Participants No.1 and No.28.

proving terrorism-related cases, as compared to ordinary offences. Terrorist activities often involve 'the offences of conspiracy and encouraging crime' which 'are notoriously difficult to prove'.[230] A senior prosecutor contended that the precursor offences are designed to address the socio-cultural and socio-economic elements of terrorism, which:

> [E]ssentially means that we have recognised terrorism has come beyond just normal dissatisfaction. Terrorism, unlike normal crimes, for most parts are ideologically driven.[231]

Accordingly, the prosecutor views that offences that criminalise such acts like terrorist recruiting, training and providing moral and material support are crucial.

In Malaysia, this type of offences is not uncommon. It can be traced in the pre-independence legislation, such as the Minor Offences Act 1955 that criminalised precursor acts like having possession of housebreaking implements or having a blackened or disguised face.[232] More precursor offences can be found in the Dangerous Drugs Act 1952. For instance, it is an offence to have 'possession any pipe or other utensil for use in connection with the smoking of prepared opium, or any utensil used in the preparation of opium for smoking or consumption otherwise'.[233] Again s.121A of the Penal Code 1936 goes beyond the preparatory stage, by including the act of imagining the death of or hurt to the Yang di-Pertuan Agong. Strictly speaking, it is an offence punishable with death, albeit how absurd it sounds. The construct of the provision mirrors the English Treason Act of 1351, which makes 'compassing or imagining' the death of the King as a form of treason.

The examples correspond with the justifications of having precursor offences. The offences are designed as a preventive tool responding to the exceptional nature of such crimes. Based on the above examples too, it seems that precursor offences can be justified by the rampancy of the principal crime, like drugs abuse and housebreaking.

As in counter-terrorism strategy, the approach to include preparatory acts as part of terrorist activities can be seen in one of the earliest definitions of 'terrorist' in

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230 Stuart Macdonald, 'Prosecuting Suspected Terrorists: Precursor Crimes, Intercept Evidence and the Priority of Security, in Lee Jarvis and Michael Lister (ed), *Critical Perspectives on Counter-Terrorism* (Routledge, Abingdon, 2015) 131.

231 Participant No.6.

232 Section 10(2)(a) of Dangerous Drugs Act 1952 [Act 234].

233 Section 28(i) Minor Offences Act 1955 [Act 336].

Malaysia. According to the Malayan Emergency regulations, 'terrorist' includes a person who:

> [d]emands, collects or receives any supplies for the use of any person who intends or is about to act, or has recently acted, in a manner prejudicial to public safety for the maintenance of public order.[234]

The same definition was later adopted in the ISA 1960.[235] Although these definitions were not meant for the criminalisation approach, the perception that preparatory acts of terrorism are something that must be curbed is obvious.

At present, the precursor offences within anti-terrorism law in Malaysia can primarily be found in Chapter 6A of the Penal Code, along with other provisions within Special Measures against Terrorism in Foreign Countries Act 2015 and Anti-Money Laundering, Anti-Terrorism Financing, and Proceeds of Unlawful Activities Act 2001.[236] The following are the precursor offences under the Penal Code which are reported to have been used by the prosecution in courts:[237]

234 Colonial Office (CO) 537/5984 Colonial Office [CO] 537 / 5984, Definition of Terrorism, in the Federation of Malaya Government Gazette, July 13, 1950, No. 32, Vol. III, L.N. 302 in the Emergency (Amendment No 12) Regs, 1950.

235 Section 2, Internal Security Act 1960 [Act 82].

236 Act 574, Act 770 and Act 613.

237 Based on reports made by the Malayan Law Journal, Current Law Journal, Legal Network Service and official judgments published at Official Website of Malaysian Judiciary, <http://www.kehakiman.gov.my/ms/alasan-penghakiman>

Table 6.4: Precursor Offences in the Penal Code 1936

Offences	Sections
Providing devices to terrorist groups	s.130D
Recruiting persons to be members of terrorists group or to participate in terrorist act	s.130E
Providing Training and instruction to terrorist group and persons committing terrorist act	s.130 F
Inciting, promoting, soliciting property for the commission of the terrorist acts.	s.130G
Providing facilities in support of terrorist acts	s.130H
Soliciting or giving support to terrorist groups of for commission of terrorist act	s.130J
Possession of items associated with terrorist groups or acts	s.130JB
Harbouring persons committing terrorist act	s.130K
Becoming member of a terrorist group	s.130KA
Intentional omission to give information relating to terrorist acts	s.130M
Providing or collecting property for terrorist act	s.130N
Dealing with terrorist property	s.130Q
Preparation of Terrorist Act	s.130JD

The offences in the table comprise all sorts of inchoate and pre-inchoate crime. There are other precursor offences that can also be found in other laws beyond anti-terrorism legislation. For example, offences related to firearms and explosive substances, as discussed before in Chapter 5.[238]

In sum, precursor offences provide early intervention for the state to prevent crime before it takes place. Widening the scope of offences would broaden the scope of police powers to investigate crime.[239] Accordingly, some offences seem to be more useful to the police investigation, rather than prosecution and conviction. Despite that this type of offence has received a certain level of acceptance in the past and at present, careful consideration should be exercised as such offences are inconsistent with the norms within criminal law. The implications of the implementation of these offences will be now discussed.

238 Section 5.3, Chapter 5.

239 Victor Tadros, 'Justice and Terrorism' (2007) 10 *New Criminal Law Review* 658.

6.4.2.3 The Deviation from Normal Criminal Law Principle

The substantial deviations of special offences in the SCM from the ordinary criminal offences can be underlined mainly from the two following aspects.

The first aspect concerns the departure from the established principle embodied in the maxim *actus non facit reum, nisi mens sit rea.*[240] That means 'an act does not make a man guilty of a crime unless his mind be also guilty'.[241] Without any of these essential elements, the crime is incomplete. In the context of Malaysia, the elements of mens rea and *actus reus* are stated explicitly in statutes. The Penal Code 1936 goes one step further to define what is the meaning of words that carry the blameworthy mental element, such as 'dishonestly, 'fraudulently' and 'reason to believe'.[242] However, a considerable number of the provisions related to terrorism-offences in the Penal Code 1946 omit to state the *mens rea* element. The most controversial provision is s.130JB that criminalises possession of items associated with terrorist groups or activities. The provision states:

> 130JB. (1) Whoever—
>
> (a) has possession, custody or control of; or
> (b) provides, displays, distributes or sells, any item associated with any terrorist group or the commission of a terrorist act shall be punished with imprisonment for a term not exceeding seven years, or with fine, and shall also be liable to forfeiture of any such item

Apart from being a precursor offence and routinely used by the prosecution, the missing mens rea element makes the offence infamous. It must be noted as well that the defining criteria relating to the offending items are too vague. 'Items associated with terrorist groups' extend to books, videos, flags and pictures of a terrorist group.[243] Comparing the UK, section 57 of the Terrorism Act (TA) 2000 concerns possession of items for a purpose connected to terrorism.[244] Apart from that, the provision requires a

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240 Frederick Pollock and Frederic William Maitland, *The History of English Law Volume II* (Cambridge University Press, Boston, 1895) 476.

241 *Haughton v Smith* [1973] UKHL 4 .

242 Section 24, 25, 26, Penal Code 1936 [Act 574].

243 *Public Prosecutor v Azizi bin Abdullah* [2017] MLJU 649; *Public Prosecutor v Mohamad Nasuha Abdul Razak* [2017] 1 LNS 1420.

244 Clive Walker, (n 2) 211-223

person to have knowledge of the presence and control over the items.[245] Another significant difference between the provisions in the UK's TA 2000 and the Penal Code 1936 is related to the available defence. It is a defence under the TA 2000 for the accused 'to prove that his possession of the article was not for a purpose connected with the commission, preparation or instigation of an act of terrorism'. But this is not a defence under the Penal Code 1936. For that reason, the Court of Appeal in *Siti Noor Aishah Atam v Public Prosecutor* (2016) held that decisions and interpretations of the UK courts with regards to section 57 of the TA should not be followed by the Malaysian courts, as the provisions are 'too far different'[246] Accordingly, the court held that the offence under section130JB of the Penal Code 1936 is a strict liability offence. The main reason was that the provision is silent on the mental element of the offence. The trial judge contended that:

> If the Parliament intended to enact the offence under s.130JB with 'mens rea'…the words such 'knowing', 'intentionally, "having reason to believe" should have been inserted in the said provision.[247]

This is a substantial impact on criminal law. Strict liability offences cause the reversion of the burden of proof to the accused. It is arguably against the cardinal rule in the criminal justice system where the onus of proof is always on the prosecution.

The second aspect of impacts connects with the criminalisation of a 'state of being', rather than acts or 'state of doing'. The Penal Code criminalises the act of attending or being at a place used for terrorist training.[248] In terms of the *mens rea* and *actus reus* elements, as well as 10-year maximum imprisonment, the Penal Code offence is almost the same with the offence under section 8 of the UK's Terrorism Act 2006.[249] Both laws do not stipulate 'reasonable excuse' as a defence for observation or humanitarian missions.

6.4.2.4 External Jurisdiction Offences

The criminal law often operates in accordance with the principle of territoriality. The rule underlines the power of a state to take action against crimes which are committed

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245 *R v G* and J [2009] UKHL 13, para 53.

246 *Pendakwa Raya v Siti Noor Aishah Binti Atam* [2016] MLJU 895.

247 *Public Prosecutor v Siti Noor Aishah Atam* [2017] 1 LNS 684, para 30.

248 Section 130FB (1), Penal Code 1936 [Act 574].

249 Clive Walker, (n 2) 207.

within its borders.[250] An offender must be tried and punished following the principle of *locus criminis*, which is based on the place where the crime was committed. However, the working of the territorial concept of criminal law is not always straightforward too.[251] For instance, when an offence is partly committed in one jurisdiction, then consummated in another jurisdiction. There are also exceptions to the principle of the territoriality in criminal law. In the context of Malaysia, the exceptions can be found in legislation governing special types of crime, such as corruption and human trafficking. In general, there are two types of extra-territorial offences. Firstly, a state is empowered to prosecute its own citizen for committing a crime in a foreign country. For example, a Malaysian citizen who commits sexual offences against children abroad can also be charged in Malaysia, apart from the country where the crime takes place.[252] Similarly, a Malaysian who commits any corruption offences abroad can still be tried in Malaysia.[253] It is irrelevant whether such an act amounts to an offence in the country where the crime is committed.

The second category moves beyond nationality. A state can expand its criminal jurisdiction in order to prosecute a foreign national for an offence committed outside its territory. In Malaysia, offences related to terrorism, human trafficking and dissemination of fake news fall under this type of category.

The creation of extra-territorial offences as a response to terrorism can be found in many jurisdictions. For example, the UK Criminal Jurisdiction Act 1975 and the Criminal Law (Jurisdiction) Act 1976 in the Irish Republic, create extra-territorial offences which can be tried in both jurisdictions.[254] Singaporean anti-terrorism legislation criminalises terrorist assistance or dealing with a Singapore citizen outside of Singapore, regardless of whether the target of the terrorist is in Singapore or not.[255]

In Malaysia, the Penal Code 1936 states that Chapter VI, which comprises terrorism offences, applies to any offence committed:

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250 See *SS Lotus (France v Turkey) (Judgment)* [1927] PCIJ (ser A) No 10.

251 Danielle Ireland-Piper, Extraterritorial Criminal Jurisdiction: Does the Long Arm of the Law Undermine the Rule of Law (2012) 13 *Melbourne Journal of International Law* 122.

252 Section 3, Sexual Offences Against Children Act 2017 [Act 792].

253 Malaysian Anti-Corruption Commission Act 2009 [Act 694]. See also, s.12(2), UK Bribery Act 2010 (chapter 23).

254 Clive Walker (n 2) 524. See also; In the Matter of Article 26 of the Constitution and in the Matter of The Criminal Law (Jurisdiction) Bill 1975 [1977] *IR* 129.

255 Michael Hor, 'Terrorism and the Criminal Law: Singapore's Solution' (2002) *Singapore Journal of Legal Studies* 30.

(a) by any citizen or any permanent resident on the high seas on board any ship or on any aircraft whether or not such ship or aircraft is registered in Malaysia;
(b) by any citizen or any permanent resident in any place without and beyond the limits of Malaysia;
(c) by any person against a citizen of Malaysia;
(d) by any person against property belonging to, or operated or controlled by, in whole or in part, the Government of Malaysia or the Government of any State in Malaysia, including diplomatic or consular premises of Malaysia, any citizen of Malaysia, or any corporation created by or under the laws of Malaysia located outside Malaysia;
(e) by any person to compel the Government of Malaysia or the Government of any State in Malaysia to do or refrain from doing any act;
(f) by any stateless person who has his habitual residence in Malaysia;
(g) by any person against or on board a fixed platform while it is located on the continental shelf of Malaysia; or
(h) by any person who after the commission of the offence is present in Malaysia,

as if the offence had been committed in Malaysia.

(2) In this section-
(a) "offence" includes every act done outside Malaysia which, if done in Malaysia, would be an offence punishable under this Code;[256]

Further, the term 'terrorist act' is also defined to include any 'act or threat of action within or beyond Malaysia'.[257] It is also irrelevant if the target is a person or property situated outside Malaysia, or 'the public of country or territory other than Malaysia'.[258]

In *Public Prosecutor v Yazid Sufaat* (2014), the defence contended that charges against the accused were defective and bad in law, as they specifically referred to terrorist acts against members of the public in Syria and not in Malaysia.[259] It was also argued that the SOSMA 2012 should not be used against the accused as the threat posed was not to Malaysia. As discussed before, the SOSMA 2012 was

256 Penal Code (Amendment) 2007 Act [A1210]. See; s.4(1)-(2), Penal Code 1936 [Act 574]

257 S.130B(2), Penal Code 1936 [Act 574]

258 S.130B(5)(a)-(b), Penal Code 1936 [Act 574]

259 *Public Prosecutor v Yazid Sufaat & Ors* [2014] 2 CLJ 670.

enacted under Article 149 of the Federal Constitution, which authorises measures to eliminate threats within Malaysia. However, the Court of Appeal rejected the contention and emphasised the legislative intent to countering terrorism, which is transnational in nature. The panel also highlighted the provisions concerning the extra-territorial jurisdiction within the Penal Code.[260]

There are at least three reasons why a state expands its criminal jurisdiction with regards to terrorism-related offences. The first reason reflects the transnational nature of terrorism itself, which has been discussed previously in justifying terrorism as a special type of crime.[261] Besides, the Internet has become a useful tool for launching attacks from afar or strengthening networks and operations globally. There has been a noticeable pattern that Malaysian IS supporters were radicalized and recruited through social media and in cyberspace.[262] According to an interviewed senior prosecutor, 60 individuals have been prosecuted for various terrorism-related offences under Chapter VIA of the Penal Code 1936 related to the use of social media.[263] There are several Malaysian IS recruiters who are known to operate from Syria and the Philippines.[264]

The second reason is connected to international responsibility and a reflection of solidarity with the global community.[265] International treaties and conventions, including United Nations Security Council Resolutions, encourage the extension of state jurisdiction.[266] For instance, offences related to terrorism financing and hostage-taking as stipulated in the International Convention for the Suppression of the Financing of Terrorism 1999 and International Convention against the Taking of Hostages 1983. At the same time, states are pushed to take necessary measures to avoid being labelled a 'safe haven' for terrorism.[267] After 9/11 and Bali Bombings 2002, Malaysia has been reported as hosting terrorist networks.[268] A senior officer at the Ministry of Foreign Affairs who deals with security matters confirmed that:

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260 *Public Prosecutor v Yazid Sufaat & Ors* [2014] 2 CLJ 670.

