COUNTER-TERRORISM AND THE RULE OF LAW IN MALAYSIA: AN ANALYSIS OF LEGISLATIVE RESPONSE

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COUNTER-TERRORISM AND THE RULE OF LAW IN MALAYSIA: AN ANALYSIS OF LEGISLATIVE RESPONSE

ABSTRACT

In this ubiquitous age of terrorism threat facing most nations, the question arises in this study is whether democratic states like Malaysia, India and the United Kingdom (UK) who uphold the concept of Rule of Law, have encouraged or lessened terrorist happenings through their various legislative responses to terrorism. There appears to be a continued worrying trend in not applying the Rule of Law by the courts in Malaysia and its counterparts in India and the UK during a state of emergency. Whilst both countries share similar legal system and process with Malaysia in many aspects, it is further observed that the enacted terrorism legislations were insidious which allow for the circumvention of constitutional and procedural safeguards. Therefore, it is expected that protecting basic human rights is overlooked whenever a democratic nation fights terrorism. Hence, the focus study of these selected jurisdictions seeks to identify and examine the similar pattern of enacted terrorism legislations with considerable impact in these key areas such as, the abnegation of individual human rights; the doctrine of separation of power; judicial activism or restraint towards upholding the Rule of Law; and finally, the impact on the democratic functionality of the States in combating terrorism. The study will also examine what lessons can Malaysia develop from the Indian and UK's experience in countering terrorism. This research will reveal the values of the Rule of Law have been sacrificed, and it creates undemocratic results not only in Malaysia but in the jurisdictions compared when enforcing counter-terrorism measures. It fails to consider human rights values whenever a conflict in balancing between individual rights and national security arises.

The interest of the States appears to dominate the constitutional rights of the citizen. The study will conclude that a democratic nation must always uphold the values and respect for everyone which is central to human rights even if that person is an enemy of the State. It is, therefore, indispensable for democratic nations to preserve the tradition of having a respectable legal system.

Keywords: Anti-terrorism, National Security, Rule of Law, POTA 2015.

ANTI-KEGANASAN DAN KEDAULATAN UNDANG-UNDANG DI MALAYSIA: SATU ANALISA TINDAK BALAS UNDANG-UNDANG

ABSTRAK

Dalam zaman ini, kerap kali ada ancaman keganasan yang dihadapi oleh kebanyakan negara, maka persoalan yang diungkitkan dalam penyelidikan ini adalah sama ada negara berdemokrasi liberal seperti Malaysia, India dan United Kingdom (UK) yang memegang teguh kepada konsep kedaulatan undang-undang pada hakikatnya, menggalakkan atau mengurangkan lagi ancaman keganasan yang sering berlaku dengan menggunakan pelbagai peruntukan undang-undang yang sedia ada. Nampaknya terdapat trend berterusan yang membimbangkan di mana penghormatan kepada kedaulatan undang-undang telah gagal dilaksanakan oleh pihak mahkamah di Malaysia maupun di negara-negara seperti India dan UK apabila kecemasan menimpa negara-negara tersebut. Walaupun kedua-dua negara yang dipilih dalam penyelidikan ini mempunyai sistem undang-undang yang sama dalam kebanyakan aspek, adalah diperhatikan undang-undang keganasan yang diperkenalkan telah mengakibatkan perlindungan hak-hak dalam perlembagaan ataupun undang-undang yang sedia ada diabaikan oleh pihak kerajaan. Justeru itu, perlindungan di bawah undang-undang telah lupus apabila sesebuah negara berdemokrasi menentang unsur-unsur keganasan. Fokus kajian terhadap negara India dan UK adalah bertujuan untuk mengenal pasti dan mengkaji corak yang sama pelbagai perundangan keganasan yang teleh diperkenalkan oleh mereka yang mempunyai impak yang besar dalam bidang-bidang utama berikut seperti beikut, pengorbanan hak asasi manusia; doktrin pengasingan kuasa; aktivisme kehakiman atau halangan ke arah menegakkan kedaulatan undang-undang; dan akhirnya, fungsi demokratik sesebuah negara.

Penyelidikan ini juga akan meneliti apakah pengajaran yang boleh diteladani oleh Malaysia dari negara seperti India dan juga pengalaman yang dialami oleh UK. Akhirnya, tesis ini akan mendedahkan bahawa nilai-nilai kedaulatan undang-undang telah diabaikan, dan ia mewujudkan suasana yang tidak berdemokratik sebahagian besar dapat dilihat dari keputusan-keputusan yang diberikan oleh pihak mahkamah di Malaysia dan juga dari negara-negara yang di kaji apabila melaksanakan langkah-langkah anti keganasan. Selain dari itu, kerajaan juga tidak mengambil kira nilai-nilai hak asasi manusia apabila timbul konflik dalam mengimbangi antara hak individu dan keselamatan negara. Penyelidikan ini akan mendedahkan bahawa kepentingan negara nampaknya lebih dipentingkan dari pembelaan hak-hak perlembagaan seseorang warganegara. Seterusnya, penyelidikan ini akan menyimpulkan bahawa sesebuah negara berdemokrasi mesti sentiasa menegakkan nilai-nilai dan menghormati setiap individu yang merupakan faktor yang penting kepada hak-hak asasi manusia, walaupun seseorang tersebut dianggap sebagai musuh negara. Maka, adalah wajip untuk negara-negara berdemokrasi mengekalkan tradisi yang mempunyai sistem undang-undang yang dihormati.

Kata Kunci: Anti-Keganasan, Keselamatan Negara, Kedaulatan Undang-undang, POTA 2015.

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LIST OF ABBREVIATIONS

Common Abbreviations

e. g – (exempli gratia) for example

et. al – (et alia): and others

etc. – and so fourth

i.e. – that is

id. – (idem) the same below

ibid – (ibidem) in the same place

op cit – in the work cited

Vol. – volume

Notes on Abbreviations

ECHR – European Court of Human Rights

FC – Federal Court

HL – House of Lords

ICCPR - International Covenant on Civil and Political Rights

SC – Supreme Court

UN – United Nations

Law Reports

AIR – All Indian Report

ALL ER - All England Report

LNS – Legal Network Series

Journals

AMR – All Malaysian Report CLJ – Current Law Journal

CLJ – Current Law Journal

IIUM Law Journal – International Islamic University Law Journal

JMCL – Journal of Malaysian and Comparative Law

MLJ – Malayan law Journal

MLJA – Malayan Law Journal Article

MLJU – Malayan Law Journal Unreported

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Emergency Regulations Ordinance 1948

Federal Constitution of Malaysia

Internal Security Act, 1960 (Repealed)

Judges' Code of Ethics Act 2009

Peaceful Assembly Act 2012

Penal Code [Act 574]

Penal Code (Amendment Act) 2003

Prevention of Crime Act 1959

Prevention of Terrorism Act 2015

Rules of Court 2012

Security Offences (Special Measures) Act 2012

Special Measures Against Terrorism in Foreign Countries Act 2015

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Country	Name of Legislations	Date in force
Malaysia	Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 [Act 613]	15 January 2002
	Penal Code (Amendment) Act 2003	6 March 2007
	Prevention of Terrorism Act 2015	1 September 2015
	Special Measures Against Terrorism in Foreign Countries Act 2015	15 June 2015
India	Prevention of Terrorism Act 2002	21 September 2004 *(Repealed)*
	Terrorist and Disruptive Activities (Prevention) Act 1987	24 May 1987 *(Repealed)*
	Unlawful Activities Prevention Act 1967	30 December 1967
UK	Anti-terrorism, Crime and Security Act 2001	14 December 2001
	Counter-Terrorism and Security Act 2015	12 February 2015
	Prevention of Terrorism Act 2005	11 March 2005 *(Repealed)*
	Terrorism Act 2000	20 July 2000
	Terrorism Act 2006	30 March 2006
	Terrorism Prevention and Investigation Measures Act 2011	14 December 2011

2. DEFINITION OF TERRORISM IN MALAYSIA, INDIA & THE UK

(*The differences are highlighted in **BOLD PRINT***)

(i) Malaysia – Section 130B (2) Chapter VIA of the Penal Code

(2) "…. *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 organization to do or refrain from doing any act.

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

(a) involves serious bodily injury to a person;

(b) endangers a person's life;

(c) causes a person's death;

(d) creates a serious risk to the health or the safety of the public or a section of the public;

(e) involves serious damage to property;

(f) involves the use of firearms, explosives or other lethal devices; 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]**."

(ii) India – Section 15 of the Unlawful Activities (Prevention) Act 1967

(15) '*Terrorist act'* - Whoever does any act with intent to threaten or likely **to threaten the unity, integrity, security, economic 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**, -

(a) by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisonous or noxious gases or other chemicals or by any other substances (whether biological radioactive, nuclear or otherwise) of a hazardous nature or by any other means of whatever nature to cause or likely to cause -

(i) death of, or injuries to, any person or persons; or

(ii) loss of, or damage to, or destruction of, property; or

(iii) disruption of any supplies or services essential to the life of the community in India or in any foreign country; or

(iiia) damage to, the monetary stability of India by way of production or smuggling or circulation of high quality counterfeit Indian paper currency, coin or of any other material; or

(iv) damage or destruction of any property in India or in a foreign country used or intended to be used for the defence of India or in connection with any other purposes of the Government of India, any State Government or any of their agencies; or

(b) overawes by means of criminal force or the show of criminal force or attempts to do so or causes death of any public functionary or attempts to cause death of any public functionary; or

(c) detains, kidnaps or abducts any person and threatens to kill or injure such person or does any other act in order to compel the Government of India, any State Government or the Government of a foreign country or an international or inter-governmental organisation or any other person to do or abstain from doing any act; or commits a terrorist act.

(iii) UK – (Part 1) Section 1 of the Terrorism Act 2000

(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, **racial** or ideological cause.

(2) Action falls within this subsection if it:

(a) involves serious violence against a person,

(b) involves serious damage to property,

(c) endangers a person's life, other than that of the person committing the action,

(d) creates a serious risk to the health or safety of the public or a section of the public or

(e) is designed seriously to interfere with or seriously to disrupt an electronic system.

The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.

(4) In this section -

(a) **"action" includes action outside the United Kingdom,**

(b) a reference to any person or to property is a reference to any person, or to property, wherever situated,

(c) **a reference to the public includes a reference to the public of a country other than the United Kingdom**, and

(d) "the government" means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the United Kingdom.

(5) In this Act, a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation.

CHAPTER 1: INTRODUCTION

1.1 RESEARCH BACKGROUND

The world we live in today is facing with pervasive terrorism threats. Some are large scales that have caused grievous harm to humans. The aftermath of 9/11 event in New York has shaped how the world perceives the despicable act of terrorism. The world acknowledged the devastating effect it can bring to humanity when thousands of innocent lives have been sacrificed by the irresponsible act of the terrorists.[1] The lethality an act of terrorism can cause to humankind by non-state actors forced the United Nation Security Council to pass Resolution 1373[2] mandating on all nations throughout the world to enact new anti-terrorism laws and to take proactive steps in various counter-terrorism measures. In response to the Security Council Resolution 1373 and the massacre brought by the 9/11 attacks, the United States hastily enacted the US Patriot Act 2001 followed by similar reactions of a few others notable liberal democratic nations in the world like the United Kingdom, Canada, Australia and India. Human Rights Watch also reported that 140 countries have since passed their respective domestic anti-terrorism laws post 9/11 attack.[3] Although most democratic States have passed new counter-terrorism legislations ensuing from the clarion calls from the United Nations, terror incidents persist after more than a decade since 9/11. In August 2014, the rise of an extreme Islamist group known as the Islamic State of Iraq and the Levant (ISIL) made the world to revisit their counter-terrorism policy and legislation with the passing of UN Security Council Resolution 2178. The terror plot committed by the ISIL displayed brazen brutality on

[1] Mohamed Nagdy and Max Roser (2016) 'Terrorism' Retrieved from: https://ourworldindata.org/terrorism/ [Site accessed on 02.09.16]
[2] Resolution 1373 (2001) dated 28.09.2001 available at: <http://www.un.org/en/sc/ctc/specialmeetings/2012/docs/United%20Nations%20Security%20Council%20Resolution%201373%20(2001).pdf > Site accessed on 13.08.16
[3] "Global: 140 Countries Pass Counterterror Laws since 9/11, Human Rights Watch accessible at: https://www.hrw.org/news/2012/06/29/global-140-countries-pass-counterterror-laws-9/11"

their captives. When photojournalist James Foley was beheaded and aired live on the YouTube.com Channel, the broadcast sent shock waves to the world and sparked off the world's condemnation as it was a barbaric act unacceptable in our modern society. The continued engagement by ISIL on social media such as Twitter and Facebook for their global recruitment drive for new members worried most worlds' governments including Malaysia. Thus, the United Nations Resolution 2178 [4] was meant to prevent the continual recruitment drive by ISIL of local individuals to become their foreign terrorist fighters and to inhibit the indoctrination of their extreme ideology among its supporters. Responding to the Resolution 2178, Malaysia has passed the Prevention of Terrorism Act, 2015 ('POTA 2015').

On the local front, Malaysia has been fighting domestic terrorism since independence from the British in 1957 by using local laws. The now repealed Internal Security Act, 1960 ('ISA 1960') was one of the infamous security law ever promulgated to serve as a preventive measure under Article 149 of the Constitution. The primary intention of ISA 1960 was to combat subversion threats against the security of the State then especially the constant threat coming from the Communist Party of Malaya ('CPM').[5] ISA 1960 was also meant to safeguard the public interest and security of Malaysia besides subduing organised violence against persons and property. With the demise of CPM in 1989, ISA 1960 continued to be used and abused by the government to suppress political dissidents over the years and it became known as a controversial piece of legislation that allows the State institutions, in particular, the police to evade the normal criminal procedures for common crimes and using arbitrary pre-trial detention of the suspect without legal

[4] "UN SCR 2178 (2014)" <http://www.un.org/en/sc/ctc/docs/2015/SCR%202178_2014_EN.pdf>
[5] Kheng, C.B. (2009). The Communist Insurgency in Malaysia, 1948-90: Contesting The Nation-State and Social Change". *New Zealand Journal of Asian Studies*, *11*(1), 132-152.

justification.[6] This has irked various stakeholders like the Bar Council[7] and other civil rights organisation because it directly infringed the basic human rights of the suspects. After much criticisms and continued pressure on the government to repeal the ISA 1960, at last, it came true when Security Offences (Special Measures) Act, 2012 ('SOSMA') was passed to replace ISA.

Historically, Malaysia has been fighting with domestic terrorism starting with the CPM and thereafter, some separate incidents of terror were instigated by small fundamentalist groups such as *Al-Mau'nah* and the '*Memali Incident*' led by Ibrahim Libya. Fortunately, our Royal Malaysian Police successfully foiled those minor domestic terrorism threats just in time before they achieved their ambitions. The only foreign encounter with terrorists by Malaysia was in 2013 when a militant group sent by their leader known as Sultan Jamalul Kiram III tried to claim his territorial rights over Sabah by invading Lahad Datu, Sabah. However, they were all defeated and caught by our security force and recently pleaded guilty in court after being charged.[8] To date, Malaysia has been strenuously fighting with domestic terrorism using readily available legislative tools starting from the previous ISA 1960 (repealed) to the existing legislations such as SOSMA 2012, the Penal Code (Chapter VIA) and the new POTA 2015. However, those counter-terrorism legislations enacted were accused by the proponents of human rights as a grave threat to the enjoyment of essential human rights and infringed the concept of the rule of law due to its insidious nature.[9] Thus, it will be opened to abuse by the legal enforcement agency and other institutional arms of the government.[10] The political

[6] Human Right Watch, 2011, "Malaysia: End Use of Internal Security Act- Detention of 13 a Step Back for Reform" < https://www.hrw.org/news/2011/11/21/malaysia-end-use-internal-security-act> Site accessed on 8.8.2016.
[7] Memorandum by the Malaysian Bar Council on ISA dated 19 July 2010 available at: <http://www.malaysianbar.org.my/index.php?option=com_docman&task=doc_view&gid=2696 > Site accessed on 8.8.2016
[8] *"Six in Lahad Datu Intrusion Case Plead Guilty"* available at: <http://www.bernama.com/bernama/v8/ge/newsgeneral.php?id=1218369>
[9] The Malaysian Bar - Joint Press Release | *Detention Without Trial is Oppressive and Unjust and Violates the Rule of Law*. *Malaysianbar.org.my*. Retrieved 2 September 2016, from <http://www.malaysianbar.org.my/press_statements/joint_press_release_by_the_three_bars_of_malaysia_%7C_detention_without_trial_is_oppressive_and_unjust_and_violates_the_rule_of_law.html>
[10] Ibid

opponents allege the abuse by the government as a threat to Malaysia's democracy. Despite having numerous legislations in hand to combat terrorism threat with some overlapping the others, the issue at hand is to what extent such abuse of power by those institutional arms in the government impacts the application of the rule of law? Is there a blatant disregard for the rule of law in implementing counter-terrorism policy by the government?

What then is 'Rule of Law'? Can the concept of the rule of law help to deter or mitigate terrorist cause? The rule of law is said to have been breached when the legal norms taken by the government do not match the standards made known to the public or rather when officials act arbitrarily without due consideration to the legal rules already set out in advance. Another view propounded by Albert Dicey stressed on the proper operation of the ordinary courts where the rule of law is being applied widely. This procedural understanding of the rule of law requires courts to pay attention to fairness that is signalled by ideals such as "natural justice" and "procedural due process." [11] The rule of law is violated when the courts supposed to represent these procedural safeguards are weakened or interfered with. The aspect of the doctrine of separation of powers and the independence of the judiciary became intermingled with one another and therefore, it is incompatible with the rule of law. With the widespread serious terrorist threats affecting most democratic nations today, the challenge of adherence to the rule of law became more inimical especially when there is a strong tendency to cross the boundary that divides the lawful from the unlawful in the name of fighting terrorism. Some examples of government oversight to uphold the rule of law in the key practice area of counter-terrorism are identified as follow:

[11] DICEY A.V., "*Introduction to The Study of the Law of the Constitution*" II0-2I (Liberty Classics edition, I982)

- Pre-trial investigation and detention of terrorism suspects which encroach personal liberty with prolonged pre-trial detention;

- The right to a fair trial and judicial independence can be infringed with the setting up of Special courts or Tribunal to hear terrorism cases based on a different set of procedural rules by circumventing the existing criminal justice system;

- Provisions in the anti-terrorism laws that urge the courts to apply adverse inferences which run contrary to the accepted criminal liability principle of presumption of innocence/guilt of suspects;

- Broad unchecked powers given to the executive will promote arbitrary, unfair and confusing application between anti-terrorism laws and ordinary criminal laws.

Having identified the government's oversight in counter-terrorism key practice area, Hardin opined that we could not depend solely on the judiciary alone to pass a quality rule of law to fight terrorism. Citizens must also be actively involved by serving as watchful eyes and ears on domestic terrorist activities.[12] This is true in a practical sense because the law is powerless to prevent an act of terrorism from occurring or repeating. For example, no law can ever deter anyone who wishes to become a suicide bomber. Hence, even if we have the most effective anti-terrorism legislation in place, it may be the most invasive legislative tools if other aspects of the fundamental human rights and the rule of law are disregarded.

For this study, a comparative perspective from other jurisdictions will be explored. India, being the largest democratic nation in the world today will be selected for this research besides looking at the United Kingdom's perspective. There are many areas of convergence and divergence between Malaysia's and India's anti-terrorism laws. As both

[12] Hardin, Russell (2001): "*Law and social order*" Philosophical Issues 11:61-85, Social, Political and Legal Philosophy, 2001;

countries were formerly under the British colonial rule, the legal and administration of justice system were inherited from the English common law system, and both countries used to share many legal similarities. This is not surprising as in many aspects; the Indian criminal legislations like their Evidence Act 1872, Indian Penal Code 1860 and Criminal Procedure Code 1973 are similar to the Malaysian criminal laws. In relation to fighting terrorism, India too has its fair share of terrorism threat since independence coming from the states of Punjab, Kashmir and Jammu near Pakistan's border. Among the notorious incidents of terror that happened in India were aimed at the government with the assassinations of their Prime Ministers like Indira Gandhi in 1984 and Rajiv Gandhi in 1991. However, the most prominent were the armed attack on their Parliament in 2001 and the devastating 2008 Mumbai terror attacks against tourists. India's early anti-terrorism laws can be traced to Terrorist Disruptive Activities Act (Prevention) 1987 ('TADA'), the Unlawful Activities (Prevention) Act, 2008 ('UAPA'), and the repealed Prevention of Terrorism Act, 2001 ('Indian POTA'). All the anti-terrorism laws in India have also caused human rights concerns and susceptible to chronic abuse by their law enforcement agencies.[13] The seriousness of the human rights abuse has prompted the Indian Supreme Court to make these comments, "*terrorism often thrives where human rights are violated*" and *"[t]he lack of hope for justice provides breeding grounds for terrorism.*" [14] Much like Malaysia, many opponents of anti-terrorism laws in India have predicted that the judiciary would be deferential and are complicit to many of these counter-terrorism efforts by the government instead of upholding the rule of law.[15] However, does this lead to the surrender of our guaranteed constitutional rights in exchange for national security and interests of the State? Where is the protection under the law by the court in times of terrorist violence? To answer these questions, it is

[13] Kalhan, A. (2006) "Colonial continuities: Human rights, terrorism, and security laws in India" *Columbia Journal of Asian Law*, *20*, 93.
[14] See: "*People's Union for Civil Liberties v. Union of India"* AIR (2004) SC at page 456, 467
[15] *Op cit*. Kalhan. A.

necessary to explore the exact relationship between the fight against terrorism and applying the concept of the rule of law.

Like India and Malaysia, the United Kingdom (UK) is also a victim of both domestic and international terrorism. Terrorist activities in the UK started from the conflict in Northern Ireland, which is a British territory. The major challenge has been the movements of the Irish Republican Army (IRA) where the IRA has taken its struggle to the streets of London and other cities in England. They assaulted ordinary civilians, armed forces, police and the business sector via separate bombings. On 7 July 2005 (7/7), the suicide bomb attacks that crippled the London public transport system brought terrorism to serious political attention again. Following the 7/7 incident, the government through a series of new anti-terrorism laws changed substantively the procedure regarding the power of the police in investigating and prosecuting terror suspects. There have been numerous terrorism legislations enacted since 2000 by the UK government prior to the 7/7 incident. Among the notable legislations were Terrorism Act 2000 (TA 2000), Anti-terrorism, Crime and Security Act (ATCSA) 2001, Prevention of Terrorism Act (PTA) 2005 (Repealed), Terrorism Act (TA) 2006, Counter-Terrorism Act (CTA) 2008, Terrorism Prevention and Investigation Measures Act 2011 (TPIM 2011) and the most recent is the Counter-Terrorism and Security Act (CTSA) 2015. With more new legislations being introduced over time with some parts being repealed, amended or extended, these new anti-terrorism laws have caused tension and anxiety for its compatibility with human rights in the UK. But it is noteworthy to observe the glaring divergence between Malaysia's counterterrorism practice and the UK. In the UK, if any anti-terrorism laws contradicted the Articles in the European Convention on Human Rights (ECHR) prior to the UK exiting the European Union[16] or their domestic Human

[16] "*Brexit: All you need to know about the UK leaving the EU* - (2016). *BBC News*." Retrieved 31 December 2016, from http://www.bbc.com/news/uk-politics-32810887

Rights Act 1998, the House of Lords stand ready and willing to strike down the law without hesitation. This can be seen in the famous case known as HMP Belmarsh [17] a case decided in 2004 under the ATCSA 2001 by the House of Lords. It was held that section 23 of the ATCSA 2001 was incompatible with Articles 5 and 14 of the European Convention where it is disproportionate and permits detention of suspected international terrorists in a way it discriminates based on one's nationality or immigration status. In response to the said ruling, Part 4 of the ATCSA 2001 was repealed and replaced with the control order under the PTA 2005 by the UK government. Unfortunately, section 3(10) of the PTA 2005 was later also found to be inconsistent with Article 6.1 of ECHR provision for the right to a fair trial and repealed. Justice Sullivan of the UK High Court called the PTA 2005 an "affront to justice" in a case known as RE: MB.[18] Just from the two case-law examples, it goes to show the UK courts regardless of their hierarchy does not simply pledge allegiance to the legislative or executive when upholding the rule of law and human rights. Because of this, the quality of the rule of law in the UK's counterterrorism practice is worth noting.

Now, the main theoretical premise of this thesis is whether anti-terrorism laws must be complemented with strict adherence to the rule of law to be effective as the concept of the rule of law has always been the foundation of every democratising nation. This premise echoed the observation by Ban Ki-moon, the Secretary-General of UN as follows, *"All too often; national counter-terrorism strategies have lacked basic elements of due process and respect for the rule of law."*[19] In pursuing this further, this study will investigate if applying the good quality rule of law is essential to the success of counter-terrorism campaigns in Malaysia by comparing the approach taken by India and the UK.

[17] A & Others v Secretary of State for the Home Department [2004] UKHL 56
[18] [2006] EWHC 1000 (Admin)
[19] Ban Ki Moon - *"5 steps to prevent violent extremism"* available at <http://www.un.org/sg/statements/index.asp?nid=9388>

1.2 STATEMENT OF PROBLEM

In responding to UN Security Council Resolution 1373 in the war on terror, many member countries have enacted new emergency anti-terrorism laws that change their domestic legal framework significantly.[20] The assumption surrounding the belief of most nations in the war on terror is that the existing laws are insufficient or ineffective to counter this 'new criminal' offence. Therefore, a new and improved legislation is needed. However, the drawback is the emergence of these 'extraordinary new laws' ruined the proper functioning of good governance, transparency, the due process and individual freedom - what otherwise would be regarded as a benchmark of most liberal democratic nations.[21] Some legislators argue that during a state emergency, the intrusion of our civil rights, the right to due process and the right not to be detained without just cause are not justifiable.[22] While the government is tasked to protect the lives of its citizens, simultaneously it must tread a fine line without compromising fundamental democratic values. Often in a rush to legislate new emergency laws, the government overlooks less invasive steps such as tightening our border control using the immigration law to curb the inflow and outflow of suspected terrorists, enhancing the intelligence-gathering capabilities and suppressing the financial flow from the suspected terrorist activities. Instead, the government in their overzealous act to fight terrorism prefers to enlarge broad legal powers and is perceived as abusing its power under the criminal justice system.

Introducing POTA 2015, in particular, has violated due process mechanism besides recommending strict procedures and penalties to tackle the danger of terrorism threats. The pre-trial detention of people as provided under the new preventive anti-terrorism laws

[20] Roach, Kent, "*The Criminal Law and Terrorism"* Global Anti-Terrorism Law and Policy, Victor Ramraj, Michael Hor, Kent Roach, eds., Cambridge University Press 2005.
[21] *Ibid*.
[22] *"Najib is wrong - Sosma, Pota and NSC not necessary to fight terrorism*." (2016) Malaysiakini. Retrieved 3 September 2016, from https://www.malaysiakini.com/news/349950

provision is an affront to the traditional democratic legal system and has been arbitrarily applied to disrupt civil liberties and rights in the interests of national security by the enforcement agency previously under other preventive security laws in Malaysia.[23] Consequently, the government threatens the well-being of a democratic society and not the terrorist threat itself. In the words of legal scholar Alan Dershowitz, he opined, "*the Government loses credibility when it cannot tackle issues along due process concerns and resort to other means of prosecuting people*." [24] Among the common fears in the new anti-terrorism legislations are the deviation of criminal law norms, the broad unchecked executive powers and the constraint of judicial review. All these widespread concerns are analogous to *rule by law* and not rule of law.

Besides the rule of law, another important aspect to consider is that, in the realm of the criminal law system, we already have provisions to punish those who commit murder or abet in committing the murder. The question is, does the murder committed under the act of terror warrant enactment of special laws to deal with it instead of using the existing ordinary criminal law? Is terrorism offence a '*sui generis*' type of new crime of the 21st century that require special legislation? This special treatment will create another parallel criminal legal system and procedures by the State just to handle terrorism cases alongside the pre-existing penal system. Proponents of anti-terrorism laws argue that terrorism is not like the ordinary criminal law where it is about punishing those who are guilty of the offence committed. This is about pre-empting an act of terrorism yet to be committed to avoid mass mortality of humankind perpetrated by the terrorists. The reason advanced by the government to protect the community through new preventive laws was that terrorism posed an extraordinary threat, which required an extraordinary response seems justifiable.

[23] Ibid
[24] Alan Dershowitz, "*Rights from Wrongs: A Secular Theory of the Origins of Rights*" (New York: Basic Books, 2004), 1st ed. Pg. 14

However, such a new paradigm shift has caused a knee-jerk reaction among criminal practice lawyers. For example, under section 130JB (1) (a) of the Penal Code (Chapter VIA), it is noteworthy that even at the formative stages of an action like possessing a T-shirt with ISIL symbol can be deemed as an offence of '*supporting*' terrorist cause and the perpetrator can be jailed up to seven years although the actual terrorist act may not occur or has yet to happen.[25] Is this what the government perceived as '*extraordinary threat*'? It is hard to imagine why owning a simple T-shirt which ultimately may or may not be worn while committing any act of terror attracts such a heavy punishment than a crime for example, of voluntarily causing hurt against another person under section 323 of the Penal Code.[26] The criminalisation of such preparatory terrorism offence (inchoate offence) has reversed the settled criminal law principle of presumption of guilt as the element of criminal intent ('*mens rea*") may be absent at the preparatory stage of the crime. Therefore, this research contends that preparatory acts unnecessarily culminate into a criminal offence under these Acts and it is unfair for individuals to be held liable and to receive such a harsh punishment. By mounting a charge of such individual under preventive anti-terrorism laws for a preparatory terrorism act may increase the risk of wrongful convictions and abuse of due process of law due to lack of clear criminal intent.

Another noteworthy mention is the new preventive anti-terrorism law confers a broad range of power to the executive to act. The power identified as deviating from the traditional criminal justice system is being used arbitrarily in the pre-trial detention and when issuing the arrest warrant. Although such broad executive powers to detain without trial has been around since the ISA days, the fact it has been resuscitated in SOSMA and

[25] "*Commando charged with having IS T-shirt*" – available at: <http://www.thestar.com.my/news/nation/2015/12/02/commando-charged-with-having-is-tshirt/ >

[26] Section 323 of the Penal Code provides: *"Whoever, except in the case provided for by section 334, voluntarily causes hurt, shall be punished with imprisonment for a term which may extend to one year or with fine which may extend to two thousand ringgit or with both"*

POTA calls for further study whether they are compatible to other democratic jurisdiction vis-à-vis India or the UK. Detention orders issued by the executive usually encroach on the constitutionality issue, as it is a direct intrusion on an individual's freedom guaranteed under the constitution. They have received robust criticisms since its creation during the ISA and were systematically abused by the authorities to confine individuals due to insufficient evidence to lay a formal charge before the court. The worst fear is while under detention for suspected security offences, persons detained have been reportedly tortured and subjected to cruel, inhuman, or degrading treatment.[27] The report of detainees being tortured follows the long-standing human rights concern that detainees under the preventive detention are always subjected to abuse by the enforcement agency to extract an involuntary confession. Other criticism directed at preventive detention stems from its dependence upon predictions of an intended threat to national security. In fact, when the executive exercises its power, there is also a high possibility of a wrong prediction being made on one's future conduct that may eventually lead to an innocent individual being unlawfully detained. Therefore, it is important the government does not lose sight of the foundational criminal law principles such as the presumption of innocence and the need for proof of individual fault beyond a reasonable doubt.[28] A detention order grounded on predicting a future event not only failed to meet the demanding standards of criminal law principles, but it is also hard to disprove its legality when issued out by the government. Without a proper check and balances in place of the wide executive powers, such preventive detention is a direct curtailment of human freedom contrary to its intended rehabilitative purpose.

It is an axiom that exercising executive power is traditionally a function of a constitutional separation of power with executive power being restrained by judicial

[27] "*Sosma detainees allege torture, sexual humiliation in custody*" available at: <https://www.malaysiakini.com/news/327255>.
[28] Roach, *op cit*. at p.140.

review or by being held accountable to parliament. The legitimate expectation of this mechanism is to make sure that our government exercises its power correctly without violating our civil rights. However, for enforcing counter-terrorism laws by the judiciary, there is scepticism and concern on the willingness and ability of the judiciary to carry out its function effectively according to the rule of law. For example, in upholding personal liberty and restraining of executive power, the propensity of the judicial deference to the will of the executive is high. Such judicial subservience is problematic because it sanctioned the violation of civil liberties indirectly and created a dangerous precedent for future reference. This is shown by our Malaysian court's stand that the arrest under security offences cases is different as that of an ordinary criminal arrest. The Court of Appeal's landmark case of *Borhan Hj Daud & Ors v Abd Malek Hussin*[29] was the authority that held security law like ISA is a special law made under article 149 of the Constitution. As such, the law is valid even though it is contradictory to article 5, 9 or 10 and 13 of the Constitution. Similarly, too in India, when the constitutionality of their anti-terrorism legislation (TADA) was challenged in court, the Indian Supreme Court also upheld its legality and distinguished between special law and general law. It went on to state that the disputed anti-terrorism acts are special in a sense they are made to deal with only particular instances, henceforth, any deviations from the procedure in common laws are permissible.[30] Conversely, in the UK, their House of Lords when interpreting terrorism laws does not falter to strike down any provisions of their anti-terrorism laws found to have abrogated human rights concern.[31] The approach taken by the UK Law Lords was not only commendable but had emboldened human rights advocates, unlike the obsequious approach taken by their counterparts in Malaysia and India.

[29] (2010) 8 CLJ 6
[30] *Kartar Singh v. State of Punjab*, 1994 SCC (3) 569; See also: *PUCL v. Union of India*, (2004) 9 SCC 580 where the Supreme Court also upheld the validity of Indian POTA.
[31] A & Others v Secretary of State for the Home Department, *op. cit.*,

Although the study of terrorism can raise many issues of contention across different jurisdictions, this research seeks to investigate the part of legislative failure to adhere to the rule of law traditions, in particular, the due process and human rights concern. In the war on terror, we saw the invocation of many stringent anti-terrorism laws in Malaysia, India and the UK. Unfortunately, all these legislations have violated due process mechanisms and have strict procedures and penalties that are repugnant to the precept of the rule of law. Equipped with this background knowledge, this research also intended to explore further on the ineffectiveness of judicial control of executive power during times of emergency and the extent of its failure to restrain the broad executive power from being abused. Further, according to the UN Resolutions 1373[32] regarding terrorism, the fundamental human rights of the individual must not be compromised in fighting terrorism. In that respect, to ensure that the democracy of a state survives, rights of individuals must always be respected, but many countries have displayed their unwillingness to do so.

To sum up, creating the new anti-terrorism law like the POTA 2015, specially tailored to fight terrorism in Malaysia, is acting to the prejudice of the accused and antithetical to the concept of the rule of law. The study of other democratic jurisdictions here analyses the differences and similarities of counter-terrorism legislations and strategies adopted in particular, how each country manoeuvres around the application or misapplication of the rule of law. Drawing from their experience, this research will focus on the limits and impact on applying the rule of law in the war on terror through legislations, and the similar legal issues or strategies facing India and the UK, which can be a lesson for Malaysia.

[32] UN Resolution 1373 (2001) o*p.cit.,*

1.3 RESEARCH OBJECTIVES

- To analyse the challenges in striking a delicate balance between national security and personal liberty in crafting the anti-terrorism law in Malaysia.

- To analyse and compare the rhetoric of counter-terrorism measures, the interplay between the policy consideration and its impact on applying the rule of law with a special focus on India and the UK.

- To evaluate if judicial activism has a role in upholding the rule of law with the continued demands for internal security to combat terrorism by the government.

- To examine if anti-terrorism legislations form a '*new dimension*' by shifting away from the ordinary criminal law system, given the global trends in counter-terrorism activities.

1.4 RESEARCH QUESTIONS

Some of the issues for consideration in the thesis in relation to counter-terrorism legislations and its impact on applying the rule of law are:

- What are the dilemma and challenges in drafting an anti-terrorism law in Malaysia?

- In the effort to counter-terrorism, are the enacted anti-terrorism laws of Malaysia, India and the UK insensitive in observing the rule of law tradition? (The rule of law concerns is associated with the criminal law practice, for

example, the presumption of innocence, no detention without charges being laid, proof of guilt beyond a reasonable doubt and right to put up defence)

- In trying security offence cases, to what extent are the Malaysian courts in deference to the executive and legislature as opposed to upholding the rule of law? (This connects to judicial activism/restraint in preserving the rule of law and human right concerns by analysing the approach taken by other comparable jurisdictions, for example, India and the UK)

- To what extent has the anti-terrorism law created a '*new dual criminal system*' in the administration of criminal justice by disregarding the core principles of the rule of law just to penalise terror suspects?

1.5 SIGNIFICANCE OF STUDY

With the passing of anti-terrorism law like POTA 2015 enacted hastily without the opportunity of thorough debates in Parliament, it has raised many controversies over the changes that took place in the law and procedure taken to fight terrorism. As a result, this challenges the conceptual and limits on applying the rule of law in a democratic State like Malaysia. The study is significant for many reasons. First, it serves as a supplement to the existing literature on anti-terrorism legislation such as POTA 2015, focusing especially on claims this new piece of legislation is abhorrent to the rule of law values. Second, from a practical viewpoint, the research seeks to propose an improvement to the existing anti-terrorism law with recommendations. Third, the research may contribute towards a better understanding of the contested areas hitherto left open due to heavy criticisms hurled at the provisions of the anti-terrorism law. The existing literature on this subject focused mainly on legislation before the enactment of POTA 2015 where Saroja Dhanapal and Johan Shamsuddin published the only comprehensive work which focused on SOSMA

2012 in the year 2016.[33] However, present understanding of whether POTA 2015 is a continuation of what has been left out from SOSMA 2012 is unclear and, whether POTA responds to the rule of law values positively is worth exploring further. There is also a shortage of analysis of terrorism law between Malaysia, India and the UK although all the countries shared rich common law traditions. Hence, there is a need for a comprehensive study of the terrorism laws governing in all the three (3) countries besides understanding their respective strengths and weaknesses, which make up a legitimate point for comparison. What follows is an attempt to highlight the most pressing challenges and strategies faced by India and the UK that might help Malaysia to understand their tensions and to formulate a possible solution or recommendation in this prevalent war on terror.

Although detractors of anti-terrorism laws have invoked many constitutional and domestic law issues before POTA is passed, to date, the outstanding broad issues on the separation of powers, the civil liberties and independence of the judiciary stay unresolved in the name of fighting terrorism. All these problems are said to be associated with the concept of the rule of law. The importance of this study is also to discern the counter-terrorism measures adopted by Malaysia and to what extent it deviates from the accepted legal norms applicable in times of peace. Perhaps, this is the most difficult challenge facing most democratic states today including Malaysia.

The finding of this research will contribute to the growing body of literature on the assessment of counter-terror measures not only in Malaysia but also in India and the UK. Overall, this study will also help the legislature and policy-makers in enacting or planning

[33] Dhanapal, S., & Sabaruddin, J. S. (2016) "An Initial Exploration of Malaysians Perceptions of SOSMA 2012" Journal *of Malaysian and Comparative Law, 42(2).*

for future reforms or amendments to anti-terrorism provisions, especially relating to balancing the rights and obligations to comply with the rule of law principle.

1.6 SCOPE AND LIMITATION OF THE STUDY

There are at least two identified limitations in this field of study.

1.6.1 Lack of empirical data

Data collection makes up a difficult area in this field of research. Most data like for example, the terrorist profiles and reports are in the hand of the Government with some classified as 'secret' for intelligence purposes, and the leak of it can be penalised under the Official Secrets Act, 1972. In the field of terrorism studies, however, law researchers can only collect data from limited open sources, such as media reports, academic journals, internet sites, law reports and other unclassified sources, of which some information may be incorrect. The limitation of terrorism studies in amassing data such as to get terrorist incidents or statistic can never be so reliable and exhaustive as compared to what is available from government databases. Hence, in assessing the efficacy of the government's counter-terrorism legislations, the biggest obstacle facing the academic field is the lack of empirical data to rely on.

1.6.2 Lack of decided case laws

It is to be noted that SOSMA was only in full-force from 31 July 2012 and POTA came later 1 September 2015. Because of its infancy, inadequate case laws are decided by the court so far under both acts for academic research. Therefore, a study of other legal frameworks in the similar field like India and the UK is helpful for this research. The UK legal framework is chosen because the source of the Malaysian emergency laws was

founded on the English Common law just like India as both countries were formerly under the British rule. During the colonial times, emergency legislation was already being introduced by the British to tackle terrorism and insurgency threats. Therefore, to some extent, there are similar characteristics in the respective anti-terrorism laws from the countries surveyed. However, it should be stressed that the research cannot be exhaustive, but rather as an academic reference focusing on the present scope of the study.

1.7 RESEARCH METHODOLOGY

In the research arena, few methodologies usually employed by scholars. It ranges from quantitative and qualitative methods as seen in the field of social science and in some other scientific disciplines. The research method employed in this study is purely on *'doctrinal method'* of research. According to Duncan and Hutchinson, 'doctrine' came from the Latin noun '*doctrina*' that means instruction, knowledge or learning. Doctrine has been defined as *'[a] synthesis of various rules, principles, norms, interpretive guidelines and values. It explains, makes coherent or justifies a segment of the law as part of a larger system of law. Doctrines can be more or less abstract, binding or non-binding"* [34] Thus, in the academic legal research, doctrinal approach is preferred because law is promulgated from rules, principles and precedents in a coherent legal system and doctrinal research is skewed towards the analysis of legal rules and/or to formulate legal doctrines out from the research outcome. Since our Malaysian legal system is based on the common law system, the source of laws is derived from the statutes and decided case laws. However, these legal rules cannot run by itself. It must be applied to a particular set of facts of the situation under consideration. A commentator like Walby puts it in this way, "*doctrinal research lies at the heart of any lawyer's task because it is the research*

[34] Duncan, N. J. & Hutchinson, T. (2012). "Defining and Describing What We Do: Doctrinal Legal Research." Deakin Law Review, 17 (1), 83-119. Retrieved from https://ojs.deakin.edu.au/index.php/dlr/article/view/70/0 Site accessed on 12.08.16

process used to identify, analyse and synthesise the content of the law." [35] Duncan and Hutchinson point out further that, "*legal rules take on the quality of being doctrinal because they are not just casual or convenient norms, but because they are rules which apply consistently and which evolve organically and slowly. It follows that doctrinal research is research into the law and legal concepts.*" [36]

It is also an erroneous notion to conceive that doctrinal method is to seek an answer or conclusion to a legal problem or to resolve a particular legal problem. In fact, judges or legal practitioners adopt the doctrinal method often in their course of works except that with academic researchers, they do not have to give a legal solution for a client. Westerman aptly describes the approach taken in academic legal research as follows:

> *"Most … take as a starting-point a certain new legal development, such as a new interpretation of a certain doctrine, or a new piece of European regulation, and just set out to describe how this new development fits in with the area of law they are working on, or, if it does not seem to fit in, how the existing system should be rearranged in order to accommodate for this novelty. So, after first depicting what the new development actually consists of, my colleagues commonly address the question of how the new development can be made consistent with the rest of the legal system, in which sense other related concepts are affected and how current distinctions should be adapted and modified. After having described all this, they usually recommend steps in order to accommodate the new development."* [37]

Meanwhile, Chynoweth,[38] another research scholar opined that "*doctrinal research is concerned with the discovery and development of legal doctrines for publication in textbooks or journal articles and its research questions taking the form of asking what is the law?"* in the particular context.

[35] Walby, K. (2014). "Research Methods in Law, Law & Society Review," 48(2), 486.
[36] *Op cit*. Duncan, N. J. & Hutchinson, T. (2012).
[37] "Westerman, Pauline C., Open or Autonomous: The Debate on Legal Methodology as a Reflection of the Debate on Law in Van Hoecke, M. (Ed.). (2011). *Methodologies of legal research: Which kind of method for what kind of discipline?* Bloomsbury Publishing"
[38] "Chynoweth, P. (2008). Legal research in the built environment: a methodological framework". Available at: <http://usir.salford.ac.uk/12467/1/legal_research.pdf>

Therefore, as for the doctrinal research, the weight and its validity are less significant as compared to the research undertaken in the empirical world. But the validity of doctrinal legal research must inevitably agree with the consensus within the legal scholastic community. The doctrinal research depends much on the interpretive and qualitative analysis of textual content only. For this present research, the doctrinal method selected is both analytical and descriptive. The materials for this study will be compiled and gathered from primary and secondary sources and analysed to explore the desired goal. Materials from primary sources include Acts of Parliament, reported case laws, reports of research committees, papers presented at conferences, and reports of commissions were taken as a reference. However, the majority of information were amassed from secondary sources that are from selected books, articles, journals, and the internet which were studied to carry out the objectives of this research paper. Opinions of research scholars, academicians, jurists and other experts were added to give support for this study. In doing so, a balanced view was sought. However, in the politically loaded field of terrorism research like this, it was tough, if not impossible to have a balanced view.

1.8 LITERATURE REVIEW

It is an undeniable fact the growth of terrorism studies gains its momentum only after the 9/11 attacks. Resolution 1373 by the UN Security Council started the worldwide crusade against the terrorists by all member states. In the international arena, we have witnessed the military deployment and significant changes to the international legal framework. Even more important has been the drastic steps taken by liberal democracies what would have been the benchmark for transparency, due process, individual freedom, and good governance. Countries willing to sacrifice the liberty of their citizen to pursue security instead of their firm commitment to the rule of law values and democratic

governance raise concerns among democrats. During the passage of POTA as the Malaysian new anti-terrorism law, many critiques were advanced by its detractors including the Human Rights Watch. [39] One of the fiercest criticism came from the Malaysian Bar in a detailed report that claimed POTA disrespects not only the Rule of law; it is repulsive to the principle of natural justice.[40] Highlights of POTA's controversial features that are objectionable are detention up to 60 days for investigative purposes,[41] denial of the right to legal representation,[42] the ouster of judicial scrutiny [43] and detention without trial up to two years.[44] In our nation's history, preventive detention without trial is seen as a harassment tool by the government. This was so when the draconian ISA was initially used to fight communist insurgency after our independence, and thereafter, it has been conveniently applied against political dissenters.

Despite the assurance given by the Home Minister Ahmad Zahid Hamidi [45] at the Parliament during the debates on POTA bill, he affirmed that civil liberties and human rights would be defended, however, judging from the past records, many stakeholders like the Opposition Legislators, the Bar Council and the Human Rights group are sceptical of this vague assurance. From a legal perspective, the detention without trial laws as featured in POTA is abhorrent to the rule of law and against natural justice because it undermines public trust in the law enforcement for lack of transparency[46] especially when detention without trial empowers the police to arrest even without sufficient evidence

[39] HRW slams Malaysia's new 'repressive' anti-terrorism law. (2015). Human Rights Watch. Retrieved 12 August 2016, from https://www.hrw.org/news/2015/04/07/hrw-slams-malaysias-new-repressive-anti-terrorismism-law.
[40] The Malaysian Bar - 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. Malaysianbar.org.my. Retrieved 12 August 2016, from http://www.malaysianbar.org.my/press_statements/press_release_%7C_prevention_of_terrorism_bill_2015_violates_malaysias_domestic_and_international_commitments_is_an_affront_to_the_rule_of_law_and_is_abhorrent_to_natural_justice.html"
[41] Section 3 & 4 of POTA, 2015
[42] Section 10(6) ibid
[43] Section 19(1) Ibid
[44] Section 13 (1) Ibid
[45] "Malaysia passes anti-terrorism Bill after new arrests of 17 terror suspects" (2015). *The Straits Times*. Retrieved 16.08 2016, from <http://www.straitstimes.com/asia/se-asia/malaysia-passes-anti-terrorismism-bill-after-new-arrests-of-17-terror-suspects>
[46] *Op cit.* The Malaysian Bar Press release

being established.[47] This extraordinary measure as featured in POTA forms part of the preventive paradigm with dominated counterterrorism efforts not only in Malaysia but in India and the UK too. There is also considerable published literature that hypothesised a common assumption underlying national responses to terrorism threats which are, terrorism cannot be tackled through the traditional criminal justice system, but instead, requires '*special laws and procedures*' to overcome it.

Like Malaysia, India has responded to terrorism threats by enacting an array of extraordinary anti-terrorism laws such as TADA 1987, POTA 2002 (repealed) and UAPA 1967 to strengthen the hands of security and police forces. Although all the Indian anti-terrorism laws have deviated from the ordinary criminal procedures such as the powers of arrest, pre-trial detention, bail procedures and trial in courts, human rights advocates in India claim it is critical for the state to safeguard their people from terrorist attacks, even if it encroaches civil liberty in self-evident ways.[48] Over the years, human rights advocates, religious minorities, political dissidents, including the *Dalits* and other poor and underprivileged people have been victims of these repressive anti-terrorism laws in India. Although the extraordinary anti-terrorism laws allow for certain deviations from the normal criminal procedural laws under the Indian Constitution during a state of emergency, [49] however, fundamental rights like a fair trial and the right to life and liberty cannot be suspended.[50] Clearly, the Indian state authorities are not immune and can be held accountable if there is evidence of abuse of powers. The Supreme Court of India in the case of *Kartar Singh v. State of Punjab* [51] ruled that *"if the law enforcing authority becomes a lawbreaker, it breeds contempt for the law, it invites every man to become a law unto himself and ultimately it invites anarchy*". It follows that human rights values

[47] For example, see section 3 & 4 of POTA, 2015
[48] Nair, R. (1998). "Confronting the Violence Committed by Armed Opposition Groups. *Yale Hum. Rts. & Dev. LJ*, *1*, 1".
[49] Article 352 of the Indian Constitution, 1949
[50] Article 359 Ibid
[51] (1994) SCC (3) 569

such as freedom from torture, cruel or degrading treatment and freedom from arbitrary arrest and detention form a moral and legal imperative not only unique to India but for most democratic nations. In another development, the Indian Supreme Court also pronounced that, "*terrorism often thrives where human rights are violated*," and *"the lack of hope for justice provides breeding grounds for terrorism."* [52]

In the UK, they are confronting a different challenge. Prior to the UK exiting the European Union, the heated debates surrounding the state power and human rights law in the war on terror have been the challenges in complying with the European Convention on Human Rights (ECHR) and its national Human Rights Act 1998. The UK government often rests its argument for a strong counter-terrorism policy, but at the same time trying to adhere to Article 2 of the ECHR, which is to protect the lives of its citizens. However, other rights are being infringed simultaneously. For example, Article 8 of ECHR – the right to privacy and Article 5 ECHR – the right to liberty and security of person. The overwhelming question then is whether the safeguard of one right over the others is disproportionate. Following the 9/11 attacks, the UK Parliament has passed a series of anti-terrorism legislations notably, ATCSA 2001, PTA 2005, CTA 2008 and CTSA 2015. These laws confer broad powers to the state to prevent mass attacks by the terrorists, and it seems to comply with Article 2 to create a 'safer state' for its citizens. Irrefutably, this appears like a noble act by the state.

Some critics argue the state might act disproportionately or for other subtle objectives along the way when implementing the laws. However, this argument is inconclusive, as the judiciary in the UK has been emboldened by their own Human Rights Act or under the ECHR to undermine some of the government's harsh counter-terror measures –

[52] People's Union for Civil Liberties v. Union of India, AIR 2004 SC 456, 467.

ostensibly seen as a milestone for human rightist. For example, with *Secretary of State for the Home Department v MB,*[53] the court held that the control orders issued under PTA 2005 against the detainee could be quashed if the court determines that the detainee has not had a fair trial.

However, with the continued upsurge in terrorist acts around the world today, as reported widely in the media, terrorism menace, has become truly a phenomenal security issue unavoidable for many states like Malaysia, India and the UK to tackle. Wilkinson observes that many democratic states in fighting terrorism have restricted liberties by applying the so-called "emergency powers" to deal with terrorism.[54] What it means here is the emergency powers deployed by the states emanate from the preventive security laws that allow the government to safeguard the state's security while preserving civil liberty and democracy. Wilkinson further remarks,[55] "*In countering terrorism, the democratic state confronts an inescapable dilemma. It has to deal effectively with the terrorist threat to citizens and the state itself without destroying basic civil rights, the democratic process, and the rule of law*." It is firmly believed by the states that by adopting preventive laws, and by suspending rights and liberties, it allows the state to maintain national security and simultaneously, to safeguard civil rights. But counter-terrorism legislations are deemed contentious because they have features of "trade-off" and "benefits" for a democratic society.[56] The expected benefits are the state gains an increased power to arrest, prosecute, and incarcerate terrorists, while the trade-off entails

[53] [2006] EWCA Civ.1140
[54] Wilkinson, P. (2011) Terrorism versus democracy: The liberal state response. Taylor & Francis, points out that "*most democratic states which have experienced prolonged and lethal terrorist campaigns of any scale within their borders have at some stage introduced special anti-terrorist measures aimed at strengthening the normal law in order to deal with a grave terrorist emergency*."
[55] Wilkinson, P. (1986) "Maintaining the democratic process and public support in *The Future of Political Violence* (pp. 177-184)" Palgrave Macmillan UK.
[56] Freeman, M. (2003). Freedom or security: The consequences for democracies using emergency powers to fight terror. Westport, Conn: Praeger.

the suspension of liberties and the due process rights of terrorist suspects that are perceived as neglecting the rule of law values.[57]

At present, politicians have been giving us the impression that terrorism threat today demands special responses that may invade into previously untouched personal freedoms we used to enjoy. Hence, the state may have to revamp the relationship with its citizen to cope with the continued risks to national security that terrorism threat poses. As a result, states may have no choice but to dissolve some of the human rights protection and to disrupt citizens' movements or routines. From a sociological perspective, the average citizens are anxious about the threat of terrorism and agree that terrorists ought to be tracked and penalised severely on capture.[58] Besides, they would agree to limit their own civil rights if it were a necessary measure to guarantee their safety against a potential terrorist attack. Arguably, if this is the popular view of the average citizen, legal scholars cannot agree about how best to fight terrorism without infringing fundamental rights and liberties. Some scholars argued that once the political centrality of addressing people's concerns by governing through crime[59] has been established, *'governing through terrorism'* [60] meets little resistance since people have become used to the approach taken by the governments. As observed by scholars, even though the war on crime has been going on for some time,[61] the predicted long war on terror [62] appears to squash the values of due process of law in many democracies. It does not seem too far-fetched to discover how this is being violated. The alarm has been raised over the departure from this rule of

[57] Ibid
[58] Ibid
[59] Simon, J. (2007) *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear.* Oxford: Oxford University Press.
[60] Mythen, G. and Walklate, S. (2006) *'Criminology and Terrorism: Which Thesis? Risk Society and Governmentality?'* British Journal of Criminology, 46: 379-98.
[61]Garland, D. (2001) *The Culture of Control: Crime and Social Order in Contemporary Society*, Oxford University Press & Simon, J. (2007) *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear.* Oxford: Oxford University Press.
[62] Rogers, P. (2006) *Into the Long War.* London: Pluto Press.

law values that anti-terrorist measures represent,[63] but the departure from the due process has been expected by the same preventive measures taken against those suspected of organising the drugs trade cases before. These measures are claimed to be a normal response to the perceived difficulties of getting information about either terrorist or serious criminal activity and react by revoking vital aspects of procedural justice. For example, the Malaysian POTA allows for the detention without due process as highlighted earlier.[64] Likewise, in India, they also have utilised pre-trial detentions without bail up to 180 days under their UAPA[65] although it conflicts with Article 22 of the Indian Constitution on the rights against arbitrary detention. The argument for the need for pre-emptive action is justified due to the discreetness nature of terrorism offence affecting national security.

Although the preventive paradigm cast a wider net by often targeting guilt by association in breach of the rule of law ideals that demands people to be held accountable only for their own actions, the preventive paradigm is overlooking the rule of law's most fundamental commitments as required by a democratic nation. In fact, the rule of law is to ensure checks and balances in place on the state's power and to make the state accountable for their actions to distinguish between guilt and innocence. According to Cole and Lobel,[66] "*these ideals mix uneasily with the strategies of the preventive paradigm which generally demand sweeping executive discretion, shun questions of guilt or innocence (because no wrong has yet occurred), and substitute secrecy and speculation for accountability and verifiable fact.*"

[63] Blick, A. and Weir, S. (2005) *The Rules of the Game: The Government's Counter-Terrorism Laws and Strategy.* Democratic Audit, University of Essex.
[64] Section 13 (1) (b) POTA, 2015 *op.cit.*
[65] Section 43D (2) UAPA,1967
[66] David Cole and Jules Lobel: *Why We're Losing the War on Terror* available at: http://www.thenation.com/article/why-were-losing-war-terror/

Some contemporary theorists like Agamben [67] take the opposite view and claim that in the present age of terror, the law has been suspended and replaced by a juridical void, a black hole from which all pretensions to legality are expelled. Schmitt [68] stresses that in a time of emergency; the sovereign sheds any pretence of being constrained by law and instead deploys it against designated enemies. The sovereign's acts may be legal in a thin sense that a political process has ratified them. In these circumstances, *'rule by law*' has subjugated the *'rule of law'*, a strategy that may push people into a legal grey zone with few rights of redress. The distinction between the *rule of law* and *rule by law* can be further expounded here. For example, Rule by law is where tyrannical governments make use of an administrative mechanism like the judicial system and the police to repress and suppress the rights and freedoms of ordinary citizens, contravening the international standards of human rights and liberties. Lord Bingham defines the rule of law as, "*That all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect in the future and publicly administered in the courts*." [69]

However, applying the rule of law very much depends on whether judges are emboldened to challenge the executive in their attempt to rule by law. Thus far, we can affirm that judicial adherence to the rule of law against the intrigues of the executive is taken by the UK Law Lords. However, Dworkin in support of this notion has counselled, "*it would be a terrible mistake for those who worry about civil rights and liberties to pin too much hope on the judiciary in times of crisis."* [70] Despite this assessment, Zedner still advises judges to "*throw their weight around and in so doing, to tip the balance in favour*

[67] Agamben, G. (2005) State *of Exception.* Chicago: University of Chicago Press.
[68] Schmitt, C. (1985, first published 1922) *Political Theology: Four Chapters on the Theory of Sovereignty*. Cambridge, MA: MIT Press.
[69] Lord Bingham (2007). The Rule of Law The Cambridge Law Journal, 66, pp 67-85. doi:10.1017/S0008197307000037.
[70] As cited in Vaughan, B., & Kilcommins, S. (2010). The governance of crime and the negotiation of justice. *Criminology and Criminal Justice*, *10*(1), 59-75.

of individual liberties."[71] By proceeding with this judicial activism, there is a danger of setting up a zero-sum game between personal and state rights. The advancement of one aspect of rights will see a diminution of the other. Some scholars may argue that adjusting procedures of a due process that cut into the freedom of some may be a necessary condition for a model directed towards the control of terror crimes. However, Heymann does not agree but makes this observation, "*Changing the basic rules of law enforcement, even to combat terrorism…. evokes substantial fears in democratic nations."*[72]

Wilkinson goes further in arguing, "*it must be a cardinal principle of liberal democracy in dealing with the problems of terrorism, however, serious these may be, never to be tempted into using methods incompatible with the liberal values of humanity, liberty, and justice*." [73] While the above scholars point to the costs of using emergency powers against terror activities, they can be costly too if they are constantly being abused by the government. While the costs of using emergency powers may be large, the costs from abuses of emergency powers can be much greater.[74] Throughout the scholarly literature on terrorism, it is commonly asserted there is a *trade-off* when states use emergency powers. Although emergency powers given to the government to act in times of state emergency may be effective, many scholars presume that such power will be abused to destroy democracy. Wilkinson describes the consequences of emergency powers in this manner:

> "*In discussing special [emergency] powers any liberal will speak with strong distaste and reluctance … Too many cases come to mind of ambitious politicians around the world who have exploited such measures for their own ends, or who would dearly like to do so. Mainly because of these abuses and the real dangers of permanent dictatorship emerging, liberals are right to insist that special powers*

[71] Zedner, L. (2005) 'Securing Liberty in the Face of Terror: Reflections from Criminal Justice', *Journal of Law and Society*, 32(4): 507-33.
[72] Heymann, P. B. (2000). Terrorism and America: A common sense strategy for a democratic society. MIT press. 113.
[73] Wilkinson P (2011), Terrorism versus Democracy, (op-cit) at pp 115.
[74] Hewitt, C. (1993). Consequences of political violence. Darthmouth. posits that "*the most severe disruptions are produced not by political violence itself but by the governments' response to it.*"

should only be used if there is a fundamental threat to the political or economic system." [75]

Walsh, who argues that using emergency powers is a "question of balance - between the desirability of making this power available for the social good and the need to ensure that it is not abused", echoes this concern.[76] Another scholar like Garnett worries that "*The powers necessary to suppress riot, insurrection, and revolution can easily overturn democracy*."[77] Evelegh claims, "*The means needed to defeat terrorism and suppress insurrection are the ones needed to enforce a tyranny*." [78] Finally, Bonner cautions by saying that "*One does not save the liberal state from terrorism by trampling roughshod on its most precious values and postulates; that may change the nature of the state for the worse.*" [79] Where scholars diverge, it is whether they accept the trade-off. This entails deciding which is the most important of the two goals - protecting democracy or maintaining state's security – an issue that comes into conflict when states confront terrorism. Most scholars of terrorism argue this trade-off should be resolved in favour of protecting democracy. Heymann is one of them who recognises this trade-off between fighting terrorism and protecting civil liberties. He argues that: "*civil liberties must be protected and law enforcement agencies can be effective under normal laws, and that emergency powers add unnecessary risk*." In addition, he prescribes devoting more resources to law enforcement agencies, but not increasing their powers.[80] The problem with all these positions on how to resolve the trade-off between protecting democracy and fighting terrorism is that most scholars accept there is such a trade-off when emergency

[75] Wilkinson, P (1977) "Terrorism and the Liberal State (London: Macmillan Press)," at pp 159–160.
[76] Walsh, D. P. (1982). Arrest and interrogation: Northern Ireland 1981, *Journal of Law and Society*, 37-62.
[77] Garnett, J. C. (1990). "Emergency Powers in Northern Ireland. Coping with crises: how governments deal with emergencies, *2*, 45.
[78] Evelegh, R. (1978). Peace keeping in a democratic society: the lessons of Northern Ireland" McGill-Queen's Press-MQUP. at p. 60.
[79] Bonner, D. (1992). "United Kingdom: The United Kingdom response to terrorism" Terrorism and Political Violence, *4*(4), 171-205.
[80] Heymann, Terrorism and America, (op cit) at page 80 and 156.

powers are adopted by the state in their war campaigns against terror. As for the states, emergency powers through legislations are expected to be the most effective tool.

In the academic discourse on terrorism studies, many international terrorism scholars have done an extensive study on the impact of terrorism on the democratic values of states. However, there has been no specific study on this new anti-terrorism law in Malaysia, namely POTA 2015, to determine if and how it deviates from the requirements of due process and constitutional guarantees vis-à-vis the rule of law, although there was an earlier study[81] on SOSMA 2012 which evoked heavy criticisms for abrogating fundamental human rights as enshrined in our Federal Constitution. To sum up, in countering terrorism, many options are available for a state to adhere to the rule of law principles. Ideally, the foremost step for democratic states is to embrace the rule of law as an asset and not seeing it as a burden. As the former President of Israel's Supreme Court, Aaron Barak once said in a case forbidding the use of "moderate physical pressure" in interrogating terror suspects:

> "*A democracy must sometimes fight terror with one hand tied behind its back. Even so, a democracy has the upper hand. The rule of law and the liberty of an individual constitute important components in its understanding of security. At the end of the day, they strengthen its spirit and this strength allows it to overcome its difficulties*." [82]

1.9 SUMMARY AND STRUCTURE OF THE STUDY

The present study is premised on this proposition, namely, the respect for the rule of law is vital in the fight against terrorism, and based on this presumption, the main thesis is that democratic legislators show a tendency to ignore the rule of law traditions when

[81] Saroja Dhanapal, Johan Shamsuddin, (2015) A comparative study: ISA 1960, SOSMA 2014 and the Federal Constitution. Journal of Malaysian and Comparative Law, Vol. 42 (Issue 1) at page 67.
[82] Public Committee Against Torture v State of Israel, HCJ No. 5100/94, available at: <http://www.btselem.org/download/hc5100_94_19990906_torture_ruling.pdf>

confronted with terrorism threats. The possibilities of state strictly abiding by the rule of law as a means and not limitations within the counter-terrorism legislations will be explored. The thesis is divided into six (6) chapters. The following is a brief description of the key issues in each of the chapter.

Chapter 1 is an introduction to the historical overview of the security threat faced by Malaysia with a cursory examination of other democratic nations like India and the United Kingdom on how they developed their legal frameworks to tackle terrorism threat over the years. This chapter conceptualises the notion of 'terrorism threat' by briefly exploring Malaysia's history in subduing security threat since independence, how the security laws evolved over times and their application today. From the historical experience explored, a general conclusion can be drawn in **Chapter 1** that is, the respect for the rule of law is absent in most counter-terror measures adopted by the state.

After considering the historical development of terrorism and national security threat facing Malaysia, India and the UK, **Chapter 2** discuss the dilemma and challenges faced by Malaysia in drafting anti-terrorism laws. The two primary considerations for the government when drafting new anti-terrorism laws are protecting national security on the one hand and safeguarding the personal liberty of citizens on the other. Often, to balance the two competing rights is an arduous task for any democratic nations today including Malaysia. This observation will be dealt with in **Chapter 2.**

The 9/11 terrorist attacks, the emergence of ISIL and the passing of UN SCR 2178 opened up the debate about the difficulty of properly protecting or at least 'balancing' human rights in fighting terrorism threat in democratic states. This called for further exploration of the interplay between constitutional rights under the constitutional law; the

all-embracing broad governmental power and finally, the doctrinal issues like legal and political theory when implementing counter-terror measures. These issues will be considered in **Chapter 3**. In **Chapter 3**, the research question on whether Malaysia, India and the UK observe the rule of law when confronted with terrorism threat will be examined. This will be achieved by doing an analysis of the selected states. At the end of **Chapter 3**, the thesis will conclude that in the war on terror, it is vital to preserve the rule of law despite the degradation of the rule of law in most states counter-terrorism practice.

Chapter 4 explores to what extent the Malaysian courts are in deferential or subservient to the executive and legislatures instead of upholding the rule of law when confronted with terrorism cases. This chapter will investigate if judicial activism has a role to play in the sense the court stands ready to quash executive order or actions by the enforcement if there is an injustice. There is ample support for the claim that the concept of the rule of law is also tied to judicial review in the court. In judicial review, the rule of law forms a morally weighted concept, and it allows any individuals to adjudicate their rights through a court of law. However, many of these legal rights ventilated before the court were not properly addressed due to judicial restraints practised by the judiciary. This calls for an analysis of case laws from other states to discover whether this thesis can give confirmatory evidence that our courts are deferential to the executive/legislators. At the end of **Chapter 4**, the fundamental issue is whether judicial review in counter-terrorism cases can ease the state from the tarnished image of not respecting the rule of law or to offer an avenue for its people from further discriminatory effects practised by the government while combating terrorism.

