

Prevention of Terrorism: An Initial Exploration of Malaysia's POTA 2015

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ABSTRACT

The threat posed by terrorism, a world-wide phenomenon, is not easy to address. Contributing to the difficulty of the task are the changing motivation of terrorist activities, their diverse sources of financing, the increasingly more destructive and dangerous methods of attack as well as their varied targets. Terrorism, thus, seems to require special measures to prevent and curb. Many countries have enacted new laws or have amended existing ones and these have common features relating to the investigation, apprehension and prosecution of suspected terrorists. A notable feature of such legislation is the detention of suspects without charge or trial and without the other constitutional safeguards accorded to a criminal. One such piece of anti-terrorist legislation is Malaysia's recent Prevention of Terrorism Act 2015 (POTA). This paper espouses the view that POTA is necessary to curb terrorism in Malaysia and analyses the new Act to identify its strengths and weaknesses in curbing acts of terrorism in the country with the view of recommending amendments that would enhance its effectiveness as a piece of anti-terrorist legislation.

Keywords: Internal security, Malaysia, Prevention of Terrorism Act, terrorism, terrorists

INTRODUCTION

The term 'terrorism' comes from the French word *terrorisme*, which is based on the Latin verb *terrere* (to cause to tremble)¹. In modern times, 'terrorism' usually refers to the killing of innocent people by a private

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¹ The Jacobins cited this precedent when imposing a Reign of Terror during the French Revolution. After the Jacobins lost power, the word "terrorist" became a term of abuse.

group² in such a way as to create a media spectacle. In 2005, a United Nations Panel Report described terrorism as any act that causes death or serious bodily harm to the public with the end aim of forcing a government or an international organisation to do or abstain from doing an act. The Institute for Economics and Peace (2014) defined terrorism as both the actual use of unauthorised force and violence or the threat to use such force in furtherance of either political, economic, religious or social goals. It went on to add that these goals are achieved through the use of fear, coercion or intimidation.

The 2015 Global Terrorism Index reported that there is a very high increase in terrorist incidents leading to more deaths and in 2014 alone, 32,000 people were killed as a result of terrorist acts (VOH, 2015). As clearly revealed, 9/11 witnessed the most destructive terrorist assaults in recorded history and the attacks led to far bloodier conflicts as part of the subsequent war on terror (Silke, 2014). The Institute for Economics and Peace (2014) identified two factors that are linked closely to terrorist activities. Firstly, political violence within the nation and secondly, the conflicting environment of the nation. History has proven that 92% of all terrorist attacks that

occurred between 1989 and 2014 were in countries that were experiencing political violence initiated by the government, while 88% of these attacks took place in countries experiencing or involved in violent encounters (IEP, 2014). As a result, it has been advocated that there is a need to implement policies that address the social and political factors that foster terrorism (Killelea, cited in VOH, 2015). The same source also recommended some changes such as to reduce state-sponsored violence, disperse group grievances and cultivate practices that respect human rights, freedom of religion and different cultural nuances. According to the Institute of Peace and Conflict Studies (2004), using the law as a tool to improve national security is an inept practice in democracies as it leads to major conflict between security interests and civil liberties.

Despite this, there are numerous Acts of Parliament, regulations, rules and orders that provide for special counter-terrorism powers and offences in countries around the world. According to Liberty (2015), while some of these new laws and specific terrorism offences may be necessary, many others are not. It further added that most recent counter-terrorism legislation is dangerously overboard and has affected vast numbers of people, in particular peaceful protesters and ethnic minority groups, thereby undermining civil liberties and fundamental human rights (Liberty, 2015). A list of common concerns raised against such laws include issues related to indefinite detention without charge, unsafe

² It must be noted here that this definition is questionable for in certain states such as Israel, the state itself can be considered terrorist for its actions in Palestine. Further, military actions of a country (statism) are not deemed as terrorist activities but private group actions are labelled as terrorist activities.

and unfair control orders imposing severe and intrusive prohibitions, allowing stop and search without suspicion and that are disproportionately used against peaceful protesters and ethnic minority groups, the dangerously broad definition of 'terrorism' and the banning of non-violent political organisations amounting effectively to censorship of political views, which has the potential to drive debate underground.

In Malaysia, one of more recent encounters with terrorists took place in 2013 when a militant group under the leadership of Sultan Jamalul Kiram III, tried to claim territorial rights by invading Lahad Datu in Sabah. The duration of the incident, which lasted 43 days, caused the deaths of 56 militants, six civilians and 10 Malaysian Security Force members. Fortunately, the intrusion was defeated and charges were brought against the perpetrators who were apprehended. In 2014, as reported by the Institute for Economic and Peace (2014), four cross-border kidnapping for ransom operations took place in eastern Sabah³. Although there is specific legislation to counter terrorism in Malaysia, it must be

noted that terrorist incidents continue to occur. Anti-terrorist legislation in place in Malaysia are the Security Offences (Special Measures) Act 2012 (SOSMA) and the newly enacted Prevention of Terrorism Act 2015 (POTA). The need for new legislation that specifically aims to address militant activity in the country arose due to the spread of aggression, which continues to increase and threaten many nations such as France, leading to collaboration among countries like Malaysia and Australia to counter the threat (Hansard, 2015, April 6). According to police records up to 31 March, 2015, 75 persons who were suspected for involvement in the Islamic State have been arrested. Of them, 24 have been convicted under SOSMA 2012, another six were convicted under the recently amended Prevention of Crime Act 1959 (POCA), 13 were banished, 24 were released and four are still under investigation (Hansard, 2015, April 6). Despite these claims, questions are raised as to the necessity for a new act since the reported statistics are not large enough to justify the enactment of more repressive legislation that can open the door for abuse, leading to the violation of the rights of persons and organisations. However, supporters to this new Act claim that despite the small number, the destruction that can occur if terrorist activities are successful could be devastating and, therefore, harsher laws are required.

