



How to cite this article:

Ahmad, A. R., & Dhillon, S. K. (2022). Must the prevention of terrorism entail the violation of human rights? The case of Malaysia's prevention of terrorism act. *UUM Journal of Legal Studies*, 13(2), 243-266. <https://doi.org/10.32890/uumjls2022.13.2.10>

MUST THE PREVENTION OF TERRORISM ENTAIL THE VIOLATION OF HUMAN RIGHTS? THE CASE OF MALAYSIA'S PREVENTION OF TERRORISM ACT

¹Abdul Razak Ahmad & ²Simraatraj Kaur Dhillon

Bait al-Amanah, Kuala Lumpur, Malaysia

¹Corresponding author: delpiso2000@gmail.com

Received: 11/2/2021 Revised: 29/11/2021 Accepted: 20/12/2021 Published: 21/7/2022

ABSTRACT

The enactment of the Prevention of Terrorism Act 2015 (POTA) in Malaysia has led to numerous detentions and rulings that are arguably violations of human rights. Through an analysis of primary and secondary materials, viz., the Federal Constitution of Malaysia, court decisions and relevant statutes, this paper questions the necessity of such draconian preventive detention legislation as POTA and concludes that a valid concern for national security has infringed the rights of Malaysian citizens. Thus, POTA must be re-evaluated and re-examined to ensure that the Malaysian government defends the traits that differentiate them from the terrorists they are combating.

Keywords: Prevention of terrorism, human rights, national security, counterterrorism, natural justice.

INTRODUCTION

In 2015, the Parliament of Malaysia passed the Prevention of Terrorism Act (hereinafter referred to as POTA), one of the few pieces of legislation in Malaysia that legalizes preventive detention and restricts certain fundamental liberties that are enshrined in Malaysia's Constitution. Since POTA's inception, much has been said and written about the legislation and its effects. A thorough evaluation, however, is acutely required to understand POTA's position in the battle against terrorism, as well as the nexus between national security and fundamental human rights in Malaysia. This review argues for striking an equilibrium between ensuring national security and safeguarding the rights of the citizenry of all political beliefs and positions.

Article 149 of the Federal Constitution enables the use of preventive detention during peacetime to maintain public order. Following Article 149, Malaysia has adopted preventive detention legislation to deal with situations that purportedly could not be dealt with by the criminal justice system (Naz & Bari, 2015). The Internal Security Act (ISA) 1960 was the first of such legislation which allowed the government to hold people in preventive detention for up to 60 days without trial, followed by (renewable) detention of up to two years on the approval of the Home Affairs Minister. After nearly 52 years, the ISA was finally abolished in 2012, following a year-long domestic and international campaign. Despite the repeal of the ISA, the executive branch of the government reinstated some of its provisions, most notably through passing a new statute, the Prevention of Terrorism Act, in 2015.

METHODOLOGY

This is a qualitative study that analysed and interpreted such secondary data as case law, statutes and journal articles on counterterrorism legislation. By analysing and interpreting the pertinent laws and regulations, this study sought to understand the intent of the lawmakers, and scrutinised how laws are being enforced and how they are being challenged.

In-depth interviews with four security officials were conducted as part of this research. Each interview lasted 30 minutes. A semi-structured

questionnaire, with some prepared questions, were used to conduct the in-depth but unstructured interview with security officials. Understandably, the security officials did not want to be quoted or named out of concern that their typically confidential operational and enforcement activities could come under public scrutiny. Overall, the qualitative approach provided a sufficiently nuanced understanding of the issues concerning preventive detention laws.

LITERATURE REVIEW

Many countries, including Malaysia, have enacted or amended legislation on the investigation and prosecution of suspected terrorists (Dhanapal & Sabaruddin, 2017). As one of such anti-terrorist legislation, POTA has aroused controversy as detained suspects without the right to trial are deprived of the constitutional safeguards accorded to offenders. This literature review examines the infringement of an individual's fundamental liberties for the sake of national security. By assessing POTA's strengths and weaknesses, this review provides an additional perspective to the prejudices experienced by suspected terrorists detained under the Act.

On 30 March 2015, the Malaysian government put forward seven bills at the Dewan Rakyat (House of Representatives, the lower house of Parliament) associated with anti-terrorism. These bills included the Prevention of Terrorism Act (POTA) 2015 (Malaysia: New Anti-Terrorism Measures Tabled in Parliamen, 2015; (last visited Sept. 13, 2021). According to its introduction, the objective of POTA is to prevent terrorist activities from being committed or to provide support for terrorist acts by terrorist groups in a foreign nation or a component of a foreign country that have been listed, as well as to supervise individuals involved in such offence. One justification for the enactment of POTA was that acts of terrorism had already happened including additional action to terrorise by a "substantial body of persons both inside and outside Malaysia". As these acts were prejudicial to national security, Parliament was led to believe that it was necessary to adopt POTA to avert such acts.

POTA 2015 was specifically promulgated to combat threats by the Islamic State (IS). More than a hundred Malaysian jihadists

had taken part in the so-called “holy war” during the zenith of the Islamic State of Iraq and Syria (ISIS) led by governments in Syria and Iraq. According to the Royal Malaysia Police (PDRM) at least 90 Malaysian jihadists were active in ISIS between 2013 and 2019 (Aslam, 2021). While legislation in particular, POTA and the Security Offences (Special Measures) Act 2012 (SOSMA) were necessary to cope with the increasing threat of terrorism and to protect Malaysia’s security interests (Santhana Dass, 2021), critics were concerned that provisions of these laws such as indefinite detention without charge, unsafe and unfair control orders, and refusal of the right to legal counsel infringed the fundamental human rights of Malaysians (Dhanapal & Sabaruddin, 2017). It is undeniable that recent counterterrorism legislation, including POTA, are dangerously overboard and have impacted many Malaysians, particularly peaceful protestors and ethnic minority groups.