Chapter 5 will consider in what way the concepts and threats of terrorism influence the administration of the criminal justice system. Terrorism phenomenon today poses

intriguing questions under the realm of criminal law. Arguably, terrorist acts can be classified under ordinary criminal offences such as murder, homicide, conspiracies or any other penal provisions under our Penal Code, unfortunately, this is not the case. Terrorism offence is regarded and treated as a special offence in exceptional or emergency laws. Substantively, the concerns are in which way anti-terrorism laws depart from the traditional criminal law norms. For instance, by relaxing the mental element required for conviction for terrorism or expanding criminal liability further to those who provide training for new recruits are just some examples whereby terrorism offence has departed from the norm of criminal law. By criminalising inchoate conduct that might otherwise be harmless, cause concerns about over-criminalisation by states. On the procedural side, criminal lawyers have expressed concerns there are no procedural safeguards, especially in the investigative procedure. This chapter will explore the issues.

From the analysis of other democratic jurisdictions that are based on the English Common law, the aim of **Chapter 6** is to shed light on how to protect human rights, to adhere strictly to the rule of law traditions and to have a long-term national security intact while continuing to campaign against terrorism. This research endeavours to provide recommendations, suggestions and possible solutions to this ubiquitous menace facing the world today. **Chapter 6** will also discuss the overall conclusion of the study presented and will close with a general outlook with an assessment as to the future of counter-terrorism research.

CHAPTER 2: DILEMMA AND CHALLENGES IN CRAFTING ANTI TERRORISM LEGISLATION IN MALAYSIA

2.1 INTRODUCTION

After more than a decade, the memory of the 9/11 massacre has faded into oblivion until the world was awakened again by the turmoil perpetrated by an insurgent group calling themselves the Islamic State in Iraq and the Levant (ISIL) in the Middle East. The brutal beheading of photojournalist James Foley by ISIL and broadcasted live via videos on the YouTube.com has provoked the human desire around the world to retaliate against such a barbaric act.[1] Many beheaded victims were western captives and slaughtered by ISIL if their respective governments do not fulfil their demand for ransoms. The brutality portrayed brazenly by the group in the social media was unacceptable in our contemporary society. ISIL social media propaganda, not only attracted local new recruits but also foreign sympathisers worldwide to join them.[2] Some members of the ISIL are also talented in internet technology which made their recruitment drive much easier by using the social media platform such as Twitter and Facebook to entice new recruits from everywhere around the world. The success of IS's recruitment drives was further heightened by their self-declaration of a new Islamic Caliphate and their continuous military victories over their enemies.[3] Despite the clarion call by the United Nations (UN) Security Council under Resolution 2178 [4] for member states to prevent the continual recruitment drive by ISIL, however, according to published news, in the past 12 months, the number of foreign recruits by ISIL has doubled.[5] Malaysia, in responding to

[1] Foley beheading video shocks the world, Obama says - BBC News. (2016). BBC News. Retrieved 27 August 2016, from http://www.bbc.com/news/world-middle-east-28867627
[2] "*Where Are ISIS's Foreign Fighters Coming From?"* (June 2016). *Nber.org*. Retrieved 27 August 2016, Available at http://www.nber.org/digest/jun16/w22190.html
[3] . Gates, S., & Podder, S. (2015). Social media, recruitment, allegiance and the Islamic State. *Perspectives on Terrorism*, *9*(4)
[4] UN SCR 2178 accessible at <http://www.un.org/en/sc/ctc/docs/2015/SCR%202178_2014_EN.pdf>
[5] Eric Schmitt and Somini Sengupta, Sept 26, 2015 "*Thousands Enter Syria to Join ISIS Despite Global Efforts"* <http://www.nytimes.com/2015/09/27/world/middleeast/thousands-enter-syria-to-join-isis-despite-global-efforts.html> Site accessed on 10.10.15

Resolution 2178 enacted the Prevention of Terrorism Act 2015 (POTA). After the 9/11 attacks on the American soil, President Bush also signed anti-terror laws like the USA Patriot Act 2001 (USPA) to keep the nation safe and free.[6] But, for the American peoples, after more than a decade they only realised now that the sweeping new powers under the USPA have curtailed state's judiciary power. The American peoples felt they have been short-changed by the government in relinquishing some of their civil rights, in particular, the right to personal freedom.

Hence, this thesis puts forward the claim that personal liberty is essentially a fundamental human right and it should not be ignored or suspended in exchange for national security consideration. Further, can terrorism threat become so critical and more real than any other threat to lives that justify having the anti-terror laws with a far-reaching effect? Some scholars like Wilkinson [7] and Heymann [8] emphasised that in any democratic regime, democracy and civil liberties must be upheld whether in wartime or in peacetime, but for the government, national security overrides those core aspects of fundamental human rights. Even assuming the government is right to prioritise national security over the other fundamental human rights in battling terrorism, it does not necessarily mean our country will be much safer as Benjamin Franklin once said: "*Those that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety"* [9]

[6] "H.R.3162 - 107th Congress (2001-2002): Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001," October 26, 2001, accessed January 23, 2017, https://www.congress.gov/bill/107th-congress/house-bill/3162.

[7] Wilkinson, P. (2011) Terrorism versus democracy: The liberal state response. Taylor & Francis, points out that "*most democratic states which have experienced prolonged and lethal terrorist campaigns of any scale within their borders have at some stage introduced special anti-terrorist measures aimed at strengthening the normal law in order to deal with a grave terrorist emergency*."

[8] Heymann, P. B. (2000). Terrorism and America: A commonsense strategy for a democratic society. MIT press. 113.

[9] "In 1755 (Pennsylvania Assembly: Reply to the Governor, Tue, Nov 11, 1755), Franklin wrote this phrase. This phrasing was also the motto in *Historical Review of Pennsylvania* , attributed to Franklin"

2.2 DILEMMA IN DEFINING THE RHETHORIC OF TERRORISM

Today, we are facing a different threat to global peace and security. Unlike terrorism of the past, some scholars argued that we are now confronting a "new" kind of terrorism.[10] However, scholar like Crenshaw has a differing view. She claimed that terrorism today is "*not fundamentally or qualitatively new phenomenon but grounded in an evolving historical context. Much of what we see now is familiar, and the differences are of degree rather than kind*." [11] With the world's big political power in play today, the definition of what is terrorism and what is not becoming a rhetorical concept for many nations. So far, there is no unanimity on the common meaning of terrorism that is universally accepted. An under-inclusive definition may expose citizen vulnerable to harm because the law does not apply when needed. Whereas an over-inclusive definition can mean that, the extraordinary new powers given to the enforcement agencies may apply too broadly. As a result, it can undermine human rights and enable ordinary criminal acts to be labelled as terrorism. While Resolution 2178 adopted by the UN Security Council required states to take immediate action to counter terrorism, it did not spell out the meaning of terrorism which left the states bewildered in drafting their own definitions. This poses a serious subjectivity problem as the concept of terrorism is a much-contested term. While some people may see an act as a terrorism offence, others can view it as a struggle for liberation like the freedom fighter, which is justifiable. Just by trying to distinguish between a 'terrorist' and 'freedom fighter' can be very tricky because it depends on how their political sympathisers view their struggles. If they like the goals of the freedom fighter, then he or she is not a terrorist and vice versa. The classic example to look at was the struggle by the late Nelson Mandela, a Nobel Peace Prize winner. The late Mandela was

[10] Scholars views like "Hoffman B, (1988) Inside Terrorism (New York: Columbia University Press), Benjamin, D., & Simon, S. (2003). *The age of sacred terror: Radical Islam's war against America*. Random House Incorporated; Laqueur, W. (2000). *The new terrorism: Fanaticism and the arms of mass destruction*. Oxford University Press on Demand; and Lesser, I., Arquilla, J., Hoffman, B., Ronfeldt, D. F., & Zanini, M. (1999). *Countering the new terrorism*. RAND corporation."

[11] Crenshaw, Martha. 2007. "The Debate over New vs. Old Terrorism" accessible from <www.start.umd.edu/start/publications/New_vs_Old_Terrorism.pdf>

labelled as a terrorist by the US government[12] and the UK[13] during his fight against the apartheid in South Africa.

When defining what tantamount to an act of terrorism, the term 'insurgency' or 'guerilla warfare' has been alluded to terrorism activities interchangeably.[14] Although the strategies or tactics adopted by the guerillas and insurgents appear similar to the terrorists, they are different in certain ways. Hoffman explained that guerillas run like a military unit and larger in numbers, although with the insurgents, they may have similar characteristics, except they adopt different tactics and strategies, for example, hit-and-run after achieving their targets. Hoffman further distinguishes between guerilla groups, insurgents and terrorists as follows:

> "*Terrorists, however, do not function in the open as armed units, generally do not attempt to seize or hold territory, deliberately avoid engaging enemy military forces in combat, are constrained both numerically and logistically from undertaking concerted mass political mobilization efforts, and exercise no direct control or governance over a populace at either the local or national level."* [15]

Meanwhile, in another study by Schmid and Jongman[16] they provide a comprehensive list of useful guides often used in defining terrorism. From the list of 109 terrorism definitions examined, they used percentages to find how often each component is used. In their findings, violence and force components were represented by 83.5%, political was 65% and for fear, terror emphasised was 51%. So, in describing terrorism, 'violence' and 'political' are the key components that are universally adopted in defining terrorism according to them. Briefly, their definition is as follows:

> *"Terrorism is an anxiety-inspiring method of repeated violent action, employed by (semi) clandestine individual, group, or state actors, for*

[12] *US government considered Nelson Mandela a terrorist until 2008* (2013) NBC *News*. Retrieved 27 August 2016, from http://www.nbcnews.com/news/other/us-government-considered-nelson-mandela-terrorist-until-2008-f2D11708787
[13] *Margaret Thatcher branded ANC terrorist while urging Nelson* (2013). *The Independent* Retrieved 27 August 2016, from http://www.independent.co.uk/news/uk/politics/margaret-thatcher-branded-anc-terrorist-while-urging-nelson-mandela-s-release-8994191.html
[14] Gunaratna, R. (2008). Bruce Hoffman: Inside Terrorism: (New York, Columbia University Press, 2006). p.35
[15] Ibid
[16] Jongman, A. J. (2017). Political terrorism: A new guide to actors, authors, concepts, data bases, theories, and literature.

> *idiosyncratic, criminal, or political reasons, whereby in contrast to assassination - the direct targets of violence are not the main targets. The immediate human victims of violence are generally chosen randomly (targets of opportunity) or selectively (representative or symbolic targets) from a target population and serve as message generators. Threat and violence-based communication processes between terrorist (organization), (imperiled) victims, and main targets are used to manipulate the main target (audience (s), turning it into a target of terror, a target of demands, or a target of attention, depending on whether intimidation, coercion, or propaganda is primarily sought*."[17]

James Lutz and Brenda Lutz came out with their less complicated definition as compared to Schmid and Jongman. They relied on these criteria to build-up the definition of terrorism that is:

> *"Terrorism involves political aims and motives. It is violent or threatens violence. It is designed to generate fear in a target audience that extends beyond the immediate victim of the violence. The violence is conducted by an identifiable organisation. The violence involves a non-state actor or actors as either the perpetrator, the victim of the violence or both. Finally, the acts of violence are designed to create power in situations in which power previously had been lacking (i.e. the violence attempts to enhance the power base of the organisation undertaking the actions)."*[18]

However, the most distinctive aspect of the above definition is that it carries the word "civilian", unlike some alternative definitions, for example, Boaz Ganor produces a simple definition claiming: "*terrorism is the deliberate use of violence aimed at civilians in order to achieve political ends*".[19] Without the word "civilian" present, it raises ambiguity on the type of victims targeted by the terrorists. Meanwhile, Anthony Richards in his article "*Conceptualising Terrorism*" believes that "*a comprehensive (and more honest) definition of terrorism needs to incorporate the possibility of terrorism that one might sympathise with or even endorse as well as 'bad terrorism' an international*

[17] ibid
[18] Lutz, James, and Brenda Lutz. *Global terrorism*. Routledge, 2013.
[19] "The Relationship Between International and Localized Terrorism - Boaz Ganor," accessed February 3, 2017, http://www.jcpa.org/brief/brief004-26.htm.

approach to the phenomenon arguably should reflect this".[20] His brief definition of terrorism is:

> *"Terrorism is the use of violence or threat of violence with the primary purpose of generating a psychological impact beyond the immediate victims or object of attack for a political motive."* [21]

Following the various definitions of terrorism propounded by the above scholars, it can be summed up that terrorist aim is to extend territorial power geographically and to promote their political agendas. To reach these objectives, they have selected their victims randomly to instil a psychological fear in their victims.

When Malaysia responded to Resolution 2178, the new Prevention of Terrorism Act, 2015 (POTA) was enacted. Under the Malaysian POTA, the term 'terrorist act' was cross-referred to section 130 B (2) of the Penal Code in Chapter V1A. Under the Penal Code definition, the 'terror act' is done or the threat is made with "*the intention of advancing a political, religious or ideological cause*" and intended to "*intimidate the public or a section of the public*;" or to "*influence or compel the Government of Malaysia or the Government of any State in Malaysia, any other government, or any international organization"*.[22] Further, in sub-section (3) it provides for any harm or damages inflicted while committing the terror acts.[23] Interesting to note is there are exemptions under Section 130B(4) where political protest or industrial action is not considered as a terrorist act if it does not intend harm such as serious risk to health and safety of the public or a section of the public. Such exception does not exempt legitimate form of protest. For a protest to fall outside the ambit of the law, the government just needs to show that the conduct was intended to create a serious risk to the health or safety of the public or a

[20] Richards, A. (2014). Conceptualizing terrorism. *Studies in Conflict & Terrorism, 37*(3), 213-236
[21] Ibid
[22] See: s.130 (B) (2) (b) and (c) of the Penal Code
[23] See: s.130 (B) (3) ibid

section of the public. But the point to make here is that in seeking to prevent terrorism, the government must be careful not to suppress legitimate dissent under the disguise of national security. Terrorism law must also be clear enough leaving no room for advancing myriad ways of interpretation. More so, when the punishment provided in the Penal Code is severe for suspected terrorist activities. For example, under Section 130J (1) (b) of the Penal Code, if anyone is found guilty of supporting terrorist acts, he or she can be liable to a maximum imprisonment of 30 years or life imprisonment or a fine including forfeiture of assets. This key issue of definition is significant in determining who the state will consider as a terrorist and who will be subjected to the strict laws. In the absence of an unambiguous definition, the cumulative effect will diminish the protection of individual rights and the sanction of harsher penalties that are concomitant with the designation of "terrorism".

2.3 NATIONAL SECURITY CONSIDERATION

In modern democratic societies today, two competing issues trigger many controversial debates between the government and the human rights groups. The central issue here is how to balance the protections of a citizen's personal liberties against the national security in times of state emergency. No doubt, the state owes a moral obligation and duty to protect the safety and the well-being of their citizens, the equilibrium between the two competing issues is a big challenge for the state in reality. Sometimes the state can play the opposite role as a threat to their own people by legislating laws under the disguise of crime prevention. This is observed when a state has widened their power arbitrarily with the enactment of new anti-terror laws. In Malaysia, there is already reason

to suspect the government of using counter-terrorism laws like the new POTA to undermine the fundamental legal rights such as the right to legal counsel.[24]

Under the preventive laws on terrorism, the most controversial aspect is when a person is detained for suspected terrorist activities without first committing the act. Whether this pre-charge detention is a legitimate deprivation of personal liberty depends on how a state views such a threat. To prove the legitimate purpose taken by the State, it is always linked to the national security consideration or crime prevention. Therefore, the contention here is whether such action taken can be questioned and if so, who is the one to question it. What happens if the government made the wrong assessment of the threat or risk to national security? De Londres and Davis pointed out that:

> "….*there are three responses to the limitation of personal liberties resulting from Executive power during times of violent terrorist related emergencies: (1) trust the Executive to behave responsibly and lawfully; (2) rely on the Legislature and the popular democratic processes to force the Executive to behave responsibly and lawfully and minimize judicial intervention; or (3) call on the Judiciary to intervene and restrict unlawful behaviour produced by the Executive, the Parliament or both acting together*." [25]

Along similar lines, Ramraj argues that:

> "For *threats of national security, the Executive, with the advice of the security intelligence community and other security experts within the bureaucracy is in a much better position to assess and respond to the risk of terrorism than the public, the legislature or the judiciary. When it comes to risk assessment, experts, particularly in their area of expertise are more likely than ordinary people to be right*." [26]

Hence, the government would be in the best position to decide and assess matters involving national security. However, the underlying arguments advanced by the above

[24] Section 10(6) of the POTA, 2015
[25] De Londras, F., & Davis, F. F. (2010). Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanisms. *Oxford Journal of Legal Studies*, *30* (1), 19-47.at p.19
[26] Ramraj, V. V. (2005). Terrorism, risk perception and judicial review. *Global Anti-Terrorism Law and Policy*, 107-126 at p 116.

scholars were rejected by human rights advocates such as Human Rights Watch.[27] They cannot accept that there is a need to sacrifice one's personal liberty over national security consideration. Because the government in taking the purportedly legitimate steps in counter-terrorism could be objectively wrong in their assessment of the risk factors or being driven by some other ulterior motive. To date, the history of preventive detention laws in Malaysia revealed grave human rights violations linked to their practice by the government. For example, the previous draconian Internal Security Act, 1960 (ISA) originally meant to counter communist insurgency in the past has been used against political dissents, NGOs and student activists in the infamous '*Operation Lalang*' [28] until it was repealed lately. It is also feared that in relation to preventing terrorism, preventive detention featured in POTA can be a convenient tool for the government for any illegitimate purpose just like how ISA was indiscriminately applied during the operation Lalang.[29] The way the preventive law operates hinge on future predictions of an imminent threat to national security and practically speaking, it is an impossible task to test the degree of harm or danger as it is yet to occur.[30]

Next, this thesis shall examine what is the various counter-terrorism strategy adopted by the state and why it is said to have breached human rights, in particular, the right to personal liberty. In the study of state counter-terrorism strategy, there are at least two known models identified by Bhoumik.[31] They are 'criminal justice' and 'intelligence' models. He argues that preventive detention fits firmly within the 'intelligence model' of counter-terrorism strategy because it is proactive rather than reactive, with an emphasis

[27] "*Malaysia passes controversial anti-terror bill - BBC News*" (2015). *BBC News*. Retrieved 27 August 2016, from http://www.bbc.com/news/world-asia-32194636?OCID=twitterasia
[28] T. C. Kee, (2012). "*What Everyone Should Know About Operasi Lalang.Malaysiandigest.com*." Retrieved 27 August 2016, from http://www.malaysiandigest.com/archived/index.php/25-features/commentary/18552-what-everyone-should-know-about-operasi-lalang.html
[29] "*Anti-terrorism Bill passed in Parliament after long debate*" (2015). *Thestar.com.my*. Retrieved 27 August 2016, from http://www.thestar.com.my/news/nation/2015/04/07/anti-terrorism-bill-passed-in-parliament-after-long-debate/
[30] Corrado, M. L. (1996). Punishment and the Wild Beast of Prey: The Problem of Preventive Detention. *The Journal of Criminal Law and Criminology (1973) - 86*(3), 778-814 at p.791
[31] Bhoumik, A. (2004). Democratic responses to terrorism: A comparative study of the United States, Israel, and India. *Denv. J. Int'l L. & Pol'y, 33*, 285 vol. 33, p.304

on preventive measures and intelligence to infiltrate terrorist organisations and to thwart potential terrorist acts. As a preventive measure, under the intelligence model, terrorism is not viewed primarily as a criminal activity, but rather as a threat to the security of the state. Therefore, it can serve a legitimate purpose within the 'intelligence model' because: (a) Preventive detention is to thwart an imminent terrorist act or preserving evidence relating to a terrorist act, not for criminal prosecution *per se*; (b) To achieve its purpose, preventive detention has a lower threshold that is required for a criminal arrest. Lesser facts are required to justify detention, allowing investigative and policing authorities to intervene at an earlier time than the criminal law would otherwise allow; (c) Preventive detention relies on lesser evidence than the ordinary criminal law and for that reason, it overcomes difficulties relating to getting evidence about a terrorist charge. In contrast to the 'criminal justice' model, terrorism is treated as a crime. The model provides for the capture and prosecution of a suspect after a terrorist act committed. As crime must have an act *(actus reus)*, the criminal justice model depends on the prosecution after the fact has taken place, making it reactive as opposed to proactive.[32] This includes all specified crimes as defined in the statute with the use of the police force to investigate the breach of the law and determining guilt in a public trial.[33] The two models fostered by Bhoumik seem to suggest that terrorism is an extraordinary crime than ordinary crime and under the intelligence model, it cast away all procedural rules and relaxed the evidential burden. However, the intelligence model suffers from criticism for lack of transparency and can be potential for abuses. The risk of arbitrary detention also raises concerns that preventive law contravenes international human rights law – especially the right to liberty. By using the criminal justice model, it has the advantage of the judiciary to provide safeguards from being abused by the administrative of any orders given under the preventive detention.

[32] Ibid. at p. 296.
[33] Ibid. pp. 298-99.

From the foregoing discussion, perhaps the Malaysian POTA was crafted following the 'intelligence model'. Preventive detention under the Malaysian POTA operates prospectively in a way the criminal law does not. An individual can be detained without probable cause or without future prosecution for up to two years.[34] In addition, on the expiry of the two years, the detention can be renewed for another two years.[35] Moreover, the government may detain a person even if such person has not committed an offence or if there is insufficient evidence for criminal charges against such person. The lower threshold of the evidentiary burden required under the preventive law is because the difficulties in prosecuting suspected terrorists because of inadmissible intelligence information, the frustrations of interrogation of terrorists trained to resist standard interrogation techniques and the fear of witnesses in testifying in terrorist trials.[36] Further justification of preventive detention according to Seibert-Fohr,[37] as she observes is that:

> *"In a number of States, argument has been raised that they are not able to provide within a short period of time enough for evidence for the courts to uphold the arrest on criminal charges. This led some States, such as the United Kingdom and the United States to use preventive or administrative detention in their counter-terrorism efforts...."* [38]

The difficulties of gathering enough evidence in terrorism cases are also hindered by the transnational nature of terrorism where coordination between governments and law enforcement agencies restrains an effective investigation. This is further compounded by States lacking capability or the political will to fight terrorism within their territories. Therefore, based on the earlier observation by Fohr, the need for early police intervention was understood as one of the principal justifications for relying on preventive detention

[34] Section 13(1) of POTA, 2015
[35] Section 17(1) of POTA, 2015
[36] Cassel, D. (2007). Pretrial and preventive detention of suspected terrorists: Options and constraints under international law. *J. Crim. L. & Criminology*, *98*, 811. pp. 823-24
[37]. Seibert-Fohr, A. (2004). The Relevance of International Human Rights Standards for Prosecuting Terrorists. Walter, C., Vöneky, S., Röben, V., & Schorkopf, F. (Eds.). (2004). *Terrorism as a challenge for national and international law: security versus liberty?* (Vol. 169). Springer Science & Business Media. pp. 125-163
[38] Ibid . pp. 145-47

law in Malaysia's counter-terrorism strategy. It has the effect of '*buying more time*' for investigation and intelligence gathering. Furthermore, in preventing a terrorist attack, if the police intervention is too late, the impacts of terrorist attacks could well occur with dire consequences which can devastate a large segment of society based on the current trend of terrorist attacks. Primarily, this is the dilemma facing the democratic government today in balancing national security over personal liberty when implementing counter-terrorism strategy. So far, under the new Malaysian POTA, no suspected terrorists have been detained under section 13 (1) of the Act at the time of writing this thesis as the law is still new to see its full force. But it is noteworthy that in Malaysia, there are already other legislations in place to deal with terrorist threats before the enactment of POTA, that is Security Offences (Special Measures) Act, 2012 (SOSMA), Prevention of Crime Act, 1959 (POCA) and the relevant provisions in of the Penal Code (Chapter VIA). With an array of counter-terrorism legislations to apply by the government, the question is whether POTA is necessary or is it an overzealous action by the government looking for extensive power?

2.4 PERSONAL LIBERTY CONSIDERATION

The roots of personal freedom and the protection against arbitrary detention can be traced to the 13th century in England - the medieval charter called Magna Carta 1215. Article 39 of the Magna Carta in English provides that:

> "*No freeman shall be taken or imprisoned or disseized or outlawed or exiled or in any way harmed – nor will we go upon or send upon him - save by the lawful judgment of his peers or by the law of the land*." [39]

Since then, the Magna Carta became the symbol of the prohibition on arbitrary power. Today, all nations are guided by the Universal Declaration of Human Rights for

[39] Statutes of the Realm 6-7 (1810) UK, art.39.

protecting personal liberty. Although the Universal Declaration is a mere expression of collective opinion and therefore not a binding application, the multilateral treaty under the International Covenant on Civil and Political Rights (ICCPR) in particular, Article 9(1) that provided for the right to personal liberty and security, freedom from arbitrary arrest and detention binds 168 parties. The right in Article 9(1) entails other procedural safeguards for preserving rights to freedom and safety under Article 9(2) to (5) such as:

> "(2) the right to be informed as to the reasons for arresting and detention, and of any charges laid; [40]
>
> (3) the right to be promptly brought before a judge or other judicial officer to exercise judicial power and the right to be entitled to trial within a reasonable time or to release;[41]
>
> (4) the right to take proceedings before a court without delay on the legality of detention and order release if the detention is not lawful;[42]
>
> (5) the right to compensation if there has been unlawful arrest or detention." [43]

It is to be observed here that Article 9(4) ICCPR enshrined the writ of *habeas corpus*. Now, having briefly examined the legal framework of personal rights as provided under Article 9, the inherent issue of concern is that in crafting counter-terrorism laws by member states, has any of the basic fundamental rights in particular, right to liberty is being considered? What is Malaysia's position regarding the compliance with the international treaty like the ICCPR? It is noteworthy that Malaysia is neither a signatory nor a party to the ICCPR treaty. How then is the Malaysian government going to reconcile their preventive detention law with the rights promulgated under Article 9(1) ICCPR?

In the case of Malaysia, it adopts *dualism* approach as far as international law is concerned. What this means is international law and municipal law are two distinct

[40] ICCPR Article 9(2).
[41] Ibid. Article 9(3).
[42] Ibid Article 9(4).
[43] Ibid Article 9(5).

systems of law functioning in its own sphere. The rules of international law can only work in our local legal system provided they are enacted by the Parliament. However, there were limited attempts by the Malaysian court to apply the international law. As an example, in the case of *MBf Capital Bhd. & Anor v Dato Param Cumaraswamy*, [44] the defendant was appointed by the United Nations as a Special Rapporteur on the Independence of Judges and Lawyers. When he was accused of defaming the Plaintiff, he relied on section 22 (b), Article VI of the Convention on the Privileges and Immunities of the United Nations, 1946 to claim immunity as his defence. However, the High Court took the view *(inter alia*): (1) that the United Nations Secretary-General's Certificates issued to define the privileges and immunities accorded to the defendant was merely an opinion; and (2) the issue of immunity was not capable of decision in a summarily, and therefore, that the matter ought to be resolved at the full hearing of the suit. The Court of Appeal subsequently endorsed this view.[45] Privileges and immunities came up again in another defamation suit involving the same Special Rapporteur in *Insas Bhd & Anor v Dato' Param Cumaraswamy*.[46] However, by this time the International Court of Justice (ICJ) has already given an advisory opinion on the position of Dato' Param as Special Rapporteur. The ICJ [47] held that Dato' Param was qualified to claim privilege from legal process for the words uttered by him during his term of office as a Special Rapporteur and the Malaysian government had to notify the courts of the ICJ's findings. In the wake of the rulings on Dato' Param, the Malaysian High Court in *Insas's case* gave legal effect to the ICJ's advisory opinion. Ensuing from the decision of *Insas,* we can articulate that it is laudable for the Malaysian Court to give binding effect to ICJ's advisory opinion. However, recent case-law seems to point to the Malaysian Court's approach's having been

[44] [1997] 3 CLJ 927
[45] [1998] 1 CLJ 1,
[46] [2000] 4 CLJ 709
[47] [1999] ICJ Reports 62.

on '*dualism*.' The case in point was illustrated in *Than Siew Beng & Anor v. Ketua Pengarah Jabatan Pendaftaran Negara & Ors* [48] where Justice Asmabi held that:

> "*International treaties do not form part of the law in Malaysia unless such treaties have been incorporated into the municipal law. The court would refer to these international norms only if the same had been incorporated by way of municipal law"*

In another development, the High Court was asked to consider the Universal Declaration of Human Rights ('UDHR') in the case of *Lim Jen Hsian & Anor v. Ketua Pengarah Jabatan Pendaftaran Negara & Ors*.[49] The court held that:

> *"The UDHR is applicable in Malaysia only to the extent that it is not inconsistent with the Federal Constitution. The provisions of the UDHR must be read together with s. 4(4) of the Human Rights Commission of Malaysia Act 1999. Unlike some other constitutions in other jurisdictions, the Federal Constitution does not impose on the Malaysian courts to take cognisance of international human rights laws in any of its provisions."*

From the study of the above-decided cases, we can, therefore, conclude that the Malaysian courts will only apply international treaties provided the treaty referred to has been converted into the national law enacted by the Parliament. Admittedly, the Malaysian courts do not take cognisance of international human rights laws, but for the later discussion that follows, this article will examine to what extent the Malaysian POTA 2015 has fared if to compare with the international norms and practice.

Under the Malaysian POTA, a person can be subjected to a detention order if the issuing authority is satisfied that such person has been or is *engaged* in the *commission* or *support* of terrorist acts in a foreign country or any part of a foreign country. The detention period can be for a period not exceeding two years.[50] Under the Malaysian

[48] [2016] 6 CLJ 934.
[49] [2016] 7 CLJ 590.
[50] Ibid. Section 13(1)

POTA, the word '*preventive*' is absent, and it only refers to 'detention order'.[51] Although the government is tacit in describing preventive detention without trial under the provision of the law, one thing is that the person is locked up because they are likely to commit a foreseeable offence against the national interest. The detainee's past criminal records or links are relied upon to justify the arrest and detention. Irrefutably, such suspicion can be purely imaginary. The most contentious aspect of preventive detention is the denial of one's personal freedom based on an administrative judgment that could be wrong and ultimately, it leads to a blatant injustice.

The next issue of contention is before a detention order is issued to a suspected person, what test shall apply to make it legitimate and compatible with the principles of justice? How to know if the practice is in line with the international human rights standard under the international treaty? To shed light on these issues, it is, therefore, wise to look into the jurisprudence of Article 9(1) of the ICCPR and various key cases brought before the Human Rights' Committee. In the case of *C v Australia*,[52] C was detained without a valid entry permit in the immigration detention pending removal from Australia. The Human Rights' Committee noted that in relation to asylum seekers, all applications to enter and remain in Australia are thoroughly considered on a case-to-case basis. The Committee held that the likelihood for the asylum seekers to disappear if released into the community is there. Therefore, such persons ought to be detained. As such:

> *"The policy of detaining unauthorised arrivals is reasonable, proportionate and necessary in all of the circumstances under such cases... were not arbitrary, as they were justifiable and proportionate on the grounds outlined above."* [53]

[51] Ibid section 13(1) (b)
[52] *C v Australia* (900/1999) 13 November 2002, UN Doc CCPR/C/76/D/900/1999.
[53] Ibid

The Human Rights' Committee has emphasised that under Article 9(1) ICCPR, the concept of proportionality ought to be observed. In *Danyal Shafiq v Australia*, the Human Rights Committee referred to *C v Australia* and held that the main test [whether such detention is arbitrary] is to determine if the detention is reasonable, proportionate, justifiable and appropriate in the circumstances.[54] Article 9(1) propounds the view that it requires the consideration if a particular measure is a legitimate aim and purpose. If so, whether such measure is essential to reach that purpose, having considered whether a less restrictive way is available as a choice to this measure. An analysis of major decisions on terrorism cases in the United States [55] and the United Kingdom [56] the principle of proportionality has played a key role in the disposition of each case. Further, according to Nowak's explanation on proportionality as applied under Article 9(1) ICCPR, he opined that:

> "*Cases of deprivation of liberty provided for by law must not be manifestly unproportioned, unjust or unpredictable, and the specific manner in which an arrest is made must not be discriminatory and must be able to be deemed appropriate and proportional in view of the circumstances of the case."* [57]

The foregoing discussion and analysis above on interpreting Article 9(1) illustrate that 'proportionality' is, therefore, a question of balance. By applying this understanding, this means that had a less intrusive measure achieved the purpose of a preventive detention order, the scales would be unbalanced and disproportionate. This 'proportionality' principle has been applied and accepted by our local court here in *Sivarasa Rasiah*.[58] In a more recent case of *Azmi Sharom*,[59] the Federal Court again reaffirmed the proportionality principle as laid down in *Dr Mohd Hashim's* case [60] that the legislation or

[54] *Danyal Shafiq v Australia* (1324/2004) 5 November 2004, UN Doc CCPR/C/88/D/1324/2004, para.4.10
[55] *Rasul v Bush*, 542 U.S. 466 (2004); *Hamdi v Rumsfeld*, 542 U.S. 507 (2004); *Rumsfeld v Padilla* 542, U.S. 426 (2004);
[56] *A (FC) v Secretary of State for the Home Department* (2005) 2 AC 68
[57] Manfred Nowak.*UN Covenant on Civil and Political Rights. CCPR Commentary* (2nd rev. ed.). Kehl am Rhein: Engel, 2005. ISBN: 3-88357-134-2.
[58] *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333
[59] *PP v. Azmi Sharom* [2015] 8 CLJ 921
[60] *Dr. Mohd Nasir Hashim v. Menteri Dalam Negeri Malaysia* [2007] 1 CLJ 19

executive action must not only be objectively fair but must also be proportionate to the object sought to be achieved. However, whether this approach taken by the court checks and balance the executive's power in preventive detention under POTA has yet to be tested. A further point must consider here is, although Malaysia is not yet a signatory to the ICCPR and yet abides by its principles as laid down in the treaty, can Malaysia downplay Article 9(1) of ICCPR in times of emergency to implement preventive detention as a response to counter-terrorism? Is there any room for derogations? This is important for discussion because the standards under the international conventions do not provide room for derogations.

Under international law, a '*state of emergency*'[61] refers to a governmental declaration to suspend human rights guarantees under each of the international human rights instruments like the ICCPR. This exercise will entail an attempt to balance international human rights obligations and the national interest. Article 4(1) of ICCPR [62] allows a state to declare a state of emergency whereby limited derogation is permitted. This begs the question whether terrorism threat in Malaysia gives a good reason for the declaration of a state of emergency. To answer this, we must look at the approach taken by the European Court of Human Rights (ECHR) for guidance. The case of *Lawless v Ireland (No 3)* [63] directly dealt with this issue. There, the ECHR confirmed that under the international law, terrorism could be the kind of emergency that would validate a declaration state of emergency. It went further to clarify the concept of a public emergency as a situation of exceptional and impending crisis or danger involving the public and making up a threat

[61] The International Law Association (ILA) adopted the "Paris Minimum Standards of Human Rights Norms in a State of Emergency" which contain the following prescription:

(a) The existence of a public emergency which threatens the life of the nation, and which is officiallyproclaimed, will justify the declaration of a state of emergency.

(b) The expression "public emergency" means an exceptional situation of crisis or public danger, actual or imminent, which affects the whole population or the whole population of the area to which the declaration applies and constitutes a threat to the organizedlife of the community of which the state is composed. (Available at: Lillich, R. B. (1985). The Paris minimum standards of human rights norms in a state of emergency. *The American Journal of International Law*, *79*(4), 1072-1081)

[62] See Article 4(1) ICCPR available at: <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

[63] No. 1/61, Judgment of July I, 1961, of the European Court of Human Rights. (The text of the opinion was issued in both French and English but only the French text is official.) Accessible from: http://hudoc.echr.coe.int/eng?i=001-57518.

to the life of the community of which the State is composed. In another case called the *Greek case*, the ECHR summarised the characteristic of a public emergency as follows:

> *"(i) it must be actual or imminent;*
> *(ii) its effects must involve the whole nation;*
> *(iii) the continuance of the organised life of the community must be threatened;*
> *(iv) the crisis or danger must be exceptional in that the normal measures or restrictions permitted by the Convention for the maintenance of public safety, health and order are plainly inadequate*." [64]

Following the above proposition as laid by the ECHR, perhaps the demand for "actual or imminent threat" includes a state of emergency declared as the preventive measure, that is, to face possible imminent exceptional situations including the threat of terrorism. Hence, the government is justified in derogating the international treaty pertaining to human rights as provided under Article 9(1) of the ICCPR. Therefore, it can be succinctly put that the permissible variations are allowed but are limited. National security concerns do not justify a complete abrogation of rights. Any variations may need to be compensated as far as possible by an alternative safeguarding mechanism, usually in the form of judicial scrutiny or a fair trial. Malaysia, in response to the Security Council Resolution 2178, in a hurry introduced POTA by neglecting one's right to liberty under detention. This holds true when POTA did not allow for judicial review of a detention order issued by the authority [65] unless the decision-making body has acted *ultra-vires* the object of the Act. Only under such a limited circumstance that the court can interfere regardless of the ouster clause. [66] Such a provision is a clear example of depriving the detainee to contest in court if there is any abuse by the authority. This merit the concern that the denial of due process is objectionable to the rule of law traditions upheld by many democratic

[64] The decision can be found in "The Greek Case as reported in the Yearbook of the European Convention on Human Rights:The European Commission and European Court of Human Rights (1969), para.153"
[65] Section 19(1) of POTA
[66] See: Kwang, H. P. (2016). The New Prevention of Terrorism Act 2015 (POTA): A legal commentary. *Journal of Malaysian and Comparative Law*, *43*(1) at page 24.

states. As observed, most countries weaken their respect for the rule of law and liberties in wartime. According to Falk,[67] what is ominous is the executive sensitivity to civil liberties, human rights and the rule of law; it is unlikely that *judicial* protection during wartime will be very effective except in extreme instances of abuse where the security justifications seem frivolous. This is further compounded in an atmosphere of national emergency when the executive branch purports to have the superior secret knowledge that is not allowed to be shared; hence, there is a judicial reluctance to invalidate government policy by the court.[68] The question is how we check if there is any abuse by the government. The rule of law supposedly to subject state power to careful checks to enforce the line between guilt and innocence and to hold government officials accountable to accept clear rules. However, these ideals mix uneasily with the strategies of the preventive model that demand wide executive discretion and avoiding questions of guilt or innocence (because no wrong has yet occurred). The problem starts when the rule of law insists on objective evidence of wrongdoing; the preventive detention model relies on predictions about future behaviour and *secret* evidence held by the government. Such predictions generally cannot be proved true or false; normally rest on questionable assumptions vulnerable to textual manipulation of the law. But what matters most with great concern to many is whether the decision-making procedure under POTA has complied with the essence of the rights guaranteed and protected under the Federal Constitution.

[67] Brysk, A., & Shafir, G. (Eds.). (2007). "*National Insecurity and Human Rights: Democracies Debate"Counterterrorism*. University of California Press. Retrieved from http://www.jstor.org/stable/10.1525/j.ctt1ppbw5
[68] Ibid

2.5 A COMPARATIVE PERSPECTIVE FROM THE UNITED KINGDOM AND INDIA

2.5.1 United Kingdom

When the UK passed Terrorism Act 2000, it was meant to replace all the existing counter-terror legislation enacted resulting from the earlier struggle with the Northern Ireland insurgency and to have a coherent law that covered the whole of the UK.[69] Following the attacks of 9/11, the UK Parliament moved to pass more terror legislations starting from the year 2001. In fact, all the major UK's counter-terror legislation like the Anti-Terrorism, Crime and Security Act, (ATCSA) 2001; the Prevention of Terrorism Act (PTA), 2005 and the Counter-Terrorism Act 2008 was premised on the idea that the laws must grant powers to the state to prevent mass attacks that would otherwise cause large numbers of civilian casualties. This array of anti-terror laws also raised the issues of whether the UK government was overzealous in fighting terrorism just like Malaysia, or whether the state has acted proportionately under the provision for the right to life as laid down in the European Convention on Human Rights (ECHR). [70]

For balancing national security of the state and personal liberty of its citizens, the situation in the UK differs slightly from Malaysia. Although the threat from terrorism can induce certain derogations under the ECHR or ICCPR provisions by the UK government, there is, however, certain conditions to be satisfied. Conte provides two procedural and four substantive conditions.[71] The two procedural conditions are: First, *"state may only derogate from those rights capable of derogation;"* Second, "s*tate must proclaim a state of emergency and give notice of the derogation to the Secretary-General of the United*

[69] G Hogan and C Walker (1989), *Political Violence and the Law in Ireland* (Manchester University Press)
[70] See Article 2 of the ECHR
[71] Conte A. (2010). *Human rights in the prevention and punishment of terrorism: Commonwealth approaches: The United Kingdom, Canada, Australia and New Zealand*. Springer Science & Business Media.

Nations (or of the Council of Europe for the ECHR);" The four substantive conditions are:

> *(1) "it must be shown that the derogating measures are adopted during a time of public emergency which threatens the life of the nation;*
> *(2) the derogating measures must be limited to those strictly required by the exigencies of the situation;*
> *(3) the measures must not be inconsistent with [the State's] other obligations under international law; and*
> *(4) they must not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."*

Regardless of whether the existence of an emergency that threatens the life of the country or its population, certainly the threat of terrorism may even affect the independence or territorial integrity of a sovereign state. As highlighted earlier, under article 4(1) of the ICCPR, States may suspend the application of certain rights during a state of an emergency that threatens the life of a nation like acts of terrorism. It is to be noted that Article 15 of the ECHR[72] is like Article 4 of the ICCPR. In the ICCPR and the ECHR to which the UK was a party before exiting the European Union recently, it allows the UK to perform their democratic objectives while safeguarding the personal liberty of its citizens. The UK government anti-terror measures and the limited derogation allowed under Article 15 of the ECHR is an important issue to consider. The wording of Article 15 of the ECHR is broadly similar to that of Article 4 of the ICCPR with the addition of the words "*in times of war*."

In the UK, the Human Rights Act 1998 (HRA 1998), which acts as a governing framework for human rights issues are being applied broadly by the British Law Lords. Among the highlights in the HRA 1998 that is worth noting are, for example, the UK's

[72] See Article 15 ECHR available at: Anonymous (2016). *Echr.coe.int*. Retrieved 1 September 2016, from: "http://www.echr.coe.int/Documents/Convention_ENG.pdf"

State Secretary is empowered to declare any derogation from one of the rights under the ECHR[73]. Further, any public authority in the UK may not act in a manner irreconcilable with a European Convention right.[74] This encompasses any government and the courts' action. However, the parliament is exempted because it needs to enact legislation found to be incompatible with ECHR.[75] The same is accorded to any Ministerial function of the Ministers in discharging their duties.[76] It is noteworthy that the UK's HRA 1998 can apply to the private and public action.[77]

The stark contrast between the UK and Malaysia is that the UK courts are vested with strong authority to declare any inconsistency under their HRA 1998 whereas, with Malaysia, no judicial review is permissible [78] even if there is a clear human rights violation. It is observed that where an incompatible is known between any law provisions that touch on the human rights, or freedoms, the result varies remarkably between how Malaysia and the UK way of handling it. Although section 3(2) of HRA 1998 disallows the judiciary in the UK to nullify any law at odds with ECHR, the court is vested with clear authority to declare any incompatibility.[79] The UK court has also held before the control orders issued under the Prevention of Terrorism Act 2006 were incompatible with liberty rights and the right to a fair trial under Article 6 of the ECHR.[80] However, making a declaration of incompatibility under the HRA 1998 should stand as an exceptional measure, only if a conflict between the HRA 1998 and other legislation, which make it incompatible and thus firming up the interpretative presumption under section 3.[81] Therefore, the UK government has the choice of changing the offending law whenever a

[73] Section 14 Human Rights Act,1998
[74] Section 6 *ibid*
[75] See Section 6(3) *ibid*
[76] Section 6 (6) ibid.
[77] Wilson v First County Trust Ltd (No 2) [2001] EWCA Civ. 633.
[78] See section 19(1) POTA 2015 *op cit*.
[79] Section 4 Human Rights Act *op cit*
[80] Re: MB [2006] EWHC 1000.
[81] "R v A (No.2) [2001] UKHL 25, as per Lord Steyn" at para. 44.

declaration of incompatibility is issued. Unless there are "compelling reasons" for the British Minister to make any corrective order by amending the law to remove the incompatibility, he may do so under the law.[82] Besides the above-mentioned provisions, section 8(1) of the HRA 1998 sets out a general power to the court to "*grant such relief or remedy, or make such order within its powers as it considers just and proper*" regarding violation of personal liberties by any public authority.

Where human rights issue involving member states are a concern, the European Court acts as ultimate arbiters. If any member states wish to declare any derogation of rights and freedoms, it is incumbent on them to satisfy the necessity besides proportionality principles. It must also be confined strictly by the exigencies of the situation. As observed earlier, both the European and the UK courts have played a significant role in setting the limits of what a government could do with countering terrorism. Although it can be argued that the UK government exerts a delicate balance between security and liberty when faced with actual threats and imminent attacks, the UK government pushes the security side of the scale as far as it can. However, when prompted by the courts for violation of human rights, the UK government retreated and responded by promptly changing its anti-terror laws. One example was the case of '*Belmarsh'*.[83] The House of Lords affirmed that the indefinite detention regime under the ATCSA 2001 was irreconcilable with the right to liberty. It was also found to be discriminatory. The House of Lords also concluded the differential handling between the British terrorists and the foreign terrorists under ATCSA 2001 could be objectively justified. Regardless of their nationality, both could be involved in international terrorism. So, the UK government amended Part 4 of the ATCSA 2001. As highlighted in the foregoing paragraph, without a valid derogation in place, in the past the ECHR repeatedly found the preventive

[82] See Section 10(2) Human Rights Act, 1998
[83] A & Others v Secretary of State for the Home Department [2004] UKHL 56

detention without charge to be irreconcilable with Article 5(1) - the right to liberty. This view is further supported by Webber,[84] who suggested that almost every element of English detention laws has been challenged on grounds of violation of human rights in the domestic courts and in the ECHR. This has led the UK government to rethink and redraft the British counter-terrorism strategy.

2.5.2 India

Much like Malaysia and the UK, India also confronts a similar quandary of trying to balance between protecting national security and safeguarding personal liberty in the efforts to counter terrorism. It was the belief of the Indian government that by having stringent laws with wide power to the executive and the law enforcement authorities will help frustrate terrorist threats in India. The position taken by India's national security strategies in counterterrorism is akin to their Malaysian counterpart's belief. Currently, the applicable central anti-terror law in India is the Unlawful Activities Prevention Act, 1967 ('UAPA') following the repealed of Prevention of Terrorism Act, 2001 ('Indian POTA'). Like the Malaysian POTA 2015, most Indian anti-terror legislations have deviated from the criminal procedures. Among the notable areas that cause the controversy are the wide powers of arrest by the police, using unnecessary force by the armed forces under the disguise of protecting their national security and preventive detention against terror suspects. Despite some contentious aspect as contained in India's procedural anti-terror law, the Indian National Human Rights Commission affirmed the justification of having the then anti-terror law like the Indian POTA (repealed) because *"(i) it is difficult to secure convictions under the criminal justice system; (ii) trials are*

[84] Webber, D. (2016). "*Preventive Detention of Terror Suspects: A New Legal Framework*." Routledge.

delayed;"[85] Hence, according to Singh, that explains why it is reasonable for terrorism offences to be taken outside the boundary of the ordinary criminal law system.[86]

In contrast to Malaysia, India not only subscribed to many international human rights treaties, it is a signatory to the ICCPR. India's Constitution also provides, *"The state shall endeavour to foster respect for international law and treaty obligations*."[87] Moreover, in *Visakha v. State of Rajasthan,*[88] the Supreme Court emphasised on India's role as far as the International conventions are concerned by holding that:

> "*any International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into [domestic] provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee."*

As discussed earlier in the above sub-headings, in times of public emergencies, the ICCPR permits member states to derogate the rights "*that threaten the life of the nation and the existence of which is officially proclaimed.*"[89] However, it is obligatory to satisfy the exigencies of the situation, besides it must be proportional. But so far, India did not openly announce its intention to derogate from Article 4 (1) of the ICCPR's rights when faced with any emergency situations. Instead, it is interesting to note that India's anti-terror laws have gone through enactments and re-enactment without observing any of the stipulated conditions for derogations.

Irrefutably, the Indian state, like Malaysia under Article 149,[90] has the power to pass security laws to safeguard its citizens from terrorist attacks and to keep peace and order. But one may query whether this state's power has been invoked within the reasonable

[85] "*Opinion on the Prevention of Terrorism Bill 2000* dated 14 July 2000 by India National Human Rights Commission," New Delhi. Retrieved 13 September 2016, from <http://nhrc.nic.in/impproceed.htm>
[86] "UK Singh (2007) *The State, Democracy and Anti-terror Laws in India* Sage Publications; New Delhi, P16"
[87] Article 51 of the Indian Constitution
[88] AIR 1997 SC 3011
[89] Article 4 (1) ICCPR
[90] Article 149 of Malaysian Federal Constitution

limits allowed under the Indian Constitution. The question of reasonableness is directed at the way such anti-terror laws are implemented by the government, whether fairly or unfairly invoked on its citizens. As to the standard of reasonableness, the answer lies in the heart of their constitutional framework to regulate the power of the state and to prevent any arbitrary incursion of personal liberty. For example, to guarantee the right to speech, expression, peaceful association and movement, these rights are enshrined in Article 19 of the Indian Constitution. However, the Indian government could enforce "reasonable restrictions" on such freedoms if it affects *inter alia,* the security of the state.[91] Hence, in *Ram Manohar Lohia v. State of Bihar*,[92] the Supreme Court explained the concepts of "*security of the State*," "*public order*," and "*law and order*" by providing distinguishable clear examples to follow. A "*law and order*" situation occurs when two persons involved in a violent fight. On a bigger scale, if the fight is derived on an issue connected to groups of people from a community, and so it influences the community, then this befits a "*public order*" situation. As for threats to the security of the state, they make up only a small circle within the public order and are usually insignificant. Regardless of the explanation given by the Supreme Court in *Lohia's* case, the concepts of public order and national security issues continue to be vague.[93] Further, in times of an emergency, the Constitution allows the suspension of Article 19 rights. Even though Article 22 safeguards protection against unlawful detention and arrest, but, it does not extend to individuals caught under the preventive detention laws.[94] It is further observed that the Indian Constitution legalised preventive detention[95] since the drafter of the Constitution could have anticipated that "*there may arise occasions in the life of the nation when the need to prevent citizens from acting in ways which unlawfully subvert or disrupt the bases of an*

[91] Article 19(2) of the Indian Constitution
[92] (1966) 1 SCR 709
[93] "K.G. Kannabiran (2004), *The Wages of Impunity: Power, Justice and Human Rights* Orient Longman; New Delhi"
[94] Article 22 (3) of Indian Constitution
[95] Article 22 (4) – (7) *ibid*

established order that may outweigh the claims of personal liberty."[96] So, in the contest between the security of the state and individual rights protection in India, it has fostered much debate in their Parliament just like in Malaysia during the passing POTA 2015. Among the common national security issues raised by both nations are the underlying arguments which focus on the due process and the arbitrary preventive detention regime.

It is interesting to highlight here that although the right to life and personal liberty is safeguarded under Article 21 of the Indian Constitution, the exception is that it must be in accordance with the *procedure* established by law, however, the term '*procedure'* was not clearly defined. In the landmark case of *Maneka Gandhi v. Union of India* [97] the Supreme Court tried to deliberate the term *procedure* judicially. The court took a decisive stand and held that the term '*procedure*' ought to be construed that "*all actions of the state must be right, just and fair, not arbitrary, fanciful or oppressive*." Apparently, this landmark decision seems inconsistent with Article 22 that allows for preventive detention, the provisions for deprivation of personal liberty[98] and the freedom of movement.[99]

There are important Indian lessons that can be learned from the Indian experience. The Indian judiciary, like their UK counterparts, took a proactive role in interpreting their anti-terror legislations found to be in breach of human rights ideal. Although the Indian Supreme Court treatment of human rights violations under the Constitution has been strict judging from the historical landmark decisions made, the efficacy of judicial institutions in India may not be impeccable all the time. One thing for certain is the emboldened steps taken in both the UK and the Indian courts were to make sure that their particular anti-terror legislations and its implementation are lawful constitutionally, besides following

[96] "Rajbhar v. State of West Bengal" (1975) 3 SCR 63, 70;
[97] (1978) SCC 248
[98] Article 21 of Indian Constitution
[99] Article 19 (1) (d) *ibid*

the ICCPR obligations. The active roles shown by the judiciary in both nations are something commendable and should be a valuable lesson for their Malaysian counterparts. Indeed, the judiciary institutions can play a pivotal role in curbing the arbitrary power of the executive in relation to implementing state counter-terror measures.

In the post 9/11 world, the enactment of antiterrorism laws evokes a continuous struggle between personal liberties and national security issues due to the reactions to terrorism threat which resulted in potential human rights abuses.[100] State disregards the adherence to the international law obligations and the domestic constitutional law when drafting anti-terror laws which may lead to violating human rights value. Admittedly, terrorism also encroaches upon human rights by disrupting the security of the nations and its citizen. Hence, there are dilemma and challenges in balancing the two competing rights simultaneously. It is believed that to counter terrorism effectively, it should not be fought like what Mahatma Gandhi once said that, "*An eye for an eye only ends up making the whole world blind.*" [101]

2.6 IS THE FEAR OF TERRORISM OVERSTATED?

When our Prime Minister tabled a white paper in the Parliament last year on 26 November 2014 entitled: '*Towards Combating the Threat of Islamic State*', it was claimed that the continuous threat of ISIL propaganda and its radical ideology in the Middle-East can infiltrate into our country.[102] Because of this fear, our country needs a new law specifically to combat such a threat to our nation and to deter Malaysians from supporting

[100] Kumar, C. R. (2004). "Human Rights Implications of National Security Laws in India: Combating Terrorism While Preserving Civil Liberties". *Denv. J. Int'l L. & Pol'y*, *33*, 195.
[101] Mahatma Gandhi "Quotes at BrainyQuote.com. (2016). *BrainyQuote*. Retrieved 11 September 2016, from <http://www.brainyquote.com/quotes/quotes/m/mahatmagan107039.html>"
[102] *Prime Minister's Office of Malaysia. Pmo.gov.my*. Retrieved 27 August 2016, from http://www.pmo.gov.my/home.php?menu=speech&page=1676&news_id=745&speech_cat=2

such a group. Despite the fear instilled by our government, the act of terrorism in Malaysia presents an insignificant danger to life as compared to many other activities we do daily. According to a study by Wolfendale,[103] the chances of motorists being killed in car accidents are greater than being killed in a terrorist attack even after 9/11. Until recently, Malaysia encountered its first ever ISIL sympathisers attack in the suburb of Kuala Lumpur.[104] Although there has been no record of major casualty caused by the attack, our government with great enthusiasm still thinks that the abundance of counter-terrorism legislations like the SOSMA, the Penal Code (Chapter VIA), and POTA are all necessary to fight terrorism.

Supporters for the need of radical counterterrorism measures may acknowledge that although the danger of being slaughtered in a terrorist attack is not present yet, such future risk of terrorism can be massive in scale to warrant the suspension of one's freedom as a preventive step ahead of such catastrophic damage. Although it may be tricky to argue against any hypothetical possibilities, admittedly, an act of terrorism could instantly kill hundreds of thousands of innocent lives in the blink of an eye. On the other hand, does the inculcation of fear on its citizen justify a compromise of personal liberty by the government? While evaluating the probability of a potential threat is hard, equally, there is a lack of proof that terrorists main target is to slaughter many innocent lives at random.[105]

In summary, the evidence that terrorists are planning massive acts of terrorism on our soil is slight, unlike other western or middle-eastern countries. This was confirmed by a recent report published by the UK Foreign Office,[106] which shows that Malaysia is not

[103] J. Wolfendale: '*Terrorism, Security, and the Threat of Counterterrorism'* Studies in Conflict and Terrorism 29(7):753-770 February 2006.
[104] '*Cops confirm Movida bombing first ever IS attack in Malaysia'* – available at http://www.thestar.com.my/news/nation/2016/07/04/movida-igp-confirm-is-attack/
[105] J. Wolfendale - *op.cit*.
[106] *Mapped: Terror threat around the world* accessible at: http://www.telegraph.co.uk/travel/maps-and-graphics/Mapped-Terror-threat-around-the-world/

even listed as the top ten countries with high terror threat rating. Even the Malaysian Deputy Home Minister [107] concurred that: "*They (ISIL) don't want to cause harm to the local population. This will be counter-productive to their own struggle. They want to focus on areas where there are a lot of foreigners and where unIslamic activities thrive and at the same time hurt security forces*"

Therefore, the argument that terrorism threat in Malaysia is life threatening is hyped up as compared to any other threats to a human, be it natural and man-made. Although our government has a moral obligation to guard the lives of citizens against any danger, in doing so, does it mean taking away certain basic legitimate human rights as a trade-off? Is the right to national security so important that the government can abnegate those rights? If the answer is in the affirmative, equally the government should have a similar moral obligation to reduce the danger of road accidents, street crime, and other life-threatening events even when doing so demands the restriction of our civil liberties. If terrorism portrays an insignificant threat than other real threats facing Malaysia as highlighted above, what good does it serve by overstating the danger of terrorism and inculcate the unnecessary culture of fear on Malaysians during the passage of POTA in Parliament? In a recent development, the Royal Malaysian Police Counter-terrorism division's principal assistant director, Datuk Ayob Khan Mydin Pitchay, in a briefing to foreign diplomats in Malaysia also confirmed that the ISIL threats were "very much contained"[108] now due to the great efforts put up by the police. Thus, it is believed this containment is certainly not due to the efficacy of POTA.

[107] *Daesh Terrorists Not Driven By Religious Ideology*. *Berita Wilayah*. (2016). *Bernama.com*. Retrieved 27 August 2016, from http://www.bernama.com/bernama/state_news/news.php?id=1210348&cat=ct

[108] *Malaysia to foreign diplomats: Isis threat against country 'contained' for now*. (2016). *International Business Times UK*. Retrieved 15 August 2016, from <http://www.ibtimes.co.uk/malaysia-foreign-diplomats-isis-threat-against-country-contained-now-1575276>

But on the other hand, we cannot simply dismiss the possibility that terrorists can also come in all guises under the pretext of making the world safe for democracy. It is noteworthy that sometimes the state can play the opposite role as a threat to their own people or to terrorise them into submission. This is known as 'state terrorism' as identified by scholars such as Noam Chomsky and Sluka.[109] Although we tend to take for granted that terrorists must be from insurgents or criminals, it can also come from members of the military or the state security agency. There is no clear definition on the identity or characteristic of a terrorist. Hence, we cannot always assume that terrorism is reserve only for non-state actors. If state actors do what terrorists do – such as aggression or any unlawful acts against the innocents, why should they escape moral condemnation? Throughout history, some states commit terrorism act systematically against their own citizens to control the society. For example, the Nazi had done this in Germany and Stalin in the Soviet Union. Some states even employed terrorism while waging war to invade other territorial rights. This can be seen in the bombings of Hiroshima and Nagasaki during World War II to terrorise innocent civilians and to force the state's enemy to surrender. Such atrocities committed by the warring states surely fits the definition of terrorism perfectly. So, state terrorism is, more often than not, worse than terrorism perpetrated by non-state actors. And historically, the state can be the greatest terrorist too.

2.7 SUMMARY

The new anti-terrorism legislation known as POTA in Malaysia seems to have brought much contention, particularly the preventive detention provisions as highlighted above. Much of the contention raised was directed at the unfairness when an individual could face detention without trial for up to two years as a crime preventive measure taken by

[109] Sluka, J., Chomsky, N., Price, D., Modood, T., Shaw, A., Kenny, A. K., ... & Selwyn, T. (2002). Comment. Anthropology Today, 18(2), 22-27.

the government against would-be terrorists. However, in crafting the anti-terror law in Malaysia, the most critical consideration for the government would revolve around striking a delicate balance between one's personal liberties against the national security, in which case, an equilibrium is hard to achieve as highlighted. Despite the dilemmas faced by the government, it is acknowledged that counterterrorism requires many compromises in the fundamental principles of legality. In fact, nothing wrong with prevention itself as a motive or a strategy particularly, in fighting terrorism. But, the right to one's liberty which is a corollary to the rule of law values should not be abandoned as a matter of principle as this is abhorred by citizens of democratic states.

To sum it up, trying to craft an effective and all-inclusive preventive law against the threat of terrorism is not an easy task for the government. The important thing to note is, a nation abiding by the rule of law should observe the rule of law values and not regard it as an obstacle in their counterterrorism campaigns. Although admittedly, individuals' liberties would be abrogated for the benefit of a larger societal good in fighting terrorism, the government ought to take cognizance of this important aspect which cannot be traded-off totally or ignored in their counter-terrorism policy.

CHAPTER 3: A COMPARISON OF COUNTER-TERRORISM LEGAL FRAMEWORKS AND ITS IMPACT ON THE RULE OF LAW

3.1 INTRODUCTION

To fight terrorism under the UN Security Resolution 1373, many countries have enacted new anti-terror legislations, despite some already having their own domestic criminal law to address terrorist concerns. There were high anxieties over how the new laws will impact on the application of the rule of law within their anti-terror campaigns, especially on how to bring to justice those terrorists and to legalise their capture and punishment. Some critics in the terrorism literature lend further support to the claims that the war on terrorism was portrayed as a war on human rights and the rule of law. In fact, the rule of law plays a pivotal role to ensure that personal freedoms are not trampled upon in our eagerness to crack down suspected terrorists. [1] It is further observed that post-9/11 events created two sets of laws – making the inimical relation between terrorism and ordinary criminal law conspicuous. It is also interesting to see the interaction between the state and the terrorists in using different tools against each other. The terrorists use brutal force to achieve their objectives by destroying the state's facility, while the state uses the legal tools to achieve its goal by using executive power to maintain peace and order. As highlighted in the scholarly literature on terrorism in chapter 1, the state encounters a dilemma when taking up counter-terror activity that aims at ensuring the freedom and security of its citizens against any harm. Ironically, that freedom and security given are also being reduced by the state simultaneously. These conflicting interests of protecting national security and upholding human rights make up one of the greatest challenges facing democratic nations today. Some suggest that to guarantee security, it is necessary

[1] Dickinson, L. (2002). "Using Legal Process to Fight Terrorism: Detentions, Military Commissions, International Tribunals, and the Rule of Law" *South Carolina Law Review*, *75*, 1407.

to relinquish certain liberties, human rights and the rule of law. While others are of the contrary view that to deal with terrorism threats, any steps taken ought to follow the rule of law principle. Therefore, states are facing a dilemma and under immense public pressure because they must show not only able but capable of handling this "new threat" coming from the terrorists. In chapter 2, it was discovered that States counter-terrorism strategies must adopt a proactive stance just to penalise the terrorists due to the disastrous outcomes of today's contemporary terrorist actions.

Admittedly, it is now more crucial to prevent would-be terrorist actors from attempting or planning an attack instead of waiting impassively for the terror acts to happen. Thus, the preventive paradigm is imperative following the current trends of the terrorism threat. No doubt many of these anti-terrorism measures adopted by the state raise the challenging issue of striking the right balance between protection of individual liberties and national security, the preventive measures adopted by the state such as detention without charge to hold suspected terrorists or even non-suspects is the most controversial action taken by the state. The question is whether the derogation of one legal act can be justified in pursuing supposedly another noble aim in fighting terrorism cause? There is already overwhelming evidence that all countries undermined their respect for the rule of law and liberties in wartime. In fact, national security arrangements shaped after 9/11 paves the way towards compromising good governance of the states. William Cohn put forward the view that, in the aftermath of 9/11, consideration must be directed not only at the degradation of the rule of law but also at the delusion by the leadership that the openness of a democratic society aggravates the security threat of a nation.[2]

[2] Cohn, W. A. (2011). "Degradation of the Rule of Law in Response to Terrorism: A Failed Approach. In C. P. Webel & J. A. Arnaldi (Eds.) The Ethics and Efficacy of the Global War on Terrorism: Fighting Terror with Terror (pp. 87-114). New York: Palgrave Macmillan US."

This chapter attempts to analyse the relationship between the rule of law within the counter-terrorism legal frameworks of Malaysia, India and the UK and also to address these concerns: In fighting terrorism cause, is non-compliance with the rule of law traditions justified? What are the main impediments in applying the rule of law by the States in their counter-terrorism legal frameworks? Can the rule of law be ignored if there are limitations in its application? The findings in this chapter 3 will offer insights on whether there was a debasement of the rule of law in countering terrorism by the comparable States.

3.2 CONCEPTUALISATION OF THE RULE OF LAW IN THE WAR ON TERROR

3.2.1 The scope of the Rule of Law

According to a report published by the World Justice Project (WJP), an independent, multidisciplinary organisation working to advance the rule of law around the globe, Malaysia was positioned at 56th in the Rule of Law Index 2016. [3] The WJP gives a unique, unbiased report on how the Rule of Law is being experienced by 102 nations globally. In a just society, the notion of the Rule of Law is important and always intertwined with the human rights agenda. So, when speaking of protecting human rights, often the Rule of Law principles will come into play as the guardian of human rights. The Rule of Law is believed to alleviate global peace and political stability around the world. Peerenboom argues that Rule of Law could help to avert wars from happening,[4] but he cautioned that "*We should not put too much confidence in the ability of the rule of law to evade war if a superpower is resolved on going its own way*." In the aftermath of 9/11, the Rule of Law's

[3] *WJP Rule of Law Index® 2016*. (2017). *Data.worldjusticeproject.org*. Retrieved 30 March 2017, from http://data.worldjusticeproject.org/#table
[4] Peerenboom, R. (2005). *Human Rights and Rule of Law: What's the Relationship*. *Escholarship.org*. Retrieved 17 March 2017, from https://escholarship.org/uc/item/5fk0j20q

role in fighting terrorism received much focus and attention by democratic states. Though the Rule of Law has not been explicitly mentioned anywhere in Statute books including the Malaysian Federal Constitution, the term has frequently been seen adopted by the Malaysian courts in their written judgment. The Federal Court of Malaysia in one of its judgment has declared the expression '*law*' as in Article 5(1) of the Constitution [5] encompassed written law and the common law of England, which means the Rule of Law, and it also covers all its integral components both procedural and substantive dimensions such as 'procedural irregularity' or 'rules of natural justice'. [6] Similarly, in the preamble of the Universal Declaration of Human Rights (UDHR),[7] it also mentions the Rule of Law only in passing. Neither does the International Covenant on Economic, Social and Cultural Rights (ICESCR) nor the International Covenant on Civil and Political Rights (ICCPR) ever mentions the Rule of law expressly. Despite its cryptic fashion in not referring to the Rule of Law expressly, undoubtedly it is fundamental and indispensable guides for the working of a good governance and democratic government.

