The New Prevention of Terrorism Act 2015 (POTA): A legal commentary

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Abstract

On April 7, 2015, our Parliament passed the new Prevention of Terrorism Act. 2015 (POTA) after going through heated debate for more than 10 hours. The new POTA faced considerable opposition and criticism for introducing the continuing detention without trial, which the lawmakers have claimed to be similar to the already repealed Internal Security Act (ISA) that dominated Malaysia for the past 52 years. It was further contended by many quarters that the new POTA gives our government greater authority to track and intercept terrorist acts and the fear of it being abused is not guaranteed, judging from the past history of cases under preventive detention in Malaysia. Although our Prime Minister himself has given his assurance that the executive arm will not have any say on who to detain under POTA, nevertheless it creates new crimes, new penalties, and new procedures for use. The introduction of POTA by our government has also attracted adverse comments by Human Rights Watch Deputy Director Phil Robertson with the following remarks: " by restoring indefinite detention without trial, Malaysia has re-opened Pandora's box for politically motivated, abusive state actions". Thus, it is the aim of this article to provide an assessment and legal commentary on the relevant sections of the POTA that are claimed to be 'controversial' by many, and whether it undermines basic human rights besides looking at other nations as a comparative study.

I. INTRODUCTION

The turmoil caused by the Islamic State (ISIS) to Syria and Iraq, and the growing threat of other forms of terrorism in the world has led to the passing of the new Prevention of Terrorism Act 2015 ('POTA') in Malaysia. The Prime Minister, on 26 November 2014 delivered a White Paper entitled: *'Towards Combating the Threat of Islamic State'* [1] after recognising that there was a continuous threat of violence within and outside the country. Resolution 2178 adopted by the United Nations Security Council against imminent threats

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1 Office of the Prime Minister, Putrajaya, Malaysia, 26 November 2014, "Teks Ucapan Pembentangan Kertas Putih ke Arah menangani Ancaman Kumpulan Islamic State", http://www.pmo.gov.my/home.php?menu=speech&page=1676&news_id=745&speech_cat=2. Site accessed on 7 April 2015.

to global peace and security perpetrated by these terrorist acts were noted in the White Paper and brought up for discussion. The White Paper proposed the creation of a new law.

POTA was born from this initiative, as a new preventive measure to address and to combat militancy in the country. It enables law enforcement officials to track down and penalise those who are suspected terrorists. It is a preventive measure utilised alongside other existing Acts, intended to combat terrorism by de-radicalising detained suspects. Those Acts are the Penal Code [Act 574], Prevention of Crime Act 1959 [Act 297] and the Security Offences (Special Measures) Act 2012 [Act 574] known as SOSMA. POTA created a fresh definition of counterterrorism, and its primary goal is aimed at suspected individuals committing or supporting any terrorist in or outside the country. It is also intended to curb the activities of terrorist organisations as listed and provided for in the preamble of the Act. The Prime Minister had given his personal guarantee that this new law would not be utilised for the advancement of any political agenda. He further affirmed that the executive body of the government would not interfere in matters of one's detention under the new Act.[2] However, reading the interpretation section 2(1), words like '*engaged*', '*commission*', '*support*' and '*involving*' have not been clearly explained. In what way do these general words come into play when ascertaining an act of terrorism? These concerns were raised by human rights activists as well as the Malaysian Bar Council, that POTA is too broadly drafted and thus open to abuse; as almost anyone could potentially be a victim under POTA.

II. THE CRITIQUES OF POTA

With the demise of the controversial Internal Security Act 1960 (ISA) in 2011, after almost 52 years of dominance the inherent fear in most critics of POTA is that POTA would be just another 'reincarnated' ISA, regardless of its improvements. While there are positive features in POTA that outweigh the superseded ISA, critics such as Amnesty International,[3] International Bar Association and Human Right's Watch[4] contend that its provisions may nevertheless have violated basic human rights despite many of the improvements made in counterterrorism. This concern has led opposition legislators to call it the twin of ISA. This article will address the relevant sections that are of concern to many.

A. Part I: Preliminary [Section 1-2]

Section 2 is the interpretation section that provides the definition for selected words and terms used in the Act. As highlighted earlier, this section did not include definitions for

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2 Datuk Seri Najib further added, "We will place it under a credible body so that only those truly involved in terrorism can be detained under the new act. That way, we can guarantee Malaysia will continue to be safe". Available at https://sg.news.yahoo.com/sedition-act-curb-terrorism-says-najib-023817008.html. Site accessed on 11 April 2015.

3 "*Malaysia: New Anti-Terrorism Law A Shocking Onslaught Against Human Rights*" accessible at https://www.amnesty.org/en/press-releases/2015/04/malaysia-new-anti-terrorism-law-a-shocking-onslaught-against-human-rights/. Site accessed on 4 April 2016.

4 "*HRW slams Malaysia's new 'repressive' anti-terrorism law*" accessible at:https://www.hrw.org/news/2015/04/07/hrw-slams-malaysias-new-repressive-anti-terrorism-law. Site accessed on 4 April 2016.

the words '*engaged*', '*commission*', '*support*' and '*involving*' although these words were in the preamble. Without a clear definition, it provides the police a wide discretionary power of arrest under section 3 to interpret what is deemed as preparatory actions taken by the suspected terrorist. This has a far-reaching effect and is open for abuse by law enforcement officers. As an example, the disproportionate targeting of suspects by the police often leads to periods of pre-arrest detention, followed by a release when the police have decided not to charge the suspects under the Act. These pre-arrests are done with merely 'reasonable belief' by the officer that the suspect has likely engaged, committed, supported or been involved in terrorist activities which restrict civil liberties. In fact, for the term '*terrorist act*', reference must be made to the Penal Code under Chapter VIA.[5]

