

A Comparative Study: ISA 1960, SOSMA 2014 and the Federal Constitution

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Abstract

The Internal Security Act (ISA) 1960 was the preventive detention law in force in Malaysia prior to the enactment of the current preventive law, the Security Offences (Special Measures) Act, ('SOSMA') 2012. ISA 1960 was enacted after Malaysia gained independence from Britain in 1957. It allowed for detention without trial for criminal charges under limited, legally defined circumstances. On 15 September 2011, the Prime Minister of Malaysia, Dato Seri Najib Tun Razak said that this legislation will be repealed and replaced. The SOSMA 2012 was passed by the Parliament to replace the ISA 1960 and it was given the royal assent on 18 June 2012. Since the first Act came into play in 1960, there has been an ongoing debate as to its implication and necessity which the new Act has not laid to rest. Since its enactment, this new Act has been scrutinized and debated upon at various levels both locally and internationally. This research analyses the SOSMA 2012 to identify whether the new Act has removed all the concerns raised against the previous Act, the ISA 1960. It also aims to ascertain if any of the rights upheld in the Federal Constitution are being violated by the provisions in the new Act. The findings indicate that there is still room for concern on the implications of the Act in reference to infringement of the rights upheld in the Federal Constitution. However, these infringements can also be said to be in alignment with Article 149 of the Federal Constitution. The paper ends with a comment that it is too early to make any judgment be it positive or negative as the Act is still new and it has to run its course before any conclusion can be made.

I. INTRODUCTION

The battle against Internal Security Act (ISA) 1960 has now progressed into a battle against Security Offences (Special Measures) Act (SOSMA) 2012. There are arguments for and against the Act and its implication on the balance between protecting basic human rights and the nation's security. Syed Husin, an ex-detainee of ISA 1960, in a forum at Universiti Malaya lamented on the introduction of the Security Offences (Special Measures) Act 2012, saying those arrested under this Act were treated almost like criminals.¹ "At least

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¹ Syed Husin, 2014, "*The People Have To 'Bangkit': Sedition Act Will Only Be Repealed If Public Fights It*". <http://www.malaysia-chronicle.com/index.php?option=com_k2&view=item&id=379901:the-people-have-to-bangkit-sedition-act-will-only-be-repealed-if-public-fights-it-syed-husin&itemid=2#ixzz3gjsxnm3c> Site accessed on 30.10.2014.

under the ISA, we could claim to be political detainees. Unfortunately, if you are arrested under SOSMA 2012, you are no more than a criminal”, he added further. Datuk Mohd Noor Abdullah, a former Court of Appeal judge in an interview with Malay Mail Online on April 15 2014 claimed that the Prime Minister Datuk Seri Najib Tun Razak had made a big mistake by repealing the ISA and warned him against repeating it by abolishing the Sedition Act, a law he said should now be strengthened instead.² According to him, strengthening the Sedition Act by incorporating the offences into SOSMA 2012 would strike fear in those who wish to instigate racial strife as it would give the authorities arbitrary detention powers quite similar to that of the now-repealed ISA 1960. In his concern, he raised the issue that there are a lot of people in the Islamic schools and most of the militants are making use of the Islamic knowledge/teaching to influence people to go into militancy. Malaysia’s Deputy Home Minister, Wan Junaidi Tuanku Jaafar said although the development of militancy is not that serious but we cannot ignore it and despite the authorities’ belief that they have a handle on the situation, it is not the same as when the ISA 1960 was in existence for it had allowed for detention without trial but “(u)nfortunately under SOSMA 2012, ample evidence is needed against those involved to bring them to court.³ This argument is debatable on the basis of justice and fairness.

The recent decision in High Court where it decided to throw out the maiden charges filed SOSMA 2012 shows that authorities must come to terms with the loss of arbitrary detention powers they once wielded before the repeal of the ISA 1960. In the case,⁴ Justice Kamardin Hashim ordered Yazid Sufaat and his friends, Halimah Hussein and Muhammad Hilmi Hasim, to be freed after allowing their applications to strike out the charges made against them for “inciting unrest” in Syria. The basis of the decision is that the charges and the application of the SOSMA 2012, which was enacted under Article 149 of the Federal Constitution cannot be used to prove the charges against them as the Article is only applicable to acts of threats in Malaysia. Thus, by replacing the ISA 1960, the SOSMA 2012 has lost the former’s arbitrary powers to detain an individual indefinitely and without charge. Proponents of the ISA 1960 believe this reduced power may hamper its ability as a security law to be used against global terrorism, but critics contend that there are already adequate laws to deal with such instances.⁵

Since the debate on the ISA 1960 has not been laid to rest, this research analysed SOSMA 2012 to identify whether the new Act has removed all the concerns raised against the previous act, ISA 1960, and also to identify if any of the rights upheld in the Federal Constitution are being violated.