Subsequently, calls to abolish draconian laws in Malaysia have resurfaced, with the common theme that terrorism laws are unjust and repressive (Santhana Dass, 2021). Kwang (2018) argued that POTA is the reincarnation of the Internal Securities Act (ISA) 1960 that was abolished in 2012. While there are features in POTA that are helpful in counterterrorism, its provisions continue to violate basic human rights (Kwang, 2018). Overall, studies suggest that using the law as an instrument to combat terrorism is a *maladroit* custom in a democracy as it leads to conflict between national security and civil liberties.

There has been increased focus on such terms as *support*, *engaged*, *commission* and *involving* in Section 2(1)¹ of POTA. These terms have neither been clearly defined nor explained, leaving too much room for interpretation (Kwang, 2018). The literature suggests that this situation would lead to potential abuse, as almost anyone can be charged under POTA. Without clear definitions of the stated terms, scholars opine that the inevitable outcome would be the police being granted wide discretionary powers, who can then arrest individuals merely on the “reasonable belief” that these individuals have supported, engaged, committed or even been involved in terrorist activities (Dhanapal & Sabaruddin, 2017).

Most literature on POTA highlight the clear violation of fundamental liberties enshrined in the Federal Constitution. POTA and SOSMA

¹ Prevention of Terrorism Act (POTA) 2015 Section 2(1).

are referred to as “detention without trial” legislation. Article 5 of the Federal Constitution² provides constitutional safeguards for an individual that is being tried under the law and numerous researchers agree that these safeguards, such as the right against arbitrary arrest and the right to legal counsel, must be upheld (Dhanapal & Sabaruddin, 2017). Regardless of the negative impact of the use of preventive detention on an individual’s fundamental rights, international human rights law, however, does not require the use of preventive detention to be limited to real crises. Rather, international human rights legislation simply emphasises that preventive detention should not be employed arbitrarily (Naz & Bari, 2015). While international human rights law is ineffective against preventive detention, modern constitutional democracies have been unable to limit the use of preventive detention power to emergencies (Naz & Bari, 2015).

Researchers have also analysed the effectiveness of POTA 2015 as a mechanism to combat terrorism activities. The specific power to order detention lies with an independent body, namely the Prevention of Terrorism Board (POTB), meaning that the government itself is powerless whether or not to detain a suspect (Kwang, 2018) The Yang di-Pertuan Agong appoints members of the POTB on the suggestion of the Home Affairs Minister. Thus, a legitimate question is raised as to whether a committee ultimately nominated by the government (on the recommendation of the Home Affairs Minister) is independent of the government. The literature fails to address this issue. Yet, most commentators agree that detention without charge and trial is an effective mechanism to prevent terrorism, as the harm caused by a successful terrorist attack is irreparable (Dhanapal & Sabaruddin, 2017).

Some researchers have elucidated the possible ways for an individual to defend themselves under POTA (Santhana Dass, 2021). For instance, Section 13(10)³ states that all rulings under POTA are subject to judicial review by the High Court. Although an individual cannot be represented by counsel in a POTA proceeding, they can make an application for *habeas corpus* (challenging their unlawful detention) at the time of arrest. Moreover, a legal representative may submit a formal letter to the POTB challenging the arrest of the individual, which the POTB would have to investigate and evaluate.

² Federal Constitution of Malaysia Article 5.

³ Prevention of Terrorism Act (POTA) 2015 Section 13(10).

Having reviewed a range of literature on counterterrorism legislation and its effects on fundamental human rights, it is clear that a major limitation is the lack of quantitative data on the issue of terrorism. Numerous studies use qualitative analysis to question the necessity of such a draconian law but the lack of statistics impair the justification of such repressive legislation that violates fundamental human rights. While the literature agrees that such legislation infringes civil liberties, further research must be conducted as to the remedies available for individuals charged under POTA.

POTA AND ITS RAISON D'ÊTRE

In November 2014, the then Prime Minister of Malaysia Dato' Sri Najib Tun Razak presented a White Paper, "Towards Combating the Threat of The Islamic State" in Parliament, recognizing the continuing risk of violence from ISIS within and beyond Malaysia. According to the Royal Malaysia Police, by the end of 2019, 102 Malaysians had left the country to join Islamist militant groups. Of these, 40 were killed battling in Iraq and Syria, including nine who ended their lives as suicide bombers (New Straits Times, 2019). In addition, 40 individuals, including returnees from Syria, were arrested for being influenced by militant ideologies (White Paper: Addressing the Threat of the Islamic State Group, 2014). To contain the situation and prevent future threats from these militant groups, a departure from the normal criminal justice process was necessary, at the expense of the personal liberties of Malaysian citizens. The context for the requested departure from the normal criminal justice process was the specific situation of the ISIS threat.

New legislation was suggested based on the proposals in paragraph 59 of the White Paper to deal specifically with Malaysians connected with terrorist organizations and engaged in militant operations.⁴ The White Paper emphasised the government's commitment to combating the international community's risks posed by the Islamic State Group ("IS"). POTA, Malaysia's new preventative detention law, is primarily meant to tackle terrorist activities and deter Malaysians from engaging in any militant operations in the country. Therefore, this hinders both the commission and backing of violent attacks involving

⁴ Speech on Presentation of White Paper to address the threat of the Islamic State (November 26, 2014), Prime Minister's Office (website).

terrorist organisations of a foreign country. Likewise, POTA also controls persons affected by terrorist acts and states that there will be no legislative compromise with individuals engaged in terrorism (White Paper: Addressing the Threat of the Islamic State Group, 2014). Furthermore, since POTA is intended to combat terrorism by deradicalizing suspects, it is used together with other existing acts such as the Penal Code [Act 574], Prevention of Crime Act (POCA) 1959 [Act 297], and the Security Offences (Special Measures) Act 2012 [Act 747], or better known as SOSMA, yet another controversial draconian Act.