In Malaysia, the ideals of the Rule of Law play a significant role in the legal and political system. These rich rule of law traditions was inherited from the '*Westminster*' form of government when Malaysia was under the British's rule. The establishment of the new Federation from Malaya to Malaysia is manifested in Article 4(1) which provides for the supremacy of the Constitution. Although the phrase *'the rule of law*' was not found anywhere in the constitution, following the racial disturbances on May 13, 1969, the government introduced five key principles to promote national unity.[8] The five pillars of

[5] Article 5(1) provides that: "*No person shall be deprived of his life or personal liberty save in accordance with law"*
[6] Lee Kwan Woh v. PP (2009) 5 MLJ 301
[7] "Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, at 71, U.N. Doc A/810 (1948), available at http://www.unhchr.ch/udhr/lang/eng.pdf"
[8] Yatim, R. (1995). Freedom under executive power in Malaysia: A study of executive supremacy. Endowment.

the nation known as the '*Rukunegara*' was conceived. The Rukunegara contains these principles:

- "*Belief in God*;"
- "*Loyalty to the King and Country*;"
- "*Supremacy of the Constitution*;"
- "*Rule of law;"*
- "*Courtesy and Morality*;"

However, the conception of the Rule of Law as the Fourth Pillar in the Rukunegara is not necessarily the same as the rule of law as conceived by Dicey or the various ICJ [International Commission of Jurists] congresses according to Dr Rais Yatim, a former Federal Law Minister of Malaysia. He propounded the view that the rule of law as enumerated in the *Rukunegara* was limited to the rules and regulations promulgated by the government that must be followed.[9] The explanation provided by Dr Rais Yatim reflects, to a large extent, the view of the rule of law according to the government only. The reasoning given by Rais appears that the *Rukunegara* was planned specifically in the wake of a communal crisis which threatened national security and the main emphasis seems to address national unity only. This view is too narrow in scope for the Fourth Pillar. Justice Dr Hamid Sultan in a recent decision in the case of *Pathmanathan a/l Krishnan (also known as Muhammad Riduan bin Abdullah) v Indira Gandhi a/p Mutho*,[10]explains the relationship of the rule of law and the role of the court metaphorically. He cautions it is important to apply the right version of the rule of law. If the correct version of the rule of law is being applied, it can transform a dessert into an oasis and vice versa. The role of the court is, therefore, to ensure that an oasis is not turned into a dessert again. Justice Dr Hamid further sums up:

[9] *Ibid* p.28
[10] [2016] 4 MLJ 455 at p.495

> *"...under the Constitution, the court's role is not to turn a desert into an oasis. That role to turn a desert into an oasis rests with the other pillars and not the courts. The court's role is limited, to that extent. These separate roles are often referred to as separation of powers. However, when the courts' decision paves the way for an oasis to be turned into a desert that may be referred to as a fusion of powers. Fusion of powers is an anathema to the constitutional framework and will impinge on fundamental rights and justice."*

The above dicta seem to suggest that under the Malaysian constitutional framework, the five pillars mentioned in the *Rukunegara* plays a particular role to protect the constitution under the doctrine of separation of powers. No arbitrary decisions may be made by the Legislature, Executive or the Judiciary as their decisions may be subjected to the fourth pillar (the Rule of Law). To uphold law and order in Malaysia, the fourth pillar acts as the arbiter.

Admittedly, the Rule of Law has several inferences and meanings in many democratic nations. However, its simplest meaning is that everything must follow the law. What this means is whenever the government acts capriciously or took unjust actions, or by bypassing the normative rules and procedures under the laws or constitution, the government is deemed to have breached the Rule of Law. Applying the rule to the powers of the government today, this requires the authority to justify their actions, which would otherwise be wrong under the law. The Rule of Law provides that any decisions made by the government should be based only on recognised principles or laws made known to the public in advance. It cannot apply discretionarily. If we discovered the historical origin of the concept of the Rule of Law traditions, it could be traced to Sir Edward Coke - the Chief Justice during King James I's reign. Coke laid down the supremacy of the law that applies equally to the executive including the King in "*Dr Bonham's case*." He stated that Parliament enacted legislation would be invalid if, in breach of "*common right and reason, or repugnant, or impossible to be performed, the common law will control it, and*

adjudge such Acts to be void." [11] The real implication was the recognition of the supremacy of a higher rule of law, binding on both Parliament and the courts. Although in *Bonham's* case, Coke did not explicitly explain what he meant by "*common right and reason.*" After that, Dicey developed further Coke's theory in his well-known book called "*The Law and the Constitution.*" According to Dicey, he outlined three main facets of the rule of law. The first principle is that: "*no man is punishable or can be lawfully made to suffer except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land*." This understanding presupposes the system of due process that was inconsistent not only with the arbitrariness of the sovereign but also with how justice is dispensed, requiring that people only be punishable by the courts. Besides due process, one of the other noted features of the rule of law is legal equality – Dicey's second principle. Agents of the state should not be excused from the same justice that applies to the ordinary citizen: "*every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.*" However, an inclination is shown by the law enforcement agencies they are above the rule of law when discharging their duties - purportedly in their noble duty to eradicate criminals. Dicey third point is elucidated:

> "*We may say that the constitution is pervaded by the rule of law on the ground that the general principles of the constitution (as for example the right to personal liberty, or the right to public meeting) are the result of juridical decisions determining the rights of private persons in particular cases brought before the Court.*" [12]

Dicey states that many constitutions of the states (countries) guarantee their citizens basic human rights such as personal liberty and freedom from unlawful arrest. These fundamental rights are called documentary guarantee by the states for its citizen but, according to him, such a documentary guarantee is not adequate unless they are

[11] Williams, Ian (2006). Dr Bonham's Case and 'void' statutes. Journal of Legal History. Routledge. 27 (2): 111–128.
[12] Dicey, A.V. (2013). "*The law of the Constitution*" (Vol. 1). OUP Oxford p.195

appropriately enforced in the Courts of law. Although for a long time Judges had been accepting Dicey's ideas, as time went on, the rule propounded by Dicey saw strong academic criticism. Differing concepts of the Rule of Law were put forward by respected commentators. The tension between various viewpoints is further exacerbated regarding the Rule of Law understanding. For instance, Raz has commented upon "*the tendency to use the rule of law as a shorthand description of the positive aspects of any given political system.*"[13] Finnis describes "*the rule of law* as *the name commonly given to the state of affairs in which a legal system is legally in good shape.*" [14] Tamanaha called the rule of law as "*an exceedingly elusive notion giving rise to a rampant divergence of understandings and analogous to the notion of the Good in the sense that everyone is for it, but have contrasting convictions about what it is*." [15] In the light of various opinions advanced by these commentators, the expression of the Rule of Law became nebulous and subjective in the modern world today. So, the relationship between the Rule of Law and the concept of law ought to be viewed intimately than those understood in the olden day's jurisprudence.

Some legal scholars argue this parochial Rule of Law should not be confined to just its value, but also to include the procedural aspects of our modern practice of law that is often ignored. As the rule of law proliferates, some are institutionally "*thin*," while others are substantively "*thick.*" [16] A thin conception emphasises the formal rule of law. This entails a legal system, regardless of whether they are from a capitalist, socialist and theocratic or even a democratic society.[17] While for thick conceptions according to Peerenboom,[18] *"starts with the basic elements and purposes of a thin conception. It also*

[13] Raz, J. The Rule of Law and its Virtue (1977) 93. *Law Quarterly Review*, *195*, 195-6
[14] Finnis, J. (2011). Natural law and natural rights. Oxford University Press. p.270
[15] Tamanaha, B. Z. (2004). On the rule of law: History, politics, theory. Cambridge University Press.p.3
[16] Peerenboom, R. (2004). Varieties of rule of law: An introduction and provisional conclusion in Asian Discourses of Rule of Law, ed. Peerenboom (London: Routledge Curzon), 1–10.
[17] Raz. J *op cit*.
[18] Peerenboom, *op cit*.

integrates elements of political morality such as particular economic arrangements (free market capitalism, central planning, Asian developmental state or other varieties of capitalism), forms of government (democratic, socialist, soft authoritarian, theocratic) or conceptions of human rights (libertarian, classical liberal, social welfare liberal, communitarian, compassionate conservative, Asian values, Buddhist, Islamic, etc.)"

Despite the rhetorical meaning of the Rule of Law, lawyers and legal scholars have proposed ways that might help to have a clearer understanding. By having a particular formal characteristic of law may be the answer. Besides that, it is also suggested to include certain procedural guarantees as part of the understanding of these parochial rules. Although legal scholars have emphasised on the formal aspects, for the lawyers, the procedural aspects are important to note. Professor Waldron has joined the chorus of lawyers in highlighting the important of the procedure.[19] His rationale is also shared with those who believe the rule of law is not just an academic discourse. Waldron opined that:

> *"Getting to the Rule of Law does not just mean paying lip service to the ideal in the ordinary security of a prosperous modern democracy: it means extending the Rule of Law into societies that are not necessarily familiar with it; and in those societies that are familiar with it, it means extending the Rule of Law into these darker corners of governance, as well"*

Waldron went on to say:

> *"When I pay attention to the calls that are made for the Rule of Law around the world, I am struck by the fact that the features that people call attention to are not necessarily the features that legal philosophers have emphasised in their academic conceptions. Legal philosophers tend to emphasize formal elements of the Rule of Law, such as rule by general norms rather than particular decrees; rule by laws laid down in advance rather than by retrospective enactments; rule under a system of norms that has sufficient stability (is sufficiently resistant to change) so as to furnish for those subject to the norms a calculable basis for running their lives or their businesses; rules by norms that are made public, not hidden away in the closets of bureaucracy; rule by clear and determinate legal norms, norms whose*

[19] Waldron, J. (2011). The rule of law and the importance of procedure. Nomos, 50, 3-31.

meaning is not so obscure or contestable as to leave those who are subject to them at the mercy of official discretion."

What Waldron means here is that a procedural Rule of Law demands officials to apply the law with great care and attention to fairness. Procedural due process and natural justice must be adhered to and respected. For instance, if any person is found to have breached one of the rule or law, they should be entitled to a hearing, make an argument, and challenge the evidence brought against them before any punishment connected with the violated rules/laws can apply to them. The rule of law is breached when the establishments claimed to represent these procedural safeguards are weakened or trampled. Hence, political ideals such as the independence of the court, executive and the legislature, in what commonly termed as the separation of powers are closely related to the Rule of Law ideals. It is bad to have clear rules or laws, but they are not adequately managed, and likewise, it is also bad either to have fair procedures intact, but these rules keep changing to suit the changing situation. The worst part is when the rules or laws are there, but they are ignoring altogether. It looks like the procedural aspect of the Rule of Law seems to position on the premium values that differ somewhat from those emphasised in the formal picture by highlighting the importance of the legal process rather than the formal attributes of the norms. [20]

In the war on terror, the common complaint from most detainees is the denial of a proper court process to put up a defence on whatever evidence raised against them. Instances when the Rule of Law is breached at the detention centre where terrorists are being held, the detainees have in mind only the procedural aspects rather than the traditional virtues of what the Rule of Law demands. People are more worried about the non-availability of due process rights of those detained and the independence of the

[20] Fallon Jr, R. H. (1997) "The Rule of Law as a Concept in Constitutional Discourse." *Columbia Law Review*, 1-56 at p.6

court's system. The detainees' rights of legal representation are fundamental rights and should not be deprived or else, how are they going to explain their side of the story on charges made against them. More so, in terrorism cases, the laws dealing with terrorism detention are often too ambiguous or the evidence of the terror suspects' involvement is withheld by the authority. Essentially, these are all the gist of common objections raised in the habeas corpus application filed in court. Therefore, the concern on the procedural facets of the rule of law as expounded by Waldron extends the scope of the Rule of Law traditions. Waldron[21] has expanded a list of ten demands for the Rule of Law from the Dicey's trio as follows:

a) "*A hearing by an impartial tribunal that is required to act on the basis of evidence and argument presented formally before it in relation to legal norms that govern the imposition of penalty, stigma, loss, and so forth;"*
b) *"A legally trained judicial officer, whose independence of other agencies of government is ensured;"*
c) *"A right to representation by counsel and to the time and opportunity required to prepare a case;"*
d) *"A right to be present at all critical stages of the proceeding;"*
e) *"A right to confront witnesses against the detainee;"*
f) *"A right to an assurance that the evidence presented by the government has been gathered in a properly supervised way;"*
g) *"A right to present evidence on one's own behalf;"*
h) *"A right to make legal argument about the bearing of the evidence and about the bearing of the various legal norms relevant to the case;"*
i) *"A right to hear reasons from the tribunal when it reaches its decision that is responsive to the evidence and arguments presented before it;" and*
j) *"Some right of appeal to a higher tribunal of a similar character."*

The above demands are usually connected with what we understand as 'natural justice' - a principle often upheld by courts in Malaysia. These are key components of the Rule of Law according to Waldron. He believes that if we ignore the procedural aspects as set

[21] Waldron, *op cit.*

out in his list above, we will seriously "*sell short the idea of the Rule of Law.*" If we re-examined Dicey's first principle, it mentions about institutions and procedures in that (*inter-alia*) – "*a person must not be made to suffer except under a decision of a court arrived at in an ordinary manner observing the ordinary legal process."* As the phrase 'Rule of Law' always evokes a list of demands by many legal scholars, Raz is just one of the many that mention the importance of procedural parts of the Rule of Law's understanding like Waldron. In fact, Raz's fourth, fifth and seventh items also touch on procedural aspects such as:

> *"(4) The independence of the judiciary must be guaranteed… (5) The principles of natural justice must be observed… [o]pen and fair hearing, the absence of bias, and the like … (7) The courts should be easily accessible*." [22]

3.2.2 The Relationship between the Concept of Law and the Rule of Law

From the above discussion, it is acknowledged that the 'Rule of Law' is a multifaceted expression used to support diverse ideologies. The word '*law*' make up just one of its components in the entire phrase. On the face of it, perhaps, we ought to comprehend the concept of law first before we can understand the full meaning of the Rule of Law. Just like when we try to appreciate the expression like the "*protection of human rights*," we ought to first comprehend the minor part of what human rights entail. Although legal theorists prefer to adopt the phrase "*legality*" or "*principles of legality*" instead.[23] Regrettably, the Rule of Law has become a catchphrase, and a contested concept too.[24] Both Bellamy and Raz have noted, "*some accounts of the Rule of Law use the term as a catch-all slogan for every desirable policy one might wish to see enacted* " [25] The term is

[22] Raz, op cit. p. 216–17.
[23] See: Hart, H. L. (1983). Problems of the Philosophy of Law. *Essays in jurisprudence and philosophy*, 88-119.
[24] Waldron, J. (2002). Is the rule of law an essentially contested concept (in Florida)? *Law and Philosophy*, *21*(2), 137-164.
[25] Bellamy, R (2007). *Political constitutionalism: a republican defence of the constitutionality of democracy* (pp. 1-270). Cambridge University Press a p.54.

often accused of having no determinate meaning, and Taiwo has commented that: *"[it] is very difficult to talk about the Rule of Law. There are almost as many conceptions of the Rule of Law as there are people defending it"* [26] Further, according to some, to measure the standard of law in a society, the Rule of Law is a tool for testing [27] but, not a right test because only the quality of the law being tested.[28] To lay claim the Rule of Law exists in a society may show something about the value of the law being applied in society,[29] but, it may not point to any moral value.[30] Others consider the rule as the political ideals in the society.[31] When talking about the Rule of Law, one thing that appears to have consensus is widespread of disagreement within the Rule of Law discussion in seeking its true meaning.

The understanding of the Rule of Law just adumbrated above, query the success of the efforts put forward by legal scholars to theorise it. Waldron thinks the current practice is not the only standard essential for both law and the Rule of Law understanding. The Rule of Law is very much a political ideal in line with the many schools of thoughts according to him. Meanwhile, Kramer appears to disregard the present understandings of the Rule of Law entirely. He prefers Lon Fuller's eight criteria [32] of legality and asserts that the Rule of Law can apply equally to the service of evil and the service of good. He argued that "*the Rule of Law has no necessary connection to morality where the freedom it provides, might not actually obtain*." [33]

[26] Taiwo, O. (1999). The rule of law: the new Leviathan? *The Canadian Journal of Law and Jurisprudence*, 12(01), 151-168 at p. 154.
[27] Kramer, M.H. (2004). *Where law and morality meet.* New York: Oxford University Press.
[28] Finnis, J. (2011). *Natural law and natural rights*. Oxford University Press. At p.270.
[29] Kramer, *op cit*
[30] Raz, J. (2009). *The authority of law: essays on law and morality*. Oxford University Press on Demand.
[31] Waldron, J. (2008). 09.The Concept and the Rule of Law, 43. *Georgia Law Review*, *1*.
[32] Fuller, L.L. 1969. "*The morality of law*, 2nd ed. New Haven: Yale University Press, p.39 The eight formal principles of Lon Fuller's inner morality of law are: i) Generality; ii) Publicity; iii) Prospectivity; iv) Intelligibility; v) Consistency; vi) Practicability; vii) Stability; and viii) Congruence."
[33] Kramer, M.H. 2004. *Where law and morality meet*. New York: Oxford University Press, 172–222.

Hence, the subject of the importance of conceptual understanding between the law and the Rule of Law is not just verbal. Raz offers a practical claim that we must understand the law first. He wrote that the Rule of Law should act as a check and balance of abuse that arises from the law and as such:

> *"The law inevitably creates a great danger of arbitrary power - the Rule of Law is designed to minimise the danger created by the law itself…. Thus, the Rule of Law is a negative virtue……. the evil which is avoided is evil which could only have been caused by the law itself."* [34]

The above suggests that before you get to the Rule of Law, you must learn what the law entails besides knowing the dangers it causes. However, according to Waldron, Raz is wrong about this.[35] Waldron argues that "*the Rule of Law is an ideal designed to correct the dangers of abuse that arise when political power is exercised, not dangers of abuse that arise from the law in particular.*" He claims "a natural correlation" between positivist and formalist conceptions of the Rule of Law and between richer concepts of law and the Rule of Law:

> *"Conceivably the correlation could be shaken loose by an insistence that the concept of law and the Rule of Law are to be understood quite independently of one another...Or we could imagine some positivist sticking dogmatically to [a positivistic concept of law], but acknowledging the importance of a separate Rule-of-Law ideal that emphasised procedural and argumentative values. But those combinations seem odd: they treat the Rule of Law as a rather mysterious ideal – with its own underlying values, to be sure, but quite unrelated to our understanding of the law itself. It is simply one of a number of ideals (like justice or liberty or equality) that we apply to law, rather than anything more intimately connected with the very idea of law itself"* [36]

The Rule of Law goal is to correct abuses of political power by insisting on governance through law. That mode of governance is believed to be more proper to safeguard us against abuse as compared to rule by men. Hence, the law is seen here as a remedy rather

[34] Raz. J (2009). The authority of law: essays on law and morality. Oxford University Press on Demand
[35] Waldron, *op cit*
[36] ibid

than viewed as the potential problem to the understanding of the Rule of Law which share the same ideals. Another claim propounded is that an understanding of the Rule of Law presupposes an understanding of the law. Bentham calls this expository jurisprudence over censorial jurisprudence.[37] According to him, whenever we have something to say about law, two likely characters will surface. One is an expositor, and the other is a censor. The expositor will explain to us what the law supposes to be, whereas the censor will observe to us what he thinks the law ought to be. The former, therefore, is concerned only in explaining, or in enquiring after the facts: while the latter, reflecting further upon reasons.[38] Bentham further said, "*if we do not maintain a bright-line between expository and censorial jurisprudence, then our legal exposition will be contaminated by moralistic or wishful thinking and our moral evaluation will be confounded by a sense that nothing wicked can be law and nothing legal can be wicked*."[39] On this account, the Rule of Law should be positioned firmly on the censorial rather than the expository side of this division, since it is undoubtedly an evaluative ideal. It is true to claim it is requisite to understand the facts of political life and how power is being exercised before we can deploy the Rule of Law as an evaluative ideal.[40] One conclusion we may come to is there is no easy answer on whether to understand the concept of law first as a precursor to knowing the Rule of Law. Contemporary legal theorists offer no straight answer although all give valuable insights. Admittedly, the views are wide-ranging and confusing too which make it harder to reconcile with one another.

[37] Bentham, J. (1970). "*An introduction to the principles of morals and legislation* (pp. 293-5). J. H. Burns, & H. L. A. Hart (Eds.)" University of London.
[38] Edvinsson, R. (2009). Legal Positivism and Real Entities. *The Quest for the Description of the Law*, 5-14.
[39] Ibid at n.37
[40] ibid

3.2.3 Fighting terrorism using the Rule of Law ideals

Terrorism threat worldwide today perpetrated by those willing to martyr in the cause of killing others tests the adherence to the rule of law to the greatest. For democratic states, their absolute moral duty is to safeguard their citizens against the consequences of such violence, but there is also a strong temptation to cross the boundary which separates the lawful from the unlawful in their counter-terrorism measures. Although the rule of law is recognised as the cornerstone of contemporary constitutional democracy,[41] in the absence of it, there is no democracy. Restraining the powers of government, protection of fundamental rights and adherence to the Rule of Law are the essential characteristics of the present modern constitutionalism.[42] Beyond that, however, it is unclear what precise characteristics the rule of law must have to help preserve constitutional democracy. It is also widely believed the rule of law and constitutional democracy must go hand in hand though they may not always be in harmony resulting in conflict occasionally between the rule of law and democracy. This is evident in the war on terror. Because of the severe nature of the terrorist threat, the argument is, the ordinary rules may not apply or suitable to be adopted. This thinking has even pervaded into many domestic laws regime. As an example, in the wake of 9/11, President Bush issued a Presidential order proclaiming the authority to use military commissions to try terror suspects by disregarding procedural safeguards and the rights of the suspects caught in the United States. Those who supported the setting up of military commissions have clarified their views and considered the law as unfitting when human security is threatened and taking quick action is, therefore, necessary. The 9/11 tragedy has compelled us to re-examine what the rule of law can offer us as a nation and as a citizen of a nation, especially the role that legal process might play in the long-term efforts to combat terrorism.[43]

[41] Michel Rosenfeld. (1994). *Constitutionalism, identity, difference, and legitimacy: theoretical perspectives*. Duke University Press.
[42] Ibid
[43] Dickinson, L. (2002). *op cit.*

When Malaysia gained its independence, the founding fathers of the Malaysian Constitution accepted the doctrine of constitutional supremacy similar to the model practised in the US and India. The Legislature, Executive and the Judiciary are beholden to preserve, protect and defend the sanctity of the Federal Constitution. The particular section of the Constitution that deals with the fundamental liberty of a person is in Article 5 to 13. In the past, when Malaysia was confronted with insurgency threat from the Communist Party of Malaya (CPM), the government had deployed preventive laws like the repealed ISA, 1960 to subdue their movements. After the government's success in defeating communism threats, unfortunately, the government continued to use the same preventive laws to crush political and civil dissidents conveniently until the law was repealed in 2012 by another preventive law known as SOSMA, 2012. In the light of terrorism threat and in response to the UN Resolution 2178, Malaysia passed another new preventive law specially to deal with terrorism threat called Prevention of Terrorism Act, 2015 (POTA 2015) despite receiving much criticism as highlighted in Chapter 2.

Passing anti-terror laws such as the POTA 2015 has raised constitutional and domestic law issues about the separation of powers, the rights of terror suspect detainees and the extent to which civil liberties can or should be restricted in the name of fighting terrorism. Supporters argue that such changes to the constitutional and legal frameworks are necessary to allow the fight against terrorism and to keep peace among nations. Hence, this would entail the suspension of ordinary criminal law and procedures. However, in preserving existing norms regarding due process and civil liberties even during emergency times, it will show a commitment to the Rule of Law and distinguish between terrorist's unjust means from our just and respected means about terrorism. Thus, the debate over the executive's treatment of terror detainees' rights has so far been waged

primarily on the terrain of Malaysian constitutional law rights. Opponents of the executive's actions argue that preventive detentions for security cases and detention without trial threaten the core procedural rights as guaranteed by the constitution. Besides, it also violates the fundamental separation of powers principles too. For instance, the setting up of the Prevention of Terrorism Board under POTA 2015 [44] has usurped the authority and jurisdiction of ordinary criminal courts to try suspects in terrorism cases. These concerns are the important rule of law arguments. Also, the controversies surrounding the changes in the domestic legislation and the zealous actions taken by the government to combat terrorism reveal the conceptual and practical limits of applying the Rule of law effectively. The preventive detention provision as featured in Section 13 of POTA 2015 [45] reminisces the prior widespread use of preventive detention laws under the old ISA 1960 (repealed). As a result, the Malaysian system of governance is portrayed as becoming more authoritarian. Justice in Jeopardy had this to say in their report in 2000:

> *"Although the Malaysian Constitution guarantees important rights, these rights are often deprived of their meaning and force by constitutional restrictions, many of which also deny judicial review of the executive action. A body of restrictive legislation exists in Malaysia that requires major change if Malaysia is to be ruled in accordance with a just rule of law*." [46]

It is further observed that in Malaysia, the Constitution empowers the Parliament to pass laws which can derogate basic guarantees provided the law has one of these recitals: "*that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation*:

> *(a) to cause, or to cause a substantial number of citizens to fear, organised violence against persons or property; or*

[44] See section 8 of POTA, 2015
[45] Section 13 provides for the issuance of a detention or restriction order issued by the Prevention of Terrorism Board.
[46] International Bar Association. (2000). Justice in Jeopardy: Malaysia 200. Report on behalf of the International Bar Association, the ICJ Centre for the Independence of Judges and Lawyers and the Commonwealth Lawyers' Association and the Union Internationale des Avocats.

(b) to excite disaffection against the Yang di-Pertuan Agong or any Government in the Federation; or

(c) to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence; or

(d) to procure the alteration, otherwise than by lawful means, of anything by law established; or

(e) which is prejudicial to the maintenance or the functioning of any supply or service to the public or any class of the public in the Federation or any part thereof; or

(f) which is prejudicial to public order in, or the security of, the Federation or any part thereof." [47]

The intention of Article 149 is designed for Malaysian Parliament to enact laws to maintain public order and security of the nation. In passing any security laws, certain actions or assertions would be valid even if they contradicted the constitutional provisions that guarantee the liberty of the person,[48] freedom of movement [49] and freedom of speech, assembly or association.[50] The earlier ISA 1960 (repealed) and other recent security laws like SOSMA 2012 and POTA 2015 are the current significant pieces of restrictive legislation enacted under Article 149. At first, the birth of SOSMA 2012 was a positive step to return the power of the court to try security offences, but POTA 2015 has revived some draconian features of the repealed ISA 1960 by having a Prevention of Terrorism Board to hold up terrorist suspects without trial. This was viewed by some opposition legislators and commentators as returning to the dark era of ISA. In the past, when security cases under the ISA 1960 were brought to court for alleged breach of rights under Article 5(3) of the Constitution, the court has applied Article 149 to validate the law.[51] Hence, there was no way the security laws can be challenged in court even if it was allegedly found to have contravened the constitutional rights because of the provision under Article 149. Besides the security legislations like SOSMA 2012 and POTA 2015

[47] Article 149 (1) of the Federal Constitution.
[48] Article 5 of the Federal Constitution.
[49] Article 9 ibid
[50] Article 10 ibid
[51] See *Borhan Hj Daud & Ors v. Abd Malek Hussin* (2010) 8 CLJ 6

enacted under Article 149, it is noteworthy that several other pieces of legislation also limit the fundamental guarantees in the Malaysian Constitution such as the Printing Presses and Publications Act 1984 and the Sedition Act 1948. However, it is beyond the scope of this thesis to canvass the full scope of these laws.

In a constitutional democracy, the rule of law appears to rest on a paradox. When the government carry out the will of the majority through law, the rule of law seems to favour the state because the state is upholding its moral duty. On the other hand, in regard to the safeguarding of basic rights under the constitution, the rule of law appears to be on the side of the citizen in the sense that rights under the constitutional law can be invoked by the citizen against the state for whatever unlawful actions taken by the state. It means to say, the relationship between constitutional democracy and the working of the rule of law is always not in coherence with one another. Besides, a dilemma can also stem from the split within the rule of law in a constitutional democracy especially, in the war against terrorism as highlighted earlier. When we assume that the rule of law values will at least shield us from the oppressive ordinary laws, within the same constitution itself, certain derogations of fundamental constitutional rights are permissible. The derogation formula "in a time of public emergency" is also allowed under the International Treaty such as the ICCPR[52] - much like the provision under Article 149 of the Malaysian Constitution.

According to Rosenfeld, the fact that "*all laws, be it constitutional or ordinary, it would be approved by some but rejected by others seems to erect a barrier to the legitimation of the rule of law in a constitutional democracy*." [53] Consistent with his idea, that explains why we see enacted legislation are susceptible to being perceived as suitable or acceptable by some but abusive or oppressive by others. To illustrate this for example,

[52] Article 4 of the ICCPR allows a State to declare a state of emergency.
[53] Rosenfeld, M. (2001). The rule of law and the legitimacy of constitutional democracy. Cardozo Law School, Public Law Research Paper, (36).

before the tragic 9/11 event, the US State Department regularly condemned other countries for crushing insurgents, terrorists and others who threatened the public and social order, by resolutely criticised any derogation of civil or political rights, especially any deviations from the rule of law values. Madeleine Albright – the then US Secretary of State spoke in Uzbekistan on 17 April 2000 about the need to have perseverance in the face of terrorism:

> *"[T]he United States will not support any and all measures taken in the name of fighting drugs and terrorism or restoring stability. One of the most dangerous temptations for a government facing violent threats is to respond in heavy-handed ways that violate the rights of innocent citizens. Terrorism is a criminal act and should be treated accordingly–and that means applying the rule of law fairly and consistently. We have found,* ***through experience around the world, that the best way to defeat terrorist threats is to increase law enforcement capabilities while at the same time promoting democracy and human rights****"*[54] *(emphasis added)*

The 9/11 event that took place on the US soil compelled the US government to reappraise the sage words of Madam Albright articulated in Uzbekistan. Paradoxically also, before 9/11, many Asian countries had been condemned by the US for deploying draconian national security laws including Malaysia. Now, in the age of terrorism, the US is shifting its goalpost by asserting pressure on the world to reinstate or to adopt more aggressive domestic security laws, despite protests by citizens in these countries that such laws are antithetical to democratic ideals and eventually will lead to an infringement of civil liberties. To become legitimate, the rule of law would need at least a democratic accountability, however, when faced with a threat to human security like terrorism, the much-cherished right is thrown out of the window.

[54] Bingham, L. (2007). The rule of law. The Cambridge Law Journal, 66(01), 67-85.

3.2.4 The dilemma in adhering to the Rule of Law and enforcing anti-terror laws

The threat of international terrorism as manifested in the 9/11 attacks in the US and the events that followed, reinforcing the claims of those who support the need to extend the authority of the security and intelligence services by having emergency legislation. However, one of the most challenging issues in the war on terrorism is passing special laws to address the threat of terrorism and to promote counter-terrorism without ignoring human rights value. The school of thought that maintains there should not be special legislation devoted to acts of terrorism is of the opinion that the ruling authorities when dealing with terrorism should act in the framework of existing legislation or to change and expand the existing legislation. This should be done as part of the primary legislation and under the regular legislative procedure, not as emergency legislation. Others believe the severity of the threat of terrorism and the urgency of the problem rarely allow for a slow process or reaction, which is likely to take weeks or months of political negotiation between parties and various other entities in the government. Therefore, the threat of terrorism requires a rapid response, and those who are engaged in the important task of defeating terrorism should be given all the legislative tools they need for effective prevention. However, alongside the need for emergency legislation, it is a must to set rules to limit the danger of arbitrary legislation that may be used by the authorities for illegal purposes and deviating from the original intention of the emergency legislation. Often than not, this emergency legislation will stay in force long after the problem for which they were enacted has disappeared. The law will then become convenient tools for the government to suppress dissidents. For instance, the Malaysian draconian ISA 1960 now repealed, continued to be applied by the government against political dissidents and civilians for the past 52 years long after the threat posed by communists had ended. This was heavily criticised as a blanket restriction of many basic human rights.

Given the principles of freedom of thought, opinion, association and political or religious adherence – essentially the Rule of law ideals, it will never be easy for a democratic government to judge just how far to go in matters of proportionate control for handling the threat to national security. If the steps taken are too lax or too strict, peace and security may be compromised, if not endangered to its citizen. Estimating how far to stretch counter-terrorism actions during crisis times will need an administrator capable of judging the extent to which individual rights should be safeguarded against the safety of the entire community. The government must convince others that the lines of action taken are ethically sound and practical. These are important dilemmas facing the democratic nations in the light of terrorist incidents happening worldwide today. Thus, a counterterrorism scheme must have a threshold that is clear and candid and has an understandable evaluation of objectives, problems, options and risks.

Whittaker[55] observes that most governments in response to terrorism threats seem to prefer two different lines of counter-terrorism rhetoric namely, '*anti-terrorism*' and '*counter-terrorism*'. Anti-terrorism relies greatly on legal force to enforce the law. There is an inbuilt danger that such force if heavily applied, may violate the legal and human rights of suspects and their dependents. Counter-terrorism moves directly into physical prevention and restraint and naturally threatens the rights of privacy, movement and association. These lines of action are tactical ploys subservient to the overall plans and strategies deployed by the government.[56] It is an indisputable fact that special emergency laws like the anti-terror legislations enacted by states will raise the dilemma of potential harm to liberal democratic values and civil liberties.

[55] Whittaker, D. J. (2014). *Counter-terrorism and human rights*. Routledge.
[56] ibid

However, the question is whether it is possible to fight terrorism within the framework of normal criminal law without having any special emergency law. Hoffnung proposes three tests to examine the reasoning of the decision made in security issues: (1) *What is the interest being protected?* (2) *How serious is the danger?* (3) *How immediate is it?* [57] According to him, the higher the correlation between the seriousness of the danger, the likelihood of it occurring and its immediacy, the greater the justification for restrictions imposed regarding the danger. The tests as proposed by Hoffnung seems insufficient. He didn't account for factors such as the scope of terrorism, its immediate and long-term possible damage, its characteristic and the physical danger and harm to morale it poses to the country and to society in general.[58] When a country is forced to cope with the wide-scale terrorist threat, it must set up a special legal foundation enabling it to take the necessary steps (offensive, defensive, legal and intelligence) to fight the threat effectively. Even assuming these steps are vital, legislative power should be limited in scale so it will not destroy liberal and democratic values.[59]

Over the last decade, the United Nations (UN) has often condemned the circumvention of the law's due process and the secrecy that accompanies with restrictive controls deployed by member states surreptitiously in the war against terrorism. The UN observed that tough repression in so many countries has been curtailing almost all human rights – civil, political, economic, social and cultural while countering terrorism.[60] Although certain rights, it is stressed, must not be subjected to 'derogation', this call is often ignored by member states. There are many instances of state counter-terrorism going over the humanitarian edge, but nothing much can be done internationally. Hence, it makes one

[57] As quoted by Ganor, B. (2011) in "The counter-terrorism puzzle: A guide for decision makers." Transaction Publishers.
[58] Ibid at page 224.
[59] Ibid at page 225.
[60] Report of the UN High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism (A/HRC/28/28) dated 19 December 2014 available at: *List of reports* (2016). *Ohchr.org*. Retrieved 19 October 2016, from <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session28/Pages/ListReports.aspx>

question why when the states deploy harsh counter-terrorism methods; they are not judged against the international moral and socio-political conventions?

3.3 LEGAL FRAMEWORKS OF MALAYSIA, INDIA AND THE UNITED KINGDOM'S ANTI-TERROR LEGISLATIONS

3.3.1 Malaysia

Malaysia enacted its first new anti-terrorism law, namely the Anti-Money Laundering Act 2001 (AMLA 2001) to proscribe the financing or financial support to terrorists and to cripple the flow of funds in terrorism-related activities. Unlike POTA 2015, AMLA 2001 was focussing mainly on crippling and tracking the financial trail of terrorist networks. In 2003, the Penal Code and the Criminal Procedure Codes were amended to increase the penalties for terrorist acts and allow for the prosecution of individuals who give material support for terrorists. There were other additional features added like to expand the use of wiretaps, surveillance of terrorist suspects and allow video testimony in terrorist cases. Hence, the Penal Code (Amendment Act) 2003 added a new Chapter VIA into the Malaysian Penal Code. These provisions deal with the suppression of terrorist acts and the financing of these acts. In the same year, AMLA 2001 received its first amendment to enable the authorities to trace, freeze, seize and forfeit monies connected to terrorism acts. Under the new amendment, it is immaterial if the source of funds is legitimate or the proceeds originated from other offences, thus giving the authority broad seizure power.[61]

In response to 9/11, Malaysia only tweaked their current laws by relying primarily on the ISA, 1960 (repealed) to deal with terrorism threats until the introduction of a new

[61] See: Part VI - Freezing, Seizure and Forfeiture under AMLA (*Amendment*) 2003.

Chapter VIA in the amendment to the Penal Code in 2003. Historically, the ISA 1960 (repealed) has its origins in the Emergency Regulations Ordinance 1948 (ERO 1948) which was enacted by the then British colonial government under the High Commissioner Sir Edward Gent, as a response to the growing communist violence in 1947 before independence.[62] During that dark era, Malaya was facing a real emergency, and the ERO 1948 conferred wide-ranging powers to the British High Commissioner to make any rules or regulations considered necessary for the interest of the general populace even if it had to alter the ordinary criminal procedure. The Commissioner was also empowered by the ERO 1948 to change, amend, supersede or suspend any written law, to impose curfews, to censor media publications and to detain persons without trial not exceeding one year.[63] On 12 July 1948, when the Communist Party of Malaya (CPM) sought to overthrow the government to set up a communist republic, a state of emergency was declared by the British. It was reported that by the end of 1948, about 11,799 people were already being detained under the preventive law and the figure increased up to 33,992 as of Malaysia's Independence Day.[64] The 12-year struggle from 1948 to 1960 is also known as the Malayan Emergency period. After the end of the Malayan Emergency, and the surrender of the communist leaders, the Malaysian government repealed the ERO 1948 and introduced the ISA, 1960 (now repealed). Rather than extending the ERO 1948, the ISA 1960 (repealed) was enacted under Article 149 of the Federal Constitution of Malaysia and became a statute which could only be repealed by an act of Parliament. The restrictive provisions stemming from the ERO 1948, an extraordinary law during the colonial time of emergency were inherited into the ISA 1960 until SOSMA 2012 was introduced to repeal the law.

[62] Lee, T. (2002). Malaysia and the Internal Security Act: the insecurity of human rights after September 11. Sing. J. Legal Stud., 56
[63] "Abu Bakar Munir, Chapter 8: Malaysia, in Andrew Harding and John Hatchard (eds), Preventive Detention and Security Law: A Comparative Survey (Martinus Nijhoff Publishers, 1993)" 132.
[64] ibid

Although the ISA 1960 (repealed) is no longer the law today, it is worth nothing that some of its features bear a resemblance to the current security laws like the SOSMA 2012 and POTA 2015. For examples, the broad and ambiguous definitions of terrorist activities under the old ISA 1960 (repealed) allow any police officer to detain an individual for an initial period of up to sixty days and thirty days respectively with the possibility of criminal charges being brought at a later stage. This pre-trial detention pending charge is also found in section 4(5) of SOSMA 2012 where a police officer may detain a suspect for up to twenty-eight days. However, under section 4(1) and 4(2) of POTA 2015, the pre-trial detention pending inquiries can be up to a cumulative of fifty-nine days – albeit a day short of the sixty days under the ISA 1960 (repealed). Further, if the police officer has '*reason to believe*' the individual is "*acting in any manner prejudicial to the security of Malaysia … or to the maintenance of essential services therein or to the economic life thereof"* an arrest can be made without a warrant.[65] Coincidentally, the subjective term of '*reason to believe,*' was used as a threshold before an arrest can be made by the police under SOSMA 2012 [66] and POTA 2015 [67] as well.

The most controversial part of the ISA 1960 (repealed) was the Minister for Home Affairs might order an individual to be detained for two years. Using the same grounds, the Minister can issue a further detention order to detain the individual for a period of up to two years,[68] and this may be renewed for an indefinite number of times.[69] The detention provisions in the ISA, 1960 (repealed) are highly problematic because they allow indefinite detention without charge, and there were no comprehensive and efficient procedural safeguards for the detainees. The provision for indefinite detention under the old ISA has conferred the Minister with unfettered wide discretion to incarcerate anyone

[65] Section 73(1) ISA 1960 (repealed)
[66] Section 4 (1) SOSMA 2012.
[67] Section 3(1) POTA 2015.
[68] Section 8(1) ISA 1960 (repealed)
[69] Section 8 (7) *ibid.*

suspected of becoming a threat to the security of the nation. At that time, the concerns of most civil society were, the ISA 1960 (repealed) had been deployed as a convenient political tool by the government to stifle dissent, although the law was originally designed to tackle the social and economic chaos brought about by the communist insurgency in a true emergency situation. On 17 April 2012, SOSMA 2012 was approved by the Parliament to replace the draconian ISA 1960. The stark difference between SOSMA 2012 and ISA 1960 saw the return of the court's power to hear and try terrorists caught in Malaysia as provided under section 12 of SOSMA 2012 (Part V). The first terrorism case brought to the High Court under SOSMA 2012 was Yazid Sufaat and his friends.[70] Yazid though a Malaysian, joined the Jemaah Islamiyah until his arrest by Malaysian authorities in 2001.[71] Yazid had helped al-Qaeda to develop anthrax as a weapon of bioterrorism.

When a new terror group known as the Islamic State (ISIL) – a break away from the al-Qaeda group emerged in 2014, many gullible Malaysians were drawn by the group's extremist ideology. They were brainwashed into joining them in Syria to wage a '*jihad war*' (holy war) against those who opposed their goals. The situation worried not only the Malaysian government, but it became a global issue that affected other nations. In response to this global threat perpetrated by ISIL, the UN mandated all member states to pass new anti-terror laws under the UN Resolution 2178. This resolution prompted the Malaysian government to pass a new anti-terror law known as POTA 2015 to curb the constant ISIL threat and propaganda in Malaysia. POTA 2015 is to enable law enforcement officials to track down hard and penalise those who are suspected terrorists. It is a preventive measure to combat acts of terrorism by de-radicalising the detained suspects alongside with other existing Acts already in force. Those acts are the Penal

[70] PP v Yazid bin Sufaat & Ors (2015) 1 MLJ 571
[71] "*Witness tells court Yazid Sufaat member of JI Malaysia*." (2015). Themalaymailonline.com. Retrieved 16 October 2016, from http://www.themalaymailonline.com/malaysia/article/witness-tells-court-yazid-sufaat-member-of-ji-malaysia.

Code and SOSMA 2012. POTA not only create a new definition of counter-terrorism, but its primary goal is also aimed at suspected individuals committing or supporting any terrorist in and outside our country. Besides, it curtails the activities of the listed terrorist organisation as provided in the preamble of the Act. It is to be noted here that besides these legislations mentioned, Malaysia has other legislations such as Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001, Aviation Offences Act 1984 and Special Measures Against Terrorism in Foreign Countries Act 2015 which can be employed if needed by the government to aid and enhance counterterrorism activities.

3.3.2 India

Historically, India had been enmeshed in the war against terror since independence 68 years ago. Over the last decades, India has been struggling with insurgents at its border with Kashmir, Pakistan and Afghanistan. In the south, they were dealing with the now defunct notorious Liberation Tigers of Tamil Eelam (LTTE) or commonly known as the 'Tamil Tigers' until the group was crushed in 2009. In 1984, when Indira Gandhi was killed, the Parliament enacted Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA) as a special emergency anti-terror legislation. Subsequent to that, in December 2001 when the Indian Parliament house was attacked by terrorists, the Prevention of Terrorism Act, 2002 (Indian POTA) was brought in to repeal TADA. Indian legislators acted promptly by declaring the Indian POTA to be a crucial tool to combat terrorism following the daring strike by the terrorists at the heart of the world's largest symbol of democracy in the world. Like the Malaysian POTA, the Indian POTA, had dissenters too, who criticised the law as unnecessary and harsh. For example, the Indian police were given broad power to apprehend a suspect up to 180-days without being properly charged

in court.[72] According to Human Rights Watch Report released in March 2003, it was reported that "*POTA had in fact been abused and misused against political dissents including religious minorities. This has included the arrest of leaders of various political parties in Kashmir, Tamil Nadu and Uttar Pradesh.*" [73] In response to the continued abuse by the administrative officers, the Indian government later repealed POTA in September 2004. Although the law was repealed, POTA is, however, still applicable today because the revocation of the Act did not affect those pending legal proceedings or investigations of cases initiated under the Act which has yet to be completed.

With the repealed of POTA, the Unlawful Activities Prevention Act 1967 (UAPA) is the main anti-terrorism law in India today. In fact, the UAPA was enacted in 1967 by the Indian Parliament. The original intention of the Act then was to lay down reasonable regulations on certain rights like peaceful assembly, freedom of speech and expression to protect the unity and sovereignty of the State of India. Strict provisions on terrorist acts were added slowly via several amendments to the law on terrorism starting from 2004 following the repealed of the Indian POTA. The Mumbai terrorist attacks in 2008 have led the UAPA to incorporate the meaning of a 'terrorist act' under section 15.[74] The

[72] Section 49(2)(b) of the Indian POTA

[73] "*In the Name of Counter-Terrorism: Human Rights Abuses Worldwide* by HUMAN RIGHTS WATCH, dated March 25, 2003 accessible at: https://www.hrw.org/report/2003/03/25/name-counter-terrorism-human-rights-abuses-worldwide/human-rights-watch-briefing"

[74] Section 15(1) reads: "Whoever does any act with intent to threaten or likely to threaten the unity, integrity, security, economic 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,- (a) by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisonous or noxious gases or other chemicals or by any other substances (whether biological radioactive, nuclear or otherwise) of a hazardous nature or by any other means of whatever nature to cause or likely to cause -

i. death of, or injuries to, any person or persons; or
ii. loss of, or damage to, or destruction of, property; or
iii. disruption of any supplies or services essential to the life of the community in India or in any foreign country; or

iii a. damage to the monetary stability of India by way of production or smuggling or circulation of high quality counterfeit Indian paper currency, coin, or of any other material; or

iv. damage or destruction of any property in India or in a foreign country used or intended to be used for the defence of India or in connection with any other purposes of the Government of India, any State Government or any of their agencies; or

(b) overawes by means of criminal force or the show of criminal force or attempts to do so or causes death of any public functionary or attempts to cause death of any public functionary; or

duration of pre-trial detentions without bail up to 180 days remains the same under UAPA[75] although it disagrees with Article 22 of the Indian Constitution on the rights against arbitrary detention. The worry that UAPA inherited some of the contentious provisions from the repealed Indian POTA was similar to the mounting concerns of many commentators in Malaysia that the Malaysian POTA will be the 'twins of the ISA'. Besides the UAPA, it is to be noted that India also has the Indian Penal Code ('IPC'), which provisions are in '*pari materia*' with our Malaysian Penal Code [*Act 574*] that deal with terrorism and related offences. This encompasses the crime of instigating a war against the Indian's sovereignty much like the provision in the Malaysian Penal Code,[76] except that our distinct Chapter VIA deals directly with terrorism offences. In many aspects, India shares common legal similarity with our Malaysian laws such as their Code of Criminal Procedures Code 1973 (CrPC) and the Indian Evidence Act 1872. More often than not, in most terror incidents in India, charges can be preferred on the accused person based on various Central and State Laws. The Mumbai attacks case was a clear example of the multiplicity of charges being trumped-up against the accused.[77] In India, although the CrPC and the Evidence Act 1872 apply widely across all criminal cases brought to court, with terrorism cases, special rules deviate from the general principles of law and evidentiary rules. This is owing to the fact that there are various Central laws passed to try similar areas of law and overlapping with other enacted State laws.[78] Therefore, India's legal framework on terrorism is complex because various anti-terror laws enacted can equally apply to deal with each terrorism case.

(c) detains, kidnaps or abducts any person and threatens to kill or injure such person or does any other act in order to compel the Government of India, any State Government or the Government of a foreign country or an international or inter-governmental organisation or any other person to do or abstain from doing any act; commits a terrorist ac

[75] Section 43D (2) UAPA same as Section 49(2)(b) of the POTA

[76] Under section 121 of IPC (Chap VI) which is similar to our section 121 of Malaysian Penal Code (Chap VI)

[77] In "State of Maharashtra v Mohammed Ajmal Mohammad Amir Kasab", (2012) 8 SCR 295 where Ajmal Kasab was convicted under nine different offences under IPC, two under UAPA (s.16 & 13), one each under Arms Act, 1959, Explosives Act, 1884, Explosive Substances Act, 1908

[78] Such as the "Maharashtra Control of Organised Crime Act, 1999 (MCOCA), Karnataka Control of Organised Crime Act, 2000 ('KCOCA') and the Chhattisgarh Vishesh Jan Suraksha Adhiniyam, 2005 [Chhattisgarh Special Public Safety Act] ('CVJSA')"

3.3.3 United Kingdom

Unlike Malaysia and India, UK's conflict with domestic terrorism stretched as far back to the ninetieth century.[79] In the UK, especially in Northern Ireland, special anti-terror laws were adopted as early as 1922, and in the UK in 1939. During the 1960s and 1970s, due to the conflicts in the Northern Ireland between the Loyalists group and the Irish Republicans, harsh police measures were deployed to curtail the emergency situation.[80] At that time, fighting terrorism attracted no serious international attention, although the UK government had been waging a protracted war with the Irish Republican for many decades. With the modern outbreak of the 'Troubles' in the Northern Ireland starting from 1969 onwards, special legislative provisions were enacted. As the communal violence escalated, special powers were quickly enhanced and supplanted by the Northern Ireland (Emergency Provisions) Acts 1973 (EPA 1973). EPA 1973 established the controversial "Diplock" courts whereby terrorist offences were tried by a judge without juries, unlike the ordinary criminal trials in the UK. Under the system, the director of public prosecutions can authorise 'scheduled offence' cases being heard before judges of their own selection. "Diplock" courts were accused of not complying with the international norms on the right to a fair trial.[81] For example, the absence of judicial remedies against an arbitrary arrest and detention, against the unlawful treatment of detainees and the limited provisions for bail.[82] The statute also provided for entry, search and seizure, broad powers of detention, proscription, the stopping of roads, the closing of licensed premises, and the collection of information by security forces. These wide-sweeping measures have been criticised and condemned for infringing on human rights.[83] Due to concerns over the

[79] Walker, C. (2007). "The United Kingdom's anti-terrorism laws: Lessons for Australia. Law and liberty in the war on terror," p.181-195.
[80] "Conte, A. (2010). Human rights in the prevention and punishment of terrorism: Commonwealth approaches: The United Kingdom, Canada, Australia and New Zealand." Springer Science & Business Media.
[81] Korff, D., & Diplock, S. K. (1982). *The Diplock Courts in Northern Ireland: A Fair Trial?* SIM.
[82] See: Part I & II of the EPA 1973
[83] McEvoy, K., & Mika, H. (2001). Punishment, policing and praxis: Restorative justice and non-violent alternatives to paramilitary punishments in Northern Ireland. *Policing and Society: An International Journal*, *11*(3-4), 359-382.

Act, subsequently, EPA 1973 was amended by the Northern Ireland (Emergency Provisions) Act 1975 & 1978.

According to Walker, "*the UK has regularly experienced and legally responded to terrorism for the past three centuries or more.*"[84] The early responses to fight terrorism were mostly through ordinary criminal law. It is further observed that the UK has a plethora of legislations that deal with terrorism offences which were labelled as the most draconian in the western countries today.[85] The primary UK anti-terror legislative response covers these statutes: Terrorism Act 2000 (TA 2000), Anti-Terrorism, Crime and Security Act 2001 (ATCSA 2001), Prevention of Terrorism Act 2005 (PTA 2005), Terrorism Act 2006 (TA 2006) Counter-Terrorism Act 2008" (CTA 2008), Terrorism Prevention and Investigation Measures Act 2011 and Counter-Terrorism and Security Act 2015 (CTSA 2015).[86]

The UK's anti-terror legal framework begun with the enactment of the TA 2000, which should place UK's anti-terrorism legislation on a strong foothold. However, the circumstances of 9/11 had marked a new stage of threat worldwide which signalled for new legislative responses which led to the enactment of several other anti-terror laws. A year after the enactment of TA 2000, the British counter-terrorism legislation again took another new direction when the ATCSA 2001 was pushed through British Parliament. The ATCSA 2001 featured the most draconian measure by having indefinite detention of foreigners suspected of terrorist activities. Besides the provision of indefinite detentions, the ATCSA 2001 introduced several other new significant changes. Among these are the power to seize and forfeit property and cash belonging to terrorists. This was following the decisions made by the UN SCR 1373 mandating all its members to cripple the flow

[84] Walker (2007) op cit. p.181
[85] Conte, A (2010) op cit. p.220
[86] There are also other UK legislations that deal with terrorism-related offences such as, the "*Explosive Substances Act 1883; Biological Weapons Act 1974; Internationally Protected Persons Act 1978; Chemical Weapons Act 1996; Civil Aviation Act 1982; Aviation Security Act 1982; Taking of Hostages Act 1982; Nuclear Material (Offences) Act 1983; Aircraft and Maritime Security Act 1990; Chemical Weapons Act 1996*."

of terrorist funding worldwide. ATCSA 2001 also covers weapons of mass destruction, the potential threat from pathogens and toxins, including nuclear,[87] and the security of airlines facilities.[88] The most contentious part of the ATCSA 2001 has been Part 4. This part discussed immigration and asylum matters including detention without trial of terror suspects. Despite strong opposition to Part 4 of the Act, the law was enforced with the ensuing derogation from the ECHR under article 5(1)(f). This controversial part 4 of the Act lasted until an adverse judgment by the House of Lords[89] which led to its abrogation under PTA 2005. With the passage of PTA 2005, the sole purpose of the new legislation then was to change the controversial part of the ATCSA 2001 namely, Part 4 that deals with indefinite detention. Hence, the PTA 2005 [90] repealed the controversial aspect of detention without trial regime.

Under section 1(1) of the PTA 2005, the meaning of control orders was defined as "*an order against an individual that imposes obligations on him for purposes connected with protecting members of the public from a risk of terrorism*." The Home Secretary may issue a control order on a person whom he or she suspects that the person has engaged in a terrorism-related activity[91] and thus, imperative to protect the populace from the risk of terrorism to issue such a control order on that person.[92] Basically, there are two control orders under PTA 2005: (i) non-derogating control orders can be issued by the Secretary of the State under the legislation[93] and; (ii) derogating control orders require a derogation from article 5 of the ECHR and must seek permission from the court.[94]

[87] See Parts 6–8 of ATCSA 2001
[88] Part 9 of ATCSA 2001
[89] A & Others v. SS for the Home Department [2004] UKHL 56 (a.k.a. '*Belmarsh 9*')
[90] See section 16(2) (a) of the PTA 2005.
[91] Section 2(1) a PTA 2005
[92] Section 2(1) b *ibid*
[93] Section 2 *ibid*
[94] Section 3 *ibid.*

In the light of the July 2005 bombings in London, the UK government believed that certain conduct was not covered by their existing anti-terror legislations. Hence, TA 2006 was passed to penalise such conducts which fall outside the ambit of the existing acts. Thus, the primary change brought about by this Act was to expand the power of the police further [95] and to add new criminal offences that are the criminalisation of the *"encouragement of terrorism"* [96] including the glorification of terrorism. Anyone caught for such an offence is liable to receive a maximum imprisonment of up to seven years.[97] TA 2006 also includes extraterritorial jurisdiction over crimes committed outside the UK.[98] After TA 2006, the CTA 2008 came on board. The Act "deepens and widens" the existing counter-terrorism and all other legal measures adopted by the government.[99] This includes an enlarged power to collect and share information as seen in Part 1 of the Act. An aggravating feature in sentencing is in section 30 for any person caught for an offence which "*has or may have a terrorist connection.*"[100]

Now in the UK, the latest anti-terror legislation is the CTSA 2015 which received Royal Assent on 12 February 2015.[101] Amongst its key feature includes the ability to deter people from travelling overseas to participate in terrorist activity.[102] The UK government's greatest fear is when these jihadists return to their homeland, they bring together their underlying ideology to propagate and to garner support for terrorism among the locals. The CTSA 2015 also enhances the ability of enforcement agencies to check and control the actions of those who may pose such a threat. In reacting to the increasing support for ISIS among British citizens, Theresa May, the then Home Secretary brought

[95] Section 23(7) ibid.
[96] Section 1(1) ibid
[97] Section 1(7) ibid. Other new offences include the spreading of terrorist publications (sec.2), the preparation of terrorist acts (sec.5), and training for terrorism (s.6).
[98] Section 17 of TA 2006 includes commission of offence abroad
[99] Walker, C. (2009). "*Blackstone's Guide to the Anti-Terrorism Legislation*." Blackstone Press. p. 31.
[100] Section 30 of CTA 2008
[101] "Counter-Terrorism and Security Act - GOV.UK." (2014). Gov.uk. Retrieved 23 October 2016, from https://www.gov.uk/government/collections/counter-terrorism-and-security-bill
[102] The power to seize one's travel document is provided in Part 1 of CTSA 2015.

together many more aggressive restrictions on terrorist suspects, including new obligations imposed on airlines, ship and rail[103] under the new CTSA 2015. Mrs May claimed the new CTSA 2015 was the "*toughest powers in the world*" against terrorism.[104] In the Act, there is also a provision for the internet providers to keep relevant communication data and to hand them over to the authority upon request.[105] However, the most contentious is the Act imposes a "statutory duty" on various institutions like colleges, schools, prisons and councils to report any terrorist activity.[106] It is now mandatory for universities to come up with new policies and guidelines on extremist campus speakers or invited speakers and similarly, the prison authority and local council must formulate policies on how to handle radicals in their course of work. In short, the Home Office is empowered to give directions for non-conformity with section 26(1) in cases, for example, to prevent an extremist preacher from lecturing at the university.

Overall from the above observation, the UK anti-terror legislations together with the special counterterror measures have been developed at different times in history. These measures are, for example, the prolonged pre-charge detention, extensive police powers and the adoption of temporary, provisional legislation that were later re-enacted in most cases. It is further noted that the UK Home Secretary has far-reaching powers for fighting terrorism. This can be seen in Part 4 of the ATCSA 2001 where the Home Secretary has the authority to direct indefinite detention of suspected foreign terrorists. Under PTA 2005, again the Home Secretary is in charge of issuing the non-derogating control orders or to lodge an application with the competent court for a derogating control order. Arguably, such wide power should vest in the judiciary instead of the executive.

[103] This is provided in Part 4 of CTSA 2015
[104] "Holehouse, M. (2014). *Counter-terrorism Bill: What it contains.Telegraph.co.uk*. Retrieved 23 October 2016, from <http://www.telegraph.co.uk/news/worldnews/islamic-state/11254950/Counter-terrorism-Bill-What-it-contains.html>"
[105] See Part 3 of CTSA 2015
[106] Section 26 (1) *ibid*

3.4 THE DEGRADATION OF RULE OF LAW PRINCIPLES WITHIN THE ANTI-TERROR LEGISLATIONS

Changes in the legislative framework in response to terrorist threats in Malaysia, India and the UK since the 9/11 attacks have witnessed the integration of national security issues and criminal justice to form part of the extraordinary security laws passed by the authority. This integration has rested on the premise that terrorism is an unprecedented threat and so it requires legislation tailored to what has been called as a '*new paradigm in prevention*.'[107] Generally, the criminal law has largely, though not exclusively, focused only on dealing with crimes that have taken place. But the reason for the shift in governmental emphasis towards prevention in counter-terrorism is that terrorism is an extraordinary threat that calls for a special response. As terrorists do not appear to be deterred by the prospect of arrest, trial and punishment after an attack have been committed, or even death in an attack, it is, therefore, imperative for states to resort to more pre-emptive counter-terrorism methods to prevent future terrorist attacks. A unique theme of most anti-terror legislations is focusing on what is referred to by legislators, the police and other security agencies as 'prevention' - hoping to foil further or foreseeable attacks from the terrorists. In the preventive counter-terrorism arena, this has contributed to several tensions and conflicts in the legal response to terrorism. One key concern is the implications of the Rule of Law principles in implementing the counter-terror laws. The preventive methods adopted by the states may be effective in forestalling terrorist activity to a lesser or larger extent, but often this may come with a high price to pay when individual human rights are sacrificed along the way. In the post-9/11 events, many questions were raised about the non-compliance of established law, in particular, the adherence to the principle of the Rule of law in response to fighting terrorism.

[107] Cole, D. (2006). Are we safer? Georgetown Law Faculty Publications and Other Works, 10.

As highlighted earlier in chapter 2, the most common criticism against the state is that the state will restrict the liberty of its citizens in fighting terrorism. In the debate on how to balance these two competing rights, it calls for examining the issues of security against losing liberty. Posner and Vermeule explain this assumption clearly.

> "*We assume that there is a basic trade-off between security and liberty. Both are valuable goods that contribute to social welfare, so neither good can simply be maximised without regard for the other…The problem from the social point of view is one of optimisation: it is to choose the point along the frontier that maximises the joint benefits of security and liberty.*" [108]

However, not everyone shares the above same assumption. Donohue cautions this dominant paradigm of a trade-off between security and freedom is perilous:

> "*But in the rush to pass new measures, legislators rarely incorporate sufficient oversight authorities. New powers end up being applied to non-terrorists - often becoming part of the ordinary criminal law. And temporary provisions rarely remain so - instead, they become a baseline on which future measures are built. At each point at which the legislature would otherwise be expected to push back - at the introduction of the measures, at the renewal of the temporary provisions, and in the exercise of oversight - its ability to do so is limited. The judiciary's role, too, is restricted: constitutional structure and cultural norms narrow the court's ability to check the executive at all but the margins*." [109]

Donohue argues that:

> "*Some rights are fundamental to liberal democracy and cannot be relinquished. Setting such rights to one side, the security or freedom framework fails to capture the most important characteristic of counterterrorist law: it increases executive power, both in absolute and relative terms, and, in so doing, alters the relationships among the branches of government with implications well beyond the state's ability to respond to terrorism. But this is not the only omission. Missing, too, are the broad social, political, and economic effects of counterterrorism. The dichotomy also glosses over the complex nature of both security and freedom. The resulting danger is that the true cost of the new powers goes uncalculated - to the detriment of the state." [110]*

[108] Posner, E. A., & Vermeule, A. (2006). Emergencies and Democratic Failure. *Virginia Law Review*, 1091-1146. p.1098
[109] Donohue, L. K. (2008). *The cost of counterterrorism: Power, politics, and liberty*. Cambridge University Press. at p.2
[110] *Ibid* at p.3

The views as propounded by the above scholar proves the dichotomy of security versus liberty is insufficient for any moral or legal assessment of state responses to terrorism. That will bring us to this question: how is one going to judge the counterterrorism measures of a state? Are they operating within or outside the principles of the Rule of law traditions? Perhaps, one must not ignore the moral rights and human rights that form the foundation of our fundamental rights in our society. On this basis, these discussions are some of the most critical aspects of a state's legislative responses to terrorism.

3.4.1 Historical background of Preventive Detention in Malaysia

Before embarking on discussing the operation and the challenges of a preventive detention regime, it is essential to explore the historical aspects of the regime. In Malaysia, the state of emergency was declared over on 31 July 1960. However, the preventive detention system was maintained by the authority as a potent tool against internal security threats. Rather than extending the Emergency Regulations, the ISA 1960 was enacted based on Article 149 of the Federal Constitution of Malaysia to turn into a permanent statute that could only be annulled by an act of Parliament. The restrictive provisions of the earlier Emergency Regulations which were a special law during the state of emergency were codified into Malaysia's everyday law. With the ISA 1960, the government continued to enjoy powers to jail persons assessed as harmful to the national security of Malaysia, with somewhat broad powers to curb freedoms of expression, association, and the press. On 21 June 1960, the late Tun Abdul Razak, the then Deputy Prime Minister presented the ISA Bill for its second reading in the Parliament when he

said: *"Let me make it quite clear that it is no pleasure for the Government to order the detention of any person. **Nor will these powers be abused**."* [111] (*Emphasis added*)

Later on, during the debates by the lawmakers of the ISA Bill, the late Tun Razak said this:

> *"We have, Sir, as has been said, to defend our independence and to defend a democracy which we intend to establish. The Honourable Member for Ipoh suggests that if we pass this Bill today, our children will have cause to regret for what we have done. Sir, no one can predict the future, history alone can tell; but I am of the firm conviction that if we pass this Bill today our children and grandchildren will be very thankful for our foresight, our forethought (Applause), for taking measures to protect our young nation and our new State, and for taking measures to make democracy safe in this country, and for taking measures this country a healthy place for them to live in the years to come. I do hope in that spirit Honourable Members of this House will now give this Bill a second reading."*[112]

During the 52 years when the ISA 1960 was in force, the government systematically turned the law to suppress political dissent. Throughout the 1960s, arrests and detention without charge under the ISA 1960 were directed at those who engaged in communist movements.[113] When the ruling party Alliance's first-time loss of its two-thirds majority in Parliament in 1969, racial riots erupted which gave the government the reason for having the ISA 1960 to control the situation from escalating further.[114] These riots witnessed over 200 individuals were reportedly killed and many areas of Kuala Lumpur were ruined, which prompted the Yang di-Pertuan Agong (the King) to proclaim a state of emergency. Although the Emergency (Public Order and Prevention of Crime) Ordinance 1969 was passed soon after the turmoil, the ISA 1960 remained and worked as a potent preventive tool against future aggression.[115]

[111] Parliamentary Debates, *Dewan Rakyat* (21.6.1960), at p. 1189
[112] Parliamentary Debates, *Dewan Rakyat* (22.6.1960), at p. 1354
[113] Fritz, N., & Flaherty, M. (2002). Unjust Order: Malaysia's Internal Security Act. *Fordham Int'l LJ*, *26*, 1345.
[114] Ibid p.1356-7
[115] Ibid p.1356

In the early 1980s, Prime Minister, Mahathir Mohamad expressed his view of the ISA 1960 shortly after he took over the post. At that time, the public hope that using preventive detention orders would diminish under the leadership of Mahathir. However, political trouble in 1987 saw another revival of this preventive detention measures extensively applied by the government as the reliable measures to suppress political protests. In October 1987, police arrested 106 people in the infamous "*Operation Lalang*", consisting of prominent leaders and opposition lawmakers, who were jailed without charge under the ISA 1960.[116]

Prior to 9/11, the government had arrested suspects for alleged terrorist activity and links to the Kumpulan Mujahidin Malaysia ('KMM') militant group.[117] Of some of the arrests and detentions, the authority applied the ISA 1960 as a weapon to suppress political dissent, although the authority was not producing convincing evidence to justify the arrests. These arrests and detentions prompted critics to seek for an assessment of the restrictive detention provisions of the ISA 1960. In 2001, a High Court judge recommended the Parliament to examine the ISA 1960 and to minimise its abuses.[118] Shortly after the judgement, in May 2001, local human rights groups launched the "Abolish ISA Movement" with 82 non-governmental organisations to pressure for abolishing the ISA 1960.