Notwithstanding the concerns raised, the new Act, POTA 2015, was passed. It must be noted that the passing of POTA 2015 has raised great concern. It must be

³ This is inclusive of the kidnapping of a Chinese tourist and a Philippine hotel employee in April by armed men from a diving resort off the coast of Semporna, the kidnapping of the Chinese manager of a fish farm from an island near Lahad Datu in May, the abduction of a Philippine and a Malaysian national from another fish farm in Kunak in June and the killing of a Royal Malaysian Police (RMP) officer and another officer, who remained in captivity at year's end in July, by armed men at a diving resort on Mabul Island.

conceded that the Act came into place with Parliament adjourning only at 2.26 a.m. after the last motion to amend the POTA 2015 Bill was defeated with 79 votes for and 60 votes against (Hansard, 2015, April 6). POTA 2015 faced considerable disapproval and criticism because it is claimed that in essence, the Act contains provisions for detention without trial, similar to the infamous Internal Security Act 1960 (ISA). However, supporters of POTA 2015 asserted that it is not similar to the ISA, claiming that the power of executive has been removed and placed under the Prevention of Terrorism Board (POTB) elected by the King (Hansard, 2015, April 6). It is also argued the 60 days' detention without judicial review under the ISA has been removed and the current 60 days' detention under the new Act is through court process (Hansard, 2015, April 6). However, it must be acknowledged that detention without trial was not the only feature of POTA that was attacked. The provisions immunising decisions of the POTB created under POTA from judicial review (Section 19) also drew heated criticism. Section 6 (1) POTA 2015, which enables detention of suspects for a maximum of 59 days (including the initial remand period) before being brought to the POTB, and Section 13 (1) POTA 2015, which gives powers for further detention of up to two years, which can be renewed if the POTB decides there are reasonable grounds, were also criticised. These provisions, which allow the POTB to detain the suspect without any judicial review and further, to detain them up to

two years, appear to contravene principles in the rule of law, especially the principles of natural justice, the right to a fair hearing, the courts' power to review the way in which the other principles are implemented and that the courts should be accessible for no man should be denied justice. Since there are concerns with regards to the sections of POTA 2015, the authors aimed to examine the Act in terms of the historical context of its enactment as well as to identify the particularities and the peculiarities of its implementation. Further, the authors will also analyse POTA 2015 to identify the strengths and weaknesses with a view to identifying whether there is room for concern as to its provisions with regards to any breach of basic human rights.

BACKGROUND OF POTA 2015

POTA 2015 was initiated as a new legislation by the Prime Minister, Datuk Seri Najib Tun Razak, in Parliament in November 2014. A White Paper entitled "Towards Addressing Threats of Islamic State (IS) Groups" was used as a foundation for the legislature to introduce the Bill in the House of Parliament. In the presentation of the White Paper, the continuous threats of violence both within and outside the country were raised as a serious concern⁴. Further, in the presentation, the Prime Minister emphasised on the Malaysian Government's commitment to combat

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

threats by IS alongside the international community and he advocated for new legislation. Paragraph 59 of the White Paper recommended new legislation to be enacted to address in specific the threat posed by IS. The White Paper called for specific anti-terrorism legislation to be adopted and for the current relevant laws, the Security Offences (Special Measures) Act 2012, the Prevention of Crime Act and the Penal Code, to be reinforced (Para 23 and 24, White Paper 2014). POTA 2015 Act 769 received the consent of the King on 28 May, 2015 and came into force officially on 1 September, 2015. Besides the enactment of the new Act, four amendments were enacted comprising the Penal Code (Amendment) 2015 (PC), Security Offences (Special Measures) Act (SOSMA) (Amendment) 2015, the Prevention of Crime Act (POCA) (Amendment) 2015 and the Prisons Act 2015.

ANALYSIS OF POTA 2015

POTA 2015 is divided into five distinct parts, as follows:

- Part I: Preliminary
- Part II: Powers of arrest
- Part III: Inquiries
- Part IV: Detention and Restriction Orders and
- Part V: General.

Each is considered in turn. Section 2 in Part 1 is the interpretation. It defines a total of nine expressions either directly or by reference to other provisions of

POTA 2015 or to definitions in other statutes. The only expression relevant for our purposes is 'terrorist act', which the section says "has the same meaning assigned to it by the Penal Code [Act 574]". In the Penal Code, 'terrorist act' is defined very comprehensively in Section 130B (2), (3) and (4) as:

- (2) For the purposes of this Chapter, '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, or any international organisation 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 public⁵.

That the very wide definition of ‘terrorist act’ may encompass many innocent actions has drawn much criticism (Hansard, 2015, April 6). There was also much debate on the definition in POTA 2015 for it refers to the definition in the Penal Code, which is seen to be contradictory. The Penal Code 1976 under Section 130B (2) defines terrorist acts to include “threat made with the intention of advancing a political, religious or ideological cause” but Section 4 (3) POTA 2015 states that “No person shall be arrested and detained under this section solely for his political belief or political activity”.