But concerns have been raised as to whether POTA will end up being used by the government to silence political dissidents, rivals, or even ethnic minority groups, thus abusing the law's *raison d'être*. Such terms as “support”, “commission”, “engaged” and “involve” which are used to identify whether an act of terrorism has been or is in the process of being committed are not defined and are nowhere to be found in Section 2(1) of POTA which defines terms used in the act. As explained earlier, scholars believe this omission will lead to the police being granted wide discretionary powers which they will use to justify arrests based on “reasonable belief” (Danapal & Sabaruddin, 2017).

There are several precedents for the concerns that POTA's *raison d'être* will be abused. POTA's predecessor, the infamous Internal Security Act (“ISA”) 1960, was initially enacted as a temporary measure to fight a communist rebellion but ended up being used against political dissidents and activists on the grounds of preserving national peace and stability. In 1987, the ISA was used in Operation Lalang, also known as *Ops Lalang*, the worst assault on civil society in Malaysia. A total of 106 activists, academics, students, and dissidents were detained under the ISA (Operation Lalang Revisited, 1987). The ISA was also used during Gerakan Reformasi, a political campaign to reform the ruling government. Numerous individuals associated with the then Prime Minister's political opponent, Dato' Seri Anwar Ibrahim, were arrested and detained under the ISA. The authorities used the ISA to detain advocates opposing Anwar's unlawful arrest, Anwar's supporters and even translators (A chilling statutory declaration, 2008).

Purportedly, to prevent repetitions of such abuse under POTA, POTB now holds the power that was previously vested in the executive to order the detention of a suspect(s). The government is supposedly

prevented from abusing POTA but the independence of the POTB is questionable as appointments to the POTB are made via the Home Affairs Minister's recommendation to the Yang di-Pertuan Agong (Dhanapal & Sabaruddin, 2017). (POTA).⁵

In addition to addressing the threat of terrorism, according to the White Paper introduced by the then Prime Minister, POTA was also deemed necessary to counter and halt the dissemination of racially divisive comments and elements in Malaysia. Therefore, to fully appreciate the importance of this view, the scope of POTA's applicability must be thoroughly explored.

POTA'S ANATOMY

POTA can be divided into five sections, namely, the Preliminary section, Powers of Arrest and Remand, Inquiries, Detention and Restriction Orders and the General Provision.

Part I: Preliminary Section

POTA uses the legal definition of terrorism, as provided in the Penal Code. According to Section 2(1) of POTA, a terrorist act "has the same meaning granted to it by the Penal Code [Act 574]." Section 130B (2) of the Penal Code specifies 11 acts or threats of actions that are deemed 'terrorist act[s]'⁶, that is, acts, that either, "(a) involve serious bodily injury to a person, (b) endanger a person's life, (c) cause death, (d) create a serious risk to the health or the safety of the public, (e) involve serious property damage, (f) involve the use of lethal devices, (g) involve releasing or exposing to the public dangerous or toxic chemicals, (h) is designed or intended to disrupt or seriously interfere with any computer systems, (i) designed or intended to disrupt or seriously interfere with essential emergency services such as the police, (j) involve prejudice to national security, or (k) any act or omission constituting an offence under the Aviation Offence Act 1984 [Act 307]."

POTA defines a terrorist act broadly, which has its positive and negative aspects. A comprehensive definition of terrorism is necessary to deal

⁵ Prevention of Terrorism Act (POTA) 2015 Section 8(1).

⁶ Penal Code [Act 574] Section 130B(3).

readily with the wide range of acts that form the threat or outcome of a terrorist attack. With a flexible definition, the law is equipped to deal with terrorism over time and changes in the subject matter. On the flip-side, the problem with broad definitions is that they facilitate abusive interpretations which can be used to justify abuse of power.

Section 130B subsection (3)(j) defines a terrorist act as one that “involves prejudice to national security or public safety” but fails to address what amounts to “prejudice to national security”. This is the same broad interpretation that has been used by the executive and bureaucracy and as such should be challenged (Kwang, 2018).

In contrast, parallel legislation in the United Kingdom (UK), Section 1 of the Terrorism Act 2000, stipulates only five types of acts or threats of actions that must be coupled with an intention to influence the government or an international government entity or intimidate the people or a group of citizens. In addition, the action must be carried out to further a political, religious, racial or ideological cause.

Under subsection 2, Section 1 of the Terrorism Act, these acts involve “(i) serious violence against a person, (ii) serious damage to property, (iii) endangers a person’s life other than that of the person committing the action, (iv) creates a serious risk to the health or safety of the public or a section of the public, or (v) is designed seriously to interfere with or seriously disrupt an electronic system.” Furthermore, subsection 3 states that any act that comes under subsection 2 and entails the use of guns or explosives constitutes an act of terrorism.