² Mohd Noor Abdullah , 2014, cited in Syed Jaymal Zahiid). “Put sedition offences under SOSMA , ex-judge suggests”. *The Malaymail Online*. <<http://www.themalaymailonline.com/malaysia/article/put-sedition-offences-under-sosma-ex-judge-suggests>> Site accessed on 30.10.2014.

³ Sumisha Naidu, 2014, “*Malaysia believes militancy in country under control*”, <<http://www.eikawaz.com/malaysia-believes-militancy-in-country-under-control/>>. Site accessed on 30.11.2014.

⁴ Public Prosecutor v Yazid bin Sufaat & Ors (2015) 1 MLJ 571-27 January 2014.

⁵ Anonymous, 2013, “*Maiden SOSMA case collapse highlights post-ISA learning curve*”, *The Malaysian Insider*, <<http://www.themalaysianinsider.com/malaysia/article/maiden-sosma-case-collapse-highlights-post-isa-learning-curve#sthash.0HjO2NIW.dpuf>>. Site accessed on 30.11.2014.

II. LITERATURE REVIEW

Providing internal security for its own citizens is among the essential public goods any state has to deliver and ranks high among its primary sources of legitimacy.⁶ Although Malaysia has not felt the full presence of international terrorist groups, unlike some of its neighbours, there are some local insurgents.⁷ In the years preceding the end of the colonial rule in Malaysia, a communist insurgency arose that agitated for independence more aggressively than other nationalist forces then established in the country.⁸ The British colonial authorities responded with Emergency Regulations, the ISA 1960's precursor, which similarly provided for detention without trial. Malaysia retained the Regulations at independence in 1957 but in 1960, the new Parliament enacted the ISA 1960, aimed at suppressing the insurgent militants who continued to mobilize, particularly along the borders.⁹ According to Bennoun,¹⁰ in the face of terrorism, human rights law's requirement that states "respect and ensure" rights necessitates that states take active steps to safeguard their populations from violent attack, but in so doing do not violate rights. He went on to add that security experts usually emphasize the aspect of ensuring rights while human rights advocates largely focus on respecting rights. He concluded that the trick, which neither side in the debate has adequately referenced, is that states have to do both at the same time.

The ISA 1960 was introduced by the then, Deputy Prime Minister, Tun Abdul Razak, on 1 August 1960 for the sole purpose of fighting the communist insurgency in Malaya. Tun Abdul Razak made "a solemn promise to the Parliament and the nation that the ISA 1960 would never be used to stifle legitimate opposition and silence lawful dissent." The purpose of ISA 1960, being a preventive detention law empowered the police to detain any person for up to 60 days without trial for any act which allegedly prejudices the security of the nation. After the 60 days, the Minister for Home Affairs can extend the detention period for up to a period of two years, renewable indefinitely, thus permitting indefinite detention without trial. In order to understand how draconian this law is, we must compare it to ordinary criminal law where an arrested person has to be brought before a Magistrate within 24 hours of arrest. When produced before the Magistrate, the Magistrate may allow the person to be detained by the arresting authority pending further investigation pursuant to the Magistrate's powers under s. 117 of the CPC.¹¹

⁶ Mitsilegas, V., Monar, J. & Rees, W., "*The European Union and Internal Security: Guardian of the People?*", New York: Palgrave Macmillan, 2003, pp.5.

⁷ Political Overview. (2012). Malaysia Defence & Security Report, 1, pp. 68-74.

⁸ Fritz, N. and Flaherty, M., "Unjust Order: Malaysia's Internal Security Act 26" *Fordham Int'l L*, 2002, Vol 26 (5), pp 1-95.

⁹ Fritz, N. and Flaherty, M., "Unjust Order: Malaysia's Internal Security Act 26" *Fordham Int'l L*, 2002, Vol 26 (5), pp 1-95.

¹⁰ Bennoun, K, Terror/Torture. *Berkeley Journal of International Law*, 2008 Vol 25 (1), pp 1-61.

¹¹ Malaysian Bar's Memorandum on the Security Offences (Special Measures) Bill 2012, Amendments to the Penal Code, Amendments to the Evidence Act 1950, and Amendments to the Criminal Procedure Code, <http://www.malaysianbar.org.my/index.php?option=com_docman&task=doc_view&gid=4558> . Site accessed on 30.9.2014.