The 9/11 terrorist attacks in New York further stifled this "Abolish ISA Movement" and gave a good excuse for the government to further extend the detention without charge to terrorism suspects and non-suspects based on a broad interpretation of security offence

[116] "*Operation Lalang Revisited*. (2016)". *Aliran.com*. Retrieved 5 November 2016, from http://aliran.com/oldsite/hr/js3.html
[117] Lee, T. (2002). Malaysia and the Internal Security Act: the insecurity of human rights after September 11. *Sing. J. Legal Stud.*, 56. KMM is believed to have close ties with Al-Qaeda.
[118] *Abdul Ghani Haroon v Ketua Polis Negara and Anor*. (2001) 2 CLJ 709

in the ISA 1960. In three separate sweeps shortly after 9/11, the government detained militants with alleged links to the KMM. Twenty-two suspects were also alleged to be associated with the Jemaah Islamiah ('JI'), a radical group that seeks to validate an Islamic Union of Malaysia, Mindanao and Indonesia.[119] These arrests coincided with the capture of 13 JI militants in Singapore.[120] Fearing the threats from the Islamic radicals, usually, the citizens are more eager to allow the government the power to seize and detain whoever it believed was linked to the KMM, JI or even merely opposition parties. While it is unproven whether some of these detainees sought to carry out terrorist acts, 9/11 gave Mahathir more political power to exploit the situation.

Though the Malaysian government insisted there was a solid and imminent threat to national security after the 9/11, most of the preventive detentions under the previous repealed ISA 1960 were aimed at people allegedly responsible for minor offences or merely political dissent. Admittedly, there may be cases of exceptional security threat that requires pre-emptive actions, but in such circumstances, the burden falls on the Malaysian government to prove the need to use such detention and the proportionality of such detention. The Government's consistent use of the ISA 1960 to suppress political dissents received constant criticism that these arrests and detention are driven by surreptitious purposes. Finally, in the year 2012, the draconian ISA 1960 was finally repealed by introducing SOSMA 2012. Although SOSMA 2012 was enacted to address broad security offences, and not specific to terrorism cases *per se*,[121] the controversial indefinite preventive detention without trial like the ones in the ISA 1960 is no longer available

[119] "*Malaysia reveals militant link to arrests - January 23, 2002*." *Edition.cnn.com*. Retrieved 5 November 2016, from http://edition.cnn.com/2002/WORLD/asiapcf/southeast/01/23/malaysia.muslim.arrest/index.html

[120] "*Press Releases Singapore Government Press Statement on ISA Arrests," 11 January 2002*. *Mha.gov.sg*. Retrieved 5 November 2016, from <https://www.mha.gov.sg/Newsroom/press-releases/Pages/Singapore%20Government%20Press%20Statement%20On%20ISA%20Arrests,%2011%20January%202002.aspx>

[121] The preamble of SOSMA 2012 states: "it is necessary to stop action by a substantial body of persons both inside and outside Malaysia

1. to cause, or to cause a substantial number of citizens to fear, organized violence against persons or property;
2. to excite disaffection against the Yang di-Pertuan Agong;
3. which is prejudical to public order in, or the security of, the Federation or any part thereof; or
4. to procure the alteration, otherwise than by lawful means, of anything by law established."

under SOSMA 2012. All new security offences detainee caught by the police under this Act will be accorded with a proper trial in the High Court.[122] SOSMA dictates that a detainee must be brought to the High Court and charged with an offence after 28 days of detention. In contrast with the ISA 1960, a person is not charged or tried before a court of law for the offence under this Act. In fact, the Human Rights Commission of Malaysia (Suhakam) has lauded the move taken by the government to replace the much controversial ISA 1960 with SOSMA 2012.[123] Unfortunately, the advent of POTA 2015 in response to the UN Resolution 2178 brought the preventive detention regime to the fore again which led one of its strong proponents to claim that POTA 2015 was like twins of ISA.[124]

3.4.2 A Survey of Preventive and Pre-trial Detention Regime in Malaysia, India and the UK

Without a doubt, the preventive detention is a counter-terrorism tool that brings a grave risk of abuse because of the conceptual and procedural flaws relating to its practice. While many states felt it is a crucial and effective counter-terrorism tool, others may have expressed certain concerns. For example, the counter-terrorism context of preventive detention refers to the future act, which is impossible to predict with complete accuracy and presents a risk of detaining innocent people.[125] In Malaysia, the prediction problem is not exclusive to the terrorism context - it applies equally to other sources of preventive detention powers in Malaysia, especially preventive detention without charge under the Emergency (Public Order and Prevention of Crime) Ordinance 1969 - (EO 1969) which was repealed only in 2013, the Dangerous Drugs (Special Preventive Measures) Act 1985

[122] See Section 12 of SOSMA 2012.
[123] "*Security Offences Bill a positive step, says Suhakam" - Nation | The Star Online*. (2012). Retrieved on 5 November 2016, from http://www.thestar.com.my/news/nation/2012/04/16/security-offences-bill-a-positive-step-says-suhakam/
[124] "*Prevention of Terrorism Bill a welcomed conjoined twin to ISA, says Perkasa" - The Rakyat Post*. (2015). Retrieved 5 November 2016, from http://www.therakyatpost.com/news/2015/03/31/prevention-of-terrorism-bill-a-welcomed-conjoined-twin-to-isa-says-perkasa/
[125] Cole, D. (2009). Out of the shadows: Preventive detention, suspected terrorists, and war. *California Law Review*, *97*(3), 693-750. At p.696.

[126] and the Prevention of Crime Act 1959 - (POCA 1959). Following the repeal of the EO 1969, the Malaysian government is now resorting to POCA 1959 to facilitate preventive detention and detention without trial of those suspected of committing crimes such as triad activities, drug trafficking and organised crime. In 2015, POCA 1959 was further strengthened to include terrorism as an offence under the Act. Since then, the police have been aggressively using POCA 1959 to crack down on suspected criminals, and it saw 188 people were subjected to detention orders under this Act.[127]

The term "preventive detention" can be traced back to Lord Wrenbury in the World War I English case of *R v Halliday*.[128] Today the term "preventive detention" is typically used to describe a situation where a person is detained for reasons either political or connected with national security, public order, or public safety. Under the preventive laws, the authority is empowered to detain suspected gang members, criminals, drug traffickers or even any individual who cannot be formally charged owing to lack of evidence. The preventive detention regimes in these Acts highlighted above are analogous to the preventive detention order issued under POTA 2015. It is further observed that the term preventive detention has been employed by various countries and writers in several contexts, such as administrative detention,[129] investigative detention,[130] pre-charge detention or ministerial detention.[131] At this point, it must be concerned that the term 'administrative detention' is an appropriate term to refer to the preventive detention under POTA 2015 as the decision to detain terror suspects lies solely in the hands of the

[126] Emergency (Public Order and Prevention of Crime) Ordinance 1969 (*repealed)*; Dangerous Drugs (Special Prevention Measures) Act 1985 (Act 316). The former was firstly introduced as a temporary measure to control the spread of violence after the May 13, 1969 racial riots, but has continued to be in force until 2013. The latter was introduced with a sunset clause, under which the Act will be reviewed every five years. Since 1985, the Act has been successfully renewed from time to time

[127] *IGP: 808 held under Prevention of Crime Act in 2015*. (2016). *Themalaymailonline.com*. Retrieved 27 April 2017, from http://www.themalaymailonline.com/malaysia/article/igp-808-held-under-prevention-of-crime-act-in-2015

[128] [1917] AC 260 (H.L)

[129] Waxman, M. C. (2009). Administrative Detention of Terrorists: Why Detain, and Detain Whom? *Columbia Public Law Research Paper*, (08-190), 08-190.

[130] Stigall, D. (2009). *Counterterrorism and the comparative law of investigative detention*. Cambria Press.

[131] Steven Green, 'Chapter 2: Preventive Detention and Public Security – Towards A General Model' in Harding, A. & Hatchard, J. (Eds.). (1993). *Preventive Detention and Security Law: A Comparative Survey* (Vol. 31). Martinus Nijhoff Publishers.

Prevention of Terrorism Board (PTB) without the sanction of the court. The general fear about 'administrative detention' without the court's direct involvement is the noticeable lack of check and balance in place to safeguard the rights of the detainees whether the detention order issued by the PTB is arbitrary.

While there seems to be no universally accepted definition of "preventive detention" under the international law, basically the preventive detention regimes can be divided into three broad classifications, namely detention under the immigration laws, internal security detentions and the pre-trial detention. The three categories vary in several aspects, including the legal grounds for detention, notice of the framed charges, the requirement to appear before a regulatory authority, the duration of detention, the right to have access to lawyers, the right to a fair and public hearing, judicial review of the detention, and finally, the rules on interrogation during detention. Further, it must be stressed that terror acts are not the particular act that threatens national security. Acts such as treason, secession, sedition and subversion against the government can also amount to a threat to national security. Hence, preventive detention to protect national security is broader than preventive detention of countering terrorism, as terrorism is just one of several potential threats to national security. In Malaysia, while there is a clear difference of detaining any suspect for reason of national security or for reason of countering terrorism, in general, it requires the grounds of detention to be that the detainees act in any manner prejudicial to national security.[132] In this respect, the terms national security and anti-terrorism are sometimes used interchangeably pertaining to preventive detention regimes under the Malaysian security laws such as SOSMA 2012 and POTA 2015. Therefore, in the interests of clarity, one must distinguish between preventive detention

[132] See the Preamble to POTA 2015 and SOSMA 2012

for reasons of national security/counter-terrorism and for merely making inquiries or investigation (pre-trial detention).

In Malaysia, pre-trial detention is essentially detention pending police inquiries. The police are empowered to detain any terror suspects for inquiries for up to 21 days in Malaysia under POTA 2015.[133] This pre-trial detention can be further extended for another thirty-eight days on the written application to the court by the Public Prosecutor.[134] Such detention orders may be made if there are grounds for believing the detained person is engaged in the commission or support of terrorist acts. Besides the pre-trial detention under POTA 2015, the Malaysian government can also detain a person preventively for broad security offences under SOSMA 2012 for up to 28 days[135] and under POCA 1959 for up to 60 days.[136]

In contrast with India, under section 57 of India's Criminal Procedure Code 1973 ('CrPC 1973'), it dictates that in the absence of a court order issued by a Magistrate, a suspect caught without a proper warrant is to be released at once.[137] However, under India's anti-terror laws such as the Prevention of Terrorism Act, 2002 (POTA 2002) - (now repealed) and the current UAPA 1967, it allows up to 180 days[138] of detention by disregarding the application of section 57. The pre-trial detention period for up to 180 days in India is certainly excessive than in Malaysia. Further, the controversial detention provisions as laid down in India's anti-terror laws, not only conflicts with section 57 of the CrPC, it also runs contrary to the right protection against unreasonable detention.

[133] See Section 4 (1)(a) of POTA 2015
[134] Section 4 (2) (a) ibid.
[135] See Section 4(5) SOSMA 2012
[136] See Section 4(1)(a) and 4 (2) of POCA 1959.
[137] Section 57 CrPC provides*: "Person arrested not to be detained more than twenty- four hours. No police officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under section 167, exceed twenty- four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate' s Court"*
[138] Section 49(2) (b) of Indian POTA 2002; Section 43D (2) (b) of UAPA 1967

Also, under Article 22 of the Indian Constitution 1949,[139] it provides the safeguard on arbitrary detention.

However, the contradictions are easily resolved by reading Article 22 (7) of the Constitution where it explicitly puts forward the proposition that the preventive detentions as applied in India are the instances of exceptions bestowed by the Parliament.[140] Pre-trial detention had been around since introducing the Terrorist and Disruptive Activities, 1987 (TADA 1987)[141] which provided for the extended periods of detention of terror suspects in India. It was applied even after TADA's repeal and continued to be adopted and enforced until POTA 2002[142] was repealed. Indeed, the extended pre-trial detention has dramatically changed the provision under section 167(2) of the CrPC 1973. The section outlines the procedure to be followed in instances whenever the police officers failed to conclude their investigation within the time span of twenty-four hours allowed. Under such situations, it allows further detention for a particular number of days on complying with certain requirements.[143] In Malaysia, the similar law can be found in Section 117 of the Criminal Procedure Code (CPC) which provides for the procedures when an investigation cannot be completed within twenty-four hours for ordinary crimes except for security offences. Special security laws like

[139] Article 22 is a safeguard provision against any arbitrary arrest and detention under the Indian constitution

[140] Article 22(7) states that: " *Parliament may by law prescribe (a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub clause (a) of clause (4);(b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and (c) the procedure to be followed by an Advisory Board in an inquiry under sub clause (a) of clause (4) Right against Exploitation "*

[141] See: section 20(4) TADA 1987

[142] Section 49(2) POTA 2002

[143] *Section 167(2) CrPC states: "The Magistrate to whom an accused person is forwarded under this section may, whether he has or has no jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction: Provided that –*
(a) the Magistrate may authorise the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days; if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding
(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;
(ii) sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub- section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter"

POCA 1959, SOSMA 2012 and POTA 2015 have its set of procedures to follow if the investigation cannot be completed after the first twenty-four has lapsed. It is noteworthy that the maximum number of pre-trial detention for an ordinary criminal offence under section 117 of CPC is limited to fourteen days only, which is a way much lower than in India. In the UK, counter terrorism laws that allow pre-trial detention by the police to arrest individuals without a warrant who are reasonably suspected of being terrorists are provided under the Terrorism Act, 2000.[144] Once the suspected terrorist is arrested, they may be detained without charge for up to forty-eight hours pending the police investigation and to gather evidence for criminal proceedings. However, the forty-eight hours period was later amended by the Terrorism Act, 2006 to allow pre-trial detention up to twenty-eight days.

Despite the many provisions in the legislation that allows for an extended pre-trial detention period of terror suspects as highlighted above, in India especially, various aspects of the law were brought up to the court to challenge its legitimacy. For instance, in the case of *Mulund Railway Blasts*,[145] the Indian Supreme Court attempted to balance the liberties of the accused person charged in court against the national security concerns in arriving at a conclusion. It stated that although situations in serious offences like those arrested under TADA 1987 and POTA 2002, some leeway was given to the investigating machinery to complete their investigation by extending the time needed. However, this extension was not to be given automatically provided the conditions listed in the Act are satisfied. Save for all the listed conditions being fulfilled by the authority upon their application in court; the court should reject the extension of the accused's detention period applied by the authority.[146] The Court remarked:

[144] Section 41 of Terrorism Act, 2000.
[145] Ateef Nasir Mulla v State of Maharashtra (2005) 7 SCC 29 (Mulund Railway Blast case)
[146] Mulund Railway Blast case, para 12.

> *"The report of the Public Prosecutor must satisfy the Court that the Investigating Agency had acted diligently and though there had been progress in the investigation, yet it was not possible for reasons disclosed to complete the investigation within the period of 90 days. In such cases, having regard to the progress of the investigation and the specific reason for the grant of extension of time, the Court, may extend the period for completion of the investigation thereby enabling the Court to remand the accused to custody during the extended period. These are compulsions which arise in extraordinary situations. […] It is only with great difficulty that the investigating agency is able to unearth the well planned and deep-rooted conspiracy involving a large number of persons functioning from different places. It is even more difficult to apprehend the members of the conspiracy. The investigation is further delayed on account of the reluctance on the part of the witnesses to depose in such cases. It is only after giving them full assurance of safety that the police is able to obtain their statement. Thus, while law enjoins upon the investigating agency an obligation to conduct the investigation with a sense of urgency and with promptitude, there are cases in which the period of 90 days may not be sufficient for the purpose. Hence, the legislature, subject to certain safeguards, has empowered the Court concerned to extend the period for the completion of the investigation and to remand the accused to custody during the extended period."* [147]

In *Mulund Railway Blast*, the accused also contended that he had not been given sufficient notice of the application moved under the first proviso to section 49(2) (b) of the POTA 2002.[148] Although there is no statutory requirement to give any notice to the appellant in any specific form, the judge opined that even there was no specific provision to this effect, fair play and principles of natural justice demand that before granting the authority to extend time to complete their investigation, the court must give notice to the accused should the accused wishes to oppose the said application. The court further thinks by bringing the accused to court and informing the accused of the proposed application for extension of time to conclude the police investigation, is sufficient for the accused for notification of the intended application. The prerequisite of notification had to be

[147] *Mulund Blast* case, para 13.

[148] Section 49(2)(b) has the following proviso: *"Provided further that if it is not possible to complete the investigation within the said period of ninety days, the Special Court shall extend the said period up to one hundred and eighty days, on the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of ninety days: Provided also that if the police officer making the investigation under this Act, requests, for the purposes of investigation, for police custody from judicial custody of any person from judicial custody, he shall file an affidavit stating the reasons for doing so and shall also explain the delay, if any, for requesting such police custody "*

interpreted into the law that touches on the fairness and the principles of natural justice as decided by a Supreme Court decision in the case called *Sanjay Dutt* [149] which was cited in the *Mulund Railway Blasts* case with approval.

Because of the decision in *Mulund Railway Blasts* case, when the POTA 2002 was repealed, the pre-trial detention under section 49(2) was not abolished. In fact, when the UAPA 1967 was amended in 2008, section 43D (2)[150] was similar to section 49(2) of POTA 2002. The amended UAPA 1967 removed the provisions about confessions made while in the police custody, but the 2008 amendments brought back many of the old provisions under the old POTA 2002.[151] However, the good part of it was the strict criteria for discharging a suspected person taken into custody over 180 days under section 43D (2) of the UAPA 1967 received considerable attention by the Indian High Courts in some cases brought before them.[152] The accused can no longer be kept indefinitely. If the accused furnish bail, he must be released when the investigation cannot finish within the time frame allowed. Under section 43D (2) of the UAPA 1967, the merits of the case are immaterial to justify further extension of the detention period. It is observed that the court in arriving at these conclusions had turned to the court's decision on section 167(2) of the CrPC.[153] The decided cases ignored the Explanation I in section 167(2) of the CrPC, which provides that despite the expiration of the 60/90-day time-frame allowed (and in

[149] See para. 3 in the case of Sanjay Dutt v State through CBI, Bombay (1994) 5 SCC 410.
[150] In the sub-section (2) it states: "*Section 167 of the Code shall apply in relation to a case involving an offence punishable under this Act subject to the modification that in sub-section (2),*
(a) the references to fifteen days, ninety days and sixty days, wherever they occur, shall be construed as references to thirty days, ninety days and ninety days respectively; and
(b) after the proviso, the following provisos shall be inserted namely: -
Provided further that if it is not possible to complete the investigation within the said period of ninety days, the Court may if it is satisfied with the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of ninety days, extend the said period up to one hundred and eighty days: Provided also that if the police officer making the investigation under this Act, requests, for the purposes of investigation, for police custody from judicial custody of any person in judicial custody, he shall file an affidavit stating the reasons for doing so and shall also explain the delay, if any, for requesting such police custody."
[151] "Dhawan R; *India's Unlawful Activities Prevention Act (UAPA): The Return of POTA & TADA" - Europe Solidaire Sans Frontières*. (2008). *Europe-solidaire.org*. Retrieved 9 November 2016,
<from http://www.europe-solidaire.org/spip.php?article15177>
[152] Cases such as BK Lala v Chhattisgarh, (2012) Cri LJ 1629 para 17.
[153] Rajnikant Jivanlal v Intelligence Officer, Narcotic Control Bureau, New Delhi, (1989) 3 SCC 532; Union of India v Thamisharasi, (1995) 4 SCC 190.

UAPA 90 /180 days), an accused person will be kept in custody if the accused person cannot provide any bail. Although the court has moved in the right direction to shorten the length of detention for those who provide bail, but what happens to those accused persons who are destitute or fail to meet the conditions of the bail? For example, the requirement of sureties will make these poor peoples helpless and continue to languish in jail. Arguably, still, no protection accorded in the UAPA 1967 for these peoples to be discharged on bail. In cases when an accused person exercised his rights under section 43D (2) of UAPA 1967 for statutory bail, and if the accused custody was held to be illegal, the Indian Supreme Court has pronounced that if there was any extension of time for investigation being made in court later, the duration of detention could not be extended retrospectively. Otherwise, it will defeat the accused legal right that arose on the expiry of the 90 days' periods.[154]

In India, the difficulty of getting bail upon arrest is the most sinister form of deviating from the criminal procedural norm. As highlighted, within 24 hours after arrest, an accused person ought to be brought before the magistrate court under their ordinary criminal procedure laws. Unless it appears to the presiding Magistrate that the investigation cannot be accomplished within the 24-hour period, the magistrate must discharge the accused on bail. During this preliminary stage, even though bail is not applicable outright in some serious non-bailable offences such as murder, such procedural rule is intended to be obeyed and not an excuse not to grant bail. Within the 90 days, if no charge sheet is registered against the accused person, bail is ready as of right to the accused.[155] Unfortunately, the UAPA 1967 extends up to 180 days the duration of pre-trial detention, of which a possibility of the accused person is kept for 30 days under the police custody while under investigation. In some cases, however, if a report submitted

[154] See Sayed Mohd. Ahmed Kazmi v State, GNCTD & Ors (2012) 12 SCC 1, para 25.
[155] Section 167 of CrPC

by the public prosecutor showing the progress of the investigation or prima facie evidence is shown, the court may increase another 90 days if it is satisfied the investigation cannot be completed on time. Another striking feature in the 2008 amendment of the UAPA 1967 is the denial of bail for illegal immigrants in India who are apprehended for offences committed under this anti-terror law. Hence, refusal of bail for the immigrants under the UAPA 1967 provisions called into question India's counter-terror measures as being undemocratic. Past practices in enforcing the TADA 1987 and the POTA 2002, have shown similar provisions where many detainees under such anti-terror laws were held in pre-trial detention for an indefinite period although there are ostensible safeguards prescribed under Article 22 of the Indian Constitution.

Besides pre-trial detention, another type of preventive detention adopted earlier by the UK government as a measure to counter terrorism was in the form of immigration detention. An example can be seen in the UK's case of '*Belmarsh*.' The *Belmarsh* case[156] was brought by nine foreign nationals certified as international terrorism suspects by the UK Home Secretary under section 21 of the Anti-Terrorism, Crime and Security Act 2001 (ATCSA 2001) and had been detained under section 23 of the ATCSA 2001. The ATCSA 2001 allows for the detention of suspected international terrorists without charge. The claimants challenged the legality of the ATCSA and the UK government's decision to derogate from Article 5 of the ECHR regarding the detention provision. In its decision, the Law Lords examined whether the detention regime under the ATCSA 2001 was a proportionate response to the emergency situation and concluded that it was not. The House of Lords granted a quashing order regarding the derogation order and a declaration under section 4 of the Human Rights Act 1998 (HRA 1998) that section 23 of ATCSA

[156] A v. Secretary of State for the Home Department [2004] UKHL 56

2001 was incompatible with the ECHR insofar as it was disproportionate and permitted discriminatory detention of suspected non-national terrorists. Although English Court does not have the power under the HRA 1998 to strike down a domestic legislation, after the House of Lords' decision of *Belmarsh*, the Blair government abandoned Part 4 of the ATCSA and changed course. Subsequently, the UK government developed more criminal law framework approach to preventive detention.

It should be noted, however, that unlike the pre-trial detention framework, detention without charge is usually not predicated upon a detainee's criminal activity and a person can be held preventively. Hence, the preventive detention discussed in this chapter focus primarily on the national security preventive detention frameworks as featured in Malaysia, India and the UK's counter-terrorism legislations. Under the Malaysian POTA 2015, a person may be detained without trial for a term not exceeding 2 years if the Prevention of Terrorism Board (PTB) is satisfied that the detention is needed in the interest of the security of Malaysia if such person is engaged or support terrorist acts;[157] or the PTB may issue a restriction order and the person shall then be subjected to police supervision not exceeding a five-year period[158] with certain conditions to observe. The detention and restriction period can be extended if the board determines there are valid grounds and if not. It can direct the person to be set free. If the restricted person violates the terms of the restriction order, he can be liable to a jail term not exceeding ten years and not less than two years.[159] No hearing before the court of law is given to the terror suspect which is in direct contrast with SOSMA 2012.[160]Rather, the order is issued directly by the PTB. The executive powers are no longer vested with the Home Minister, unlike in the old ISA cases. When SOSMA 2012 was introduced to repeal the ISA 1960,

[157] See Section 13(1) of POTA 2015
[158] Section 13(3) ibid.
[159] Section 13(5) ibid
[160] Section 12 of SOSMA 2012

the court has been tasked to adjudicate on the culpability of the detained person for offences committed under the Act,[161] and this has been lauded as a right move in law.

However, with POTA 2015, it has empowered the five members of the PTB with the tasks of determining the culpability of the detained person for terrorism offences. Meanwhile, in India, the law which authorised detention for up to 12 months was first provided under the Preventive Detention Act 1950 (PDA 1950). The aim of PDA 1950 was to prevent an individual from acting in a manner prejudicial to the defence or security of India. Although introduced as a temporary measure to address exigent circumstances in the aftermath of independence, the Act remained in force for nearly two decades until it was repealed. Later, the Indian government enacted the Maintenance of Internal Security Act 1971 (MISA 1971), which more or less retained the provisions of the PDA 1950. The Act gave broad powers of preventive detention, search and seizure of property without warrants, telephone and wiretapping among its features. MISA 1971 was used broadly by the government during India's state of emergency between 1975-77. After much criticisms, MISA was abolished in 1978. The current legislation that provides for preventive detention is the National Security Act 1980 (NSA 1980) introduced during Indira Gandhi's government. The NSA 1980 restored many of the old provisions of the PDA 1950 and the MISA 1971. Ironically, the Act foresaw years of new repressive legislation including TADA 1967 and POTA 2002. The stated objective of the NSA 1980 is to fight "anti-social and anti-national elements including secessionist, communal and pro-caste elements and elements affecting the services essential to the community." The NSA 1980 allows preventive detention for up to 12 months, and the procedural requirements are primarily the same as under the PDA 1950 and MISA 1971. The Act also gives impunity to those security forces engaged in suppressing the violence. It is

[161] See Section 12 ibid

noteworthy that besides NSA 1980 which provides for preventive detention, India's anti-terror law like UAPA 1967 does not have provision for detention without trial.

Another significant legal observation here is that, under POTA 2015, terrorism offence may not be done yet or is not accomplished at the point of arrest. However, individuals would have been arrested merely on reasonable suspicion as provided in the Act.[162] This is termed as 'inchoate' offence under the criminal law. It is further observed that under the Malaysian Penal Code, an individual attempt to commit a crime when they cause such an offence to be committed and in such an attempt does any act towards committing such offence.[163] Offences like conspiracy, abetment and instigation fall under this group. The rationale behind the inchoate offence is to prevent a probable crime before it is crystallised - a proactive step in crime prevention. The terrorism offences under Chapter VIA of the Penal Code shared the same sentiment by criminalising acts carried out to prepare for a terrorist act. However, under POTA 2015, even at the formative stages of an action, for example, like giving a speech can be deemed as an offence of '*supporting*' although a terrorist act may not materialise or has yet to take place. This 'catch-all' offence may lead to individuals being penalised with detention even before any clear criminal intent can be established, bearing in mind no court of law to establish that element of criminal intent under POTA 2015. In tackling terrorism, Malaysian government seems to have preferred to act pre-emptively by capturing people before any clear intention to commit the terrorist act is established, an approach known as the 'precautionary principle'[164] But what is more problematic is the sweeping definition outlined in POTA 2015 that will give an extensive discretion for the authorities to make an arrest. The preamble to POTA 2015 is unclear on the precise circumstances in which

[162] Section 3(1) ibid
[163] See Section 511 of the Penal Code
[164] For review of this principle, see Sunstein, C. R. (2005). *Laws of fear: Beyond the precautionary principle* (Vol. 6). Cambridge University Press.

the law may be applied and on what basis an individual can be incarcerated without a proper charge being laid. This is further confounded by the vague meaning of the phrases like '*commission', 'support'*, '*involving'* and '*engaged.'*[165] Arguably, this may cause a person being detained without trial beyond the legitimate purposes of the Act. The Malaysian High Court has noted the broad scope and vague context under the previous repealed ISA 1960 whereby a person may be arbitrarily detained for security offences. In the case of *Abdul Ghani Haroon v. Ketua Polis Negara and Anor*, [166] the High Court opined that the phrase "*prejudicial to the security of Malaysia*" is too general and vague in nature as found under the section 73(1) (b) of the repealed ISA 1960. Justice Hishamudin Yunus in the same case said:

> *"If the arresting officer has reason to believe that the applicant (detainee) has acted or is about to act or is likely to act in a manner prejudicial to the security of Malaysia then the affidavit must state in* ***what manner*** *the applicant (detainee) has acted or is about to act or is likely to act in a manner prejudicial to the security of Malaysia. The court is not interested in detailed information. Some reasonable amount of particulars should be provided for the purpose of satisfying the court that there is some basis for the arrest and to enable the detainee who believes he is innocent to defend himself." (Emphasis added)*

Apparently, with *Abdul Ghani Haroon,* the Malaysian High Court has treated vague statutory provisions with a more restricted scope of judicial interpretation in the past when dealing with security laws. This was a significant step taken by the Malaysian judiciary, but it is uncertain when the broad language used for detention under the POTA 2015 will be read more narrowly like *Abdul Ghani Haroon*. It is important to know under POTA 2015, once a suspect is apprehended, the evidential burden rests on the suspect to prove that the preparatory activity did not progress further to cause a terrorist attack so as to

[165] The preamble in POTA 2015 provides: "*An act to provide for the prevention of the commission or support of terrorist acts involving listed terrorist organizations in a foreign country or any part of a foreign country and for the control of persons engaged in such acts and for related matters*"
[166] (2001) 2 CLJ 709

avoid being detained by the authority. By shifting the burden of proof, it runs contrary to the basic criminal law system that everyone charged with a crime shall be presumed innocent until proven guilty. The criminalisation of preparatory terrorism offence and the shifting of the burden of proof is indeed unfair to the accused because a situation can arise when the prosecution holds materials helpful to the accused but are unwilling to disclose due to the public interest consideration, especially in security offence cases.

Hence, the accused's lawyer cannot conduct a proper defence in a trial. It is an indisputable axiom that a person accused of having committed a crime should receive a fair trial and, if he cannot be tried fairly for that offence, he should not be tried for it at all. The right to a fair trial is, therefore, a cardinal requirement of the Rule of Law. What must be recognised is that fairness means fairness to both sides, not just one. Under the criminal law, the procedure followed must give a fair opportunity for the prosecutor and the accused to prove his case and to the accused to rebut it. However, with the advent of POTA 2015, not only the presumption of innocence has been compromised, it is also against the principle of natural justice on the right to have a fair hearing.

Another issue of greater concern is the period of the preventive detention order is not static. Depending on the decision made by the PTB, the duration of detention can be reduced to less than two years. However, at the same time, the period of detention may also be renewed by the PTB for a further term of two years[167] before the expiry each time on the same grounds or for reasons different from those on which the order was originally made, or partly for the same reasons and partly for various reasons.[168] The most controversial part of extending the detention order is that no limit on the number of times

[167] Section 17(1) of POTA 2015
[168] Section 17(2) (a) – (c) ibid

an order may be extended. A detention order under the POTA 2015 can be extended for unlimited numbers of two-year periods, as long as the PTB decides to do so.[169] Perhaps, the power to impose or renew the detention of a person without limit equals to an indefinite term of imprisonment considering such person has not been found guilty of any offence, be it major or minor. This is viewed as denigrating the principle of the Rule of Law. The argument that police needs an indefinite amount of time to remove terror threats posed by an individual is a fallacy. Although under certain circumstances, it may be possible that detention beyond a particular fixed period is necessary, such open-ended detention must not be adopted arbitrarily.

There is also another preventive order that can restrict the freedom of movement of a person under POTA 2015, although that person is not confined to the detention centre. This is termed as a restriction order, and such an order can be for any period not exceeding five years at a time.[170] A restriction order may prevent a person from being out of doors between the times stated in the order; requiring him or her to notify the police of his movements at specified times; not to have access to the internet unless it is provided in the order, and he may be asked to attach with an electronic monitoring device. Similar to the making and extension of the preventive detention order, a restriction order issued can be renewed for a further five years based on the same or different grounds, and there is also no limitation on the maximum periods a restriction order can be extended each time on expiry. The restriction order is more like an in-house detention to be applied when the police see it as unnecessary to detain a person in a detention centre. The punishment for non-compliance with the conditions stipulated in the restrictive order can be severe. Any person found to have violated the order can be jailed up to a maximum of ten years.[171]

[169] Section 17(5) ibid
[170] See Section 13(3) ibid
[171] Section 13 (5) ibid

Such order is similar to the order issued by the UK known as Terrorism Prevention and Investigation Measures (TPIM).

It appears from the investigations of the problems encountered in Malaysia and India regarding preventive and pre-trial detention; the UK is no exception in confronting with a myriad of challenges in trying to implement an effective preventive detention regime. Although the UK government experiences a rich historical past in tackling act of terrorism by using legislation, it is to be noted that detention without charge has been around even before 9/11 and has been applied against the IRA in the Northern Ireland for decades. The impact of 9/11 prompted the UK Parliament to introduce another anti-terror law known as ATCSA 2001 quickly. The most controversial provision in ATCSA 2001 has been the broad executive power granted to the Home Secretary to detain foreigners suspected to be engaged in terrorism activities without charge.[172] Webber [173] reported that from the year 2006 until the end of 2011, saw the duration of detention period without charge raised to twenty-eight days for those who were arrested for terrorism act. In 2014, forty-four out of sixty-five people detained under terror legislation were dealt within seven days. Besides detention without charge, the UK government's counter-terrorism strategy entails the implementation of control orders (now abolished) under the Prevention of Terrorism Act 2005 (PTA 2005). Due to its controversial nature of the order, finally, the control order was replaced with TPIM.

Before the start of the control orders under PTA 2005, the House of Lords in the case known as '*Belmarsh'* has made a decision that the power to detain foreigners indefinitely thought to be a threat to national security and to detain them without trial under Part 4 of ATCSA 2001 contradicted the provisions in the ECHR.[174] It was decided the powers

[172] A and others v Secretary of State for the Home Department (2004) UKHL 56 (*The Belmarsh case*)
[173] Webber, D. (2016). *Preventive Detention of Terror Suspects: A New Legal Framework*. Routledge.
[174] See the *Belmarsh* case

granted in the ATCSA 2001 to be prejudicial against foreigners caught under this Act. Besides, it was disproportionate to the threat posed by these foreigners. In just three months after the court decision, the UK government enacted the PTA 2005 in March 2005. The new Act was supposed to offer an alternative to the illegitimate detention found in ATCSA 2001 with a two-layered control order.[175] Essentially, a control order was issued to a person by imposing obligations such as curfews to prohibit or restrict that individual from engaging in the terrorism-related activity. The Court in the case of *Secretary of State for the Home Department v MB* [176] has laid down the test for imposing a control order:

> "*Whether it is necessary to impose any particular obligation on an individual in order to protect the public from the risk of terrorism involves the customary test of proportionality. The object of the obligations is to control the activities of the individual so as to reduce the risk that he will take part in any terrorism-related activity.*"

Unlike the first counter-terror measures in the form of preventive detention without charge as applied in the *Belmarsh*, control orders are not restricted to foreigners only. The government viewed the control orders as a tool to stop and interrupt those terror suspects whom the government thinks cannot be charged nor deported for lack of evidence. So, the aim of control orders is to safeguard the overall populace from the threat pertaining to an act of terrorism by imposing burdens on these suspects who are believed to be engaged in terrorism activities (though without strong proof). Such an order is to control or prohibit these individuals from participating in some terror activities. Control orders are theoretically civil procedures even though a violation of such imposed responsibility by the suspect creates an unlawful offence which can be jailed up to a maximum of five years. A judge gives the control orders at the behest of the Secretary of State. In the application for issuing a non-derogating order in court, the onus of proof in court is

[175] See Section 2 and 4 of PTA 2005
[176] [2006] EWCA Civ. 1140

different from the usual civil standard "*on the balance of probability"*, but on a lower standard of "*reasonable ground for suspicion*" only.[177] Arguably, the lesser threshold required here will help the UK government whenever a control order is sought from the court. Finally, in December 2011, the much controversial control order system was repealed and succeeded with Terrorism Prevention and Investigations Measures (TPIM).

The PTA 2005 envisaged two distinct kinds of a control order. They are classified as the derogating and the non-derogating order. The difference by derogation referred to the UK's commitments as member states of the ECHR before this (*Pre-Brexit*), wherein Article 5 forbids the detention of a person without having due process of law. Before a control order can be issued out, regardless of whether derogation or non-derogation, the Secretary of State had to communicate with the police officers first to figure out if there was adequate proof against a suspected person for reasons of mounting a criminal prosecution.[178] Through the duration of the control order, the suspected person's conduct will be regularly monitored by the police officers with a view of possible prosecution later.[179] However, according to the past records, the UK government has only issued non-derogating orders.[180] Therefore, it can be argued that a non-derogating control order can seriously limit a person's freedom by setting many terms on a person believed to be participating in terrorism activities. Section 1(3) PTA 2005 states:

> *"The obligations that may be imposed by a control order made against an individual are any obligations that the Secretary of State or (as the case may be) the court considers necessary for purposes connected with preventing or restricting involvement by that individual in terrorism-related activity."*

[177] Donkin, S. (2013). "*Preventing terrorism and controlling risk: A comparative analysis of control orders in the UK and Australia*" (Vol. 1). Springer Science & Business Media.
[178] Section 8(2) PTA 2005
[179] Section 8(4) ibid
[180] Donkin, S *op cit*. n 7

The obligations referred to in section 1(3) above connotes limiting the freedom of movements. Further, the suspect may be compelled to wear an electronically monitored device at the Secretary of State's assessment of each case. Terrorism-related activity is not merely restricted to the offence of commission, preparation or instigation,[181] but any behaviour in aiding or supporting including helping any suspected persons associated with any terrorist activity will be caught.[182] Examples of such offences include writing, publishing or publishing material glorifying terrorism; openly promoting or speaking and motivating others to commit terror acts.[183]

A non-derogating control order can be in force for twelve months and could be extended for the duration for which the Secretary of State believed s 2(1) still applied.[184] Once a non-derogating order was granted, it must be agreed to by a Judge of the High Court within seven days.[185] The court's role was to decide if the recommendations brought forward by the Secretary of State were flawed.[186] If it held the proposal forwarded was workable, a proceeding had to be set up. However, the suspected person was not allowed to be in court as the application was made via ex parte, nor being informed of the petition, nor provided with the opportunity to defend himself.[187] If the court found faults in the Secretary of State's argument, or in the obligations recommended, the order or that specific obligation had to be set aside, or else, the order had to be approved.[188] Once approved, the individual in question will be conveyed the order issued against him.[189] What tantamount to defects in the Secretary of State's application in court, the PTA 2005

[181] Section 1(9) a ibid
[182] Section 1(9) b – d ibid
[183] After the enactment of the PTA in 2005, Terrorism Act 2006 (TA 2006) was introduced to amend the control order regime in PTA 2005. TA 2006 made new preparatory terrorism offences such as "*encouragement of terrorism (sec 1), dissemination of terrorist publications (sec 2), preparation of terrorist acts (sec 5) and training for terrorism (sec 6).*" These new offences allowed individuals who might otherwise have been subjected to a control order to be charged in court.
[184] See section 2(4) and (6) PTA 2005
[185] Section 3(1) a and 3 (4) ibid
[186] Section 3(2) a ibid
[187] Section 3(5)(a), (b) and (c)
[188] Section 3(6) ibid
[189] Section 3(9) ibid

pointed out that the concepts applicable on any typical judicial review would be employed,[190] that is Diplock Trilogy[191]on illegality, procedural impropriety and irrationality. Actually, Lord Diplock himself also contemplated a fourth dimension which is one of proportionality. In short, executive powers can be set aside by the court if they have breached the fundamental rights such as due process in any case brought before the court. Additionally, the original issued non-derogating control order could be amended, both at the suggestion of the suspected person or the Secretary of State.[192] Interestingly also, section 2(9) outlined that all the obligations to be imposed did not necessarily have to connect to the incident which the suspected person was caught initially. Effectively, this is giving the Secretary of State a complete discretion to enforce more constraints. As earlier mentioned, while the control order was a civil measure, and yet, any violation of the commitment by the suspected person in the said order is vulnerable to criminal prosecution.[193]

In the wake of criticism on control orders, a revised form of control order regime was later introduced in 2012 called TPIM measures.[194] The new system is more flexible and focused on less stringent conditions than found in the control orders,[195] but critics say it is little more than "*control orders lite*." [196] The earlier control orders regime introduced through the PTA 2005 were more constraining as terror suspects were subjected to relocation to another district away from their original place of abode and can also be placed under 16-hour curfews. Suspects can also be prevented from mixing with certain named people, having mobile phones or using the internet. Under the new TPIMs, the

[190] Section 3(11) b ibid
[191] Bonner, D. (2006). Checking the executive? Detention without trial, control orders, due process and human rights. *European Public Law*, *12*(1), 45-71.
[192] Section 7(1) PTA 2005
[193] Section 9(1) stated: *"A person who, without reasonable excuse, contravenes an obligation imposed on him by a control order is guilty of an offence."*
[194] See: Section 1 of the Terrorism Prevention and Investigation Measures Act 2011 (Chap 23)
[195] Schedule 1 Part 1 ibid
[196] "*UK counter-terror review explained" BBC News*. (2016). Retrieved 14 November 2016, from <http://www.bbc.com/news/uk-12289294>

suspects can be tagged electronically with a device and require them to report regularly to the police. Thus, TPIMs relate more closely to current civil law restrictions. The aim of the measures is to have a protective effect by interrupting the terror suspects' plans or to alleviate police investigation. Henceforth, the police officers will have a legal responsibility to make sure that the suspect's behaviour is held under regular check with the hope to bring a criminal charge later on against the suspect. TPIMs are imposed by notice to the Secretary of State who must *inter alia* be satisfied on the balance of probabilities[197] that the suspect is or has been engaged in terrorism acts and it is crucial to use any of the wide range of measures to safeguard the citizen from the danger of terror attacks.[198] TPIMs may not exceed two years duration,[199] but the Secretary of State must keep under review whether it is necessary to continue the measures.[200] Permission from the High Court must be sought before the measures may be imposed.[201] After permission is given, and the suspect is served with the notice detailing the measures, the High Court conducts a review hearing when it is reasonably practical.[202] A suspect has a right of appeal against any decision to vary or extend the notice, or any refusal to vary or discharge the notice.[203] Besides judicial scrutiny, the Secretary of State must issue a quarterly report.[204] The Secretary of State's TPIM powers is only valid for five years.[205]

Having examined and investigated the different workings of a preventive detention regime from the three jurisdictions, this thesis observes that UK's preventive detention framework keep strictly to a dual-purpose approach. It permits initial pre-trial detention for the purpose of investigation and to facilitate decisions about whether to charge a terror

[197] The evidential standard of "reasonable ground" under section 3(1) of TPIM Act was amended by section 20(1) of CTSA 2015 to "balance of probabilities"
[198] Section 2(2) TPIM Act 2011
[199] Section 5 ibid
[200] Section 11 ibid
[201] Section 6 - 9 ibid
[202] Ibid
[203] Section 16 ibid
[204] Section 19 ibid
[205] Section 21 ibid

suspect or not ultimately. However, this is not the case for Malaysia. Malaysia's pre-trial detention under POTA 2015 will eventually lead to indefinite detention without charge for a period starting from two years [Section 13(1)] and can be renewed for another two years on expiry [Section 17 (1)]. In the case of India, the duration of pre-trial detention can be up to 180 days which is so far the longest in duration amongst the three countries studied. The UK only permits preventive detention of terror suspects without charge for up to fourteen days. It can be said that the UK wields a delicate balance between security and liberty in this regard. When faced with significant actual threats and attacks, the government pushes the security side of the scale as far as it can. When prompted by the courts, the UK has retreated and responded to the findings of human rights violations by changing its laws quickly. For example, discriminating between local citizens and foreigners regarding the length of detention periods resulted in the repeal of ATCSA 2001. When the length of curfews under control orders reached eighteen hours, and the ECHR considered that period amounted to a deprivation of liberty,[206] the government pulled back and reduced the curfew to sixteen hours. Unlike other comparable jurisdictions in this study, at least the UK government listened and acted promptly to complaints about control orders and replaced them with TPIMs right away. In direct contrast with Malaysia, it took the government fifty-two years to enact SOSMA 2012 to repeal the draconian ISA 1960 despite already receiving many criticisms on ISA 1960 over the past years. The situation in India is not far better than Malaysia in legislating new anti-terror laws. Although anti-terror laws in India evolved faster than Malaysia, unfortunately, it saw some 'bad' laws inherited into the new law each time. For example, the extended period of pre-trial detention for terror suspects stemmed from TADA 1987 and was adopted by POTA 2002, and later in UAPA 1967. This development is akin to seeing '*a wolf in a sheep's clothing*'.

[206] *SS for Home Dept. v. JJ & others* [2007] UKHL 45.

Another noteworthy mention is the unique source of legal power where the security laws or the emergency powers are derived for the three states. In a system of government based on constitutional supremacy such as Malaysia and India, the emergency powers to pass an emergency law such as POTA 2015 affecting the safety of Malaysians can be traced to Article 149 of the Federal Constitution. For India, Article 352 of the Constitution empowered the President of India as the head of the executive branch to proclaim a state of emergency and bestowed the government with the extraordinary power to make laws such as preventive security laws. As observed in this thesis, the apparent constitutional rights to enact emergency security laws seem to work paradoxically with other fundamental rights to liberty and freedom as enshrined in the constitutional frameworks and therefore, is perceived as repugnant to the Rule of Law values. However, in Malaysia and India, the judiciary is obligated to protect, defend and to preserve the sanctity of the Constitution at all cost. In contrast to parliamentary supremacy regime practised by the UK government, the public will have no recourse when the majority of the parliamentarians made new emergency laws such as the ATCSA 2001 that curtailed personal liberties rights as there are no checks and balances on the mighty Parliament under such a system. Therefore, English judges cannot simply strike down legislation even if the UK Parliament enacts unjust laws that infringe on fundamental human rights. The UK Law Lords may just state it's the policy of the government and that they are not prepared to interfere. Such an approach taken by the UK courts is an acceptable norm and justified under the doctrine of parliamentary supremacy.

3.5 CIRCUMVENTING FUNDAMENTAL RIGHTS IN THE SHADOW OF THE 'WAR ON TERROR'

Part of the challenge involved in judging the effectiveness of emergency legislation like the anti-terror laws stems from the vast variety of functions and aims for which it can be employed by the state in confronting terrorism threat as pointed out in the earlier section of this thesis. Although most security measures are evidently targeted at reforms designed to have a preventive effect by seeking to correct underlying security concerns encountered by the states, at the same time, fundamental rights such as the rights to personal liberty, the presumption of innocence and the right to have a fair trial or due process have all been eroded by the state. This section will explore the departure of these counter-terror measures from the normal criminal procedure and how such departures have been dealt with by the Courts in resolving the conflicts that have emerged owing to such differences.

3.5.1 Arrest and Detention

In Malaysia, Article 5 of the Federal Constitution lays down the underlying rights against unlawful arrest and detention of all citizen and non-citizens alike.[207] The study of arrest and detention provisions here confines only to terrorism-related cases, given the many security legislations regulating the same in Malaysia. The arrest and detention provisions in the earlier security laws like the ISA 1960 (now repealed) and the current POTA 2015 are distinct from those found in the Criminal Procedure Code (Act 593) that govern ordinary criminal cases. Before discussing the limitations of individual liberties under the law, it is helpful to set out the applicable basic rights as guaranteed to every citizen in Malaysia. Article 5(1) of the Constitution stipulates that every person under

[207] Part II of the Federal Constitution in Article 5 (1) states: "*No person shall be deprived of his life or personal liberty save in accordance with law"*

arrest and is held in detention in Malaysia has a constitutional right to be informed the reasons for his/her arrest and the right to have legal representation as soon as practical. Furthermore, the detained person is expected to be brought before a Magistrate within twenty-four hours period and cannot be held beyond the permitted period.[208] However, exemptions to the foregoing are allowed in cases under the preventive detention laws as promulgated under Article 149 of the Constitution. For example, this can be seen in practically all enacted security laws in Malaysia including the POTA 2015 which has deprived those fundamental guarantees highlighted. A suspected person can be further remanded in police custody for up to twenty-one days after being brought before a Magistrate when the initial twenty-four hours period of detention has lapsed.[209] This is in contrast with the ordinary criminal cases where the maximum duration of pre-trial detention allowed is limited to fourteen days only.[210]

Under section 3(1) of POTA 2015, it grants broad power to the police to conduct an arrest based on only '*reasonable belief*' that a person is a terror suspect. So far, there are no reported case-laws of the extensive power exercised by the police being challenged in court - perhaps, this is due to its infancy. However, a closer review of cases involving other security offences like ISA 1960 in the past proved the court is unwilling to consider the arrest under security offences cases similar to that of a normal arrest. The Court of Appeal's landmark case of *Borhan Hj Daud & Ors v Abd Malek Hussin* **[211]** has dispensed with this subject directly. This case was an appeal against the High Court's decision in granting the respondent general, aggravated and exemplary damages for wrongful arrest and detention, assault and ill-treatment and for oppressive, arbitrary and unconstitutional action. The High Court Judge observed that the respondent was never properly notified

[208] Article 5(4) ibid
[209] See Section 4 (1) of POTA 2015.
[210] See Section 117 (2) Criminal Procedure Code
[211] (2010) 8 CLJ 6

by the 1st appellant on why he was taken into custody as mandated by the Federal Constitution under Article 5(3). His Lordship also found that the first appellant could not produce in court with enough details and material evidence of the respondent's conduct to confirm the arrest under section 73(1) of the ISA 1960 including the respondent's detention. The appellants then appealed against the High Court's judgment. The first appellant alleged that after taking the respondent to the Police Contingent Headquarter (IPK) and after lodging a report, he had prepared a form as required under Art. 5(3) of the Constitution explaining to the respondent the grounds of his arrest.

Raus Sharif JCA (as he then was) delivering the judgment of the court in allowing the appeal states that: the arrest of the respondent was not an ordinary arrest. Respondent arrested under section 73(1) of the ISA 1960, was a special law made under Article 149 of the Constitution. Under the said Article 149, it explicitly provides that such law like the ISA is valid even though that is incompatible with Articles 5, 9 or 10 and 13 of the Constitution. The Court of appeal followed the case of *Kam Teck Soon v Timbalan Menteri Dalam Negeri Malaysia*[212] - a Federal Court decision. Although in *Kam Teck Soon* it was a case of Emergency (Public Order and Prevention of Crime) Ordinance 1969, the inference from here is that security legislation attempts to tilt the judges' mind in balancing the national security and due process of law by placing strong emphasis more on national security rather than to a fair trial consideration.

The Court of Appeal in *Borhan* went further to state the police officer did not have to tell the respondent the grounds of his arrest. It was legitimate for the first appellant to state he had "*reason to believe*" that there were reasons to support the detention of the respondent following section 73(1) of the ISA 1960. The first appellant did not have to

[212] (2003) 1 CLJ 225 FC

furnish the court with sufficient details and material evidence of the respondent's conduct to justify the arrest and detention. The broad view adopted by the court in security offences like the ISA, and arguably, the same will apply to cases that come under POTA 2015, with the similar phrase of "*reason to believe*" under section 3 like *Kam Teck Soon* (supra). The path taken by the court in security offences case has undermined fundamental rights as enshrined in the Federal Constitution in Art. 5(3) when no necessity imposed on the police to inquire and/or to offer details to prove the culpability of the suspect detained. Under the traditional criminal liability principle, we have the objective element of the crime known as the *actus reus* – that is, committing an illegal act or omitting a required act. Besides that, we also have the subjective element called *mens rea* – having the knowledge or intent, or both, relating to the crime. The broad provision under section 3 of POTA seems at odds with the accepted principles of criminal liability. As long as the police officer has reason to believe that the suspects' actual or probable intentions (rather than their acts), this will suffice for an arrest and detention. A lighter burden of proof is needed to make an arrest and to detain people under this section. The cumulative effect is that we can't rule out that the probability of innocent people may be arrested, detained, and tortured for unlawful arrest. At the very least, the police should go further to prove the suspect provided support and such support provided will likely to help the listed organisation [213] to pursue its unlawful terrorist aims instead of just relying on reasonable belief to be so, which may be mere tales, conjecture or mere hints. This reverses the established criminal law principle of presumption of innocence on suspects whenever he or she is caught under POTA 2015.

[213] As provided under "section 66b and 66c of the Anti- Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 [Act 613]"

Meanwhile, in India, when the Indian POTA 2002 was repealed in 2004, it was followed by amendments to the UAPA[214] in the same year. Later, further amendments in the UAPA in 2008 saw the provision like the old section 52 of POTA[215] was dropped. Section 43A of the UAPA, introduced in 2008,[216] requires that any enforcement officer with authority may make an arrest based on the belief "*from personal knowledge*" or information supplied by someone else, or any materials, or any things that might offer any proof or evidence relating to the offence committed under the Act. It is further observed that in many terror cases, the arrest of terrorist suspects come within the purview of the UAPA instead of following the usual provisions under the CrPC 1973 which confuse the situation even further. Like POTA 2002, bail can be denied for up to 180 days for investigation.[217] In India, the constitutional provisions on safeguards of life and liberty appear to give the cherished rights with one hand and take away with the other. For example, Article 22(1) guarantees that a detainee is informed of the grounds for arrest and is given access to a lawyer. Article 22(2) follows by the need to be brought before a court within twenty-four hours of an arrest to have the detention confirmed. However, these guarantees do not apply to persons arrested under any law that provides for preventive detention.[218] A series of legal challenges were ventilated in the Indian courts on the constitutionality of their anti-terror laws. In *Kartar Singh v. State of Punjab*,[219] the Supreme Court ruled that TADA was unconstitutional as regards to their detention provision. It emphasised the necessity to strike a balance between liberty and security but acknowledged ways in which the law might be misused. Another significant case law to

[214] Unlawful Activities (Prevention) Act No.29 (2004)
[215] Section 52 of the Indian POTA 2002 provides: "Arrest (1) where a police officer arrests a person, he shall prepare a custody memo of the person arrested. (2) The person arrested shall be informed of his right to consult a legal practitioner as soon as he is brought to the police station. (3) Whenever any person is arrested, information of his arrest shall be immediately communicated by the police officer to a family member or in his absence to a relative of such person by telegram, telephone or by any other means and this fact shall be recorded by the police officer under the signature of the person arrested. (4) The person arrested shall be permitted to meet the legal practitioner representing him during the course of interrogation of the accused person: Provided that nothing in this sub-section shall entitle the legal practitioner to remain present throughout the period of interrogation."
[216] Unlawful Activities (Prevention) Act No.35 (2008)
[217] Section 43(D) ibid
[218] Article 22(3) of Indian Constitution
[219] (1994) SCC (3) 569

look at is the case of *PUCL v Union of India*.[220] The Supreme Court, in that case, held that POTA was constitutional as regards to the detention provisions.

Pursuing this further, in the UK, the detention and arrest of a suspected terrorist are already well-developed. Under the Police and Criminal Evidence Act 1984 (PACE 1984), a person suspected of criminal offences including various terrorism-related offences can be detained without charge up to 4 days (96 hours).[221] When TA 2000 was first introduced, the UK Parliament agreed that in terrorism cases, pre-charge detention should be set at 7 days. Later in 2003, the Criminal Justice Act 2003 (CJA 2003) extended this period to 14 days. In 2006, after a failed effort by the government to enhance the period to 90 days, TA 2006 successfully sanctioned the periods of detention to 28 days but subject to annual renewal. Finally, the Protection of Freedoms Act 2012 permanently reduced the pre-charge detention period of a terror suspect to a maximum of 14 days.[222]

In the UK, police powers to make an arrest are found within the PACE 1984 itself, albeit the existence of a common law power of arrest for any infringement of the peace.[223] The common law power to act in self-defence and to keep out crimes have also been generally evoked in their counter-terrorism measures but, as mentioned by Walker,[224] their application was proven contentious. Terror suspects may be held in custody without charge for forty-eight hours initially, and thereafter, a police officer who has not been involved in the investigation will review the status of the investigation every twelve hours.[225] In contrast with the usual 36 hours of an investigative detention as laid

[220] AIR (2004) SC 456
[221] Section 43 and 44 of PACE 1984
[222] Section 57 Protection of Freedoms Act, 2012 available at: *Legislation.gov.uk*. Retrieved 30 April 2017, from <http://www.legislation.gov.uk/ukpga/2012/9/section/57/enacted>
[223] R v Howell [1982] QB 416.
[224] Walker, Clive. 2009. Blackstone's Guide to The Anti-Terrorism Legislation. Oxford: 2nd Edition, Oxford University Press
[225] See Part II of Schedule 8 of the TA 2000

down under the PACE 1984,[226] the 28-days detention was a major departure from what was essentially a maximum 96-hours detention allowed – more than 7 times the limit for a person suspected of committing murder. In 2008, another attempt was proposed through the Counter-Terrorism Bill 2008 to have 42 days of investigative detention, but this proposal again did not materialise.[227] The development of this proposed law raised the concern of the Human Rights Committee (HRC). The HRC stressed that once a suspected terrorist is under arrest, he should be notified if any charge is laid against him as soon as possible and to be brought to court promptly or to be released.[228] Observing that many of the rationalisations for prolonging the duration of pre-charge detention was based on evidence that is unacceptable at trial, for example, intercepted evidence. It is noteworthy that Code C to the PACE 1984 [229] calls for a suspect to be brought to court once adequate proof has been acquired and to go ahead with the view of securing a conviction of the suspect. So, Code C encourages charges to be brought against the suspect without delay, otherwise, the prolonged detention without charge of the person becomes an issue of contention. But, most anti-terror legislations in the UK did not specify the exact timing to frame a charge against the terrorist suspect. It can also be argued that UK anti-terror laws authorise detention to retrieve evidence from the terrorist suspect without focussing on searching for strong evidence to lay a charge promptly.

[226] See Section 43 PACE 1984
[227] For further insight, please see the "Joint Committee on Human Rights report, Counter-Terrorism Policy and Human Rights (13th Report): Counter-Terrorism Bill 2008, 30th report of the 2007–2008 Session"
[228] Human Rights Committee, 2008 Concluding Observations (n 4) para 15.
[229] PACE Code C 2014 - Publications - GOV.UK. (2014). Retrieved 16 November 2016, from https://www.gov.uk/government/publications/pace-code-c-2014

3.5.2 Right to a fair trial and due process of the law

A cardinal rule of law principle is that a person shall be entitled to a fair trial and due process of law. It is a right to be enjoyed pre-eminently not only in a criminal trial but civil trials as well. It also applies to adjudicative procedures whereby one or more parties may suffer grave consequences if an adverse decision is made. However, under most anti-terror legislation provisions, a departure from this settled principle is apparent. For example, under POTA 2015, the Malaysia government set up a Prevention of Terrorism Board (PTB) to adjudicate offences punishable under the statute.[230] The PTB, which essentially acts like a tribunal with a special set of procedural rules are presided over by a Chairman with at least fifteen years of legal experience [231] to be chosen by the Yang di Pertuan Agong (the King). Each sitting will need a quorum of three members, and they shall decide its own procedure. The proposed powers being conferred on the Inquiry Officer are powerful and wide. It allows the Inquiry Officer to get evidence by whichever means he feels necessary during an investigation against a suspect. It does not matter whether such evidence is admissible or inadmissible so long the evidence is desirable or necessary for the officer.[232] Basically, the rules of evidence do not apply. The inquiry officer may also use his own discretion to call for any documents related to the detainee solely based on his own judgment. The crucial part is the non-representation of lawyers at the inquiry for the detainee or any witnesses called at the inquiry.[233] If lawyers are not allowed to be in an inquiry, how the detainee is going to defend his case effectively. Justice Hishamudin (as he then was) in the much notable ISA case of *Abdul Ghani Haroon v Ketua Polis Negara & Anor [234]* opined that it is unjust if the detainee is not allowed to have access to legal representation and it certainly makes a mockery of the

[230] Section 8(1)(a) – (c) of POTA 2015
[231] ibid
[232] Section 10 (3) (a) ibid
[233] Section 10 (6) ibid
[234] [2001] 2 CLJ 709

right to apply for *habeas corpus* as guaranteed by art. 5(2) of the Constitution. Often encountered in security hearing like this, the government hold material which may help the detainee and therefore ought to be disclosed to him, but are unwilling to disclose because they consider that it would be damaging to national security interest to do so. As such, the inescapable question underlying in security cases was, did the procedure adopted deny the detainee a fair trial? Regardless of whether the hearing was conducted by the administrative (PTB) or in the open court, the detainee's right to a fair hearing may be compromised if the material is not disclosed to him.

In contrast with the position in the UK regarding disclosure of 'secret material', the case of *MB* which has already been referred to in the earlier part here, the High Court Judge observed: "*The basis for the Security Service's confidence is wholly contained within the closed [i.e. secret] material. Without access to the material it is difficult to see how in reality, MB could make an effective challenge to what is, on the open [i.e. disclosed] case before him, no more than a bare assertion*". It was then decided that a fair hearing was not accorded to MB. However, when MB's case came up to the Court of Appeal, the Appeal Court had a different opinion. They held that in cases involving undisclosed materials, the appointment of special advocates could be a sufficient protection of fairness for the detainee. In another development, - the case of AF,[235] the complaint was the police held secret information not readily available to AF, and AF was unaware what was the nature of the complaints against him. The judge accepted without qualification an argument advanced by AF's counsel that no precise or substantial allegations of AF's engagement in the terrorist-related activity had been shown to him when he was arrested. AF was kept in the dark on how his case was built-up by the Home Secretary.

[235] *Secretary of State for the Home Department v AF* (2007) UKHL 46, (2008) 1 AC 440

Later, both MB and AF brought up their appeal to the House of Lords and both cases came up for hearing together. The courts in both cases have acted in compliance with the Statute and the rules in getting the available secret material in the course of the investigation, but the concern was whether the legal process could be incoherent with the detainees' fair trial rights according to the ECHR convention. The majority of the bench acknowledged that the legal procedure could work unfairly on the detainees. In a unanimous decision, the UK House of Lords held that AF ought to be provided with sufficient facts about the case levelled against him and to allow him to instruct his defence team for reason of procedural fairness. Thus, the rule of law was affirmed.

As for India, the Indian government does not have administrative trials like Malaysia. Instead, they set up special courts and procedures for trying terrorist-related cases. When TADA was in force, special courts to hear terrorist cases were first established under TADA. Later, the Indian POTA inherited the establishment of these special courts. In 2008, when the UAPA was amended, some of POTA's important provisions were continued through the amendments. However, the provisions on setting up special courts were revised and added into another new legislation known as the National Investigation Agency Act 2008 (NIAA 2008). The NIAA 2008 was passed ensuing from the Mumbai terror attacks.[236] The Act provides for the creation of the National Investigation Agency (NIA) that may investigate and prosecute any offence listed under the UAPA, Chapter VI of Indian Penal Code[237], and other laws known as Scheduled Offences.[238] Like the powers of the ordinary Indian police, the NIA is empowered to investigate offences throughout India as provided under section 3(2) of the NIAA 2008. Besides that, under section 11 (1) and 22(1), the central and state governments may set up Special Courts for the trying

[236] Library, C. (2016). "*Mumbai Terror Attacks Fast Facts*." *CNN*. Retrieved 21 November 2016, from http://edition.cnn.com/2013/09/18/world/asia/mumbai-terror-attacks/
[237] Chapter VI of Indian Penal code covers: "*Offences against the State, including sedition and waging war against India"*
[238] Section 3 NIAA 2008 read with the Schedule.

Scheduled Offences. However, a regular session court may have the jurisdiction to hear UAPA cases[239] provided the case is not investigated by the NIA.

Although the setting up of these special courts received the critique of human rightist who contends that they infringe due process expectations and also other essential legal rights as enshrined in the Indian Constitution,[240] the use of special courts for trying terrorism cases was affirmed by the Supreme Court.[241] The wish to have an early court trial and delivery of punishment, particularly when a death sentence is warranted, were the reasons behind the setting up of special courts to try terrorism cases. However, the right to a fair trial assured by both the Indian Constitution[242] and the ICCPR [243] has been encroached by the setting up of these special courts. Rules available in the special courts were derived from POTA and TADA, which were in tension with the rights to be tried openly before an impartial tribunal, trial in absentia, and the right to cross-examine the prosecution's witnesses.[244] There was no witness protection measure for the defence witnesses. On the contrary, witnesses for the prosecution may seek protection of their personal identity if they were asked to testify. Arguably, this is unfair for the defence witnesses as they may also fear harassment or pressure by the NIA when they step forward to become defence witnesses.

With the UAPA amendments in 2008, it restored judicial independence by dropping the special courts entirely. The amendments moved those alleged infringements of terrorism offences under UAPA to normal court to be tried just like any other criminal

[239] UAPA, section 2(1) (d).
[240] See: "Setty, S. (2010). Comparative perspectives on specialized trials for terrorism. *Me. L. Rev.*, *63*, 131."
[241] Kartar Singh v State of Punjab, (1994) 3 SCC 569. "*While the Supreme Court has sustained these witness identity procedures in both TADA and POTA against constitutional attack, it also has expressed concern that accused persons may be put to disadvantage to effective cross-examining and exposing the previous conduct and character of the witnesses.*"
[242] Article 20 of Indian Constitution. See also Menaka Gandhi v Union of India (1978)1SCC248 where the Supreme Court has provided a broad interpretation of '*procedure established by law*' to include '*substantive due process'*
[243] Article 14 of ICCPR
[244] See "Kalhan, A. (2006) Colonial continuities: Human rights, terrorism, and security laws in India. *Columbia Journal of Asian Law*, *20*, 93."

offences without the government manipulation. In the 2008 amendments, Court's power to try defendants in absentia was abolished, but it allowed the regular courts with the discretion to have the proceedings in camera and to consider other procedures to shield the prosecution witnesses' identity, but not the defence witnesses. To a certain degree, UAPA amendments also pose the same issues as POTA on the possible infringements of the right to a fair trial.

3.6 TOWARDS COMPLYING WITH THE INTERNATIONAL LEGAL FRAMEWORK? - A CASE WITH THE ICCPR

As already dealt with in the preceding sections above, governments are not only entitled to apply pre-emptive measures to fight terrorism, they are required under international law to use reasonable steps to safeguard the lives of people against terrorist attacks. But whether a threat renders preventive detention reasonably necessary is inevitably elusive in practice. International Law on human rights is manifested in several international human rights treaties or conventions and in customary international law. But the core attributes of human rights under the International Law on standards governing preventive detention mainly stem from the International Covenant on Civil and Political Rights ('ICCPR'). While the ICCPR provides for security-based preventive detention which can deny the liberty of a person, such detention must be lawful and proportionate under the national laws. It is noteworthy that the Human Rights Committee's interpretations of the ICCPR and case decisions although not binding on state parties, have the considerable persuasive authority and have been an authoritative source of international law by the International Court of Justice. Human rights norms dictate that preventive detention shall not be arbitrary. It is one of the fundamental guarantees under the Universal Declaration of Human Rights that no one shall be subjected to arbitrary

arrest or detention.[245] In addition, Article 9(1) of the ICCPR requires that arrest and detention must not be arbitrary. This section will examine the cases and decisions related to security-based detention within the international legal framework i.e. the ICCPR.

3.6.1 Article 9 (1) ICCPR – The Right to Liberty

Article 9(1) of the ICCPR provides:

> "*Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law*."