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[5] "Section 130B (2) defines terrorist act as an act or threat of action within or beyond Malaysia that:-
(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;
(g) involves releasing into the environment or any part of the environment or distributing or exposing the public or a section of the public to-
(i) any dangerous, hazardous, radioactive or harmful substance;
(ii) any toxic chemical; or
(iii) any microbial or other biological agent or toxin;
(h) is designed or intended to disrupt or seriously interfere with, any computer systems or the provision of any services directly related to communications infrastructure, banking or financial services, utilities, transportation or other essential infrastructure;
(i) is designed or intended to disrupt, or seriously interfere with, the provision of essential emergency services such as police, civil defence or medical services;
(j) involves prejudice to national security or public safety;
(k) involves any combination of any of the acts specified in paragraphs (a) to (j) and includes any act or omission constituting an offence under the Aviation Offences Act 1984 [Act 307].
(4) An act or threat of action falls within this subsection if it-
(a) is advocacy, protest, dissent or industrial action; and
(b) is not intended-
(i) to cause serious bodily injury to a person;
(ii) to endanger the life of a person;
(iii) to cause a person's death; or
(iv) to create a serious risk to the health or safety of the public or a section of the public.
(5) For the purposes of subsection (2)-
(a) a reference to any person or property is a reference to any person or property wherever situated, within or outside Malaysia; and
(b) a reference to the public includes a reference to the public of a country or territory other than Malaysia.
[Note: Previously known as the Anti-Money Laundering Act 2001. Change in short title vide section 3 of the Anti-Money Laundering (Amendment) Act 2003 [Act A1208]"

There are ten mentioned acts or threats of action listed under paragraphs (a) to (j) of subsection (3) of the Penal Code. In addition, paragraph (k) thereof provides for the act or threat of action involving any combination of the acts named in the previous 10 sub-paragraphs. A terrorist act is the act or threat of action intended or may be reasonably regarded as intended to intimidate the public or a section of the public [paragraph (i) of subsection 2 (c)] or influence or compel the Government of Malaysia or of any state in Malaysia, any other government, or any international organisation to do, or refrain from doing any act [paragraph (ii) of subsection 2 (c)]. Interestingly, there is no definition of what is a terrorist act. In the illustration section, it shows aspects of the act or threats having characteristics of a terrorist act. If we look further at paragraph (j), even the threat of action which "involves prejudice to national security or public safety" is also vague and general. Such a definition allows for a broad interpretation of what is believed to be a threat to national security.

As an example, does it mean that groups such as 'Bersih 2.0' or 'Kita Lawan' are terrorist groups and a threat to national security or public safety having organised street demonstrations, comparable to extremist groups like 'Al-Ma'unah' or 'Kumpulan Mujahidin Malaysia' (KMM)? By having such ambiguity in the law, there is no assurance that police officers may not violate one's fundamental liberties guaranteed under Articles 5, 9 and 10 of the Federal Constitution. For detention matters under POTA, reference must be made to section 130B of the Penal Code. There are also some exemptions provided for under sub-section 4 of the Penal Code such as: "*for protests and strikes that does not cause or is not intended to cause death or serious bodily harm by violence, endanger a person's life or cause a serious risk to public health or safety*." Such 'lawful' protests or strikes are not an act of terrorism. Another significant point to note here is that under section 130B (2)(b) of the Penal Code, there is also a need to show that the acts of terrorism are to propagate an ideological, religious or political cause. Which means to say that to prove a terrorist act under POTA, motive is necessary to justify any detention or restriction order. This requirement of motive may encourage political and religious profiling, targeting those who do not share similar mainstream views. These concerns were raised by Kent Roach in his article when he argued that "…investigations into political and religious motives can inhibit dissent in a democracy."[6]

B. Powers of Arrest and Remand [Sections 3 -7]

Section 3(1) states that a police officer may without a warrant, detain any person if the officer has reason to believe that grounds exist which would justify the holding of an inquiry into the person arrested. Whenever a person is under arrest, the police officers shall refer to the public prosecutor for further instructions within seven days from the arrest [section 3(2)]. The relevant issue here for consideration is the subjectivity of the phrase '*reason to believe*' by the police officer. As far as the interpretative section 2 is concerned,

[6] Kent Roach, *The World Wide Expansion of Anti-Terrorism Laws After 11 September 2001* (2004) *Studi Senesi* 487, 491.

it provides us with nothing about the meaning of the phrase. So, we may have to look elsewhere for guidance. Section 26 provides us with the meaning of reason to believe [7].

Section 26 tells us that a person is said to have reason to believe when he has "*sufficient cause*" to believe. To believe a thing is to assent to a proposition or to accept a fact as real even though he has no immediate personal knowledge of such fact. In *Gulbad Shah*[8] Ratigan J explained the phrase "reason to believe" in section 411[9] of the Indian Penal Code which is *in pari materia* with our section 26. Further, the word used in the section is "believe" and not "suspect" or "suspicion". In another Indian case of *Rango Timaji*[10] Melvill J distinguished the words "believe" and "suspect" as:

> "The word believe is a very much stronger word than suspect, and it involves the necessity of showing that the circumstances were such that a reasonable man must have felt convinced in his mind that the property with which he was dealing must be stolen property."

In a local case, *Ahmad bin Ishak v Public Prosecutor*,[11] the appellant was convicted on the charge of voluntarily assisting in disposing of property (a cheque) valued at $2,000.90, which he knew or had reason to believe to be stolen property, in contravention of section 414 of the Penal Code. The appellant received twelve months imprisonment. On appeal, Arulanandom J held:

> "Now, reasons to believe, knowledge, intention, are things in a man's mind and you cannot see it, you cannot hear it... You must look into the circumstances and consider if the circumstances are such that *any reasonable man could see sufficient cause to believe* that it was stolen". (Emphasis added)

Relying on the Indian court's decision and *Ahmad bin Ishak*, the test to adopt is a reasonable man test with sufficient cause to believe. Mere suspicion should not be the only ground for an arrest as it needs further solid evidential grounds to justify the arrest based on case-laws cited.

However, a closer scrutiny of cases involving security offences show that the court is reluctant to treat an arrest under security offences in the same way as that of an ordinary arrest. The Court of Appeal's landmark case of *Borhan Hj Daud & Ors v Abd Malek Hussin*[12] has dealt with this issue directly. This case was an appeal against the

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7 Section 26 of the Penal Code states that – "*A person is said to have reason to believe a thing, if he has sufficient cause to believe that thing, but not otherwise*."