Despite these controversies and the criticism made against POTA 2015, it must be noted that Malaysia is not the

⁵ Parts are highlighted for emphasis.

only country in the world to cast a wide net to snare anti-terrorist acts. Many of the phrases used in POTA 2015 appear in anti-terrorism legislation around the world. For instance, Section 1 of the United Kingdom's Terrorism Act 2000 enacts that 'terrorism' means:

- (1) In this Act 'terrorism' means the use or threat of action where—
 - (a) the action falls within subsection (2),
 - (b) the use or threat is designed to influence the government or an international governmental organisation or to intimidate the public or a section of the public, and
 - (c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.

A similar definition appears in Section 15 of India's Unlawful Activities (Prevention) Amendment Act (UAFA) 2008, where it is stated that terrorists include "Whoever does any act with intent to threaten or likely to threaten the unity, integrity, security or sovereignty of India or with intent to strike terror or likely to strike terror in the people or any section of the people in India or in any foreign country." Although the researchers are indicating there are other countries whose legislations have wide definition for the term 'terrorists', they are not contending or condoning that it is acceptable to have such wide definitions.

That POTA is limited to terrorist acts seems to make it less draconian than the Internal Security Act 1957 (ISA), which permitted detention without trial for not only terrorist acts but also other activities⁶. However, Stephen Thiru, the President of the Malaysian Bar, has denounced POTA 2015 as a shameless revival of the ISA, stating that it is of the same ilk as the Prevention of Crime Act 1959 (POCA), which was extensively amended and expanded in 2014, to allow detention without trial and restricted residence or internal banishment. Another of his objections is that while POTA 2015 purports to be directed at persons who are "engaged in the commission or support of terrorist acts involving listed terrorist organisations in a foreign country or any part of a foreign country," the failure to define "engaged," "commission," "support" and "involving" invests the legislation with an extremely wide reach, rendering it susceptible to abuse; almost anyone could be targetted under POTA 2015 (Thiru, 2015).

Part II of the Act lists the powers of arrest and remand. Section 3(1) allows for arrest without warrant if a police officer has reason to believe that grounds exist that would justify holding an inquiry under this Act. In such a situation, the suspect can be retained for not more than seven days, after which he has to be referred to the Public Prosecutor for direction. Sections 4(1) and (2) adds to

⁶ See Part II, Chapter 1 of ISA 1960 .

the period of detention possible under this Act. Terrorist suspects may be detained by the police for an initial investigation period of 21 days, which may be extended by an additional 38 days. Detainees are denied the right to counsel except during the formal recording of statement by the investigation officer. Based on the initial investigation, the POTB appointed by the King (acting on the advice of the minister) may order the suspect to be detained for up to two years without trial. The initial two-year detention may be extended by an unlimited number of two-year detention terms. The law denies detainees the right to challenge the POTB's decision through a judicial review other than on questions of compliance with procedural requirements. Additionally, POTA 2015 under Section 13(3) empowers the same board to restrict a suspect's place of residence, travel, access to communication facilities and the use of the Internet for renewable periods of up to five years. POTA 2015 relates much more directly to terrorism and extends the power of the already established Security Offences (Special Measures) Act 2012 (SOSMA) that replaced the ISA. While the ISA allowed initial detention of 60 days with unlimited renewals based solely on the will of the Home Minister, SOSMA 2012, on the other hand, limits the detention period for up to 28 days after which the Attorney-General can decide to prosecute on specific charges. Under POTA 2015, there is also no provision for bail as provided for under Section 13(1) SOSMA 2012, indicating a backward

movement because SOSMA 2012 was supposedly enacted to remove the negative application of law under the ISA, which did not have any provision for bail. POTA 2015 has the same 60-day initial detention period as the ISA but with possible extensions of up to two years at a time relying not on the Executive (Prime Minister) *per se* but on the executive powers of the POTB. Under Section 13(3)(1), there is also the inclusion of an electronic monitoring device that will be used to keep track of a suspect's location.

Section 3(1) and (2) are the most debated provisions of the Act. The major concern over POTA 2015, as with the earlier ISA, is that it gives police and the appointed POTB the power to detain suspects without warrant for an extended period of time and immunises the exercise of this power from judicial review (Soon, 2015). POTA 2015 has, as we have seen, been denounced as a reincarnation of the repealed ISA but the Deputy Home Minister, Datuk Seri Dr Wan Junaidi Tuanku Wan Jaafar, has denied this charge. According to him, POTA differs from the repealed ISA in a crucial way in that unlike the ISA, which conferred the power to detain a suspect by executive fiat, the power to detain is now vested in the appointed POTB rather than in the police or a minister. The current Prime Minister, Datuk Seri Najib Razak, has stated that the executive has no say in the decision to detain an individual. The POTB, according to the Prime Minister, is a "credible body" that ensures that only those truly involved in terrorism can be

detained and, therefore, guarantees the safety of Malaysia (Syahir Ashri, 2015). However, it is worth considering whether a board that is, ultimately, appointed by the government (the King acts on the advice of the Prime Minister in appointing the board) is truly independent of the government. Section 4(4) provides that no person shall be arrested or detained ...for his political belief or activity.” Critics see the exclusion of “political belief and political activity” as a ground for detention as providing false comfort. This is because Section 4(6) enacts that “...political belief or political activity means engaging in a lawful activity through—

- (a) the expression of an opinion or the pursuit of a course of action made according to the tenets of a political party that is at the relevant time registered under the Societies Act 1966 [Act 335] as evidenced by—
 - (i) membership of or contribution to that party; or
 - (ii) open and active participation in the affairs of that party;
- (b) the expression of an opinion directed towards any government in Malaysia; or
- (c) the pursuit of a course of action directed towards any government in Malaysia.”