The above Article 9(1) could be interpreted as affirming the preventive detention if it is non-arbitrary, lawful and the procedures for the detention are according to the law. But the second sentence of Article 9 adds the prohibition on the arbitrariness of arrest and detention of an individual as an added requirement. What it meant by arbitrariness was defined in Hugo *van Alphen v The Netherlands*,[246] where it defined "arbitrariness" to include several core elements. It held by the Human Rights Committee that:

> "*Arbitrariness is not to be equated with against the law but must be interpreted more broadly to include elements of* ***inappropriateness***, ***injustice***, ***lack of predictability*** *and* ***lack of necessity.*** *This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances"*[247] *(emphasis added)*

After Hugo Van Alphen's case, in another case of *A v Australia*,[248] the HRC reiterated its interpretation of Article 9(1) ICCPR. Besides confirming *Hugo Van Alpen*, the committee added two more pre-conditions. Arrest and detention must also be '*necessary'* and '*proportionate*.' In *A v Australia*, the detainee was kept under detention for entering

[245] Article 9 UDHR states: "No one shall be subjected to arbitrary arrest, detention or exile" available at *Universal Declaration of Human Rights | United Nations*. (2016). *Un.org*. Retrieved 20 November 2016, from <http://www.un.org/en/universal-declaration-human-rights/>
[246] UN Doc CCPR/C/39/D/305/1988 [3.1].
[247] UN Doc CCPR/C/39/D/305/1988 [5.8].
[248] UN Doc CCPR/C/59/D/560/1993 [9.4]

Australia illegally without a legal refugee status. *A* was then detained for seven months pending an investigation of his refugee status. According to the Committee, a person may be detained for reasons of illegal entry into Australia, but simply detaining pending determination of his entitlement to refugee status with no provision for periodic was arbitrary, even though *A* embarked the country illegally in the first place.[249] The Committee stressed that "*arbitrariness must not be equated with against the law*" but interpreted more broadly to include such elements such as inappropriateness and injustice.[250] In Danyal *Shafiq v Australia*,[251] the Committee referred to the case of *A v Australia* to find the main test about whether the detention is arbitrary, and whether the detention is reasonable, proportionate, proper and justifiable in the circumstances. Therefore, to avoid infringement of the Covenant's prohibition on arbitrary detention, any national legal framework on security-based preventive detention must be manifestly just, predictable and proportionate. In the upshot, the manner a preventive detention is framed must not be unfair. It must be appropriate and proportionate, given the circumstances of the case.

3.6.2 Article 9 (2) ICCPR – The Right to be Informed

Article 9(2) of the ICCPR provides:

> *"Anyone who is arrested shall be informed, at the time of the arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.*"

Basically, two rights embodied in this article. The first is that anyone who is arrested must be notified of the reasons for his or her arrest and the reasons for the detention. The second applies to pre-trial detention framework which requires an accused person to be

[249] ibid
[250] ibid
[251] UN Doc CCPR/C/88/D/1324/2004 [7.2].

promptly notified of the charge brought against him. The Human Rights Committee (HRC) stressed the first right in the context of preventive detention without charge in General Comment 8 and indicated that "if the so-called preventive detention is used, for reasons of public security, information of the reasons must be given."[252] In *Caldas v Uruguay*, the HRC clearly expressed that:

> *"Article 9(2) of the Covenant requires that anyone who is arrested shall be informed sufficiently of the reasons for his arrest to enable him to take immediate steps to secure his release if he believes that the reasons given are invalid or unfounded."* [253]

The HRC, therefore, stressed that simply by informing the detainee he was arrested with no clue provided of the material complaints of was clearly a breach of Article 9(2) of the ICCPR[254] against the detainee as it was obviously not enough for the detainee to try to challenge his detention. It is noteworthy that, besides information relating to the justification for the detention, the Committee requires other related information to be provided to the detainee's family. In *Davlatbibi Shukurova v Tajikistan*,[255] taking into account the fact that the state authorities did not inform the detainees' family members about the date or the location of the detainees' execution immediately after the judgment, the Committee regarded such detention as an inhuman treatment of the applicant and concluded that it was contrary to the ICCPR.[256]

The national security detention framework as discussed earlier in this chapter will not normally lead to any criminal prosecution of the detainee, and when it relates to the second requirement that the detainee shall be informed of the specific "accusations"

[252] Human Rights Committee, *General Comment 8: Right to Liberty and Security of Persons (Article 9)* (30 June 1982), reprinted in Secretariat, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.6 at 130 (29 July 1994) 1 (acknowledging that administrative detention is sometimes lawful) (*General Comment 8*)
[253] UN Doc CCPR/C/19/D/43/1979 (21 July 1983) [13.2]
[254] Ibid
[255] UN Doc CCPR/C/86/D/1044/2002
[256] Ibid

against him may not seem befitting. Nevertheless, in most security-based detention cases, individuals are detained for reasons of involvement in terrorist activities or because they are believed to be able to offer the state authorities with terrorism-related intelligence information. If the detainee is not provided with the specific "accusations" about which terrorist activity he or she was suspected of being involved in, the detainee cannot make use of his or her right to apply for judicial review or habeas corpus.

3.6.3 Article 9(3) ICCPR – The Right to Trial within a reasonable time

Article 9(3) provides:

> "*Anyone arrested or detained on a **criminal charge** shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantee to appear for trial, at any other stage of the judicial proceedings, and, should the occasion arise, for execution of the judgment.*" (*emphasis added*)

From the wording of Article 9(3), it only applies to those "arrested or detained on a criminal charge". It should be recalled that as national security preventive detention is a pre-emptive measure based on preventing future terrorist activities, no charge is contemplated. Article 9(3) does not regulate such detention. Arrest or detention without charge is accordingly protected against by Article 9(4), in which an effective remedy such as habeas corpus is guaranteed.

3.6.4 Article 9(4) ICCPR – The Right to Judicial Supervision

Article 9(4) states:

> *"Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."*

As discussed above in relation to the permissible length of periods of detention, any detention must be subjected to judicial supervision, through which the justification for the detention can be fully assessed. The right of access to proceedings before a court ensures that detainees shall be provided with the opportunity to have a judicial review of the legality of the detention, regardless of whether such arrest or detention is lawful or unlawful. Article 9(4) may be breached when an individual is legally detained under domestic legislation but has not been offered the opportunity to have the legality of the detention judicially examined by the court.

Under the common law remedy of *habeas corpus*, it allows a detained person to challenge the legality of his detention before a court of law and to petition for his release if the detention is unlawful.[257] When Article 9(4) was first drafted, it expressly provided the right to *habeas corpus*[258] as an effective remedy. However, this term was ultimately omitted and replaced with a neutral expression "proceedings before a court" to allow states to set up effective remedies according to their own legal traditions and within their domestic legal systems.[259] The HRC has confirmed that the right to have the court to review the lawfulness of the detention "applies to all persons deprived of their liberty by

[257] Nowak, M. (1993). *UN covenant on civil and political rights: CCPR commentary*. NP Engel.
[258] Ibid
[259] ibid

arrest or detention."[260] In *Vuolanne v Finland*,[261] the Committee stated that Article 9(4) also applied to administrative detention without charge:

> *"whenever a decision depriving a person of his liberty is taken by an administrative body or authority, there is no doubt that Article 9, paragraph 4, obliges the State Party concerned to make available to the person detained the right of recourse to a court of law*."

Anyone detained must be accorded with an effective recourse regardless of whether they are being detained under a pre-trial detention regime or under a national security detention regime. This provision does not give the detainee with the right of actual appearance before a competent judicial authority, which was only explicitly granted by Article 9(3) to persons detained under a pre-trial detention regime and does not extend to security-based detention. However, when a person has been detained without criminal charge for a lengthy period with no periodic review, this detention will become "arbitrary" and offend the core prohibition in the ICCPR. Such lengthy or even indefinite detention also confronts the rule of law and the principle of natural justice. From this perspective, one can conclude that the right of actual appearance before a competent judicial authority is implicit in Article 9(4). Another issue arising out of Article 9(4) is the meaning of "court." Similar to Article 9(3), a court shall have the power to examine the legality of the arrest or detention. Likewise, the court must also have similar power to instruct the release of the detainee once the detention is considered illegal. In Article 14(1),[262] the term "court" extends to cover not only ordinary courts but also special courts, such as administrative constitutional and military courts.[263]

[260] General Comment 8, above n 132,
[261] UN Doc CCPR/C/35/D/265/1987 (7 April 1989) [9.6]
[262] Article 14(1) ICCPR states: "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children "
[263] Nowak above n.137

As examined in this section, the definition of '*arbitrariness*' has incorporated the value of the laws of natural justice, the human rights, and the concept of the rule of law. These basic principles have either been stated in the express terms or already incorporated in the aims and purposes of the ICCPR. This thesis can affirm that security-based preventive detention without charge is not arbitrary *per se*. What is required is a detention without charge measures must be non-arbitrary, in another word the detention regime ought to follow the rules of natural justice, be proportionate, appropriate and predictable, and also need to incorporate comprehensive and efficient procedural safeguards. Unfortunately, the HRC's jurisprudence does not offer clear guidance on how long a period of detention may be regarded as "*arbitrary*".[264] This is understandable, due to a lack of clear classification of detention regimes and the distinctiveness of every detention regime in the individual state. Accordingly, an assessment of the arbitrariness of preventive detention for reasons of national security in any state can only be based on a case-by-case analysis.

3.7 SUMMARY

It is conceived by legal scholars and jurists that the Rule of Law forms the bedrock of a democracy and therefore, it should be respected by democratic nations. When speaking of the notion of the Rule of Law, it is always intertwined with the human rights agenda. In this chapter, the grave concern is whether counter-terrorism legal frameworks enacted are neglecting the rich Rule of Law traditions in the name of protecting the security of the States. Although the Rule of Law can lead to several corollaries and meanings in many democratic nations including diverse views propounded by scholars, one thing for sure is that the Rule of Law is believed to promote global peace and political stability.

[264]Cases such as *Ahani v Canada*, UN Doc CCPR/C/80/D/1051/2002; *Schweizer v Uruguay*, UN Doc CCPR/C/17/D/66/1980; *Medjnoune v Algeria*, UN Doc CCPR/C/87/D/1297/2004; *Davlatbibi Shukurova v Tajikista, UN* Doc. CCPR/C/86/D/1044/2002

An analysis done on several counter-terrorism strategies and legal frameworks deployed by the comparative States is to have a preventive detention regime to thwart would-be terrorists found to have undermined human rights and the Rule of Law ideals. In fact, under the International Human Rights law standard, it has established the permissible range of preventive detention laws. This standard requires that any national detention measures must be lawful, necessary, predictable and proportionate to its proposed aim of preventing terrorist acts, procedures that ensure substantive review of the justifications of detention and other essential rights that protect detainees against inhuman treatment, including the right to be informed of the reasons for detention, the right to contact with the outside world, the right to a confidential lawyer-client communication, and the right to be brought by state authorities before a competent judicial body - in effect these are the Rule of Law ideals. It is posited here that a preventive detention regime that suspends human rights should only be permitted when all the above notions have been incorporated in national detention regimes.

This chapter has compared the preventive detention regimes in Malaysia, India and the UK by considering not only the provisions of anti-terror laws that featured preventive detention but also the influence of a distinct national identity, background, legislative history and the adherence to the Rule of Law. Terrorism threat has never been unfamiliar in the three countries' mind. Various national security legislations to tackle terrorism have already in force way before the 9/11 attacks. Not surprisingly, domestic laws of preventive detention in Malaysia, India and the UK, diverge in some significant respects. One of the major differences is the period of detention. In the UK, terrorism suspects and non-suspects may be detained for up to 36 hours provided by PACE 1984 with the possibility of this being extended by a further 14 days, whereas preventive detentions in Malaysia can be extended for an indefinite period.

Judging by the mere length of detention, even the 14-day period of detention in the UK is contrary to the international human rights standard. Similarly, the prolonged detention in Malaysia under POTA 2015 for example, is not only disregarding the international standards but also because there is no court involvement in the issuing process of the detention order. An issue of grave concern is the two-year period of detention with the possibility of extending to an indefinite period in Malaysia. Moreover, the threshold for detentions without charge in Malaysia is low, requiring only the subjective satisfaction of the PTB set up under POTA 2015 that the detention is necessary to prevent detainees from acting in a manner prejudicial to national security purportedly to curtail terrorism threats. Although in India, their current anti-terror law such as UAPA 1967 has no provision for indefinite detention without trial, the pre-trial detention of terror suspects up to 180 days is definitely against the international human rights standards. Although India is a party to the ICCPR[265] unlike Malaysia, and yet India has elected not to adhere strictly to this international treaty which called for the principle of proportionality to be applied in the treatment of detainees. As least under the UK's preventive regime, an initial detention, or a continued one can only be issued when it is necessary to prevent an imminent terrorist act occurring or to preserve evidence relating to a terrorist act.[266] But the grounds of detention are far from clear under domestic laws in some jurisdictions compared. For example, in India and Malaysia, there is no further clear explanation of the key terms such as "*reason to believe from personal knowledge*" in section 43A of UAPA 1967 before an arrest can be made or "*prejudicial to the security of Malaysia*" as seen in the preamble of POTA 2015. The uncertainties and ambiguities surrounding the preventive regime may significantly broaden the executive's power to

[265] UNTC (2017). *Treaties.un.org*. Retrieved 1 May 2017, from <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en>
[266] Section 41 of TA 2000

detain without charge preventively. There were already notable instances of the potential damages undesirable in its Malaysian and Indian counterparts, partly due to the low threshold of detention and the undefined key terms. Hence, preventive detention schemes have constantly been used to stifle political dissent rather than to prevent real national security threats.

By comparing Malaysia's detention without charge regimes established under POTA 2015 against other jurisdictions like India and the UK, including under the international human rights norms like the ICCPR, the detention provision by itself is highly polemic. The two-year period of preventive detention (which can be extended) is not only disproportionate to the objective of the preventive regime but also against the Rule of Law and the doctrines of natural justice. The detention regimes fail to include procedural restrictions in several respects, such as communication with the outside world while under detention. During the half-a-century history of the security-based laws passed in Malaysia and in the countries studied, the courts did sometimes try to support the integrity of the Constitutions or to safeguard the constitutional rights and freedoms. For examples, in the case of *Abdul Ghani Haroon* in Malaysia, the *AF* in the UK and the *Mulund Railway* case in India. However, the judiciary's efforts nevertheless have caused the respective governments to react through significant amendments to their security laws, and to a certain extent, it was perceived as to further limit judicial authority in reviewing detentions.

Most anti-terror laws were passed as an interim emergency measure during actual times of emergency. However, emergency laws are often framed in vague and undefined terms which create a possible setting for illegal or arbitrary detention. As demonstrated by the examples in this chapter, the detention regimes established under the emergency

legislations continued to be used after the particular state of emergency disappeared, which means that the indefinite detention regimes are a source of violation of human rights. While these measures were necessary during a genuine time of emergency, when emergency laws are not regularly renewed or reviewed, the normalisation of extraordinary rules/laws conflicts with the underlying understanding human rights law – the respect for human rights, particularly the right to liberty. The traditional criminal justice system, with its well-established evidentiary and procedural requirements, has been supplanted, at least in part, by the preventive detention regime. Hence, there is a real danger this preventive detention regime might weaken the established Rule of Law and the criminal justice system not only in Malaysia, in India and the UK. If there is anything to be gained from the tension between detention without charge and the protections of fundamental rights, and how the jurisprudence of human rights law has developed regarding preventive detentions without charge, certain individual rights and liberties should be respected by all States.

It is further observed in this study that the current security situation, flowing from the tragic 9/ 11 terrorist attacks, and the US-led "War on Terror" turned out as a right excuse for having the indefinite detention without trial regimes to be regularly applied just like any other ordinary criminal law to fight international and domestic terrorism. In Malaysia, the repealed ISA 1960 was once being rigorously condemned as a tool for the Malaysian government to silence human rights activists before the 9/11 attacks by many Western democracies; however, it now appears that the world is more receptive to the oppressive use of preventive detention measure.[267] With the international community discussing the need and effectiveness of pre-emptive measures in fighting terrorism, more and more western states were already resorting to preventive detention schemes. In these regards,

[267] For discussion of the western democracies' inconsistent reaction to the detention regime before and after 9/11, see Hor, M. (2002). Terrorism and the Criminal Law: Singapore's Solution. *Sing. J. Legal Stud.*, 30.

the Malaysian government can now proudly claim their preventive detention without charge used to suppress communist threats via the ISA 1960 in the past was indeed a robust and reliable anti-terrorism measure adopted and recognised by many states now.

In an ideal model of a preventive detention regime, it is postulated here there should be an appropriate role for judges to apply the Rule of Law. In addition to that, the powers exercised by the state authorities must be authorised by the Rule of Law and to adhere to the concepts of legality besides natural justice. Judges should be encouraged to apply a heightened standard of judicial review and to take an active role to scrutinise the process and merits of any detention order. Essentially, this is the crux of the Rule of Law values and for human rights protection. While the executive or legislature has often failed to observe these basic principles, and the deprivation of personal liberty has been characterised as in agreement with the Constitution of the States, for example, in Malaysia and India, the courts should act as the guardian of these fundamental rights, regardless. In so doing, judges' clear resistance to the wrongful use of the preventive detention regimes will be the starting point. On whether a judicial review has a role to play in upholding the Rule of Law values in fighting and preventing terrorism will be taken up in the later chapter 4 of this thesis.

CHAPTER 4: JUDICIARY ROLE IN COUNTER-TERRORISM AND ITS COMPATIBILITY WITH OTHER DEMOCRATIC LEGAL FRAMEWORKS

4.1 INTRODUCTION

As discussed in chapter 3, briefly, the rule of law calls for a legal system whereby the laws are clear in meaning, unambiguous and applies impartially to everybody. To fortify this understanding, the court performs a vital role in defending the rule of law by constantly keeping the acts or power of the government under check and balance. While the judiciary's work is confined to enforce any laws and regulations that are lawful, it has been entrenched with legal powers to restrict government authority seen as tyrannical. In a tense situation like in this age of constant terrorism threat, the court is the last avenue as far as defending human rights, basic freedom, and personal liberty is concerned. However, in the past, the Malaysian judiciary had constraints put upon them that limit their power to meet its role within the rule of law system. As a consequence, the separation of powers between the judiciary, the legislative and the executive in Malaysia has been altered owing to the deliberate interference of the government in the judiciary role. The doctrine of separation of power is very significant in the Malaysian context in understanding the different powers as practiced by the three distinct bodies of the government. This doctrine has been presented by the western scholars, especially John Locke and it was further developed by Montesquieu, an eminent French philosopher in the 18th century. The most striking concept of the separation of powers is the same bodies should not make the law, and to enforce and penalise those who breach it. The late HRH Raja Azlan Shah, the Lord President once pronounced that:

> "*The Constitution is not a mere collection of pious platitudes... that no single man or body shall exercise complete sovereign power, but that it shall be distributed among the executive, legislative and judicial*

> *branches of government, compendiously expressed in modern terms that we are a government of laws, not of men*." [1]

So, the fundamental principle which gave the right to the courts' authority to strike down any act beyond the legal authority has been the *ultra vires* rule. This concept of ultra vires was acknowledged as the ground for the courts to apply the spirit and intent of the legislature. Besides that, it is to be noted that the courts' role is not restricted to control the limits of the legal powers legislated by the Parliament, but it can also play a role to ensure that natural justice is done too. Judicial review is generally carried out by way of an application by the aggrieved person in the High Court[2] of any acts or decisions made by the executive body purportedly incoherent with the rule of law standards. Thus, judicial review of the governmental action evokes the court's challenges in performing its judicial function to allow people to contest the authority's decision. If an executive decision is antithetical to the law, it is the judiciary that is authorised under the law to declare them as void. Essentially, this is the concept of what we comprehend as a separation of government functions which is a typical characteristic of a democratic state. Therefore, the courts must interpret laws passed by the Parliament to ensure it affirms the ideals of constitutionalism.

Following this understanding, it is, therefore, imperative for a federal government like Malaysia to have a strong and independence judicial system to safeguard citizen rights from being violated. Or else, a sovereign state like Malaysia will become a state with constitutional rights but lacks enforcement of such rights. Hence, various government actions deemed unlawful must be controlled by the laws itself. With the separation of power, each of the separate body will limit the other to make sure they will not go beyond

[1] Loh Kooi Choon v Government of Malaysia [1977] 2 MLJ 187, FC at 188
[2] See Order 53 Rule of Court 2012. The Malaysian position with regard to judicial review is governed by the Specific Relief Act 1950 (Act 137) and consistent with para 1 of the Schedule of the Courts of Judicature Act 1964 (Act 91) where the court is granted with the inherent powers.

or misuse their authority. This viewpoint is expressed by Lord Acton when he wrote: "*Power tends to corrupt, absolute power corrupts absolutely.*"[3] The Malaysian court speaking through the late former Lord President of Malaysia, HRH Raja Azlan Shah in *Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [4] echoed a similar view when he said: "*Every legal power must have legal limits, otherwise there is a dictatorship*."

Now, having seen the significance of this doctrine of separation of powers, especially the role of the court in limiting the arbitrary power of the executive, the key issue to be considered in this chapter is, to what extent the court can improve counterterrorism laws by way of judicial review. For the government, the court is unsuitable to judge such areas because the court lacks the skill of the government when dealing with terrorism threats. However, scholars believe submitting to judicial review is essential for keeping the rules of law values. This chapter will investigate in details the foregoing concern.

4.2 THE ROLE OF THE JUDICIARY IN EXIGENCY SITUATION

4.2.1 Delineating the scope and nature of judicial review

In 1988, when Malaysia was facing judicial crisis[5] under the leadership of Prime Minister Mahathir Mohamad, Article 121(1) of the Federal Constitution went through an amendment which effectively curtailed the function of the courts to review the decision of the authorities substantially. The judicial crisis first emanated from the suspension of five superior court judges and then proceeded with the later dismissal of three supreme court judges including the Lord President in a blatant disregard of constitutional norms.

[3] Lord Acton wrote to Bishop Creighton that the same moral standards should be applied to all men, political and religious leaders included (1887) - Online Library of Liberty.Oll.libertyfund.org. Retrieved 2 December 2016, from http://oll.libertyfund.org/quote/214
[4] [1979] 2 MLJ 135
[5] "*Malaysia's 1988 Judicial Crisis Reviewed"* (2016). *Law.lexisnexis.com*. Retrieved 8 December 2016, from http://law.lexisnexis.com/webcenters/hk/Blogs--Analysis/Malaysias-1988-Judicial-Crisis-Reviewed.

Following the unpleasant episodes in the judiciary, the amended Article 121(1) stripped the "judicial power" from the courts. It was Mahathir's intention to direct the judiciary to carry out their functions as authorised only by the federal law. The amended Article 121(1) saw the setting aside of the principle as laid down in *Dato' Yap Peng v PP* [6] that the "*judicial power*" of the Federation must remain exclusively in the judiciary and cannot be arrogated by or given to any other bodies of the government. The amendment was aimed at abolishing the renowned doctrine of separation of powers. As already highlighted earlier, the separation of the three branches of governments' power has been an integral part of our democratic framework, but ever since the amendment to Article 121(1) took place, it gives the impression that the powers of the courts are only confined to what has been provided by or under the statute.[7] Hence, within our constitutional framework, the doctrine of separation of powers is not well-observed. In *PP v. Kok Wah Kuan,* [8] the Federal court ruled that after the change to Article 121, the judicial power of the Federation no longer vested in the two High Courts (Malaya and Sabah & Sarawak). The term judicial power means the scope and powers of the two High Courts in Malaysia derived from the federal laws or statue. It was for Parliament to decide on what powers it will give to or to take away from the judiciary. To quote the dicta of former Chief Justice Abdul Hamid Mohamad when he declared the following in that case:

> *"If we want to know the jurisdiction and powers of the two High Courts, we will have to look at the federal law. If we want to call those powers 'judicial powers', we are perfectly entitled to. But, to what extent such 'judicial powers' are vested in the two High Courts depend on what federal law provides, not on the interpretation the term 'judicial power' as prior to the amendment."*[9]

[6] [1987] 2 MLJ 311
[7] Article 121(1) states "There shall be two High Courts of co-ordinate jurisdiction and status, namely - *(a)* one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry at such place in the States of Malaya as the Yang di-Pertuan Agong may determine; and (b) …. and such inferior courts as may be provided by federal law; and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law."
[8] [2007] 6 CLJ 341.
[9] ibid

The decision in *Kok Wah Kuan* on the face of it repudiated the doctrine of separation of powers as declared by the Federal Court. Effectively, the decision had also dismantled the independence of the judiciary and the rule of law by changing from Constitutional supremacy to Parliamentary supremacy. However, in the recent Federal Court ruling in *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat* [10] saw the return of the judicial power of the court. Speaking through Justice Zainun Ali in the landmark decision, her Ladyship penned these strong words as a reminder:

> *"With the removal of judicial power from inherent jurisdiction of the judiciary, that institution was effectively suborned to Parliament, with the implication that Parliament became sovereign."*

Further, her Ladyship added:

> "*The important concepts of judicial power, judicial independence and the separation of powers are as critical as they are sacrosanct in our constitutional framework.*"

Justice Zainun's dicta above appeared to reassert the doctrine of separation of powers and judicial independence as fundamental to the Malaysian constitutional framework. Despite the enfeebling Article 121 (1) provision, judges like Zainun Ali FJ had boldly censured the executive whenever it exceeded or abused its powers.

In *Semenyih Jaya*, even though the amended Article 121(1) remains intact today, the court has invigorated it. As of now, the judicial power exercised by the court is understood as the inherent authority of the judiciary to examine and review a law or an executive action or when there is a breach of fundamental rules of law. The court retains the authority to invalidate a law, to set aside a government's decision/act, or instruct a government officer to take action in a specific way if the court feels the provision of the law or the conduct to be unlawful or to be inconsistent with the law. The classic test for

[10] [2017] 1 LNS 496

finding out whether the actions of an individual or authority is liable to judicial review, one must know whether the power is assumed from the state or the non-statutory power. If this body performs a public duty, then the subject matter can be reviewed by the court. Likewise, if the body or authority in question carries out a statutory power under a statute, then it is vulnerable to review by the court unless the Parliament plainly made known its objective to remove judicial scrutiny by having ouster clauses in place. For example, under section 19(1) of POTA 2015.[11] Perennially, the aim of having the court to review any decision or action of the authority is to safeguard a citizen and to make certain that the government gives a person a fair and reasonable treatment in its decision-making process.

In the Malaysian judiciary's context, traditionally, the High Court exercises its supervisory power over the judgments of subordinate courts or individuals who carry out quasi-judicial function like tribunals entrusted with the administration of public acts and duties.[12] It is to be noted also that the court is not involved in ascertaining if there are any 'merits' in the decision reviewed nor if a 'right' decision has been deliberated by the authority in the decision-making process. The court is merely concerned if the authority has acted illegally [13] during the decision-making process. Generally, the courts will only interfere when the authorities had exercised their power unlawfully and not sanctioned by the statute (*ultra vires*) or when the authority applies its powers unfairly or arbitrarily.

However, in the Federal Court case of *R Rama Chandran v The Industrial Court of Malaysia,*[14] not only was the main relief prayed for by the claimant granted, the majority

[11] Section 19 (1) (*inter-alia*): "There shall be no judicial review in any court on any act done or decision made by the Board in the exercise of the discretionary power **except** in regard to any question on compliance with any procedural requirement governing such act or decision"

[12] Azlan, A., & Andri, A. A. B. (2007). *Judicial review handbook*. Kelana Jaya, Selangor Darul Ehsan: Malayan Law Journal Sdn. Bhd. p. 15.

[13] The court can interfere if there is an error on the facts but decided cases said "a court of supervisory jurisdiction does not have the power to substitute its own view of the primary facts for the view reasonably adopted by the body to whom the fact finding power has been entrusted" - See *Adan v Newham London Borough Council* [2001] EWCA Civ 1916

[14] [1997] 1 MLJ 145 at p 191:

decision of the court granted damages which ordinarily was within the purview of the tribunal reviewed, and this was permissible subject to any contrary legislation intention. Apparently, the decision of *Rama Chandran* expanded the powers of the High Court in exercising judicial review powers which are not only limited to its supervisory role as highlighted earlier. Further, if following *Rama Chandran*, the principle that in judicial review cases, the courts cannot usurp the decision-making jurisdiction of the body reviewed has been difficult to discern and has been distinguished by later cases.[15] In *Petroliam Nasional Bhd v. Nik Ramli Nik Hassan*,[16] the Federal Court viewed the exercise in *Rama Chandran* as regards to the power of the reviewing court to substitute the decision of public bodies or tribunals with its decision without the need to remit the same for re-adjudication as an exercise of controlled judicial activism to balance the needs of justice in the light of the broadening powers conferred on the public bodies or tribunals. The Federal Court qualified that such action does not mean that the reviewing court is exercising appellate powers. It is akin to the exercise of court's discretionary power but it depends on the factual matrix and/or modalities of the case.

Besides the scope and the inherent power of the court in a judicial review application, the nature of the judicial review is such that the aggrieved person wants to seek civil law reliefs such as a certiorari, mandamus, prohibition and habeas corpus. Although under the administrative law, there are also private law remedies available such as damages, injunctions and declarations, however, this thesis will only focus on habeas corpus - a well-recognized prerogative writ often applied to preventive detention for security offences. A writ of habeas corpus is a judicial order to the prison officials requiring that a detainee is brought to the court so it can be ascertained whether that person is detained

[15] See Court of Appeal case of Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor (1996) 1 MLJ 261. However, in *Ng Hock Cheng v Pengarah Am Penjara & 2 Ors* (1997) 2 AMR 4193 the Federal overruled the majority of decision of the Court of Appeal in Tan Teck Seng with regard to the narrow point that the court has jurisdiction to substitute the penalty imposed by the body reviewed.

[16] (2004) 2 MLJ 288

legally and whether he should be released from detention. A habeas corpus petition is an application filed in court by an individual who opposes to his own or another's detention. The petitioner must establish that the authority calling for his detention made a legal or factual error in issuing such a detention order. The writ of habeas corpus serves as a powerful check and balance on how a state values the constitutional rights especially in protecting personal freedom against any unreasonable and unlawful conduct of the state. In essence, a writ of habeas corpus will be allowed if the petitioner or detainee can prove the detention order is ultra vires or there is an inordinate delay in framing a legal charge against him.

4.2.2 Restraining judicial review through ouster clauses

Generally, ouster clauses are legislative provisions that purport to prevent certain administrative decisions from being subject to judicial review by the court. They are said to be the most comprehensive means whereby the Parliament has sought to limit the scope of judicial review. They are also regarded as controversial because such clauses are perceived as an attempt by the Parliament and the government to suppress constitutional powers given to the court under the Constitution. Hence, ouster clauses have a precarious relationship with the rule of law merely because they are used to put certain administrative decisions beyond challenge in the courts, and apparently, such clauses are also within the limits of the constitution. Despite the constraints imposed by the ouster clauses as seen in most security legislations in Malaysia, recent jurisprudence regarding judicial review bounds can be found in the recent Court of Appeal case of *Pathmanathan a/l Krishnan (also known as Muhammad Riduan bin Abdullah) v Indira Gandhi a/p Mutho and other appeals* [17] where Justice Hamid Sultan JCA made these remarks on judicial review:

> *"Judicial review parameters of the court under the doctrine of constitutional supremacy are wide. The Judiciary is empowered to review*

[17] [2016] 4 MLJ at p.499

> *(a) Executive decision; (b) legislation; (c) any constitutional amendments; (d) any policy decision. The methodology they can employ in any of the review process is principally based on the jurisprudence that the Executive and/or legislative decisions must confirm to the constitutional framework and the decision-making process must not be arbitrary. For example, if a legislation or constitutional amendment or policy, violates the constitutional framework, it will be struck down as of right based on ultra vires doctrine. If the ultra vires doctrine is not applicable, the court may employ the concept relating to* ***illegality****,* ***irrationality****,* ***procedural, impropriety, reasonableness*** *and* ***proportionality*** *to check the decision-making process of the executive."* (*Emphasis added)*

The above remarks by Justice Hamid JCA seem to divide into a few criteria that are acceptable to bring a judicial review application in court. In fact, Hamid's views echoed the broad classification of the famous Lord Diplock's trilogy on "*illegality (unlawfulness), irrationality (unreasonableness) and procedural impropriety (unfairness)*" in the case of *Council of Civil Service Unions v. Minister for the Civil Service* ('*the GCHQ case*').[18] Lord Diplock, in that case, endeavoured to establish the key grounds for applying judicial review in the court in a modern setting as follows:

> *"Judicial review has I think developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call '****illegality****', the second '****irrationality****' and the third '****procedural impropriety****'. That is not to say that further development on a case by case basis may not in the course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of '****proportionality****' which is recognised in the administrative law of several of our fellow members of the European Economic Community […]" - (Emphasis added)*

The above grounds are now considered acceptable to bring claims for judicial review, however, not exhaustive, as there can be other ground occasionally used like for instance,

[18] 1985] AC 374

the error of law on the face of the record.[19] The error of law may be committed on actions taken or decisions made within the jurisdiction of the authority concerned. However, one of the major drawbacks of judicial review has often been perceived as politically and administratively inconvenient for the government, and the Parliament has responded by attempting, through ouster clauses in legislation, to oust or limit the court's jurisdiction to review administrative decisions. Ouster clauses usually have an express provision such as "*not subject to judicial review*" or "*shall not be questioned in any court of law*." Over the years, various forms of ouster clauses have evolved with varying success.[20] The court's adverse attitude to ouster clauses has resulted in the court's giving "*an expansive rather than a narrow or strict interpretation*"[21] of ouster clauses. Therefore, where a statute provides for finality of a decision and shall not be further appealed against or quashed, the court can still step in.[22] Besides that, such ouster clauses in statutes would have to face the challenge premised upon any constitutional rights guaranteed under the Federal Constitution.

The House of Lords' decision in *Anisminic Ltd v Foreign Compensation Commission* [23] dealt with the effect of an ouster clause. The formula in the case was that the ruling of the decision-making authority should not be called into question in any court of law. It has been accepted as authority that such a clause does not oust the common law review jurisdiction where there is an error of law in reaching a decision by a public authority.[24] In *Re Racal Communications Ltd,*[25] Lord Diplock accepted the *Anisminic* case as authority that there should no longer be any distinction between errors of law which go to jurisdiction and those which do not. However, in the Privy Council case of *South East*

[19] See Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union (1995) 2 MLJ 317 at 342, as per Gopal Sri Ram JCA.
[20] For example, Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan (2002) 3 MLJ 72 where section 59A of the Immigration Act, 1959 (Act 155) was held to exclude judicial review). See also section 19 (1) of POTA 2015 (*supra*)
[21] Per Vincent Ng J. in Malayawata Steel Bhd v Mohd Yusuf bin Abu Bakar & Anor (1994) 2 MLJ 167
[22] See *R Rama Chandran* (*op cit*)
[23] (1969) 2 AC 147, (1969) 1 All ER 208
[24] Syarikat Kenderaan Melayu Kelantan Bhd (*supra*)
[25] (1981) AC 374 at 380

Asia Fire Bricks v Non-Metallic Mineral Products Manufacturing Employees Union [26] which was an appeal from the Malaysian Federal Court, the Privy Council held that an ouster clause would be effective where the error of law does not go to jurisdiction. This case maintained the distinction between errors of law which go to jurisdiction and errors of law which do not. After the Privy Council decision, the *Fire Bricks* case had caused much divergence in construing the effect of the ouster clause.[27] Finally, the confusing position was settled down by the Federal Court in the case of *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [28] when the court ruled that the distinction made in *Fire Bricks* between an error of law on the face of the record and an error of jurisdiction is no longer considered the good law. All errors of law would be subjected to review.

4.2.3 Judicial stance towards countering terrorism threats in Malaysia

Following the above discussion in the foregoing section, although the court faces the constraints by the boundaries of ouster clause, and yet the court is vested with the discretionary power to check the legitimacy of executive decisions. However, a cursory analysis of the past ISA cases before the enactment of anti-terror law such as POTA 2015, the judiciary is reluctant to play its essential role in upholding the rule of law and instead, prefer to act primarily as a rubber stamp to endorse executive actions for terrorism offence. This was proven by the court's deferential approach to some key issues ventilated in the court. For example, when the validity of section 8B[29] of the ISA 1960 was

[26] (1980) 2 MLJ 165

[27] See for e.g, *Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers* [1991]1 MLJ 417; *Re Dunlop Estates Bhd, Dunlop Estates Bhd v All Malayan Estates Staff Union* [1981] 1 MLJ 249; *V Subramaniam & Ors v Craigielea Estate* [1982] 1 MLJ 317; c.f *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317 at 342 where the Court of Appeal (per Gopal Sri Ram JCA) did not follow *South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union* [1980] 2 MLJ 165 and held that the decision of the Privy Council in that case and all cases approved by it in that respect no longer constituted good law

[28] [1999] 3 MLJ 1

[29] Section 8 B (1) of the ISA 1960 states, **"[*t*]*here 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 *Yang di-Pertuan Agong* or the Minister in the exercise of their discretionary power in accordance with this Act, save in regard to any question on compliance with any procedural requirement in this Act governing such act or decision. (Emphasis added)"

challenged in the court in the case of *Kerajaan Malaysia & Ors v. Nasharuddin Nasir*.[30] There, the Federal Court declined to query the legitimacy of section 8B as it would be perceived as improper questioning of the clear intent and purpose of the enacted law. Hence, the stance taken by the court goes to show the ability of the legislative's power to oust judicial scrutiny which may lead to grave consequences for the adherence to the rule of law.

Another dominant issue that often arose in the court during the ISA era was whether adequate grounds to justify a detention under the security laws ought to be provided to those detained. The common argument put forward by counsel representing the detainee has always been the impossibility to mount an effective challenge in court on behalf of the detainee in a writ of habeas corpus petition without being supplied with an adequate reason for detention. The example can be drawn from the case of *Nik Adli bin Nik Abdul Aziz v. Ketua Polis Negara*.[31] There, the court decided a new statement of reasons for extending the detention order was not required from the Minister before the expiry of the first detention order. Arguably, the detainee may be held indefinitely based on the ministerial order and the uncontested statement of allegations of facts in the original detention order when it was first made. In another ISA case known as *Ahmad Yani bin Ismail & Anor v. Inspector General of Police & Or*s, [32] the appellants argued in court that the police failed to give the reasons for arresting the detainees and so has breached Article 5(3) of the Constitution.[33] In response to this argument, the government relied on section 16 [34] of the ISA 1960 to claim immunity besides taking refuge under the Constitution. Article 151(3) of the Federal Constitution states: "*information needs not be supplied if it*

[30] [2004] 1 CLJ 81
[31] [2005] 5 CLJ 329
[32] [2004] 4 MLJ 636
[33] In the first limb of Article 5(3) of the Federal Constitution, it explicitly provides the right to be informed of the reasons of arrest.
[34] Section 16 of the ISA 1960 states: *Nothing in this Chapter or in any rules made thereunder shall require the Minister or any member of an Advisory Board or any public servant to disclose facts or to produce documents which he considers it to be against the national interest to disclose or produce.*

is the opinion of the authority that disclosure would be against the national interest." In *Ahmad Yani*, the court adopted a more restrictive approach by justifying the reason to refuse information regarding the detainee's arrest by the officers under the national security interest. This is perceived as deterring any challenge to the validity of the detention.

In the preceding paragraph, the present of section 8B of ISA 1960 - ouster clause, coupled with the subjective test of the ministerial discretion, court's power to review ISA cases had been removed substantially. But, until recently, the subjective test for judicial review was dropped following the Federal Court decision in *Titular Roman Catholic Archbishop of Kuala Lumpur v. Menteri Dalam Negeri & Ors*[35] whereby it is trite now that the test to be adopted for judicial review in court will be the objective criterion. But the trends in judicial reasoning in the earlier security cases, in particular, the ISA cases will shed light on how the Malaysian court will play its role, especially in the wake of the constant terrorist threats globally. As discovered in the majority of court judgments handed down during the era of ISA, the courts were not prepared to question the power exercised by the executive particularly, if it involved the security of the country. Most judges seemed to avoid from deliberating on the national security issue as the matter was presumed to be under the purview of the executive. In *Nasharuddin Nasir,*[36] the Federal Court delineated the judiciary's role as follows:

> *"It seems apparent from these cases that where matters of national security and public order are involved, the court should not intervene by way of judicial review or be hesitant in doing so as these are matters especially within the preserve of the executive, involving as they invariably do, policy considerations and the like*."

[35] [2014] 6 CLJ 541.
[36] *Op cit* n.30

However as observed now, the court has been very serious in eliminating terrorism threats from the country in the era of global terrorism. This was apparent when the courts have shown no mercy when trying terrorism offence. Severe sentences were already handed down since the beginning of 2016. Offences such as withholding terrorist information will warrant a maximum imprisonment term of seven years under the section 130M of the Penal Code.[37]

4.2.4 Revisiting security cases under the ISA 1960 in Malaysia

To date, there have been no cases brought to court to challenge the legality of preventive detention issued under the new POTA 2015 nor to contest the efficacy of its ouster clause under section 19(1). However, it is interesting to note that ouster clause provision under section 19(1) of POTA 2015 was worded similar to section 8B (1) of the repealed ISA 1960.[38] The same goes for other preventive security law such as section 15A (1) of the POCA 1959, which states (*inter alia*): "*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….*"

So, by analysing past ISA cases, we can appreciate and observe the trend adopted by the court in dealing with judicial review of security offences by virtue of the doctrine of judicial precedent. It is also germane to note the remarkable extent of powers previously conferred upon the government under the much controversial ISA 1960 has made a case in point for a strong judicial institution to review and to protect against any human rights

[37] Courts show no mercy for terrorism offences. Free Malaysia Today. Retrieved 16 December 2016, from http://www.freemalaysiatoday.com/category/nation/2016/12/16/courts-show-no-mercy-for-terrorism-offences/

[38] Section 8B (1) ISA 1960 provides: "*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 Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with this Act, save in regard to any question on compliance with any procedural requirement in this Act governing such act or decision*."

abuses. Unfortunately, the legal restrictions imposed on the court's judicial power has induced a "*court, with thin, courageous exceptions, disinclined to read the provisions to ameliorative effect*."[39] An analysis of the earlier ISA *habeas corpus* petitions, the Malaysian courts have consistently shown considerable deference to the government. Initially, a subjective test was adopted by the courts when interpreting the discretionary power of the authority. This can be seen in the 1969 habeas corpus case of *Karam Singh v. Menteri Hal Ehwal Dalam Negeri*, where Justice Suffian stated:

> *"Whether or not the facts on which the order of detention is to be based are sufficient or relevant, is a matter to be decided solely by the executive. In making their decision, they have complete discretion and it is not for a court of law to question the sufficiency or relevance of these allegations of fact."* [40]

The subjective test was followed by *Theresa Lim Chin v. Inspector General of Police.*[41] Theresa was held during *Operation Lalang* - a nationwide clampdown on detractors of the government by the police force. She filed a writ of habeas corpus against the government for her immediate release from ISA detention. In dismissing her habeas corpus petition, the court maintained that the subjective test referred to both police and ministerial ordered detentions as "*one scheme of preventive detention*." [42] Interestingly, in *PP v Koh Yoke Khoon*, a case under section 4 the Emergency (Public Order and Prevention of Crime) Ordinance 1969, the detainee was supposed to be detained for two years at the detention centre at *Pulau Jerejak.* The court found that the detainee was actually incarcerated in a place other than what had been unequivocally stated in the detention order issued by the Home Minister. The High Court subsequently allowed the habeas corpus application. On appeal by the prosecution, the then Supreme Court

[39] Fritz, N., & Flaherty, M. (2002). Unjust Order: Malaysia's Internal Security Act. *Fordham Int'l LJ*, *26*, 1345.
[40] [1969] 3 MLJ 129.
[41] [1988] 1 MLJ 293
[42] Ibid at p 296

speaking through Hashim Yeop Sani SCJ had construed the emergency powers of the state strictly in dismissing the appeal by stating that:

> *"Detention not in accordance with law is inconsistent with the fundamental right guaranteed under Article 5(1) of the Federal Constitution where a law deals with detention. There are abundant authorities to show that the provisions of such law must be construed strictly and, in the case of doubt, the Court should lean in favour of the subject".* [43]

Gradually, the courts are moving away from the subjective test to objective test in deciding security offences cases. For instance, in the case of *Karpal Singh v. Menteri Hal Ehwal Dalam Negeri*,[44] Judge Peh Swee Chin held that "*there exist exceptions to the non-justiciability of the Minister's mental satisfaction, including mala fides*." In *Karpal's* case, it was alleged that out of a total six charges framed against him, one was substantially wrong and made in error. Hence, the court was of the view that if taken objectively, *Karpal's* arrest was *mala fide* and habeas corpus was allowed. Following the release of *Karpal* by the court and in the 1988 amendments, the government proposed taking away the role of the court in reviewing any discretionary power exercised by the Minister under the ISA 1960. A new section 8B of the ISA (ouster clause) was introduced by the government.

As a result, following challenges on habeas corpus applications in court were very much restricted to a fragile opportunity involving section 73 of the ISA 1960 - the initial 60-day detention made by the police. Despite the difficulty faced by the ISA detainees in successfully getting habeas corpus in court on a narrow ground, in 2001, the High Court in *Abdul Ghani Haroon v Ketua Polis Negara* [45] allowed the habeas corpus application. Justice Hishamudin in the landmark case decided that "*procedural irregularities,*

[43] [1988] 2 MLJ 301 at p. 302
[44] [1988] 1 MLJ 468
[45] [2001] 2 MLJ 689

including failures to grant access to lawyers and family, and failures to specify the reasons for detention and extension of the detention, caused the police detention invalid." The judge also remarked the refusal of these basic rights "*makes a mockery of the right to apply for habeas corpus as guaranteed by art 5(2) of the Constitution*." Hishamudin further declared, "*it is perhaps time for Parliament to consider whether the ISA… is really relevant to the present-day situation.*"[46]

Mohamad Ezam bin Mohd Noor v. Ketua Polis Negara [47] was another remarkable case supporting a habeas corpus petition. *Ezam* with few others were reformist activists and detained for purportedly organising a huge demonstration on the street. The Federal Court opined that the intention of confining *Ezam* and his friends were not for security reasons because the police did not investigate them for their supposed military action, but subjected them to the undisclosed objective of intelligence gathering "*unconnected with national security*."[48] Therefore, based on procedural arguments in court, the detention order was held to be *mala fides*. The above cases seem to move away from precedent when the court prefer to use an objective test on the police's decision due to the "*enormous power conferred upon police officers ….and the potentially devastating effect …arising from any misuse thereof*." The court also pointed sections 73(1) and 8 "*though related, can still operate rather independently*."[49] Even though the police made a wrong decision, it did not go to nullify the subsequent ministerial detention order.

In the history of past ISA judicial reviews, the courts were subservient to the executive power in matters concerning security. However, lately, the court has been prepared even in the slightest chance available, will restrict on government's excessive power. For

[46] Ibid at 690-691
[47] [2002] 4 MLJ 449
[48] Ibid at 470.
[49] Ibid at 474.

example, in the recent duo's case of *Khairuddin Abu Hassan* and his lawyer *Matthias Chang*. Initially, both were charged under section 124L of the Penal Code[50] to be read together with SOSMA 2012 for allegedly seeking to undermine the Malaysian banking and financial services by making various police reports on 1MDB financial scandal across five countries. The Kuala Lumpur High Court ruled last year that the charge under section 124L of the Penal Code was not a security offence and therefore should not be read with SOSMA 2012. Unsatisfied with the decision, the prosecution later appealed against the High Court ruling and recently, the Court of Appeal unanimously upheld the decision of the High Court on 13 December 2016.[51]

On another note, the Kuala Lumpur High Court has also recently allowed a habeas corpus application for non-security offences in the case of *Lim Kean Teck* – a drug related case where the accused was held under a preventive detention order issued by the Minister under the Dangerous Drugs Act (Special Preventive Measures) 1985 ('DDA 1985').[52] There, the court was satisfied that the applicant's arrest and detention were made with mala fide, to wit, building up the case against the applicant. When the applicant was caught by the police, there was no reason to believe or was there any valid grounds which could warrant his detention under section 6(1) of the DDA 1985.[53] The court held there was a breach of mandatory procedural requirement which makes the applicant's detention to be unlawful. Hence, habeas corpus was granted. Although arguably, *Lim Kean Teak*'s case was unrelated to security offence *per se*, however, given these recent developments, we can assume that the court has taken a more proactive stance to uphold civil liberties

[50] Section 124L provides: "*Whoever attempts to commit sabotage or does any act preparatory thereto shall be punished with imprisonment for a term which may extend to fifteen years*."
[51] *Appeals Court rules Khairuddin, Chang cannot be charged under Sosma - Nation | The Star Online*. (2016). *Thestar.com.my*. Retrieved 16 December 2016, from http://www.thestar.com.my/news/nation/2016/12/13/court-khairuddin-chang-sosma/
[52] In the High Court Kuala Lumpur's case of *Lim Kean Teck v. Ketua Polis Negara & Ors* (*Permohonan Jenayah No: 44-20-02//2015*) (Unreported) Decision delivered on 9 May 2016 available at: <http://kl.kehakiman.gov.my/?q=node/162>
[53] Section 6(1) of DDA 1985 *states…the Minister must consider, inter alia, the report of the inquiry officer before making the detention order*.

against any form of governmental abuse of process, especially in cases involving preventive detention laws such as POCA 1959, SOSMA 2012 and POTA 2015.

Granted that not all the judges in Malaysia may share the same outlook and are deferential toward the executive powers, but, the court ought to be constantly reminded of the sage words of the former Lord President Suffian when he said:

> "…*Preventive detention is, therefore, a serious invasion of personal liberty. Whatever safeguards that are provided by a law against the improper exercise of such power must be zealously watched and enforced by the court. In a matter so fundamental and important as the liberty of the subject, strict compliance with statutory requirements must be observed in depriving a person of his liberty. The material provisions of the law authorising detention without trial must be strictly construed and safeguards which the law deliberately provides for the protection of any citizen must be liberally interpreted. Where the detention cannot be held to be in accordance with the procedure established by the law, the detention is bad and the person detained is entitled to be released forthwith. Where personal liberty is concerned an applicant in applying for a writ of habeas corpus is entitled to avail himself of any technical defects which may invalidate the order which deprives him of his liberty*."
>
> (See *Ex-parte Johannes Choeldi & Ors* [1960] 1 LNS 25; [1960] MLJ 184.) [54]

4.3 JUDICIAL DEFERENCE AND THE COVERT DEROGATIONS OF THE RULE OF LAW IN COUNTERING TERRORISM

Malaysia has a robust counter-terror measure in the form of detention without trial and restrictive order that are cloaked under the constitutional authority[55] with apparent human rights compliance. By adopting these extraordinary measures in Malaysia, it signifies the conception of a "*pre-emptive*" system running side-by-side with the traditional criminal justice system. Any individuals can be hauled up regarding their foreseeable future

[54] See Re Datuk James Wong Kim Min, Minister of Home Affairs, Malaysia & Ors v Datuk James Wong Kim Min (1976) 2 MLJ 245 at 251.
[55] See Article 149 of the Federal Constitution that empowers the Parliament to pass special laws to prevent any threat against public order.

actions or threats which are perceived as a significant shift from the ordinary criminal justice system. Zedner has called this process as part of what "*an emerging genre of preventive justice*" [56] influenced by an immense threat coming from the terrorist acts and enabling for preventive steps to be taken out of anxiety against the imminent dangers and to fight terrorist acts before it happens. In direct contrast, under a typical post-crime system, an act of crime must be established, followed by the element of proof and then punishment to follow. However, in a pre-crime system, it is now structured firstly on appraising the risk factors, followed by suspicion and then the pre-emptive action of the purported terrorist acts by way of detention without due process of the law. The departure from the traditional criminal justice procedure is viewed as pursuing to make covert derogations and to alter the guaranteed rights so they may appear weak in practice. Although in Malaysia, the government kept asserting they defend its citizens from the act of terrorism, their strategy was to claim limited rights to liberty and due process against the phenomenal threat created by terrorism. Such strategy appears to work well because of the '*panicky'* environment created by the authorities and the media exaggeration that we are in constant danger of terror attacks. Some viewed the government leant towards terrorism threat for justifying open derogation of human rights values by coaxing the judiciary into agreeing on the minimal interpretations of certain constitutional rights as Ramraj claims, "*an institutional safeguard against policy-making motivated primarily by public fear*." [57] Further, the International Commission of Jurist in a report published in 2009, the panel of Jurists spoke of the risk faced by the court under this pre-emptive system which "*may prove to be no more than a façade of justice to what is an inherently unfair procedure*."[58]

[56] For further reference please see "Zedner, L. (2007). Pre-crime and post-criminology? *Theoretical criminology*, *11*(2), 261-281.at 261-62."
[57] Victor V Ramraj, "Terrorism, Risk Perception and Judicial Review in Victor V Ramraj, Michael Hor & Kent Roach, eds, *Global Anti-Terrorism Law and Policy* (Cambridge, UK: Cambridge University Press, 2005)" 107 at 110
[58] International Commission of Jurists. "*Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights* (Switzerland: International Commission of Jurists, 2009)" at 99

So, in reality, the court's protection will always come under grave pressure when the protection of fundamental rights is most needed from them. As this section will explore, the Malaysian authority has been pursuing to convince the courts to accede in limiting the fundamental rights protection, by fervently encouraging the judiciary of the need for particular judicial deference involving national security. In the past, the authority in their endeavours to reduce the judicial role in matters concerning the national security has extended further to even convince the court on the proportionality of the steps needed to tackle security issues facing the state. This section will explore some critical aspects of the preventive detention narrative, in the context of judges' role in interpreting security laws and the impact of the pre-emptive regimes against the backdrop of the rule of law as adopted by the Malaysian government. In particular, whether judicial deference still provides an overwhelming support to the government now than in the past in matters concerning the nation's security. If not, it is argued that the court's habitual deference to the government or even the Parliament can cause a deeper prejudicial bearing on constitutional rights, especially in letting the government runs its course what is in effect covert derogation from constitutional rights guaranteed by the constitution.

The Malaysian authority in their endeavours to fight terrorism has rounded up and detained 68 Jemaah Islamiah (JI) members in June 2005. JI is an Islamist terrorist group based in Indonesia focused on setting up a Southeast Asia Islamic Caliphate *('Daulah Islamiyah').* Those JI members arrested were held under the repealed ISA 1960 by the Malaysian government. Some of the suspects arrested were also believed to have been linked to another terror group known as 'Kumpulan Militan Malaysia' (KMM). According to the Malaysian authority, the group is "*an international terrorist group that is trying to bring down the government and create an Islamic state by force*." Certain members of

'Parti Islam Se-Malaysia' ('PAS') - the Islamic opposition political party, were implicated by the Malaysian government of being KMM members. As a result, some PAS members comprising of four youth leaders were locked up under the ISA 1960 in 2001 when the authority suspected them to be related to the KMM. *Nik Adli bin Nik Abdul Aziz*, the son of the late Chief Minister of Kelantan State, was among those detained. *Nik Adli* then filed a writ of habeas corpus in the High Court demanding for his release from ISA detention. Unfortunately, the court dismissed his habeas corpus application. Later, upon the expiry of his detention order in September 2003, *Nik Adli's* detention with four others PAS members were extended for another two years by the government. The validity of this renewal was contested in the High Court.[59] In the court, their counsel contended there were several flaws in the procedures, especially the one involving the omission to give a proper account on what basis the renewal of the detention orders was made against the petitioners. Unfortunately, the argument on the procedural flaws was struck down by the High Court. The court opined the need to provide another new report of the alleged facts did not arise as the authority can rely on the same facts as those relied on when the earlier detention order was made; henceforth, "*there had been no breach of any procedural requirement*." Dissatisfied with the decision, all the petitioners then filed an appeal to the Federal Court. Unfortunately, the Federal Court agreed with the decision held by the High Court. *Nik Adli's* case showed the government's stance when dealing with security cases facing the country and was not prepared to take a liberal approach in interpreting the provision of the security laws. However, on a very limited occasion, the court has been kind to uphold the sanctity of constitutionalism. To support this proposition, a case in point is somewhat demonstrated in the High Court decision of *Nasharuddin v. Kerajaan Malaysia & Ors (No.1).*[60] There, *Nasharuddin* was captured on 17 April 2002 under section 73(1) of the ISA 1960. During the first High Court hearing, the petitioner

[59] Nik Adli (supra) n.31
[60] [2003] 1 CLJ 345

challenged his constitutional rights under Article 5(3) to have legal representation - a right protected under the Federal Constitution. Judge Suriyadi (*as he then was*) found out that the conduct shown by the police officer was '*mala fide*' and unfair by depriving his constitutional rights while he was held in custody by the police. Further, the Judge observed the procedure deployed by the police force was "*coldly calculative.*" It was preposterous to allow the petitioner access to his family before his hearing, but intentionally depriving the timely professional advice at such a crucial moment when his hearing was upcoming in court. In a strong remark, Justice Suriyadi chided the police force who was answerable for the counsel's failure to have access to the petitioner.

> *"The noble intention of arresting unsavoury characters, with the sole purpose of ensuring permanent stability in Malaysia, surely has the backing of all right-minded citizens. But let not the very people who are supposed to be our protectors, go overboard and end up hijacking the hard-earned democratic processes, to the extent of side-lining a court order…… The good name of the police force, held in high esteem by the public, might also be besmirched due to the questionable modus operandi of a few recalcitrant members."*

In the second proceeding filed for a writ of habeas corpus in *Nasharuddin bin Nasir v. Kerajaan Malaysia & Ors (No 2),*[61] Justice Suriyadi allowed *Nasharuddin's* habeas corpus petition as his detention order under the section 73(1) ISA 1960 was unlawful for the following reasons. First, when the original detention order was renewed automatically, it failed to show that the said officers had satisfied the mandatory requirements of section 73(1) (a) and (b) thereof.[62] Second, the officer-in-charge failed to show clearly the intention of the extension as laid down in *Mohamed Ezam Mohd Noor*

[61] [2003] 1 CLJ 353

[62] Section 73 (1) reads: "Any police officer may without warrant arrest and detain pending enquiries any person in respect of whom he has reason to believe:
(a) that there are grounds which would justify his detention under s. 8; and
(b) that he has acted or is about to act or is likely to act in a manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof (hereinafter referred to as the specific purpose)."

v. Ketua Polis Negara and Other Appeals. [63] Third, the respondents (authority) did not follow the objective test. According to Justice Suriyadi, taking each of the three grounds above distinctly would undermine the legitimacy of the said detention order. The Judge concluded that if the original detention order was defective, the resulting detention order of the Minister under section 8 of ISA 1960 must likewise be defective too. As a result, *Nasaruddin's* habeas corpus was allowed.

Following the decision of the High Court in *Nasharuddin*, the high hopes and expectation that the court was prepared to examine the validity of detention orders were promptly quashed when the prosecution successfully appealed to the Federal Court in *Kerajaan Malaysia & Ors v. Nasharuddin Nasir*.[64] The Federal Court in answer to an argument raised by *Nasharuddin's* counsel on the validity of the ouster clause in section 8B of the ISA 1960 has decided that section 8B to be constitutionally valid; and so, the High Court had no legal power to judicially review the decision of the Minister to issue a detention order save for procedural grounds. The Federal Court declared:

> "*In this case, the Minister, having seen the police report, was satisfied, on a subjective basis, that the respondent's activities had threatened national security. It was therefore not open for the court to examine the sufficiency or relevance of the allegations contained in the report. These are important considerations which the learned Judge ought to have taken into account. His failure to do so had an erroneous impact upon his conclusion that the detention order issued by the Minister under s. 8 of the ISA was tainted*." [65]

The Federal Court commented that even if the trial judge was compelled to intervene and to consider the legality of the Minister's decision under section 8 of ISA 1960, the

[63] [2001] 3 CLJ 198 at p.218 where the High Court opined: "Pursuant to s. 73(1) (b) of the ISA, the **specific purpose of the detention must be identified**. A setting out in full of the language in s. 8(1) of the ISA would be fatal as it would result in the specific purpose of the detention not being identified and would also render s. 73(1)(b) superfluous" (emphasis added).
[64] [2004] 1 CLJ 81.
[65] Ibid at p.83

judge ought to adhere to the principles enunciated in *Karam Singh* - the subjective test. Based on the finding of facts, the Federal Court ruled the detention order was lawful as the Minister was convinced that the provisions were satisfied subjectively.

In the later cases that follow, the imperatives of non-intervention are echoed in other ISA cases like *Abdul Razak Bin Baharudin & Ors v. Ketua Polis Negara & Ors*[66] and *Ahmad Yani bin Ismail & Anor v. Inspector General of Police & Ors*.[67] In *Ahmad Yani*, the detainees were accused of having a connection with JI. Writ of habeas corpus petition was filed by the detainees in the High Court to secure their release. Following the arguments in *Kerajaan Malaysia & Ors v. Nasharuddin Nasir* (*supra*), the judge concluded that section 8 order was not subject to the legality of the section 73 order under the ISA 1960.[68] It was further declared that the Minister's satisfaction on issuing a detention order was not objectively justiciable in court as decided in *Karam Singh's* subjective test. On another matter propounded in court, the petitioners contended that the ISA 1960 which was promulgated by Article 149 of the Constitution was void as it disagrees with the right to have freedom of religion under Article 11. However, the judge dismissed this argument and held the right under Article 11 was not absolute and "*does not authorise any action contradictory to any common law pertaining to public order, public health or morality*." The petitioners also attempted to argue along the lines that section 8B (ouster clause) was in effect void as it took away the right to have the court review any governmental decisions and was therefore "inimical to the rule of law." However, this argument did not convince the court either. Like the earlier Federal Court's decision in *Nasharuddin's* case (*supra*), the High Court preferred to endorse the legality of section 8B of the ISA 1960 by acknowledging that the High Court lacks the inherent

[66] [2004] 7 MLJ 267, [2004] 1 LNS 224
[67] [2004] 4 MLJ 636
[68] This position was re-affirmed again by the Federal Court in the case of *Manoharan Malayalam & Ors v. Kerajaan Malaysia & Ors* [2009] 4 CLJ 679

jurisdiction to proclaim section 8B ultra vires as this will result in "*presenting an advisory opinion which would equal to judicial vandalism*."[69] Having perused some of the judicial approaches in the cases examined above, one cause for concern is that the judiciary, as the interpreter of security laws, seemed to have neglected its obligation to protect fundamental liberties when pitted with the demands of national security in Malaysia.