8 (1888) PR No 37 of 1888, 95.

9 Section 411 Indian Penal Code: "*A person must be held to have 'reason to believe' property to be stolen within the meaning of section 411... when the circumstances are such that a reasonable man would be led by a chain of probable reasoning to the conclusion or inference that the property he was asked to deal with was stolen property, although the circumstances may fall short of carrying absolute conviction to his mind on the point."*

10 (1880) 6 Born 402, 403.

11 (1974) 2 MLJ 21.

12 (2010) 8 CLJ 6.

High Court's decision in awarding the respondent general, aggravated and exemplary damages for unlawful arrest and detention, assault and ill-treatment and for oppressive, arbitrary and unconstitutional action. The High Court judge found that the respondent was never properly informed by the first appellant of why he was arrested as mandated under article 5(3) of the Federal Constitution. His Lordship also found that the first appellant was unable to provide the court with adequate details and material evidence of the respondent's conduct to validate the arrest and detention of the respondent under section 73(1) of the ISA. The appellants appealed against the High Court's decision. The first appellant claimed that after taking the respondent to the Police Contingent Headquarter (IPK) and after lodging a report, he had prepared a form as required under article 5(3) of the Constitution explaining to the respondent the grounds of his arrest.

Raus Sharif JCA (as he then was) when delivering the judgment of the court in allowing the appeal stated that, the arrest of the respondent was not an ordinary arrest. The respondent was arrested under section 73 (1) of the ISA, this was a special law made under article 149 of the Constitution. Article 149 of the Constitution expressly provides that laws such as the ISA is valid even though it is contradictory with arts. 5, 9 or 10 and 13 of the Constitution. The Court of appeal followed the Federal Court case of *Kam Teck Soon v Timbalan Menteri Dalam Negeri Malaysia*[13] even though *Kam Teck Soon* was a case under the Emergency (Public Order and Prevention of Crime) Ordinance 1969. What one can infer from here is that security legislations tend to tilt the judges'minds when it comes to balancing national security and the due process of law. There seems to be a greater emphasis on national security rather than on a fair trial. The legal position in *Borhan's* case was applied by Justice Su Geok Yam recently on 22 April 2015 at the Kuala Lumpur Criminal High Court in *Teresa Kok's* case.[14]

The Court of Appeal in *Borhan* went further to say that the police officer was not required to inform the respondent in detail of the grounds of his arrest. It was legitimate for the first appellant to state that he had "*reason to believe*" that there were grounds to justify the respondent's detention under section 73(1) of the ISA. There is also no requirement for the first appellant to provide the court with sufficient details and material evidence of the respondent's conduct to justify the arrest and detention of the respondent under section 73(1) of the ISA. This is the broad view taken by the court in security offences like ISA, and certainly it will apply to cases that come under POTA, which has the similar phrase "*reason to believe*" under section 3 like *Kam Teck Soon*. The approach taken by the court in security offence cases has undermined fundamental liberties as enshrined under article 5(3) Federal Constitution, when there is no necessity imposed on the police to inquire and/or to provide details to show the culpability of the suspect detained. Under the established criminal liability principle, criminal offences comprise the so-called *actus reus* – that is, committing a prohibited, or omitting a required act - the objective element of the crime, and the so-called *mens rea* – having a specified level of knowledge or intent, or both, concerning the act - the subjective element. The broad provision under section 3 of POTA seems at odds with the established principles of criminal liability. As long

[13] (2003) 1 CLJ 225 FC.

[14] Teresa Kok, 22nd April 2015: "The unjust High Court decision on my unfair ISA detention" – Available at www.thestar.com.my/news/nation/2015/04/22/court-teresa-kok-loses/ Site accessed on 11 April 2016.

as the police officer has reason to believe the suspects' actual or likely intentions (rather than their acts), this will suffice for an arrest and detention.

A lesser burden of proof is required to make an arrest and to detain people under this section. The combined effect is that the likelihood of innocent people may be arrested, detained, and tortured for wrongful arrest, may not be rulled out. At the very least, the police should go further to prove the suspect provided support and such support provided will likely help the listed organisation[15] to pursue its unlawful terrorist aims instead of merely relying on reasonable believe to be so, which may be based on mere rumours or suspicion.

Another noteworthy legal observation here is that, under POTA, the harm may not be done as yet or is not completed at the point of arrest. This is termed as 'inchoate' offence under the criminal law. Under the Penal Code, a person attempts to commit an offence when he/she causes such an offence to be committed and in such an attempt does any act towards committing such offence.[16] Offences like conspiracy, abetment and instigation fall under this category. The rationale behind inchoate offence is to deter a potential crime before it crystallises - a proactive step in crime prevention.

The terrorism offences under Chapter VIA of the Penal Code echo the same intent by criminalising acts made in preparation of a terrorist act. However, under POTA, even at the formative stages of an action (for example, giving a speech can be deemed as an offence of '*supporting*' although a terrorist act may not occur or has yet to occur) an offence may have been perpetrated. This 'catch-all' offence may cause individuals to be penalised with detention even before any clear criminal intent can be found, bearing in mind, there is no court of law to determine that element under POTA. In the attempt to counter terrorism, the authorities seem to have opted to act pre-emptively by arresting people before any explicit plan to commit the terrorism act is found, an approach known as 'precautionary principle'[17] But what is more worrying is the broad definition drafted in POTA that will give the authorities a wide discretion to make an arrest. Once a suspect is arrested, the evidential burden lies on the suspect to prove that the preparatory activity has not gone further toward devising a terrorist attack. Shifting the burden of proof, runs contrary to the fundamental criminal justice system that everyone charged with a criminal offence shall be presumed innocent until proven guilty.[18] This is further compounded by case law precedent like *Borhan* which had decided that the police is not required to satisfy to the court (arguably will also apply before the Prevention of Terrorism Board set up under section 8 of the POTA) with sufficient particulars and material evidence of the suspect's actions to validate the arrest and detention in security offences case.