261 Section 5.2.2, Chapter 5.

262 Kirsten E. Schulze and Joseph Chinyong Liow, 'Making Jihadis, Waging Jihad: Transnational and Local Dimensions of the ISIS Phenomenon in Indonesia and Malaysia' (2018) 15:2 *Asian Security* 122.

263 Participant No.7.

264 Participants No.2 and No.27.

265 Clive Walker,(n 2) 232.

266 See United Nations Security Council Resolution No.1373 (2001) and No.2178 (2014).

267 Lord Lloyd of Berwick*, Inquiry into Legislation against Terrorism* (Cm 3420, 1996) vol. 1, paragraph 1.12.

268 Joseph Chinyong Liow, 'The Mahathir administration's war against Islamic militancy: operational and ideological challenges' (2004), 58:2 *Australian Journal of International Affairs*, 241. See also National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report*, formally named Final Report of the National Commission on Terrorist Attacks Upon the United States (July 2004) <https://www.9-11commission.gov/report/911Report.pdf > accessed 10 April 2018.

> There are attempts to bring FTF (foreign terrorist fighters) into Malaysia, there are also plans to build training grounds in Malaysia.[269]

At the regional level, Malaysia has also become a hiding and recruiting place for militant groups from nearby conflict zones or insurgencies in Southern Philippines and Southern Thailand, and previously Acheh Province, Indonesia.[270] For instance, a senior leader of Abu Sayyaf group was arrested in Kota Kinabalu in March 2018, and several other Filipinos were detained in Sandakan for allegedly recruiting members for the organisation.[271] There were also arrests involving individuals from other Muslim countries due to their affiliations to terrorist organisations or alleged involvement in terrorist activities. Therefore at this point, the aim goes beyond countering perceptions, but rather to prevent Malaysia from becoming a 'transit point and source country' for terrorists.[272]

However, it seems unlikely that foreign nationals will be prosecuted in Malaysia for committing terrorism offences abroad, given the application of the *aut dedere aut judicare* principle. Most cases in the past ended with deportation or extradition based on mutual understanding with the receiving countries.[273] For instance, an Iranian citizen who was allegedly involved in the Bangkok bombings 2012 was arrested in Kuala Lumpur and later extradited to Thailand. In 2014, seven Indonesian citizens who were planning travel to Syria to join IS were deported back to Indonesia.[274] These

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269 Participant No.13.

270 Peter Chalk, 'Separatism and Southeast Asia: The Islamic Factor in Southern Thailand, Mindanao, and Aceh' (2001) 24:4 *Studies in Conflict and Terrorism* 241; Joseph Chinyong Liow, 'The Security Situation in Southern Thailand: Toward an Understanding of Domestic and International Dimensions' (2004) 27:6 *Studies in Conflict and Terrorism*, 531; Ian Storey 'Southern Discomfort: Separatist Conflict in the Kingdom of Thailand' (2008) 35:1 *Asian Affairs: An American Review*, 31; Saroja D. Dorairajoo 'Violence in the south of Thailand, Inter-Asia' (2004) 5:3 *Cultural Studies* 465; John Funston 'Malaysia and Thailand's Southern Conflict: Reconciling Security and Ethnicity' (2010) 32: 2 *Contemporary Southeast Asia: A Journal of International and Strategic Affairs*, 234; Antje Missbach, 'The Waxing and Waning of the Acehnese Diaspora's Long-distance Politics' (2013) 47:3 *Modern Asian Studies* 1055.

271 Inspector General of Royal Malaysia Police, 'Media Statement: The Arrest of Seven Suspects Linked to Terrorist Group' (24 March 2018); Inspector General of Royal Malaysia Police, 'Media Statement: The Arrest of Eleven Suspects Linked to Terrorist Group' (21 February 2018)

272 Dewan Rakyat Hansard, 7 April 2015, 20.

273 See *Belhaj & anr v Straw & ors* [2017] EWHC 1861 (QB), *Menteri Dalam Negeri, Malaysia & Anor v Seyed Ramin Paknejad* [2017] MLJU 256; *Amin Ravan v Menteri Dalam Negeri & Ors* [2015] 5 MLJ 577; *Ahmed Ibrahim Bilal v. Ketua Polis Negara & Ors* [2011] 1 CLJ 85.

274 United States Department of State, *Country Reports on Terrorism 2014* (June 2015) 69, available at <https://www.state.gov/documents/organization/239631.pdf > as accessed on 20th April 2018

cases may arguably reflect the non-interference principle adopted by the ASEAN countries.[275] Otherwise, perhaps it is more appealing to let a state deal with its own citizens based on existing extradition treaties, even if this offends against the notion of 'exporting terrorism'.[276] In fact, the prosecution cannot avert deportation.[277] A convict will be deported eventually after the completion of the sentence, except in cases involving the death penalty.[278] Several participants viewed that Malaysia should not prosecute the Filipinos who were involved in the 2013 armed incursion, as it is an act of war launched by foreign nationals and prosecution embroils complicated processes and high costs.[279]

The arrests and extraditions of foreign suspects who committed a crime abroad are often made on the request of the suspects' own country. In May 2017 for instance, three Turkish citizens were arrested and detained under the SOSMA 2012 for their alleged links with Fethullah Gülen group.[280] The organisation has been proscribed as a terrorist organisation by the Turkish government, as endorsed by the Organisation of Islamic Cooperation (OIC).[281] The Turkish citizens were later extradited, and no prosecution was conducted against them in Malaysia.[282] At this point, the extra-territorial legislation provides extra powers to the authorities to detain the suspects temporarily pending the extradition process. Previously, the ISA 1960 was used for this purpose.[283]

The third reason echoes the state's duty to protect its citizens, as discussed earlier at Section 6.2.1. It can be explained through these two perspectives. Firstly, the duty to protect is translated into the act by way of preventing citizens from committing

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275 United States Department of State (n 274), 63

276 Privy Counsellor Review Committee, 'Anti-Terrorism, Crime and Security Act Review: Report', December 2003, HC 100, para 195

277 David Anderson and Clive Walker, 'Deportation with Assurance' (cm 9462, July 2017) para 5.55.

278 Section 8(d)(ii) Imigration Act 1959/63 [Act 155].

279 Participants No. 16 & 23.

280 Yiswaree Palansamy, 'IGP confirms Turks not abducted, but detained under SOSMA' (The Malay Mail Online, 4 May 2017) <http://www.themalaymailonline.com/malaysia/article/igp-confirms-turks-not-abducted-detained-under-sosma> accessed 9 April 2018.

281 See Home Office, *Country Policy and Information Note Turkey: Gülenist movement Version 2.0* (February 2018) 18; The Council of Foreign Ministers of OIC, Resolution No:47/43-POL on the Fethullah Terrorist Organization (FETO) <https://www.oic-oci.org/subweb/cfm/43/en/docs/fin/43cfm_res_pol_en.pdf> accessed 9 April 2018.

282 *Public Prosecutor v Ummi Kalsom Bahak* [2015] 7 CLJ 503; *Public Prosecutor v Mohd Syafrein Bin Rasid and Mohamed Yusoffe Ishak* [2015] MLJU 674.

283 Several Free Acheh Movement members and Southern Thailand separatists were detained under the ISA 1960 for few months. See Aliran's ISA Watch, Internal Security Act in Malaysia ISA Detention, <https://aliran.com/archives/monthly/2001/3e.htm> accessed 10 April 2018.

terrorism at home or abroad. In *Public Prosecutor v Ummi Kalsom Bahak* (2015) and *Public Prosecutor v Mohd Syafrein Bin Rasid and Mohamed Yusoffe Ishak (2015)*, the accused persons were arrested at the Kuala Lumpur airport on the way to Syria.[284] Secondly, the duty to protect prompts the state to launch pre-emptive action. The pre-emptive measure, at this point, refers to state responses within its borders without transgressing another state's territory. For instance, extra-territorial terrorism-related offences are relevant in dealing with returning fighters, those who left to join armed conflicts outside Malaysia. In the past, there were significant threats coming from 'Afghan alumni' who later established Jemaah Islamiyah and Kumpulan Mujahidin Malaysia.[285] Both groups have links with Al-Qaeda.[286] The government has expressed grave concern over these individuals if they return.[287] It is plausible due to their experience in the battlefield that they were exposed to violence and brutality, as well as skills and technical knowledge in weapon-handling, warfare and bomb-making.[288] Their extreme ideology can also pose threats to society too, while 'their status and credibility can be used to radicalize and recruit new terrorist networks'.[289] A private lawyer, who has handled terrorism-related cases in Malaysia, argued that these individuals are the 'real terrorists' that deserve prosecution.[290]

However, the prosecution certainly faces difficulties in obtaining evidence in proving offences committed abroad, particularly in war or conflict zones.[291] In *Public Prosecutor v Muhammad Kasyfullah bin Kassim* (2016), the accused was prosecuted after coming back from Syria.[292] He pleaded guilty to a charge under s.130J(1)(b) of

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284 *Public Prosecutor v Ummi Kalsom Bahak [2015]* 1 LNS 1493; *Public Prosecutor v Mohd Syafrein Bin Rasid and Mohamed Yusoffe Ishak [2015]* 1 LNS 943.

285 Sidney Jones, 'The changing nature of Jemaah Islamiyah'(2005) 59:2 *Australian Journal of International Affairs*, 169; Stuart Koschade, 'A Social Network Analysis of Jemaah Islamiyah: The Applications to Counterterrorism and Intelligence' (2006) 29:6 *Studies in Conflict & Terrorism* 575.

286 Zachary Abuza, 'Funding Terrorism in Southeast Asia: The Financial Network of Al Qaeda and Jemaah Islamiya' (2003) 25:2 *Contemporary Southeast Asia: A Journal of International and Strategic Affairs* 169; Kamarulnizam Abdullah, 'Kumpulan Mujahidin Malaysia (KMM) and Jemaah Islamiyah (JI): The Links' (2009) 4:1 *Journal of Policing of Intelligence and Counter Terrorism* 29.

287 Ahmad Zahid bin Hamidi, Home Minister, Dewan Rakyat Hansard (25 May 2015) 5.

288 Samuel Thomas Koruth, *Radicalisation in Southeast Asia: A Selected Case Study of Daesh in Indonesia, Malaysia and The Philippines* (The Southeast Asia Regional Centre for Counter-Terrorism (SEARCCT), Kuala Lumpur, 2016) 59-60.

289 The United Nations Security Council Counter-Terrorism Committee, 'CTED Trends Report: The Challenge of Returning and Relocating Foreign Terrorist Fighters: Research Perspectives' (March 2018) 7 <https://www.un.org/sc/ctc/wp-content/uploads/2018/04/CTED-Trends-Report-March-2018.pdf> accessed 18 April 2018.

290 Participant No.13.

291 Participants No.23 and No.24.

292 *Public Prosecutor v Muhammad Kasyfullah bin Kassim* [2016] 10 MLJ 233.

the Penal Code. With regards to the difficulties faced by the prosecution if the trial went on, the presiding judge observed thus:

> The Court believes that the prosecution has a very heavy task in order to prove the charge if a full trial takes place, particularly in obtaining evidence from Syria and Istanbul (where the accused has committed the pleaded offence). Apart from this case, there is a number of overdue cases which have the same problem waiting for evidence from parties abroad.[293]

At this juncture, inter-state cooperation is vital. However, according to an interviewed senior prosecutor, seeking help from other countries through the mutual legal assistance process takes a very long time, and the court will not prolong a trial for that reason.[294] The main concern is how to deal with relevant witnesses who live in another jurisdiction.[295] Although the Evidence Act 1950 recognises the admissibility of witness statements taken by foreign authorities, it is too ambitious to expect them to carry out most of the investigation work or to do so under Malaysian laws.[296]

In sum, the expansion of criminal jurisdiction beyond national boundaries is exceptional, but when it does occur, it often involves a special type of crime. Owing to international conventions and global trends, it is now common for a state to legislate extra-territorial anti-terrorism law. The move essentially symbolises solidarity with the global community in confronting terrorism. In the context of Malaysia, the Penal Code 1936 makes it clear that all terrorism-related offences within Chapter IVA are extra-territorial offences. However, it seems that prosecution is not the ultimate aim of having such law, as the practicality of the extra-territorial offences is relatively limited. It is mainly due to the difficulties of gathering and transferring evidence that is situated outside the jurisdiction. Thus, the prosecution process has to depend on international cooperation, and certainly, this will cause delay and additional cost for terrorism trials. For that reason, its effectiveness remains questionable. Arguably, it is useful for the police power to investigate terrorist activities involving international terrorist groups.

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293 *Public Prosecutor v Muhammad Kasyfullah bin Kassim* (n 283), para 29, cf; *Public Prosecutor v Muhammad Kasyfullah bin Kassim* [2017] CLJ 63, where the Court of Appeal rejected the difficulty of obtaining evidence abroad to be used as a mitigating factor if the accused pleads guilty.

294 Participant No.7.

295 Gerard Hogan and Clive Walker, *Political Violence and the Law in Ireland* (Manchester University Press, Manchester,1989) 314.

296 See Chapter VA: Admissibility Of Evidence Obtained Under Mutual Assistance In Criminal Matters Requests of the Evidence Act 1950 [Act 56].

The extra-territorial terrorism offences have also been used to detain foreign suspects pending deportation or extradition. Hence, the special process within the SCM is deployed with no intention to prosecute. At this juncture, the SCM emphasises other purposes of the criminalisation approach beyond conviction, such as investigation, symbolism, pre-emption, and global solidarity.

6.4.3 Special Criminal Processes

Apart from the special offences, special processes form another fundamental part within the SCM. For some, the procedural law may be more important. An interviewed private practitioner who has been handling criminal cases for nearly 20 years contended that:

> The issue that is not so much about creating laws as to what amount to act of terrorism, or this act just normal penal offence. But the issue is more of the special law, that is SOSMA, which seems to be very much tailored in order to facilitate the prosecution to prosecute suspects or individuals who have been charged with security offences.[297]

As mentioned before, all special terrorism-related offences are 'security offences' as defined under the SOSMA 2012, therefore are subject to special procedures stipulated in the Act.[298] Based on the principle *generalibus specelia derogant*, 'where a special provision is made in a special statute, that special provision excludes the operation of a general provision in the general law'.[299] Therefore, the normal procedures can only be applied in matters which are not expressed in the SOSMA 2012.[300] Appendix F illustrates major differences between special processes under the SOSMA 2012 and 'normal' processes under the Criminal Procedure Code 1935.

Since its introduction, the authorities routinely use the SOSMA 2012 in countering terrorism and other security threats.[301] The legislation, however, has emerged as the most controversial anti-terrorism legislation in Malaysia. This is mainly due to the following three reasons.

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297 Participant No.1.