The foregoing means that no person shall be arrested and detained solely for his/her political belief or political activity unless

the stipulated political activity is unlawful. The problem is that it is the government who decides whether a political belief or activity is lawful or unlawful. After all, if the government does not allow a political activity and organisers of that activity to go ahead and hold it, nothing prevents the government from labelling it as ‘terrorism’. It has been argued that in reality, there is no difference between this law and the ISA that was originally enacted to curb the activities of the Malayan Communist Party, but was later extensively used by the government on its political dissidents. There is also concern that organisations not registered as political parties under the Societies Act 1966 or not registered under the Societies Act 1966 at all, may be subjected to the wide powers of POTA 2015. Proponents of this view point out that in the past, politicians and political activists had been detained under the ISA for ordinary criminal activities that were nonetheless viewed as prejudicial to national security or public order (Thiru, 2015). Others see a conspiracy afoot. The latter see both the introduction of POTA 2015 and the proposed amendments to the Sedition Act 1948 as part of an all-out attempt by the Malaysian government to silence critics and dissent, a move that has already seen more than 150 individuals, including opposition politicians, journalists and human rights defenders being arrested, investigated and charged under the Act (Asian Forum for Human Rights and Development, 2015).

Part III of the Act details the inquiry process starting with Section 8, which

delineates the setting and composition of the POTB, while Section 9 deals with the appointment of the Inquiry Officer, which proscribes a police officer from being appointed as such. Section 10 spells out the extensive powers of the Inquiry Officer, Section 11 gives details on the Inquiry Officer's access to detainees/prisoners and, lastly, Section 12 gives information about the Inquiry Officer's report. These sections are criticised heavily as conferring draconian powers on the Inquiry Officer, who is not expressly defined in POTA, and is tasked with investigating the allegations against the accused person and presenting the evidence to the POTB (Thiru, 2015). Thiru stated that in this regard, the normal rules of evidence and criminal procedure are excluded and the Inquiry Officer may procure evidence by any means and in the absence of the suspect. The Inquiry Officer then presents his/her report to the POTB; there is no provision for the POTB to inquire into the report or require further investigation. Moreover, a suspect is not legally represented before the POTB. The POTB has extensive powers i.e. it may issue a detention order of up to two years or a restricted residence order of up to five years. These periods of detention or restricted residence may be subsequently renewed for an indeterminate period. These orders are made by the POTB without due process, in as much as the accused person is denied the right to make legal or any representation to the POTB (Thiru, 2015).

Part IV of the Act provides for detention and restriction orders. Under Section 13(1) (b), the POTB can impose detention of up to a period not exceeding two years or under Section 13(3), the POTB can also impose a restriction order for any period not exceeding five years with all or any restrictions and conditions listed in Section 13(3)(a) to (l). Further under Section 17(1), the POTB can extend the duration of the detention order by not more than two years and restriction order by not more than five years. Section 19(1) excludes judicial review in any court in respect of any act done or decision made by the POTB. Section 19(2) defines judicial review to include proceedings by way of:

- (a) an application for any of the prerogative orders of *mandamus*, prohibition and *certiorari*;
- (b) an application for a declaration or an injunction;
- (c) a writ of *habeas corpus*; and
- (d) any other suit, action or legal proceedings relating to or arising out of any act done or decision made by the Board in accordance with this Act.

The Human Rights Commission of Malaysia has described these sections as lacking sufficient safeguards against abuse of power. The deficiency in question includes lack of provision for ensuring transparency and accountability. The concerns of the Commission include the following:

- a) The lack of legal representation of an accused person during the Inquiry (Section 10(6)) as well as the provision for indefinite detention without trial (Section 13) are of serious concern and in breach of the right to a fair trial according to Article 5 of the Federal Constitution as well as Article 10 of the Universal Declaration of Human Rights (UDHR).
- b) The absence of a right to judicial review, save for the review of procedural matters is an affront to the right to a fair hearing and the right to have the legitimacy of one's detention determined by an independent and competent Court of Law.

The Commission asserted that the right to a fair trial is absolute and cannot be limited. Furthermore, arbitrary detention is a serious threat to liberty and to the enjoyment of all other fundamental rights. The Commission is also concerned by the lack of procedural safeguards necessary to prevent unlawful detention and is, therefore, of the opinion that their absence directly violates the Federal Constitution and International Human Rights Law (Hasmy Agam, 2015).

Concern that the Act contravenes principles of human rights are unlikely to go away. However, against such criticism can be pointed out the fact that similar provisions are found in anti-terrorism

statutes in other countries. Such provisions, designed to combat the increasing number of terrorist events in the world are to be found in the US' Patriot Act 2001, Canada's Anti-terrorism Act 2001, the UK's Prevention of Terrorism Act 2005 and India's POTA 2002⁷. Similar provisions found in POTA 2015 are also seen in the Gujarat Control of Terrorism and Organised Crime Bill (GCTOC), which was passed on 31 March, 2015⁸.