The aforementioned comparison indicates a glaring difference between the definitions of a terrorist act under POTA and the UK Terrorism Act. POTA has a broader definition of terrorism, while the latter has a more precise definition, with much less room for abusive interpretations. While a broad definition provides some help in dealing with the multidimensional and complex nature of terrorism, the lack of precision in the definition can undermine the fight against terrorism. The Malaysian approach, for example, will hinder an effective international strategy to combat terrorism because nobody can agree as to what is terrorism. The Malaysian approach will also hinder effective international enforcement and wider international mobilization of resources against terrorism. A more precise definition makes it harder for a terrorist organisation to gain public legitimacy,

sympathy or support. Thus, it is of utmost importance to eliminate ambiguity in the definition of terrorism and terrorist acts to avoid a vague interpretation that can potentially be used to infringe fundamental human liberties.

Part II: Powers of Arrest and Remand

The power to arrest lies in the hands of the police officer, as under Section 3(1) of POTA, the police officer can, without a warrant, arrest any person if they have “reason to believe” that grounds exist. The law then provides that “the case shall be referred by the police officer to the Public Prosecutor for instructions within seven days from the arrest” [Section 3(2)].

In this context, “reason to believe” has not been properly defined and is too vague to know what constitutes preparatory action taken by suspected terrorists. Justice necessitates that the grounds for arrest must be clear and can be established. The subjectivity of the phrase, “reason to believe,” as well as its interpretation, varies depending on the arresting officer. As a result, the imprecise definition readily leads to arbitrary arrest in the name of national security or classified intelligence.

Section 26 of the Malaysian Penal Code defines “reason to believe” as having sufficient cause to believe and the legal standard is the reasonable person test.⁷ Therefore, mere suspicion without solid evidence is inadequate to justify the arrest. However, the application of Section 26 “reason to believe” varies, depending on the nature of the case. With security offence cases, the court hesitates to treat the arrest the same way as it would ordinary offences. In the case of *Borhan Hj. Daud and Ors v Abdul Malek Husin*,⁸ the Court of Appeal ruled that the detention was lawful, although there were insufficient grounds for the arrest. In its ruling, the Court stated that the arrest was not an ordinary one. The respondent was arrested under the Special Measures Act of the ISA, Section 73(1), which falls under Article 149 of the Constitution. Referring to its decision on the case of *Kam Teck Soon v Deputy Home Affairs Minister*, the Court of Appeal allowed such an arrest because it is permitted under Article 149, provided

⁷ *Ahmad bin Ishak v Public Prosecutor* [1974] 2 MLJ 21.

⁸ *Borhan Hj. Daud and Ors v Abdul Malek Husin* [2010] 8 CLJ 656 CA.

that the ISA is valid, notwithstanding that such an arrest contravenes Articles 5, 9, 10 and 13 of the Constitution.⁹ Based on these cases, although there is guidance as to what constitutes “reasons to believe” under the Penal Code, arrests made according to POTA would not be treated as arrests made under ordinary criminal law offences. Thus, under POTA, the likelihood of arbitrary arrest is extremely high.

When it comes to security offences, the arresting officer need not “prove beyond [a] reasonable doubt” their reason to believe. Considering the broad definitions, police officers are not required to prove the culpability of suspects (Kwang, 2018).

Another significant issue is the shift in the burden of proof. The presumption of innocence until proven guilty does not apply to offences charged under POTA. Therefore, a suspect can be arrested even before the act is committed since they have to prove their innocence instead of being provided with evidence of guilt by the prosecution. POTA and other preventive detention measures justify detention for inchoate offences on the grounds that doing so prevents potential crimes (Horder, 2016). However, the shift in the burden of proof legitimizes detention without clear criminal intent.

The “presumption of innocence” is a fundamental principle of human rights as provided in Article 14(2) of the International Covenant on Civil and Political Rights 1966.¹⁰ Nevertheless, in the past two decades, numerous preventive detention legislation has been introduced as part of the global counterterrorism strategy. The burden of proof is weakened and shifted to the accused, especially when terrorism prevention operations rely significantly on secret intelligence, which complicates criminal prosecution. This approach under POTA should not be the norm. The principle of presumption of innocence, therefore, must mirror the requirements under criminal law to protect innocent individuals from being implicated as threats to national security.

Section 4(3) POTA 2015 further states that “No person shall be arrested and detained under this section solely for his political belief or political activity”. This crucial provision, which was absent in the ISA, is said

⁹ Ibid.

¹⁰ Article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) 1996 mentions the right of a criminal offender to be presumed innocent until proven otherwise.

to be the reason why the abuse happened in the ISA era. Supposedly, strict observance of Section 4(3) should limit the government from using POTA against political dissidents. However, terrorism acts are usually the products of political belief and ideology. There are already many instances of suspected terrorists being convicted under other Malaysian counterterrorism laws. These convictions were based solely on the belief that the suspects were supportive of the IS ideology by having in their possession an Islamic State flag or disseminating Islamic State propaganda videos. If ideology is not political, how then do we explain terrorism and political violence? As a result, the efficacy of Section 4(3) in protecting Malaysians from arrest or detention purely because of their political beliefs or political activities must be questioned.

Furthermore, the contradiction between Section 130B of the Penal Code and Section 4(3) of POTA leaves a grey area that may provide the government with opportunities to abuse the statute. Section 130B(2) (b) states that a terrorist act must be carried out with “the intention of advancing a political, religious or ideological cause”. However, Section 4(3) of the POTA states that no one shall be arrested or imprisoned merely for their political beliefs or political participation. Does this lapse leave unanswered such questions as to which political beliefs are included in Section 130B but are excluded from Section 4(3)? Who determines these political beliefs?

