

Analysing the Prevention of Terrorism Act 2015 in Combating Terrorism in Malaysia

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ABSTRACT

Combating terrorism and violence has been a global challenge that alerted many world leaders, and Malaysia has actively participated in preventing the threats in a variety of methods and mechanisms. In the effort to preserve the security of the country and its people, Malaysia had introduced the Prevention of Terrorism Act (POTA). The genesis of the formation and legislation of POTA is based on the increasing trend of terrorism attacks around the globe, which finally affected the security of the world countries. Internationally, the 11 September 2001 tragedy had been a turning and changing point for the world to emphasise new mechanisms of combating and preventing terrorism in this country. In Malaysia, the existence of terrorism groups such as Jemaah Islamiyah that originated from Indonesia and some local extremist groups are needing a fresh approach of comprehensive legal framework to combat the terrorism effectively. This issue is very important to be addressed as terrorism is seen as threat to national security and it may impact negatively on the peace and harmony of a state.

Keywords: Terrorism, POTA, combating terrorism, violence

INTRODUCTION

The Prevention of Terrorism Act (POTA) was legislated by the government of Malaysia in 2015. It was drafted to prepare the authorities with tools and powers to prevent, investigate and charge the terrorism act in this country. This act was gazetted to overcome the weakness of existing legislation at that time and improve Malaysia's capacity to combat any unexpected and different challenges of future terrorism. This act comprises several provisions that give crucial powers to the authority in accordance with efforts on combating terrorism. One of the provisions, which is the wider investigative power, allows the authority to make wider surveillance, intercept communications and collect intelligence. The steps are important to identify and disrupt any potential and suspected terrorism activities.

Another crucial aspect in this act is its concentration to strengthen the country's border security. It allows the immigration to take any necessary actions such as denying

the entry of a suspected person that is involved with any terrorism groups and extremists. This provision is made to ensure the interception of any potential threats before it welcomes any danger in the country's border. The Act also establishes a comprehensive legal framework for the prosecution of terrorism-related offences. It defines various acts of terrorism, including planning, financing, and executing terrorist acts, as well as recruiting and providing support to terrorist organisations. By clearly outlining these offences and their associated penalties, the Act sends a strong message that terrorism will not be tolerated in Malaysia. The Prevention of Anti-Terrorism Act plays a vital role in Malaysia's efforts to protect national security and maintain social harmony. By providing law enforcement agencies with enhanced tools and powers, the Act enables them to stay one step ahead of potential threats and prevent acts of terrorism before they occur. Moreover, the Act sends a strong deterrent message to those who may be involved or contemplating involvement

in terrorist activities. However, it is crucial to strike a balance between security measures and protecting individual rights and civil liberties. Safeguards and oversight mechanisms should be in place to ensure that the Act is not misused or abused for purposes other than countering terrorism.

Upholding the principles of fairness, transparency, and due process is essential to maintain public trust and legitimacy in the government's counter terrorism efforts. Therefore, the Prevention of Anti-Terrorism Act in Malaysia is a crucial legal instrument in the country's fight against terrorism. Its introduction was prompted by the global rise in terrorism and the local presence of extremist groups. By empowering law enforcement agencies with necessary tools and provisions, the Act strengthens Malaysia's ability to prevent, investigate, and prosecute acts of terrorism. However, it is essential to maintain a careful balance between security measures and individual rights to uphold the principles of justice and democracy.

THE COMPLIANCE OF THE FUNDAMENTAL RIGHT IN THE FADERAL CONSTTUTION

The Prevention of Terrorism Act 2015 (hereinafter called as 'POTA') which was approved by Parliament has caused a lot of criticism and debate among the general public and legal practitioners.¹ This new law is said to have violated the basic human rights that have been provided in the Federal Constitution because this act has legalized preventive detention without limitation. Among the criticisms directed is that there are provisions that allow indefinite detention without charge, unsafe and unfair control orders, and refusal of the right to legal counsel, which infringes the fundamental human rights of Malaysians.² For example, in section 10(6) of POTA, it has been explained that a person who has been detained cannot be represented by an advocate and solicitor. In section 13(2) POTA on the other hand legalize the

continuation detention which it stated that the Inquiry Officer can detain someone for 2 years. Since this Act highlights the issue of detention, it will be more related to Article 5 of the Federal Constitution. Here, the question arises whether the fundamental rights in Article 5 are deprived entirely?

