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Balancing security and human rights

The end of the Internal Security Act shifts the focus on striking a balance between tackling terrorism, preserving public safety and upholding human rights, writes **SANTHA OORJITHAM**

REPEALING the internal Security Act (ISA) and annulling the proclamations of emergency will shift powers back to the courts, restore fundamental rights to the people – and could create more work for the police.

Part of the "political transformation" announced by Datuk Seri Najib Razak on the eve of Malaysia Day this year, these changes were the historic conclusion of his promise to comprehensively review the ISA when he became prime minister in April 2009.

Since 1964, Malaysia has been under a state of emergency – with proclamations made during the confrontation with Indonesia that year, a political crisis in Sarawak in 1966, the May 13 riots in 1969 and another political crisis in Kelantan in 1977.

"During the emergencies, the government enacted laws and their subsidiary legislations to manage the situation," explains Datuk Othman Talib, former director of internal security and public order with the police. Once the emergency proclamations are annulled, all these subsidiary laws will be null and void, after a six-month grace period.

All the overlapping states of emergency will come to an end as will Parliament's power to pass laws inconsistent" with constitutional provisions "required by reason of the emergency", such as the guarantees of liberty, freedom of movement, speech, assembly and association.

"The long-term impact is that the civil liberties enshrined in the Federal Constitution shall be respected and enjoyed by all," sums up former Bar Council chairman Datuk Kuthubul Zaman Bukhari.

For example, Dr Andrew Harding, professor of Asia-Pacific law at Canada's University of Victoria notes, under the new laws "it will not be possible to detain people for making speeches or expressing particular views".

But what would happen in a situation like the one before Operation Lalang in 1987, "when speeches were made that could well have led to inter-communal strife?" he asks.



Prime Minister Datuk Seri Najib Razak announced sweeping legal reforms on Sept 15.

They could be charged under the Sedition Act "which still prohibits questioning of policy relating to what we know as the 'sensitive issues', or the Penal Code. Beyond that, the government would only have the option of declaring a new emergency."

The Yang di-Pertuan Agong's emergency powers under Article 150(2B) to promulgate "such ordinances as circumstances appear to him to require" (except when both Houses of Parliament are sitting concurrently) will also end.

Over 90 such ordinances promulgated by the Agong since 1964 will also lapse, including EPOPCO.

For the courts, there will now be more powers to review cases. Article 150(6) had prevented judicial review of all the emergency laws and ordinances on constitutional grounds.

However, as Othman notes, there was still judicial review for detainees under such legislation "by filing for habeas corpus".

Najib said there would be two new laws to prevent subversion, violence and terrorism and they would ensure basic

rights and freedoms were preserved. Detention by the police would be shorter and could be extended only by a court order – although terrorism cases would still come under the home minister. And, he promised, "No individuals will be detained solely for their political ideologies."

"If the emergency laws are repealed, the police will have a tougher time proving guilt in court as compared to security cases where the standard of proof is lower," admits Othman.

In cases under emergency law, he points out, "The onus is on the accused to prove innocence."

According to Minister in the Prime Minister's Department Datuk Seri Mohamed Nazri Abdul Aziz, one of the two new laws would deal with countering terrorism while the other would be to maintain public order.

Amendments to the Penal Code in 2006 defined terrorism and allowed detention for up to 14 days, notes Othman.

"We must have a parent act on terrorism even though there are provisions under the Penal Code," says former home minister Datuk Seri Mohd Radzi

Sheikh Ahmad.

"But it must not be like the ISA and the safeguards must be there."

Both acts should have a "saving clause" similar to what the select committee on the Dangerous Drugs (Special Preventive Measures) act, which he chaired, proposed: every five years the act should be renewed by Parliament, giving MPs the opportunity for debate.

The select committee on the Criminal Procedure Code and Penal Code, which he also chaired, recommended that all detainees must be informed of their rights to engage a lawyer, their family has to be informed within 24 hours and "within a reasonable time" the detainee's location should be disclosed and both family and lawyers should have access. These proposals were adopted and "should be in the two new acts as well," he says.

Back in 2003, the Human Rights Commission of Malaysia had recommended replacing the ISA with new legislation that would provide for detention for investigation of special offences relating to national security, public order, subversion and terrorism.

Police could detain a person for such offences for up to 24 hours, after which he would have to be produced before a High Court judge. The judge could order him to be detained further for up to seven days each time, for a maximum of 29 days.

After that, he would have to be either freed or charged in court.

"There may be circumstances which may require extraordinary measures, such as where there is a threat to national security," explains commissioner Datuk Dr Khaw Lake Tee. But any detainee also has the right "to be brought before the court, to be informed of the charges levied against him, the right to legal representation and the right to be released if there are no reasonable grounds for his detention".

Or, as Radzi puts it, "Everything must be brought to court and all must be decided by the courts."