The situation in the UK differs slightly from Malaysia with some notable attempts of the UK Law Lords to restrain the power of the executive in times of emergency. However, there is evidence that in the era of the '*war on terror*' a new judicial activism is intervening on the side of liberty. Kavanagh, for example, has argued that several more recent decisions show that courts are now "*more assertive than they have traditionally been in the national security context,*"[70] and these decisions are cited to support the belief we now enjoy a rights-aware and rights-enforcing judiciary. The UK's House of Lords provides further evidence of this new era of rights enforcement. In *Belmarsh* (discussed earlier in Chapter 3), the House of Lords was willing to review the proportionality of the UK's derogation from the European Convention and the compatibility of section 23 of ATCSA 2001 with the UK Human Rights Act 1998 ('HRA 1998').[71] The Lords determined that the proviso under section 23 of ATCSA was "*incompatible with Articles 5 and 14 of the European Convention insofar as it is disproportionate and permits detention of suspected international terrorists in a way that discriminates on the ground of nationality or immigration status*."[72] The reactions this judgment portrayed was the courts had made headway for civil liberties rights. For example, the judgment in *Belmarsh* "*shows that the courts will sometimes stand up to a powerful executive and be more*

[69] As per Justice Heliliah bt Mohd Yusof in *Ahmad Yani* (n.67)
[70] Kavanagh, A. (2009). Judging the Judges under the Human Rights Act: Deference, Disillusionment and the" War on Terror". *Public law*, (2), 287-304.
[71] [2004] UKHL 56 Op cit.
[72] ibid

assertive than they have traditionally been in the national security context."[73] However, from an opposing perspective, Clarke (then UK's Home Secretary), gave the impression of the effect when he lamented the court's decision:

> *"[T]he Government believed that the part 4 powers were justified … and … it was necessary to take positive action against peripatetic terrorists who happened to be living here … In these circumstances, I repeat that my judgment is that there remains a public emergency threatening the life of the nation. The absence of the part 4 powers would present us with real difficulties*." [74]

In reality, the effect of *Belmarsh* has been overstated, and the judgment did not hinder the executive in any meaningful way. As Ewing notes, "*the detained individuals remained in custody until new legislation was introduced giving the Home Secretary the power to detain them at home by way of control orders*." [75] Thus, the controversial detention regime was merely swapped with another system allowing 'house arrest'. This new control order regime in the UK has been the subject of judicial review proceedings,[76] and "*the decisions were initially welcomed as another step towards the normalisation of terrorism laws, and a positive exercise of judicial power*."[77] In *Secretary of State for the Home Department v JJ*, for example, the Law Lords ruled that some of the non-derogating control orders found under PTA 2005 were incompatible with the HRA 1998. However, Ewing and Tham have commented these decisions "*are more important for what they appeared to permit rather than what they purported to prohibit*." [78] While *JJ* outlawed the detention up to 18 hours, Lord Brown decided that "*12 or 14-hour curfews … are consistent with physical liberty*"[79]

[73] Kavanagh, *(supra*) n.70.
[74] UK House of Commons Oral statement: 'Measures to Combat Terrorism' – Powers in Part 4 of ATCSA 2001, 26 January 2005 (C.Clarke) available at: *Statewatch.org*. Retrieved 22 December 2016, from <http://www.statewatch.org/news/2005/jan/10uk-control-orders.htm>
[75] Ewing, K. (2007). The political constitution of emergency powers: a comment. *International Journal of Law in Context*, *3*(04), 313-318.
[76] In the case of SS for Home Department v JJ (2007) UKHL 45, SS for Home Department v MB and AF (2007) UKHL 46 and SS for Home Department v E (2007) UKHL 47
[77] Ewing, K. D., & Tham, J. C. (2008). The continuing futility of the Human Rights Act. *Public Law*, *668*, 681.
[78] ibid
[79] As per Lord Brown in the case of SS v JJ [2007] UKHL 45

and, in *Secretary of State for the Home Department v E*, the Law Lords did uphold the validity of a 12-hour curfew.[80] The effects of control orders are discussed at length by Ewing and Tham,[81] but some of the consequences on human rights because of the executive's decision to replace the detention with control orders in the wake of *A* are worth observing. The following is the summary account of the control orders regime as narrated by the lawyer representing his client:

> *"The procedure of freeing the detainee and served with the Control Orders was disorganised and displayed a total lack of human rights. My client was allowed to go at 10.30pm and brought to a place under house arrest. He was dismissed having no money and food at the address of his new accommodation. He continued with no food and with no money until about 4.30pm the following day. He had no access at all to the telephone. The terms and conditions of the Control Order banned any forms of communication with the outside world via mobile phones or through the internet. He was allowed to leave the new accommodation in between 7 am and 7 pm but was totally cut off from any social contact except if he ran into someone by chance."* [82]

Besides the deplorable conditions as highlighted above that one may face under the control orders regime, a further consequence was its impact upon third parties. For instance, regarding those married detainees, before their 'release' from the Belmarsh prison, their spouses and kids could meet anybody and to have visitors. However, with control orders in place, now all visitors must be screened and approved by the police. This clearance procedure caused uneasiness as people do not wish to be labelled as a "*known associate of a terror suspect*." The control orders were seen as to promote the seclusion of the controlled person and their families from the society. Some note that people felt discriminated especially friends or relatives of the controlled person who are non-UK

[80] [2007] UKHL 47 (supra) n.76.
[81] Ewing and Tham (above) n.77. p.674-8
[82] *Joint Committee on Human Rights - Twelfth Report* of Session 2005-06, Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act, 2005, (Appendix 10) *Publications.parliament.uk*. Retrieved 22 December 2016, from <http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/122/12217.htm>

citizens and feel more exposed to harassment.[83] In a later development, the then Home Secretary, Alan Johnson, declared that one of the detainees named AF has his control order revoked in September 2009,[84] following a landmark ruling in June that year whereby the court decided it was unlawful to use "secret evidence" to put people under a 16-hour curfew. Ensuing from that, there is a general belief that any remaining control orders will also be revoked as well.[85] The decision to revoke AF's control order has been attributed to the judgment in *Secretary of State for the Home Department v AF*, [86] in which the court held that an individual imposed with a control order ought to have an indication of what the evidence to support that order is. It was an agreed fact in AF that "*the open material did not afford the Secretary of State reasonable grounds for suspicion of involvement by AF in terrorism-related activity. The case against him was to be found in the closed material*."[87] The House of Lords considered that the best way of achieving a fair trial was for all evidence to be disclosed. It did, however, acknowledge this principle may conflict with national security. Ultimately, drawing upon the European Court of Human Rights decision in *A v the United Kingdom*,[88] the House of Lords concluded that "*non-disclosure cannot go so far as to deny a party knowledge of the essence of the case against him."* [89] A control order could not be made by entirely secret evidence. Perhaps *AF* meant that we can now rely on an apparently rights-enforcing judiciary (and can be portrayed as the latest chapter in the legal saga stretching back to ATCSA in 2001).[90] However, the practical effect of *AF* is limited. This is because the House of Lords merely required that the controlee knows the gist of the case against him or her. It is clear that the executive is keen to create the impression they are compelled to alter policy by a

[83] Ewing and Tham, above n.77 p.675
[84] Jones, A. (2009). *Terror suspect freed from control order*. *The Guardian*. Retrieved 22 December 2016, from https://www.theguardian.com/uk/2009/sep/07/control-order-terror-law-lords-johnson
[85] Travis, A. (2009). *Most control orders likely to be revoked after terror suspect freed*. *The Guardian*. Retrieved 22 December 2016, from https://www.theguardian.com/politics/2009/sep/07/control-orders-terror-suspects-revoke
[86] [2009] UKHL 28
[87] ibid
[88] Application No.3455/05) [2009] ECHR 301 (19 Feb 2009)
[89] [2009] UKHL 28 p.65
[90] Kavanagh. (*supra)* n.70

rights-enforcing, activist judiciary. It started off with the then UK Home Secretary, Clarke, who lamented the decision in *A* in 2005 and similarly, the Home Office in September 2009 has endeavoured to impress that the judgment in *AF* "*forced [the Home Secretary] to revoke the control order, even though the government considered it necessary to protect the public from a risk of terrorism"* [91] In reality, however, the courts have no jurisdiction to compel the Home Secretary to take any action. Under the HRA 1998, UK courts can only issue a declaration of incompatibility,[92] which the House of Lords declined to do in *AF*. The revocation of the control order is to be welcomed – the orders presented a severe restriction upon the liberty of the individual – but, the courts cannot force their revocation as that decision can only be a political one. The control order, like the detention without trial regime which it replaced, is a means of pre-emptive control. It is enforced through a ministerial decision, grants considerable executive discretion and has far reaching consequences for those involved. The House of Lords may congratulate itself for what at first glance appears to be a series of muscular rights-enforcing judgments. However, the decision in *Belmarsh* did not require the release of a single detainee and ultimately resulted in introducing control orders. The House of Lords declared these orders to be legitimate and compatible with the HRA 1998, although they permit '*virtual house arrest*'[93] and the only procedural guarantee is that the controlee must be allowed to see the "*essence of the case against him*." [94]

The above discussion demonstrates how the Malaysian and the UK courts deal with terrorism cases. While the Malaysian Courts were subservient to the executive and legislature, in the UK, it was the opposite. The UK court appears to be emboldened in enforcing civil liberties and human rights. Pursuing this further on India's position, it is

[91] Travis. (supra) n.85
[92] See Section 4 of UK Human Rights Act 1998
[93] Joint Committee on Human Rights, (supra) n.82
[94] [2009] UKHL 28 p.65

discovered that the conduct of India's Supreme Court during wars does not necessarily follow the conventional view that judges would be pro-state during a crisis. Apparently, the judges there seemed to distinguish between two kinds of threats to the security of India. Terrorist attacks (rather than wars) evoked more deference to the other branches of the state, but not necessarily at the cost of incursions of the civil liberties.[95] A Supreme Court judge was more likely to think in favour of the nation after a terrorist attack than during a war. Why that is so is hard to explain. Perhaps this was because terrorists target at both citizens and soldiers, which can disrupt both the national and a citizens' security simultaneously,[96] in contrast to a conventional war that usually targeted at the Army. The Court's judgment in the case of *PUCL v. Union of India* [97] appears to agree with this notion. The appellants were civil rights activists who sought to challenge the constitutionality of the Indian POTA 2002. In highlighting the war on terror, the court said this was not a traditional criminal justice endeavour, but a situation of guarding India's sovereignty including its subjects. The court held that terrorism was a new challenge for the state and declared:

> "*To face terrorism, we need new approaches, techniques, weapons, expertise and of course new laws (such as POTA)*."

And the court said the need for the Act

> "*…. is a matter of policy and the court cannot go into the same, once legislation is passed, the government has an obligation to exercise all available options to prevent terrorism within the bounds of the constitution. Mere possibility of abuse cannot be a ground for denying the vesting of powers or for declaring a statute unconstitutionally*." [98]

[95] Shankar, S. (2015). Judicial Restraint in an Era of Terrorism: Prevention of Terrorism Cases and Minorities in India. *Socio-Legal Rev.*, *11*, 103.
[96] Ibid. p.108
[97] (2003) 4 SCC 399.
[98] ibid

In a study brought to light by a scholar, it was reported that even if the court is deferential to the executive power during an emergency, it can still care for the rights of minorities in particular circumstances such as during the aftermath of political authoritarianism.[99] However, during the crisis in India from 1975 to 1977,[100] the Supreme Court of India had refused to safeguard civil rights when tasked with balancing the demand for justice in the eyes of citizens against the open conflict with the government establishment.[101] It was perceived by the courts that if they question the legitimacy of arrests effected by the government under the anti-terror laws would have pitted the court against the other branches of the state and could be viewed as an institution running against the state's objective or anti-citizen – a charge the Supreme Court was struggling to change in the post-crisis stage.[102] According to the scholar, after an emergency regime like the crisis of 1975-77 in India, the judiciary recovers public legitimacy by projecting itself as a champion of the weak groups.[103]A judge was 48% more likely to show a pro-accused ruling in a TADA 1987 cases as opposed to preventive detention case, pointing to a shift by post-Emergency judges. Even though, the courts in India have gained the reputation of embracing '*judicial activism*' regarding socio-economic rights, there was still a significant lack of such activism on detainees' rights under India's anti-terror laws, and this was typical with the bleak outlook of the succeeding government which believed national security should trump over civil rights.[104] When India's anti-terror law like POTA 2002 was repealed, the Congress-led United Progressive Alliance (UPA) government amended the UAPA 1967 in 2004 with UAPA 2004 and later made further amendments in 2008 known as UAPA 2008. The UAPA 2008 made worst certain features of the law for instance, by having the phrase "*likely to threaten*" as the base for

[99] Shankar, S. (2009). Scaling Justice: India's Supreme Court, Social Rights, and Civil Liberties. *OUP Catalogue*.
[100] "*40 years on, those 21 months of Emergency*." (2015). The Indian Express. Retrieved 23 December 2016, from http://indianexpress.com/article/explained/40-years-on-those-21-months-of-emergency/
[101] ibid
[102] Sathe, S. P. (2002). *Judicial activism in India*. Oxford University Press.
[103] Shankar (2009) above n..99
[104] Shankar (2015) above n..95 p.109

establishing intent besides trimming down strict feature such as detention without bail from six months in POTA 2002 to three months. Besides that, confessions obtained during police custody were inadmissible in court, and the suspect can be detained under detention for up to 30 days. These controversial features as seen in the UAPA 2008 which are inherited from POTA 2002 did not gain the support of civil rights activists as they are abhorrent to the Rule of Law values. They have taken up the issues with the government which include: (i) a vague definition of '*terrorist act*,' and '*abetment*';[105] (ii) lack of proper legal procedures in the listing of organizations suspected of involving in the 'terrorist acts' with the consequence that the onus of establishing innocence rests with the proscribed organization; (iii) allowing official immunity to agents of the state engaged in counter-terrorism which brings forth the effect of blocking the prosecution of officials acting in bad faith;[106] and (iv) granting the death sentence for those whose terrorist act shall: "*if such act has resulted in the death of any person.*" [107] Although judges read and interpret the laws in accordance with the intent and purpose of the Constitution without fear or favour, however, the guaranteed constitutional liberties were circumvented by the constraints of national emergency or by the purported deferential behaviour of the judiciary. However, the point to make here is this. If the provision of the anti-terror laws by itself like the UAPA 2008 which are either too broad or too narrow in some of its provisos, judges who take a restrictive approach will be labelled as subservient to the executive power, although this may not be a true reflection of the judiciary's stance when applying the anti-terror laws.

As discovered from the above discussion, nations like Malaysia, India and the UK, experienced major legal defeats over controversial counter-terrorism measures. In the

[105] Section 15 UAPA 2008
[106] Chapter VII, Section 49 of UAPA 2008
[107] Chapter IV, Section 16 (a) of UAPA 2008

UK, for instance, the decisions of *A v Secretary of State*[108] showed an encouraging shift not only from past habits of judicial deference when examining national security powers, but it had also boldly attempted to restrict preventive detention regimes and offer significant procedural protections for those people subject to imprisonment. Regrettably, however, these attempts to protect rights to personal liberty and procedural fairness backfired over time as the governments later discovered ways surrounding those 'unfavourable' decisions given out by the court by taking advantage of their doctrinal weaknesses or using them as justifications to create further expansions of national security powers. So, while these judgments were initially considered a victory for civil liberties and setbacks for the national governments, the long-term impacts have been their unintentional adverse rights repercussions. This once a 'good case' had in a way 'gone wrong', and civil libertarians must now acknowledge that constitutional rights are now more uncertain as a result and less rights-friendly than once thought. Therefore, this calls for a further exploratory examination of whether judicial activism by judges has a role to play in strengthening the judiciary over the government overreaching power during a national emergency.

4.4 IS 'JUDICIAL ACTIVISM' THE KEY TO AMELIORATE JUDICIAL POWER? - A CASE STUDY OF MALAYSIA, INDIA AND THE UK

There are many reasons for developing judicial activism. It is hard to point out the exact reasons for the growth of judicial activism under any constitution. This is because there cannot be any thorough comprehension of such causes given the different observation and views of some groups of the society concerned with judicial activism in particular, and the judicial power in general. Critics of judicial activism put forth the argument that the courts assume the roles given to the other organs of the state.

[108] [2004] UKHL 56

Meanwhile, defenders of judicial activism think otherwise and contend that the courts merely conduct their legal function. Hence, the following analysis in the later paragraph will investigate the development and some of the well-accepted circumstances which drive a court or a judge to be active while performing their judicial powers given to them either by a constitution or any other law.

4.4.1 Defining Judicial activism

As highlighted in the preceding paragraph, attempts to explain and understand "judicial activism" are frequently criticized as unduly broad, highly partisan or "devoid of content."[109] The former Chief Justice of Malaysia, Tun Zaki Tun Azmi in addressing the subject of judicial activism at a law conference had cited and concurred with Chief Justice Robert French, the Chief Justice of High Court of Australia that: 'Judicial Activism' is an "ill-defined concept". According to Tun Zaki, "*When an unexpected decision on any point of law is made, those supporting judicial activism will say that it is so. The conservatives, on the other hand, will say that such a decision is a mere interpretation*."[110] He further declared that "*activist judges are those who in discharging their functions exceed what the Constitution provides, or what the history defines, or what the contemporary society expects of them."*[111]

Now, if judicial activism concept is hard to define, the question is how do we spot an occurrence of activism? A simplistic answer is that judicial activism occurs when judges decline to relate to the Constitution or laws impartially according to their original context, or do not care for the binding precedent of a higher court and instead, decided a particular case rest solely on the personal preference of the sitting judge. However, some scholars

[109] Roosevelt III, K., & Garnett, R. W. (2006). Judicial Activism and Its Critics. *U. Pa. L. Rev. Penumbra*, *155*, 112.
[110] *The Malaysian Bar - Judicial Activism or Judicial Interpretation? Malaysianbar.org.my*. Retrieved 12 June 2017, from http://www.malaysianbar.org.my/legal/general_news/judicial_activism_or_judicial_interpretation_.html
[111] ibid

erroneously believe judges engage in judicial activism whenever they strike down a law.[112] But it should be noted that judges' subjective decisions or verdicts could also mean they are not upholding unconstitutional or repressive laws. In applying the law as it is written, judges may reach verdicts or decisions that are (or may be regarded to be) bad laws but are justly decided. Although judges are required not to form an opinion whether a law eventually leads to good or bad outcomes, what is paramount is whether the law infringes the Constitution and, if not, how it is to be interpreted and applied in a case. Hence, judicial activism can take several forms such as citing foreign laws to interpret local laws, discovering new "rights" not found in the original text, advancing policy issues over and above the demands of the existing law, and deflecting the text of the Constitution or a law to conform with the judge's own sentiments, to name just a few.[113]

Besides the above understanding, there is also a commonly accepted view that judicial activism is connected to issues of the administrative progress of a state. In other words, it is the active role displayed by the court or the judges to censure any malpractice of the government which explicate judicial activism activities. Therefore, the term "*judicial activism*" or the contrary "*judicial restraint*" relates to the firmness of the court's inherent authority. Often, these expressions are applied non-committal and meant to be descriptive to describe judges who are more active in dispensing justice as opposed to those who are more constrained in their approach. In the broadest sense, the description is neither complimentary nor condemn from the angle of personal or professional opinion. However, sometimes judges may be criticised or applauded for departing from or for adhering to the '*right path*' of the decision-making process. This is evident in a typical judicial review application when judges may have construed a law or constitutional rights

[112] Slattery, E. (2017). *How to Spot Judicial Activism: Three Recent Examples. The Heritage Foundation*. Retrieved 12 June 2017, from http://www.heritage.org/the-constitution/report/how-spot-judicial-activism-three-recent-examples#_ftn4
[113] ibid

extremely equivocal in its text according to his opinion. Naturally, this will in return lead to a different perception of what is deemed as the "legitimate role" or "the correct role" to be played by the judiciary in dispensing justice. Therefore, judicial activism is an abstract concept. It may imply other things to other people, although, some admit that it stands for judicial strength while others may look upon it as a form of "*judicial creativity*."[114]

4.4.2 A survey of judicial activism instances

4.4.2.1 Malaysia

Under Article 4(1) of the Malaysian Constitution, it clearly states "*that the Constitution is regarded as the supreme law of the Federation and that any law passed which is inconsistent shall be void*." Article 4(1) has been a natural corollary to the power vested in the court to review the lawfulness of any enacted laws. The court has the inherent authority to examine the constitutionality and to declare any laws invalid for breach of the enshrined rights provided in the Constitution. However, in practice, the courts are weak in its role to preserve the constitutional rights which saw the formation of a system of de facto legislative supremacy as opposed to a governmental system founded on constitutional supremacy like Malaysia. Further, it is noted earlier that in 1988, the integrity of the judiciary has been severely eroded throughout the constitutional crisis - a terrible event that witnessed a major conflict between the judiciary and the executive with the unprecedented dismissal of the Lord President by the then Prime Minister Mahathir Mohamad.

The constitutional crisis that took place in the year 1988 saw the courts' powers were stripped in the aftermath of the case in *Dato Yap Peng v PP*.[115] There, the Supreme Court

[114] Sathe, S. P. (2002). Judicial activism in India. Oxford University Press.
[115] [1988] 1 M.L.J. 119.

struck down a statutory provision in the Criminal Procedure Code (CPC) namely, section 418A. The particular provision grants the Public Prosecutor the power to transfer triable criminal cases from a Subordinate Court to the High Court and this was perceived as usurping the judiciary as provided under Article 121 (1) which states that "*judicial power of the Federation shall be vested in two High Courts*" at that time. By a majority decision, Justice Eusoffe Abdoolcader described section 418A of the CPC as "*both a legislative and executive intromission into the judicial power of the Federation vested in the courts under Article 121*." [116] Therefore, section 418A of the CPC was declared unconstitutional by the then Supreme Court. Following the defeat of the government in *Dato Yap Peng's* case, the government quickly responded by amending Article 121(1). It was the ensuing amendment to Article 121 (1) that saw the judicial powers of the Malaysian Courts had been taken away. Now, the amended Article 121 (1) expressly declares the courts in Malaysia "*shall have such jurisdiction and powers as may be conferred by or* ***under federal law***" *(emphasis added).* Arguably, since then, the judiciary, as one of the co-equal branch in the constitutional framework has been demoted to a subordinate level simply because the judicial powers must derive from the statute/federal laws. That means to say, ever since the judicial crisis in 1988, the Malaysian courts have been subservient to the legislative/executive and there were hardly any notable instances of judicial activism taking place but instead, foresaw the beginning of '*judicial restraint*' era.

So, when it comes to interpreting the Malaysian Constitution even before the constitutional crisis in 1988, the "four walls" approach was being applied broadly by the Malaysian court as early as in 1963. This can be derived from the case of *Government of Kelantan v. Government of the Federation of Malaya & Anor* [117] where it was held that: "*The Constitution is primarily to be interpreted within its own four walls and not in the*

[116] Ibid at p.318.
[117] [1963] 29 MLJ 355.

light of analogies drawn from other countries such as Great Britain, the United States of America or Australia."[118] Therefore, it can be discerned that the Malaysian judges have a tendency to apply a strict legalism for constitutional interpretation.[119] The four walls approach taken by the court remains alive until recently when the judiciary showed signs of moving away from strict literalism toward a more reasonable and purposive approach when construing the rights under the constitution. As an illustration, in *Sivarasa Rasiah v. Badan Peguam Malaysia,*[120] the Federal Court declared that Article 10 which guarantees the "*right to freedom of association had to be both reasonable and proportionate because restrictions that limit or derogate from guaranteed rights must be read restrictively*." [121] Surprisingly, the Federal Court set out to take "*a more colourful approach to interpretation,"* by encouraging that *"… the provisions of the Constitution, in particular, the fundamental liberties guaranteed under Part II, must be generously interpreted…."*[122]

Another interesting case to look at is *Nik Nazmi bin Nik Ahmad v. PP* [123] a decision delivered by the Court of Appeal in 2014. This time, the court was tasked to examine the constitutionality of the Peaceful Assembly Act 2012 (PAA 2012), in particular, section 9(1) and 9(5) when reading with Article 10 on freedom of assembly under the Constitution. Essentially, *Nik Nazmi'*s complaint in court was the strict imposition of at least ten days' notice to the police before his planned assembly had transgressed on his constitutional rights to assemble. The Court of Appeal agreed with him and allowed his appeal. Further, the court ruled that Article 10 must be read "*in conformity with the general jurisprudence relating to reasonableness and proportionality*."[124] The point to

[118] Ibid at p.369
[119] Tew, Y. (2016). On the Uneven Journey to Constitutional Redemption: The Malaysian Judiciary and Constitutional Politics. *Pac. Rim L. & Pol'y J., 25*, 673.
[120] [2010] 2 MLJ 333
[121] Ibid at para.5
[122] Ibid at para. 3.
[123] [2014] 4 MLJ 157.
[124] Ibid at para. 6.

note here is that the Appeal Court, besides applying the reasonableness test, had declared that the court had a "*constitutional duty…to ensure that enshrined freedom is not violated by retrogressive legislation…. without meaningful grounds consistent with the Federal Constitution*." [125] The judgements in either *Sivarasa* or *Nik Nazmi* were applauded in the legal fraternity as a major retreat from the earlier restricted and legalist approach taken by the court in interpreting constitutional rights. However, recent court judgments seem to show a withdrawal from this trend when it comes to rights adjudication. For example, in 2015, the constitutionality of section 9(1) and 9(5) of PAA 2012 was challenged once again in the High Court in *PP v. Yuneswaran*.[126] Relying on *Nik Nazmi's*, the High Court judge acquitted *Yuneswaran*. The prosecution then appealed against the decision. In an apparent departure from its previous judgment in *Nik Nazmi*, Justice Raus Sharif PCA (as he then was) speaking for the Appeal Court decided that section 9 of the PAA 2012 was valid and did not infringe Article 10. The Appeal Court declined to adopt the Federal Court's case in *Sivarasa* on reasonableness test. Instead, the court stated that *"the correct approach is to look at the legislative competency of Parliament,*" pointing to a strict legalist approach is to be taken by the court. The Appeal Court declared: "*The Courts in this country do not comment on the quality of a law, that is to say, the Courts do not consider it any part of its judicial function to paint any law as 'reasonable' or 'unreasonable' or 'harsh' or 'unjust' …"*[127]

Just a few days after the decision in *Yuneswaran,* on the 6 October 2015, the Federal Court handed down its decision in *PP v. Azmi Sharom.*[128] In that case, Professor Azmi Sharom, a law lecturer was charged under the Sedition Act 1948 (SA 1948) for expressing his thoughts about the legitimacy of the 2009 Perak constitutional crisis. He then brought

[125] Ibid at para. 16.
[126] [2015] 3 CLJ 404.
[127] [2015] 9 CLJ 873 at para. 63.
[128] [2015] 8 CLJ 921

the case to the Federal Court to challenge the constitutionality of section 4 of the SA 1948. The apex court unanimously held that section 4 was constitutional and the provision did not impinge on Article 10 rights. The former Chief Justice Arifin Zakaria found that the term "reasonable" as the qualifying measures to the limits on freedom of expression in Article 10 was never intended to be included by the framers in drafting the Federal Constitution. Hence, "*it is not for the Court to determine whether the restriction imposed by the legislature pursuant to Article 10(2) is reasonable or otherwise.*"[129] If the Court were to embark on doing so would be as if the Court is *"rewriting Article 10(2) of the Constitution*."[130] However, the Federal Court appeared to welcome the proportionality test in deciding the legitimacy of the law - the other test adopted in *Sivarasa* besides reasonableness. Remarkably, the Federal Court has turned down the reasonableness criterion but instead, approved the proportionality principle which is viewed to be a lot stricter than reasonableness in another jurisdiction, for example like the UK.[131]

However, given the latest landmark ruling by the Federal Court on 20th April 2017 in *Semenyih Jaya* (as highlighted in sub-heading 4.2.1 above), it may pave the way for the court to restore judicial power which was stripped since the 1988 amendment to Article 121(1). The credit of this recent development of the law should go to the '*activist'* judge, that is Justice Zainun Ali who has boldly declared that: "*Concomitantly, the concept of the independence of the judiciary is the foundation of the principles of the separation of powers*."[132] Therefore, "*the courts, which formed the third branch of the government had a duty to ensure there was a check and balance mechanism in the system, including the crucial duty to dispense justice according to law*."[133] But for now, it is still too early to

[129] Ibid at para. 37
[130] Ibid at para.40
[131] For example, As per Lord Hope in *R v. Shayler* [2003] 1 AC 247, where his Lordship at para. 61 declaring the proportionality test is like "*a close and penetrating examination of the factual justification*"
[132] Anbalagan, V. (2017). *Federal Court: Parliament cannot curtail judiciary's power*. *Free Malaysia Today*. Retrieved 6 May 2017, from <http://www.freemalaysiatoday.com/category/nation/2017/04/26/federal-court-parliament-cannot-curtail-judiciarys-power/>
[133] ibid

evaluate to what extent the Malaysian courts will expand this recent development to reclaim its judicial powers.

4.4.2.2 India

In the above discussion, basically, the Malaysian judicial powers have been curtailed by the 1988 amendment to Article 121 of the Constitution. In comparison with India, which is also founded on constitutional supremacy like Malaysia, the Supreme Court in India adopts a more positivist approach in adjudicating and safeguarding constitutional rights. Under India's Constitution, it lays down that the law as declared by the Supreme Court shall bound on all courts within the territory of India.[134] There are two sources of law in India. Legislature forms the principal source while the other derives from the judicial interpretation of the existing law from the Judges. As India's constitution accepted these two processes of law-making, the acceptance of the judge-made law process can be an activism by the judiciary. When the court displays a tendency for judicial activism, what this means is a bold examination of the prevailing law by the activist judges, with the aim to strengthen the efficiency of that law for social progress. On the other hand, judicial passivism is understood as an analysis of the prevailing law without an attempt to strengthen its good features nor to advance the development and the scope of that law. This process has evolved over time started with the formation of the courts of law as the mode of administration of justice.

At the onset, the profound notion of judicial activism has not been well-accepted by the Indian court. Most of the court prefers to adopt a conservative approach instead. But it is inaccurate to assume that judicial activism episodes in India were absence. In fact, from time to time, some occasional and limited occurrences of judicial activism took

[134] Article 141 of the Indian Constitution

place although the public may have no inkling of its existence in India. The roots of judicial activism in India can be traced to the court's earlier affirmation on a judicial review application in court. For example, the Indian Supreme Court in *A.K. Gopalan v. State of Madras*[135] has stated that its capacity for judicial review was ingrained in the Indian Constitution. Even in their absence, if any of the basic liberties were encroached upon by any legislative act, the Court has the authority to hold the law to be invalid. Hence, the attitude of the Supreme Court was gradually turned out to be the activist court.

A.K Gopalan was the earlier instances of judicial activism as early as in 1950. During this period, the inconvenient judgement handed down by the Supreme Court caused uneasiness for the government was later abridged through constitutional amendments by the Indian government. Therefore, a discussion on the extent of the Parliament's authority to change the Constitution at their whims began. A constitutional issue was brought up to determine if the Indian Parliament may exert their constitutional power as provided in Article 368 to remove or even to restrict a constitutional right in the case of *Shankari Prasad v. Union of India.*[136] The court held there was no limitation imposed on the authority of the Indian Parliament to do so. The same issue had been taken up again in *Sajjan Singh v. State of Rajasthan*.[137] Two judges have answered positively although it was only a minority judgment. After that, in 1967 with *I.C. Golak Nath v. State of Punjab*,[138] it was decided that Parliament cannot change the Constitution to remove or curtail the constitutional rights. In India, judicial activism occurrence can be broader in scope, more diverse and extensive. By using the Court's power to hear judicial review extensively, the Supreme Court of India has extended even larger and broader influences.

[135] 1950 AIR 27
[136] 1951 AIR 458
[137] 1965 AIR 845
[138] 1967 AIR 1643

The court can apply its inherent jurisdiction to address almost everything or to grant any order to administer absolute justice.

The one instance of notable judicial activism worth further discussion here was the decision of *I.C. Golaknath*[139] as cited earlier. There, a quorum of eleven judges selected from the Supreme Court to determine the constitutionality of India's Constitution (17th Amendment) Act, 1964. By a majority of 6:5, the court speaking through Subba Rao C.J. held that (*inter alia*):

> (i) "Constitutional amendment is a legislative process;
>
> (ii) Amendment is a law within the meaning of Article 13[140] of the Constitution;
>
> (iii) Parliament has no power from the decision to amend any of the provisions of Part III of the Constitution to take away or abridge the fundamental rights enshrined."

Golaknath's decision above was thought to have finally settled down the constitutional jurisprudence in India. The ratio of the decision clarifies that any modification of the constitution that contravened the basic rights will be legitimate before *Golaknath*, but it becomes invalid only prospectively. Chief Justice Subba Rao affirmed the Part III (Fundamental Rights) of the Constitution to achieve the supremacy of the Indian Constitution. The decision had reversed the two earlier cases that dealt with that same subject viz. *Sankari Prasad* and *Sajjan Singh* as highlighted above. While striking down the two preceding decisions, Subba Rao CJ said:

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[139] Briefly, the fact of the case was the Constitution (17th Amendment) Act, 1964 had amended Article 31A and introduced two new laws viz. the Mysore Land Reforms Act 1962 and Punjab Security of Land Tenures Act, 1953. Article 31A provides for acquisition of estates etc. although they are irreconcilable with fundamental rights bestowed by Article 14 (*Equality before law*), Art.19 (*Protection on freedom of speech etc*.)

[140] Article 13 (1) states: "*All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void, 13(2) states: The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void"*

> *"While ordinarily this court will be reluctant to reverse its previous decision, it is the duty in the Constitutional field to correct itself as early as possible, for otherwise the future progress of the country and the happiness of the people will be at stake (we are) convinced that the decision in Sankari Prasad's case, is wrong, it is pre-eminently a typical error case where this court should overrule it. The longer it holds the field the greater will be the scope for the erosion of fundamental rights. As it contains the seeds of destruction of the cherished rights of the people, the sooner it is overruled the better for the country"* [141]

From the above dicta, it sufficiently shows a change in the conduct of the court. Besides, it signifies a milestone relating to judicial activism taken by the Indian Supreme Court. However, this decision was not well-received by the Parliament. Then Indian Parliament retaliated by passing the 24th Amendment which clearly specified that Parliament was not restricted in its power regarding a constitutional amendment. However, that amendment was challenged in the Court in *Kesavananda Bharati v. State of Kerala*.[142] This time, a quorum of thirteen judges of the Supreme Court heard the validity of the Constitution (24th and 25th Amendments) Act, 1971 enacted to reverse the decision of *Golaknath's* case, in particular, Article 368 of the Indian Constitution.[143] With the passing of the Constitution (24th Amendment) Act 1971, it is now lawful for the Indian Parliament if they wish to change the Constitutional provisions including those touching on "Fundamental Rights" under Part III of the Constitution. The key issue in *Kesavananda* was whether the judgement in *Golaknath's* case was correctly decided. The expanded quorum of 13 judges from the Special Bench later unanimously confirmed that the Constitution (24th & 25th Amendment) Act 1971 was valid and reversed the prior

[141] Ibid note 138
[142] (1973) 4 SCC 225
[143] In so far as the constituent power to make formal amendments is concerned, it is article 368 of the Constitution of India which empowers Parliament to amend the Constitution by way of addition, variation or repeal of any provision according to the procedure laid down therein, which is different from the procedure for ordinary legislation. Article 368, which has been amended by the Constitution (24th Amendment), Act, 1971. Article 368 provides: "*Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article"*

decision of *Golaknath's case.* The decision in *Kesavananda* has paved the way for the legality of later Constitution Amendment Acts brought before the court.

Following the above decision, that means to say every aspect of the Indian Constitution is amendable provided in the aftermath, the underlying basic structure of the constitution and its framework remains intact. From the foregoing study, it witnessed that the Indian Supreme Court had succeeded in *Golaknath* in allowing a constitutional amendment to be made. However, in an expanded special bench of judges from the same Supreme Court, it had also overruled *Golaknath* to test the legitimacy of other constitutional amendments. Because of *Kesavananda Bharati,* perhaps it can be claimed there can be no other better instances of judicial activism in India than the one by the Supreme Court in *Kesavananda.* Although the decision seemed to wrestle supremacy between an elected Parliament and the court in India, it has conferred the legitimacy on the basic structure doctrine. That doctrine clarifies that the power to amend the constitution and the making of a constitution by the Parliament can never be equal.

Besides the broad power conferred on the Supreme Court of India to invalidate a constitutional amendment, the apex court has also embarked on their responsibilities in enforcing fundamental rights. Under Part III of India's Constitution, it guarantees the fundamental rights that are the 'Right to life and personal liberty'. The Indian Supreme Court has been confronted with construing the several terms in Article 21 which states:

> "*No person shall be deprived of his life or personal liberty except according to procedure established by law.*"

Among the terms that the court has been asked to define including the meaning of '*life*', '*personal liberty*', and what it means by '*procedures established by law*'. It is germane to observe that till the watershed judgment of *Maneka Gandhi v. Union of*

India,[144] the court has adopted a very restrictive approach in construing the above terms. However, to discover the judicial behaviour on fundamental rights, it becomes necessary to examine the case law on Article 21.

In *A.K. Gopalan,* a leading case on constructing the core right to one's life and liberty, the court was asked to decide the legality of the Preventive Detention Act, 1950 (PDA 1950) Briefly, the facts are, *Gopalan* was detained under PDA 1950 had applied for a writ of habeas corpus for his release from detention under Article 32 of the Constitution. He relied on the grounds that PDA 1950 violated Articles 13, 19, 21 and 22 of the Constitution and hence, his detention was unlawful. It was held by the majority of the judges that the Act was '*intra-vires*' and was declared lawful. The ambit of 'right to freedom' and 'personal liberty' as adopted in Articles 19 and 21 of the Constitution was brought up in court for interpretation. The court held that Article 19,[145] also promising individual freedoms, could not be read as related to the substantive law only, nor Article 21, which touch on procedural matters. Further, the court decided that Articles 19 and 21 did not complement one another. The Court declared that Article 21 adopted the terms "*personal liberty' which has a definite connotation in law and that 'personal liberty' stating that it means a personal right not to be subjected to imprisonment, arrest or other physical coercion in any manner that does not admit of legal justification*."[146] The phrase "*personal liberty*" in Article 21 does not cover the meaning of freedom as in Article 19. According to another judge P. Shastri J, he added that Article 21 did not intend to yield safeguard against government's violations.[147] The majority of the judges maintained that the term 'law' as found in the phrase "*procedure established by law*" under Article 21, was not applied in the sense of 'general law'. It was held that the term 'law' as stated in

[144] 1978 AIR 597,
[145] Article 19 of the Constitution provides: *"(1) All citizens shall have the right - (a) to freedom of speech and expression; (b) to assemble peaceably and without arms; (c) to form associations or unions 1[or co-operative societies]; (d) to move freely throughout the territory of India; (e) to reside and settle in any part of the territory of India*;"
[146] Per Das, J, at paras 219 and 220, Ibid.
[147] *Ibid*, at para 59

Article 21 is similar to *state-made law.*[148] Although this watershed decision touched on several areas of law, for this study, it would be adequate to consider the summary regarding Article 21 briefly:

> *(i) "Article 19 and 21 are not complementary to each other;*
> *(ii) Personal liberty under Article 21 means liberty of the body and protection from wrongful arrest, detention or physical intimidation;*
> *(iii) Law denotes the state-made law;*
> *(iv) Article 21 looks at the procedure and not the 'law' even if it is unlawful. Basically, Article 21 incorporates only the procedural due process but not the substantive due process"*

The Supreme Court's restrictive construction as observed above has restrained the Indian court from providing a liberal interpretation and the gist of what it means to have the "right to life and personal liberty" as laid down in Article 21 especially, on fundamental rights.[149] Here, there was no judicial activism as the court has exerted an absolute control. It is observed that ever since the decisions of *A.K. Gopalan*, limited liberal judgements have enlarged the latitude of Article 21 on life and personal liberty.

The interpretation and extent of 'personal liberty' again emerged for review in the case of *Kharak Singh v. State of U.P.*[150] In that case, the legality of the Uttar Pradesh Police 'Regulations 236' which allowed the police force to keep a record of habitual criminal offenders such as the petitioner, including keeping him under surveillance with no statutory basis was challenged in court. Surveillance here means it involves the police approaching the house of the suspects, domiciliary visits at night, periodical enquiries by police officers in which the petitioner claimed this law breached his basic right to freedom of movement as provided in Article 19 (1) (d) and the right to one's personal liberty in

[148] *Ibid* at para 18, 109 and 193.
[149] Till the landmark case of *Maneka Gandhi v. Union of India* AIR 1978 SC 597.
[150] [1963] AIR 1295

Article 21. To decide on the Petitioner's claims, the judge, besides determining the extent of Article 19 (1) (d), had to deal with the scope of Article 21 on personal liberty too.

The respondent in *Kharak Singh* argued that the impugned Police Regulations 236 constituted no infringement of the freedoms guaranteed in Part III of the Constitution, and assuming if they were, they had been framed in the interests of public order and to enable the police to discharge its duty in a more efficient manner, and hence were reasonable restrictions on that freedom. By a majority from a special bench of six judges of the Supreme Court, it was held that "*the right of privacy is not a guaranteed right under our Constitution*," and "*the attempt to ascertain the movements of an individual is merely a manner in which privacy is invaded and is not an infringement of a fundamental right guaranteed in Part III of the Constitution."* However, Justice Subba Rao disagreed. In his dissenting minority judgment he held that:

> *"The right of personal liberty in Art. 21 implies a right of an individual to be free from restrictions or encroachments on his person, whether those restrictions or encroachments are directly imposed or indirectly brought about by calculated measures. If so understood, all the acts of surveillance under Regulation 236 infringe the fundamental right of the petitioner under Art. 21 of the Constitution.*"

Although the majority of the Supreme Court Judges in *Kharak Singh* did not accept the right to privacy as fundamental rights guaranteed under the constitution, the recent Supreme Court's decision held on 24 August 2017 in the case of *Justice K S Puttaswamy (Retd) v Union of India* [151] has overruled *Kharak Singh's* position and apparently it endorsed the earlier dissenting judgment of Justice Subba Rao. It is noteworthy the Indian Supreme Court for the first time since *A.K. Gopalan* has shifted from a rigid interpretation of Article 21 to enlarge the scope of 'personal liberty' by proclaiming personal liberty is

[151] (2017). *Supremecourtofindia.nic.in*. Retrieved 26 August 2017, from <http://supremecourtofindia.nic.in/supremecourt/2012/35071/35071_2012_Judgement_24-Aug-2017.pdf>

a basic right protected and guaranteed under the Constitution following the case Justice *K S Puttaswamy*. Briefly, the leading facts were whether forcing the citizens to give a sample of their fingerprints including their iris scan violates the privacy of that person. To answer this issue, the Supreme Court convened a seating of nine judges to decide whether this right to privacy is a constitutionally protected value. After days of the hearing, it was finally decided that privacy is a fundamental right, and it is intrinsic to a right to life. Justice Abhay Manohar Sapre, one of the nine Judges hearing this landmark case said: "*Right was not absolute and was subject to the certain reasonable restrictions which State was entitled to impose*," but the "*Right to privacy was one of those cherished rights which every civilised society recognises in every human being*". He further enunciated that:

> *"In my considered opinion, the right to privacy of any individual is essentially a natural right, which inherent in every human being by birth. Such right remains with the human being till he/she breathes last. It is indeed inseparable and inalienable from human being. In other words, it is born with the human being and extinguish with human being".*[152]

Just after *Kharak Singh*, in *Satwant Singh v. A.P.O., New Delhi*,[153] another notable constitutional case, Subba Rao CJ, speaking for the court held that "*liberty under Article 21 of our Constitution provides the same broad understanding as is given to the term 'liberty' by the 5th and 14th Amendments to the U.S. Constitution and the expression 'personal liberty' in Article 21 only removes the elements of 'liberty' enshrined in Article 19 of the Constitution*." In *Satwant Singh,* the court was asked to rule whether the right to travel overseas is within the term of 'personal liberty' under Article 21. In a majority decision, the court answered in the affirmative as there was no provision of law governing or even denying an individual of such a right. So, the denial to grant travel documents such as a passport or the removal of passport infringes Articles 21. This decision was

[152] ibid
[153] AIR 1967 SC 1836.

significant because the Supreme Court had recognised 'personal liberty' under Article 21 to contain a larger breadth than just the liberty of the person (body) as compared to what was earlier understood in *A.K. Gopalan*.

Another contentious decision worthy of mention here was the preventive detention case of *ADM Jabalpur v. Shivakant Shukla*.[154] This case was also overruled by the recent Supreme Court's decision of *Justice K S Puttaswamy* along with *Kharak Singh*. Briefly, the case involved the Presidential order issued under Article 359 (1) of the Constitution which states "*no person has locus standi to submit a petition under Article 226 before a High Court for 'habeas corpus' or any other writ or order or direction to exert any claim to personal liberty of a person arrested under Maintenance of Internal Security Act, 1971 (MISA 1971) because the order of detention is illegal or mala fide, was called into question*." The right of an individual to file a habeas corpus petition to challenge the legality of preventive detention under the MISA 1971 has been stripped by the said Article 359. On the ground of greater demands for a national security interest, the Supreme Court affirmed the legitimacy of the presidential order and the suspension of the writ of *habeas corpus* during a state emergency. Clearly, most judges from the constitutional bench refused to see the severity of the condition. They were not bold enough to call a spade a spade, and this was most likely due to the effect of a state of emergency. However, the dissenting opinion penned by Khanna, J worth mention when he stressed that the role of 'the rule of law' is the recognised benchmark of all civilised nations. The learned judge said:

> *"Even in the absence of Article 21 of the Constitution, the State has got no power to deprive a person of his life or liberty without the authority of law… without such sanctity of life and liberty, the distinction between a lawless society and one governed by laws would cease to have any meaning."*[155]

[154] AIR 1976 SC 1207
[155] AIR 1976 SC 1207, at p. 1256.

The dissenting opinion of Justice Khanna has been acclaimed as a humanitarian and right judgment by some scholars.[156] Because of this brave activist move by Justice Khanna, any future application should not be ruled out when it comes to Article 20, 21 and 359 in any circumstance regardless of the declaration of a state emergency. Ostensibly, what appeared to be only a dissenting decision in *ADM Jabalpur* by Justice Khanna was eventually recognised and acknowledged years later by the Supreme Court in the case of *Justice K S Puttaswamy* as the correct position of the law. This can be observed from the judgment of Justice Dr D Y Chandrachud when he said this:

> *"The judgments rendered by all the four judges constituting the majority in **ADM Jabalpur** are seriously flawed. Life and personal liberty are inalienable to human existence. These rights are, as recognised in **Kesavananda Bharati**, primordial rights. They constitute rights under natural law. The human element in the life of the individual is integrally founded on the sanctity of life. Dignity is associated with liberty and freedom. No civilized state can contemplate an encroachment upon life and personal liberty without the authority of law".*[157]

In endorsing Justice Khanna, the following was stated by Chandrachud J:

> *"Justice Khanna was clearly right in holding that the recognition of the right to life and personal liberty under the Constitution does not denude the existence of that right, apart from it nor can there be a fatuous assumption that in adopting the Constitution the people of India surrendered the most precious aspect of the human persona, namely, life, liberty and freedom to the state on whose mercy these rights would depend. Such a construct is contrary to the basic foundation of the rule of law which imposes restraints upon the powers vested in the modern state when it deals with the liberties of the individual. The power of the Court to issue a Writ of Habeas Corpus is a precious and undeniable feature of the rule of law."*

Now, having analysed the notable decision of the Indian case laws on constitutional rights above, there was another prominent judgment that has changed the understanding

[156] Baxi, U. (1980). The Indian Supreme Court and Politics. Eastern Book Co, p.103.
[157] Op cit. n.151

of Article 21 is the landmark case of *Maneka Gandhi*.[158] The case has apparently aroused the attention of the Indian court again on the rights under Article 21 of the Constitution. There, *Maneka's* passport was impounded by the Regional Passport office in Delhi under section 10 (3) (c) of the Passport Act 1967 owing to "public interest." However, the government did not give grounds for its move "in the interest of the public". She submitted to the Supreme Court to challenge the impugned order. Among the main grounds argued by *Maneka*:

(i) The right to travel is part of "personal liberty" within the context of that phrase as adopted in Article 21 and no individual can be denied of this benefit except "*according to the procedure prescribed by law*."

(ii) Section 10 (3) (c) of the Passport Act 1967 violates the constitutional rights promised under Article 14 (Equality before law) and Article 21 (Protection of life and personal liberty);

(iii) To impound a passport under section 10 (3) (c), public interest must take place and the mere possibility of a public interest issue occurring in the future would be no basis to impound the passport.

The declaration by the state through an affidavit filed in court claimed *Maneka's* passport had been taken because the Commission of Inquiry needed her attendance. The Supreme Court held that Section 10 (3) (c) of the Passports Act 1967 would not violate Articles 14 or even Article 21.

[158] Op cit. n. 144

The most compelling feature of *Maneka*'s case above was that the court established a fundamental doctrine of interpreting constitutional rights. The court declared there cannot be a simple textual construction of the Constitution. Those terms are rich with suggestions and hints but will only unfold when various circumstances arise. For instance, the Constitution explicitly states the right to freedom of expression and speech but does not allude to the right to freedom of the press. The Supreme Court in *Maneka* has held that the right to free speech includes the right to freedom for the media. Constitutional expressions are loose-textured, and it is for the interpreting court to draw out the distinctions in the text when circumstances demand it. The Court interprets the Constitution not purely as a Statute law but as an organic law of the country. It is further observed that *Maneka's* decision explicitly acknowledged Justice Subba Rao's dissenting judgment in *Kharak Singh* which was the correct constitutional principle although it was only a minority judgment. *Kharak Singh* has given way to what is now a settled position in constitutional law. The decision in *Maneka* carried the constitutional principle of the over-lapping nature of fundamental rights to its logical conclusion.

Now, arising from the above case-laws observation, the Indian and Malaysian courts have many similarities in term of exercising its constitutional role in safeguarding the entrenched basic rights under the Constitution by way of judicial review. However, the Indian Supreme Courts were more robust and active in playing its judicial role as compared to its Malaysian counterparts which prefer to adopt a subservient attitude to the legislature and the executive. This judicial attitude could be attributed to the undesirable curtailment of judicial powers ever since the 1988 amendment to the Malaysian Constitution as highlighted earlier.

4.4.2.3 United Kingdom

Pursuing this further to the UK's position, the system of government in the UK differs from that of Malaysia and India. In the UK, they have no written constitution, and they subscribe to the parliamentary democracy system of government. Although in the UK, judicial review of administrative action existed long ago, but the courts did not have the power to review the acts of Parliament because Parliament was supreme. This is in direct contrast with the doctrine of constitutional supremacy followed by Malaysia and India. However, beneath the low profile of the UK courts lie the creative attempt of the courts to uphold individual liberty and reinforce the rule of law. For the UK citizen, they do not support for a written bill of rights because they are brought up with the belief that the liberty of the person is inviolable and the courts will tolerate its breach only if backed by a provision of law. This infamous quote from Lord Atkin illustrates such a belief. The learned judge said: "*In accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court of justice*." [159] Thus, the British peoples felt secured under their omnipotent Parliament merely because they had full confidence in the power of their democracy. Over the years, however, it witnessed the concept of Parliamentary sovereignty has remarkably transformed in practice and in law after the UK has joined the European Convention on Human Rights and has recognised the jurisdiction of the European Court of Human Rights. However, until recently, following the wish and desire of its people, the UK government decided to opt-out from the European Union. But in the past, the UK courts have held in many instances that a European Community law shall prevail over an Act of the UK Parliament.[160]

[159] Eshugbayi v. Govt. of Nigeria, 1931 AC. 662
[160] R v. Secretary of State for Transport, ex. parte Facortame, (1991) A.C. 603.

While there were several striking judicial activism happenings in India since independence, it is believed that in the UK, following the enactment of the Human Rights Act 1998 (HRA 1998), an era of judicial activism flourishes. The unpleasant episode that has persistently surfaced during the past years in the UK has been how much the court uses its authority to decide on governmental objectives. It is further observed that usually, most erudite discussion on the latitude of judicial activism focuses on the judicial function in making the law. As of late 1989, Professor Michael Zander, when looking at the judges' role and position, whether they were the active or passive type, has noted: "*the traditional and dominant posture of the English judiciary on this question has been that the judge's role is broadly passive*."[161] Although the UK courts seldom being complained of being partisan, the courts have repeatedly been lambasted by the UK's Secretary of State for taking 'liberal' approach in coming to any judgments or opinions.[162] For example, David Blunkett MP, the then Secretary of State, gave vociferous criticisms of the court's decision by giving this statement:

> *"This relationship [between Parliament and the judiciary] has changed beyond all recognition over the past 30 years, thanks to the use of judicial review – the process by which an individual can ask the court to overturn effect or implementation of a law on their individual circumstance. Judges now routinely use judicial review to rewrite the effects of a law that Parliament has passed."*[163]

Despite the unfounded criticism hurled at the judiciary, a significant point worth mention here is the UK Law Lords lack the authority to invalidate any laws. Even assuming if the court declares an incompatibility of any law under the HRA 1998, it is still up to the UK House of Commons to determine what to do subsequently. The government must decide whether to change the law or to continue with it regardless of

[161] Zander, M. (2015). *The law-making process*. Bloomsbury Publishing.
[162] See for example "Reid attacks judges who hamper 'life and death' terrorism battle" *Independent*, 10 August 2006 and in contrast Lord Lester of Herne Hill QC's article "The Prime Minister is undermining public confidence in the rule of law and the judiciary", *The Guardian*, 16 May 2006
[163] David Blunkett MP, "I won't give in to the judges", *Evening Standard* 12 May 2003

their incompatibility. This is in direct contrast with their Indian counterparts whereby the Supreme Court in India has the authority to declare laws as unlawful, a function lacking in the UK Supreme Court, which the UK Government seems not to confer under the Constitutional Reform Act, 2005.

In the past, there have been several efforts by the UK government to propose laws to deter or remove the instances of judicial review exercised by the Court. However, the court has taken such prohibitions in a limited manner. Otherwise, it will deny the court's supervisory power.[164] The House of Lord in the landmark case of *Anisminic Ltd. v Foreign Compensation Commission*[165] was called upon to decide various issues in relation to Foreign Compensation Commission's several Orders issued under the Foreign Compensation Act 1950. However, the critical part was the provision under section 4(4) which states the decision by the Commission "*shall not be called into question in any court of law*." This is, in essence, an ouster clause similar to the one found in the Malaysia POTA 2015. Lord Reid in delivering his judgement pointed out:

> *"Statutory provisions which seek to limit the ordinary jurisdiction of the court have a long history. No case has been cited in which any other form of words limiting the jurisdiction of the court has been held to protect a nullity. If the draftsman or Parliament had intended to introduce a new kind of ouster clause so as to prevent any inquiry even as to whether the document relied on was a forgery, I would have expected to find something much more specific than the bald statement that a determination shall not be called in question in any court of law […]*" [166]

Another case directly in point where the UK courts demonstrate its readiness to evade the ouster clause is found in the immigration case of *R v Secretary of State for the Home Department* (*ex p Fayed).*[167] This case involved the Fayed brothers who were born

[164] Supperstone, M., & Knapman, L. (Eds.). (2002). *Administrative Court Practice: Judicial Review*. Butterworths.para 2.7
[165] [1969] 2 A.C. 147
[166] Ibid
[167] [1998] 1 WLR 763

Egyptians. Both the brothers had stayed in the UK since the 1960s and allowed indefinite leave to remain in the UK. They applied for naturalisation as a British citizen under the British Nationality Act, 1981 and was rejected by the Home Secretary. No reasons were provided to the Fayed brothers, and their request for the grounds of their rejection was also declined. This is due to the terms as provided under section 44(2) of the Act which stipulates that any decisions made by the UK's Home Secretary are not "*required to assign any reason for the grant or refusal of any application under*" the Act and whatever decisions made by him "*shall not be subject to appeal to, or review in, any court."* At the Court of Appeal, Lord Woolf MR found the applicants were not being informed of what aspects of their applications for citizenship have encountered problems or objections. Without such information readily available to them, the applicants would not be able to offer any information to support their applications. Thus, section 44(2) provision that states the Home Secretary's decision was not appealable nor subject to any review by the court did not discharge the minister's duty to act fairly. Further, it also does not remove the court's power to ascertain whether fairness was met.

Before the HRA 1998 is passed, judicial review of the main legislation in the UK was practically non-existent under a governmental system bound by the doctrine of parliamentary sovereignty. However, we must take note that the judicial review exercised by the UK court on their primary legislation differs from reviewing any administrative actions by the court. The then UK House of Lords in a very rare situation had exercised its judicial review power of Acts of Parliaments before the HRA 1988 came into operation. For instance, in *R v Secretary of State for Transport, (ex parte Factortame Limited)*[168] and *R v Secretary of State for Employment, (ex parte Equal Opportunities Commission),*[169] the House of Lords asserted their power not to apply legislations that

[168] Op cit. n.160 [1991] AC 603
[169] [1995] 1 AC 1

breached European Union (EU) directives. The earlier decided cases by the UK courts were in a way endorsed the supremacy of EU laws above the related domestic legislations which were found to conflict with one another. Those cases were not concerned about the constitutional principles to review the merits of Acts of Parliament. The advent of HRA 1998 changed the court's position by granting the court with robust power to review the Acts of Parliament to determine whether they follow a set of rights as codified in the law.[170] The superior courts may examine statutes authoritatively and to declare them incompatible with the ECHR.[171] Even though the HRA 1988 disallow the judiciary to nullify Acts of Parliament, it has empowered them to question the policy decisions of the legislature when passing the law.

Recent development in the UK courts has witnessed active role played by the judges in exerting its judicial power. For instance, in a case unrelated to HRA 1988 known as *Jackson v Her Majesty's Attorney General*, [172] the Law Lords there stated in obiter dicta that the courts are not to be passive, given Parliament's supremacy. Lord Steyn held that the sovereignty of Parliament means "*a construct of the common law;*" and court's review is perceived as somewhat "*even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish*"; and the HRA embodied a "*further qualification of the Diceyan conception of parliamentary sovereignty.*" Lady Hale further elucidated:

> *"[t]he courts will treat with particular suspicion (and might even reject) any attempt to subvert the rule of law by removing governmental action affecting the rights of the individual from all judicial powers; and Lord Hope stated that parliamentary sovereignty is no longer if it ever was, absolute…the rule of law enforced by the courts is the ultimate controlling factor on which our Constitution is based."*

[170] Kavanagh, A. (2009). *Constitutional Review under the UK Human Rights Act*. Cambridge University Press.
[171] Edwards, R. A. (2002). Judicial Deference under the Human Rights Act. *The Modern Law Review*, *65*(6), 859-882.
[172] [2005] UKHL 56.

The above case seems to infer the importance of the rule of law principle as enforced by the court to put in the right perspective governmental action ultimately - especially those touching on the infringement of individual rights. This can be seen applied in the security case known as *S and others v Secretary of State for the Home Departments* [173] where the respondents were nine Afghans. On 6 February 2000, they hijacked a plane on an internal flight from Kabul to Mazar-i-Sharif. The hijackers then forced the pilot to divert the aircraft to London Stansted Airport to refuel. After a long stand-off for almost 70 hours with the UK authorities, they finally surrendered and claimed asylum. When the case was decided, both the UK Prime Minister and the Home Secretary have been overcritical of how the judiciary has interpreted the law. At the High Court, Justice Sullivan ruled that the nine Afghans could remain in the UK although the government was seeking for their deportation. Prime Minister Tony Blair was cited as having said:

> *"We can't have a situation in which people who hijack a plane, we're not able to deport back to their country. It's not an abuse of justice for us to order their deportation, it's an abuse of common sense, frankly, to be in a position where we can't do this."*[174]

Then an appeal was filed in the Court of Appeal against the High Court's judgment of Justice Sullivan. At the appellate court, the court made scathing remarks about the working of the authority by specifying that:

> "*The history of this case through the criminal courts, the immigration appellate authority and back into the civil courts has attracted a degree of opprobrium for carrying out judicial functions. Judges and adjudicators have to apply the law as they find it, and not as they might wish it to be*." [175]

[173] [2006] EWHC 1111 (Admin)
[174] *BBC NEWS | UK | Blair dismay over hijack Afghans*. (2017). *News.bbc.co.uk*. Retrieved 13 January 2017, from http://news.bbc.co.uk/2/hi/uk_news/4757523.stm
[175] [2006] EWCA Civ 1157

In yet another security case where the court had been called upon to deliberate on individual rights was the case of the *Secretary of State v MB*.[176] There, the Court dismissed the contention of the radical Islamist applicants that the measures in Section 3 of PTA 2005 were irreconcilable with Article 6 on the right to a fair trial of the ECHR. The Court held that the imposed Control Order on the applicant which comprised a 14-hour curfew did not deny the applicant of his freedom. The court decisively reinforced the challenged procedures under the PTA 2005 by confirming the Control Order should be enforced *"except where to do so would be incompatible with the right of the controlled person to a fair trial."*

However, the one case-law whereby the UK Law Lords have drastically departed from the legislative intention under the amended Anti-Terrorism, Crime and Security Act 2001 (ATCSA 2001) has been *A and others v Secretary of State for the Home Department*.[177] It was also in this judgment that unveiled the boundaries of judicial strength. The onslaught of 9/11 that took place when the HRA 1998 was already in force posed a considerable concern "*to the philosophical and political integrity*" of the government's plan to constitutionalize human rights according to Gearty.[178] However, when the Labour government proposed to revise the post-911 national security plan drastically, they foresaw human rights as a deterrent.[179] But the UK government proceeded quickly to introduce ATCSA 2001 within three months in the aftermath of 9/11 was an immediate outcome of human rights concern. For example, under section 24, the Secretary of State on reasonable grounds can arrest foreign terror suspects indefinitely without a hearing if they undermine national security. In *A's* case, nine foreigners qualified by the Home Secretary as foreign terror suspects were kept in Belmarsh Prison. Subsequently, all the

[176] [2007] UKHL 46.
[177] [2004] UKHL 56
[178] Gearty, C. (2007). *Civil liberties.* Oxford University Press. p. 18
[179] Sweeny, J. (2010). United Kingdom's Human Rights Act: Using its Past to Predict its Future.

foreign suspects had appealed against their detention orders. In the court, even though the Law Lords by a majority deferred to the authority's declaration on the reason of a national emergency, however, the Law Lords found for the detainees on other restricted grounds. The court held that section 23 of the ATCSA 2001 discriminates foreigners which are contrary to Article 5 of ECHR - the right to liberty and security of the person and Article 14 of ECHR - freedom from discrimination. The court then made a declaration of incompatibility.[180] The court in arriving at its decision, diligently refer to the Strasbourg Court's opinions to support their decision[181] by dismissing the claims advanced by the Attorney General that the Court lacks the power to intervene in matters touching on national security such as the ATCSA 2001. In response to the argument, Lord Bingham decisively reasoned:

> *"[i]t is…of course true…that Parliament, the executive and the courts have different functions. But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself. The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision making as in some way undemocratic…the 1998 Act gives the courts a very specific, wholly democratic, mandate."*

Following the above case, the highest court of law in the UK at that time, that is the House of Lords had no legal authority to compel the UK Government to pay compensation to the detainees for non-compliance of the ECHR.[182] Although the decision was given in December 2004, the detainees were not set free until March 2005. It was observed that the government complied with the declaration of incompatibility, not due to the Court's authority or any pressure from the public, but because the government

[180] Leigh, I. (2007). Concluding remarks. In H. Fenwick, R. Masterman, & G. Phillipson (Eds.), Judicial reasoning under the UK Human Rights Act. New York: Cambridge University Press. p. 190.
[181] Sweeny, J. (2010). Positive political theory and the UK's new parliamentary system of government. Available at SSRN: http://ssrn.com/abstract=1703965.
[182] Wintemute, R. (2006). The Human Rights Act's first five years: Too strong, too weak, or just right? King's College Law Journal, 17, 209–227.

introduced a "sunset" clause and incorporated it into the ATCSA 2001.[183] Eventually, the UK Parliament amended Part 4 of the ATCSA 2001 and replaced it with a control order under the PTA 2005. Under the new PTA 2005, it allows the authority to issue Control Orders to restrain the liberty of peoples suspected of engaging in terrorism acts.[184] Control Orders give the Home Secretary with ample authorities and legal powers to order terror suspects to show up at the police station constantly, to stay in their home, to hand over their travel documents and to allow home visitation at any time by the police officers.

In a recent case that drawn real constitutional interest and importance has been the Supreme Court decision in *R (Evans) v Attorney General*.[185] The court has reasserted and 'reclaimed' its supervisory role in reviewing the executive actions. Briefly, the facts are as follows. Evans, a journalist with the Guardian newspaper, wanted disclosure of a particularly privileged communication between the UK government ministers and Prince Charles (the so-called "black-spider memos"). The Commissioner for Information applying the Freedom of Information Act 2000 (FIA 2000), maintained the stand adopted by the Government not to release the requested letters. On appeal to the Upper Tribunal, it was concluded in the public interests that it supports the disclosure. However, the Attorney General thought otherwise by issuing section 53 certificate[186] under FIA 2000, seeking to invalidate the decision given by the Tribunal. A judicial review was filed at the court by Evan challenging the certificate, and it was upheld by the Divisional Court. The case was further brought to the Court of Appeal. The Appeal Court reversed the decision of the lower court and found the Attorney's power was being applied illegally. The Supreme Court subsequently also concurred with the position taken by the Court of Appeal when the case reached them.

[183] ibid
[184] Bogdanor, V. (2009). The new British constitution. Portland: Hart Publishing.
[185] [2015] UKSC 21
[186] Section 53(2) FIA 2000 allow for an "accountable person" (in this case it means the Attorney General) to issue a certificate declaring that he has "on reasonable grounds" not to disclose.

At the Supreme Court, fundamental precepts of the rule of law was invoked by Lord Neuberger (with whom Lord Kerr and Lord Reed concurred) The court held (inter alia) that: (i) a court judgment binds all the parties and must not be overruled by anybody including the government; (ii) the government's conduct, and any decisions made must be reviewed by the court. In Lord Neuberger's view, the Attorney General was disobeying the two principles by proposing to circumvent the judgment of the Upper Tribunal. In cases when a full and open hearing by a court has been held to determine the issue of public interests, the said judgment cannot be overturned by the government simply because after having viewed the facts and reasons, the government now adopts another view. The Supreme Court further said if Parliament intended the Act to be applied in that manner, it would have been done 'crystal clear' which effectively support the integrity of the rule of law principle. The Supreme Court by a majority decided that the certificate issued by the Attorney was unlawful under the FIA 2000 and the certificate was also contrary to Article 47 of the Charter of Fundamental Rights[187]under the EU law. The significant of the case is that parliamentary sovereignty must be discussed in the framework of the rule of law.

Now, having examined the decided case laws in the UK, many legal scholars would have assumed that judicial decisions lead to law making process. This understanding seems to suggest that the Court of law remains unrestricted to declare any order they desire, "*even when based on such wide-ranging factors as normative legal theory, moral philosophy or judicial culture*" according to the scholar.[188] The Court's obsequiousness in HRA 1998 cases may change if the judges are ready to embrace new ideas and propositions about the way they should judge the cases that brought before them. By

[187] Article 47 provides for the right to an effective remedy and to a fair trial.
[188] Ip, E. C. (2014). The judicial review of legislation in the United Kingdom: a public choice analysis. *European Journal of Law and Economics, 37*(2), 221-247.

analysing the legislative and the judiciary '*conflicts*' as a recurring process, it is, therefore, inaccurate to pre-suppose that the judiciary has the last word when interpreting a law. The Judiciary's deferential behaviour may be better construed within the constitutional framework. However, one thing for sure is that the HRA 1998 has indeed widened the standard range of judicial work by enabling the judiciary to apply any difference of opinion between the only two institutional players viz. the UK House of Commons and the ECHR when it comes to human rights policy-making. The development in the UK courts has not been too widespread enough to deviate much from the two institutional players. Hence, it is doubtful to conclude that a single development in the Court's deferential attitude can escalate to a further robust situation. Lord Steyn exemplified these "legislative-judicial interactions," as bearing a remarkable semblance to the public view presented here:

> "*Most legislation is passed to advance a policy…frequently it involves in one way or another the allocation of resources; factors such as policy issues and costs will often be relevant in searching for the best interpretation; [i]n common law adjudication it is an everyday occurrence for the courts to consider, together with principled arguments, the balance sheet of policy advantages and disadvantages; and if the courts arrive at a result unacceptable to Parliament, the latter can act with great speed to reverse the effect of a decision, and it has done so in the past*." [189]

The above observation contributes to our further understanding that by incorporating rights protection through section 4 of the HRA 1998 into law, it was predominantly the UK's government wish to allow for judicial supervision while maintaining parliamentary sovereignty. The declaration of incompatibility limits the courts to '*courteous requests for conversation, not pronouncements of truth from on high*'.[190] The overall gist of section

[189] Ibid.
[190] Gearty, C. (2006). *Can human rights survive?* Cambridge University Press.

4 of HRA 1998 had been to adhere to the traditional '*Diceyan theory'*[191] on parliamentary supremacy while facilitating judicial control of rights protection. Such a move is interesting to the judicial review sceptic since it empowers the court to set the alarm by finding possible governmental abuse while letting the judgment of the matter in the works of the democratically elected government.

By comparing to what extent, the courts in Malaysia, India and the UK are prepared to flex its judicial power, especially in enforcing human rights through judicial review exercise, one must recognise that at its conceptual stage, judicial review is commonly understood slightly in a different way in some constitutional systems. In a system behold to constitutional supremacy such as Malaysia and India, the judicial review had two distinctive features: judicial review *per se* as part of the administrative law, and constitutional judicial review in the context of the constitutional law. The former is concerned with the direct issue of whether some actions carried out by the government or some public administrative body was actually within the power bestowed, and the actions taken complied with the correct procedural requirement. The issue here appeared to be one of the processes instead of the end results. The constitutional judicial review usually tackles the underlying issue of whether a specific law, action or decisions made was in agreement with the constitution provisions, the infringement of which will usually nullify the impugned law, action or the decisions given. It would be exceedingly simplistic to categorise administrative and constitutional judicial review as entirely different occurrences as administrative judicial review proceeding can (and often does) also involve a question of constitutional compliance. However, the administrative judicial

[191] Dicey's theory expounded that: "*The principle of Parliamentary Sovereignty means neither more nor less than this, namely that Parliament has, under the English Constitution, the right to make or unmake any law whatever; and further that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament...*" - See: Dicey, A. V. (1960). Introduction to the Study of the Law of the Constitution.

review is possible without having a constitutional query occurring. And of course, the constitutional judicial review is involved strictly with the issue of constitutionality only.