For years, many countries around the world have been contending with horrific patterns of terrorism, including fundamentalist terrorism, which have claimed tens of thousands of lives and governments of many political stripes have been regularly responding to this violence with atrocity. Bennoun asserts that this is a global problem requiring a global response.¹² He went on to add that terror/torture represents a spectrum of brutalizing practices often justified in the name of a greater good or higher purpose¹³ but he criticized those who justify torture, and other atrocities, in the name of fighting terror for it undermines the very respect for human dignity and the universality needed to sustain comprehensive global norms against terrorism.¹⁴

The ISA 1960, is often considered extreme, as it serves to severely curtail and undermine civil liberties and human rights and it contributes to the creation of a deeply authoritarian political environment, in which attacks on independent voices – whether they emanate from the media, academia or the opposition - are routine.¹⁵ The ISA 1960 is thus critically deployed to impede mobilization on the part of the political opposition and any other groups deemed undesirable by the government. The ISA 1960 itself became the subject of a mass based campaign - the Abolish ISA Movement ("AIM") – and groups like the Malaysian Bar Council had called for its repeal.¹⁶ According to Phil Robertson,¹⁷ Deputy Asia Director at Human Rights Watch, “the detention of 13 people under the ISA shows that it’s still business as usual in Malaysia when it comes to trampling suspects’ basic rights,” and he went on to add that Malaysia’s duty to provide security for its population needs to be consistent with international human rights standards. If there is evidence that the 13 were involved in criminal offenses, they should be quickly brought to court, publicly charged with specific offenses under the Malaysian criminal code, and given a prompt and impartial trial. If there is insufficient evidence to charge them with specific offenses, then they should be immediately and unconditionally released.¹⁸

When the Malaysian Prime Minister, Datuk Seri Najib Razak announced plans to repeal the country’s controversial ISA 1960, the Minister of Home Affairs made his case for keeping the ISA, declaring it has only been used “sparingly” and “no person has ever been detained only for their political beliefs” and he argued that the ISA 1960 “continues to be relevant and crucial as a measure of last resort for keeping the country safe and secure”.¹⁹ Former Malaysian Prime Minister, Tun Dr Mahathir Mohamad encapsulated

¹² Bennoun, K, *Terror/Torture*, *Berkeley Journal of International Law*, 2008, Vol 25 (1), pp 1-61.

¹³ Bennoun, K, n13, pp 1-61.

¹⁴ Bennoun, K, n13, pp 1-61.

¹⁵ Fritz , N. and Flaherty, M, “Unjust Order: Malaysia’s Internal Security Act 26” *Fordham Int’l L*, 2002 ,Vol 26 (5), pp 1-95.

¹⁶ Memorandum from the Malaysian Bar Council, supra n.12, at 1, 1998, Malaysian Bar Council’s general meeting . <<http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1899&context=ilj>> Site accessed on 12.11.2014.

¹⁷ Human Rights Watch, 2011, “Malaysia: end use of internal security act”, <<http://www.hrw.org/news/2011/11/21/malaysia-end-use-internal-security-act>> Site accessed on 12.11.2014.

¹⁸ Human Rights Watch, 2011, “Malaysia: end use of internal security act”, <<http://www.hrw.org/news/2011/11/21/malaysia-end-use-internal-security-act>> Site accessed on 12.11.2014.

¹⁹ Chen. S, 2011, “*Singapore: Human rights and the Internal Security Act*”, <<http://asiancorrespondent.com/66146/singapore-human-rights-and-the-internal-security-act/>> Site accessed on 29.11.2014.

the paradox when he expressed his support for his government's decision in terms of winning the "moral high ground" over other developed countries. He compared those detained under the Act to those held in Guantanamo Bay, saying, "Previously, they [the US] criticized Malaysia for purportedly being cruel by detaining people without trial. But they are the ones doing it now".²⁰ Laurie Berg, a practicing lawyer from Australia, who had been given the mandate to observe and report the entire preliminary hearing of habeas corpus application presented the report to the press and urged the Government of Malaysia to repeal the ISA 1960 in its entirety as indefinite detention without trial violates international human rights standards.²¹ The recommendation was in line with the universally recognized human rights norms and fundamental freedoms, particularly the right to "participate in peaceful activities against violation of human rights and fundamental freedoms" as enunciated in Article 12 of the Declaration on Human Rights Defenders.²²

Malaysia, being a member state of the United Nation was urged to comply with the fundamental principles of justice and universally recognized human rights norms enshrined in the Universal Declaration of Human Rights, particularly on the prohibition of arbitrary arrest, detention or exile.²³ The use of ISA 1960 demonstrated various violations of human rights such as the right to fair and public trial, the right to be presumed innocent until proven guilty, the right to answer the charges against those arrested under the Act and the right not to be arbitrarily detained and the Observatory Report further stated that in some of the cases, the Government had failed to show illegal or dangerous act had taken place as alleged to have threatened national security. The use of the ISA 1960 also undermined the independence of the judiciary to scrutinize evidence of the alleged illegal or dangerous act.²⁴ According to Hishammudin Rais (Ex-ISA Detainee, Civil Rights activist), the ISA 1960 was like a guillotine that is continuously hanging on the heads of the citizens of Malaysia.²⁵ Where a conflict occurs between human rights and national security, national security should be given the highest consideration because without the existence of a peaceful country, there will be no humans to enjoy their rights.²⁶ The historic decision of Prime Minister, Datuk Seri Najib Tun Razak made in September 2011 to repeal the ISA 1960 in response to popular pressure could affect the country's ability to deal with suspected terrorists, over 100 of whom had been arrested under the notoriously

²⁰ Chen, S, 2011, "Singapore: Human rights and the Internal Security Act", <<http://asiancorrespondent.com/66146/singapore-human-rights-and-the-internal-security-act/>> Site accessed on 29.11.2014.