298 See s.3 and First Schedule, Security Offences (Special Measures) Act 2012 [Act 747].

299 *Public Prosecutor v Chew Siew Luan* [1982] 2 MLJ 119. See also *Public Prosecutor v Chu Beow Hin* [1982] 1 MLJ 135.

300 *Teoh Li Wah v Public Prosecutor* [2015] MLJU 946.

301 Deputy Home Minister, Dewan Rakyat Hansard (4 April 2017) 193; No explanation given about any action taken against other 12 arrested individuals.

The first reason connects to the common perception that equates the Act with the infamous ISA 1960.[302] The SOSMA 2012 is 'more or less the same' as the ISA 1960, according to a private lawyer who has been handling criminal cases since 2008.[303] Another criminal lawyer echoed the same view based on the repressive nature of the SOSMA 2012 that possibly violates the fundamental rights of an accused person.[304] According to another senior practitioner, the only difference is that the former provides 'detention with trial', while the ISA 1960 authorised 'detention without trial'.[305] This is mainly because a person who is arrested under the SOSMA 2012 has no right to bail pending trial, except in very limited circumstances.[306] The use of the SOSMA 2012 against political activists reaffirms the belief that it is the reincarnation of the repealed ISA 1960.[307] It must be noted as well that several suspects who were initially arrested under the SOSMA 2012, were later detained under the POTA 2015 and POCA 1959 for detention without trial.[308]

The second reason is related to the public misconception that the SOSMA 2012 is new legislation that criminalises all terrorism-related offences and provides detention without trial. Thus, the SOSMA 2012 has been cited in all criticism against legal counter-terrorism measures. In actual fact, the SOSMA 2012 is designed to 'depart from the procedures laid down under the Criminal Procedure Code, the law which governs the conduct of criminal cases' and it 'merely regulates the trial of the offences and does not create the said offences'.[309]

The third reason concerns a number of provisions in the SOSMA 2012 that give more advantage to the prosecution and greater power to the police. The impression is not without merit. As a matter of fact, the government often mentioned that 'the SOSMA is a procedural law which aims to provide special measures to facilitate investigation and prosecution'.[310] Accordingly, it is perceived as 'a lopsided

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302 SUARAM, *Malaysia Human Rights Report 2016* (Suara Inisiatif Sdn. Bhd., Kuala Lumpur, 2017) 10.

303 Participant No.2.

304 Participant No.8.

305 Participant No.9.

306 See s.13, Security Offences (Special Measures) Act 2012 [Act 747].

307 Mickey Spiegel, 'Smoke and Mirrors: Malaysia's "New" Internal Security Act' (June 14, 2012) No.167 *Asia Pacific Bulletin*, <https://www.eastwestcenter.org/system/tdf/private/apb167_0.pdf?file=1&type=node&id=3351> accessed 15 April 2018.

308 SUARAM, Malaysia Human Rights Report 2016 (Suara Inisiatif Sdn. Bhd., Kuala Lumpur, 2017] 3

309 *Public Prosecutor v. Khairuddin Abu Hassan & Anor* (n 103) para 34. See also *Public Prosecutor v. Yazid Sufaat & Ors* [2014] 2 CLJ 670; *Public Prosecutor v. Yazid Sufaat & Ors* [2015] 1 MLJ 571.

310 Irmohizam bin Haji Ibrahim, Dewan Rakyat Hansard, 4 April 2017, 179.

law'.[311] An interviewed private criminal lawyer described 'most provisions in the SOSMA totally in favour of prosecution'.[312]

In sum, the repealed ISA 1960 and its repressive implementation shadow the reactions towards the SOSMA 2012, either among the public or legal community. The attitude of the authorities also reinforces the impression that these two laws are of the same kind. However, as mentioned before the most glaring difference between the two is the trial. With that, the disapprovals towards SOSMA 2012 are not in total, but rather specifically to the special procedures that regulate trials. Thus, it is important to examine as to how the SOSMA 2012 regulates the terrorism-related trial in a special way and what are the impacts.

6.4.3.1 From the Certification to the 'Scheduled Offences' Approach

Before 2011, trials of security offences were subject to Essential (Security Cases) (Amendment) Regulations 1975, or ESCAR 1975.[313] The Regulations were made under Section 2 of the Emergency (Essential Powers) Ordinance No.1 of 1969.[314] Under section 2 of the Regulations, 'Security cases' means any 'offence against section 57, 58, 59, 60, 61 or 62 of the Internal Security Act, 1960', and offences that 'in the opinion of the Attorney- General, affects the security of the Federation'.[315] Hence, apart from the existing power the Attorney General, who is also the Public Prosecutor, is vested additional discretionary power to issue a certificate, so that a security case can be conducted in accordance with special process.[316] This certification approach is almost similar to the practice in the Northern Ireland under the Justice and Security (Northern Ireland) Act 2007, with exception to the offences under the ISA which must be tried under the ESCAR 1975.[317] Accordingly, a certified case will be tried in the High Court before a judge alone without jury.[318] It must be noted that the jury system

311 Participant No.1.

312 Participant No.13.

313 P. U. (A) 362/75.

314 The validity of the Essential (Security Cases) Regulations, 1975 was discussed in *Johnson Tan Han Seng v Public Prosecutor*; *Soon Seng Sia Heng v Public Prosecutor, Public Prosecutor v Chea Soon Hoong*; *Teh Cheng Poh v Public Prosecutor* [1977] 2 MLJ 66.

315 Section 2, Essential (Security Cases) (Amendment) Regulations 1975.

316 Tommy Thomas, *Abuse of Power: Selected Works on the Law and Constitution* (SIRD, Petaling Jaya,2016) 223.

317 Section 1, Justice and Security (Northern Ireland) Act 2007.

318 For the UK, see, Clive Walker, (n 2)499; for Malaysia, see: Cyrus Vimalakumar Das, *Emergency Powers And Parliamentary Government in Malaysia: Constitutionalism in a New Democracy* (PhD thesis, Brunel University, 1994) 420.

was still implemented in Malaysia at the time when the regulations were introduced.[319] Trials by jury and assessors were abolished in 1995.[320]

The SOSMA 2012, by contrast, adopts a scheduled-offences approach by defining what are 'security offences' that must be tried according to special procedures. Walker uses the term 'scheduled-offences approach' by referring to a situation where the law does not provide a specific definition of terrorism, but only provides a list of specific offences which are commonly involved in terrorism.[321] However, in this context, the term is used loosely to describe how the SOSMA 2012 operates more straightforwardly, as opposed to the certification mode under the ESCAR 1975. All types of offences, which are subject to special procedures, are explicitly stated in the First Schedule of the Act. The offences are:

(i) Offences under Chapter VI (Offences against the State) of Penal Code [Act 574]
(ii) Offences under Chapter VIA (Offences Relating to Terrorism) of Penal Code [Act 574]
(iii) Offences under Chapter VIB (Organized Crime) of Penal Code [Act 574]
(iv) Offences under Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 [Act 670]
(v) Special Measures Against Terrorism in Foreign Countries Act 2015 [Act 770]

Thus, based on the First Schedule, the Attorney General or Public Prosecutor no longer has the discretionary power to issue a certificate as in the past. It is notable that offences related to the possession and use of firearms, ammunition, explosives, or weapons are not considered as 'security offences'. Trials of these offences in the past were often conducted following the special process under ESCAR 1975.[322]

The transition from the certification approach to scheduled-offences approach brings at least two substantial impacts on the SCM in Malaysia. The first impact is an advantage. The scheduled-offences approach offers clarity and consistency as demanded by the rule of law. The Attorney General's conduct in exercising his

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319 H P Lee, *Constitutional Conflicts in Contemporary Malaysia* (Oxford University Press, Oxford, 2017) 155.

320 See Chapter 4, para 4.2.3.

321 Clive Walker, (n 2) 500. Gerard Hogan and Clive Walker, *Political Violence and the Law in Ireland* (Manchester University Press, Manchester, 1989) 5.

322 For example; *Ang Eng Chan v Public Prosecutor* [1978] 1 MLJ 201.

discretionary power has often been seen as political and lacking independence.[323] That includes the issuance of a certificate under ESCAR 1975.[324] The scheduled-offences approach under the SOSMA 2012 arguably can prevent possible abuse or negate the impression of bias in determining which process should be applied. The Attorney General or the Public Prosecutor is obliged to comply with the First Schedule in the SOSMA 2012. Further, the Schedule can only be amended by the Parliament, as it is part of the law.[325] Besides, the clear provision on the applicability of specific offences can assist the authorities during the investigation. In other words, the investigation will be conducted to collect evidence based on the standard of evidence required, either by the SOSMA 2012 or normal procedures and evidentiary rules.[326]

The second impact of the scheduled offences approach, which is arguably a disadvantage, concerns the limit imposed on the prosecution in bringing a charge against a suspect in court. There are only two options, either to deploy specified offences and the special processes prevail or to make use of ordinary offences and processes.

Table 6.5: The Application of the Normal and Specified Processes in the present SCM

	Normal Process	Special Process
Normal Offences	**/**	**X**
Specified Offences	**X**	**/**

This situation may discourage the prosecution from adopting the NCM, particularly in cases that involve complicated evidence or witnesses whose identity requires protection. The dilemma was illustrated in one terrorism case shared by a senior prosecutor.[327] Two terrorist suspects were initially charged with an attempt to commit murder, along with terrorism-related offences. Committing murder per se or attempting to commit it is not an offence in the First Schedule of the SOSMA 2012, so the normal process prevails. However, the prosecution later withdrew the charge of attempting murder. The accused later pleaded guilty to the offences of committing a terrorist act and soliciting support for a terrorist group. The senior prosecutor explained that special procedures under the SOSMA 2012 are required to prove the case, and conducting a

323 See *Teh Cheng Poh v Public Prosecutor* (n 104).

324 See *Mohd Amin Bin Mohd Razali & Ors v Public Prosecutor* [2003] 4 MLJ 129; *Public Prosecutor v Khong Teng Khen & Anor* [1976] 2 MLJ 166.

325 cf Section 65(3), UK Terrorism Act 2000.

326 Participant No.30.

327 Participant No.7.

joint trial of normal and special offences might involve intricate legal issues.[328] The SOSMA 2012 is silent as to whether ordinary offences in the Penal Code 1936, apart from in Chapters VI and VIA can be tried following the special procedures under the Act. For that reason, it is plausible that the prosecution would use terrorism-related offences, including the offence of committing a 'terrorist act' simpliciter that covers various ordinary offences by definition. But in return, additional 'terroristic' elements, such as the political or religious or ideological intention of the acts must be established.[329]

As for an accused person who is charged with specified offences, he or she would accordingly lose the chance to be tried based on normal procedures, even if the prosecution does not need special procedures. In *Mohd Amin Bin Mohd Razali and Others v Public Prosecutor*, a pre-SOSMA 2012 case, the prosecution decided to put aside special procedures under the ESCAR 1975 even though the case was initially certified as a 'security case'.[330] The Attorney General who led the prosecution team clarified that:

> The prosecution was using the ESCAR for the venue of the trial on security grounds but was avoiding applying the stringent rules under the ESCAR…the ESCAR was very much in favour of the prosecution and that going halfway was all right as the appellants were not prejudiced.[331]

If the trial took place at present, it must be strictly conducted based on the special process under the SOSMA 2012. That means some substantial rights of the accused will be denied, such as the right to bail.[332] If the prosecution does not require special processes, like in the above case, such infringements of rights are hardly justified.

In sum, the scheduled offences approach provides legal clarity concerning the application of special process within the SCM. Such precision, however, pushed the prosecution to the 'either-or' situation. It would indirectly render the use of ordinary offences in countering terrorism, which is the NCM, to be unappealing for the prosecution. Apart from that, the special process that infringes significant rights of the

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328 Participant No.7.

329 Sec 130B(2)(b) Penal Code 1934 [Act 574].

330 *Public Prosecutor v Mohd Amin Bin Mohd Razali & Others* [2002] 5 MLJ 406; the accused were charged with waging war against Yang di-Pertuan Agong.

331 *Mohd Amin Bin Mohd Razali & Ors v Public Prosecutor* [2003] 4 MLJ 17.

332 See *Public Prosecutor v. Khairuddin Abu Hassan & Anor* (n 103); *Public Prosecutor v Arivalagan a/l Velu & Others* [2017] MLJU 1109; Public *Prosecutor v. Lee Ngan Chea* [2015] 6 CLJ 117; *Public Prosecutor v Nik Abd Afif Nik Man & Others* [2015] 10 CLJ.

accused could hardly retain its moral justification if the existing normal process is adequate and can work effectively. Accordingly, as posited in Chapter 5 earlier, the certification approach would give more benefit to the criminalisation project, as compared to the scheduled offences approach.[333]

6.4.3.2 Judicialisation of Process

One of the significant changes brought by the criminalisation approach in Northern Ireland was the establishment of the Diplock court.[334] The role of a presiding judge was altered, mainly due to the absence of a jury to hear the trial.[335] As discussed earlier, the criminalisation approach brings power back to the Malaysian courts to play a greater role in the counter-terrorism strategy. Thus, the SCM moves the judiciary beyond its traditional functions and practices in hearing trials related to terrorism. That can be seen in the following three aspects.

The first aspect concerns the involvement of the judiciary in investigation before the trial begins. Based on the normal procedure under the CPC 1934, the judiciary plays a limited role at this stage. That includes hearing the application to prolong detention if the investigation cannot be completed within twenty-four hours. Contrary to the normal process, the SOSMA 2012 allows any Sessions Court Judge to 'record any statement or confession made (by suspects) to him at any time before the commencement of the trial'.[336] This type of evidence can be used in the trial later on, whereby it is inadmissible in an ordinary criminal trial under the CPC 1934.[337] The use of torture and force by the police in extracting confessions and statements was the main reason for the amendment.[338] Further, the sceptical attitude towards custodial confessions is not uncommon in Common Law jurisdictions.[339] However, in special offences like terrorism, where the evidence is often limited or hard to collate,

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333 Section 5.5.1.2, Chapter 5.

334 John Jackson, 'Many Years on in Northern Ireland: The Diplock Legacy' (2009) 60 *N. Ir. Legal Q* 213.

335 John D. Jackson and Sean Doran, 'Conventional trials in unconventional times: The Diplock Court Experience' (1993) 4:3 *Criminal Law Forum* 503.

336 Section 27(1) Security Offences (Special Measures) Act 2012 [Act 747].

337 Sec 113(1), Criminal Procedure Code 1935 [Act 593].

338 Salim Ali Farrar, 'The "New" Malaysian Criminal Procedure: Criminal Procedure (Amendment) Act 2006' (2009) 4 *Asian Criminology* 129. See also, Report of Commission to Enquire Into the Standard Operating Procedures and Regulations in Relation to the Conduct of Body Search in Respect of an Arrest and Detention by the Police (Kuala Lumpur, 2006).