Ensuing from the above distinction, it is therefore clear that in a system based on parliamentary supremacy such as the UK, judicial review has traditionally been administrative and organised around the key idea of ultra vires.[192] Under such judicial review, the issues about executive actions are linked to exercising prerogative power (in which case many problems involving security and counter-terrorism would reside) were usually regarded to be outside the scope of judicial review.[193] However, developing a human rights culture in the UK with the creation of HRA 1998 has led to the growth in many judicial review cases to something that appears far more like the constitutional judicial review (although without the power to strike down the law unlike a system based on constitutional supremacy).[194] Mark Elliott has observed that this development has never been satisfactorily discussed as a matter of doctrine, but is related to a normative belief that as much as possible the exercise of public power must be capable of being subjected to judicial scrutiny.[195]

However, in the record of judicial history in the UK over the last ten years, ever since the terrorist attacks, it witnessed a smaller degree of judicial deference and an increased level of judicial 'muscularity' (or some may have called it '*activism*') than in the past.[196] The landmark decision often quoted to reflect this state was the case popularly known as *Belmarsh* [197] as discussed earlier although the judgment may have its critics. There are

[192] Elliott, M. (2001). *The Constitutional Foundations of Judicial Review*. Bloomsbury Publishing.
[193] In the UK, the prerogative power has been subjected to judicial review. However, the exercise of that power was ordinarily not. Fraser LJ in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at [398] summarised the position as "*the courts will inquire into whether a particular prerogative power exists or not, and, if it does exist, into its extent. But once the existence and extent of a power are established…the courts cannot inquire into the propriety of its exercise*."
[194] It is observed that under s.4 of the HRA 1998, the UK Courts can pronounce a measure to be incompatible with the HRA, but this does not affect on the operation, validity or continuation in force of that Act.
[195] Ibid. Elliott, M (2001) at p.5-10
[196] De Londras, F. (2011). *Detention in the 'War on Terror': Can Human Rights Fight Back?* Cambridge University Press.
[197] A and others v. Secretary of State for the Home Department [2004] UKHL 56

some who contend that judicial adjudication of counter-terrorist measures is simply institutionally inappropriate.[198] Though the courts appear to be not so deferential beforehand, the standard of judgement-making continues to be doubtful because there is a misapplication of the laws or because judges are delivering the perception of muscularity while acceding to executive demands. Hence, it has recalibrated down our earlier understandings of the key concepts ventilated in courts such as detention and due process.[199]

4.5 SUMMARY

In the years following 9/11, there was a hustle of legislative activity across the world aimed at extending and easing the role of criminal law in addressing and preventing terrorism threats. Criminal laws and rules were changed and widened to entail a much wider scope of restricted conduct, stretching as far as to include preparatory terrorism acts. New or transformed criminal jurisdictions, proceedings, laws of evidence and punishment were unveiled.[200] This was followed by a massive increase in terrorism prosecutions in the past years.[201] However, whether or not these general trends have contributed to a rule of law approach to counter-terrorism, or incompatibility with the fundamental principles of criminal law in counter-terrorism legal framework is most likely open for further debates.[202] What is noticeable is that the new and aggressive strategy adopted under the criminal law in reaction to terrorism threat is conspicuously unparalleled to the approach under the ordinary criminal law in response to crimes dedicated to countering an act of terrorism.

[198] Posner, E. A., & Vermeule, A. (2007). *Terror in the balance: Security, liberty, and the courts*. Oxford University Press.
[199] Fenwick, H., & Phillipson, G. (2010). Covert derogations and judicial deference: redefining liberty and due process rights in counterterrorism law and beyond. *McGill LJ*, *56*, 863.
[200] Duffy, H. (2005). *The "war on Terror' and the Framework of International Law*. Cambridge University Press.
[201] MENDOZA, M. (2011, September 4). Rightly or wrongly, thousands convicted of terrorism post-9/11. Retrieved February 11, 2017, from 9/11: Ten Years Later, http://www.nbcnews.com/id/44389156/ns/us_news-9_11_ten_years_later/t/rightly-or-wrongly-thousands-convicted-terrorism-post-/
[202] Duffy, H (2005) Op cit. n.200

Admittedly, a real or perceived risk of terrorism has the potential to disrupt our government machinery substantially. It envisages an environment where liberal democracies commitment to constitutionalism and human rights is challenged with intolerant steps being introduced by the government to curb terrorism threats. Counter-terrorism strategy is likely to be a demonstration of executive supremacy in introducing repressive counter-terrorist measures that sit uncomfortably with the ideas of proportionality, limited power, respect for individual rights, and equal application of the law. This is of obvious concern to many scholars like De Londras and Davis. Both the scholars opined that:

> *"Within a system of separated powers, there are three potential responses to the limitation of individual liberties resulting from Executive actions during the times of violent, terrorism-related emergency: (i) trust the Executive to behave responsibly and lawfully; (ii) rely on the Legislature and the popular democratic processes to force the Executive to behave responsibly and lawfully and minimize judicial intervention; or (iii) call on the Judiciary to intervene and restrict unlawful behaviour produced by the Executive, the Parliament or both acting together"* [203]

Both of the above scholars acknowledged that executive supremacy was unacceptable by concurring that some constraints on the executive's broad power were desirable. Often, the on-going use of closed materials in counter-terrorism cases give rise to complaints of the lack of transparency, which in turn creating an even more suspicious environment by simply trusting the executive actions. Therefore, this called for a democratic state to have a robust and independence judiciary to review governmental actions deemed unlawful. Essentially, the point is whether 'counter-terrorist judicial review' can help to give protection to the state from the acerbic effect of counter-terrorism and vice versa 'the people' from its discriminatory powers of the government. In a typical counter-terrorist judicial review, it entails challenging the constitutionality or human rights compliance of

[203] De Londras, F., & Davis, F. F. (2010). Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanisms. *Oxford Journal of Legal Studies*, *30*(1), 19-47.

counter-terrorist measures under the Constitution or as part of a broader proceeding such as habeas corpus petitions or defences to criminal charges.

The key point to any debate about the role of the courts in counter-terrorist judicial review displays the inherently constitutionalist question it evokes. At its core, the issue is about how rather than whether to ensure that counter-terrorism actions do not represent extreme exercises of authority. Usually, the issue at hand pertains to how those counter-terrorist measures and limitations may be determined. Another pertinent issue to consider is how we will evaluate whether counter-terrorist actions have gone beyond those boundaries or not, even though figuring out the limits is not a straight forward one. It produces challenging issues like: should limitations be found and confined only to the local law? Or in the case of the UK, do European Convention laws have any influence on the UK domestic laws? – (this was raised before the UK finally left the European Union). How do somewhat unclear but important principles such as the rule of law, natural justice, and the concept of limited power get taken into account? Undoubtedly, constitutions are significant sources, but the content of a constitution is not necessarily uncontested. Neither is whether or not any particular constitution may leave the implementation and governance of counter-terrorism measures at the hand of the executive with little or no application of constitutional rights and values. To say that 'the constitution' acts as a source of limitations are somewhat confused the proposition. Besides, in some constitutional systems, for example, like Malaysia and India, the enacted law with a constitutionalist character can play a constitution role in determining the limits, however, it invokes concerns on whether it can be (or should be) applied to restrict parliament and the executive by way of judicial review.

The moment the limitations have been determined, there may arise another problem on how to make sure that they are followed. Certainly, in the right situation, self-

regulation would work best to ensure conformity. But, the government departments, the public service and the Parliament together with the executive itself must ensure compliance. Unfortunately, history tells us this does not happen in reality. Any account of counter-terrorist measures by states was variously found to be unconstitutional, incompatible, even in a state like the UK having the HRA 1998 with constitutionalist character, were discovered to contravene the international human rights law standard. It is this concern that considerable conflicts in opinion evoke debates amongst the institutional power players.

In the ordinary course of events, we incline to depend on the judiciary to determine where the boundaries of permissible government actions lie. This is so even in parliamentary supremacy model of government like the UK in which, the doctrine of ultra vires allows for the underlying concept of having judicial review. Ultra vires demand that state establishments do not apply power to any greater degree than explicitly sanctioned by the law. Meanwhile, in jurisdictions that followed constitutional supremacy, for example, in Malaysia and India, the power to decide the limitations of permissible government action sits within the purview of the courts. However, there is an uninspiring historical past of counter-terrorist judicial review episodes as highlighted in these jurisdictions. For example, the Malaysian courts are authorised to nullify government's behaviour if they are found to violate the people's rights, but unfortunately, the Malaysian judiciary has been a long way from vibrant in safeguarding the fundamental rights as promised in the Constitution. The predominant judicial stand has been to hold to a rigid literalist approach within the four walls of the Constitution - followed by a narrow-minded disposition to even consider the fundamental rights concepts. Hence, as observed, the Malaysian courts had a greater tendency to submit substantially to the executive branch without carrying out hardly any meaningful review over the executive infringements on

the core human rights. Even though the concept of Constitutional supremacy is the recognised fabric of the Malaysian legal system, the entrenched broad powers of the governing federal government have created a scenario of 'de facto' parliamentary and executive supremacy. It is, therefore, postulated in this chapter that to reclaim the Malaysian judiciary constitutional position as a co-equal branch of government, they ought to be amenable to continue its constitutional responsibility to affirm its dedication to constitutional supremacy and to uphold the rule of law. For an example, the recent landmark development of law such as *Semenyih Jaya's case* should be further encouraged and expanded. This should continue to be the case even when the powerful political branches are attempting to overstep these values. The courts must also play an increased role in monitoring such powers of the political branches. This calls for a change of direction of the judiciary's attitude toward interpreting constitutional rights which make out a case for '*judicial activism*.' Encouraging a constitutional adjudication approach in a manner true to its core principles would be a desirable step for the Malaysian judiciary towards constitutional redemption especially when challenging rights under terrorism cases.

Comparing the position of the Malaysian judiciary with that of India, the Indian Supreme Court appears to be more robust and rights orientated. As highlighted in the case-law cited, judicial activism occurrence in the Indian court has been elevated to a considerable extent. Undoubtedly, in India, judicial activism has accomplished a lot to improve the conditions of the public. Several wrongful actions by the authorities or individuals were put in the correct perspective by the court. It saw the Indian courts have transformed to make justice readily available to the needy, and the deprived segment of the community. This development created by the Indian court offers to keep alive the expectation of the individuals in seeking justice and eventually, to motivate everyone to apply for redress by using the legal system via the court. The Indian Constitution contains

several provisions which empowered the judiciary there to play and exert an active role, especially on the fundamental rights issue. Thus, the Indian Supreme Court has been touted as the guardian of citizens' rights. In a direct contrast with Malaysia, the Malaysian judiciary has much to emulate its Indian counterparts in these regards, and it is proposed that the Malaysian judges should take a more active role, especially in safeguarding the basic constitutional rights of the citizen.

In the scholarly discussion on judicial muscularity or activism, it revolves several concepts in the scholarly field: institutional appropriateness, quality and capacity. For instance, according to Jenkins, judicial muscularity from a rights-based viewpoint of the superior courts can occasionally be too obscure in setting down principles or choosy in what they will review. Furthermore, what seems to be muscularity sometimes must be viewed in its entirety before any qualitative findings are made.[204] De Londras contends there may be cases of an implied muscularity on the surface, but it may look disappointing because the courts felt constrained in their conclusions because of worries on inter-state comity and foreign affairs.[205]

While the debate on the advantages of having the government over the judicial solutions in countering terrorism cases to prevent unwanted, ineffectual or protracted litigation, generally, it is due to the lack of a political answer that the role of courts is activated. The refusal of the government to acknowledge and compensate affected individuals for egregious infringements in the name of counter-terrorism is antithetical to fundamental principles of equality before the law and human rights. In this regard, the courts have crucial roles to play in dealing with this anomaly and enabling a measure of fairness for the victims. Hence, there can be little doubt on the importance of the principle

[204] Jenkins, C. D. (2014). When good cases go bad: unintended consequences of rights-friendly judgments. In *Critical Debates on Counter-terrorism Judicial Review*. Cambridge University Press.
[205] de Londras, F. (2014). Counter-Terrorist Judicial Review as Regulatory Constitutionalism.

of judicial oversight as a measure of accountability. The role of the courts is definitely crucial in safeguarding the legal rights of the individuals and in reaffirming the fundamental rule of law values on which a democratic system of government hinges.

When we study on how counter-terrorism measures taken by states can be checked and balanced, the role of judicial review in restraining exercises against governmental abuse is indispensable, and most scholars consensually recommended the role of the judiciary should be confined towards constitutionalism even when during a state of emergency. Regardless of the debates and conflicts on the suitability, efficiency, quality and practice of counter-terrorist judicial review by the court - the root of all these rhetorical arguments fostered is the preservation of the core constitutionalism during the precarious state of counterterrorism era.

CHAPTER 5: COUNTER-TERRORISM LEGAL FRAMEWORK AND ITS IMPACT ON THE NORMATIVE CRIMINAL LAW SYSTEM

5.1 INTRODUCTION

In Chapter 4, it is discovered that the courts more often than not will display a deferential attitude towards the government - by granting the governments and prosecutors what they sought. Terrorism offences have basically survived constitutional scrutiny even when they have been a covert derogation of the Rule of Law values as illustrated in Chapter 3 earlier. Therefore, in the quest for what solve the ongoing terrorist menace has led to the readjustment of criminal law provisions that particularly aim at curtailing terrorism. Such laws and regulations have been criticised for two irreconcilable reasons. One is that the law right now punishes terrorist acts and also those found to be in the planning stage to commit those acts.[1] Hence, critics of the conception of this new terrorist offences have cited their redundancy as the new offences are only window dressing hoping to calm the "worried populace."[2] An alternative critique is that terrorism offences have gone further than what the criminal law needs to proscribe "*by adding inchoate liability on top of inchoate crimes risk creating atrocities such as attempting conspiracies*." [3] The earlier criticism is undeniably suitable in connection with the accomplished terrorist acts, and to a substantial extent, planning for terrorist activities could also be penalised as conspiracies or attempts. A typical ingredient of conspiracy is there needs to be a consensus to commit an act that, if committed, would make up a crime, and it is irrelevant that a party to the conspiracy later has second thoughts.[4] Some need to

[1] Benjamin Jr, J. J. (2009). In Pursuit of Justice Prosecuting Terrorism Cases in the Federal Courts-2009 Update and Recent Developments. *Case W. Res. J. Int'l L.*, *42*, 267.
[2] Metcalfe, Eric. 2007. *The Future of Counter- terrorism and Human Rights, 32-3* and Parker, E. (2007). Implementation of the UK Terrorism Act 2006-the relationship between counterterrorism law, free speech, and the Muslim community in the United Kingdom versus the United States. *Emory Int'l L. Rev.*, *21*, 711. (citing similar view on this)
[3] Macklem, P., Daniels, R. J., & Roach, K. (2001). *The security of freedom: Essays on Canada's anti-terrorism bill*. University of Toronto Press.
[4] Chesney, R. M. (2006). Beyond Conspiracy-Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism. *S. cal. l. rev.*, *80*, 425.

have overt actions evidencing the conspiracy; others do not, albeit the lack of overt acts may weaken evidence of the conspiracy. This research observes there are justifications for the conception of this extraordinary new terrorism offences. First, some suspected terror activities cannot get caught by the substantive offences and conspiracy. For example, a benefactor may give money to a terrorist organisation for the purpose it is to be applied for non-profit needs or to fund legitimate propaganda. But the benefactor may be unaware that the organisation funded by him has links with terrorists. If so, the person is not guilty of a conspiracy because the person does not wish to support the terrorist group or their objectives. But an insensitive government may conclude that even if the organisation uses the money only for the cause for which they are given, this may still help to encourage the organisation's capability to indulge in terrorist activities.[5] Therefore, by criminalising an offence to prepare for terrorism makes it much easier to curb would-be terrorists. In the UK, the law has expanded encouragement to include "glorifying terrorist objectives."[6] Similarly, in Malaysia, it is an offence to support any terrorist organisation, and the penalty prescribed for this crime is very severe. This is found under section 130J of the Penal Code (Chapter VIA) which states: (*inter alia*) whoever gives support to any terrorist groups can be liable to life imprisonment or imprisonment for a term not exceeding thirty years. A second justification for the creation of this extraordinary terrorism offences is that the government may try to make it much easier to secure convictions against the terrorists and finally, the third justification is that terrorist offences may call for extraordinary approach and treatment. That explains why bail is not allowed for those charged with crimes of terrorism. Terrorism offences usually

[5] Flanigan, S. T. (2006). Charity as resistance: Connections between charity, contentious politics, and terror. *Studies in Conflict & Terrorism, 29*(7), 641-655.
[6] Section 1(3) (a) of the Terrorism Act, 2006. See also "*Redundant restriction: The U.K.'S offense of Glorifying terrorism.*" (2017). Retrieved February 20, 2017, <from http://harvardhrj.com/2010/10/redundant-restriction-the-u-k-%E2%80%99s-offense-of-glorifying-terrorism/>

attract a higher sentence if a person is involved or promotes such crimes. On this feature, Lord Philips opined that:

> *"If sentences are imposed which are more severe than the circumstances of the particular case warrants, this will be likely to inflame rather than deter extremism."* [7]

For the government, new anti-terror laws enable them to track and capture individuals whose actions would probably not get caught by the traditional criminal law provisions. Essentially, terrorism offences are targeted at apprehending potential culprits at an initial stage of their preparation or planning. If a serious threat is coming from terrorist attacks, the timely intervention could bring down the probability of severe harm to the civilians. This is the best defensive strategy preferred by the government. However, there are concerns by critics about the use of the new terrorism law to penalise individuals for acts they may or may not commit rather than for acts they have already committed. This is indiscernible because the new terrorism offence appears to look more at the future of non-terrorism instances. Critics are also concerned with the relaxation of the burdens of proof which eventually will lead to more unlawful prosecutions and convictions. Although legislatures have reacted aggressively to contain the act of terrorism in various ways, this chapter will study a widespread propensity to enlarge the capability of the criminal law to pursue preventive measures to counter terrorism offence. Despite the courts adopting a strict interpretation of the constitutional rights, yet, many terror suspects have been found guilty. Having said that, many terrorism convictions may come at a cost. A consequence of the costs is that, admittedly, authorities do make errors of judgement, and those who pay the most for the errors are individuals whose freedom are already constrained because of the wide-ranging executive powers are given to the 'new' criminal

[7] *Rahman v R* [2008] 4 All ER 661, per Lord Philips.

justice systems. Hence, the aim of this chapter is to analyse the overall challenge to the underlying criminal law framework in countering terrorism.

5.2 THEORETICAL FRAMEWORK OF COUNTER TERRORISM MODELS

5.2.1 The prevalent criminal justice and the war models

Wilkinson puts forward his view that in a state that adheres to democracy, the main goal of a counter-terrorism approach should be to safeguard and upkeep democratic principles besides the Rule of Law and its populace.[8] He emphasises that these objectives should outweigh the need of eradicating terrorism and political violence, otherwise it will weaken democratic ideal. Further, Wilkinson postulates that "*any bloody tyrant can solve the problem of political violence if he is prepared to sacrifice all considerations of humanity, and to trample down all constitutional and judicial rights*." [9] In countering terrorism, two recognised methods are namely, the prevalent criminal justice model and the war model.[10] The latter recommends the maximum use of force to reach the objectives while the former recommends the adherence to the Rule of Law principles and to use minimal force in only exceptional conditions.[11] The two models seem immiscible; but, they usually meet or are applied in combination. The manner in which the risk of terrorism is presented supports the two models mentioned. Chalk[12] contends counter-terrorism strategies must be practical and should also adhere to the standards of liberal democracies. The majority of the liberal democracies view the act of terrorism as a criminal offence instead of subversive political pandemonium; therefore, it may become a question for

[8] Hannon, P. J. (1979). Paul Wilkinson. Terrorism and the Liberal State. Pp. xiv, 257. New York: John Wiley, 1977. *The ANNALS of the American Academy of Political and Social Science*, *441*(1), 202-202.
[9] ibid
[10] Wardlaw, G. (1989). *Political terrorism: Theory, tactics and counter-measures*. Cambridge University Press.
[11] Crelinsten, R. D. (1998). The Discourse and Practice of Counter-Terrorism in Liberal Democracies. *Australian Journal of Politics & History*, *44*(3), 389-413.
[12] Chalk, P. (1995). The liberal democratic response to terrorism. *Terrorism and Political Violence*, *7*(4), 10-44.

criminal justice agencies.[13] Steps implemented ought to follow the Rule of Law that allows suspected individual protection under the law and the right to have fair trials. In Malaysia and India, these privileges are provided in the Constitution. Whereas in the UK, the rights of the individual which include the right to a fair trial and the right to privacy, are assured by the European Convention on Human Rights. However, on the local front, law enforcement agencies usually employ the opposite by using physical force while interrogating suspects in extreme situations.

The war model presumes that terrorism is definitely not a simple criminal act, rather, an activity of violence towards the state.[14] Those who support terrorists or terrorists themselves are generally regarded as state enemies and are regularly portrayed as dangerous individuals that threaten our peace-loving life. When terrorism is presented in this fashion, it will rationalise military engagement by the state. But in theory, war treaties including the International Humanitarian Law (IHL) regulate these interventions by the military power.[15] On the other hand, other social contract advocates like Rousseau claims persons who contravene societal privileges or breach the social contract are no more regarded as belonging to the state. Instead, these people are now waging a 'war' against the state.[16] By breaking the social contract, they claim, takes away the entire relationships involving that person and the state.[17] Some posit that the state government is liable to offer safety and protection to its citizens even if exceptional steps may be needed. Some claim the legal order lies in the state's sovereignty, and the Rule of Law can stand out to increase the confidence of the public. Thus, the focus of the war model approaches as

[13] Zimmermann, D. (2005). Between minimum force and maximum violence: combating political violence movements with third-force options. *Connections: The Quarterly Journal*, *4*(1), 43-60.
[14] Baudrillard, J. (2003). *The spirit of terrorism and other essays*. Verso.
[15] Kalshoven, F., & Zegveld, L. (2011). *Constraints on the waging of war: an introduction to international humanitarian law*. Cambridge University Press.
[16] Rousseau, J. J. (1895). *The Social Contract; Or, Principles of Political Right* (No. 83). Allen and Unwin.
[17] Gómez-Jara, C. (2008). Enemy combatants versus enemy criminal law.

Schmitt claims, is actually to restore legal order and the status quo by eliminating terrorists.[18] Therefore, using strong force is the key to this approach.

Whilst war rules are available under the domain of international law, however, they differ significantly if compared with the local criminal law. As an example, the globally acknowledged Geneva Conventions "*remain the foundation for the protection and deference of human dignity in armed conflict*"[19] by criminalising treatments of torture while under detention, the maltreatment of convicts, and also the bullying of detainees in the time of war. Basically, member states who are signatories under the Conventions are restricted by their procedures and regulation providing a safeguard to war detainees or civilians and armed forces involved in the conflicts. However, the absence of powerful international enforcement agencies complicates the enforcement of IHL provisions. As documented by Goldsmith and Posner, conformity by the states takes place perhaps once it is determined to be financially and politically free for the state to comply or when pressured hard by the mighty states.[20] The lack of enforceability results in the decreasing recognition for international law[21] and military actions which supposedly to keep to IHL limit on civilian causalities and harm were neglected or ignored. As a result, collateral damage incurred has bigger impacts because it undermines people's trust and opinions on the legitimacy of governmental actions.[22]

Following the above discussion, the distinctions regarding the criminal justice model and the war model seem to rest on three levels of strategy that is pursuit, capture, and sanction.[23] The tasks of pursuing and capturing include the catching of the alleged

[18] Schmitt, C. (2010). *Political Theology: Four Chapters on the Concept of Sovereignty*. University of Chicago Press.
[19] The Geneva conventions today. Retrieved February 18, 2017, from <https://www.icrc.org/eng/resources/documents/statement/geneva-conventions-statement-090709.htm>
[20] Goldsmith, J. L., & Posner, E. A. (2005). *The limits of international law*. Oxford University Press.
[21] Duffy, H. (2005). *The' war on Terror' and the Framework of International Law*. Cambridge University Press.
[22] Younge, G. (2016, December 23). The war on terror has been about scaring people, not protecting them *The Guardian*. Retrieved from <https://www.theguardian.com/global/2010/jan/03/yemen-anti-terrorism-rendition-security>
[23] Feldman, N. (2001). Choices of law, choices of war. *Harv. JL & Pub. Pol'y*, *25*, 457.

wrongdoer, preserving the procedural aspect of criminal justice, and affirming the presumption of guilt until proven otherwise in court. In the tracking and capturing levels, lethal force is kept at minimal. Only courts can determine the suspect's culpability and give out punishment to offenders. The three tiers approach were similarly applied during armed conflicts. The pursuit approach taken might involve the plan to kill the enemies, and incarceration is not established by culpability or if the person is innocent or not, but to put a stop to the prisoners of war from engaging in further battle. Hence, the actual duration of how long a suspect can be held under detention is not decided by the suspect's activities but more on the length of the conflict. It can be argued that both models discussed above create a one-tier answer to multiple problems. Perhaps the approach adopted under the criminal justice model is more concerned with the aftermath of an act of terrorism - striving towards getting individuals liable to face court actions; whereas, for the war model, it handles terrorism by using pre-emptive military operations. Therefore, counter-terrorism strategies following the war model will undermine and reject the Rule of Law because they fail to consider separatism or some other types of insurrection with "*due regards to human rights principles, democracy and the Rule of Law.*"[24] Jakobs added that:

> "*The state has no need to deprive enemies of all of their rights. The state does not need to do everything it can do, but actually may refrain from doing so in order to leave the door open to a future peace agreement with the enemy.*"[25]

Therefore, the war model may convert what would otherwise be a prospective negotiating position into further clash by denying either side the opportunity of reaching a collectively good outcome.[26] The deployment of military actions as Malvesti puts it are,

[24] Wilkinson, P. (2011). *Terrorism versus democracy: The liberal state response*. Taylor & Francis.
[25] Gómez-Jara, C. (2008). Enemy combatants versus enemy criminal law
[26] Schelling, T. C. (1980). *The strategy of conflict*. Harvard university press.

"*a blunt, ineffective instrument that creates a cycle of vengeance with minimal gains at best.*" [27] The war model fails to deliver a practical approach to address terrorism menace since the war model disregards the underlying motives of terrorism. It is observed that the war model has now progressed toward a more criminal justice model.

5.2.2 The 'new' extended criminal justice model

The extended criminal justice model enables the government under certain situations to intrude civil liberties, for example, during a state of emergency. Usually, this occurs outside the traditional criminal justice systems. Administrative actions are guided by legislation and must be compatible with the threat, accountable, and the actions taken must be legitimate.[28] Criminal law-enforcement authorities remain the key players under this new model. It is learned that political meddling during the administrative operations of the police force and the courts is minimal. Wilkinson asserts by perpetrating crimes, "*it insinuates the moral conviction of the offender; hence, terrorists criminalise themselves when they pursue a systematic scheme of terror, making their acts synonymous to crime*." [29] Under this new extended model, suspected terrorists are dealt with under the boundaries within the national legislation. It is argued the reason for this model's legitimacy is based on its respect for the Rule of Law ideals such as the rights of individuals and the notion of a fair process.[30] To dispense with terrorism menace, most states have already established specific legal frameworks specially to counter such threats. In doing so, the earlier discussed criminal justice model besides inhibiting personal threats, it includes "*symbolic denunciatory roles which strengthen faith in societal values. The idea that justice can better be achieved in the context of governmental*

[27] Malvesti, M. L. (2002). Bombing bin Laden: Assessing the effectiveness of air strikes as a counter-terrorism strategy. *Fletcher F. World Aff.*, *26*, 17.
[28] Walker, C. (2009). *Blackstone's Guide to the Anti-Terrorism Legislation*. Blackstone Press.
[29] Wilkinson, P. (2011) ibid. (n.24)
[30] Sunshine, J., & Tyler, T. R. (2003). The role of procedural justice and legitimacy in shaping public support for policing. *Law & society review*, *37*(3), 513-548.

actions is implausible" according to Walker.[31] Further, Feldman thinks juxtaposing between the criminal justice model or even the war model is hard if not difficult as there are legal, policy and political dilemmas that might disrupt the actual strategy of criminalization.[32] But on the other hand, the new extended criminal justice model accepted this kind of problem and based on the opinions of Pedahzur and Ranstorp, is the best-endorsed strategy.[33] Walker argues that the government ought to be entrusted to carry out its duty to defend the state's interests given that democracy is not intended to be a suicide pact.[34] Thus, in an emergency situation in the UK for example (Pre-Brexit), the ECHR makes it possible for derogations by the government should there be a continuous and also justifiable risk, but restricts the emergency powers of the executive to ensure they are proportionate to the danger at hand. The executive is not provided with a 'blank cheque" considering the fact that derogations could be questioned in court.[35]

As highlighted, with the formation of this new criminal justice model, it enables the government to impinge on individuals' freedom and rights. As a result, it appears to depart from the traditional criminal justice systems. Walker comments that the one proper counter-terrorism strategy has got to be "*consistent with the Rule of Law and proportionate response.*"[36] In the war against drugs, the new extended criminal justice model like the one under counter-terrorism has also been applied successfully. This goes to demonstrate that the fight against terrorism in its new setting, is not just the only circumstance in which this new criminal model has been used. Pre-emption as one of the striking features in the new criminal justice model continues to be essential to prevent the

[31] Lennon, G. (2016). Clive Walker, Blackstone's Guide to the Anti-Terrorism Legislation.
[32] Feldman, N. (2001). ibid
[33] Pedahzur, A., & Ranstorp, M. (2001). A tertiary model for countering terrorism in liberal democracies: the case of Israel. *Terrorism and Political Violence*, *13*(2), 1-26.
[34] Walker, C. (2009). ibid.
[35] Hartman, J. F. (1981). Derogation from Human Rights Treaties in Public Emergencies - A Critique of Implementation by the European Commission and Court of Human Rights and the Human Rights Committee of the United Nations. *Harv. Int'l. LJ*, *22*, 1.
[36] Walker, C. (2006). Clamping down on terrorism in the United Kingdom. *Journal of International Criminal Justice*.

loss of life.[37] Other extraordinary features include granting broad power to the law enforcement, revised legal procedures and the creation of specialised tribunal or courts to handle terror suspects. Crelinsten declares this as the flexibility of the new extended criminal justice model as distinguishing between political unrest and terrorism is challenging as they might arise out of political objectives.[38] Therefore, by settling on a choice of a simple model of the criminal justice model is inadequate, and efforts have been started to strengthen counter-terrorism endeavours repeatedly. Hence, the adjustments or modification focus primarily on pre-emption to avert injury to the general populace and to target people who might be engaged in terrorism or those that may serve as a potential risk to the security of the state.[39] Scholars are of the view that the departure from the Rule of Law is unlikely under the new criminal justice model simply because special measures are contained in the respective national law to provide for executive and judicial supervision. But it is noteworthy that executive actions usually depart from democratic ideals and transgress civil rights.[40] Crelinsten further points out that: "*It has essentially been via deformations of the criminal justice system that liberal democracies have shifted away from the Rule of Law and democratic stand*."[41]

Following a period of noticeable differences involving the criminal justice models in countering terrorism, internal and external defence strategies are now merging.[42] The right to one's freedom is no more the limitation of safety when the boundary between the two has already blurred. But, when freedom is accepted as the criteria of security, security knows no boundaries.[43] Therefore, governments around the world struggle to legitimise

[37] Walker, C (2009) ibid (n.25) p.23
[38]Crelinsten, R. D. (1998). The Discourse and Practice of Counter-Terrorism in Liberal Democracies. *Australian Journal of Politics & History*, *44*
[39] Masferrer, A. (Ed.). (2012). *Post 9/11 and the state of permanent legal emergency: security and human rights in countering terrorism* (Vol. 14). Springer Science & Business Media.
[40] Crelinsten, R. D., & Schmid, A. P. (1992). Western responses to terrorism: A twenty-five-year balance sheet. *Terrorism and Political Violence*, *4*(4), 307-340
[41] Crelinsten, R. D. (1998) *ibid* (n.29) p.399
[42] Bayley, D. H. (1990). *Patterns of policing: A comparative international analysis*. Rutgers University Press.
[43] Buzan, B., Waever, O., & de Wilde, J. (1998). A new framework for analysis. *Boulder, CO: Lynne Rienner*.

the exceptional measures regarding the current menace of terrorism problems. Coordination and collaboration are in accord with this new paradigm and structures - forming a closer working relationship between various law enforcement, intelligence services and other international partners. As highlighted above, inside the new extended criminal justice model, steps have been taken by the executive to enhance the police power to address terrorism. For the safety of the state, executive actions may seem to depart from the human rights laws or the Rule of Law, however, the greatest fear is that the legislation cannot limit executive actions. As compared to the two models discussed, that is criminal justice and war models, the underlying root causes of terrorism are inadequately addressed. However, it is discovered that both criminal justice models (new and traditional) generally give due respect to the Rule of Law principles. In addition, the new extended criminal justice model makes further allowance to allow government actions to be incorporated into the national legal system to enhance law enforcement and to spruce up their strength to address terrorism which will be further explored in the later sections in this chapter.

5.3 THE ADVENT OF A 'CONTROL CULTURE' IN COUNTER-TERRORISM MEASURES

In the global scene, we have witnessed military deployments, changes in diplomatic relationships, and momentous shifts in the international legal structure. Countries with a commitment to the Rule of Law and democratic governance are among the many that have carried out these changes, and some have even applied the counter-terrorism measures to advance quelling of domestic dissent. The sacrifices of citizens' liberty these countries are willing to make to tackle security problem raise alarm bells on the constitutionality of the state. Scholars and non-governmental organisations including

human rights groups have pointed out these unprecedented efforts in countering terrorism have become a 'normal' part of the legal and political framework of a state.

Fewer inroads have been made into the much larger task of examining the normalisation of this extraordinary measures, that is, the capacity of such measures to be used in response to other (and generally far less serious) threats than that of terrorism. The aim of this sub-heading 5.3 in this chapter is to investigate the 'seepage' of this developed extraordinary legal measure in the name of counter-terrorism into the traditional criminal justice system. Therefore, the central question is: how have these extraordinary legal measures in the 'war' against terrorism influenced the traditional fabric of criminal law and justice? To what degree has terrorism brought the momentum for such states to establish a 'culture of control' more widely? The substance of these new laws and the extraordinary measures featured in it is largely based on the preventive paradigm which has dominated counter-terrorism efforts in the twenty-first century. When the state commits to the usage of the preventive law as a tool, the evidence of wrongdoing goes through a radical change to satisfy a particular standard to be adduced by the state. However, this is put under further strain by creating broad offences meant to prevent, rather than punish the commission of the crimes. Further, the criminalisation of early preparatory activity in Malaysia especially which includes '*conspiracy to do any act of terrorism*'[44] calls for a heavy reliance on intercepted evidence. But, regardless of what specific approach is taken, the traditional protection of individuals by the established rules of evidence is certainly diminished. For example, using immigration processes to detain or deport a non-citizen or to cancel a citizen's passport, and issuing control order as seen in the UK or the preventive detention orders under the Malaysian POTA 2015, involve the reliance on material that may fail to meet any appropriate evidential standard

[44] Section 130L of the Malaysian Penal Code

at trial. The chief purpose in designing such schemes is for the state to avail itself of liberty-depriving powers without the need to comply with the standards of proof and evidence which apply to the criminal justice model as traditionally conceived. However, there is an obvious tension here, as the conduct which gives rise to the making of such orders (and/or the use of immigration processes) and the penalties for breach of these orders have clear bearings to criminal wrongdoing.

The next issue called for consideration is what role does the judiciary play in a system geared so strongly towards prevention? As already discussed in Chapter 4, typically, the courts have been unwilling to question the executive's appraisal of a specific threat and have authorised sweeping and disproportionate persecution of human rights (such as the impounding of the suspect because of their racial or religious background). Hopes that judiciary might act to curb the excesses of state reactions to the threat of terrorism were raised by the UK House of Lords in *A v Secretary of State for the Home Department*.[45] The House of Lords, in that case, did declare the indefinite detention of aliens to be incompatible with the HRA 1998, which led to the swift repeal by the legislature Part 4 of the Anti-Terrorism, Crime and Security Act 2001 (ATCSA 2001). It is to be observed that the *Belmarsh* case is not a strong indicative of the close relationship which the judiciary has forged with the executive branch of government in the UK. Complaisance on national security problem remains the tone of the judicial move irresistibly. After the judgment in *Belmarsh* on the incompatibility of Part 4 of the ATCSA 2001 with HRA 1988, the House of Lords has efficaciously legalised the infringement of detainees' liberties committed by the UK Home Secretary for using the control orders. Although several applications made by individuals' subject to the orders have succeeded to some degree, Ewing and Tham are right to say the real significance in these cases "*lies*

[45] [2004] UKHL 56

not in what they prohibited but in what they appeared to permit".[46] This means that the nature of the courts' complicity in this current security agenda of the state might also be viewed as in line with the government approach to the prevention of terrorism. This explains the expansion of broad legal powers across the board–from surveillance, stop and search, interrogation and detention of terror suspects, with the eventual possibility of prosecution under the broadly framed terrorism crimes. The manner these tools work is through the activities of numerous agencies and actors such as the police, prosecutors, officers in the Home Ministry and the immigration department. The development of this new extraordinary legal measure in responding to terrorism has been identified as creating a trend of 'control culture' in our society now.

5.4 THE NORMALISATION OF EXTRAORDINARY MEASURES UNDER THE ORDINARY CRIMINAL LEGAL SYSTEM

5.4.1 Criminalising inchoate acts as a terrorist offence under the Malaysian Penal Code

Central to Malaysia's legislative answer to terrorism has been an emphasis on the pre-emption of such conduct from taking place. While this is one of the extraordinary features of anti-terrorism laws, it is important to know the need of pre-emption as a strategy for tackling criminal activity before the 9/11 tragedy. According to Zedner, central to legislative regimes set up in this atmosphere was a transformation from a "*post-crime*" society, in which crime is taken primarily as harm or wrong caused to a "*pre-crime*" society in which the outlook is changing to predict and prevent that which has yet to happen'.[47] It is, therefore, a misconception to see 9/11 as essentially changing the approach of states towards criminal activity. Instead, Goold and Lazarus note that the

[46] Ewing, K. D., & Tham, J. C. (2008). The continuing futility of the Human Rights Act. *Public Law*, *668*.
[47] Zedner, L. (2007). Pre-crime and post-criminology? *Theoretical criminology*, *11*(2), 261-281.

impact of 9/11 was to prompt states "*with a novel opportunity to develop new and powerful rhetorical arguments, in particular, the claim to exceptionalism, in favour of increased state power*." [48]

The offence regime under the Malaysian Penal Code highlights the centrality of pre-emption by Malaysia's legislative response to terrorism. The Malaysian Penal Code already contains several inchoate crimes such as attempt,[49] abetment[50] and conspiracy.[51] These offences operate by attaching to substantive offences and punishing conduct that has worked towards, but not in fact occasioned, the commission of one or more of those substantive offences. 'Attempt' applies where a person intends to commit a particular offence and he or she has taken steps towards it and performed in a manner that is "more than merely preparatory" to the commission of that offence.[52] For example, Person A would not be guilty of an attempt to murder Person B if he or she merely bought a gun intending, at some later date, to shoot Person B. However, Person A would be guilty of an attempt to murder Person B if the gun jammed while Person A sought to fire it at Person B. Person C would be guilty of 'incitement' if he or she had encouraged Person A to commit the offence of murder with the intention that the offence would be committed (regardless of whether Person A in fact engaged in any conduct in furtherance of the offence). As for conspiracy, it covers an even broader range of action than either 'attempt' or 'incitement'. It applies where a person enters into an agreement with at least one other person to achieve a common aim which is unlawful. There is no need to have a direct communication between all the parties to the agreement, or even knowledge on the part of each party to the identities and precise activities of the other parties. Furthermore, nothing need be done to further the agreement.

[48] Lazarus, L., & Goold, B. (2007). Introduction: Security and human rights: The search for a language of reconciliation. *Security and human rights*, 1-24.
[49] Section 511 of the Penal Code
[50] Section 107 (ibid)
[51] Section 120A (ibid)
[52] See the illustrations provided under section 511 of the Penal Code.

Having examined the framework of preparatory criminal offences above, a series of preparatory terrorism offences were introduced into the Malaysian Penal Code that stretched far away from the purview of the current inchoate crimes. These offences expressly criminalise acts carried out to prepare the groundworks for terrorism. For instance, if an individual has the intention to 'provide training or gives instruction to terrorist groups and persons,'[53] 'recruiting persons to be a member of a terrorist group'[54] or 'soliciting and giving support to terrorist groups' [55] that is 'connected with terrorist act' will be caught under the Code. It does not matter if an individual either has the knowledge or is reckless as to the circumstance that the relevant act is connected to a terrorist act. Section 130C has a wider *catch-all* provision for committing 'any terrorist act directly or indirectly by any means'. Under Chapter VIA of the Penal Code generally, it is unnecessary for the prosecution to prove that a decision had been made by the offender on how, when, where or by whom a specific terrorist act might be carried out.[56] Suffice for the prosecution if they can establish the offence that falls within any of the limbs under section 130 (B) (2). Chapter VIA of the Penal Code that deals with crimes related to terrorism have been criticised for distorting the traditional focus of the criminal law by punishing activities preliminary to the commission of a substantive offence. Admittedly, the Penal Code has long recognised 'inchoate' crimes that expose individuals to punishment for attempting the commission of a criminal act or conspiring with others to do so prior to introducing Chapter VIA into the Penal Code. A major rationale for each offence like the preparatory terrorism offence themselves is to prevent the act of terrorism from being ignited into something bigger and harmful. They can be used by the law

[53] Section 130F of the Penal Code
[54] Section 130E (ibid)
[55] Section 130J (ibid)
[56] See the definition of what constitutes 'terrorist act' under section 130B (2) of the Penal Code.

enforcement agencies to intervene before a substantive offence is committed or any harm is perpetrated by anyone.

In the Penal Code, an individual attempt to commit a crime whenever he or she intends to and yet do not actually follow through the related act for the offence. Conspiracy arises wherein two or more individuals agree to commit a crime together, and one of them does an act under the agreed plan. The importance that the criminal law places upon prevention is reflected in the penalties for each offence. An individual who conspires or attempts to commit a crime is liable to be penalised with the same degree as if he or she committed the offence (for instance, if the principal offence has life imprisonment as punishment, then the attempt or conspiracy to commit that particular offence carries the same penalty). Even though these existing inchoate offences are not indisputable, it has long been debated whether it is appropriate to allow the state to preventively charge and penalise any individual who plans to bring (but has not caused) harm. However, the preparatory terrorism offences go even further by explicitly penalise conducts or acts done to prepare for a terrorist act. This may be directly contrasted with the requirement for an attempt that the actions of the defendant must be more than preparatory to the commission of the offence. Hence, terrorism offences have been described as creating ‘pre-inchoate liability.’ In criminalising at the early formative stage would make people vulnerable to very severe punishment regardless of the absence of clear criminal intention. The mental elements of the preparatory terrorism offences compound the above problems. Such crimes potentially capture a broad range of behaviour that has only a very tenuous connection with the commission of a terrorist act. The fault elements allow for the possibility of charges being laid where a person is simply reckless on whether the relevant activity is 'in preparation for, or planning' or is ‘connected with' terrorist activity. This involves a much lower standard of personal culpability than the alternative fault elements

of either intention or knowledge that generally apply to serious criminal offences. Recklessness requires that a person knows of a significant risk and that it is unjustifiable, in the circumstances, for him or her to take that risk. It is, therefore, conceivable that people who are foolish or fail to conduct rigorous and comprehensive investigations might find themselves the subject of prosecution. As an illustration, section 130 JB of the Penal Code criminalises the act of possessing items associated with terrorist groups or terrorist acts. The effect of the open-ended drafting of this provision is to expose to liability a person who, for example, downloads from the internet a document providing IS's ideology and their propaganda. Since there is an ample risk that others may make use of that downloaded materials related to this terrorist group to plot harm, the person will be liable regardless of whether his or her reason for getting the document is entirely innocent (such as for academic research or mere curiosity). Regrettably, many instances where peoples have been charged under this particular section of the Penal Code in Malaysia.[57] Another problem with the offence of possessing items associated with terrorism is that the law places the burden of proof on the accused to show he or she has no intention to facilitate or help in committing any acts of terrorism.[58] This means that the accused must produce evidence there is a reasonable possibility that no such intention existed before the prosecution will have to prove it. Only at that point does the onus of proof shift to require the prosecution to rebut the defence's claims beyond a reasonable doubt. The fact that the accused must claim his or her innocence first is a significant withdrawal from the established concept in the traditional criminal law principle that an accused is presumed to be innocent and the prosecution must show all the essential ingredients of a criminal charge prior to an accused mounting his or her defence.

[57] Karim, K. N. (2016, June 16). Woman charged with possessing terror-related item. Retrieved February 24, 2017, <from http://www.nst.com.my/news/2016/06/152297/woman-charged-possessing-terror-related-item> See also Bernama. (2016, April 20). Three charged in court with terrorism. Retrieved February 24, 2017, from <http://www.nst.com.my/news/2016/04/140446/three-charged-court-terrorism>

[58] See for example, Section 130 JB(1)(a) of the Penal Code.

Further, a new offence of inciting or promoting terrorism was introduced under section 130G of the Penal Code. The offence applies to a person who incites or encourages the doing of a terrorist act or the commission of a terrorism offence. Although inciting or promoting an act of terrorism is not clearly defined, it is understood as encouraging or urging terrorism even though Chapter V of the Penal Code already contained the offence of abetment that urges another person to commit a substantive crime. There is a critical difference regarding the mental element between the new incitement offence and abetment. Under the Penal Code, the abetment offence is limited by the requirement for the prosecution to prove that the accused intended (or meant) to urge another person to commit the substantive offence.[59] The inciting offence under section 130G however, is substantially broader because it requires that the accused was reckless on whether another person would do a terrorist act or commit a terrorist offence. Therefore, it has the potential to criminalise a wide selection of genuine actions. For example, the offence could apply to any person who declares support for fighters opposing the Assad government in Syria and supports the continual resistance by these groups despite some sees it as a legitimate act. The broad definition of incitement and the lack of a limit on the offence by ignoring the accused's intention makes the potential operation of section 130G hard to predict. The inherent difficulty to criminalise incitement to commit terrorist acts in the national security context is not unique to Malaysia. The UK Parliament also made the *'encouragement of terrorism*' as an offence in their Terrorism Act, 2006 (TA 2006). This applies whenever a speaker glorifies terrorist acts (whether in the past, in the foreseeable future or generally) and a reasonable target audience might deduce that the glorified conduct ought to be followed will be covered under the Act.[60] The UK glorification

[59] Section 107 of the Penal Code states:
"A person abets the doing of a thing who - (a) instigates any person to do that thing; (aa) commands any person to do that thing; (b) engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or (c) intentionally aids, by any act or illegal omission, the doing of that thing."
[60] Section 1 of the Terrorism Act, 2006

provision includes a broad spectrum of generalised statements. The latitude and definitional confusion cause the law to becomes problematic and is perceived as an unwanted restriction on freedom of speech. Hence, it is argued that glorification provision should only be confined to criminalise statements that either give factual information that leads to terrorism offences or to encourage the commission of such offences. The apparent justification for this provision was to fill up a void in the current legislation. The UK government thought the prevailing law covered incitement to carry out a specific terrorist action, such as "*Please bomb a subway train on July 7 in London*," but would not cover for a larger generalised incitement such as "*We invite everyone to bomb subway trains*."[61] Therefore, under section 1 of the TA 2006, it is immaterial whether the statement points to a specific action or to terrorist acts generally. The breadth of the provision is too broad, and it grants considerable discretion to governments and courts. Glorification has been given the meaning of "*any form of praise or celebration*."[62] In addition, it is envisaged that the phrase "includes" actually enlarges the range and increases the convenience for discretionary application by the government. Moreover, the term "*praise*" and "*celebration*" remain ambiguous and subject to many interpretations. Because of this uncertainty, the Joint Committee on Human Rights has rightly pointed out that any reasonable individuals could differ on whether a specific comment or statement falls within the glorification definition under the Act.[63] Although the U.K.'s offence of glorifying terrorism may fill a void in the current legislation as highlighted, its scope and ambiguity are disputed. It covers expression that should not be criminalised in the first place. The specific presence of this glorification offence may lead to unnecessary scrutiny into free speech that should be protected in any democratic society, however unpleasant

[61] Ekaratne, S. C. (2010). Redundant Restriction: The UK's Offense of Glorifying Terrorism. *Harv. Hum. Rts. J.*, *23*, 205.
[62] Section 20(2) TA 2006
[63] Office, T. C., Lords, H. of, & Commons. (2005, November 28). Joint committee on human rights - Third report. Retrieved March 2, 2017, from https://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/75/7502.htm

it may be. Therefore, the glorification offence in the UK is just one of the many examples that have departed from the normative criminal law system just to fight terrorism.

Whereas in India, they also have preparatory terrorist offences which are covered in the 'all-inclusive' provision under section 18 of the UAPA 1967 which states as follows:

> "*Whoever conspires or attempts to commit, or advocates, abets, advises or [incites or knowingly facilitates] the commission of, a terrorist act or any act preparatory to the commission of a terrorist act, shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life, and shall also be liable to fine*."

The evidence from the above shows that all the countries have provisions to criminalise preparatory acts of terrorism and the offences are incorporated into their respective domestic legislations. However, the debate on preparatory terrorism offences has been criticised for going too far in criminalising action engaged prior to the commission of any terrorist act. There is, however, a strong case to be made that the nature of terrorism and the gravity of the potential harm justifies an extraordinary response. In other words, the law enforcement and intelligence agencies should not be hampered by the need to wait until a terrorist act actually occurs before stepping in and protect the population. Hence, if special offences with extraordinary measures for terrorism-related activities are indeed necessary, what is the best form in which these should be drafted? What level of personal culpability - in the sense of a particular intention or state of mind should be required? These remain unanswered.

5.4.2 The operation of preventive scheme by the states

Conceivably, the most widely known debates on the working of the Malaysian criminal law procedures are those connected to the detention of a terror suspect under the

preventive law without trial. Though under the criminal law procedure, the authorities must prosecute the accused expeditiously after completing its investigation, however, this does not apply under the preventive scheme. The accused persons can be detained without even knowing what they are alleged of. Under this extraordinary measures enacted via POTA 2015, the police are empowered to hold terror suspects for an initial 21 days with the sanction of a magistrate[64] and an extended detention for another further 38 days if the Public Prosecutor can provide adequate evidence to justify it.[65] In contrast with the ordinary arrest situations, Article 5(4) of the Federal Constitution requires that an individual arrested and detained by the police must be produced immediately before a sitting magistrate within 24 hours from the time of his arrest. The police must then apply to the magistrate for extension and if the latter deems further detention is needed, the suspect can be further remanded to enable the police to complete their investigation. In the initial period of a detention, usually, the suspect is not given permission to have access to anyone.

The POTA 2015 saw the introduction of detention without trial scheme for terror suspects which evoked fundamental challenges to the law. During the initial detention period, the suspect will appear before an Inquiry Officer as soon as possible.[66] The rules of evidence do not apply during the inquiry as the officer is empowered with the broad discretionary power to determine the admissibility of evidence.[67] The Inquiry Officer shall investigate and recommend to the Prevention of Terrorism Board ('PTB') whether there exist reasonable grounds for suspecting that the suspect is engaged in the commission or support of terrorist acts. The PTB after looking at the complete report submitted by the Inquiry Officer, if it is satisfied that it is expedient in the interest of the

[64] Section 4(1) (a) the POTA 2015.
[65] *Ibid* Section 4 (2) (a) (i)
[66] *Ibid* Section 5
[67] *Ibid* Section 10 (3)(a)

country's security, could issue a detention order for the suspect not exceeding two-year period in a place of detention as the Board may order.[68] The provisions under the POTA 2015 induced heavy criticisms among human rights activists due to the ousting of judicial controls or scrutiny under the scheme[69] which raised concern on where the principled criminal procedure and justice is heading. This was already discussed in Chapter 4 earlier.

It is well observed that the POTA 2015 defines the meaning of "terrorist act" as "*act*." In essence, it implies that individuals can be easily found guilty of preparing or organising terror acts and punished under Chapter VIA of the Penal Code or under the POTA 2015 without the need of the authorities showing any satisfactory proof of a particular period of time, day, place or process of the purported crime. The law enforcement just requires finding out the suspect's actions have linked to "an act" - even though it may be a future act. Basically, anyone could be found guilty even though the terror acts do not transpire eventually. The provisions contribute to the police extensive authority to detain a suspect on the unclear potential charges for instance, 'engaging', 'promoting' or 'supporting' an unknown terrorist act that would never happen. The vague provision of law runs counter to the demand that strong evidence should be provided to prepare the ground for a criminal prosecution prior to any loss of liberty can be enforced on a particular person. This fundamental position of criminal law standard has since been drastically changed; because of the threat presented by terrorists to Malaysia and the introduction of the POTA 2015.

It is now conceivable that the scope of the criminal law system has been enlarged to accommodate preventive detention scheme though it is hard to comprehend precisely how any criminal legal process can agree to the detention of 21 plus 38 days (in total 59 days)

[68] *Ibid* Section 13(1)
[69] Section 19 of POTA 2015.

in police custody just to investigate and to establish the offense under the POTA 2015. At least, the basic procedures and the guidelines of criminal procedure provide for some measures of protection afforded to the accused considering the weaknesses of his or her position, but when the suspects are not produced to court as soon as possible, the courts are powerless to provide any strict scrutiny of the police conduct. Though it appears to depart from the basic demand for a good valid reason for the continued holding of terror suspects, the methods and the procedural aspects set up in the POTA 2015 breaks the spirit of the established criminal rules and procedures. As laid out in the POTA 2015, it deprives an innocent individual of his or her freedom which can be for 59 days which is seen as a long-term breach of criminal law principle. Furthermore, the POTA 2015 overturns the well accepted criminal law principle on the presumption of innocence. The law will enable the governing bodies or the police to arrest anyone based entirely on what they claim the 'suspect' may possibly plan or proposes to take in the future. Hence, the laws pave the way for the creation of tyrannical regimes as individuals could just 'disappear' while under police detention without anyone knowing it.

In the comparative study of India after they gained independence, the Indian government faced an immediate dilemma. It wanted to ensure the maximum liberty for its citizen, but at the same time it wanted to "*nip in the bud every threat to national security from within.*" [70] The Constitution has a short statement dealing with protection of life and liberty,[71] and after a series of raging and bitter debates in the *Lok Sabha* (the Indian Parliament), provisions relating to preventive detention were inserted into the Constitution.[72] It is observed that the Indian Constitution gives the rights to liberty with one hand and takes away with the other. Article 22(1) guarantees that a detainee is

[70] Pylee, M. V. (2003). *Constitutional government in India*. S. Chand Publishing.
[71] See Article 21 of Indian Constitution (Ninety-Fourth Amendment) Act, 2006.
[72] Article 22(1) of Indian Constitution

informed of the grounds for arrest and is given access to a lawyer. Article 22(2) requires that a detainee is brought before a court within twenty-four hours of arrest to have the detention confirmed. However, these guarantees do not apply to "enemy aliens" or persons "arrested under any law providing for preventive detention."[73] Detention can be for periods of three months in certain circumstances as prescribed by Parliament.[74] Indian law has provided for preventive detention since independence.[75] The general criminal law, as set out in the Criminal Procedure Code 1973 (CrPC 1973), allows a police officer "knowing of a design to commit a cognizable offence" to arrest without a warrant "if the offence cannot otherwise be prevented."[76] A suspect may only be detained for twenty-four hours, "unless his further detention is required or allowed under any other provisions of this Code or of any other law for the time being in force."[77] National security legislation in India has worked in tandem with the CrPC 1973 but extended the periods of detention under the general criminal law. The current legislation in force that provides for preventive detention is the National Security Act 1980 (NSA 1980), which generated a "*rich, dizzyingly complex body of case law interpreting nearly every phrase of the act*."[78] That Act permitted preventive detention for up to twelve months of an individual to prevent him from "*acting in any manner prejudicial to various state objective including national security and public order*." The NSA remains in force and has been supplemented by additional laws designed as counter-terrorism measures. However, the law specific to terrorism offence as highlighted in the preceding chapters here is the Unlawful Activities (Prevention) Act 1967 which was amended to become the Unlawful Activities (Prevention) Act 2004 (UAPA 2004). Initially, this legislation did not deal with preventive detention, which continued under NSA 1980. However, after the Mumbai

[73] Article 22(1) (2) ibid
[74] Article 22 (4) (7) ibid
[75] Jinks, D. P. (2000). The Anatomy of an Institutionalized Emergency: Preventive Detention and Personal Liberty in India. *Mich. J. Int'l L.*, *22*, 311.
[76] See section 151 (1) of Criminal Procedure Code 1973
[77] Section 151(2) ibid
[78] Jinks (supra) p.328-36

shootings in 2008, UAPA has amended again, and several sections dealing with preventive detention were inserted. Any officer "knowing of a design" to commit an offence under the Act or "having reason to believe" that a person has committed a crime under the Act, has the power to authorise the arrest of such a person.[79] Bail can be denied for up to 180 days for investigation[80] although no bail is available under the Malaysia POTA 2015. That means to say, the denial of bail under POTA 2015 is harsher than its Indian counterparts where at least in India, bail is accorded to the terror suspects after 180 days.

A legal challenge has been brought to court on the constitutionality of the NSA 1980 that provides for preventive detention in the case of *A.K. Roy v India.*[81] However, the Indian Supreme Court held that the preventive detention was not unconstitutional, but the power to detain preventively should be construed narrowly. From the legal analysis of India's Constitution, although it permits preventive detention and purports to afford safeguards, it is meaningless as they do not apply to persons "arrested under any law providing for preventive detention."[82] Despite India's many affirmations that its preventive detention provisions are constitutional, the periods of detention are excessive, with many violations of due process rights. Little prospect of any improvement in the near future is expected.[83]

If we examine the UK's preventive scheme, their anti-terror legislations have gone through numerous challenges in the court for incompatibility with the ECHR standards. For example, the detention without charge of foreigners under the repealed Part 4 of the ATCSA 2001 was the most controversial part of the legislation in light of Article 3 of the

[79] See section 43(A) UAPA 2008 (Act No.35)
[80] Section 43 (D) ibid
[81] (1982) SCR (2) 272
[82] Article 22 (1) and 22 (2) of India Constitution.
[83] Jariwala, C. M. (2016). Preventive Detention in India: Experiences and Some Suggested Reforms.

ECHR. Although derogation "in time of war or other public emergency threatening the life of the nation," is permissible under Article 15 of the ECHR, the UK Government is the one with the broad discretion to determine exactly what is considered a state of emergency because this is generally a political opinion.[84] The House of Lords in the UK discovered these procedures to be disproportionate,[85] and therefore in disagreement with Articles 5 and 14 of the ECHR if read next to each other. Subsequently, Part 4 of this Act which was seen as a significant departure from the legal principle was amended in 2005 with the introduction of control order scheme under the Prevention of Terrorism Act, 2005 (PTA 2005). The old scheme was succeeded by another new preventive scheme known as the Control Orders scheme which the UK Government felt is much more in compliance with the permitted standard. The scheme comprises derogating and non-derogating control orders that generally create control systems essential to restrict a person's ability to engage in terrorism. Eventually, the intention here is tantamount to put the suspect under house arrest (regardless of nationality) for engaging in the terrorism-related offences. It is noteworthy that issuing non-derogating order does not require the court process and the requisite evidentiary standard is minimal. The control order procedures are regarded as not amounting to ordinary criminal law procedures, simply because inherently, there is no question of conviction. However, the infringement of a control order is considered a crime and the person breaching it is liable to be punished for an imprisonment term not exceeding 5 years.[86]

From the three states studied, each state has independently established its counter-terrorism laws, and especially its preventive detention orders, in response to particular threats in ways that reflect local domestic history, custom, and culture. Preventive

[84] A & Others v Sec. of State [2004] UKHL 56 - para. 28
[85] *Ibid* in para 68
[86] Section 9(4) (a) PTA 2005

detention as a counter-terrorism tool is fraught with procedural issues and risks of misuse and abuse as discussed above. Although it is imperative to use it to save people, it also has various drawbacks. Hence, this thesis can affirm those domestic preventive laws tailored to address the continuing global terrorist threat by the states have a far-reaching influence on the traditional criminal law practices as understood amongst the legal fraternity. However, to the ordinary people, the potential reach of preventive detention scheme signals the usefulness and necessity of ensuring this detention tool is put forth in the most rights-compliant way, without jeopardizing human rights-compliant framework and the Rule of Law. Thus, preventive detention can be a helpful tool in appropriate circumstances to prevent terror attacks, provided certain safeguards are in place.

5.4.3 Disparity and disproportionate sentencing trend under terrorism laws

Besides the preventive detention without charge, as discussed earlier, terror suspects can be punished under the Penal Code (PC). The predominant concern in sentencing terror suspects is that of imposing a severe penalty including capital punishment[87] which is perceived to be disproportionate in the circumstances. Although terrorism offences could be expected to attract heavy sentences, terrorism offenders have slightly better prior records (if we discounted their involvement in terrorism acts) than other criminal offenders. They are people of relatively good character, but because of the law, they are penalised. Those charged with terrorism offences may be hard-pressed to argue other mitigating factors, such as remorse, although some have done so, with some success as seen in the UK court.[88] The heavy maximum sentences that apply even in relation to preparatory offences also mean that sentences determined according to the common sentencing principles may be substantial, even for middle-level examples of terrorism-

[87] Section 130C of the Penal Code provides that: *"(1) Whoever, by any means, directly or indirectly, commits a terrorist act shall be punished - (a) if the act results in death, with death; and (b) in any other case, with imprisonment for a term of not less than seven years but not exceeding thirty years, and shall also be liable to fine*."

[88] See, for e.g., *Rahman v R* [2008] EWCA 1465; [2008] 4 All ER 661.

related offences. However, legislatures evidently do not consider this to be adequate in tackling terrorism threats. The following are brief examples of recent terrorism-related cases brought to court in Malaysia which had received sentences meted out by the court.

- *Nazirul Abidin Thalha*, a 24-year youth was sentenced to **one-year** imprisonment for owning publications about the Islamic State ('IS') in September 2015. He pleaded guilty to the offence under Section 130JB(1)(a) of the PC for downloading 15 publications about IS which is involved in a conflict in Syria into his smartphone memory card.[89]

- *Mohd Zaidi*, a student from Kedah, was charged under Section 130JB(1)(a) of the PC and under this section, if found guilty, he can be jailed up to seven years. Based on the facts, he was found to have kept the IS flag in a suitcase belonging to him when police searched his house. He pleaded guilty and was sentenced to **2 years** jail.[90]

- In March 2016,[91] two men, *Muhammad Armie Fatihah* and *Mohammad Hafiz Zahri* pleaded guilty to charges under section 130J(1)(a) and Section 130G(a) of the PC respectively for promoting terrorism and supporting the IS and both were handed down with **3 years and 6 months** of imprisonment by the court. *Muhammad Armie* was guilty under section 130J(1)(a) for "*promoting the commission of a terrorist act with intention to propagate an ideology to incite the masses in Syria in Taiping*" in April 2014, whereas *Mohammad Hafiz* was

[89] "*Youth jailed in first Malaysian case of Islamic state publication downloads*." Retrieved February 26, 2017, from http://www.themalaymailonline.com/malaysia/article/youth-jailed-in-first-malaysian-case-of-islamic-state-publication-downloads
[90] "*Court sentences student to two years' jail for possessing Islamic state flag*." Retrieved February 26, 2017, from http://www.themalaymailonline.com/malaysia/article/court-sentences-student-to-two-years-jail-for-possessing-daesh-flag
[91] "*Two friends jailed for supporting and promoting IS*." (2016). *NST Online*. Retrieved 14 May 2017, from https://www.nst.com.my/news/2016/03/133171/two-friends-jailed-supporting-and-promoting

guilty of supporting a terrorist group under section 130G(a). He had incited people to become a member of a group known as "*Daulah Islamiah*" to go to Syria and had also planned to set up a "jihad" camp in Malaysia. It is noteworthy that the offence under section 130G warrants an imprisonment term for up to thirty years which is perceived as very harsh.

- A 38-year-old carpenter known as *Muhammad Kasyfullah Kasim* decided to plead guilty at the Kuala Lumpur High Court for supporting terrorist acts and was given 5 years jail term.[92] *Muhammad Kasyfullah* pleaded guilty under section 130J(1)(b) of supporting terrorism involving the use of firearms to further a religious struggle that can endanger public safety. He had allegedly committed the offence by entering Syria by departing from the Kuala Lumpur International Airport (KLIA). Under Section 130J(1)(b), he can be sentenced to life or up to 30 years' jail. The prosecution, not satisfied with the prison term imposed by the High Court, had appealed to the Court of Appeal to increase the sentence. The appeal was allowed, and the court enhanced the jail term from 5 years to **12 years**; and

- On June 21, 2016,[93] the Appeal Court enhanced the sentences of *Rohaimi Abd Rahim* and *Muhamad Fauzi* who were both found guilty under section 130G(c). The charge under section 130G(c) carries an imprisonment term up to thirty years if a person is found to be "*inciting, promoting, and soliciting property for the commission of terrorist acts.*" At the Kuala Lumpur High Court in February 2016, both the accused pleaded guilty and received 3 years imprisonment term.

[92] "*Carpenter gets 5 years jail for supporting terrorism.*" Retrieved February 26, 2017, from Nation, Free Malaysia Today, available at http://www.freemalaysiatoday.com/category/nation/2016/05/03/carpenter-gets-5-years-jail-for-supporting terrorism/
[See also: Pendakwa *Raya lwn Muhammad Kasyfullah bin Kassim* [2016] 10 MLJ 233 (HC) and *Public Prosecutor v Muhammad Kasyfullah bin Kassim* [2016] 6 MLJ 567 (CA)]
[93] "*Appeals court increases jail term of two men convicted of terrorism-related offences*." Retrieved February 26, 2017, from http://www.thesundaily.my/news/1845524

Unsatisfied with the lighter sentence given, the prosecution then filed an appeal. The appeal was allowed and the court enhanced the prison term to **15 years.** What is interesting to note was the Appeal judge in enhancing the imprisonment term has remarked that the short imprisonment term given out by the High Court did not match the gravity of the offence committed. This goes to indicate at the appellate level; the judges are not in favour of shorter imprisonment term being meted out especially in terrorism cases.

Over and above the examples given, many people have also been hauled up by the police for committing preparatory terrorism-related offences that can trigger harsh sentences even though, it is uncertain whether such preparatory terrorism acts will culminate into substantial terrorist attacks. The following are some cases still pending in court at the time of writing this research.

- On June 8, 2016,[94] an aircraft technician was brought to court for two counts of promoting terrorist acts under section 130G(b) and 130H of the PC. He was allegedly promoting membership of ISIL at his residence from December 2013 to October 2015. If found guilty, he can be jailed up to 30 years under both of the sections. In another case, a different aircraft technician was charged under section 130J(1)(a) of the PC for supporting and soliciting IS through his Facebook account.[95] Under this section, the punishment is life imprisonment or imprisonment term not exceeding 30 years.

[94] De Silva, Joash. (2016, June 8). Aircraft technician charged for terrorism - nation | the Star Online. Retrieved February 26, 2017, from <http://www.thestar.com.my/news/nation/2016/06/08/aircraft-technician-charged-shah-alam/>
[95] Tamarai Chelvi (2017, February 26). Aircraft technician charged with supporting IS. Retrieved February 26, 2017, from <http://www.thesundaily.my/news/1842274>

- *Aizam,* a car painter was found to own 65 A3-size papers and three A4-size stickers linked to IS. His charge was filed under section 130JB (1)(a) of the PC for possessing items associated with the terrorist group.[96] In another unconnected case involving the same section 130JB (1)(a), a woman named *Nor Izatul* was brought to court and charged for having a black headband with the inscription of this Arabic saying "*Lailahaillallah Muhammadarrasulullah*" and "*Allah Rasul Muhammad*" - (the sayings found on the IS flag).[97] Under section 130 JB (1)(a), the punishment if found guilty is up to 7 years imprisonment.