Part III: Inquiries

Unlike the ISA, the POTA’s authority is now retained by the POTB rather than the Home Affairs Minister, which consists of a Chairman, a solicitor with at least 15 years of legal experience, a Deputy Chairman and three to six members, appointed by the Yang di-Pertuan Agong [Section 8(1)]. This Act, however, makes no mention of any criteria for the appointment of the Deputy Chairman and members of the POTB. Under Section 9, the Home Affairs Minister is tasked to appoint an inquiry officer. (A police officer is ineligible to be an inquiry officer.) The establishing of the POTB is important for two reasons: first, it significantly limits the powers of the Home Affairs Minister and second, it promotes a collective approach for deciding preventive detention cases.

Under POTA¹¹, after an arrest, the suspect is remanded and appears before an inquiry officer in a practicable amount of time, unless he or she is released. The interpretation of the term ‘as soon as possible’ was discussed in *Mohd Naazri bin Ishak v Timbalan Dalam Negeri Malaysia* (2018). The applicant had filed for *habeas corpus* because the Inquiry Officer, who took 15 days after the day of remand to see the applicant, had not complied with procedures. The court determined that, under Section 10, the Inquiry Officer had 38 days to carry out his duties. Thus, in the context of Section 10 of POTA, ‘as soon as possible’ means within 38 days and not immediately.

Appointed by the Home Affairs Minister, the Inquiry Officer, under Section 10, is generally responsible for examining the charges against the accused and submitting the findings before the Board. The rules of evidence do not apply during the investigation, since the Officer has extensive discretionary powers in determining the admissibility of evidence [Section 10(3)(a)]. The Inquiry Officer examines and advises the POTB whether there are legitimate grounds to believe that an individual is involved in the execution or facilitation of acts of terrorism. As there is little information as to the qualifications required for the appointment of the Inquiry Officer, this is yet another situation that is prone to abuse.

Not using established rules of evidence in POTA proceedings has serious constitutional implications. Notably, the emergence of preventive detention laws has begun remaking established criminal law and the penal code. Constitutional challenges are necessary because detention should be based on credible evidence and cannot be continuously based on the notion of “danger” or “threat to national security”. While constitutional law cannot effectively limit the state’s powers to incapacitate dangerous terrorist suspects, a constitutional challenge provides the necessary check on the required procedural protection when such incapacitation is necessary (Sampsell-Jones, 2010).

Under POTA, the detainee must be brought before a magistrate before detention. But procedural safeguards, such as the right to legal counsel, is not provided during the inquiry, even though this right is fundamental to human rights and due process of law. Section 10(6) of POTA specifically denies suspects the right to counsel.

¹¹ *Prevention of Terrorism Act 2015* Section 5.

Although Section 19 of POTA provides that a suspect may challenge procedural non-compliance by the police, this provision does not amount to much because it is settled law that executive decisions can be challenged before a court of law. Adequate reforms of detention procedures and pretrial investigations are required to ensure that they meet international standards. Fundamental liberties such as the right to legal representation and due process of an individual should not be compromised, according to international human rights law.

The denial of the right to representation, which is guaranteed under Article 5(3) of the Constitution, means that the accused will never have legal representation in a POTA proceeding, although legal representation does not constrain an effective investigation or render the investigation futile. Permitting the accused with access to counsel is not only constitutional but may also encourage them to cooperate, as they know they have the necessary support to undergo the highly demanding investigation interrogation. The fundamental liberties enshrined in Article 5 of the Federal Constitution must be upheld.

Part IV: Detention and Restriction Orders

POTA allows for a suspect to be detained for 59 days before being presented before the POTB¹². Detention without trial under POTA works as follows. The police have the authority to detain suspected terrorists for the first 21 days with the approval of a magistrate. If the public prosecutor can produce evidence to warrant the extension, this duration can be further prolonged to 38 days.¹³ After reviewing the Inquiry Officer's complete report, "if [the POTB] is satisfied that it is expedient in the interest of the country's security, [it can] issue a detention order for the suspect not exceeding a two-year period in a place of detention as [it] may order" [Section 13(1)]. Detention for 59 days is deemed excessive in comparison to other jurisdictions.

In contrast, UK legislation under the Terrorism Act 2000 limits the pre-charge detention period for terrorism-related crimes to a maximum of 14 days,¹⁴ with such stringent conditions as a warrant of further detention, complete information regarding the date and time

¹² *Prevention of Terrorism Act 2015* Section 4(1)(a) and 4(2)(a).

¹³ *Prevention of Terrorism Act 2015* Section 4(2)(a).

¹⁴ *Protection of Freedoms Act 2012* Section 57.

of the warrant, and the grounds of arrest to ensure the legality of the detention (Terrorism Act 2000).¹⁵

The lengthy pretrial detention of 59 days is excessive. First, most suspects have already been under extensive security surveillance before their arrests. Decisions for their detention are usually based on credible intelligence, either obtained directly or through intelligence-sharing arrangements. This surveillance should have provided the police with copious amounts of intelligence and data to support their case against the suspects. Second, police investigations have benefited tremendously from technological innovation and communications technology advancements which should propel fast, precise, and robust investigation processes. Third, a reasonable time frame should be strictly observed because deprivation of personal liberty is a serious human rights matter. A reasonable time frame will help in striking a balance between acquiring crucial evidence to enhance national security and respecting personal liberty.