²¹ Fadiyah Nadwa, 2008, "Observatory Report : ISA is a violation of human rights principle", <http://www.malaysianbar.org.my/index2.php?option=com_content&do_pdf=1&id=16232>. Site accessed on 20.11.2014.

²² Fadiyah Nadwa, 2008, "Observatory Report : ISA is a violation of human rights principle", <http://www.malaysianbar.org.my/index2.php?option=com_content&do_pdf=1&id=16232>. Site accessed on 20.11.2014.

²³ Fadiyah Nadwa, 2008, "Observatory Report : ISA is a violation of human rights principle", <http://www.malaysianbar.org.my/index2.php?option=com_content&do_pdf=1&id=16232>. Site accessed on 20.11.2014.

²⁴ Fadiyah Nadwa, 2008, "Observatory Report : ISA is a violation of human rights principle", <http://www.malaysianbar.org.my/index2.php?option=com_content&do_pdf=1&id=16232>. Site accessed on 20.11.2014.

²⁵ Malaysian Civil Liberties Movement (MCLM), 2013, ISA - Internal Security Act <mclm.org.uk/health/382-isa-internal-security-act.htm> Site accessed on 20.11.2014.

²⁶ Paneir Selvam, R, 25th May 2014, "Adopt UK or Aussie anti-crime laws" New Straits Times. <<http://www2.nst.com.my/nation/adopt-uk-or-aussie-anti-crime-laws-1.336221>> Site accessed on 10.11.2014.

harsh ISA 1960 since May 2001.²⁷ Thus, the nation was looking forward to the changes in the new Act, SOSMA 2012 that replaced the ISA 1960 but unfortunately the new Act has raised numerous criticisms as it is advocated that the provisions are similar to those in the ISA 1960 or even more restrictive of basic human rights.

The Security Offences (Special Measures) Act (SOSMA) 2012 by its name indicates that it is a legislation providing for special measures relating to security offences. It was enacted pursuant to Article 149 of the Federal Constitution and it replaced the ISA 1960. In a nutshell, the legislation deals with the special manner of arrest, procedures for trial and its rules of evidence, as well as the handling of sensitive information or publication in respect of security offences.²⁸ According to Mathilde Tarif,²⁹ the new internal security law, SOSMA 2012, replaced the former law on internal security – the ISA 1960 – that was considered as authoritarian, given the fact that it gave powers to detain suspects for a several-year period without any trial, only based on suspicions affecting internal security which is seen through the provisions of the Act. Although, under section 8 (1) of the Act, it is stated that custody shall not exceed a two-year period but section 8 (2) gets round this limit, allowing its two-year sentence to be renewed as many times as needed, under the same accusations as the first warrant or under brand new ones.

According to Sharif,³⁰ some of the highlights of the Act are:

1. The person arrested may be detained for 24 hours for investigation.
2. The period of detention may be extended up to 28 days. This may be reviewed every five years.
3. There will be no recourse for detainees to challenge their arrest or subsequent incarceration.
4. The public prosecutor may authorize the police to intercept, detain and open any postal article.
5. Police can also intercept any message transmitted or received in any form and also intercept and listen to any conversation.

²⁷ Political Overview. (2012). Malaysia Defence & Security Report, 1, pp. 68-74.

²⁸ Aingkaran Kugathasan, 2013, “War on terrorism versus civil liberties of individuals: An analysis of the Malaysian Security Offences (Special Measures) Act 2012”, Special Report” <http://www.monitor.upeace.org/archive.cfm?id_article=961> Site accessed on 24.11. 2014.

²⁹ Mathilde Tarif , 2013, “Malaysia Keeps Ruling Under Controversial Security Laws In Secret translated By Florence Carré”, <http://www.lejournalinternational.fr/Malaysia-keeps-ruling-under- controversial-security-laws-in-secret_a1131.html> Site accessed on 20.9.2014.

³⁰ Aizat Sharif, 8th February 2013, “What is the Security Offences (Special Measures) Act 2012?” Astro Awani, <<http://english.astroawani.com/malaysia-news/what-security-offences-special-measures-act-2012-6715>> Site accessed on 15.11.2014.

6. The police can with a permit enter any premises to install devices to intercept and retain any form of communications.
7. Sensitive information can be admitted as evidence in court.