339 *Ibrahim v King* [1914] *AC* 599.

statements made in custody can be of use.[340] For that purpose, the SOSMA 2012 brings in the judiciary as an impartial party to record statements and confessions of terrorist suspects. Police officers are not allowed to be at the place where the recording takes place.[341] Apart from an appearance of neutrality, it must be noted too that a Sessions Court judge is legally qualified and has served in the Judicial and Legal Service for a considerable period.[342] Accordingly, the prosecution can present the evidence with confidence without having to prove the confession was made without threat, inducement or promise. On the other hand, accused persons can also make use of the evidence if it is favourable to their defence. In *Public Prosecutor v Atik Hussin bin Abu Bakar and others* (2016), the accused persons used the statements, which were recorded shortly after their arrest, to corroborate their testimony in court.[343] So at this point, the involvement of the judiciary in the terrorism process provides a proper safeguard to preserve the right of suspects, as well has to facilitate the need of the prosecution to optimise the use of available evidence.

The second aspect of the judicialisation of process is related to two unconventional powers and functions, which are given to the court in dealing with evidence. Firstly, the special process grants a presiding judge access to certain types of evidence or information, which are not accessible to all parties involved in the trial. For example, both the prosecution and the accused person can make an ex-parte application to use 'sensitive information' in a trial without making it available to the other side.[344] This procedure is understandably designed to smooth the 'judicialization of intelligence', 'in which intelligence agencies have to confront, often for the first time, a range of legal issues such as disclosure, evidentiary standards, and the testimony of intelligence personnel in criminal prosecutions'.[345] With regards to protected witnesses, only the presiding judge and the prosecution knows their identity and have the opportunity to see their demeanour while giving the evidence. The defence is prevented from challenging the credibility of the witnesses. Secondly, the special process under the SOSMA 2012 requires a judge to assess the evidence all by

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340 Recorded statement or confession made to the authorities by accused persons during investigation in drug and corruption cases are admissible as evidence, see s.37A(1) Dangerous Drugs Act 1952 [Act 234], and s.53(1) Malaysian Anti-Corruption Commission Act 2009 [Act 694].

341 *Public Prosecutor v Atik Hussin bin Abu Bakar and others* [2016] MLJU 968.

342 Abdul Hamid Omar, 'Administration of Justice in Malaysia'(1987) 2 *The Denning Law Journal* 1.

343 *Public Prosecutor v Atik Hussin bin Abu Bakar and others* [2017] MLJU 1692.

344 Section 8, 9, 10, Security Offences (Special Measures) Act 2012 [Act 747].

345 Kent Roach, 'When Secret Intelligence Becomes Evidence: Some Implications of Khadr and Charkaoui II' (2009) 47 S.C.L.R. (2d) *Supreme Court Law Review* 147.

himself, with very limited assistance from litigants as compared to ordinary adversarial trials. This is mainly due to two reasons; the rules of evidence based on the Evidence Act 1950 and Common Law are relaxed in the special process, and the SOSMA 2012 streamlines the flow of tendering evidence in a trial as compared to the normal process. According to an interviewed senior prosecutor:

> The Common Law principles (with regards to the rules of evidence) are no longer applicable in SOSMA cases, (that include) the admissibility of hearsay evidence. It (SOSMA 2012) also bulldozes the Court to accept sensitive information.[346]

Accordingly, objections made with regards to the admissibility of hearsay evidence were often rejected.[347] *Siti Noor Aishah Binti Atam v. Public Prosecutor* (2017), the prosecution tendered a police report made by the accused's father without calling him to give testimony in court.[348] The defence objected to the admissibility of the evidence, as it must be tendered through its maker.[349] The Court of Appeal rejected the objection as some rules of evidence under the Evidence Act 1950 are not applicable and 'all documents seized during a raid or in the course of investigation and the contents of the documents shall be admissible as evidence'.[350] Therefore, a judge is required to evaluate the weight and relevancy of the evidence, which has not gone through the admissibility test under the normal process. The judicialisation of criminal process within the SCM places the judge in a more solitary position to deal with evidence, which is without much assistance from other parties involved in the trial. Moreover, trials in Malaysia are conducted without a jury. For that reason, the roles of a trial judge in an adversarial criminal justice system perhaps must be reviewed. This is related to the next aspect of the judicialisation of process.

The third aspect concerns with modifications made affecting the roles of a judge in an adversarial system criminal trial. Judges are expected 'to listen to

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346 Participant No.7.

347 Participants No 9, 17,18.

348 *Siti Noor Aishah Binti Atam v. Public Prosecutor (2017),* official judgement is only available at Malaysian Judiciary official website,
<http://ejudgment.kehakiman.gov.my/ks_builtin/file_dispatcher_pub.php?id=794&key=c6331d57e1dd0c2647508e1abd700860> accessed 12 April 2018.

349 Participant No.9.

350 Section 20, Security Offences (Special Measures) Act 2012 [Act 747].

submissions or cases put by each party to an action'.[351] In a criminal trial, it is for the prosecution to decide upon evidence that will be used in order to prove the offence committed by the accused.[352] However in Malaysia, the limited role within the adversarial system under Common Law must also be construed with section 165 of the Evidence Act 1950, which gives great latitude to a judge to examine and cross-examine a witness.[353] But the provision certainly does not permit the judge to conduct examination or cross-examination of an inquisitorial nature.[354] The principle applies to judges in questioning both prosecution and defence witnesses, including the accused if he or she elects to give an under oath statement.[355] Excessive intervention may amount to an irregularity or misdirection of trial.[356] The limit set by the normal process with regards to questioning witnesses is also applicable to trials conducted under the SOSMA 2012. The deviation from the general principle brought by the Act is not relatively enormous.[357] The most significant additional role of the judge in a security offences trial is screening of potential protected witnesses.[358] Section 14(2) of the SOSMA 2012 requires the court to: 'hold an inquiry in-camera by questioning the witness concerned or any other witness in the absence of the accused and his counsel'. In practice, the interview takes place in the absence of prosecution too.[359]

In the *Lahad Datu* case, the prosecution was 'caught by surprise' when the presiding judge informed them that the witness, who had been interviewed refused protection, but chose to testify in the ordinary manner.[360] However, such a situation might not recur again as the amendment to the SOSMA in 2015 makes it clear that the

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351 *Pacific Forest Industries Sdn Bhd & Anor v Lin Wen-Chih & Anor* [2009] 6 MLJ 293, para 14.

352 *Mohamad bin Abdullah v Public Prosecutor* [2012] MLJU 52; *Tan Kim Ho & Anor v Public Prosecutor* [2009] 3 MLJ 151; *Ismadi bin Ismail v Public Prosecutor* [2011] 4 MLJ 791.

353 *Dato' Seri Anwar Ibrahim v. Public Prosecutor* [2000] 2 CLJ 695. See also Section 165 of the Evidence 1954 [Act 56] that states: The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form at any time, of any witness or of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the court, to cross-examine any witness upon any answer given in reply to any such question.

354 *Teng Boon How v. Public Prosecutor* [1993] 4 CLJ 545.

355 *Roseli Bin Amat & Ors v. Public Prosecutor* [1989] 1 LNS 103; *R v. Bateman* [1946] 31 Crt. App. R 106, 112; *R v. Cain* [1936] Cr. App. R 204 at p. 205; *R v. Gilson & Cohen* [1944] 29 Cr. App. R 174, 181.

356 *Teng Boon How v. Public Prosecutor* [1993] 4 CLJ 545; *Gan Kok Liong v. Public Prosecutor* [1968] 1 LNS 40.

357 cf UK Counter-Terrorism Act 2008, with regards to post-charge questioning by judges. See also Clive Walker, Post-Charge Questioning In UK Terrorism Cases: Straining the Adversarial Process (2016) 20:5 *The International Journal of Human Rights* 649.

358 Section 14 Security Offences (Special Measures) Act 2012 [Act 747].

359 Interviews with Participant No.23 and No.24

360 Interviews with Participants No.17, No.18, No.23, No.24.

judge must notify his or her decision within seven days of the inquiry.[361] The inquiry that involves exclusively the judge and the witness before the trial could lead to impressions and allegations of prejudice and bias. An element of transparency is, therefore, very crucial. Apart from that, the decision to allow protective measures over witnesses effects directly the right of the accused to a fair trial, particularly in challenging the credibility of the witnesses.[362] As of now, there is no provision that requires a judge to reveal what has been done in the inquiry. In *Public Prosecutor v Hassan bin Hj Ali Basri* (2014), the presiding judge made a proactive effort to briefly explain in his judgment about the inquiry.[363] Nevertheless, the judge did not elaborate as to what questions he posed to the witnesses, and no reasons were provided as to why the witnesses deserved identity protection. Perhaps, it is appropriate to consider other parties who are not involved directly in the trial, such as Sessions Court judges or 'special advocates' as in the UK's practice.[364] As mentioned earlier, the Sessions Court judges have been vested with power to record confessions before the commencement of trial. The Sessions Court judges are not involved in trial process, as all security cases are tried before High Court judges.[365]

Another pertinent issue that must be addressed is related to pre-trial detention. Section 4 of the SOSMA 2012 authorises the police to detain a suspect for up to twenty-eight days for the investigation, without judicial sanction. Under the ordinary procedure, a person must be brought to court before a Magistrate within twenty-four hours if the police intend to extend the arrest.[366] The Magistrate may then allow the person to be detained for a period not longer than fourteen days, depending on the type of offence and justification provided by the police.[367] The twenty-eight days of detention under the SOSMA 2012 is a long period, especially without judicial safeguard. Therefore, an amendment should be made to section 4 so that the police are required to obtain a court sanction for the investigatory detention under the SOSMA 2012.

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361 See s.14(2A) and s.14(2B); Security Offences (Special Measures) (Amendment) Act 2015 [Act 1487].

362 Participants No.1, No.17, No.18.

363 *Public Prosecutor v Hassan bin Hj Ali Basri* [2014] 7 MLJU 153.

364 For the role of 'special advocates' in the UK, see *R v H* [2004] UKHL 3; *R v Davis* [2008] UKHL 36; John Jackson, 'The Role of Special Advocates: Advocacy, Due Process and the Adversarial Tradition' (2016) 20:4 *International Journal of Evidence & Proof* 343; Anthony Gray, 'A Comparison and Critique of Closed Court Hearings' (2014) 18:3 *International Journal of Evidence & Proof* 230; Clive Walker, (n 2) 266-269.

365 Section 12, Security Offences (Special Measures) (Amendment) Act 2015 [Act 1487].

366 Section 28, Criminal Procedure Code 1935 [Act 593].

367 Section 117, Criminal Procedure Code 1935 [Act 593].

6.5 Conclusion

From the above discussion, although there are overlapping features between the SCM and the Emergency measures, the former should not be construed as part of the latter. It has been argued in this section that the SCM is different by considering its constitutional roots, legislative process and available safeguards. The safeguards within the SCM derive from different branches of government and could work effectively if the rule of law is upheld. For that reason, the supremacy of the Constitution, independence of the judiciary, as well as prosecution and the accountability of executive are the essential elements that cannot be compromised.

In general, the SCM acknowledges the exceptional characteristics of terrorism, and at the same time strives to preserve normative values of criminal law and the criminal justice system. Though the SCM comes with both benefits and drawbacks, there are ways to ensure the approach operates fairly and effectively. At this point, four principles formulated by Lord Lloyd when examining the UK's anti-terrorism legislation in 1996 are pertinent:

> (a) Legislation against terrorism should approximate as closely as possible to the ordinary criminal law and procedure.
> (b) Additional statutory offences and powers may be justified, but only if they are necessary to meet the anticipated threat. They must then strike the right balance between the needs of security and the rights and liberties of the individual.
> (c) The need for additional safeguards should be considered alongside any additional powers.
> (d) The law should comply with the United Kingdom's obligations under international law.[368]

With regards to paragraph (a), it must be noted that terrorism offences in Malaysia were inserted in the Penal Code 1936, which governs all ordinary crimes. Other special crimes like drugs-related and corruption offences were enacted in special statutes. It seems that the government intends to place the terrorism offences near to other ordinary crimes, except such offences are subject to special procedures under the SOSMA 2012. From the above recommendation, Lord Lloyd emphasised that exceptional laws or powers must correspond with contemporary threats. So for this

368 Lord Lloyd, *Inquiry Into Legislation Against Terrorism* (Cm 3420, 1996) vol. 1, paragraph 3.1.

reason, a periodic review of anti-terrorism legislation is imperative. The five-year review period for the SOSMA 2012 seems to be overlong, considering the intention of the Founding Fathers of the Federal Constitution to make all laws made under Article 149 revisable annually. Besides, all additional powers and measures must contain sufficient safeguards. There is room for improvement with regards to the implementation of the SCM in Malaysia. This includes a broader scope for Parliamentary review, more inclusive review mechanism and a more proactive approach adopted by the courts in striking a balance between constitutional rights and national security, state-security and human-security.

The retention of legitimacy in countering terrorism by the criminalisation approach critically depends on the SCM. In general, the need for SCM to deploy exceptional measures can be said to be backed by rational justifications. This is due to the nature of the threats posed and impacts caused by terrorism. For that reason, a state is responsible to protect its citizens. In the context of Malaysia, the SCM is a key component to make the criminalisation approach more appealing to the state counter-terrorism actors who used to rely predominantly on executive powers. Therefore, a working rule of law is essential to the SCM, as it will provide effective safeguards from different state institutions. For instance, the rule of law, which emphasises the separations of powers, would encourage the judiciary to safeguard its own function within counter-terrorism arrangements in Malaysia.

The special terrorism offences have been deployed regularly especially from 2012 onwards. The creation of new terrorism-related offences is somehow overarching, which is also in parallel with other jurisdictions, particularly the UK. But the criminalisation of terrorist acts per se, which is absent in the UK, is contentious due to its vague and wide scope. Apart from that, the precursor offences are problematic but arguably justified as they correspond to the prevention and pre-emption purposes of the law. The use of special procedures under the SOSMA 2012 was received with scepticism. It is mainly due to its provisions which seemed to be very much in favour of the prosecution, and incorrect equation with the ISA 1960. In addition, the sunset clause within the SOSMA 2012 has proved to be less effective to provide legislative safeguard to the application of the Act. Accordingly, it is suggested that all safeguards, which are the legislative, judicial and executive ones, must be strengthened. Additional new safeguards, such as the establishment of an independent reviewer of terrorism legislation, are also recommended. It has also been underlined that the present setting prevents the use of the normal process and ordinary rules of evidence in special offences trials. It is recommended that the related provisions should be amended so that the special processes are only used when necessary.

Chapter 7 - Conclusion

This research began with the proposition that the criminalisation approach should be the primary legal response to terrorism in Malaysia. It has attempted to achieve five research objectives. The first objective is related to the conception of terrorism and counter-terrorism in Malaysia, which is mainly addressed in Chapter 3 of this thesis. The second objective deals with the criminalisation approach in theory, and how it can be operated justly and effectively as a primary policy in countering terrorism. The third objective requires the researcher to analyse the working of the criminalisation approach in the context of Malaysia. The elaboration and assessment about the Second and Third Objectives are presented in Chapters 4, 5 and 6. The arrangement is based on the specific modes of the criminalisation approach, namely the Normal Criminalisation Mode (NCM), Special Criminalisation Mode (NCM) and Avoidance of Criminalisation Mode (ACM). The fourth objective involves drawing lessons based on policy transfer techniques. References to the UK's counter-terrorism approach are made throughout this thesis, particularly with regards to the prosecution-based policy. The final objective concerns possible improvements that can be made to the criminalisation approach in Malaysia in the light of the research findings. Suggestions are made throughout all chapters, which will be partly reiterated in this chapter.