Compared to the UK's terrorism legislation, POTA 2015 can be considered the lesser evil. Table 1 gives a brief analysis of some of the UK's Acts enacted as a counter measure against terrorism.

⁷ After POTA was passed in March of 2002, the Indian media and Indian human rights groups observed and criticised frequent abuses of the law, including hundreds of questionable and prolonged detentions with no formal charges filed. The most visible of these involved political figures arrested by rivals in control of state law enforcement machinery (Gagn, 2015). It must be noted that this Act was repealed in 2004.

⁸ The bill seeks to give police far reaching powers to make arbitrary arrests, present confessions in custody as evidence as per clause 16, which is currently inadmissible as such and to even intercept phone calls as per clause 14. Further, the bill provides for extending the period of investigation from the stipulated 90 days to 180 days. It makes offences under the bill non-bailable. It also grants immunity from legal action to the state government and its officers against suits, proceedings and prosecutions for anything they do in 'good faith in pursuance of the Act' as indicated in Section 25 (Shezhad Poonawalla, 2015).

Table 1
UK's Terrorism Prevention Acts

ACT	CONTENTS
Terrorism Act 2000	The Terrorism Act, (2000) (HM Government, 2000), widened the definition of terrorism to apply to domestic terrorism and included, “any political, religious or ideological” cause that uses or threatens violence against people or property; creates new offences of inciting terrorism; enhances police powers, including stop and search and pre-charge detention for seven days; outlaws terrorist groups (including Al-Qaeda)
Anti-Terrorism, Crime and Security Act 2001	Initially authorised indefinite detention of foreign nationals suspected of terrorism without charge or trial – a system now replaced with control orders after the House of Lords’ ruling in <i>A and Others</i> ; extended executive powers over freezing bank accounts and assets of suspected terrorists
Prevention of Terrorism Act 2005	Introduced control orders, which allowed the government to restrict the activities of individuals it suspects of “involvement in terrorist-related activity,” but for whom there is insufficient evidence to charge
Terrorism Act 2006	Extended the pre-charge detention period from 14 to 28 days
Counter-Terrorism Act 2008	Enabled post-charge questioning of terrorist suspects; allows constables to take fingerprints and DNA samples from individuals subject to control orders; amends the definition of terrorism by inserting a racial cause

The common feature between POTA and the UK statutes cited above is that they suspend constitutional or human rights by vesting in the executive the extraordinary power to detain a suspected terrorist without charge or trial (Soon, 2015). Although there are similarities it does not rule out the fact that the provisions in the Acts undermine basic human rights.

Having analysed the key sections of POTA 2015, it is crucial to analyse if there are any strengths and weaknesses to identify whether critics are right in their claims that the law is a further slide toward authoritarianism in Malaysia and a definitive reversal of personal freedoms that the Prime Minister, Najib Razak, vowed to introduce soon after assuming power in 2009 (Fuller, 2015).

STRENGTHS AND WEAKNESSES OF POTA 2015

The following have been submitted as strengths of POTA 2015:

- (1) That the power to order the detention of a suspect is now vested not in the executive but in a body independent of the executive, the POTB. It is said that the POTB is an independent body because it is appointed by His Majesty, the King. The government has, it is said, no say in the decision to detain a suspect. From this, supporters of POTA 2015 conclude, “only those truly involved can be detained and therefore, POTA 2015 guarantees the safety of Malaysia” (Soon, 2015; Faidhur Rahman Abdul Hadi, 2015; Bilveer Singh,

cited in Faidhur Rahman Abdul Hadi, 2015).

- (2) The inclusion of the provision against detention on the grounds of political belief and activity fortifies the safeguard mentioned in (1) (Faidhur Rahman Abdul Hadi, 2015). It is also noteworthy that the Prevention of Crime Act 1959 (POCA) is also to be amended again to streamline the mechanism therein to be in tandem with POTA. Amendment was made to Section 4 of POCA 1959 to include that “No person shall be arrested and detained under this section solely

for his political belief or political activity (2A).”

- (3) Detention without charge or trial is also defended precisely because it precedes and prevents a crime. It is argued that rather than wait for a horrific terrorist act to be committed before detaining the terrorists, it is better to have preventive laws such as POTA in place (Soon, 2015; Bilveer Singh, cited in Faidhur Rahman Abdul Hadi, 2015).

Table 2 shows some of the strengths of POTA 2015.

Table 2
Strengths of POTA 2015

Sections	Content
8. (1)	A Prevention of Terrorism Board is established...appointed by the [King].
25.	Any registered person who is convicted of any offence committed after the date of the entry of his name in the Register under any written law shall be liable to imprisonment for a term of twice as long as the maximum term for which he would have been liable on conviction for that offence, and also to whipping.
27. (1)	Any person who knowingly harbours or conceals any person who enters any State, district, mukim, town or village in contravention of any order under Section 13 commits an offence and shall be punished with imprisonment for a term not exceeding five years or to a fine not exceeding ten thousand ringgit or to both: provided that this subsection shall not apply to the case of a wife harbouring or concealing her husband or a husband harbouring or concealing his wife.