Based on this provision, many scholars and legal practitioner viewed that POTA have violated the fundamental freedom of a person under Article 5 of the federal constitution. Article 5 of the Federal Constitution states the fundamental human right, which is the liberty of a person in the Federation of Malaysia. Some of the scholars are Kwang H. P. a legal commentary. The only provision that complied by POTA is only in Article 5(2) which it provides that a person can complaint to the High court regarding the issue of unlawful detain through Habeas Corpus. In section 13(10) of POTA, it provides that all actions of the Board in subsection (1) shall be subject to review by the High Court. Here, a person detained under POTA can protect himself from wrongful detention by applying for Habeas Corpus to the high court. If the high court finds that the individual has indeed been detained illegally then he will be released immediately. This is the only provision that are complied by POTA because if the research refer to other provisions such as Article 5(3) which is right to be defended by legal practitioner and Article 5(4) which is right towards unreasonable delayed detain, the right to liberty in these provisions is deprived will not apply under this Act. That's why this Act is very controversial when it was approved because the basic human right such as personal liberty would be deprived under this Act. Regarding the validity of POTA under the Federal Constitution, it can be found in Article 149 of the Federal Constitution where special power has been given to parliament to enact laws on preventive detention during peacetime.³ That is, if there is any subversive situation that can cause harm to the people and the country,

the parliament can enact laws to empower the executive to take precautionary measures and prevent it from happening again in the future. Another important thing that needs to be highlighted in this issue is that Article 149 also allows and legalities the prevention even though it is inconsistent with any of the provisions in article 5, 9, 10 and 13.⁴ It means an indefinite continuation of preventive detention it will not violate human rights if a person is detained under POTA because the fundamental rights listed in the Federal Constitution will not apply.

Regarding the matter of compliance with fundamental rights under the Federal Constitution, POTA is said to have violated the rights provided especially the right to personal freedom. However, refer to Article 149 of the federal constitution, POTA is valid under the law and it does not violate any provision in the Federal Constitution because this Act deprives all fundamental rights provided in the Federal Constitution. Based on the parliament's enactment of POTA, we may conclude that personal liberty rights are relatively limited and not absolute. When there are extraordinary circumstances that force Parliament to pass a new preventative law, such new Act will override all human rights issued in the Federal Constitution. Since POTA would be upheld by Article 149 of the Federal Constitution, any person who was preventive detained under this Act cannot raise the issue of violation of fundamental rights as this Act would deprive all the right under Federal Constitution.

METHODOLOGY

This research adopts qualitative research method which is based primarily on library research. Content analysis will help to identify the approaches that combines legal, law enforcement, intelligence, preventive, and collaborative efforts both domestically and internationally. The aim is not only to respond to immediate threats but also to

address the underlying factors that contribute to radicalization and extremism.

CHALLENGES AND OPINIONS

Among the challenges faced in implementing and enforcing this law is when there is an opinion that this act contains broad and vague provisions that potentially may violate constitutional rights. In the writing titled Prevention of Terrorism Act (POTA) 2015: Does it Really Strengthen National Security? Mohd Hazmi Mohd Rusli, Muhammad Firdaus Azmi, & Muhammad Faisal Abdul Aziz. (2018) said that the vague definitions in some phrases in the act such as "terror-related activities" and "security offence" have made it difficult to determine the scope of the law and how to interpret and interpret it.⁵ This ambiguity creates room for abuse, which in turn can lead to arbitrary arrest and wrongful detention without sufficient evidence, undermining the right to due process and a fair trial due to the abuse of this law that allowed such a person to be detained without trial. Because detention through this act allows for detention without trial, it has given a form of injustice because everyone should be given the right to a fair trial.⁶ Without a fair trial, justice for that one offence is still impossible to prove. This can be seen in the case of Borhan Hj. Daud and Ors v Abdul Malek Husin [2010] 8 CLJ 656 CA. It needs to be generally agreed that everyone is innocent unless proven guilty. Therefore, in the circumstances permitted by this act, the concept which is practised in all justice institutions in the world has been violated. At the same time, due to the preliminary classification being provided in the law which is a vague and broad phrase, as well as opening up the opportunity for wrongful arrests to occur, then one of the main concerns is related to the issue of freedom of expression. This is said because if a person wants to express an opinion on a matter, which is contrary to mainstream thinking, then he can be arrested and

detained without a trial.⁷ Various reasons that allow the arrest can be done by citing the provision in this act. For example he can be accused of supporting and promoting terrorism, and imprisoned without any trial for him to defend himself.

Besides, lack of Judicial Oversight is also one of the challenges on the constitutionality issues. Another constitutional concern revolves around the limited role of the judiciary in overseeing POTA.⁸ The law grants significant discretionary powers to the police and the executive branch, allowing for potential abuse and arbitrary decisions. The absence of robust judicial oversight raises concerns about checks and balances, jeopardising the separation of powers and undermining the rule of law. It can also be said that this act actually disproportionately targets a certain ethnic and religious group, and it is in conflict with the principle of non-discrimination enshrined in the Malaysian Constitution.⁹ The potential for racial and religious profiling in the enforcement of POTA affects equality and harmony among Malaysia's diverse population. Due to the above, one opinion that can be raised is the concern about the lack of clear protection against torture and ill-treatment in this act.¹⁰ A criticism can be made on the rationale that this omission allows the potential violation of human rights during the process carried out based on this act such as the process of arrest, detention and interrogation. In this regard, the failure to provide robust protection against such abuse undermines the right to be free from torture and cruel, inhuman or degrading treatment, as guaranteed by the Malaysian Constitution and international human rights standards.