7.1 First Objective: To Understand and Evaluate the Conception of Terrorism and Counter-Terrorism in Malaysia

The thesis has endeavoured to answer how the state constructs 'terrorism' and its definition, which conclusions are then translated into counter-terrorism laws and policies. The investigation and assessment focus on three aspects. The first are factors that have influenced the conceptions of terrorism and counter-terrorism. Second are the form and functions of the definition of terrorism in Malaysia's counter-terrorism strategy. Third is the working of the existing legal definitions, with emphasis on their fairness and effectiveness.

7.1.1 The Shaping Factors

It has been posited in Chapter 3 that the conceptions of terrorism and counter-terrorism in Malaysia are shaped by internal and external factors. The key internal factors are Malaysia's colonial legacy and its existing authoritarian tendency.[1] The external factors can be traced from the formulation of a legal definition of terrorism in existing and previous counter-terrorism laws.[2]

The pre-independence 1948-1960 Emergency marked the beginning of Malaysia's own counter-terrorism strategy. It was an executive-based approach that relied heavily on repressive measures outside the criminal justice system. The approach then was sustained by successive governments after independence in 1957. The approach also derived its legitimacy from several provisions of the Federal Constitution 1957, which allow the operation of exceptional measures during peacetime. The Internal Security Act (ISA) 1960, along with other Emergency Ordinances embodied the approach for more than six decades. This law, which was meant to eliminate the remaining Communist terrorist threats, then became the tool of authoritarian populism in Malaysia. Its retention corresponded with overlapping Emergency declarations, which only ended in 2012.[3] Throughout these years, the rule of law weakened as executive power was not subject to effective judicial or legislative scrutiny. It is posited that the normalisation of exceptional measures occurred.[4] As a result, the criminalisation approach was less popular among the state counter-terrorism actors, including government prosecutors, security officials and police.[5]

International law and global events have also impacted the conception of terrorism and counter-terrorism in Malaysia. The significant effects can be traced in the formulation of anti-terrorism laws, particularly legal definitions in the Penal Code 1936 and the National Security Council Directive 2003. It has been discovered that the government ultimately adopted the definition of terrorism as proposed by the Commonwealth Secretariat.[6] That proposal is developed to assist countries in implementing the United Nations Security Council Resolution 1373. Further, amendments were made in 2002 to Chapter VIA Offences Relating to Terrorism of the Penal Code 1936 in order to comply with international conventions, namely the

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1 See section 3.4.1, Chapter 3.

2 See section 3.3, Chapter 3.

3 See table 4.2, Chapter 4.

4 See section 4.3.1.2, Chapter 4; see also section 6.3.2, Chapter 6.

5 See section 4.3.5.2, Chapter 4.

6 See section 3.3.3, Chapter 3.

International Convention for the Suppression of the Financing of Terrorism 1999 and International Convention against the Taking of Hostages 1979.[7] Accordingly, terrorism-related offences were created and incorporated into the Code. At this juncture, international law also contributed to the initial stage of the criminalisation approach in Malaysia. The state of the criminalisation approach at that time, however, was still sectorial, particularly before the repeal of the ISA 1960 in 2011.

It has been proposed in this thesis that there has been a change of attitude towards the criminalisation approach, particularly evidenced by the repeal of the ISA 1960 and the introduction of the Security Offences (Special Measures) Act (SOSMA) 2012.[8] Arguably the change was driven by the local political instability, rather than solely a genuine willingness to reform. Hence the scepticism raised by several research participants, particularly private practitioners and civil society representatives, against the present criminalisation approach. The perception is also based on the 'oppressive' features of the SOSMA 2012 and the introduction of the Prevention of Terrorism Act 2015, which has been perceived as resurrecting aspects of the ISA 1960.[9] Additionally, the preference for the primacy of an executive-based approach can be seen from responses in interviews given by the state counter-terrorism actors.

The change of government in 2018 may also shape Malaysia's counter-terrorism strategy.[10] This assertion, however, is mainly based on the election manifesto of Pakistan Harapan (PH), the new ruling coalition party rather than actual deeds. The government has promised to carry out radical law reforms, but no clear outline of the counter-terrorism policy has been published before the research cut-off date.

7.1.2 The Significance of Definition

It has been contended that legal definitions of terrorism in Malaysia have been designed to serve different roles within a counter-terrorism strategy reflecting existing threats.[11] The definition of terrorism in the repealed ISA 1960, for example, was meant to counter armed Communist terrorists and maintain public order.[12] So, the focus of the definition was the unlawful use or possession of firearms and

7 See section 3.3.3, Chapter 3.

8 See section 3.4.2, Chapter 3.

9 See section 5.4.3, Chapter 5.

10 Ibid.

11 Section 3.3, Chapter 3.

12 Section 3.3.1, Chapter 3.

explosives and activities that were prejudicial to public order. The National Security Council (NSC)'s definition of terrorism has been devised to regulate policy, resources and tasking of law enforcement, as well as coordinating security forces such as the police and army in projected comprehensive and inclusive counter-terrorism arrangements.[13] However, the definition of terrorism in the Penal Code 1936 is devised to facilitate the prevention and prosecution of terrorism-related activities. Accordingly, the Penal Code's definition plays a legal role in which stricter and clearer definition is essential for criminalisation, but not entirely delivered.[14]

The Penal Code 1936 defines "terrorist" "terrorist entity" "terrorist group" and "terrorist act". Like the previous definition of terrorism under the ISA 1960 which had its origins from British counter-insurgency policy, the Penal Code 1936 definition is also a product of policy transfer. It derives from the Commonwealth Secretariat's Model Legislative Provisions on Measures to Combat Terrorism.[15] Therefore, this research has examined whether the importation is appropriately suited to the Penal Code 1936 and the current Malaysian legal setting and condition. Three related impacts have been identified.[16] First, the insertion of the definition in 2002 into the existing Penal Code 1936 criminalises certain acts which were already offences. Redundant offences could bring negative impacts linked with the notion of 'over-criminalisation'. Second, the definition has altered established principles of criminal law that are embedded in the Penal Code 1936. For example, 'the intention of advancing a political, religious or ideological cause' is now considered as a mens rea, and must be proven in court.[17] In ordinary criminal offences, motive usually does not affect criminal liability.[18] Third, the creation of a 'terrorist act' simpliciter offence has occurred, which was assessed in Chapter 3 and Chapter 6.[19] It must be noted that this move was not proposed by the Commonwealth Secretariat. Additionally, the UK's government had also rejected such an offence as not comfortably reconcilable with criminalisation.[20]

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13 Section 3.3.2, Chapter 3.

14 Section 3.3.3, Chapter 3.

15 Section 3.3.3, Chapter 3.

16 Section 3.3.5, Chapter 3.

17 Section 130B (2)(b), Penal Code 1936 [Act 574], see also; section 3.3.5.2, Chapter 3.

18 Section 5.4.4, Chapter 5

19 Section 3.3.5.1, Chapter 3, section 5.4.2.1, Chapter 5.

20 Lord Gardiner, *Report of a Committee to Consider, in the Context of Civil Liberties and Human Rights, Measures to Deal with Terrorism in Northern Ireland* (Cmnd. 5847, 1975) para 70.

7.1.3 Assessment and Proposed Improvements

The Penal Code's definition of 'terrorist act' is a compilation of existing criminal offences, with motivations and objectives as additional elements.[21] The offences include causing death, bodily harm and damage to property.[22]

Three important impacts have been underlined in Chapter 3.[23] First, it has been argued that the broad definition can undermine constitutionalism and be open to abuse.[24] In order to conform better to existing normative values, it is recommended that the criminal acts within the definition of terrorism must have the same connotation as ordinary criminal offences. For example, the act of causing hurt in terrorism-related offences must be proven in a way that is similar to causing hurt under section 323 or 324 of the Penal Code 1936. The fundamental elements of *mens rea* and *actus reus* in the criminal law, along with general defences should be maintained.

Second, the inclusion of ideological, religious and political elements in the Penal Code's definition has its pros and cons.[25] On the one hand, it highlights the distinction between terrorism-related offences with other crimes, and hence justifies special processes and punishment. On the other hand, it could be detrimental to the civil rights of citizens. Two checks are suggested. Firstly, the impartiality and independence of the terrorism experts, who are called to give opinion evidence in court, must always be intact. Secondly, the courts must recognise their role as prime guardians of the constitutional rights of the accused persons.

Third, the creation of the 'terrorist act' simpliciter offence is fundamentally ambiguous and against the rule of law that requires clarity.[26] Also, the offence disregards levels of participation and seriousness among terrorism-related acts. Moreover, the 'terrorist act' simpliciter offence is punishable by death if it has links to any fatalities in a terrorist attack. Therefore, Section 130JD of Penal Code 1936 should be repealed due to the poor formulation of the offence. Other criminal offences within the Penal Code 1936, which stipulate more specific formulations of actus reus and mens rea are arguably sufficient to encapsulate terrorism acts.[27]

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21 Section 130B(3)(a) Penal Code 1936 [Act574].

22 See sections 3.3.3 and 3.3.5.1, Chapter 3.

23 Section 3.3.5.1, Chapter 3.

24 ibid.

25 Section 3.4.5.2, Chapter 3.

26 See also Section 6.4.2.1, Chapter 6.

27 See Table 5.1 and Table 5.2, Chapter 5 for offences in the NCM; and Table 6.4, Chapter 6 for offences in the SCM.

7.2 Second Objective: To Analyse the Concept of Criminalisation Approach as Primary Legal Response to Terrorism in Malaysia

In order to achieve the second objective, this thesis has identified and examined the essential values and elements of the criminalisation approach and how it can operate fairly and effectively as a primary legal response to terrorism in Malaysia. The assessment can mainly be found in Chapter 4, and further analysis based on the criminalisation mode in Chapter 5 and 6.

In Chapter 4, it was contended that the criminalisation approach firmly upholds the rule of law and the right to a fair trial.[28] These aspects are absent in the past approach that was based on executive-based measures, such as detention and banishment without trial.[29] The criminalisation approach encapsulates checks and balances and reinforces the separation of powers. The power of the executive for instance is limited and subjected to judicial scrutiny. Further, the criminalisation approach, which treats terrorists as criminals, provides consistency and clarity. The preservation of the rule of law also entails the right to a fair trial, which is enshrined in the Federal Constitution 1957 and based on the Common Law. The criminalisation approach has been argued to embody individual responsibility and due process within the existing criminal justice system in Malaysia.

The criminalisation approach nevertheless has its own drawbacks, as underlined and examined in Chapter 4.[30] The main possible risks are linked to the notions of politicisation of the criminal trial and normalisation of emergency or exceptional measures. In the context of Malaysia, the staging of 'show trials' to deliver a political message has occurred.[31] Also, the creation of special criminal law and process to facilitate the counter-terrorism agenda without adequate safeguards is detrimental to the legitimacy of the ordinary criminal law and processes.[32] Therefore, it has been recommended that the legislature, executive and judiciary could provide effective safeguards to ensure that criminalisation approach works fairly and effectively.[33]

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28 Section 4.3.1, Chapter 4.

29 See section 4.4 and table 4.4, Chapter 4.

30 Section 4.3.2, Chapter 4.

31 Section 4.3.3.2, Chapter 4.

32 Section 4.3.3.3, Chapter 4.

33 See section 6.3.2, Chapter 5, see also, Clive Walker & Mukhriz Mat Rus, 'Legislating for National Security' in Nuraisyah Chua Abdullah (ed.), *Developments in Malaysian Law* (Sweet & Maxwell, Subang Jaya, 2018) 1.

The legislative safeguard can be in the forms of periodical reviews and sunset clauses. Accordingly, it is suggested that the 5-year review of the Security Offences (Special Measures) Act (SOSMA) 2012 should be extended to cover other aspects of the law. To date, the parliamentary review is limited to the power of the police to arrest a person 'for not more than twenty-eight days, for investigation'.[34] This post-legislative scrutiny can overcome the possible risks stemming from the normalisation of exceptional measures.[35] Therefore, the special anti-terrorism legislation would be retained based on current necessity and existing threats. The establishment of a cross-party committee can also facilitate the parliamentary reviews.[36]

With regards to the executive safeguards, two mechanisms have been put forward. Firstly, the government, through the Home Ministry, should present an annual factual and information report on the implementation of the SOSMA 2012 in Parliament.[37] The report should reasonably include numbers of terrorism-related arrests, prosecutions and convictions. Apart from enhancing transparency and accountability, the report can help the continuous assessment of the law, either by the Parliament or other stakeholders. Secondly, it is also important to consider the UK's practice of having an independent reviewer of terrorism legislation. It is observed that the task of reviewing anti-terrorism law and its workings would be better performed by a specific entity, rather than placing it under the broad jurisdiction of the Human Rights Commission of Malaysia (SUHAKAM).[38] Thirdly, another significant executive institution that can provide significant safeguards is the Attorney General's Chambers. The new government's proposal to separate the role of the public prosecutor from the AG's Chambers may increase the prosecution's independence.[39] In such a way, this could provide a better safeguard to prevent political interference in the criminalisation approach. It must be noted that the role of prosecutors in terrorism-related cases expanded after the introduction of the SOSMA 2012.[40] Accordingly, a more specific code of ethics that addresses pertinent issues related to terrorism-related prosecutions should be promulgated.[41] To date, a prosecutor or known as Deputy Public Prosecutor is required to comply with the

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34 Section 4(5) & (11), Security Offences (Special Measures) 2012 [Act 747]

35 Section 5.3.2.1, Chapter 5.

36 ibid.

37 ibid.

38 Section 6.3.2.3, Chapter 6.

39 See Table 1.1, Chapter 1.

40 See Section 5.3.2.3, Chapter 5.

41 Section 6.3.2.3, Chapter 6.

Code of Ethics of Attorney General's Chambers and a series of the Attorney General's Directives and Public Prosecutor Directives which are helpful but generalist in nature.

The proposed judicial safeguards are connected with two fundamental notions - the independence of the judiciary and the judicialisation of the process in terrorism-related trials - as discussed in Chapter 6.[42] The judiciary should recognise that they are independent and must be prepared to hold the executive to account by law. It has also been established in Chapter 6 that the judicialisation of the terrorism-related process entails a more prominent role for the Malaysian judiciary, as compared to the past and in ordinary criminal trials.[43] The use of special criminal law and procedures, as well as the establishment of special courts for terrorism cases, are the key factors in empowering judges not only to deal with terrorists but also to deal with the government through its criminal justice agencies appearing before the court. At this juncture, judges must caution themselves that the use of exceptional measures illegally, or contrary to the values of constitutionalism and the criminal justice system should be the subject of censure. In terms of sentencing, judges should not depart from the established principles and be resilient against reactive pressures.

7.3 Third Objective: To Assess the Workings and Dynamics of the Criminalisation Approach in Malaysia's Counter-Terrorism Strategy

An evaluation has been conducted based on a doctrinal and empirical assessment of the anti-terrorism legislation, along with its interpretation and implementation within the Malaysian criminal justice system. The focus has been on how the criminalisation approach provides effectiveness and fairness in both theory and practice. The workings of the NCM and the SCM were analysed separately in Chapter 5 and 6.