The above sections have been seen as some of the strengths of the Act. For example, under Section 8 (1) of POTA 2015, the POTB is to be set up by the King, and this provision removes the power to detain from one person as was allowed under the ISA. However, a detailed analysis would

indicate that there is not much change in essence for the election of the POTB still depends on advice from the executive i.e. the Prime Minister. Another strength is seen in the existence of Section 25 on Double Penalties, which is very effective as this will instil fear in those who have been

arrested under suspicion for involvement in terrorists activities for he/she shall be liable to imprisonment for a term of twice as long as the maximum term for which he would have been liable on conviction for that offence and also to whipping. Thus, the Act can effectively save lives that could have been lost as a result of the activities of the person charged through these sections (Section 13 (1) and (3) as well as Section 25 of POTA 2015). Further, Section 27 (1) is also commendable as it will instil fear among those who intend to assist a terrorist for he/she can be punished with imprisonment for a term not exceeding five years or to a fine not exceeding ten thousand ringgit or both. It must be noted that although the Act discusses situations where the harbouring is committed between a married couple under this section, it is silent with regards to the parent-children relationship. In addition, it is worthy to bear in mind that despite passing such stringent laws with the intention of deterrence in mind, the effectiveness of the laws is still questionable for history shows that terrorists do not fear punishment or death as a result of strong belief in their ideologies and the conviction of the 'rightness' of their actions. While imposing sanctions, however, it must also be noted that any punishments imposed on terrorists should not be excessive nor should it breach any principles in the rule of law.

Despite the strengths attributed to POTA 2015 by its supporters, it is not free of criticism. The Malaysian Bar has

shown discontent with the loosely-defined provisions of POTA 2015, especially the definition given for the term 'terrorism' and other vague provisions as discussed. The Malaysian Bar also asserted that POTA 2015 is a repressive piece of legislation that is an affront to the rule of law and it is repugnant to the principles of natural justice (Thiru, 2015). For example, Thiru cited a scenario where a person can initially be remanded for investigative detention for a maximum of 60 days, with the Magistrate having no discretion to refuse a request by the police for remand, and therefore, reduced to being but a rubber stamp. In addition, he asserted that there is no provision for the person remanded to be informed of the grounds of arrest nor is there any guarantee that legal representation would be permitted. Amnesty International (2015) Malaysia executive director Shamini Darshini has harshly criticised POTA 2015 (and also the recently amended Sedition Act 1948) for its serious violations of human rights. Among some of her criticisms are that the provisions deny a detained person's access to a lawyers and that POTA 2015 allows suspects to be detained for a maximum of 59 days before they are brought to face the POTB, which could further order an extension of the detention up to two years.

Detractors have pointed out that POTA 2015 might be used on political rivals of the ruling government as POTA 2015, although similar to the Security Offences (Special Measures) Act 2012 (SOSMA) before it had stated that "No person shall be arrested

and detained solely for his political belief or political activity,” it only refers to parties registered under the Societies Act (Soon, 2015). This is indicated under Section 4 (6) of POTA 2015. According to Spiegel (2012), even this much-applauded provision stating that “No person shall be arrested and detained...solely for his political belief or political activity” is less helpful than it appears due to SOSMA 2012’s definition of political activity and belief as opinion or action reflecting the views of a political party that is legally registered under the Societies Act. Spiegel went on to add that the Registrar of Societies, a political appointee, has unassailable power to refuse or delay registration *ad infinitum*, a power that has been used repeatedly for political ends such as denying registration to a newly formed political party. He concluded that this may make those holding demonstrations for or against certain legislation to be committing a security offence. The researchers are of the opinion that this criticism, although aimed at SOSMA 2012, can be taken to apply to Section 4 (6) of POTA 2015 too.

The Asian Human Rights group stressed that POTA 2015 contains key elements of the now-repealed ISA, including allowing detentions without trial for up to two years with indefinite extensions (Asian Forum for Human Rights and Development, 2015). Even before this Act came into force, Evelyn Balais-Serrano, Executive Director of FORUM-ASIA, claimed that POTA 2015 is a blatant reincarnation of the ISA where it attempts to bring back the most

draconian elements of the ISA that had been heavily abused by successive *Barisan Nasional* (majority party within the ruling coalition) governments to stifle dissent. She went on to add that the reintroduction of detention without trial through POTA is a clear indication of the government’s return to authoritarianism despite its promise of democratic reform (Asian Forum for Human Rights and Development, 2015). Prior to the passing of this Act, she also urged the Upper House to reject POTA and ensure that the bill was not passed as it would have far-reaching and severe consequences on the fundamental rights of all Malaysians (Asian Forum for Human Rights and Development, 2015). Along the same lines, Wong Chen, a member of parliament from Kelana Jaya, said that there are severe restrictions of civil liberties under POTA and it can be seen as a threat to the very fragile fundamental liberties allowed in this country. He had urged the government to at least lengthen the time given to debate the new bill, given its importance. Wong also said that he found little difference between the ISA, a colonial-era preventive detention law which the Prime Minister, Najib Razak, had abolished in 2012, and the new bill (cited in Prashanth Parameswaran, 2015).

Using this as a basis, the authors analysed POTA 2015 to identify its seeming weaknesses to evaluate if there is justification to the criticism raised by concerned parties. Table 3 lists some of the sections that can be interpreted as weaknesses of the Act.