The Malaysian Bar Council has taken a strong position against the said provisions. Steven Thiru, former President of the Malaysian Bar Council, made the following statement concerning the provisions allowing for detention and restrictive monitoring of suspects:

“Under POTA, a person can initially be remanded for investigative detention for a maximum of 60 days. A Magistrate has no discretion to refuse a request by the police for remand and is reduced to a rubber stamp. Further, there is no provision for the person remanded to be informed of the grounds of arrest, nor is there any guarantee that legal representation will be permitted. This is because the police are prone to applying the exclusion under section 28A(8) of the Criminal Procedure Code to deny access to legal representation. Moreover, it is to be noted that POTA allows for a Sessions Court Judge to order that an accused person be attached with an electronic monitoring device upon the application of the Public Prosecutor. However, the Sessions Court Judge has no discretion at all in the matter. Thus, like the Magistrates’ Court in respect of investigative detention,

¹⁵ Terrorism Act 2000 Schedule 8, Section 36(3)(b)(ii)

the Sessions Court has also been made a mere rubber stamp” (Press Release | Prevention of Terrorism Bill 2015 Violates Malaysia’s Domestic and International Commitments, is an Affront to the Rule of Law and is Abhorrent to Natural Justice, 2015).

Thiru’s sharp criticism addresses the glaring problems of the absence of legal access, as well as the lack of opportunity for a suspect to challenge the detention. Thus, POTA is an oppressive legislative act that is utterly abhorrent towards the principles of justice and dangerously similar to the repealed Internal Security Act. Thus, a robust oversight mechanism must be implemented to avoid abuses of power by the authorities during the investigation process.

A NEGOTIATION OF RIGHTS: BALANCING HUMAN RIGHTS WITH SECURITY

Defeating terrorism cannot be done at the expense of human rights. Thus, we must value the sanctity of civil rights and basic liberties granted to each individual. To provide context for these ideals, it is imperative to review the law in Malaysia when it comes to rights against unlawful detention, with emphasis on Art. 5(1) of the Federal Constitution. In *Government of Malaysia v Loh Wai Kong*,¹⁶ Suffian LP explained Art. 5 narrowly when he stated:

“Article 5(1) speaks of personal liberty, not of liberty simpliciter... It is well settled that the meaning of words used in any portion of a statute – and the same principle applies to a constitution – depends on the context in which they are placed, that words used in an Act take their colour from the context in which they appear and that they may be given a wider or more restricted meaning than they ordinarily bear if the context requires it. In the light of this principle, in construing “personal liberty” in Art 5(1) one must look at the other clauses of the Article, and doing so we are convinced that the article only guarantees a person, citizen or otherwise, except an enemy alien, freedom from being “unlawfully detained”; the right, if he is arrested, to be informed as

¹⁶ *Government of Malaysia & Ors v. Loh Wai Kong* [1979] 2 MLJ 33.

soon as may be of the grounds of his arrest and to consult and be defended by his lawyer; the right to be released without undue delay and in any case within 24 hours to be produced before a magistrate; and the right not to be further detained in custody without the magistrate's authority. It will be observed that these are all rights relating to the person or body of the individual”

The Loh Wai Kong decision was pivotal and, by the doctrine of *stare decisis*, (standing by what has been decided), Malaysia still retains this authoritative interpretation when it considers the rights provided to Malaysian citizens against unlawful detention.

Following *Government of Malaysia v Loh Wai Kong*, individuals must be informed of the reasons for their arrest and must be entitled to speak with and be represented by their legal representation. Both these provisions are not available under POTA. A person may be arrested and detained without knowing the grounds of their arrest, as nothing under the statute compels the authorities to tell them. Suspects detained under POTA are not provided with legal representation. Not even the strictest or narrowest reading of Art. 5, *supra*, of the Constitution of Malaysia, would justify the conditions under which a suspect is detained under POTA.

Human rights protection in Malaysia is extremely weak. Law enforcement agencies do not protect human rights, especially considering the number of deaths in police detention. According to a statement issued by the adviser of Suara Rakyat Malaysia (SUARAM), Kua Kia Soong, there were as many as 104 deaths in police custody from 2011 to 2018. This equals an average of 26 deaths per year (IPCMC Must Prioritise Deaths In Custody, 2019). Of these deaths, 56 individuals died of medical reasons, eight individuals committed suicide, two died by accident, four from blunt force trauma and 34 others from unknown causes. A report by the Human Rights Commission of Malaysia (SUHAKAM) suggests that the main cause of these deaths is the poor conditions of detention centres. A SUHAKAM survey found that these detention centres lack necessities such as proper toilets with locks, efficient ventilation systems, proper lighting, beds and cells. Besides, the food provided to detainees does not meet the standards required by law (Laporan Kematian Dalam Tahanan Polis, 2019). This alarming situation

indicates that, in Malaysia, detainees are provided with very little or no human rights protection. Regardless of whether one is a detainee or not, no one should be denied their rights, especially not at the hands of the authorities whose functions include protecting the public.

QUID PRO QUO: SECURITY WITHOUT LIBERTY

The willingness of the Malaysian government to infringe the rights of Malaysian citizens to tackle the security problem raises alarm bells as to its constitutionality. While academicians and non-governmental organisations, including human rights groups, have noted that extraordinary counterterrorism efforts are part and parcel of the legal and political framework of most democratic states, the fundamental question remains: how to have these “extraordinary legal measures in the war against terrorism influence the delicate fabric of liberty and security?”

There should be extreme concern about the lack of judicial review of decisions and actions in POTA¹⁷ proceedings. The government is not only refusing to justify the ongoing detention of suspected terrorists; it has also prevented the courts from reviewing its refusal. POTA’s methods and procedures break from long-established criminal rules and procedures and should be viewed as a serious breach of criminal law principles that safeguard against innocent individuals being treated as criminals. It is indeed critical that the law respects civil liberties as much as it respects national security. Preventive detention legislation, such as POTA 2015, violates the long-established criminal law doctrine of “*presumption of innocence*”, allowing authorities to detain anybody based exclusively on what they think a ‘suspect’ intends to do in the future. Ergo, the laws have paved the way for the establishment of dictatorial regimes, as people can simply vanish without a trace when detained by authorities. Although preventive detention without charge is often discussed as a tactic in handling suspected terrorists and is frequently spoken about well within the context of criminal law, it is interesting to observe how the government is intentionally departing from established criminal procedure.