Since the new Act has evoked a lot of criticism from various parties, this research will analyse the SOSMA 2012 in reference to the ISA 1960 and the Federal Constitution to evaluate the validity of these criticisms. The following section discusses the findings from this analysis.

III. FINDINGS

The findings will be divided into specific headings starting with the source of authority to offences listed under the law, powers of arrest, trial processes and judicial powers as well as the comparison of ISA 1960 and SOSMA 2012 with the Malaysian Federal Constitution.

A. *Source of Authority*

The ISA (ISA) 1960 was originally enacted by the Malaysian government in 1960 under Article 149 of the Malaysian Constitution. The ISA 1960 was initially intended as a temporary measure to fight the communist insurgency. The SOSMA 2012 was also enacted under the same article and it aims “to provide for special measures relating to security offences for the purpose of maintaining public order and security and for connected matters”. The SOSMA 2012 replaced the ISA 1960. The Act was approved in the Parliament on 17 April 2012, given the Royal Assent on 18 June 2012 and gazetted on 22 June 2012.

B. *Comparison of Preliminary Details under the Acts*

Table 1 shows the detailed analysis of the various sections of ISA 1960 and SOSMA 2012. The analysis is divided into three main parts; the provisions on introduction and definitions, the provisions on the trial process and the provisions on implementation. Table I shows the comparison of the preliminary details in the Acts.