Table 3
Weaknesses of POTA 2015

Sections	Content
3. (1)	A police officer may without a warrant arrest any person if he has reason to believe that grounds exist which would justify the holding of an inquiry into the case of that person under this Act.
4. (1)	Whenever any person is taken before a Magistrate under subsection 3(3), the Magistrate shall ... remand the person in police custody for a period of twenty-one days; or
4. (2)	Any person remanded under paragraph (1)(a) shall, unless sooner released, on or before the expiry of the period for which he is remanded, be taken before a Magistrate shall ...order the person to be remanded in custody for a period of thirty-eight days...
8. (1)	A Prevention of Terrorism Board is established which shall consist of the following members to be appointed by the Yang di-Pertuan Agong: (a) a Chairman, who shall be a legally qualified person with at least fifteen years' experience in the legal field; (b) a Deputy Chairman; and (c) not less than three and not more than six other members.
8. (5)	The quorum for any sitting of the Board shall be three members.
9. (1)	The Minister may in writing appoint any person by name or office, and either generally or for any particular case, to be an Inquiry Officer for the purposes of this Act.
10. (3)	An Inquiry Officer may, for the purpose of any inquiry under this Act— (a) procure and receive all such evidence, in any form and whether the evidence be admissible or not under any written law for the time being in force relating to evidence or criminal procedure, which he may think necessary or desirable; (b) summon and examine witnesses on oath or affirmation, and may for those purposes administer any oath or affirmation;
10. (6)	Neither the person who is the subject of the inquiry nor a witness at an inquiry shall be represented by an advocate and solicitor at the inquiry except when his own evidence is being taken and recorded by the Inquiry Officer.
10. (8)	The Minister may by regulations prescribe the allowances to be paid to witnesses summoned under subsection (3).
12. (1)	An Inquiry Officer shall submit his report in writing to the Board within such period as may be prescribed by the Minister by regulations made under this Act
14.	14. No detention order shall be invalid or inoperative by reason— (a) that the person to whom it relates— (i) was immediately before the making of the detention order detained in any place other than a place of detention referred to in subsection 13(2); (ii) continued to be detained immediately after the making of the detention order in the place in which he was detained under Section 3 before his removal to a place of detention referred to in subsection 13(2); or (iii) was during the duration of the detention order on journey in police custody or any other custody to a place of detention referred to in subsection 13(2); or (b) that the detention order was served on him at any place other than the place of detention referred to in subsection 13(2), or that there was any defect relating to its service upon him.
19. (1)	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.

Sections 3 (1), 4 (1), 4 (2) and 19 (1) have been criticised by various groups and as such they will not be discussed for the authors share the same concerns. However, the authors would like to highlight some sections that could lead to ambiguity and subjectivity and be areas of concern. Two crucial sections are 8 (1), 8 (5) and 9 (1). Section 8 (1) stipulates the composition of the POTB. Here, the Act has not given clear details as to the requirement or qualification of those to be elected. It states that only the chairman needs to have 15 years' legal experience. The Act fails to stipulate any such requirement for the Deputy Chairman and the other members of the POTB. The question that begs asking concerns the lack of legal background. How can the members not be required to have a legal background when the nature of the offence is so serious that it allows arrest without warrant and detention without judicial review? Further, if the government wants the Act to be seen as neutral and devoid of political influence, then the power to appoint the Inquiry Officer should not be given to one person as stated by Section 9 (1). It would be better if a committee was set up to appoint a panel of persons who are eligible to act as an Inquiry Officer, from which one is selected when the need arises. Selection power could be vested in the King.

Section 8 (5) is also questionable. The quorum is limited to three members; this is rather a small number of officials. In addition, the presence of the Chairman is not made compulsory; this can be seen as a

flaw as he is the only one who has at least 15 years' legal experience. Without making his attendance compulsory, decisions will end up being made by people without a legal background. Further, Section 10 (3) (a) can be seen to blatantly contradict the rules related to admissibility of evidence in criminal procedures. Section 10 (6) also contravenes the principles of the Rule of Law, especially those of natural justice for it disallows legal representation for the accused as well as the witness. Further, Section 10 (8) allows the Prime Minister to prescribe allowances to be paid to witnesses summoned under Section 10 (3) (b). This section raises some concern for it can be misused as there is no criteria put in place on how such allowances are to be made in terms of amount and who qualifies. Section 12 (1) again reiterates executive intervention by allowing the Minister to determine the period for the submission of the report. Section 14 also leaves room for criticism as it vetoes judicial review even when there is an error in the due process of the detention order. Lawyer Syahredzan Johan voiced his skepticism via Twitter saying, "We are not questioning the need to combat terrorism. But safeguards must be put in place to ensure that the laws enacted are not abused. Ousting jurisdiction of the Courts via ouster section takes away a very important safeguard (cited in Syahir Ashri, 2015). Thus, it can be stated that given the trenchant criticism levelled against it, POTA needs to be amended.