¹⁷ *Prevention of Terrorism Act 2015* Section 19 contains provisions on the limitations of the judicial body in reviewing the decision of the POTB.

Undoubtedly, preventive detentions must be tailored to prevent occurrences that the conventional criminal law system cannot cope with. The government has repeatedly emphasized the necessity for a framework that allows for investigative entities to readily remove high-risk individuals from the broader population to safeguard the public. Courts have usually demonstrated great deference to the authorities by acting preventively in combating destructive acts of terrorism. Such an approach has already been adopted by courts in the United Kingdom.

Particularly, preventive detention should target, for example, would-be suicide bombers who must be detained, as the government cannot wait for these terror acts to be fully committed before taking action as the public will be exposed to too much danger. While it is imperative to recognise the gravity of the threats that these potential terrorist acts pose to the public, it is equally important to remember the rights of the people. Particularly, this is where the point of exchange must be approached carefully.

POTA AND THE NEED FOR REFORM

Considering the sophistication of modern terrorist organisations and their *modus operandi*, new legislation regarding the prevention of terrorism is extremely important. However, such legislation, as part of a state's counter-terrorism strategy, must balance public safety and individual rights to liberty, expression, and privacy. In his review of UK legislation in 1996 against terrorism¹⁸, Lord Lloyd of Berwick guided ensuring such an equilibrium between public safety and individual liberty. First, all counterterrorism laws and legislation must adhere as closely as possible to criminal law legislation and procedures. An act of terrorism is criminal and, as such, it must be addressed in the context of established criminal law practices and procedures. Any departure from such an approach would compromise the effectiveness of such law in ensuring justice and human rights. Second, additional statutory offences to address anticipated threats or prevent such threats are justified only in extreme and necessary circumstances. Even when such legislation is promulgated, it must not be at the expense of individual liberties and human rights. This means that a robust mechanism of human rights protection is not only

¹⁸ *Prevention of Terrorism (Additional Powers) Act 1996* Chapter 7.

necessary but should also be the primary objective for such legislative initiatives. Third, it is vital to subject these additional powers and safeguards to rigorous scrutiny to ensure that it is used only for specific or intended purposes. Such a move will ensure that the objectives of such additional powers are executed within the parameters of their objectives and mandate. Finally, the additional powers and safeguards must not be contrary to the state's international obligations. No state should neglect its international commitments and instead should ensure that its laws and legislations are compatible with international laws, conventions and practices.

POTA must be reformed. As a modern democratic country, Malaysia must manifest its progress through a greater commitment to implementing legislative reforms consistent with internationally accepted human rights standards and international obligations. Such reform will ensure that its efforts in countering the threat of terrorism is not only effective but more importantly, humane and wholesome in their intended outcome. Concerning the abovementioned points, a few areas should be considered.

First, the ambiguity in the definition of terrorism and its acts should be eliminated. Precise definitions will provide clarity in defeating terrorism. Moreover, they will enhance greater international cooperation and contribute to better regional and international strategies. Such clarity will also help satisfy the principle of legality, making its implementation easier and in conformity with the intended objectives of POTA.

Second, the pretrial investigation processes must be improved. Many processes need to be properly elucidated and the exercise of authority needs to be coupled with proper scrutiny. Furthermore, detention procedures must meet internationally accepted due process standards and should never be done at the expense of personal liberties. When some personal liberties must be compromised, it must be done with great care and only under extreme necessity. The length of pretrial detention must be reviewed and a reasonable limit to such detention must be considered. In this era of technological and communications advancement, investigations should be conducted relatively easier and faster. Readily available data, especially unstructured data, over the various social media and telecommunications platforms must be used to facilitate pretrial investigations. Besides, regional and international

intelligence sharing has also improved, which should shorten pretrial investigations.

Third, all procedural rules that infringe on rights to a fair trial must be revised. Counterterrorism legislation must be used to obtain convictions in courts of law, and not function as preventive detention legislation. As the ISA detention era is over, Malaysia must embrace a judicial process that is just, transparent, and credible. Thus, a preventive detention law such as POTA must lead to a fair and just criminal justice process.

Fourth, provisions regarding the presumption of innocence must conform to established criminal law principles. As terrorism-related offences are criminal offences, it is best to deal with them following criminal law processes. Any departure from such practices, especially in the context of preventing an act of terror, must be done only under the most exigent circumstances. Phrases such as ‘the threat to national security’ must only be used when there is clarity as to the degree of such threats.

Fifth, a more robust oversight mechanism is required to ensure that police powers are exercised judiciously. Pretrial investigations must be conducted in conformity with the highest standards of due process. Such oversight mechanisms will prevent the uneven application of laws and procedures and help eliminate arbitrary detention and discriminatory practices. While the current POTA framework has processes that are comprehensive and structured to minimise arbitrary detention, a more robust mechanism is required to position POTA as an effective and just preventive detention law.

POTA is a piece of legislation that gives enormous power to the police and executive, despite many instances of their failure to protect human rights, while enforcing ordinary criminal laws. If the fight against terrorism intensifies, it is hard to imagine that human rights will be high on the agenda, if POTA is used. This is why a strong oversight mechanism is crucial, especially when regular criminal law and its procedures prove to be ineffective in combating terrorism. Thus, while special legislation to tackle terrorism outside the ambit of established criminal justice procedures is justifiable, police reform is also necessary. (Nevertheless, this article does not intend to address police reform.)