Table 1: Analysis of ISA 1960 and SOSMA 2012

INTRODUCTION	<p>ISA 1960</p> <p>An Act to provide for the internal security of Malaysia, preventive detention, the prevention of subversion, the suppression of organized violence against persons and property in specified areas of Malaysia, and for matters incidental thereto.</p> <p>WHEREAS action has been taken and further action is threatened by a substantial body of persons both inside and outside Malaysia—</p> <p>(1) to cause, and to cause a substantial number of citizens to fear, organised violence against persons and property; and</p> <p>(2) to procure the alteration, otherwise than by lawful means, of the lawful Government of Malaysia by law established;</p> <p>AND WHEREAS the action taken and threatened is prejudicial to the security of Malaysia;</p> <p>AND WHEREAS Parliament considers it necessary to stop or prevent that action;</p>	<p>SOSMA 2012</p> <p>An Act to provide for special measures relating to security offences for the purpose of maintaining public order and security and for connected matters.</p> <p>WHEREAS action has been taken and further action is threatened by a substantial body of persons both inside and outside Malaysia—</p> <p>(1) to cause, or to cause a substantial number of citizens to fear, organized violence against persons or property;</p> <p>(2) to excite disaffection against the Yang di-Pertuan Agong;</p> <p>(3) which is prejudicial to public order in, or the security of, the Federation or any part thereof; or</p> <p>(4) to procure the alteration, otherwise than by lawful means, of anything by law established;</p> <p>AND WHEREAS Parliament considers it necessary to stop such action;</p>
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<p>PART 1</p>	<p>Preliminary “Advisory Board” means an advisory board constituted under Article 151(2) of the Federal Constitution; “ammunition” means ammunition for any firearm as hereafter defined and includes grenades, bombs and other like missiles whether capable of use with such a firearm or not and any ammunition containing or designed or adapted to contain any noxious liquid, gas or other thing; “Chief Police Officer” includes a Deputy Chief Police Officer and any police officer for the time being lawfully authorized to exercise the powers and perform the duties conferred or imposed upon a Chief Police Officer by this Act and in the application of this Act to Sabah and Sarawak references to a Chief Police Officer shall be construed as references to a Divisional Superintendent of Police; “controlled area” means any area declared to be a controlled area under section 49; “danger area” means any area declared to be a danger area under section 48; “document” includes any substance on which is recorded any matter, whether by letters, figures, marks, pictorial or other representation, or by more than one of those means;</p>	<p>Preliminary “security offences” means the offences specified in the First Schedule; “court” means the Sessions court; “sensitive information” means any document, information and material— relating to the cabinet, cabinet committees and State Executive Council; or (b) that concerns sovereignty, national security, defense, public order and international relations, whether or not classified as “Top Secret”, “Secret”, “confidential” or “Restricted” by a minister, the Menteri Besar or chief Minister of a State or any public officer appointed by a minister, the Menteri Besar or Chief Minister of a State; “Minister” means the Minister charged with the responsibility for home affairs; “protected witness” means a witness whose exposure will jeopardize the gathering of evidence or intelligence or jeopardize his life and well-being</p>
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	<p>“entertainment” means any game, sport, diversion, concert or amusement of any kind to which the public has or is intended to have access and in which members of the public may or may not take part, whether on payment or otherwise;</p> <p>“exhibition” includes every display of goods, books, pictures, films or articles to which the public has or is intended to have access, whether on payment or otherwise;</p> <p>“explosive” shall have the meaning assigned thereto in the Explosives Act 1957 [Act 207], and includes any substance deemed to be an explosive under that Act; Internal Security</p> <p>“firearm” means any lethal barreled weapon of any description from which any shot, bullet or other missile can be discharged or which can be adapted for the discharge of any such shot, bullet or other missile and any weapon of whatever description designed or adapted for the discharge of any noxious liquid, gas or other thing, and includes any component part of any such weapon as aforesaid;</p> <p>“Inspector General” means the Inspector General of Police and, in relation to Sabah and Sarawak, includes the Commissioner in control of members of the Royal Malaysia Police in each of those States;</p> <p>“offence against this Act” includes an offence against any regulations made under section 71;</p> <p>“periodical publication” includes every publication issued periodically or in parts or numbers at intervals, whether regular or irregular;</p>
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	<p>“Police District” has the same meaning as “police district” in the Police Act 1967 [Act 344];</p> <p>“police officer” includes a reserve police officer, an auxiliary police officer and a special police officer appointed in accordance with any written law for the time being in force;</p> <p>“promoter”, in the case of an entertainment or exhibition promoted by a society, includes the secretary and officials of the society and, in the case of a society organized or having its headquarters outside Malaysia, the officials in Malaysia of the society;</p> <p>“proprietor” includes the owner, tenant or other person in possession or control of premises and any person who receives payment for the use of premises;</p> <p>“protected place” means any place or premises in relation to which an order made under section 50 is in force;</p> <p>“publication” includes all written, pictorial or printed matter, and everything of a nature similar to written or printed matter, whether or not containing any visible representation, or by its form, shape or in any other manner capable of suggesting words or ideas, and every copy, translation and reproduction or substantial translation or reproduction in part or in whole thereof;</p> <p>“public place” includes any highway, public street, public road, public park or garden, any sea beach, water-way, public bridge, lane, footway, square, court, alley or passage, whether a thoroughfare or not, any unalienated land, any rubber estate, any plantation, any land alienated for agricultural or mining purposes</p>	
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	<p>, any theatre or place of public entertainment of any kind or other place of general resort admission to which is obtained by payment or to which the public have access, and any open space to which for the time being the public have or are permitted to have access, whether on payment or otherwise;</p> <p>“public road” means any public highway or any road over which the public have a right of way or are granted access, and includes every road, street, bridge, passage, footway or square over which the public have a right of way or are granted access; “security area” means any area in respect of which a proclamation under section 47 is for the time being in force;</p> <p>“security forces” includes the Royal Malaysia Police, the Police Volunteer Reserve, the Auxiliary Police, persons commissioned or appointed under the Essential (Special Constabulary) Regulations 1948 [G.N. 1694 of 1948], the armed forces, any local force established under any written law in force in Malaysia, and any force which is a visiting force for the purposes of Part I of the Visiting Forces Act 1960 [Act 432], and in respect of whom all or any of the powers exercisable by the armed forces or their members under this Act have been made exercisable by an order made under any such law;</p> <p>“supplies” includes ammunition, explosives, firearms, money, food, drink, clothing, medicines, drugs and any other stores, instruments, commodities, articles or things whatsoever;</p>	
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	<p>“terrorist” means any person who— (a)by the use of any firearm, explosive or ammunition acts in a manner prejudicial to the public safety or to the maintenance of public order or incites to violence or counsels disobedience to the law or to any lawful order; (b)carries or has in his possession or under his control any firearm, ammunition or explosive without lawful authority therefor; or Internal Security 13 (c)demand, collects or receives any supplies for the use of any person who intends or is about to act, or has recently acted, in a manner prejudicial to public safety or the maintenance of public order.</p>	
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If the Introduction Part of the Acts are analysed, there are notable differences that could raise concern. It must be noted that the enforcement has increased from two to four points. The ISA 1960 protects both the public (both person and property)³¹ and the government³² while the SOSMA 2012 has been extended to cover not only violence against person and property³³ but also the Yang di-Pertuan Agong,³⁴ and which is prejudicial to public order in, or the security of, the Federation or any part thereof;³⁵ or to procure the alteration, otherwise than by lawful means, of anything by law established.³⁶ Further analysis of the provisions would show that there are similarities in provisions 1 (to cause, and to cause a substantial number of citizens to fear, organised violence against persons and property) and 2 (to procure the alteration, otherwise than by lawful means, of the lawful Government of Malaysia by law established) in the ISA 1960 with 1 and 4 of SOSMA 2012. However, if provision 2 of the ISA 1960 and provision 4 of the SOSMA 2012 are scrutinized, it would reveal some differences. This is seen in the phrases ‘of the lawful Government of Malaysia by law established’ which has been replaced with the phrase ‘of anything by law established’. This change has widened the scope of application. In addition to this widening of jurisdiction, the addition indicated by provisions 2 of the SOSMA 2012 (to excite disaffection against the yang di-Pertuan Agong) and 3 of the SOSMA 2012 (which is prejudicial to public order in, or the security of, the Federation or any part thereof) too have increased the ambit of application. In the ISA 1960, the phrase ‘prejudicial to the security of Malaysia’ is used while in the SOSMA 2012, the phrase ‘prejudicial to public order in, or the security of, the Federation or any part thereof’ is used. It must be noted at this point that all these changes do not reflect positively on the law makers for instead of addressing the criticism that the provisions and application of the ISA 1960 is too wide, it has further widened the scope by giving room for possibility of further erosion of human rights.