An interesting new feature introduced in POTA is the introduction of an electronic monitoring device that can be attached to a person if that person is released. This is provided under section 6(2), sub-sections (3) and (4). The special procedures relating

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

16 See Section 511 of the Penal Code.

17 For review of this principle, see Cass R Sunstein, *Laws of Fear: Beyond the Precautionary Principle,* Cambridge University Press, 2005.

18 *Woolmington v Director of Public Prosecution* (1935) AC 462, 481.

to the electronic monitoring device are to be adhered to under section 7 of POTA. The sessions court judge has a statutory duty to explain the operation of the device and the terms and conditions to the person to be attached with the device. Any breach of the terms and conditions imposed on the suspect gives rise to an imprisonment for a term not exceeding three years [section 7(6)].

C. Inquiries [Section 8 – 12]

Section 8(1)(a) – (c) provides for the setting up of the Prevention of Terrorism Board (the Board), which comprise a Chairman (with at least 15 years of legal experience), Deputy Chairman and between 3 and 6 members to be appointed by the Yang di-Pertuan Agong. Each sitting shall have a quorum of three members [subsection (5)] and the Board shall determine its own procedure [subsection (6)]. The Home Mninister is also empowered under section 9(1) to appoint any person as an Inquiry Officer. A police officer shall not be appointment to the position [section 9(2)]. The proposed powers being conferred upon the Inquiry Officer are powerful and wide. It allows an Inquiry Officer to get evidence by whatever means he feels necessary during an investigation against a suspect. It does not matter whether such evidence is admissible or inadmissible so long as the evidence is desirable or necessary for the officer [section 10(3)(a)].

Basically, the rules of evidence do not apply at all. The inquiry officer may also, using his own discretion and based on his own judgment call for any documents related to the detainee. The crucial part is the non-representation of lawyers at the inquiry for the suspect or any witnesses called at the inquiry - [section 10(6)]. Critics have argued that if lawyers are not allowed to be at the inquiry, how is the suspect going to present his case in the best possible manner. The denial of the right to counsel is not only unjust, it also makes a mockery of the right to apply for *habeas corpus* as guaranteed by art. 5(2) of the Constitution as decided by Justice Hishamudin (as he then was) in the much notable ISA case of *Abdul Ghani Haroon v Ketua Polis Negara & Anor.*[19] Subsequent to that, the Federal Court in *Mohamad Ezam Bin Nor & others v Ketua Polis Negara & Others,*[20] decided that the police could not count on judicial tolerance where there is a denial of access to legal counsel.

Writing for the entire bench, Judge Siti Norma Yaakob found that the denial of legal assistance during the initial sixty-day detention period –

> "is conduct unreasonable and a clear violation of article 5(3)…Responding to the respondent's argument that under the ISA, the police has absolute powers during the entire period of the sixty day detention to refuse access under the guise that the investigations were ongoing…I find no justification to support the respondent's argument"

To sum up, the inquiry officer appointed under POTA in this section has unfettered powers and discretion to act as he sees fit with no system for check and balance from the

[19] [2001] 2 CLJ 709.
[20] (2002) 4 CLJ 309.

scrutiny of the judiciary. Although the appointment of such officers is in the hands of the Home Minister [section 9], what is unclear is the qualification needed and the criteria of appointment to be satisfied by the Minister.

D. Detention and Restriction Orders [Section 13 – 28]

Under sections 13(1)(a) and (b) of POTA, the Board, after considering the complete report submitted of the investigation or the report of the Inquiry Officer, if it is satisfied that it is necessary in the interest of the country's security, could issue a detention order for the person, not exceeding two-year period in a place of detention as the Board may direct; or may issue a restriction order and the person shall be subject to police supervision not exceeding a five-year period [section 13(3)] with restrictions and a variety of conditions to obey. The detention and restriction period can be further extended if the Board determines that there are reasonable grounds to do so, and if not, it can direct a person be set free. If the restricted person contravenes the terms of the restriction order, he/she is liable to a term of imprisonment not exceeding ten years and not less than two years [section 13(5)]. No hearing before the court of law is accorded to the suspect. Rather the order is issued personally by the authority i.e. Prevention of Terrorism Board.

The executive powers are no longer vested in the Home Minister, like the ISA but a five- member Advisory Board empowered with the tasks. Unlike ISA cases in the past, where it is the police who decides who to detain, under POTA only the Board is allowed to make such a decision. Criticisms hurled at the POTA for being the twin of the ISA is thus inaccurate and wrong, at least within the ambit of issuing detention or restriction orders on the suspect. Further to reinforce this point, there is a provision under subsection 10 which allows for judicial review of the Board's decision under section 13(1).

However, the controversial issue remains unresolved in that, as a general rule, no one should be detained beyond the initial period provided for in section 4(1) and (2) POTA without a finding of guilt or going through the judicial process. Whether it is a detention order or a restriction order, both orders target suspects not for what they have done, but for what they might do. Such preventive measures taken by the authority under POTA not only restrict one's personal liberty, but is also contrary to the legal maxim of being '*innocent until proven guilty*'. Practitioners have raised real concern over such detention orders issued by the Board, relying only on a lower standard of proof as opposed to the well established higher standard of proving 'beyond reasonable doubt' for criminal offences. The broad scope of the provisions in POTA makes this concern even stronger than those highlighted earlier in the preceding paragraphs. In the past, preventive orders were generally issued as an attempt to circumvent the judicial process by disallowing evidence that would have normally applied in court, to be challenged and tested in trial; offences under POTA are of no exception.