CONCLUSION

Recent trends in terrorist activities around the world has made it crucial for nations to develop preventive detention measures. However, these measures tend to ride roughshod over constitutional and human rights. The question that needs to be addressed is whether such laws that legalise violation of human rights can be acceptable since they allow serious abrogation of human rights. Thus, as a conclusion, it is advocated that the government take note of the criticism that has been voiced against POTA 2015 for the benefit of the nation. The Human Rights Commission of Malaysia, for instance, conveyed its regret that the Prevention of Terrorism Act 2015 (POTA) was passed by Parliament despite uncertainty in several of its provisions and particularly for its formulation, which was done without consultation with the Commission which, under its founding Act, is mandated, *inter alia*, “to advise and assist the Government in formulating legislation and administrative directives and procedures and recommend the necessary measures to be taken” with respect to human rights. The Commission believes many provisions within POTA are not in line with international human rights standards (Hasmy Agam, 2015). In addition, the Asian Forum for Human Rights and Development (2015) criticised the Malaysian government for reintroducing detention without trial through the hasty passing of POTA by the Lower House of Parliament on 6 April, 2015 and for proposing amendments to the Sedition Act that were tabled for first reading

at Parliament on 7 April, 2015. According to Balais-Serrano (2015), it is crucial for the “international community to recognise that Malaysia is clearly not the moderate and democratic country the government purports itself to be.” He added that “the latest developments demonstrate that a full-blown authoritarian state is re-emerging in Malaysia, with deeply entrenched repressive laws and practices and a government that is absolutely intolerant of any form of dissent and criticism.” Further, Stephen Thiru (2015) claimed that by introducing POTA, Malaysia has also violated its international commitment to abide by United Nations Security Council Resolution 2178, passed unanimously on 24 September, 2014, which provides that:

[The Security Council reaffirms that] Member States must ensure that any measures taken to counter terrorism comply with all their obligations under international law, in particular international human rights law, international refugee law, and international humanitarian law, [and underscores] that respect for human rights, fundamental freedoms and the rule of law are complementary and mutually reinforcing with effective counter-terrorism measures, and are an essential part of a successful counter-terrorism effort and notes the importance of respect for the rule of law so as to effectively prevent and combat terrorism,

and [notes] that failure to comply with these and other international obligations, including those under the Charter of the United Nations, is one of the factors contributing to increased radicalization and fosters a sense of impunity...

However, despite these criticisms, in the new millennium, Malaysia is facing the very real and increasing prospect of regional aggressors, third-rate armies, terrorist groups and even religious cults seeking to wield disproportionate power by acquiring and using weapons of mass destruction (Nagl, 2010). As a result, despite human rights violations, Acts like POTA 2015 are here to stay. This is supported by the Home Minister Dato' Seri Dr Ahmad Zahid Hamidi, who, in debating POTA 2015, asserted that terrorism is a real threat and preventive measures must be carried out (The Khilafah, 2015). However, according to Robertson (2015), prevention of terrorism is important but it needs to happen in line with and not in contradiction of international human rights law. Datuk Saifuddin Abdullah (cited in Syahir Ashri, 2015) believes in a counter-terrorism plan that takes into account democracy, liberty and human rights and already existing entities like the Asean Institute for Peace and Reconciliation (AIPR) and Counter Violent Extremism (CVE). He went on to argue that aligning all of these agencies and groups with a command centre that reports directly to the Prime Minister would be a better alternative that does not infringe on

the rights of citizens.

Political analyst Dr Chandra Muzaffar (cited in Soon, 2015) asserted that the government should focus upon the indoctrination of the young generation with a set of positive beliefs. The role played by *ulamas* (Muslim scholars) is of utmost importance when it comes to fighting the emergence of militant activity. According to him, tougher laws such as POTA 2015 and other serious punishments will not help very much when it comes to preventing violent extremism. He stated, "Instead of imposing new laws and harsh penalties, it is important for the government to identify the root causes of any terrorism activities in the country which could have been linked to Al- Qaeda and Abu Sayyaf" (cited in Soon, 2015). He also asserted that Malaysia should have laws but it should not depend on the law as the ultimate way to combat extremism but rather, focus should be given to the drivers of such extreme acts while parties concerned should find other effective solutions to combat terrorism. He concluded succinctly that criminals of any type, including terrorists, should be given a fair trial before being detained (Soon, 2015). This view is further supported by Eric Paulsen, Executive Director of Legal Rights Group, Lawyers for Liberty, who warned that while security concerns were legitimate, the approach (enactment of the new Act) was far too heavy-handed. According to Wong Chen, "While the safety and security of Malaysia must be of paramount concern, the answer will not be found in the reintroduction of oppressive

and outdated preventive laws like ISA 1960 that provide for wide and arbitrary powers to detain suspects for up to two years, renewable indefinitely, and without recourse to due process and a fair trial” (cited in Prashanth Parameswaran, 2015). Going forward, as political analyst Chandra Muzaffar aptly put, “If the government is serious in fighting the growing threat of terrorism, they should pay more attention to identifying the causes and address them accordingly, not by using force or violence to contain militant activity” (cited in Soon, 2015).

The authors conclude on a note that strict laws are needed to combat the increasing terrorist acts that are real and imminent worldwide. They concede that POTA 2015, despite being enacted to keep Malaysia safe from the threat of terrorism, which would undermine national security, raises grave concern. This is seen from historical evidence starting from the ISA, where the Malaysian Government resorted to the practice of using preventive detention measures to suppress political dissent and human rights activities.

The heated opposition to this Act highlights the need for serious thought and more research before any Acts are passed. Views of interested parties should be taken into consideration prior to the passing of an Act, especially one that seeks to counter terrorism. Representatives from around the world could gather and offer ideas to design an Act that can cater for all countries, bearing in mind that there must be a balance between protecting the security of the nation

against terrorism and upholding human rights at the same time.

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