Parts 1 of the Acts define key words/terms that are used in the Act. Some of these words which allows for comparison are discussed. In the ISA 1960, the term ‘document’ is defined to include any substance on which is recorded any matter, whether by letters, figures, marks, pictorial or other representation, or by more than one of those means’. In the SOSMA 2012, this term is replaced with ‘sensitive information’. Here, the term is made more specific in terms of definition. However, in terms of coverage of materials under it, it is equally broad as the definition in the ISA 1960. The coverage is divided into two; relating to the Cabinet, Cabinet Committees and State Executive Council; or that concerns sovereignty, national security, defense, public order and international relations. It appears very restrictive for any material which is related to the list given, despite not being classified as “Top Secret”, “Secret”, “Confidential” or “Restricted” by a Minister, the Menteri Besar or Chief Minister of a State or any public officer appointed

³¹ Introduction No 1, *Internal Security Act 1960*.

³² Introduction No 2, *Internal Security Act 1960*.

³³ Introduction No 1, *SOSMA 2012*.

³⁴ Introduction No 2, *SOSMA 2012*.

³⁵ Introduction No 3, *SOSMA 2012*.

³⁶ Introduction No 4, *SOSMA 2012*.

by a Minister, the Menteri Besar or Chief Minister of a State falls within the ambit of 'sensitive information'.

With regards to definition of key words used in the Acts, it would appear that the ISA 1960 has a more extensive list while the SOSMA 2012 only defines five key words; security offences, court, sensitive information, Minister and protected witness. The long list of words defined in the ISA 1960 is no longer relevant as most of the provisions dealing with these terms have been removed from the SOSMA 2012. Among these would be control area, danger area, promoter, proprietor, protected place, public road, security area, security forces, supplies, firearm, entertainment and ammunition. The sections relating to these terms which have been removed are s. 48 (Danger areas), s. 49 (controlled areas), s. 50 (Protected place), s. 54 (Power to order destruction of certain unoccupied buildings), s. 55 (Power to control roads, etc), s. 57 (Offences relating to firearms, ammunition and explosives) and s. 59 (Supplies). This does not mean that these sections which impose restrictions have been removed totally in the SOSMA 2012 for a detailed analysis would indicate that they are covered under general terms such as "which is prejudicial to public order in, or the security of, the Federation or any part thereof" where terms such as protected place, public road and security area are covered. On the other hand, the phrase "to cause, or to cause a substantial number of citizens to fear, organized violence against person or property" would cover possession of firearm and ammunition. These broad definitions are of concern to many. For example, the Bar Council president, Lim Chee Wee said on 10 April 2012 that the definition of "security offences" under section 3 of the new bill was still too broad.³⁷ As a result, the Bar had recommended the government to use the definition found in the International Convention for the Suppression of the Financing of Terrorism adopted by the United Nations in 1999. It limits the definition of terrorist acts to those "intended to cause death or serious bodily injury" to civilians in order to intimidate a population or compel a government to do or abstain from certain action.³⁸

A similar view was also highlighted by Spiegel, even before the Act was made law³⁹ where he asserted that the SOSMA 2012's definition of a security offence—"an act prejudicial to national security and public safety"—is overly broad; as it gives the government sufficient power to bring partisan politics into decisions as to what is or is not a security breach. He went on to cite an example where the government could decide that the then ongoing Bersih "clean elections" campaign is a security offence as it is

³⁷ Gan Pei Ling, 18th May 2012, "SOSMA: Sizing up the new security bill" Selangor Times, <<http://www.selangortimes.com/index.php?section=insight&permalink=20120516152209-sosma-sizing-up-the-new-security-bill>> Site accessed 11.11.2014.

³⁸ Gan Pei Ling, 18th May 2012, "SOSMA: Sizing up the new security bill" Selangor Times, <<http://www.selangortimes.com/index.php?section=insight&permalink=20120516152209-sosma-sizing-up-the-new-security-bill>> Site accessed 11.11.2014.