As observed, the sentencing trend favoured by the Malaysian court as far as terrorism-related offences are concerned is to take a stern approach. According to a report published,[98] from the year 2016 onwards, it saw enhanced sentences meted out by the court for terrorism-related cases. It is posited that the harsh punishment handed down by the court is, therefore, disproportionate comparatively with another criminal offence. For example, voluntarily causing hurt under section 323 of the Penal Code can be punished with merely an imprisonment term of up to a year or fine although usually the victim also suffers bodily injury. In the case of infamous blogger Wan Muhammad Azri (also known as '*Papagomo*'),[99] he pleaded guilty in court to three charges under section 323 of the PC for punching, kicking and slapping a labourer. The court handed down a fine of only RM4,300 although there was an aggravating factor presence in that case. Arguably, if following the proportionality principle, preparatory terrorism offences which rarely attract aggravating factor should not be accorded with harsh sentences. This will lead to a disparity in sentencing principles under the criminal justice system. So far, the heaviest

[96] Reduan, H. (2016, June 8). Car painter charged with possessing iS-related material. Retrieved February 26, 2017, from <http://www.nst.com.my/news/2016/06/150476/car-painter-charged-possessing-related-material>
[97] Karim, K. N. (2016, June 16). Woman charged with possessing terror-related item. Retrieved February 26, 2017, from <http://www.nst.com.my/news/2016/06/152297/woman-charged-possessing-terror-related-item>
[98] BERNAMA. (2017). "*Longer jail terms for terror offences.*" Retrieved February 26, 2017, from http://www.bernama.com/bernama/v8/newsindex.php?id=1312171
[99] *Papagomo fined RM4,300 for attack on Pakistani labourer*. (2016). *Malaysiakini*. Retrieved 6 August 2017, from https://www.malaysiakini.com/news/333709

sentence ever meted out by the court under Chapter VIA of the PC was the case of '*Lahad Datu intrusion*' in Sabah. The Kota Kinabalu High Court had sentenced some of the nine accused under section 130KA of the PC for being a member of the terrorist group to eighteen years imprisonment.[100] However, on the bright side, no one has ever been given a death sentence by the court under Chapter VIA of the PC in Malaysia.

However, in India, the death penalty has been awarded to two accused namely, *Ajmal Kasab* and *Mohd. Afzal* [101] for their roles during the 2008 '*Mumbai Attacks*.' Both the accused were charged under section 120B of Chapter VA of the Indian Penal Code 1860[102] to be read together with section 302 for murder under the same Code. Besides the Mumbai Attacks case, some other notable terrorism sentencing cases in India that are worth looking at is the case of *Mohd. Jamiluddin Nasir v State of West Bengal*.[103] The role played by the appellant *Nasir* was somewhat minimal as compared to another appellant named *Aftab*. This issue was taken up into account by the Supreme Court, and on that score, *Nasir* was sentenced to life imprisonment up to 30 years, but *Aftab* received a life sentence for the whole of his natural life. On leniency, in *State of Maharashtra v Ravi Dhiren Ghosh*,[104] the National Investigation Agency brought the case against *Dhiren Ghosh* accused of producing, trafficking, and circulating counterfeit Indian money. The accused sought for leniency because he has already spent time in jail and having to take care of his family who is his dependents. The accused having already been found guilty under the UAPA 1967 for terrorist offence, the court held that only the maximum penalty of life imprisonment could be given and nothing less. The question of leniency did not

[100] "*Nine Lahad Datu intruders jailed for life*" - nation | the Star Online. (2016, July 27). Retrieved February 26, 2017, from http://www.thestar.com.my/news/nation/2016/07/27/nine-lahad-datu-intruders-jailed-for-life/
[101] Mohd. Ajmal Amir Kasab v. State of Maharashtra (2012) 9 SCC 234
[102] Section 120 (B) states: (1) "Whoever is a party to a criminal conspiracy to commit an offence punishable with death, 2[imprisonment for life] or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence. (2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment of either description for a term not exceeding six months, or with fine or with both."
[103] 2014 AIR (SC) 2587
[104] Sessions Case No.674 of 2009 (NIA)

arise, albeit the Court allowed to consider the time already spent by the accused in prison. It is observed that the court, regardless of having a broad discretion in deciding on what kind of sentence to be meted out, as demonstrated in *Dhiren Ghosh*, the court rather opted to give the maximum penalty. Hence, the Indian courts chose not to get too involved in the theoretical aspects of sentencing but hinge more towards the heinous nature of the terror acts.

As in Malaysia and India, terrorism prosecutions in the UK are premised on a mixture of new offences and older offences such as a conspiracy to commit murder or to cause an explosion.[105] Notable new offences created by the UK's Terrorism Act 2000 are to criminalise individuals for being a member or supporter of a terrorist group;[106] financing terror;[107] and keeping printed materials for the terrorist cause.[108] Punishment may vary from a maximum of six months imprisonment to life imprisonment. However, in contrast to its Indian counterparts, the UK has refrained from imposing death sentences for terrorism offences. While terror prosecutions in the UK bear similarities with the Malaysian, however, the approach adopted by the UK courts to sentencing differ. Noticeable break started from the 2007 Court of Appeal's decision in *R v Barot*.[109] Before *Barot*, UK judgments for a terrorist conspiracy to commit murder varied between 30 to 45 years.[110] Terrorist conspiracies to trigger an explosion that risk life ranged from 20 to 35 years.[111] *Barot* involved the appeal of one of eight members of Al-Qaeda terrorist group that had plotted to initiate four terror attacks. Their plot involved the use of three limousines that contains propane gas cylinders where the explosive devices were to be

[105] Conspiracy to murder carries a maximum life sentence under section 3(2) of the *Criminal Law Act 1977* (UK), c 45. Conspiracy to cause an explosion carries a maximum life sentence under the *Explosive Substances Act 1883* (UK),
[106] See section 11 & 12 TA 2000
[107] Section 15 *ibid*
[108] Section 57; this was initially a ten-year maximum but amended to fifteen years by the *Terrorism Act 2006* (UK),
[109] [2008] 1 Cr App R (S) 31, [2007] Crim LR 741
[110] Ali Naseem Bajwa, (2010) "*Sentencing Terror Offences*" Criminal Law and Justice Weekly, Retrieved February 27, 2017, from <https://www.criminallawandjustice.co.uk/features/Sentencing-Terror-Offences>
[111] *R v Martin*, [1999] 1 Cr App R (S) 477.

remotely controlled. After found them guilty, the court handed down a life sentence with a 40-year non-parole period. *Barot* then appealed to the Court of Appeal against his conviction. The Appeal Court subsequently reduced the imprisonment term from 40 to 30 years and outlined some recommendations in sentencing terrorist acts:[112]

- In sentencing inchoate or preparatory terrorist acts, it is proper to begin by considering the punishment that would have been ideal had the target of the terror suspect been achieved;

- A life sentence with a minimal term of 40 years ought to, save in extraordinary situations, portray the maximum penalty for a terrorist who sets out to accomplish mass murder but unsuccessful in creating any actual harm; and,

- The discount that ought to be given due considerations such as a guilty plea, the ranking of the accused (a commander must get a lot harsher sentence when compared to a follower) and how the conspiracy was being pursued or accomplished.

Barot was adopted in one of UK's most serious terrorism case in *R v Ibrahim.*[113] Briefly, this case was about the unsuccessful London bombing attempt that took place two weeks after the attacks on July 7, 2005. Explosives hidden in the bags of all four terror suspects failed to detonate at the last minute after getting on the underground train. All four were caught and given life sentences with a non-parole of 40 years. Some other cases that have applied *Barot's* guidelines include *R v Jalil,*[114] which involved *Barot's*

[112] Ali Nasseem Bajwa (2010) *ibid*
[113] [2008] 4 All ER 208
[114] [2008] EWCA Crim 2910,

four co-accused charged with conspiracy to cause an explosion and endangering life with sentences imposed ranging from 15 to 25 years, and also the case of *R v Asiedu*,[115] an accomplice in the unsuccessful London plot who deserted his explosive device minutes before the proposed strike who received a prison term of 33 years. Following *Barot*, UK's sentencing judgements point to the possibility of a life sentence in cases connected with a conspiracy to commit murder, and approximately 20 or more years for creating an explosion that endangering life. The non-parole durations have varied starting from 20 to 40 years, depending upon the level of culpability and possibility of the terror scheme. Punishment for several other much less acute terror-related offences has entailed reduced custodial terms. This is expected in part to the lower maximum sentences in the law, but also with the court's tendency to allot much more weight to mitigating aspects. In *R v Rahman*,[116] appeals against six and four-year sentences for distributing terrorist printed material were lowered to 5.5 and two years. In summation, UK terror sentencing, after *Barot*, has entailed much longer custodial periods for main offenders in major terror plots, and shorter sentences for less serious plots. Yet, even the shorter sentences are usually not as short as in the less severe terrorism-related cases in Malaysia.

5.5 COUNTERING TERRORISM WITH ALTERNATIVE TO CRIMINAL LAW AND PROCEDURE

It has conclusively been set out from the foregoing discussion, challenges to the traditional principle of the criminal law are one aspect, but, they are significant to call for a deep thinking if they threaten the legitimacy of the law. In the struggle against terrorism, the criminal law is questioned not only by transformations from inside but; there is a clear yearning to come up with substitutes to the existing system. The Malaysian counter-terrorism policy appears to be strongly marked by a desire to put forth alternate paths to

[115] [2008] EWCA Crim 1725
[116] [2008] 4 All ER 661;

the criminal law to deal with the terrorism menace as pointed out in the preceding chapters of this research. If the legislative body prefers to select a different method to inflict punishments on those arrested for the cruellest crimes, inevitably one must remember that they basically doubt the criminal law, either by rejecting its validity or proclaiming it inadequate or unacceptable. One scholar describes the problem of not remaining inside the criminal justice domain as the greatest danger to human rights values.[117]

Even though the discourse of preventive detention without charge to handle terror suspects is commonly brought up within the framework of the criminal law, in fact, as demonstrated above, it is interesting to observe that they are meant intentionally by the government to depart away from the criminal procedure set up. Without a doubt, preventive detentions are tailored to manage an occurrence not wholly matched to the operation of the traditional criminal law system. The state persistently calls for the need to have a mechanism by which the investigative bodies could easily take out high-risk suspects away from the public and to give protection to the community. Due to its destructive nature an act of terrorism can inflict, the courts have demonstrated great compassion by recognising the authority's assertion that they have no option but to act preventively.[118] The demand for having preventive detention is to target would-be suicide bombers who must be restrained and the government cannot wait around for particular terror acts to be fully committed prior to take any action against the offender. One may dispute the authority's measures taken by arguing that, the moment the suspects have accomplished the specific terrorist acts, the authority can charge those perpetrators under the traditional criminal law system. However, in hindsight, this approach will open up the public to too much danger.

[117] Gearty, C. (2006). *Can human rights survive?* Cambridge University Press.
[118] *See* the judgement in *Secretary of State for the Home Department v MB*, (2008) 1 All ER 657, it was accepted by the UK Law Lords that control order system do not expose the controlled person to a risk of punishment – (See paras. 16–24, 48–50, and 90.

Granted that the substantive law in countering terrorism has become widened to the point of weakening the procedural guidelines and the principles of criminal law, the government's inability to assert a criminal charge successfully turns out to be unpalatable. If discussion focused solely on a short-term system targeting to get very dangerous terror suspects off the streets and to put these people under preventive detention while the investigative agency prepares the charge against them, this could be contentious although, arguably, it may be an acceptable case. The discussion has not, however, been only of that nature, unfortunately. In the UK, for example, much of the court discourse focused on how long is the permissible subjugation to the control order regime[119] with the government exerting too much force in calling for a longer duration of detention. While the UK government continuously highlight that under the control orders system, it only applies to cases when bringing the suspect to court is not workable,[120] but, this is likely to be overlooked. Therefore, preventive detention without charge is examined as a tool to aid the police in their investigation. This goes to suggest that the investigative authority basically wants a right to detain a suspect first and then only to investigate; simply put, to reject liberty without having the reasons for doing so.

On why the executive is adamant to create a preventive system which appears to be a substitute for the criminal justice system and positioned it out from the system is a concern which calls into question. This is because there could be other better solutions around which might maintain the reliability of the criminal law especially in its procedure which is definitely better than under the preventive system. However, the executive's move to look for an alternate to the criminal law in preventive strategies is a clear desertion from

[119] State for the Home Dept. v JJ [2007] UKHL 45
[120] Secretary of State for the Home Dept. v E [2007] UKHL 47 - (para.14)

the rules of criminal procedure. Despite the fact that the criminal law is supposed to penalise people who commit crimes, but the notion that criminal law cannot be applied effectively in counter-terrorism appears to be pragmatic and unprincipled. Without a doubt, someone responsible for committing terrorist acts is worthy of severe punishment just like those who committed other heinous criminal offences. Regrettably, with terrorism offences, one will find there's disparity and/or disproportionate punishment meted out as discussed earlier in the above sub-heading 5.4.3. Where such breaches of the laws have taken place, the notion of the Rule of Law always requires that the state guarantees the law is practised impartially. This can happen by making sure penalties through the accepted criminal law system, and its procedure is applied instead of having another set of 'new' punishment set out. This questioned the legitimacy of the criminal law system whereby it's used to pursue the robbers but regarded as immaterial for terrorists? The move to utilise alternative systems as alternative options for the criminal law in counterterrorism is a direct questioning of the criminal laws suitability to handle the crimes committed by the terrorists.

5.6 SUMMARY

One of the significant issues that emerge from the above findings is that the governments are wary of the power and influence of the criminal law in counterterrorism. They foresee that criminal trials of this nature will require the need for a full disclosure of state secrets, and there is a risk of inadvertently exposing government secrets which ought to be preserved for national security interest. Hence, there will be obstacles in getting convictions against terror suspects. Ensuing from this important issue, the government remains apprehensive of the fact that under the criminal justice system, the standard of proof beyond a reasonable doubt may suggest that some guilty people occasionally will be acquitted. As a consequence, there is a pool of people out there who

might be terrorists but cannot be found guilty. These might include people who might probably be terrorists, and also people who possibly are but cannot be established to be, given the strict criminal justice systems demanding prerequisites. This suspicion is, however, open to debate. In Malaysia, there is no record of any massive terrorist strikes that harmed civilians in the past 10 years which suggests that terrorists have successfully escaped the powers and jurisdictions under the normal criminal law system. With only one isolated incident of terror so far,[121] there have been no instances reported in Malaysia which has not resulted in successful prosecutions in the court. Thus, the hasty conclusion drawn by the Malaysian government can lead to a paradox. The demand for proof of guilt beyond a reasonable doubt means that people can only be detained as terrorists if the government can prove beyond a reasonable doubt they have carried out terror acts including inchoate terrorism offence. It is argued in this chapter there is no new necessity for the government to establish inchoate terrorism offence although, for the government, the inchoate terrorism offence implies a probability that the suspect will, if not restrained, go on to commit or promote a real terrorist attack. Inchoate offences as already explained above mean that if their substantive offence can be proved, people who may pose a relatively minor risk may be found guilty and detained without clear criminal intent. But for the government, they are still not convinced to rely exclusively on the criminal law system. Instead, they see it attractive to resort to preventive detention regime to curtail terrorism offence which is grounded on a criterion that is less demanding than those prescribed by the criminal justice system just to apprehend a would-be terrorist.

Other claims made to justify the introduction of the exceptional measures as part of the new counter-terrorism laws are that such measures could be confined to terrorism context only. They were not to be used elsewhere in the criminal law. However, there are

[121] Kumar.M (2016, July 4). Cops confirm Movida bombing first ever IS attack in Malaysia - nation | the Star

examples which can refute such a claim. For example, the expansion of the police power to conduct covert searches already restrict fundamental human rights and derogate from accepted principles of criminal justice including preventive detention without trial under the POTA 2015. It is now clear that counter-terrorism laws and procedures can provide a precedent, and even a template, for extraordinary powers in other criminal contexts. Over time, what had been seen as extraordinary are becoming a normal part of the broader criminal law system. While this chapter has focused primarily on Malaysia's context, it is important to note that the normalisation of this extraordinary measures is a trend which is becoming apparent in nations across the world. However, the grave concern of many is this new extraordinary counter-terror measure has side-lined the core principles of the Rule of Law, in particular, human rights consideration. The perceived effectiveness of this extraordinary counter-terror measures has simply become rhetorical for the authority.

CHAPTER 6: CONCLUSION AND RECOMMENDATIONS

6.1 SUMMARY

In this thesis, the role of the rule of law in counterterror legislation, in particular, POTA 2015 was examined. Chapter 1 starts with the background of the research topic. Chapter 2 explored the dilemma in crafting counter-terror legislation and the inimical conflicts between national security and personal liberty consideration. As a point of departure, it was discovered that the terminology ‘terrorism' continues to be used for an extensive range of movements, making it difficult to seek one accepted meaning that suits all of these radical movements. An effort of looking for a legal meaning was made, but the effort showed that the formulated catch-all meaning was much too wide to be of any good for usage under the criminal law. Further, from the historical review, it showed that state security legislation for example, like the repealed ISA 1960 had encountered undesirable implications that go further to denigrate the rule of law values. When the new anti-terror law namely, POTA 2015 was first introduced under the pretext to combat terrorism or any other "common enemy of the state," the government encountered many criticisms from the civil society groups and NGOs, who were worried this new law will similarly disregard the respect of the rule of law values, especially on human rights. True enough, it was discovered that POTA 2015 contributed not only more powers to the law enforcement bodies, but it has also systematically denied the citizens' human rights including personal liberties for those who are caught for committing or supporting the acts of terrorism as highlighted in Chapter 2. Admittedly, in crafting new anti-terror law like POTA 2015, striking a delicate balance between one’s personal liberties against the national security is not an easy job for the government, in which case, an equilibrium is hard to achieve as explained in Chapter 2 of the thesis. Despite that, and against this background in mind, it is, therefore, suggested that the government ought to take

cognizance that the rule of law and the liberty of an individual which makes up a crucial part of protecting national security should not be traded-off or replaced in their counter-terrorism strategies. The government must not allow human rights to be trampled and ultimately eliminated, especially in the battle against such a nebulous abstract term called 'terrorism.'

In Chapter 3, anti-terror laws of Malaysia, India and the UK were studied including the past and present anti-terror legislations. The aim is to find out whether they are in conformity with the Rule of Law values, the case-law of the several courts like the Federal Court of Malaysia, the Supreme Court of India and the UK House of Lords/Supreme Court along with the European Courts of Human Rights were brought into consideration, including academic articles where applicable. The findings in Chapter 3 were analysed. In the analysis, the influence and impact of terrorist cases reported on the law were examined. The general characteristics and developments of the anti-terror laws were identified and analysed. It was found that the Rule of Law values have often been overlooked by legislators in each country studied, even before the 9/11 event, but particularly notable after the 9/11.

The findings in Chapter 3 disclose that most legal scholars and jurists believe that the Rule of Law serves as the bedrock of a constitutional government and thus, democratic governments should respect it. Invariably, the Rule of Law is entwined with the human rights agenda. Hence, the serious concern is whether counter-terrorism legal frameworks enacted by states are losing sight of the rich Rule of Law traditions in the name of safeguarding the security of the States. An investigation of various counter-terrorism policies and legal frameworks set up by the comparative states in this study have deployed a preventive detention regime as a tool to counter would-be terrorists. Such a measure taken was found to have threatened human rights and the Rule of Law ideals. For

example, the right against inhuman treatment, the right to be informed of the reasons for detention, the right to communicate with the outside world, the right to a confidential lawyer-client communication, and the right to be brought before an appropriate judicial body - all these are the Rule of Law ideals. It is posited in this thesis that a preventive detention regime that excludes human rights should only be allowed when all the above the Rule of Law values have been included in state preventive detention regimes.

It is further observed in Chapter 3 that various domestic security legislation to confront terrorism were already in force in Malaysia, India and the UK way before the 9/11 event took place. Although the several anti-terror laws of the studied states vary in some features, one of the main differences is the time span of detention. In the UK, for instance, terrorism suspects and non-suspects may be confined for up to 36 hours as provided by PACE 1984 with the likelihood of this being extended by a further 14 days, whereas under the preventive detentions scheme in Malaysia, it can be extended for an indefinite period. By looking at the length of detention the 14-day period of detention in the UK is antithetical to the international human rights standard. Similarly, the prolonged detention in Malaysia under POTA 2015 for example, is not only overlooking the international standards but also because there is no court involvement in the issuing process of the detention order. The threshold for detentions without charge in Malaysia is low, requiring merely the subjective satisfaction of the PTB set up under POTA 2015 that the detention is needed to prevent detainees from acting in a manner prejudicial to national security purportedly to curtail terrorism threats.

In India, their current anti-terror law such as UAPA 1967 has no provision for indefinite detention without trial, but the pre-trial detention of terror suspects up to 180 days is absolutely against the international human rights norms. Although India is a party

to the ICCPR unlike Malaysia, and yet India has chosen not to comply strictly with this international treaty which called for the principle of proportionality to be applied in the treatment of detainees. In comparison, as least under the UK's preventive regime, an initial detention or a continued one can only be issued when it is necessary to prevent a possible terrorist act occurring or to preserve evidence of a terrorist act.

By comparing Malaysia's detention without charge regime set up under POTA 2015 against other jurisdictions like India and the UK, including under the international human rights norms like the ICCPR, the detention provision by itself is highly questionable. The two-year period of preventive detention (which can be extended) is not only disproportionate to the objective of the preventive regime but also against the Rule of Law and the doctrines of natural justice. In the half-a-century history of the security-based laws enacted in Malaysia and also in the countries reviewed, the courts did occasionally try to support the integrity of the Constitutions or to safeguard the constitutional rights and freedoms. For examples with *Abdul Ghani Haroon* in Malaysia, the *AF* in the UK and the *Mulund Railway* case in India. However, the judiciary's efforts have caused the respective governments to react through significant amendments to their security laws, and to a certain extent, it was perceived as to limit judicial power in reviewing detentions.

Although most anti-terror laws were passed as an interim emergency measure during actual times of emergency, however, emergency laws usually are framed in ambiguous and undefined terms which constitute a potential framework for unlawful or arbitrary detention. As demonstrated by the examples in Chapter 3, the detention regimes set up under the emergency legislations continued to be applied after the particular state of emergency disappeared. Effectively, the traditional criminal justice system, with its well-established evidentiary and procedural requirements, has been supplanted by the

preventive detention regime. Therefore, it is postulated in Chapter 3 there should be an active role for judges to apply the Rule of Law, especially in terrorism cases. Besides that, the powers exercised by the state authorities must adhere to the Rule of Law principles and natural justice. Essentially, this is the crux of the Rule of Law values and for human rights protection. In this respect, it can be hypothesised that two pivotal trends may be identified in the foreseeable future: on one side, an increasing inclination of the government to suspend human rights, specifically in the wake of a terrorist strike, and, on the other, a better understanding and awareness of courts about balancing anti-terror laws with human rights or the rule of law principles. However, in reality, it will be disappointing because when a government confronted with a threat to national security, the court will acquiesce to the will of the government and will decide the action taken by the government as acceptable. Such judicial deference is problematic because it not only sanctions the abuses of civil liberties but it also provides a 'dangerous' precedent. By right, the control of the executive is traditionally a function of a constitutional separation of powers, with executive power being restrained by a judicial review and the executive being held to account by parliament. These "*mechanisms aim to make sure that the national government exercises its powers responsibly but without intruding on protected liberties.*"[1] Regrettably, those who wish to argue that the powers of the executive should be restrained by judicial review must acknowledge that historically, the courts have been weak in these regards especially in the Malaysian context. The judiciary has repeatedly shown an unwillingness to restrain executive acts during a state of emergency is highlighted in Chapter 4.

In Chapter 4 of this thesis, the strength of the judicial role in countering terrorism in Malaysia, India and the UK was examined. Also, a survey of judicial activism occurrence

[1] Tushnet, M. (2004). Controlling Executive Power in the War on Terrorism. *Harv. L. Rev.*, *118*, 2673

in each country has been critically analysed by looking at the decided case-laws from the jurisdictions studied. The findings discovered that historically, there was a failure of the courts to restrain the executive in times of emergency. However, the evidence is that in the era of the 'war on terror' a new judicial activism is intervening on the side of liberty.

It is observed that in the ordinary course of events, people depend on the court to find out where the limits of acceptable government actions lie. As presented in Chapter 4, the doctrine of ultra vires allows for the basic concept of allowing judicial scrutiny. Ultra vires basically demand that state organizations do not use power to any greater extent than explicitly authorized by the law. This doctrine is being applied broadly in a parliamentary supremacy model of government like the UK. Even in jurisdictions that support constitutional supremacy, for example, in Malaysia and India, the power to decide the boundaries of permissible government action lies within the domain of the courts. However, there was an uninspiring historical past of counter-terrorist judicial review episodes. As an example, the Malaysian courts are empowered to invalidate government's action if they are found to violate the people's rights, but regrettably, the Malaysian judiciary has been a long way from active in protecting the constitutional rights as guaranteed by the Constitution. The prevailing judicial attitude has been to keep to a rigid literalist approach within the four walls of the Constitution - accompanied by a narrow-mindedness disposition not to consider the basic rights concepts. Hence the courts had a stronger tendency to submit substantially to the executive branch carrying no meaningful review over the executive infringements on the basic rights. However, if we compared the Malaysian judiciary with that of India, the Indian Supreme Court seems more vigorous and rights orientated. As highlighted in the many Indian case-laws cited in Chapter 4, judicial activism occurrence in the Indian judiciary has been elevated to a considerable extent.

The findings in Chapter 4 also reveal that in counter-terrorism cases, the constant debate has been on whether it is helpful to have the government measures taking over the judicial solutions to prevent an unwanted or protracted trial in court. But generally, it is due to the lack of a political answer that the role of courts is activated. The unwillingness of the government to acknowledge and compensate affected individuals because of egregious infringements in the name of counter-terrorism is contradictory to the underlying principles of equality before the law and human rights. The courts have important roles to play in dealing with this anomaly and allowing an act of real truth and fairness for the victims. Hence, there can be little doubt of the importance of the principle of judicial control as a measure of accountability. So, the strength of the courts is necessary for ensuring the legal rights of the individuals and in reaffirming the basic rule of law values on which a democratic system of government hinges such as Malaysia. In the Malaysian judiciary context, it is postulated in this thesis that it is timely they should reclaim its constitutional position as a co-equal branch of the government. The judiciary branch ought to continue its constitutional responsibility to affirm its commitment to constitutional supremacy and to uphold the rule of law. This should continue to be the case even when the powerful political branches are attempting to overstep these values. The courts must play an increased role in monitoring such powers of the political branches. This calls for a change of direction of the judiciary's attitude toward interpreting constitutional rights, especially in terrorism cases.

In Chapter 5, the focus was on the research question to what extent has the anti-terror law created a 'new dual criminal system' in the administration of criminal justice by disregarding proper rules of evidence and criminal procedures just to penalise terror suspects? One of the significant issues that emerge from the above findings is governments are cautious about the power and influence of criminal law in counter-

terrorism. They foresee that criminal trials will require the need for a full disclosure of state secrets; they are worried that where government secrets are concerned, it ought to be preserved. Hence, there will be obstacles in getting convictions against terror suspects. Ensuing from this important issue, the government remains apprehensive of the fact that under the criminal justice system, the standard of proof beyond a reasonable doubt may suggest that some guilty people occasionally will be acquitted. This suspicion is, however, controversial simply because the threshold to prove guilt beyond a reasonable doubt aims at evading any miscarriages of justice and reducing the risk of wrongful conviction. Despite this, the government introduced preventive laws such as POTA 2015 and inchoate/preparatory terrorism offences under Chapter VIA of the Penal Code. Inchoate offences as already explained in Chapter 5 means that if their substantive offence can be proved, people who may pose a comparatively slight risk may be found guilty and detained. As for preventive detention regime under POTA 2015, the detention can be grounded on a criterion that is less demanding than those prescribed by the criminal law. The expansion of the police power to conduct covert searches restrict fundamental human rights and derogate from accepted principles of criminal justice. Counter-terrorism laws have provided a precedent, or even a template, for the law enforcement agencies in other criminal contexts. Over time, what had been extraordinary measures to curb terrorism threats are becoming a normal part of the broader criminal law. The grave concern of many is this extraordinary new counter-terror measures if pitted against human rights consideration has often been sidelined and given less weight. For the government, the preventive law and procedures are an excellent measure to target the prevailing terror threats. However, ultimately, criminal prosecution should continue to be the main answer to acute criminal offences, which include terrorism.[2] However, from the civil libertarians' viewpoint, the best reason to keep the importance of criminal prosecution is that it

[2] Zedner, L. (2005). Securing liberty in the face of terror: Reflections from criminal justice. *Journal of law and society*, *32*(4), 507-533; Walker, C. (2004). Terrorism and criminal justice: Past, present and future. *Criminal Law Review*, 55-71.

demands proper evidence prior to an individual being charged and convicted of the criminal offence.[3]

6.2 LESSONS FROM INDIA AND THE UK'S EXPERIENCE

The war on terror is a real and dreadful issue amongst most states. The reaction by legal processes to this phenomenon remains to be challenging. As Malaysia hurried to legislate their POTA 2015, in view of the UN Security Council Resolution 2178, they didn't inspect the records of other states such as India and the UK, who may offer their wealth of experience in combating terrorism in order not to repeat the pitfalls and abuses carried out in the past by those states. The Malaysian government must keep this in mind every time a new law is put forward. Based on this research findings, some lessons can be learned for the Malaysian government in countering terrorism.

In 2008, when India was attacked by terrorists in Mumbai, many objectionable provisions in the TADA and the Indian POTA were resuscitated, causing anxieties that the Indian government may replicate the past poor records on protecting human rights. In India, just like in the UK, besides its moral duty to defend its citizen from possible terror attacks, the struggle towards imminent threats coming from terrorism must be carried out in conforming with the ICCPR, whereby India is a party to this multilateral treaty. The UN Security Council Resolution 1456 explicitly states, "*States must ensure that any measure taken to combat terrorism must comply with all their obligations under international law…. in particular, international human rights, refugee and humanitarian law.*" [4]

[3] Masferrer, A. (Ed.). (2012). *Post 9/11 and the state of permanent legal emergency: security and human rights in countering terrorism* (Vol. 14). Springer Science & Business Media.
[4] UN Security Council Resolution 1456 (2003) adopted on 20th January 2003 Retrieved 10 March 2017, from< http://repository.un.org/handle/11176/25388 >

Under India's many anti-terror laws, their government has provided its law enforcement agencies with the augmented power to eliminate the threat of terrorism. With this new endowed power, there exists proof this enhanced in powers has produced its undesired outcome. Each piece of a new law and powers, in fact, has reduced the accused basic rights and received an upsurge of abuse. One common theme with Malaysia POTA 2015 which can be drawn from the Indian experience is the extent of counter-terror law which has permeated into areas supposedly handled under the ordinary criminal procedure. Following this concern, some observe that one cause of this departure is from the broad meaning and scope of what makes up a "terrorist" act. As anti-terror laws usually provide the enforcement agencies with enhanced freedoms and less procedural impediments to clear when carrying out an investigation, there has been a historical pattern to make use of this increased power in situations that might not be within the purview of the law.

India's current principal anti-terror legislation in force is the UAPA 1967 which had gone through some amendments following the Mumbai 2008 terror attacks. It covers an ambiguous and wide meaning of the act of terrorism which can promote severe human rights infringements. Vague meanings, followed by heavy punishment and extended additional detention and investigation powers given to the law enforcement agencies have been taken advantage of to harass the government's political adversaries and to approve oppressive actions towards indigenous communities in India. Regarding pre-charge detention, the amended UAPA 2008 also allows a detainee to be jailed up to 180 days (along with the 30 days already under remand by the police) without charge. The Magistrate court may approve a preliminary pre-trial detention up to 90 days without the need to provide any specific reasons. But, if the authority can produce a document in court "*indicating the progress of the investigation*" together with special grounds seeking

for further detention of the detainee – (which is a rather low threshold for getting another extra 3 months), the court can increase the detention period for another 90 days. As pointed out in Chapter 3, under the Indian CrPC, a magistrate can only agree to the pre-charge detention of the accused at the maximum 90 days, provided the court is convinced "*there are adequate grounds exist for doing so*."[5] If following the traditional Indian criminal procedure, a suspect must be set free on the expiry of 90 days remand on bail, even if he or she is caught for a serious crime which warrants a death sentence if criminal charges have yet to be filed in court against that suspect.

However, the most offensive part in the amended UAPA 2008 has been the provision for the court to apply the presumption of guilt on a person suspected of pursuing terrorist acts whenever the inculpatory conduct is established but devoid of '*mens rea.*' Further illustrations can be seen under section 15 of the UAPA 2008. According to section 15, if any arms or explosives were in the control of the suspect or if fingerprints of the suspect were discovered at the scene of the crime, the court will make the presumption of guilt. This presumption of guilt or innocence of an accused person is "fundamental to the protection of human rights" and "imposes on the prosecution the burden of proving the charge" beyond a reasonable doubt and this is well-documented by the Human Rights Committee. It must not be taken away whether the state is confronting national security issues or not. It is, therefore, clear that the provision of section 15 of the UAPA 2008 promotes offensive criminal prosecution that threatens the right to due process or fair trial rights and produces excellent prospects of a miscarriage of justice.

On analysing India's anti-terror laws, it is recommended that a revamp is needed in these three phases of the criminal law process: (i) during the police investigation, (ii)

[5] Section 167 (2) (a) of the Indian CrPC 1973

during the prosecution of the accused in court, and finally (iii) during the hearing of the terrorism cases. Predominantly, it is observed that India's police method and techniques of investigating suspects are not satisfactory. The lack of investigative techniques remains the major contributor to many cases of human rights abuses. As a consequence, there exists an excessive dependence on a confession made by the witness through their witness statements.[6] Due consideration ought to be given to providing an excellent training ground for the police including the improvement of enhanced forensic expertise and services. The second issue involves the independence of prosecution. It is believed if the public prosecutor is unbiased of the government, the quality of the prosecution will have improved greatly even more so, in terrorism-related cases. This attribute has been reiterated by the Indian Supreme Court including the National Human Rights Commission and the Indian Law Commission.[7] Finally, the last issue is on the quality of India's judiciary. Without doubts, the Supreme Court of India has displayed a more assertive, independent, rights-conscious and free of any political intervention. Unfortunately, the main setback is the immense backlog of cases waiting for disposal due to manpower limitations.[8] The cumulative effects of this are inordinate delays in the disposal of pending cases, higher litigation costs and deteriorating evidence by the time of trial. Sometimes, detention pending trial even goes beyond the maximum duration if these accused persons were to be sentenced if found guilty. The inability to deliver justice timely will have led the members of the public to lose faith in the justice system. Hence, this concern should be dealt with urgently. The anti-terror laws of India can be encapsulated as follows:

[6] Kalhan, A., Conroy, G. P., Kaushal, M., & Miller, S. S. (2006). Colonial continuities: Human rights, terrorism, and security laws in India. *Colum. J. Asian L.*, *20*, 93.

[7] Verma, A. PIJPSM Cultural roots of police 22, 3 corruptions in India. *Policing: An International Journal of Police Strategies & Management* 264

[8] *Twenty million cases still pending: In India's district courts, a crisis is revealed*. (2016). *Firstpost*. Retrieved 10 March 2017, from <http://www.firstpost.com/india/twenty-million-cases-still-pending-in-indias-district-courts-a-crisis-is-revealed-2712890.html>

(i) Focus more on safeguarding the state instead of the citizens;

(ii) Overreact to the risk presented by terrorism with too many extreme actions than it is needed;

(iii) Quick in legislating new law without providing much space for public discussion or judicial scrutiny;

(iv) Excessively broad and unclear descriptions on the meaning of 'terrorist acts' which run contrary to the principle of legal certainty – a cardinal requisite of the Rule of Law;

(v) Evading and disrespecting due process by having pre-trial investigation and detention processes which trespass on personal liberty;

(vi) Lack of judicial independence and denying the rights of the accused person to have a fair trial by setting up special courts with special procedural rules for terrorism cases;

(vii) Provisions in the UAPA 1967 which asked the courts to apply adverse presumption on the suspect which contravenes the well accepted criminal law principle of the presumption of innocence;

(viii) No adequate supervision in place to limit and prevent the arbitrary and unfair powers applied by the law enforcement agencies and the decision-making of the public prosecutor.

The Indian experience as mentioned above is not intended to serve as a cautionary lesson about particular acts of abuse but rather as an example of repeated patterns of abuse encountered when attempting to fight terrorism.

Moving on to the next section in the UK, when the Terrorism Act 2000 (TA 2000) was passed and later updated by the Terrorism Act 2006 (TA 2006), it was intended to

consolidate all past pieces of emergency laws into one permanent Act. TA 2000 covered crucial and contentious powers, for example, the expansion of police power to arrest people for investigation up to 14 days (further to 28 days in the TA 2006). Often and indisputably, an emergency law was a knee-jerk response to a specific incident that occurred. In the aftermath of the 9/11, it was proposed by the UK government that TA 2000 could not deal with terrorism threat[9] and because of this concern, a new counter-terror law was required and in December 2001 saw the birth of Anti-Terrorism, Crime and Security Act 2001 (ATCSA 2001) to provide additional powers for the enforcement agencies. It has also been postulated that existing criminal law treatments were adequate to cope with terrorist acts; for that reason, there were incessant pleas for the emergency procedures to be promptly abolished. It has been convincingly contended in this thesis that the general effect of emergency law contributes the harm being done on our legal system, a devastation of the moral position of the authorities, and weakened public trust and faith in the administration of justice and the rule of law. Primarily, the influence of emergency law on trial processes resulted in the deviation from the common law procedures, which somewhat adjusted legal proceeding in favour of the prosecution.

In the UK, the main debates about counter-terror legislations were centred on the practice of preventive detention to pre-empt a terrorist act and/or to search for relevant information from the suspected terrorists. However, this does not go well with the notion of the rule of law which demands that the law gives ample protection of fundamental human rights.[10] The right to liberty is one such fundamental right. This thesis argues that neither domestic laws nor international human rights laws, as they apply to the deprivation of liberty in preventive detention, sufficiently safeguard this basic human

[9] Fenwick, H. (2009). *Civil liberties and human rights*. Routledge; Walker, C. (2009). *Blackstone's Guide to the Anti-Terrorism Legislation*. Blackstone Press.
[10] Bingham, L. (2007). The rule of law. *The Cambridge Law Journal*, *66*(01), 67-85.

right. The effect of these shortcomings is that preventive detention laws ignore the rule of law prerequisite. Hence, the best way to stop abuse, preventive detention must be modelled and implemented within a consistent legal system, founded on universal human rights and many good practices as experienced from the UK's counter-terror legislations. This can in return offer a guide for Malaysia who is having preventive detention as a counter-terrorism tool. Although both the UK and Malaysia have adopted the preventive laws, however, the UK adopts a much stricter criterion to avoid arbitrary detention. It is commendable that the UK government has preferred to abide by the jurisprudence of ICCPR and the European Convention: that of proportionality and necessity. For example, UK law was amended in response to two cases where the essence of the rulings related to arbitrary detention, even though the word "arbitrary" barely appeared in the judgments. The first of these cases concerned the legality of a control order. The Law Lords ruled that a curfew of 18 hours amount to a deprivation of liberty. Because of the ruling, curfews were reduced to 16 hours. In the second case, the law lords also ruled that it was discriminatory to detain foreign nationals (international terrorists) indefinitely when the law did not permit this for British citizens. Apparently, the offending part of the statute namely, Part 4 of the ATCSA 2001 was repealed. The ECHR has also repeatedly "*found internment and preventive detention without charge to be incompatible with the fundamental right to liberty under Article 5 and the prohibition of discrimination under Article 14, in the absence of a valid derogation under Article 15*." [11] It is observed that almost every element of contemporary UK detention law has been challenged on the grounds of violation of human rights in domestic courts and the ECHR. Some difficulties encountered in applying the detention law and policy caused the government to do serious rethinking and re-crafting of UK counter-terrorism laws. Above all, the important lesson

[11] For example, in *A v United Kingdom Appl*. No. 3455/05 ECHR (February 19, 2009).

to be learned from this is that the UK government detains terror suspects preventively, but not arbitrarily.

In January 2005, the UK government accepted the downsides of Part 4 ATCSA 2001 and announced that a new law would be introduced to repeal the offending ATCSA 2001. Eventually, the Prevention of Terrorism Act 2005 (PTA 2005) was enacted with a new control order scheme. As already set out in Chapter 3, there are two control orders. A non-derogating order may be issued out by the Home Secretary whereas non-derogating control order requires a court order. Under the PTA 2005, the court has the authority to scrutinise any application made prior to issuing the control orders. Although a court's scrutiny is required when a control order is generated, however, if the court is not expected to perform a thorough oversight role on the merits of each case, control orders continue to be a tool that can be controlled by the government. Because of the House of Lords cases like *Re:MB* and *Secretary of State for the Home Department v JJ*, the control orders were incompatible with the convention rights under the ECHR. Then the PTA 2005 was repealed by the Terrorism Prevention and Investigation Measures Act 2011 (TPIM). Basically, TPIM strategies entail the suspected person to wear an electronic tag, to report regularly to the police and being confronted with "tightly defined exclusion from particular places and the prevention of travel overseas." The suspected person must stay at his house overnight and continue to remain at home for as long as 10 hours. But, if they wish, they could apply in court to enable them to stay in some other places. The suspect may have access to the internet and mobile phone, but conditions are imposed on them. Usually, after two years, TPIMs shall end unless new proof surfaces to show the engagement in terrorism by the suspected person. Like preventive detention, it should be emphasised there is no criminal trial or civil action that is necessary to subject a person to such a measure. It is noteworthy that the TPIM is the equivalent of the 'Restrictive

Order' under POTA 2015. The important thing is what lesson can be drawn from this TPIMs for Malaysia is that, at the onset, a detainee is not kept away in seclusion in a detention centre and there is judicial oversight before any TPIMs can be issued out as provided under section 6. In direct contrast with POTA 2015, issuing the detention order and/or the restrictive order are under the control of an administrative body known as Prevention of Terrorism Board (PTB) with no judicial supervision. In fact, POTA 2015 expressly forbade any interference from the court.[12]

Another noteworthy mention is that in the UK, a yearly report on the performance of the TA 2000 and Part 1 of the TA 2006 are needed by section 36 of TA 2006. The reports coming from the Independent Reviewer of Terrorism legislation are heard and contributed to the UK government's decision to abolish the control orders regime and to create TPIMs in their place. The UK's example could serve as a model for Malaysia to establish an independent reviewer to assess on the proper and proportionate exercise of preventive detention powers. Under POTA 2015, there is no provision for any review by an independent body nor any 'sunset clause' provided. In the absence of any limits under POTA, virtually the Act can be 'carte blanche' for the Malaysian government and potentially open to further abuse as evidenced in the repealed ISA 1960.

6.3 AN OVERALL ANALYSIS AND CONCLUSION

The findings of the thesis presented an overall, albeit careful examination of the status of the rule of law in present day counter-terror legislation. In all the three states studied, a disposition by the respective legislators to disregard is human rights issues in their counter-terror laws. Except for the UK, where there are an increasing attention and

[12] See section 19 of POTA 2015.

defence of human rights, all the other states push human rights boundaries even further. This development is, to a marked extent, maintained by the case-law of domestic courts or in the case of the UK, the European courts, which pay attention over the compatibility of the law with fundamental human rights and denounce extreme actions.

This study discovered that states had adopted many legislative procedures focusing on global terrorism threats. A preponderance of measures taken by the states is examined, and when viewed from a human rights perspective, some are unsatisfactory. Most of these have been censured by the courts and were later removed. An increasing consciousness on the value of human rights is remarkable. But then again, legislators display a growing wish to have vigorous responses, and things regarded as settled law have turned into debates again, such as the presumption of innocence or the right to due process of law. Because of these developments, the noticeable fragility of fundamental human rights principles triggers concern. Observing how legislators respond to terrorist incidents, the prospects for the future are not too hopeful for any of the states, with the probable exclusion of the UK, which exhibits continuous efforts to preserve human rights. If terrorist offenders carry out to commit another shocking event equal to 9/11, there can be no assurance that human rights will be defended. It is tough to envisage exactly how the different states studied here will act in response to it. Presumably, the UK may once more continue with the control order regime (TPIMs) and possibly extend pre-charge detention. An event like 9/11 will be an example of an exigency situation, threatening the safety of the state and therefore, justifying the temporary suspension of basic human rights. Perhaps, this will get no disapproval from the domestic courts, since traditionally, issues relating to national security have constantly been thought to be the legitimate responsibility of the government alone.

This thesis concludes that the outlooks for adherence to the rule of law values, in particular, human rights are not too optimistic overall, at least in the event that yet another terrorist episode very similar to 9/11, it would continue to worry our legislators and the safeguard of human rights goes unheeded. This thesis has discovered that human rights are not respected in anti-terror legislation and its application. It is observed that we cannot always count on legislative moves whose focus are blinded by the anxiety of terror attacks. Having said that, it has also been shown that the courts act as a vital role in 'bridging' the relationship between counter-terror legislation with human rights. They have shown a great ability to fix legislative pitfalls in connection to human rights, by proclaiming the troubled provision as unconstitutional as observed in India, or the law is incompatible with the HRA 1998 as in the UK or by giving authoritative directions on its interpretation. Perhaps this thesis can safely affirm that the active participation of the courts has hampered our democracies from turning into an authoritarian state of total control. Therefore, judicial 'muscularity' or 'activism' as some may have labelled it, should be further encouraged and extended. Although judicial activism can take a number of different forms as explained in Chapter 4, it is much easier to see it in real cases than to describe it in the abstract. For example, in India, many activist judges have given a broader and liberal interpretation of constitutional rights affecting individuals ranging from the rights to life, liberty and privacy. Hence, it is suggested in this thesis that the Malaysian judges should also emulate its Indian counterparts by constantly and actively '*breathing life'* into constitution rights – a situation where Malaysia is lacking.

In this study, it is further observed that the different states apply almost similar fashions in tackling terrorism threats through legislations. However, some lessons can be learnt from the results of the analysis. The examples and approaches adopted by some states may be emulated by others, and pitfalls committed by all countries may call for

further thinking. For example, the system in the UK to temporarily limit legislation and subject it to continuous review by independent reviewers has proved partially successful because it impeded 'bad' legislation from lasting too long. The system of an independent reviewer by a legal expert in the UK usually come out with the concrete suggestion and critics for the legislator and are generally taken into consideration. Besides that, this research has revealed that most anti-terror laws and regulations infringe on the concepts of proportionality, certainty, and clarity of the law. Abuse of powers and disproportional measures are issues in which human rights were unjustifiably restricted. The principle of proportionality obstructs excessive human rights restrictions while the principles of certainty and clarity of the law make sure that laws are not drafted so they can be misconstrued and taken advantage of in practice. These concepts are therefore very crucial when drafting new legislation which legislators must take due consideration.

Another point deserves mention here [13] is miscarriages of justice are often brought about by an unbalanced state's system. Although the separation of powers is imperative to prevent any instability, we can only receive a commitment to human rights, democratic accountability, and constitutionalism if all the branches of the state play their respective role well in the check and balance in the administration of the state powers as highlighted in Chapter 4. Intrusive and coercive actions must constantly be sanctioned by a judge, and laws likely to conflict with the human rights should be specially examined.

6.4 RECOMMENDATIONS

Like India and the UK counterparts, Malaysia will continue to have serious threats from terrorist in this era punctuated with terrorism. However, adopting counterterrorism measures already proven to infringe basic human rights guarantees is not a reliable or

[13] This point has been identified in Walker, C. (1997). Constitutional Governance and Special Powers Against Terrorism: Lessons from the United Kingdom's Prevention of Terrorism Acts. *Colum. J. Transnat'l L., 35*, 1.

adequate response in these regards. For example, abusive practices in the counter-terror legislations such as POTA 2015 and Chapter VIA of the Malaysian Penal Code (PC) are in need of revamping or abolish to comply with the Rule of Law values. Moreover, some contended that if the counter-terror response is not in line with democratic benchmarks, it might lead the country to lose its integrity. Therefore, the following are general and specific recommendations for due consideration.

6.4.1 General recommendations towards countering terrorism

One ought to give some thoughts to that one plausible explanation why anti-terror laws may be more detrimental to human rights when compared to ordinary laws in a democratic society is the growing public demand for action following a terrorist strike. The public placed politicians under enormous pressure to act in response to terrorist situations. To refrain overreactions, there are generally two scenarios: first, the pressure on political actors could be decreased if those in charge of implementing anti-terror laws were less depending on public sentiment. However, this choice would be risky in a sense it would minimise democratic supervision on legislative activities. The other alternative would be to highlight (helped by mass media) the worth of the values of our society, that is the rule of law and human rights, instead of its weak point that is, the susceptibility towards terrorist assault. There is no accepted or the best counter-terrorism strategy for democracies globally. Virtually, every struggle connected with the act of terrorism features its own unique attributes. To build a best-suited solution, every nation and its security experts will probably require considering the type and seriousness associated with the risk portrayed by terrorism, besides looking at the political, societal and their economic framework. The capabilities and readiness of their law enforcement systems including the judiciary and the effectiveness of their anti-terror laws in fighting terrorism must be revisited. Beyond that, the need to consider and balance between under-reaction

or over-reaction steps taken by the government which can lead to a serious breach of human rights. It is not only the measure and strength of the democratic states' reactions that will differ, but the key point is whether the counter-terrorism approach must be tailored to the kind of terrorist threat encountered. A further danger in having excessive anti-terror laws may, over the longer time, erode the very democratic freedoms they are designed to protect. As Ignatieff contends, "…*the historical record shows that while no democracy has ever been brought down by terror, all democracies have been damaged by it, chiefly by their own overreactions*."[14]

6.4.2 Specific recommendations for the Malaysian government

(i) Section 130B (3) (e) and (h) of the PC should be repealed

Under section 130 B (3) of the Malaysian Penal Code (PC), what amounts to a terrorist act comprises an action that might result in some degree of harm. The type of harms varies from the "*death of a person, serious bodily harm, serious* ***damage to property*** *and serious disruption and* ***interference with an electronic system***." By incorporating the latter two harms in the definition of a terrorist act, Malaysia has adopted the UK's model.[15] This broad definition and scope of the terrorism offence can be problematic because it generates more intrusive investigatory powers on the police in the name of counter-terrorism. As Roach puts it, the "*real questions whether it is necessary to define all politically motivated serious damage to property or serious disruptions to electronic systems as terrorism.*" [16] It is important to bear in mind that Malaysia's counter-terrorism legal framework depends very much on its definition of what equal to a 'terrorist act' under the PC. Therefore, the wider this definition, the more likely it will lead to abuse by

[14] Ignatieff, M., & Welsh, J. M. (2004). The lesser evil: political ethics in an age of terror. *International Journal*, *60*(1), 285.
[15] See Section 1(2) of Terrorism Act 2000
[16] Roach, K. (2004). The World Wide Expansion of Anti-Terrorism Laws After 11 September 2001. *Studi Senesi*, *487*.

the law enforcement agencies. It is suggested that only conduct followed by an obvious criminal intent to result in "*death or serious bodily harm*" should be punished as a terrorism offence.

(ii) To abolish the maximum life sentence imposed on preparatory terrorist acts under section 130D, 130J and 130K of the PC

Besides making it a crime for participating in a terrorist act as provided in Chapter VIA of the PC,[17] under the same section of the PC, it also criminalised an array of acts in preparation or acts associated with an act of terrorism.[18] By introducing these preparatory terror offences into the PC, it has effectively widened criminal law liability considerably. As already pointed out in Chapter 5, a host of 'inchoate' offences, which include, attempt, incitement and conspiracy have already been recognised under the criminal law before this 'new' criminal offence was created. The argument for having such criminal offences are for crime prevention strategies. Even though inchoate offences are not uncontroversial inherently, nevertheless, the discussion has long been brought up on the suitability of enabling the State to preventively step in to pursue and penalise an individual who plans to perpetrate (but has yet to do so) devastating harm.[19] For example, section 130C (1) of the PC provides that an individual commits a terrorist act if he or she does any act '*directly or indirectly*.' The impact of the preparatory offences is to criminalise actions in advance. They make people vulnerable to harsh punishment even when no overt criminal intention has been proved. It should be reminded at this point that inchoate criminal offence of attempt is penalised as though the crimes alleged was perpetrated. For supporting a terrorist group, the maximum sentence imposed is life imprisonment which is disproportionate as the offence has yet to be committed.[20] The

[17] Section 130 C (1)
[18] Provisions such as section 130 E, 130 F, 130G and 130H of PC
[19] Mc Sherry, B. (2009). Expanding the boundaries of inchoate crimes: The growing reliance on preparatory offences. Hart Publishing.
[20] See: Section 130J(1)(a)

same maximum punishment of life imprisonment can also be imposed on those who harbour persons planning to commit terrorist acts under section 130K of the PC and for those who provide devices to terrorist groups under section 130D of the PC. This is in contrast with the ordinary principle of criminal responsibility, considering individuals who contemplate committing a terror act at the initial stage may later shift their thoughts and decided not to carry out their plans at the last moment. The primary concern here is the proportionality in penalising preparatory terror offences which run contrary to the sentencing principle under the criminal justice system. In fact, most recent terrorism trials in Malaysia have involved charges of supporting or soliciting terrorism offence as examined in Chapter 5.

(iii) To reject incommunicado detention under POTA 2015

Under section 5(1) of SOSMA 2012, it provides for immediate notification of the detainee's detention to a designated person, however, this is absent under POTA 2015. That means, under POTA, terrorist detainees can be kept under the police custody with no communication with the outside world including their immediate family for investigation. In such cases of incommunicado detention, how should the liberty/security balance be met? Some would suggest that the law should weigh more in favour of liberty because the deficiencies in the process have resulted in egregious human rights abuses. However, others might argue these methods are essential from a security perspective. Undoubtedly, important reasons may justify preventing detainees from informing a family member about the detention, such as the fear of tipping off others involved in an imminent potential terror plot. But then again, what purpose, other than a punitive one, is served by detaining them in this way for 21 days plus 38 days,[21] particularly if the danger

[21] See section 4(1) (a) and 4(2) (a) of POTA 2015

posed by the suspects will diminish over time. It is argued that detainees must have the right to inform someone of their choice about their detention, either personally, or through the medium of police or some other acceptable third party. This right must be exercised as soon as practicable after arrest and a record kept of the date when, and the name of the person to whom, the information was given. In considering the permissible time frame to delay in contacting the designated persons, in India for example, upon arrival at a police station after arrest, police must inform the detainee of his right to have a nominated third party informed about the arrest. Police must record the details of the person to whom the information was given.[22] Although sometimes, the law enforcement might want to delay the right to inform the third party until the first court appearance. For example, in the UK, a detainee may have a relative or friend informed that he is in custody when is reasonably practicable,[23] but the right to inform may be delayed for up to forty-eight hours[24] in certain specified circumstances that might involve, for example, tipping off others, interfering with witnesses, evidence, or the carrying out of the investigation.[25] If this right is delayed, the detainee must be told the reason for the delay when is reasonably practicable.[26]

(iv) To drop 'administrative' or preventive detention under section 13 (1) of POTA 2015

Under section 13 (1) of POTA 2015, the Prevention of Terrorism Board (PTB) after considering a report submitted by the Inquiry Officer, has the authority to issue a detention order for a term not exceeding 2 years. It is put forward here that such detention without trial is unfair and arbitrary which is a corollary to the understanding of the Rule of Law values. These aspects have been reviewed at length in Chapter 3. Ideally, it should

[22] Section 50A of India CrPC 1973
[23] See c.11 Sch. 8 Section 6(1) and (2) TA 2000
[24] Police and Criminal Evidence Act 1984, c.60, Code H. Revised Code of Practice in connection with the detention, treatment and questioning by police officers of persons in police detention under section 41 of, and Schedule 8 to, the TA 2000.
[25] Sch 8 section 8(4) (a) – (g) TA 2000.
[26] Ibid section 7

be eliminated because there is no upper limit on how long a detainee can be deprived of his/her liberty as section 17(2) of POTA 2015 allow PTB to extend the duration of the detention period for another 2 years upon expiry based on the same grounds on which the original detention order was made or on different grounds. There is no assurance that the extension decided by the PTB is free from abuse as there is no mechanism to review its decision. The detention order can go on perpetually if PTB decides to have the detention to continue. If the government cannot drop the detention without trial under section 13 because of the needs of law enforcement, it is suggested that regular reviews should take place to assess the threat posed by the detainee after the passage of time. At each review hearing, several specified criteria should be assessed, including the threat caused by the detainee at the date of the review, the continued necessity of detention, the length of time the suspect has been detained, and the availability of other proper methods to protect the community should the detainee be released. If the detainee is determined to pose a continuing threat, and detention is confirmed, he must know the reasons for the decision. At each review hearing, detainees, helped by independent legal counsel, must be allowed to challenge the continued detention. It is noted that even at the first inquiry hearing before issuing the detention order, legal representation is prohibited unless the detainee's own evidence is being taken.[27]

(v) To provide a mechanism for independent oversight of preventive detention laws

Many countries have recognised the importance of independent oversight of controversial measures, but current mechanisms vary in effectiveness. Having a safeguard mechanism is to check on the operation of the preventive detention legal framework and its measures. It is recommended that an independent designated person or body shall

[27] Section 10(6) of POTA 2015

monitor and report annually on the effectiveness of preventive detention measures and to recommend proper measures or the abolition of any poor measures. Based on the report and findings submitted, the government should take cognisance and respond within the time period and if necessary, to introduce changes to the detention laws if proper. Although in Malaysia and in India, there is no independent oversight of the operation of terrorism legislation, it is imperative to have in the UK. Section 36 of TA 2006 stipulates that yearly review on the effectiveness of TA 2000 and Part 1 of the TA 2006 is required.[28] As highlighted earlier, the Independent Reviewer of Terrorism Legislation report is usually noted and contributed to the government's decision to abolish control orders and create TPIMs in their place. The UK's example to have a periodic review of their counter-terrorism legislations could serve as a model for the Malaysian government to adopt in order to have a proper and proportionate exercise of preventive detention powers.

(vi) To repeal section 19(1) of POTA 2015 and to allow the detainees the right to challenge their detention in a court of law

One of the most offensive features of POTA is the ouster of judicial scrutiny. This is expressly spelt out in section 19 (1). Under that section, the detainees may not bring any judicial review for any acts or decision made by the PTB. The ouster clause is abhorrent to the Rule of Law values on the right to due process of the law. It is recommended that all detainees must be given the opportunity to challenge their detention in a court of law. This includes persons detained during a state of emergency where the states have derogated from their obligation under Article 4 of the ICCPR to guarantee the right to liberty. Court's engagement in assessing the procedure of issuing out the preventive detention orders apparently dismiss the issue that the detainee has been deprived of liberty

[28] Section 36 (1) of TA 2006 states: "*The Secretary of State must appoint a person to review the operation of the provisions of the Terrorism Act 2000 and of Part 1 of this Act*."

as the detainee has been offered a chance to question the grounds of detention in court. In addition, judicial review mechanism can be an added safeguard for the detainees if the detention order has been issued arbitrarily.

(vii) A sunset clause should be introduced in POTA 2015

Having a sunset clause is to give the crucial part of the provision in the Act to cease operation on a given date (instead of continuing to be law) or after several years. Usually, the sunset clause states that selected laws or a particular provision found in the Statute to cease on a specific time frame. However, if the legislature desires the affected law to stretch further when it expires, the legislature must pass another new legislation to replace the expired legislation. It can be considered as though the law was repealed. However, sunset clauses are not without pitfalls. If the time frame is set in a short period, evaluating the expired laws is most probably based on minimal facts on its effectiveness. As a result, the government may be inclined to downplay its practical impact on basic human rights. For these reasons, a longer duration of five years may be best-suited for the sunset clause to determine its overall performance. This would allow maximum analysis, and concurrently, enable sufficient time to pass and evidence to be collected to enable Parliament to review the laws if it desires correctly. In the absence of a sunset clause, a legislation with an enormous impact on basic human rights and liberties like the repealed ISA 1960 will be open to abuse occasionally. Hence, it is a good legislative practice to have a sunset clause introduced in POTA 2015.

(viii) To offer all detainees held under POTA 2015 with a statutory right to seek compensation if there is any violation of human rights

Thus far, no right exists in POTA 2015 to seek redress from a court if the detainees' rights have been violated. It is observed that a right to seek damages or compensation exists in some countries for wrongful imprisonment and ill treatment by the law enforcement. Some countries already have legislation that enables individuals to sue the government for compensation. For example, the UK government has paid out millions of pounds to victims of torture in Guantánamo.[29] With this compensation scheme in place, and the obligation to pay a large sum of money to a victim, it will hold back the government from simply taking future counter-terrorism action without legitimate causes. This potential cost to security must be given full consideration and balanced against the right to take action that could provide a check on egregious conduct by the government.

(ix) To expand and strengthen section 5 of the Judges' Code of Ethics Act 2009 Part III (Code of Conduct)

As highlighted in Chapter 4 of this thesis, the Malaysian judges have a stronger tendency to be deferential to the legislature and the executive in their approach during an exigency situation, more so when it concerns national security. More often than not, when trying security offences cases, the core principles of the Rule of Law have been conveniently disregarded by the court. Therefore, it is crucial to remind the judges constantly of their judicial duty to defend the enshrined Constitutional rights and the law as embodied in the common law, statute and precedent. Although Malaysian judges are bound by the Judges' Code of Ethics 2009 Act, in particular, section 5 of Part III (Code of Conduct) that provides for upholding the integrity and independence of the judiciary,

[29] Cowell, J. (2014). *Britain to Compensate Guantánamo Detainees*. *Nytimes.com*. Retrieved 6 April 2017, from <http://www.nytimes.com/2010/11/17/world/europe/17britain.html?_r=0>

it is observed that the provision under section 5 is too general and it must be further expanded or strengthen. Section 5 reads:

> *"A judge shall exercise his judicial function independently on the basis of his assessment of the facts and* ***in accordance with his understanding of the law****, free from any extraneous influence, inducement, pressure, threat or interference, direct or indirect from any quarter or for any reason"*

The above section 5 only mandated the judges to exercise their judicial function **in accordance with his understanding of the law** which is too ambiguous. It is, therefore, recommended this provision on upholding the integrity and independence of the judiciary should be enlarged to include (inter alia): to uphold the supremacy of the Constitution, to respect the enshrined rights and freedoms under Part II of the Constitution when dispensing justice, and finally, to respect the Rule of Law ideals at all times.[30] All these criteria are fundamental to prove a healthy democratic state, and the court has an important role to play in these regards.

6.5 THE WAY FORWARD

Although the experiences drawn from the comparative states may be helpful for Malaysia hoping to fortify and develop an effective legal response to counter-terrorism, it may not necessarily be the case. For instance, India has been striving hard to justify their counter-terror laws, after looking at how "developed democracies" have been operating their respective counter-terror legislations. Unfortunately, India's counter-terror framework displays minimal achievements. In fact, not even one counter-terror legislation can claim to have succeeded. Most of the time, the new law will be introduced

[30] As a starting point, the Malaysian government can follow the Republic of South Africa's model of Code of Judicial Conduct in Judicial Service Commission Act, 1994 available at: (2017) *Justice.gov.za*. Retrieved 5 December 2017 from <http://www.justice.gov.za/legislation/notices/2012/20121018-gg35802-nor865-judicial-conduct.pdf>

and later abolished or repealed. Having said that, we must also take cognisance the weakness of any particular legislative provisions does not impede the proper working of counter terror measures. Sometimes the recalcitrant law enforcers are equally to be blamed for making the legislative provisions look bad by simply abusing the law. One should not lose sight that justice is not in the legislation but in the administration of justice too.

As literature has proven, terrorism is triggered by various reasons such as having conflicting religious views, defending territorial rights, police brutality and championing minority rights. Any anti-terror laws enacted should not only focus on the end result to punish the terrorists but to address the root cause of terrorism by alleviating the dissatisfaction among the citizens. To do this, the enacted anti-terror laws should have provisions that distinguish the terrorist based on their ideals instead of having a blanket punishment. Eventually, by adopting such a measure, anti-terror laws will reflect a better balance between safeguarding national security and respecting the rule of law principles.

It is found that most anti-terror laws in Malaysia have been passed hastily in reaction towards a situation. However, once confronted with severe political resistance or being struck down by the court, the law will be abolished eventually. It is further observed that in an exigency situation, the government finds this as a good excuse for a swift passage of a new security legislation. Often, the law passed turns out to be controversial in many areas that touch on human rights. What is needed is a detailed analysis of the unwanted effects of such laws. The draft bill ought to be allowed ample opportunity for parliamentary scrutiny which is lacking. Only under such a scenario, a government can look forward to a better acceptance of the law. The government should be mindful to consider the social requirements of its people and not just indiscriminately to follow other states' approaches. The part played by the civil society is also important for checking on

the offensive character of anti-terror legislation. In Malaysia, it is good that human rights activists and the Bar Council have consistently played a key role in denouncing human rights abuses which have taken place, especially under the pretext of protecting the security of the state. Particularly, the press in Malaysia were emboldened to report prompt news on human rights abuses in the past because of the repressive practice of security law such as the repealed ISA 1960.

Amongst the primary aim of anti-terror laws ought to be how to control political resistance instead of focussing on how oppressively the government handles the law. In fact, Fromkin once explained, "*Terrorism wins only if you react to it in the way that the terrorists want you to: which means that its fate is in your hands and not in theirs*."[31] Simply put, it is within the government's control to contain terrorism threats. Hence, the key approach in fighting terrorism must not go around instilling fear and panic in the community.

In this study, I have focussed primarily on the legislative response to combat terrorism menace. But legislation is not the only answer or reaction to curtail terrorism threats. One must look beyond the legislative response and explore the root cause of terrorism from the perspective of sociology, religion, political and the economical aspect of it to give counterterrorism research a more holistic approach. The researcher wants to recommend that successive research on counterterrorism should involve the collaboration of multi-disciplinary faculties across the university to have a more inclusive and balanced view. Also, if future research can incorporate both formalist and functionalist approach, it will produce a more comprehensive assessment in the study. This is because a shortcoming of all academic studies of legislative provisions focus on formal provisions of the law rather than on how the law functions. Ideally, a functional approach (as opposed to a formal

[31] Fromkin, D. (1974). The strategy of terrorism. *Foreign Aff., 53*, 683.

approach) is desired to determine whether the law is being legitimately applied and whether it is achieving its intended purposes.

To end this study on counter terrorism and the rule of law, the researcher advocates the sage words of the late former UN Secretary General Kofi Annan as a constant reminder;

> "*We should all be clear that there is no trade-off between effective action against terrorism and the protection of human rights. On the contrary, I believe that in the long term, we shall find that human rights, along with democracy and social justice, are one of the best prophylactics against terrorism.*"[32]

[32] "Addressing Security Council, Secretary-General Calls on Counter-terrorism Committee to Develop Long-Term Strategy to Defeat Terror" | *Meetings Coverage and Press Releases*. (2017). *Un.org*. Retrieved 16 March 2017, from https://www.un.org/press/en/2002/SC7276.doc.htm

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