One of the most objectionable features of POTA is the ouster of judicial scrutiny. This can be seen in section 19(1).[21] Section 19(1) limits the power of the court to exercise its

[21] "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."

inherent jurisdiction to review the decision of the Board to issue the detention order under section 13, in what we usually term as '*ouster clause*'. This similarly worded ouster clause can also be seen in the repealed section 8B of the Internal Security Act, 1960 ('ISA') prior to POTA. Under section 8B of the ISA, the courts are empowered to scrutinise the authority if it is about "*the non-compliance with any procedural requirement governing such act or decision*". The term "procedural requirements" include jurisdictional requirements. This legal position is derived from the case of *Anisminic v Foreign Compensations Commission*[22] where The House of Lord's decision has achieved two significant results - in that it not only diluted the efficacy of the ouster clause by confining their protection to non-jurisdictional errors but also extended the scope of jurisdictional error. Hence, it is crystal clear that unless the specific pre-requisites *are* satisfied, the power to issue the Detention Order cannot be lawfully invoked. *Anisminic'*s decision has been considered and applied by the High Court in the case of *Raja Petra Raja Kamarudin v Menteri Hal Ehwal Dalam Negeri.* [23]

A scrutiny of the express provisions of the ouster clause under section 19 of POTA reveals that no judicial review is permissible where any act is done or decision is made by the Board when exercising its discretionary power under the Act. The operative words here are '*in accordance with the Act*' which simply means if the Board has acted outside the express objects of POTA, then it has acted outside its jurisdiction allowed under the Act. Under such circumstances, the Board is deemed to have acted *ultra vires* the object of the Act. The ouster clause does not take effect as decided in the case of *Raja Petra*. Whether the detaining authority has acted *ultra vires* the objects and provisions of the Act, the Supreme Court in the case of *Karpal Singh v Menteri Hal Ehwal Dalam Negeri* [24] opined that there are exclusions to the non-justifiability of the Minister's mental satisfaction which includes *mala-fides* as in that case where one of the six charges was found to be factually incorrect and made in error. As a result, habeas corpus was granted. Therefore, the principle that can be elucidated from here is that if the decision-making body goes outside its powers, or misconstrues the extent of its powers, then the Courts can interfere regardless of the ouster clause. And for judicial review, it is trite that the test to be adopted now will be the objective test as laid down by the recent Federal Court in *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors.*[25]

The next sections 20 and 21 of the POTA deal with the removal of any detained person from one place to another while section 21(1) empowers the Commissioner

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22 [1969] 2 AC 147 - Lord Morris held that: "…it becomes necessary, therefore, to ascertain what was the question submitted for the determination of a tribunal. What were its terms of reference? What was its remit? What were the questions left to it or sent to it for its decision? What were the limits of its duties and powers? Were there any conditions precedent which had to be satisfied before its functions began? If there were, was it or was it not left to the tribunal itself to decide whether or the conditions precedent were satisfied? If Parliament has enacted that provided a certain situation exists then a tribunal may have certain powers, it is clear that the tribunal will not have those powers unless the situation exists."

23 [2008] 1 LNS 920.

24 [1988] 1 MLJ 468.

25 [2014] 6 CLJ 541.

General of Prison or Inspector General of Police to produce a detainee at any place for the purpose of any public or other inquiry. Sections 22 and 23 deal with the keeping and maintaining of a proper record by the Registrar of Criminals on those who have been served with a detention or restriction order. Sections 24 – 28 supervises the movement of restricted person or persons over whom a detention order is in force. It is an offence for any registered person to consort or habitually associate with any other registered person in the place where he lives without the permission of the District Police Chief (OCPD) [section 24], or found in any place in which any act of violence or breach of peace is being committed [section 26] and for anyone to knowingly harbour any registered person [section 27].

E. General [Sections 29 – 35]

This part contains general provisions of POTA. Section 30 empowers a police officer to arrest any person committing an offence under sections 24, 26 or 27. Section 31 deals with the taking of photograph and finger impressions of any person arrested. It is an offence for any person arrested to refuse to the taking of photographs or finger impressions and such refusal can be penalised with a maximum six months imprisonment or to a fine [subsection 31(2)]. Section 32 prohibits the disclosure of information to protect the public interest, witness or his family.

III. LEGISLATIVE RESPONSES ON COUNTERTERRORISM FROM OTHER JURISDICTIONS

In the aftermath of the Al-Qaeda attack on 9/11 in the United States, it was reported that about 140 countries world-wide passed counter-terror laws.[26] However, there are few debates or any reflection on the impact of this draconian power. There can be no doubt that all governments have a legitimate interest in protecting the public from any acts of terrorism by taking pre-emptive steps to prevent them from occurring. However, the problem is that most counterterrorism legislations are particularly elusive given that these legislations circumvent criminal procedural laws and the constitutional protection of basic rights as guaranteed by the State. This creates a 'dual' criminal justice system which is antithetical to the already accepted principle of presumption of innocence. As highlighted earlier in the preceding paragraphs, any detention under counterterrorism laws is mostly preventive, unlike the punitive nature of criminal law. Simply put, an individual's freedom can be restricted merely by reasonable suspicion he/she may commit an act that might violate the national security of the State. Therefore, a comparative study (though cursory) of other nations (in this instance India and the United States of America) in their war against terror, could be an advantage for Malaysia; highlighted in particular is an analysis of the flaws of preventive laws that curtail basic rights.

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[26] "*Global: 140 Countries Pass Counterterror Law since 9/11, Human Rights Watch,* accessible at http://www.hrw.org/news/2012/06/29/global-140-countries-pass-counterterror-laws-911". Site accessed on 4 April 2016.

A. India

Historically, India has been embroiled in a war against terror since independence 68 years ago. Over the decades, India has been fighting with insurgents in Kashmir, Pakistan and Afghanistan at their borders. In the South, they faced the now defunct LTTE or commonly known as 'Tamil Tigers' until the group was defeated in 2009. In 1984, when Indira Gandhi was assassinated, Parliament enacted the Terrorist and Disruptive Activities (Prevention) Act 1987 (TADA) specifically as an anti-terror legislation. Subsequent to that, following the bold attack in December 2001 on their Parliament house, the Prevention of Terrorism Act 2002 (Indian POTA) was introduced to repeal TADA. Indian legislators acted quickly, announcing that the Indian POTA was a necessary tool against terrorism given the attack at the heart of the world's largest democracy. Like the Malaysian POTA, the Indian POTA also had dissenters who condemned the law as unnecessary and draconian. As an example, the Indian police was granted sweeping powers to detain a suspect for up to 180 days without being formally charged in court.[27] The police is supposed to notify a suspect the grounds for his or her detention promptly under the Indian Constitution and to provide the "earliest opportunity to make a representation" before a presiding magistrate.[28] But the Indian POTA circumvented these fundamental protections against the indiscriminate detention of innocents as enshrined in their constitution. For bail applications, the Public Prosecutor is given the absolute veto to oppose the bail unless the accused is not guilty of committing the offence and the court is fully satisfied with the grounds advanced by the suspect in support of the bail.[29] This provision has effectively reversed the presumption of innocence of the accused at the bail hearing in court. Another drastic provision observed is in section 53 in that when a suspect is caught in possession of explosives or arms unlawfully or if his/her fingerprints were found at the site of the offense, an adverse inference can be drawn against the suspect.[30] The provision has in effect mandated the presumption of guilt for those caught under terrorist activities.