7.3.1 The Normal Criminalisation Mode (NCM)

In Chapter 5, the NCM is proposed to be the primary mode within the criminalisation approach in Malaysia. This mode is fundamentally based on the 'normal' criminal

42 Section 6.4.3.2, Chapter 6.

43 ibid.

offences particularly in the Penal Code 1936. That includes murder, causing bodily harm, and damage to property.[44] It was also observed that several offences are 'special' in nature, but to some extent embody a certain degree of normalcy due to the NCM's longtime operation and societal acceptance — for example, offences related to firearms and even treason.[45] In terms of process, the NCM makes use of the ordinary procedures provided by the Criminal Procedure Code 1935.

It has been argued that the NCM should be given priority over other modes.[46] The main reason is that the NCM provides the most legitimate response based on the normative societal and constitutional values. Chapter 5 emphasised the capability of the NCM to delegitimise terrorism by focusing on its criminal nature and stigmatising terrorism objectives.[47] Further, concerning the operation of inchoate crimes and mode of participation, it has been argued that the NCM embodies sufficient preventive elements that are vital in a counter-terrorism strategy.[48] The NCM also offers neutrality and consistency, which are required by the rule of law.[49] This research also has examined and identified possible risks posed by the NCM to the counter-terrorism strategy and criminal law itself.[50]

The internal culture among the security officials and present legal setting has been identified as a critical constraint to the prioritisation of the NCM over the SCM and also ACM.[51] The former require adequate training to change the investigation process to be prosecution-oriented. With regards to the legal and structural constraints, the present 'Scheduled Offences' approach puts the prosecutors in an either-or dilemma. It has been argued that the certification approach is a better gateway for the criminalisation approach.[52] The prosecution should be given power to decide on the use of special process on a case-by-case basis. Notwithstanding, the prosecution decision must be subject to review by the court.

7.3.2 The Special Criminalisation Mode (SCM)

The SCM embodies the use of specially designed terrorism-related offences, particularly those in Chapter VIA of the Penal Code 1936, and exceptional

44 See Table 5.1, Chapter 5.

45 See Table 5.3, Chapter 5.

46 Section 5.4, Chapter 5.

47 Section 5.4.1, Chapter 5.

48 Section 5.4.2 Chapter 5.

49 Section 5.4.3Chapter 5.

50 Section 5.5, Chapter 5.

51 Section 5.5.1, Chapter 5.

52 Section 5.5.1.2, Chapter 5; section 6.4.3.1, Chapter 6.

processes provided under SOSMA 2012. There are legitimate justifications for the SCM, but at the same time, its potential risks should be recognised and minimised. The SCM should work effectively without undermining constitutional and criminal justice values. Accordingly, four checks are suggested: First, the SCM should only be deployed in specific cases where the NCM cannot provide a fair and effective solution. Second, legal provisions that govern special offences and processes within the SCM should be designed in a way that is close to ordinary criminal offences. For example, it has been highlighted that the notion of 'direct or indirect' commission in several provisions related to terrorism in the Penal Code 1936 is relatively foreign to the principle of criminal liability in Malaysia.[53] The Penal Code 1936 addresses criminal liability based on the modes of the participant such as direct intention, abetment and conspiracy, and attempt. Third, since the SCM embodies special measures, sufficient safeguards from different institutions, as mentioned earlier, must be in place and work effectively. Fourth, to overcome the normalisation of special laws, as mentioned earlier, post-legislative scrutiny over special anti-terrorism legislation must be carried out.

It has been contended that the SCM can be a better option than the use of preventive detention without trial, which is still desired by some factions in Malaysia.[54] The SCM brings in the judiciary, which arguably can provide safeguards for suspects in line with the rule of law and human rights principles. However, two caveats to the SCM are proposed. First, the authorities must enhance its accountability and transparency. The police, especially the Counter-Terrorism Unit should be trained to collect evidence that is admissible in court, not merely for intelligence purposes. Second, the discretionary power given to the police in any special process must be subjected to judicial scrutiny. By contrast, section 4 of the SOSMA 2012 allows the police to detain a suspect for up to twenty-eight days for the investigation. Therefore, it has been recommended that the judicial sanction is required if the police intend to detain a suspect for a certain period of time within the maximum twenty-eight days.[55]

7.3.3 The Avoidance of Criminalisation Mode (ACM)

It has been contended that the criminalisation approach should be the primary policy within Malaysia's counter-terrorism strategy, but not the sole legal response to terrorism. In Chapter 4, the roles of the ACM have been assessed, given its

53 See section 130C &130Q, see also Section 6.4.2.1, Chapter 6.

54 Section 6.5, Chapter 6.

55 Section 6.4.3.2, Chapter 6.

significant links with the NCM and the SCM within the criminalisation approach.[56] The ACM, which mainly involves the use of measures that operate beyond the criminal justice system, is not a primary subject of this thesis.[57] However, it has been argued that its operation can jeopardise the criminalisation project.[58] This effect is mainly due to the lack of safeguards provided under the law to hold the executive accountable. Therefore, it is crucial to abolish all provisions that prevent a judicial review from being exercised upon executive decision, including orders issued by the Board of the Prevention of Terrorism.[59]

7.4 Fourth Objective: To Learn Lessons from the UK's Counter-terrorism Policy

In the course of articulating and assessing the criminalisation approach in Malaysia, references have been made to the UK's counter-terrorism laws and strategy. Based on the policy transfer methodology, the lesson drawing process has been carried out, particularly regarding the meaning and implementation of the criminalisation approach in a multi-faceted strategy. Additionally, the UK's experience in Northern Ireland provides a tested model and long practice for this research especially in contextualising the working of criminalisation approach, including the SCM. Several vital reflections and lessons from the UK's strategy that could benefit Malaysia's counter-terrorism policy should now be highlighted.

First, the experience of the UK after the Diplock report in 1972 shows that, even in difficult circumstances, the criminalisation approach is feasible and can operate justly and effectively if there are present factors such as a strong political will and clear counter-terrorism policies and legislation. Second, the criminalisation approach requires a robust enforcement of the rule of law and therefore functioning constitutional institutions. These will not only defend constitutionalism but also the legitimacy of counter-terrorism. Third, transparency and accountability are core values that should be embraced by counter-terrorism actors. The values can facilitate improvements, as well as cultivate public confidence and participation in a comprehensive counter-terrorism strategy. Fourth, the invention of specific terrorism-related offences and processes is inevitable and can be justifiable.

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56 Section 4.4, Chapter 4.

57 See Table 4.4, Chapter 4.

58 Section 4.4.1.4, Chapter 4.

59 Ibid.

However, the adjustment made must not compromise fundamental criminal justice principles, as was recognised by Lord Diplock at the outset of the era.

7.5 Fifth Objective: To Propose Improvements to Present Strategy

This thesis has established that the criminalisation approach, to a certain extent and subject to compromises and some contradictions, has been adopted by the Malaysian government in recent years. It has also been contended that the criminalisation approach is capable of providing a fair and effective response to terrorism in Malaysia more so than in the past. On the other hand, this research has recognised some flaws of the existing criminalisation approach, derived from its composition and implementation. Further, the possible impacts of the normalisation of special measures due to the operation of Emergency declarations in the past have also been underlined in this thesis. Hence the proposed improvements basically move towards the two key agendas already identified — first, prioritisation of the criminalisation approach in Malaysia's counter-terrorism arrangements, second, enhancement of safeguards to ensure the criminalisation approach operates justly and effectively. Recommendations on specific aspects of the criminalisation approach have been mentioned in earlier sections of this chapter and articulated mostly in Chapter 3, 4, 5 and 6. As for a broader approach, this research has also acknowledged the need for institutional reforms in Malaysia in order to uphold the rule of law and constitutionalism.

7.6 Future Research

This thesis has examined the criminalisation approach in Malaysia, as well as assessed its feasibility. However, as delineated in Chapter 1, the scope of this research is limited to counter-terrorism policy and criminal law.[60] There are other elements within the criminal justice system which are essential and connected to the criminalisation approach but were not covered in this thesis, such as policing and investigation, rules of evidence and penology in terrorism-related cases. The topics were excluded in this research for at least three reasons. First, the topics are less significant to the research objectives as described earlier, albeit they are essential to the criminalisation approach in general. Second, the topics are broad and deserve

60 Section 1.5, Chapter 1.

specific attention — for example, a specific study on the use and admissibility of 'special' evidence in terrorism-related trials. Third, the study of the areas is perhaps better conducted using other research methods, such as quantitative research on sentencing and penology. Accordingly, the following areas are worthy of consideration for future research.

First, it is also very crucial to examine comprehensively Malaysia's present counter-terrorism agenda, which covers different measures apart from the criminal justice response. The research would be significant in the pursuit of having a coherent national counter-terrorism strategy that is compatible with constitutionalism and international obligations. A comprehensive agenda must move beyond reactive gesture, outrage or legacy of the past struggle. Accordingly, the focus should be on the effectiveness and fairness of the components within the present arrangements. As of now, the Malaysian government does not reveal its counter-terrorism strategy, as compared to the UK.

Second, the penology of terrorism is another area that deserves a more dedicated study. The adaptation of the criminalisation approach entails a distinctive penology, which embodies modifications to punishments and the penal regime. Unfortunately, this research cannot do justice to this important area, as it will possibly involve multiple disciplines and different methodologies. Several issues arise. First, the purpose of penology in the terrorism field is contested. As emphasised by several research participants, some current trends of sentencing lean towards a rehabilitation agenda, but other influences point towards retribution (including the death penalty). Another pressing inquiry concerns the significance of a sentencing guideline that is specifically designed to cover the terrorism-related offences in the Penal Code 1936.[61] Third, evidence-based research about the impacts of sentences might allay the sceptical perspective towards the criminalisation approach, which was seen by several participants in this project as inadequate to punish, deter and rehabilitate terrorists.[62]

Third, future research should also concentrate on counter-terrorism policing and investigation. It has been underlined in Chapter 4 that special anti-terrorism law grants broader powers to the police for prevention and investigation purposes. Such powers bring dangers of abuse or at least unexpected applications. Further, the shift of policy towards the criminalisation approach requires that the investigative authorities must improve their skills in gathering and presenting evidence (including

61 Section 6.2.3, Chapter 6.

62 ibid.

biometric, digital and financial evidence), while being accountable and transparent through disclosure procedures.

Finally turning to methodology, consideration might also be given to other forms of empirical research in evaluating Malaysia's counter-terrorism strategy. As explained in Chapter 2, documentary sources are limited and not all terrorism-related cases were included in law reports. Hence, apart from qualitative interviews, it is reasonably necessary to consider other methods, including quantitative ones. The increasing number of prosecutions can potentially provide richer and more detailed data.

7.7 Summary

The introduction of the SOSMA 2012 and the repeal of Emergency Ordinances was a significant signal of a turning point in Malaysia's counter-terrorism strategy towards the criminalisation approach. That makes the criminalisation approach in countering terrorism, which is the subject matter of this thesis, a novel topic in Malaysia. Within seven years, the criminalisation approach has emerged as an important legal response to terrorism in Malaysia. The primacy of the criminalisation approach in Malaysia's counter-terrorism strategy is still contestable, but its progress is perceptible. As the 'New Malaysia' emerges, there is a hope that the criminalisation approach will gain prominence to become the primary response to terrorism in Malaysia. The assertion is mainly based on two factors. First, the commitment showed by the new government to carry out institutional reforms and extensive legislation reviews. Second, the current political instability makes the government more cautious about invoking executive powers. It was the same factor that paved the way to the repeal of the ISA 1960 by the previous government in 2012, as explained in Chapters 1 and 4.

Positioning the criminalisation approach as the primary response to terrorism in Malaysia requires not only legal reforms but also cultural and mind-set shifts among all counter-terrorism actors. The process involves a considerable period of work and commitment of resources. There is also the danger that the criminalisation approach will be hampered by immediate panic reactions to sudden events. Lessons learned from the past include where the 1948-1960 Emergency regulations were revived following racial riots in 1969. A recent example can be seen through the introduction of Emergency Regulations in Sri Lanka on the next day after the

Easter Sunday bombings.[63] It is therefore vital to ensure that the underlying rule of law and constitutionalism remains vibrant in Malaysia. There must be adequate safeguards to resist the normalisation of extra-ordinary measures. The value of constitutionalism should be impressed on the hearts and minds of the lawmakers and other counter-terrorism actors. Additionally, it is inherently necessary for Malaysia to improve its commitment to adopting international counter-terrorism conventions and protocols, apart from the core human rights instruments.

63 See Part I: Section (I)- Gazette Extraordinary of the Democratic Socialist Republic of Sri Lanka 2120/5 - 22.04.2019, at <http://documents.gov.lk/files/egz/2019/4/2120-05_E.pdf> accessed 17 June 2019. See also; BBC News, 'Sri Lanka attacks: What we know about the Easter bombings' (21 April 2019) at <https://www.bbc.com/news/world-asia-48010697> accessed 17 June 2019.

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Appendix A - Ethics Committee Approval

The Secretariat
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University of Leeds
Leeds, LS2 9JT
Tel: 0113 343 4873
Email: ResearchEthics@leeds.ac.uk

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Mukhriz Bin Mat Rus
PhD Student, School of Law
Faculty of Education, Social Sciences and Law
The Liberty Building
University of Leeds
Leeds, LS2 9JT

ESSL, Environment and LUBS (AREA) Faculty Research Ethics Committee
University of Leeds

5 July 2017

Dear Mukhriz

Title of study: **The Criminalisation Approach in Malaysia's Counter-Terrorism Strategy**
Ethics reference: **AREA 16-147**

I am pleased to inform you that the above research application has been reviewed by the ESSL, Environment and LUBS (AREA) Faculty Research Ethics Committee and following receipt of your response to the Committee's initial comments, I can confirm a favourable ethical opinion as of the date of this letter. The following documentation was considered:

Document	Version	Date
AREA 16-147 Ethical Review Form (Mukhriz Mat Rus).doc	2	06/06/17
AREA 16-147 Information Sheet - Amended (Mukhriz MR)	2	06/06/17
AREA 16-147 Consent Form - Amended (Mukhriz MR)	2	06/06/17
AREA 16-147 Summary of Interview Questions.docx	1	18/05/17
AREA 16-147 Fieldwork-Assessment-Form-MED-risk-(Mukhriz Mat Rus).doc	2	18/05/17
AREA 16-147 Emails between Amanda Hemingway (School of Law) and Mukhriz.pdf	1	18/05/17

Committee members made the following comment about your application:

- **We must stress the importance of not encrypting the laptop. All data should be immediately uploaded and stored on the University M drive as soon as is feasible, and deleted from the laptop when this is done.**

Please notify the committee if you intend to make any amendments to the information in your ethics application as submitted at date of this approval as all changes must receive ethical approval prior to implementation. The amendment form is available at http://ris.leeds.ac.uk/EthicsAmendment.

Please note: You are expected to keep a record of all your approved documentation and other documents relating to the study, including any risk assessments. This should be kept in your study file, which should be readily available for audit purposes. You will be given a two week notice period if your project is to be audited.

There is a checklist listing examples of documents to be kept which is available at http://ris.leeds.ac.uk/EthicsAudits.

We welcome feedback on your experience of the ethical review process and suggestions for improvement. Please email any comments to ResearchEthics@leeds.ac.uk.