CONCLUSION

Balancing human rights and national security is a complex, evolving and unfinished process. While the government should prioritise safeguarding Malaysian citizens from potential terrorist attacks, the government must also ensure that efforts to combat terrorism are consistent with the liberties enshrined in the Constitution and democratic ideals, while upholding the administration of justice.

Before the 14th General Election, the then opposition coalition Pakatan Harapan was committed to abolishing the draconian provisions in various acts, including POTA. Pakatan Harapan won the elections but after ruling for 22 months, it collapsed. Instead of tabling amendments in Parliament, the moratoriums on POTA and two other acts, namely POCA and SOSMA, were lifted in response to the November 2018 riots at the Seafeld Temple. These developments not only showed the lack of drive and seriousness in protecting the rights of the Malaysian people but also a failure to address the issue of whether additional preventive measures such as POTA are necessary, in light of existing acts.

Malaysian society has long benefited from rights that are safeguarded by the state. Thus, we must proceed carefully when we promulgate laws that challenge the existing equilibrium of human rights and national security. Understandably, there is such legislation as POTA, which is as one might say, a necessary evil. Even so, necessity is not an excuse to disregard human rights. The paradox remains that rights are being taken away to preserve human lives. The government must remember that the rights being taken away are the same ones that distinguish us from terrorist groups (Bari, 2018); the same liberties that we should be striving to safeguard. Thus, proper legal, administrative, social and educational measures must be implemented to safeguard detainees from abuse and maltreatment in prisons and detention centres. It is hoped that the Government of Malaysia will significantly improve its performance when it comes to the critical balance of human rights and national security.

ACKNOWLEDGMENT

This research received no specific grant from any funding agency in the public.

REFERENCES

- A chilling statutory declaration. (2008, January 29). *MalaysiaKini*. <https://www.malaysiakini.com/news/59852>
- Aslam, M. M. (2021, February 16). *Fake paradise for Malaysian foreign terrorist fighters*. MEI@75. <https://www.mei.edu/publications/fake-paradise-malaysian-foreign-terrorist-fighters>
- Bari, M. E., & Naz, S. (2018). The Enactment of the Prevention of Terrorism Act, 2015, in Pursuance of the Constitution of Malaysia: Reincarnation of the Notorious Internal Security Act, 1960? *41 Suffolk Transnational Law Review* 1.
- Dhanapal, S., & Sabaruddin, J. S. (2017). *Malaysia's prevention of Terrorism Act 2015, A review*, 25 (2), 1–804.
- Hansard. (2015, April 7). *Official Portal of the Parliament of Malaysia (in Malay)*. [https://www.parlimen.gov.my/files/hindex/pdf/DR07042015.pdf#page=68&zoom=100&search=Preventi on%20of%20Terrorism%20Act%202015](https://www.parlimen.gov.my/files/hindex/pdf/DR07042015.pdf#page=68&zoom=100&search=Preventi%20on%20of%20Terrorism%20Act%202015)
- Horder, J. (2016). *Ashworth's principles of criminal law*. Oxford University Press.
- IPCMC must prioritise deaths in custody. (2019). *Suara Rakyat Malaysia (SUARAM)*. <https://www.suaram.net/2019/07/19/ipcmc-must-prioritise-deaths-in-custody/>
- Kwang, H. P. (2018). The New Prevention of Terrorism Act 2015 (POTA): A legal commentary. *Journal of Malaysian and Comparative Law*, 43(1), 15–33. <https://ejournal.um.edu.my/index.php/JMCL/article/view/12462>
- Laporan Kematian Dalam Tahanan Polis*. (2019). Suruhanjaya Hak Asasi Manusia Malaysia (SUHAKAM). <https://drive.google.com/file/d/0B6FQ7SONa3PRWFBkbjBtbFp3MTQ/view>
- Malaysia: New Anti-Terrorism Measures Tabled in Parliament. (2015). <https://www.loc.gov/item/global-legal-monitor/2015-04-02/malaysia-new-anti-terrorism-measures-tabled-in-parliament/>
- NST Online. (2019, March; September 12; 26). News Straits Times; Al-Jazeera: <https://www.nst.com.my/news/nation/2019/03/468558/13-malaysians-who-joined-islamic-state-want-come-home>; <https://www.aljazeera.com/news/2019/9/26/malaysia-arrests-16-for-suspected-isil-links-plotting-attacks>
- Operation Lalang Revisited*. (1987, December 5). Aliran Monthly. <https://aliran.com/oldsite/hr/js3.html>

Press Release | Prevention of Terrorism Bill 2015 Violates Malaysia's Domestic and International Commitments, is an Affront to the Rule of Law and is Abhorrent to Natural Justice. (2015, April 5). Malaysian Bar. <https://www.malaysianbar.org.my/list/news/p>

Sampsel-Jones, T. (2010). Preventive detention, character evidence, and the new criminal law. *Faculty Scholarship, Paper 175*. <http://open.mitchellhamline.edu/facsch/175>

Santhana Dass, R. A. (2021). Terrorism laws in Malaysia: The continuing case for SOSMA and POTA. *Middle East Institute*.

Soon, T. W. (2015). *Prevention of terrorism act pota a closer look at the pros and cons*. Malaysian Digest. <https://malaysiandigest.com/features/564892-prevention-of-terrorism-act-pota-a-closer-look-at-the-pros-and-cons.html>

Terrorism Act 2000. (n.d.). (2014). *White paper: Addressing the threat of the islamic state group*.