However, one noteworthy difference between the Malaysian POTA and the Indian POTA is the provision of judicial review in the latter as seen under section 34, one which is not available under the Malaysian POTA. With some of the weaknesses highlighted in the Indian POTA above, it is irrefutable that certain provisions can be susceptible to misuse and abuse by the enforcement officials. Like TADA, the prevalent critique of POTA is that it can be misused and used to haul up a political dissenter who is not involved in any terrorist activities. It was argued by the detractors that the broad meaning of what tantamounts to terrorist act consist of intent not only to threaten the security and unity of the State, but it also comprises any other means which "disrupt services" that can be a useful weapon for the government to apply against dissidents if they wish to.[31] According to Human Rights Watch Report issued in March 2003, it was reported that –

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27 Section 49(2)(b) of the Indian POTA.
28 Article 22(2) of the Indian Constitution (Part III).
29 Section 49(7) of the Indian POTA.
30 Section 53 of the Indian POTA.
31 Section 3(1)(a) of the Indian POTA.

> "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."[32]

In response to the continued abuse of power by enforcement officials, the Indian government later repealed POTA in September 2004. Although the law was repealed, POTA remains relevant today given its continued application in cases that are still pending legal proceedings or on investigation that began under the act.

With the departure of POTA, the Unlawful Activities Prevention Act, 1967 (UAPA) is the main anti-terrorism law in force in India now. UAPA was in fact enacted by Parliament in 1967. The original purpose of the Act was to impose reasonable restrictions on the rights to freedom of speech and expression, peaceful assembly in the interest of preserving the integrity and sovereignty of the State of India. Stringent provisions on terrorism were only added later through various amendments starting in 2004 following the repeal of POTA. It was in response to the Mumbai terrorist attacks in 2008 that UAPA incorporated the definition of a 'terrorist act' under section 15.[33] The period of pre-trial detentions without bail of up to 180 days remained the same under UAPA[34] although it conflicts with Article 22 of the Indian Constitution on the rights against arbitrary detention as discussed earlier. The fear that UAPA inherited some of the controversial provisions from the repealed Indian POTA is similar to the mounting concerns of many critics in Malaysia (that the Malaysian POTA will be the 'twin of the ISA'). In the case of UAPA, for example, previously under the section 53 of the Indian POTA only an adverse inference was drawn against the accused found with explosives or arms unlawfully or if

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[32] Human Rights Watch, 25 March 2003, "*In the Name of Counter-Terrorism: Human Rights Abuses Worldwide*, accessible at: https://www.hrw.org/report/2003/03/25/name-counter-terrorism-human-rights-abuses-worldwide/human-rights-watch-briefing" Site accessed on 4 April 2016.

[33] 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
   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; commits a terrorist act. "

[34] Section 43D(2) UAPA is the same as section 49(2)(b) of the POTA.

fingerprints were found at the site of the offence. A similar provision was incorporated into section 43E UAPA, albeit with the new imposition of a direct presumption of guilt by the court on the accused person unless the contrary is proved. Therefore, it has the effect of putting the culpability of an accused person upfront by shifting the burden of proof. Further, under section 1(4) the UAPA, a person may be penalised, even when the unlawful acts were committed outside of India. The basis behind this provision is that the source of planning or funding terrorism activities can originate from outside Indian territory.

Therefore, any terrorist activities occurring outside of India could still harm the "*unity, integrity, security, economic security, or sovereignty of India",* which amounts to a 'terrorist act' as defined in section 15 UAPA. For Indian citizens living outside India; persons in government service wherever they may be; and persons on ships and aircrafts registered in India wherever they may be, will be caught under section 1(5) if found guilty of any offence under the UAPA. This goes to show that personal liberty of an accused person under terrorism offences is usually ignored by the State when executing 'extraordinary laws'. Apart from the UAPA, it is to be noted that India also has the Indian Penal Code (IPC), which are in *pari materia* with our Malaysian Penal Code that deals with terrorism and related offences. This includes the offence of waging war against the Indian government much like the provision in the Malaysian Penal Code,[35] except that we have the specific Chapter VIA that deals directly with terrorism offences. In many aspects, India does share common legal similarities with Malaysian laws such as the Criminal Procedure Code (CrPC) and the Evidence Act.

More often than not, in most terror cases in India charges can be preferred against the accused person based on multiple Central and State Laws. The Mumbai attacks case was a clear example of the multiplicity of charges being trumped-up against the accused.[36] Although in India, the general procedural and evidentiary rules under the CrPC and Evidence Act apply to all criminal laws, with terrorism laws, there are special rules which depart from the general principles. This is due to the fact that there are various Central laws enacted to address similar areas of law and at times overlapping with other enacted State laws.[37] This will certainly give rise to the issue of duplicity and multiplicity of charges which operate unfairly against an accused person in a trial. The lesson we can learn in terms of the experiences in combating terrorism is that India has in hand a myriad of strategies to share and emulate. However, there are also pitfalls encountered by India in counterterrorism rhetoric despite having abundant years of experience.

B. United States of America

The nature of the terrorism threat in America cannot be equated with India; the latter faces multifaceted threats from domestically bred terrorism. The terrorist threat in America

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

36 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.