Yours sincerely

Rachel E de Souza, Research Ethics & Governance Administrator
On behalf of Dr Kahryn Hughes, Chair, AREA Faculty Research Ethics Committee

CC: Student's supervisor(s)

Appendix B - Information Sheet

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PhD Research: The Criminalisation Approach in Malaysia's Counter-Terrorism Strategy

INFORMATION SHEET

I would like to invite you to participate in my research project, which examines counter-terrorism measures in Malaysia. Before you decide, you need to understand why the research is being done and what it would involve. Please take time to read the following information carefully. Please ask questions if anything you read is not clear or would like more information. Take time to decide whether or not to take part in this research.

What is the purpose of the study?

This research aims to understand and examine Malaysia's counter-terrorism strategy, particularly its legal aspects. The main goal is to propose improvements to the existing counter-terrorism strategy in Malaysia.

Why have I been invited?

You have been invited to take part in the research because of your role, position and/or participation in Malaysia's counter-terrorism strategy, directly or indirectly. I am hoping that you will share your expertise, insights and experiences about the area of study.

Do I have to take part?

Your participation in the research is purely voluntary. After reading the information and discussing any queries you may have, you will be asked if you wish to go ahead with the interview. If you agree, I will ask you to sign a consent form to show that you have agreed to take part in the research. You are free to withdraw before or during the interview session. If you intend to withdraw after the interview session, you are also free to do that within 10 days after the interview session has taken place. You are not required to provide any reason if you decide to withdraw.

What will happen to me if take part?

If you have decided to take part, we will set the interview date and place. During the session, I will ask you questions concerning law, administration, institutions and process. Questions about individual cases will be avoided. You are also welcome to share any information that you think relevant to the questions posed and the research.

Will I be recorded, and how will the recorded media be used?

I would prefer to record our conversation on a digital recorder with your consent. If you are not happy with that, I will jot down your answer on paper. All the audio-recordings and notes will be kept safe and confidential. No one other than me can access the materials.

Expenses and payments?

No payment or gratuity will be given to any participants in this project. No cost should be incurred by you in taking part of the research. For example, I will go to see you at your office or at any nearby neutral location.

Appendix C - Consent Form (Sample)

School of Law
Faculty of Education, Social Sciences and Law

UNIVERSITY OF LEEDS

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Consent to take part in 'The Criminalisation Approach in Malaysia's Counter-Terrorism Strategy' research.

	Add your initials next to the statements you agree with
I confirm that I have read and understand the information sheet dated…../…../……explaining the above research project and I have had the opportunity to ask questions about the project.	
I understand that my participation is voluntary and that I can withdraw my participation in this research before and during the interview session, and within 10 days after the interview session. I understand that all my personal information and data collected from me will be destroyed and will not be used if I withdraw from this project. In addition, If I do not wish to answer any particular question or questions, I am free to decline.	
I give permission to the researcher to reproduce my responses anonymously. I understand that my name will not be linked with the research materials, and I will not be identified or identifiable in the report or reports that result from the research. I understand that my responses will be kept strictly confidential, with exception to any information pertaining to any serious harm and crime.	
I understand that relevant sections of the data collected during the study, may be looked at by individuals from the University of Leeds or from regulatory authorities where it is relevant to my taking part in this research. I give permission for these individuals to have access to my records.	
I agree to take part in the above research project and will inform the researcher should my contact details change.	

Name of participant	
Participant's signature	
Date	
Name of researcher	Mukhriz Bin Mat Rus
Signature	
Date*	

The Criminalisation Approach in Malaysia's Counter-Terrorism Strategy' research	*Document type*	*Version #*	*Date*
	Eg consent form for...		

Appendix D - Interview Schedule

Preamble:

- *Explaining purpose*
- *Obtaining consent*
- *Getting permission to record*
- *Reminding about sensitive and classified information*

Section 1- Introduction

1.1 What is your current position?

1.2 What are your main responsibilities?

1.3 How long have you held this position?

Section 2 -Terrorism and definitional issues

'To begin with, I will ask you some questions about terrorism and how we see the phenomenon. Terrorism is indeed a very wide topic, but my questions will be focusing on how our understanding and perceptions towards terrorism shape our reactions against its threats, particular legal responses'.

2.1 What is your view about the terrorism threats in Malaysia?

2.2 What are the main characteristics of terrorism in Malaysia in your opinion?

2.3 Who can be fairly considered as a terrorist in Malaysia? On what basis?

2.4 In Malaysian context, what type of acts that can be regarded as terrorist acts?

2.5 How significant is the definition of terrorism to you in performing your duty? In what ways?

2.5 What is your reference for defining terrorism?

2.6 Have you ever referred to the definition of terrorism under the Penal Code? – If necessary, I will show the provisions.

2.7 What is your view about the definition provided in the Penal Code?

2.8 Do you think the definition of terrorism under the Code is fair? – Why?

2.9 Do you think the present legal definition can be used effectively in confronting terrorism in Malaysia?

2.10 Do you think improvements could be made to the existing legal definition?

Section 3 – Counter-Terrorism in Malaysia

'I shall discuss the strategy adopted by the Malaysian government in countering terrorism. In order to examine the development of counter-terrorism in Malaysian, you will also be asked to make a comparison between past and present situations. For the sake of convenience, I will make a distinction between two periods of time, i.e.: the ISA era (1960- 2012) and post ISA era (2012-present). However you are free to point to any period of time in explaining significant developments'

3.1 In term of fairness and effectiveness, what is your opinion about executive measures provided under the ISA and other Emergency Ordinances? e.g.: Detention without trial and restriction of movement.

3.2 Do you think the repeal of ISA in 2012 was a good move?

3.3 Do you see any significant differences between the ISA era and post-ISA era? -If yes, what are the changes? If no, why do you think so?

3.4 In term of fairness and effectiveness, what is your view about Malaysia's counter-terrorism strategy after 2012?

3.5 Is the current strategy appropriate, in terms of fairness and effectiveness?

3.6 What are the most important means for countering terrorism, in your opinion, that would constitute fair and effective responses to the terrorism threats in Malaysia?

Section 4 – The Use of Criminal Justice System in Countering Terrorism

'I shall now talk about how criminal justice system can be used in countering terrorism fairly and effectively. As stated in the Participant Information Sheet, this aspect is the primary focus of my project. I refer this legal response as criminalisation approach'.

4.1 In term of fairness, how do you assess terrorism-related offenses as compared to other crimes? Are they different, in what way?

4.2 In term of effectiveness, how do you assess terrorism-related offenses as compared to other crimes? Are they different, in what way?

4.3 Should Malaysia just use the existing criminal offences like murder, causing hurt to body and damage to property to prosecute terrorist suspects? Why?

4.4 What is your view about the use of inchoate and preparatory offences in countering terrorism? (e.g.: Offences such as possession of materials link to terrorism, receiving instructions from terrorist groups under the Penal Code)

4.5 Do you think normal procedures under the Criminal Procedure Code 1935 are able to work effectively in terrorism-related trials?

4.6 Is it fair to use normal procedures in terrorism-related trials?

4.7 What is your opinion on special procedures provided under SOSMA 2012, with regards to terrorism-related trial? (e.g.: Investigatory arrest up to 28 days, the accused will be detained until the trial completed, and the admissibility of under-arrest confession.)

4.8 How far can the special procedures provide fairness in terrorism-related trials?

4.9 How far can the special procedures effectively work in cases related to terrorism?

4.10 Should we give priority to the use of criminal justice system over other measures such as executive-based action? Why?

4.11 Do you think criminal justice system should be made flexible in order to facilitate the counter-terrorism agenda? How? To what extent?

4.12 With regards to the existing executive-based measures, do you think such measures are fair and effective? Could such measures be fair and effective?

Section 5 – This section comprises different set of questions dedicated to each specific group of interviewees

'Now we shall move to questions which are more specific to your position and professional responsibilities. Some questions are connected to previous questions asked, I hope you can further clarify based on your experience. As mentioned before, you are advised not to share any classified information, and will not be asked about any specific active case'

5.1 Judges

5.1.1 Have you found any significant changes pertaining to the roles of court after the abolition of the ISA 1960 in 2012? - If yes, how? If no, why?

5.1.2 How do you assess the capability of the Malaysian judiciary to hear terrorism-related cases at present? – In terms of expertise, facilities and training.

5.1.3 Do you see any substantial differences between presiding over terrorism-related trials and other trials of ordinary crimes? - If yes, what are the differences? If no, why?

5.1.4 Based on your experience, what are the difficulties you face in hearing terrorism-related cases?

5.1.5 What are common types of evidence presented in terrorism-related trials?

5.1.6 Based on your experience, how do you find the quality of the evidence tendered by the prosecution? How far the evidence can be tested in court?

5.1.7 In what way do you think the court can ensure fundamental rights of the accused persons or suspects of terrorism-related offences are preserved?

5.1.8 How do you deal with unrepresented accused persons in terrorism related trials?

5.1.9 All terrorism-related offences are security offences under the SOSMA, so they are not bailable offences. The accused person will be detained until the trial completed. How would you ensure that these would not affect right of accused to fair trial and due process? (e.g.: limiting rights to consult lawyer, to prepare defence, possibility of mental and physical torture, which lead to changing of plea)

5.1.10 The SOSMA also allows the prosecution to apply for the accused person to be detained until all appeals are disposed, even when the trial court has acquitted the accused. What are your paramount considerations of the court in granting the application?

5.1.11 What do you think about the counter-terrorism legislation that disallows judicial review over executive decisions? e.g.: S.19 POTA which reads: 'There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction, in respect, of, any act done or decision made by the Board in the exercise of its discretionary power in accordance with this Act, except in regard to any question on compliance with any procedural requirement in this Act governing such act or decision'.

5.1.12 How can the judge provide safeguards to protect criminal justice system from being viewed as politically influenced?

5.1.13 If you use the following types of evidence, how do you asses their credibility beforehand, and ready to be tested in court?

- Forensic evidence
- Informant evidence
- Police evidence
- Expert evidence
- Confession or arrest statement

5.1.14 With regards to media:

- How to stop authorities commenting about an on-going trial?
- How the courts deal with media effectively, to avoid trial by media?

5.1.15 In terms of sentencing of terrorist, how do you decide on a proportionate and adequate sentence? Are there any guidelines or directives concerning terrorism-related cases?

5.1.16 What is your estimation about the performance of other actors within criminal justice system as regards to terrorism-related cases? (E.g. prosecutors, defence counsel, police)

5.1.17 What is your opinion about arresting an accused person for executive detention after the prosecution has failed to secure conviction?

5.1.18 Do you have any materials, which relevant to my research, such as guidelines, reports, and statistics that you can share with me?

5.1.19 Finally, is there anything you would like to add?

5.2 Prosecutors

'Now, I will ask you questions related directly to your prosecutorial duty. My questions will be divided into three parts based on trial stages, i.e. Pre-Trial, During Trial and Post-Trial'

Pre-Trial

5.2.1 As regards to the terrorism cases, have there been any significant changes to your roles after the introduction of SOSMA 2012? - If yes, what are the changes? If no, why?

5.2.2 What factors do you take into account in giving consent or special investigation to deal with terrorism? e.g.: Consent to intercept communication and application to attach electronic device to suspects.

5.2.3 How does the decision process to charge terrorist suspects take place? Who has the final say in the process?

5.2.4 In making a decision on whether to prosecute or not, do you consider other available legal measures? - If yes, what are the measures? And what factors that you take into account to deploy such measures– If no, why?

5.2.5 If available evidence allows you to charge a suspect with either terrorism offence or ordinary crime, how will you decide? According to which standards?

5.2.6 Based on your general observation, what is your opinion of the quality of evidence gathered by the police during terrorism investigation particularly for the prosecution purposes?

5.2.7 Is your institutional independence in making decision pertaining to terrorism-related cases more at risk than any other cases? If so, in what way?

During Trial

5.2.8 Is there a special group of prosecutors assigned to handle terrorism related cases? If yes, what are the main criteria of choice of the prosecutors?

5.2.10 After an accused has been charged in court, is it a practice to have plea-bargaining process in terrorism-related cases? If yes, how does it take place?

5.2.11 What types and quality of evidence that often involved in terrorism trials?

5.2.12 If you use the following types of evidence, how do you asses their credibility beforehand, and ready to be tested in court?

- Forensic evidence
- Informant evidence
- Police evidence
- Expert evidence
- Confession or arrest statement

5.2.13 How do you deal with 'sensitive information' during trial?

5.2.14 What are the complications in trials which involve protected witnesses and informers? Are they frequent? How are they overcome?

5.2.15 Other than above, what are significant differences in handling terrorism-related trials, as compared to ordinary criminal trials?

5.2.16 Do you think the present laws as regards to terrorism can guarantee the right to fair trial of the accused persons? - If yes, how? If no, why?

Post-Trial

5.2.15 What are factors that you consider in deciding on whether to appeal or not any decisions of terrorism-related cases?

5.2.16 How do you decide on the adequacy of sentence passed against terrorism-related convicts?

5.2.17 What is your opinion about arresting an accused person for executive detention after the court at the end of trial has acquitted him?

5.2.18 Do you have any materials, which relevant to my research, such as guidelines, reports, and statistics that you can share with me?

5.2.29 Finally, is there anything you would like to add?

5.3 Private Practitioners

'*Now I will be asking you question related to your duty and responsibly as a lawyer in terrorism-related cases. My questions will be divided into three parts based on trial stages, i.e. Pre-Trial, During Trial and Post-Trial'*

Pre-Trial

5.3.1 In most cases, who makes the initial contact asking you to represent the suspect? Family or Legal Aid or Police?

5.3.2 Do you get enough access to communicate with your client when he is arrested or detained?

5.3.3 What are common problems that you face during the arrest or remand application process in terrorism-related cases?

5.3.4 What are usual complaints from suspects when they have been arrested?

5.3.5 Do you think the present law and its application is fair to the suspect at this stage? Why yes/no?

During-Trial

5.3.6 What are factors that you consider before agreeing to represent accused persons in terrorism-related trials?

5.3.7 Do you normally obtain sufficient information and materials before the commencement of trial? Is Section 51A strictly observed?

5.3.8 When it comes to plea-bargaining process, are you able to advise your client properly? How and where the consultation normally takes place?

5.3.9 What are factors that you consider in advising your client on whether to accept the plea-bargaining offer or not?

5.3.10 What are common types of evidence used in terrorism-related trials? How do you find the quality of these evidence?

5.3.11 Based on your experience, how far can you test and challenge the evidence tendered in court by the prosecution?

5.3.12 How do you react when the prosecution intends to use ‘sensitive information’ and call ‘protected witnesses’?

5.3.13 What are the usual grounds of objection that you raise to get access to such evidence?

5.3.14 Are you allowed to see you client from time to time during or in between the trial?

5.3.15 Do you face other difficulties that you face in performing your task at this stage?

5.3.16 Based on your experience, what are issues that may prevent the accused person from enjoying his right to a fair trial?

Post-Trial

5.3.15 Do you think the present law provides fair and effective punishment for terrorism cases?

5.3.16 What is your opinion about arresting the accused for executive detention after the court at the end of trial has acquitted him?

5.3.17 Other than you have mentioned earlier, are there any other differences in between dealing with terrorism-related offences and normal criminal offences

5.3.18 Do you have any materials, which relevant to my research, such as guidelines, reports, and statistics that you can share with me?