Based on all the challenges proposed and highlighted, it can be seen that the Prevention of Terrorism Act provides limited space for judicial review, and through the implementation of this act in reality, it has prevented effective scrutiny of constitutional rights. This gives a form of opinion that the provisions in this act have

restricted the ability to challenge the compatibility of laws with constitutional rights and prevent the development of legal precedents. The absence of a comprehensive review mechanism undermines the rule of law and limits the protection of civil liberties.

RELEVANCY OF THE IMPROVEMENT OF THE STATUTE

Combating terrorism is never easy as balance between the national security and fundamental rights need to be properly asserted. Critics that have been discussed abovehand portray voluntarily act by the legislation body to infringe the fundamental rights. Hence, the reform of the Prevention of Terrorism Act (POTA) is relevant to strike a balance between both national security and rights vested upon the people by the Federal Constitution. First, ambiguity in the definition of certain words such as terrorism and actions that contribute to its act should be eliminated.¹¹ Precision to its wording should be sufficient in eliminating any breach to human rights. To further explain, a reference to Section 2 of POTA needs to be made. Section 2 is the interpretation section that provides definition for the words used in the act. However, this section gives no definitive clarification in regards to the word 'engaged', 'support' and 'involving'.¹² In the absence of a clear definition, the police can detain anyone that they deemed suspicious as long as they have reasonable belief that the suspect committed any terrorism activities. Therefore, in defining terrorism acts under Penal Code (reference must be made in the absence of clear definition in POTA) do all acts that constitute prejudice to national security amounts to terrorism as mentioned by paragraph (j) of Section 130B subsection 3 of the Penal Code?¹³ To illustrate, if a group of people demonstrates and voices out their opinion freely, does the act fall under terrorism act and jeopardise our national security? Undeniably, there will be

breach of fundamental rights by the authorities since the ambiguity of the law cannot assure the protection of the fundamental liberties. Hence, parliament must actively revise POTA to make sure the vagueness of its wording is eliminated.

Next, in regard to Section 3(1) which provides police to detain anyone, without warrant if the police officer has reason to believe there are terrorism activities. The subjectivity of the phrase 'reason to believe' has given police officers broad interpretation to justify their arrest of a suspected person. Section 26 has narrowed down its interpretation whereas it states that a person is said to have reason to believe if there is sufficient cause to believe. To believe something is to accept the fact as real even if we have no knowledge about the situation. Therefore, the broad interpretation of Section 3 POTA seems odd to the established principle of crime which are *actus reus* and *mens rea* because there are no obligations for the police officers to follow the principle since they have reason to believe the suspect involved in terrorism. At the very least, police officers must provide further proof of terrorism to avoid wrongful detentio

CONCLUSION

To conclude, the Prevention of Terrorism Act or known as POTA is pivotal to safeguarding national security and its people. However, in providing protection of our security, a balance must be made to fundamental rights. Hence, there is a strong urgency for refinement and clarity to the act to ensure that they adhere to the fundamental liberties while safeguarding our national security.

Besides, Malaysia, like many countries, has implemented various strategies to combat terrorism and involves a multifaceted approach that combines legal, law enforcement, intelligence, preventive, and collaborative efforts both domestically and internationally.

NOTES

¹ Kwang, H. P. (2016). The New Prevention of Terrorism Act 2015 (POTA): A legal commentary. *JMCL*, 43, 15.

² Dhanapal, S., & Sabaruddin, J. S. (2017). Malaysia's prevention of Terrorism Act 2015, A review, 25 (2), 1–804.

³ 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.

⁴ Borhan Hj. Daud and Ors v Abdul Malek Husin [2010] 8 CLJ 656 CA.

⁵ Mohd Hazmi Mohd Rusli, Muhammad Firdaus Azmi, & Muhammad Faisal Abdul Aziz. (2018). Prevention of Terrorism Act (POTA) 2015: Does it Really Strengthen National Security?. *International Journal of Law, Government and Communication*, 3(11), 27-34.

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⁷ Malik Imtiaz Sarwar. (2016). The Prevention of Terrorism Act 2015: A Blueprint for Repression. Retrieved from

<https://www.hrw.org/report/2016/06/23/prevention-of-terrorism-act-2015/blueprint-repression>

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¹¹ 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.

¹² Ho Peng Kwang (2016) The New Prevention of Terrorism Act 2015 (POTA): A legal commentary. Retrieved from

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¹³ Section 130B (3) (j)

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