37 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').

emanates largely from anti-American sentiments and the reactions by Islamist groups from perceived American interference in the affairs of the Muslim world. Therefore, existing terrorism policies and strategies in America are more inclined to the reaction towards external or foreign terrorism on American soil. When the Pentagon and the World Trade Center were hit on 11 September 2001 (9/11), a jittery US Congress speedily and unanimously authorised the USA Patriot Act 2001 (USPA) in just six weeks for fear of another recurrent attack on a similar scale. Against the backdrop of the 9/11 horrific attacks launched on American soil that sent shockwaves across the globe, Congress was convinced that the USPA was a significant piece of legislation. This is indicative in the expanded name of the USPA - Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001. Aside from the USPA, Congress also passed numerous pieces of new laws in the months subsequent to the strikes. They are, amongst others, the Aviation and Transportation Security Act 2001; the Bioterrorism Response Act 2001; Enhanced Border Security and Visa Entry Reform Act 2002; Terrorist Bombing Convention Implementation Act 2001; and the Victims of Terrorism Relief Act 2001.

The new enlarged powers accorded under USPA to enforcement officials have, similar to their counterpart in India, received many criticisms. Critics have evinced that the USPA may have been too extreme in some of its provisions, such as the capability of the authority to track e-mails and internet,[38] the sharing of data among investigators and other intelligence agencies, impounding of seized property, and conducting nationwide roving wiretaps.[39] These are just some of among the many disturbing features. In the light of these circumstances, some argue the USPA sanctions government's outright violation of civil and human rights, having no regard on the accountability for such overreaching actions taken by the authority.

Not surprising is that the evidence from the comparative study of the preventive model adopted by the US such as the USPA, suggests that its shortcomings are similar to those found in the Malaysian POTA. First, the USPA created an expansive new offence of 'domestic terrorism' and then proceeded to bar non-citizen entry into America based on their beliefs or ideologies which maybe deemed radical. Secondly, the USPA enhanced the surveillance power of its enforcement agencies, disregarding a citizen's private rights. Thirdly, the government cloaked itself with power to enforce mandatory detention and deportation of foreigners based on activities deemed as terrorist activities. The broad definition of 'domestic terrorism' is stated in section 802 USPA as -

> [A]cts dangerous to human life that are a violation of the criminal laws of the United States or of any State [that] appear to be intended to intimidate or coerce a civilian population; to influence the policy of a government by intimidation or coercion; or to affect the conduct of a government by mass destruction, assassination, or

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38 Section 216 of USPA.

39 Section 206 of USPA: "Roving wiretaps authorise wiretaps on any phone that a target may use, making Individuals and not the equipment the object of a warrant."

kidnapping; and occur primarily within the territorial jurisdiction of the United States.[40]

Much like the vague section 2(1) of the Malaysian POTA (as discussed above) similarly broad and ambigious meanings can be found in the USPA (as seen underlined above); this could likely be construed by State enforcement agencies as an authorisation to begin investigation into any political activist groups that 'appear to be intended to intimidate or coerce a civilian population'. Where there is any confrontation between the demonstrators and the police, even if it does result in physical injury it could nevertheless be interpreted as 'dangerous to human life and in violation of the criminal laws'. As an example, groups such as Greenpeace or anti-globalisation activists at the World Trade Organisation may be vulnerable to prosecution as they could be deemed as 'domestic terrorists' under this ambiguous provision. Section 411 USPA denies non-citizens entry into the United States if "a political, social or other similar group whose public endorsement of acts of terrorist activity the Secretary of State has determined undermines the United States efforts to reduce or eliminate terrorist activities." By giving the State Secretary full power in deciding who to restrict and on what ideological grounds, this will have the effect of barring many foreign scholars, speakers and political activists who may not even endorse nor espouse terrorist activities dreaded by the United States.

Next, we shall examine the enhanced intrusive surveillance and investigative powers given to the enforcement agencies such as the National Security Agency (NSA), Federal Bureau of Investigation (FBI) and the Central Intelligence Agency (CIA). In the past, due to legal and political impediments faced by the enforcement agencies, they did not combine forces in fostering counter terrorist efforts. However, this was made possible by introducing USPA that removed all the barriers. As an example, there are provisions in the USPA which stretched the application of the Foreign Intelligence Surveillance Act, 1978 (FISA) to comprise the roving wiretaps, trace devices and the use of pen registers. Under the USPA, the FBI director may seek a court order to demand the surrender of "any tangible things (including books, records, papers, documents and other items)" on his confirmation that the articles sought are required for the purpose of an investigation "to protect against international terrorism or clandestine intelligence activities." [41]

Besides the power of seizure, the FBI may also conduct secret searches at a person's office or residence without the requirement of a search warrant until the search has been completed.[42] These unwarranted searches contravened their very own common law principle as provided in the Fourth Amendment's reasonableness test.[43] Hence, civil libertarian groups like the American Civil Liberties Union (ACLU) have claimed that with such a significant expansion of surveillance accorded to the authority, it was feared

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40 Underlined for emphasis.

41 Section 215 of USPA.

42 Section 213 of USPA.

43 Under the Fourth Amendment (Amendment IV): "*it does prohibits unreasonable searches and seizures and requires any warrant to be judicially sanctioned and supported by probable cause.*"

that whatever information obtained secretly would be used for improper purposes. This has proven to be true in June 2013 when Edward Snowden, the former CIA contractor leaked numerous aspects of NSA surveillance practices to the public.[44] Because of the continuous disclosure by Snowden, this implores further question marks on whether the right to privacy of US citizens has been infringed by NSA's unjustified surveillance which the Congress has overlooked. In responding to the public outcry, a more efficient mechanism to reduce the continued abuse by the NSA is therefore warranted. Task forces were then organised to study the legitimacy and latitude of the NSA's surveillance works. The weaknesses posed by the NSA's surveillance authority and intelligence gathering have even caught President Obama's attention in early 2014 when he agreed on the need to "…revisit the question of limitation on NSA's collection and storage of data."[45] In sum, what we can gain from the American experience in so far as the surveillance activity is concerned is that the authorities have encroached into the private lives of many Americans in the name of counterterrorism.