5.3.19 Finally, is there anything you would like to add?

5.4 Police

'I will now ask you questions related to your duty in dealing with terrorism cases.'

5.4.1 Do you have a specialised team to investigate terrorism-related cases?

5.4.2 What make the members of the group different compared to other crime investigation unit? e.g. Tasking criteria, special training, special expertise.

5.4.3 How do you make sure that all collected evidence can be used (admissible) during trial? How does this differ to the way you handle other crimes?

5.4.4 How often do you see Prosecutors (DPP) during investigation stage for terrorism cases? How this differ to way you deal with normal crimes?

5.4.5 Who will decide on whether a case should be referred to the Prosecutors or be resolved by other action? (e.g.: detention, to release with monitoring device).

5.4.6 In what circumstances will the suspect be detained under special laws? - Is it different from other criminal suspects?

5.4.7 How will the accused person be held after he/she has been charged in court? At this point, are there any special procedures imposed and specific place allocated to terrorist suspects as compared to other normal crimes suspects?

5.4.8 Is it a practice to investigate (to record statement) the accused after he has been charged? If yes, for what purposes?

5.4.9 Who will decide on whether to detain or release after the court at the end of trial has acquitted him?

5.4.10 Are there circumstances in which the police consider re-detaining an accused at the end of trial?

5.4.11 Can you explain about the use of a monitoring device? What are the factors or circumstances that make the police recommend to the Prosecutor for the device to be attached to a suspect?

5.4.12 Do you have any materials, which relevant to my research, such as guidelines, reports, and statistics that you can share with me?

5.4.13 Finally, is there anything you would like to add?

5.5 Home Ministry Officers

'Now I will be asking you about Malaysian government policy in countering terrorism'

5.5.1 What is government's long-term plan in countering terrorism? Is there any strategic plan?

5.5.2 Other than legal measures, what measures are taken by the government to countering terrorism?

5.5.3 What is the government's plan against radicalisation?

5.5.4 After the repeal of the ISA 1960 and other Emergency Ordinance, do you think the government now prefers to prosecute terror suspects in court rather than detain them like before? If yes, what make you say so?

5.5.5 (Question for Member of Legal Advisor of Home Ministry) What factors do you consider in deciding on whether suspect should be detained or not? How about the use of detention power under POTA 2015 and POCA 1959?

5.5.5 (Question for Member of Prevention of Terrorism Board) What are factors that you consider in allowing or extending the detention of terror suspects?

5.5.6 Do you have any materials, which relevant to my research, such as guidelines, reports, and statistics that you can share with me?

5.5.7 Finally, is there anything you would like to add?

5.6 NGO Representatives

'Now I will ask your view about implementation the existing counter-terrorism law and government's responses against terrorism in Malaysia?'

5.6.1 How do you assess the existing counter-terrorism law and government responses against terrorism in Malaysia?

5.6.2 How can the civil society or NGOs in Malaysia can play a role effectively in Malaysia's counter-terrorism strategy? What roles should your organisation and other NGOs play?

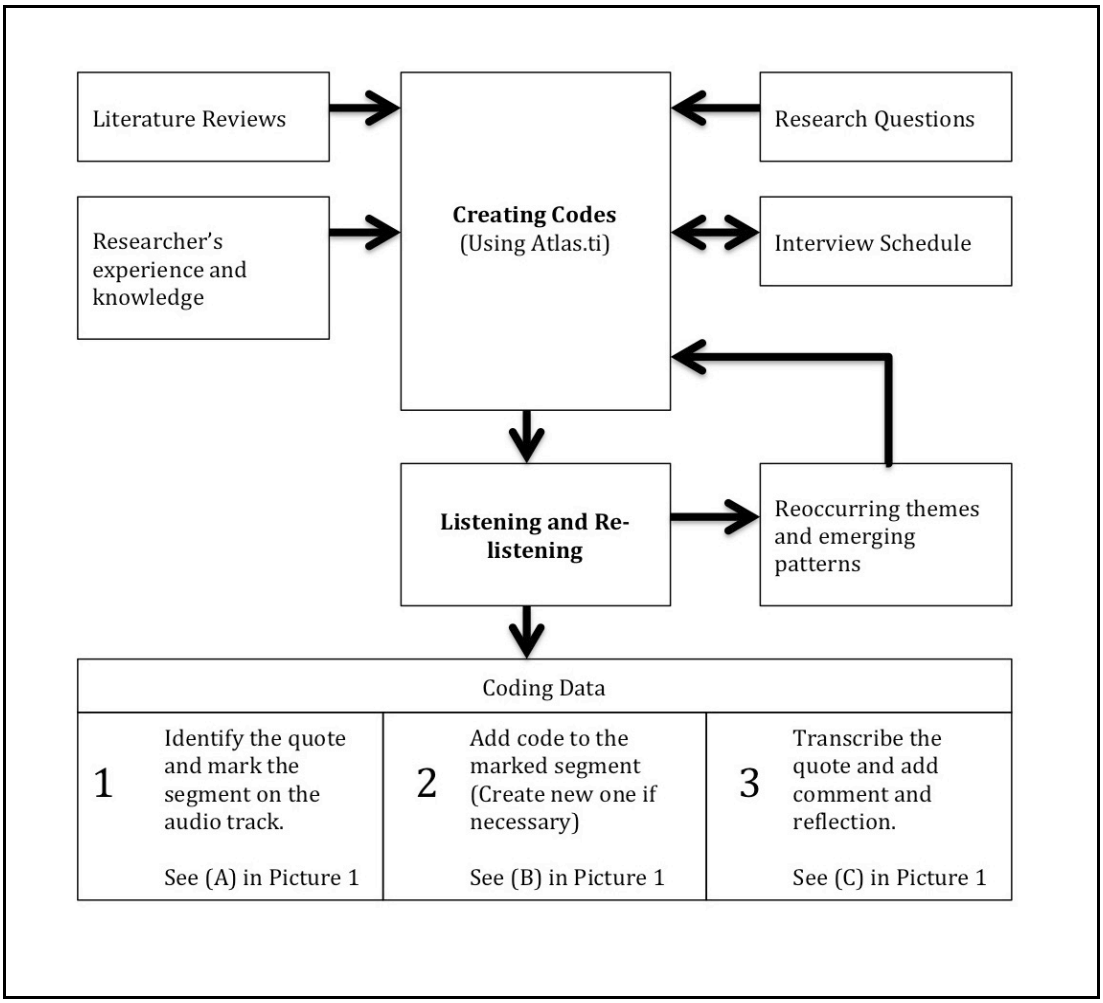
5.6.3 How do you assess the co-operation between the government and civil society in countering terrorism in Malaysia? In what way do you think the civil society can work along with the government?

5.6.4 What is your suggestion to enhance Malaysia's counter-terrorism strategy?

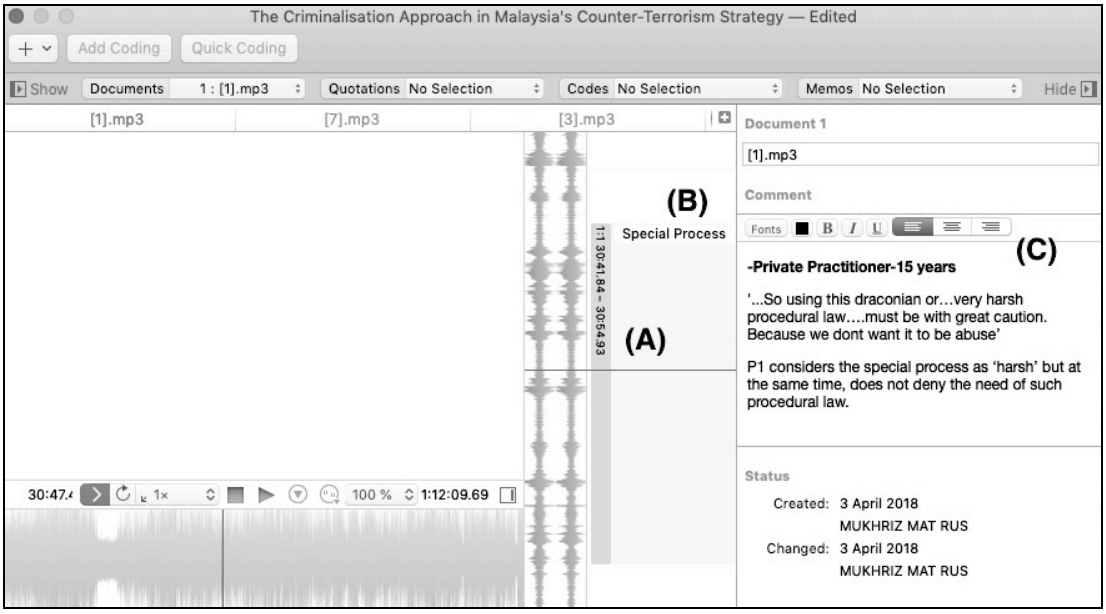
5.6.5 Do you have any materials, which relevant to my research, such as guidelines, reports, and statistics that you can share with me?

5.6.6 Finally, is there anything you would like to add?

Appendix E- The Coding Framework



Picture 1: Sample (Print Screen From Atlas.ti Software)



Legend: (A) Marked segment. (B) Code (i.e: Special Process). (C) Transcribed quote and comments.

Appendix F - Major Differences between Normal and Special Processes in Terrorism-Related Trials.

	ELEMENTS	NORMAL PROCESS	SPECIAL PROCESS
1	Legislation	• Criminal Procedure Code 1935 [Act 593] – CPC 1935 • Evidence Act 1950 [Act 56] – EA 1950	Security Offences (Special Measures) Act 2012 [Act 747] – SOSMA 2012
2	Application	All criminal offences, with an exception to special offences that are subject to special procedures.	All 'security offences', which are Offences under Chapter VI (Offences Against the State), Penal Code 1936 [Act 574] • Offences under Chapter VIA (Offences Relating to Terrorism), Penal Code 1936 • Offences under Chapter VIB (Organized Crime), Penal 1936 • Offences under Part IIIA, Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 [Act 670] • Offences under Special Measures Against Terrorism in Foreign Countries Act 2015 [Act 770] (See First Schedule, SOSMA 2012)
3	Trial Court	Magistrate Court, Session Court and High Court in accordance with their jurisdictions.	High Court (See s.12, SOSMA 2015) All trials will be heard before High Court judges in the Kuala Lumpur, Kota Kinabalu and Kuching . (See Chief Justice Practice Direction 1/2017)

	ELEMENTS	NORMAL PROCESS	SPECIAL PROCESS
		PRE-TRIAL MATTERS	
4	Arrest and detention	Any police officer may arrest without warrant if there is (inter alia): • Reasonable complaint has been made, or • Credible information has been received, or • Reasonable suspicion exist (s.23 CPC 1935) The person must be brought to magistrate within 24 hours of the arrest. (See s.28 CPC 1935, Article 5(4) Federal Constitution 1957). The magistrate may allow extension of the detention up to 14 days depending of the offence which is being investigated. (See s.117 CPC 1935)	A police officer may arrest and detain any person whom he has reason to believe involved n security offences. A police officer of or above rank of Superintendent of Police may extend the detention period up to 28 days.
5	Right to Counsel Upon Arrest	Available under s.28A, CPC 1935 See also Article 5 (3), Federal Constitution 1957.	A police officer not below the rank of Superintendent Police may allow the delay of the consultation with counsel up to 48 hours.
6	Procedures Relating to Sensitive Information.	The prosecution must deliver to the accused all document, including sensitive information, which will be tendered as evidence and a written statement of facts favourable to the defence before the trial begins The fact favourable may not be supplied to the accused if it is contrary to public interest. (See s.51A CPC 1935)	If the prosecution intends to use sensitive in the trial, the prosecutor may apply by way of tan ex parte application to the court to be exempted from the obligations under s.51A CPC 1935. The prosecution then only needs to supply a statement of facts derived from the sensitive information or a summary of the information. If the accused objects the admission of the statement or summary, an in camera hearing will be conducted. (See s.8 SOSMA 2015).

	ELEMENTS	NORMAL PROCESS	SPECIAL PROCESS
			If an accused reasonably expects to disclose sensitive information in his defence, the accused must give two days' notice to the Public Prosecutor and the Court in writing of his intention to do so. (See s.9 SOSMA 2015)
7	Recording Confession and Statements	In general, only the police record confession or statement of a suspect or witness before trial. (See s.112 & 113 CPC 1935)	Any Sessions Court Judge may record any statement or confession made to him at any time before the commencement of the Trial (See s.27 SOSMA 2015)
		TRIAL	
8	Bail pending trial	The bailable and non-bailable offences under the Penal Code 1936 are listed in First Schedule, CPC 1935. An accused person has right to be released on bail pending trial if he or she charged with a bailable offence. For non-bailable offences, the court has discretion to release the accused person on bail.	Bail shall not be granted to a person who has been charged with a security offence, with exception to: (a) a person below the age of eighteen years; (b) a woman; or (c) a sick or an infirm person, and provided that the accused is not charged with an offence under Chapter VIA of the Penal Code and the Special Measures Against Terrorism in Foreign Countries Act 2015.
9	Procedures Relating Protected Witness	The general rule is all evidence must be taken in the presence of the accused (See s.264 CPC 1935). But the CPC 1935 also provides special provisions relating to protected witness.	The provisions relating to protected witness in SOSMA 2015 are similar to the provisions in the CPC 1935 with one exception. Under the SOSMA 2015, the court must notify the prosecution its decision on the status of a witness within 7 days after the inquiry made.

	ELEMENTS	NORMAL PROCESS	SPECIAL PROCESS
		POST-TRIAL	
10	Detention Pending Appeal Process	An accused person must be released if the Court acquits him or her. (See s.182A CPC) Based on the amendment in 2012, the prosecution may apply to the court for the electronic monitoring requirement to be applicable to the person so acquitted until his or her appeal is proceeded with. (See s.445	If the trial court acquits an accused of a security offence, the prosecution may apply orally from the court for the accused to be remanded in prison pending the exhaustion of legal process. (See s.30 SOSMA 2012). The appeal process includes the appeal hearing at the Court of Appeal and Federal Court.
		RULE OF EVIDENCE	
11	Confession and Statement of the Accused	After repeal of s.115 CPC 1935, statement or confession made by the accused person would not be used as evidence against him in court. (See also s.26 EA 1950).	Any statement by an accused whether orally or in writing to any person at any time shall be admissible in evidence. (See s.18A CPC 1935)
12	Illegally Obtained Evidence	Based on decided cases, illegally obtained evidence is admissible if it is fulfilled the requirements under the EA 1950.	All documents or things seized or howsoever obtained whether before or after a person has been charged for a security offence and the contents of the documents or things shall be admissible as evidence. (See s.20 SOSMA 2015)
13	Statement contained in documents produced by computer	A document produced by a computer or a statement contained therein is admissible as evidence if it was produced by the computer in the course of its ordinary use. It may be proved by tendering to the court a certificate signed by a person who either before or after the production of the document by the computer is responsible for the management of the operation of that computer, or for the conduct of the activities for which that computer was used. (See s.90A EA 1950)	Any documents produced by computers and statements contained therein shall be admissible as evidence (See s.25 SOSMA 2012)