Another controversial issue in the USPA (like the preventive laws in India and Malaysia) is that it allows the enforcement agencies to arrest and detain aliens *suspected* of engaging in terrorist acts. The US Attorney General may detain a suspect for up to seven days before he/she decides whether to charge the alien or to release him/her.[46] One of the most renowned cases of indefinite detention post-9/11 is that of *Jose Padilla*.[47] In the case of *Padilla*, he is an American citizen arrested by federal agents at the Chicago airport for planning to detonate a bomb. After his arrest, he was not tried in court but was held in solitary detention and denied any legal counsel. This case shows that indefinite detention not only applies to aliens, it also extends to citizen like Padilla caught on American soil. Another case to look at is the case of *Yasser Hamdi* [48] also an American citizen. Hamdi was apprehended on the battleground in Afghanistan. The US government designated him as an 'enemy combatant' and held him under 'secret detention' for two years, until he agreed to renounce his American citizenship and leave America.[49] These cases cited are just some of the many examples why civil libertarians have condemned the harsh approach taken by the government against American citizens charged with this crime; citizens are blatantly denied the criminal justice system, labelled under the Act, as a 'terrorist'. In most cases involving aliens, when an accused is designated as an 'enemy combatant' the government conveniently moves the prosecution of the accused from the

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44 See Glenn Greenwald, 5 June 2013, "NSA collecting phone records of millions of Verizon customers daily", The Guardian.com: http://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order. Site accessed on 4 April 2016.

45 Remarks by the President, 17 January 2014, Review of Signals Intelligence,: https://www.whitehouse.gov/the-press-office/2014/01/17/remarks-president-review-signals-intelligence. Site accessed on 4 April 2016.

46 Section 412 of USPA.

47 *Padilla v Rumsfeld*, (2003) 352 F.3d 695.

48 *Hamdi v Rumsfeld* (2004) (03-6696) 542 U.S. 507.

49 Eric Lichtblau, 23 September 2004, "*U.S., Bowing to Court, to Free 'Enemy Combatant",* New York Times, http://www.nytimes.com/2004/09/23/politics/us-bowing-to-court-to-free-enemy-combatant.html?_r=0. Site accessed on 4 April 2016.

purview of the criminal justice jurisdiction into the military tribunal.[50] A trial before the military tribunal as opposed to the criminal courts effectively means a trial conducted with more relaxed rules of evidence and a hearing presided over by the executive arm instead of an independent judiciary.[51] In most cases involving foreign terrorists, the scale of justice will be tilted in favour of the executive and no judicial review is available.[52]

Therefore, in the final analysis of the American counter terrorism policies when compared to their counterpart in India, the intents and purposes appear to be the same. Both countries have introduced multiple legislation in response to the war against terror, albeit with some variations in the approach taken. Because of the American position in the world today, its counterterrorism policies are looked upon as an important role model in manipulating the way counter terrorist strategies and policies are perceived world-wide.

According to a recently published report,[53] in the last four years counterterrorism policies in the United States have transformed. As an example, the use of abusive interrogation practices have reduced significantly and there is an open acceptance of international laws into the United States' counter terrorism practices. This is definitely a positive development in counter terrorism practices for other democratic nations to follow, especially given the growing complaints concerning human rights abuse, often sacrificed in the fight against terror.

IV. FINAL REMARKS

In the government's effort to combat terrorism, one may ask if POTA is necessary or just another piece of legislative redundancy. There are already several punitive legislations in force that can penalise terrorist acts or rather it can serve the same purpose as POTA, to curb terrorism activities. For example, we already have Chapter VIA of the Penal Code, which covers crimes that are envisaged by POTA such as, travelling to, through or from Malaysia for the commission of terrorist acts in a foreign country,[54] possession of items associated with terrorist groups or terrorist acts; [55] or even preparation of terrorist acts.[56] The question is do we still need another preventive law to serve the same objective? In fact, the Penal Code has extensively dealt with any preparatory acts of terrorism, save for the differing punitive sanctions one will receive it is not that different. The broad definition under POTA concerning what amounts to an act of terrorism, failed to meet the requirement that a criminal act must be clearly determined. Due to the lack of perspicuity, any person is liable to the risk of being subject to harsh punishments provided by this

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50 For example, the case of Ali Saleh Kahlah Al-Marri, a Qatari student, charged with credit card fraud and was later moved into military custody. See more at: Eric Lichtblau, 9 July 2003, *Man Held as 'Combatant' Petitions for Release,* New York Times: http://www.nytimes.com/2003/07/09/politics/09COMB.html). Site accessed on 4 April 2016.

51 "Laura Dickinson, "Using Legal Process to Fight Terrorism: Detentions, Military Commissions, International Tribunals, and the Rule of Law," (2002) 75 *S. Cal. L. Rev*. 1407.

52 *Ibid.*

53 Sudha Setty, "Country Report on Counterterrorism: United States of America", (2014) 62 *AM. J. COMP. L.* 643.

54 Section 130 JA of the Penal Code.

55 *Ibid.* at s. 130 JB.

56 *Ibid.* at s. 130 JD.

preventive law. It can be argued that the wide discretionary power bestowed on the police to arrest suspects merely on reasonable belief that a terrorist act is imminent, individual rights and freedoms will be swapped for detention without trial. Indeed, POTA shifts the role of the police from being responsible for guaranteeing civil liberties into a mere repressive tool against citizens. Moreover, the government in being so hasty in legislating new laws that are already covered by existing laws could raise further discrepancies and confusion in the enforcement agency. The question is which law will the enforcement agency apply. Will it favour a harsher punishment or a lesser one? Is it going for detention without trial or the full process of law in court? This will cause unfairness and disparity in sentencing in all security offences in future. The law must be refined to the extent that it can judiciously decide the extent and the consequences of the criminal offence in line with the rule of law. Given the effectiveness of the new counterterrorism measure it is unclear at the moment, whether the danger posed to the public of arbitrary detention by over zealous authority is more critical than the menace posed by terrorism itself.