³⁹ Spiegel, M, 14th June 2012, *Smoke and Mirrors: Malaysia's "New" Internal Security Act*, Asia Pacific Bulletin, <http://www.hrw.org/sites/default/files/related_material/2012_Malaysia_EastWest.pdf> Site accessed 12.11.2014.

intended to influence or compel the government to change electoral practices that help preserve the status quo. According to Malaysian human rights campaigners, the SOSMA 2012 remains far too broad. So far the definition of 'security offence' and committing acts 'prejudicial to national security and public safety' has resulted in arrests for wearing a T-shirt depicting Che Guevara and other non-security issues.⁴⁰

Another term defined in the SOSMA 2012 which must be discussed is the phrase 'protected witness' which is defined as 'a witness whose exposure will jeopardize the gathering of evidence or intelligence or jeopardize his life and well-being'. This is a newly introduced term and it has been included to complement the new provisions in SOSMA 2012 which deals with trial procedures relating to sensitive information, specifically s. 16 (1), protection of witness' identity. These provisions specify some procedures which have given rise to a number of criticisms in terms of rights upheld in Rule of Law as well as the Federal Constitution. These are discussed in length later in this paper.

The next part of the discussion is on the provisions relating to actions taken when offences are committed in both the ISA 1960 and the SOSMA 2012. Table 2 shows the powers that the courts and police have in cases where offences are committed under the ISA 1960 and the SOSMA 2012. The analysis is divided into five parts namely; powers to arrest and detain, powers to inform next-of-kin and provide consultation with a legal practitioner, power to intercept communication, electronic monitoring device and detention pending exhaustion of legal process. The analysis indicates that the enforcement provisions for offences under these Acts have more differences than similarities. The improvements that the SOSMA 2012 promised are very limited while the additions made are more restrictive of the rights upheld in the principles of Rule of Law and Federal Constitution.

The next part of the discussion is on the laws indicated by the sections in both the ISA 1960 and the SOSMA 2012. Table 2 shows the findings of the analysis.

⁴⁰ Massoud Shadjareh, Mohdieen Abdul Kader & Mohammed Nasir, 2014, "*Human Rights in Malaysia: An Overview of Concerns*", <<http://www.ihrc.org.uk/events/10953-human-rights-in-malaysia-an-overview-of-concerns>>. Site accessed 14.11.2014.

Table 2: Analysis of the Laws in the Acts.

KEY AREAS	ISA 1960	SOSMA 2012
<p>Power to arrest and detention</p>	<p>8. *(1) If the Minister is satisfied that the detention of any person is necessary with a view to preventing him from acting in any 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, he may make an order (hereinafter referred to as “a detention order”) directing that that person be detained for any period not exceeding two years.</p> <p>(2) In subsection (1) “essential services” means any service, business, trade, undertaking, manufacture or occupation included in the Third Schedule.</p> <p>(3) Every person detained in pursuance of a detention order shall be detained in such place (hereinafter referred to as “a place of detention”) as the Minister may direct and in accordance with any instructions issued by the Minister and any rules made under subsection (4).</p> <p>(4) The Minister may by rules provide for the maintenance and management of places of detention and for the discipline and treatment of persons detained therein, and may make different rules for different places of detention.</p> <p>(5) If the Minister is satisfied that for any of the purposes mentioned in subsection (1) it is necessary that control and supervision should be exercised over any person or that restrictions and conditions should be imposed upon that person in respect of his activities, freedom of movement or places of residence or employment, but that for that purpose it is</p>	<p>4. (1) A police officer may, without warrant, arrest and detain any person whom he has reason to believe to be involved in security offences.</p> <p>(2) A person arrested under subsection (1) shall be informed as soon as may be of the grounds of his arrest by the police officer making the arrest.</p> <p>(3) No person shall be arrested and detained under this section solely for his political belief or political activity.</p> <p>(4) The person arrested and detained under subsection (1) may be detained for a period of twenty-four hours for the purpose of investigation.</p> <p>(5) Notwithstanding subsection (4), a police officer of or above the rank of Superintendent of Police may extend the period of detention for a period of not more than twenty-eight days, for the purpose of investigation.</p> <p>(6) If the police officer is of the view that further detention is not necessary under subsection (5), the person may be released but an electronic monitoring device may be attached on the person in accordance with subsections (7) and (8) for the purpose of investigation.</p> <p>(7) If the police officer intends to attach an electronic monitoring device on the person upon his release, he shall submit a report of the investigation to the Public Prosecutor.</p>

<p>unnecessary to detain him, he may make an order (hereinafter referred to as “a restriction order”) imposing upon that person all or any of the following restrictions and conditions:</p> <p>(a) for imposing upon that person such restrictions as may be specified in the order in respect of his activities and the places of his residence and employment;</p> <p>(b) for prohibiting him from being out of doors between such hours as may be specified in the order, except under the authority of a written permit granted by such authority or person as may be so specified;</p> <p>(c) for requiring him to notify his movements in such manner at such times and to such authority or person as may be specified in the order;</p> <p>(d) for prohibiting him from addressing public meetings or from holding office in, or taking part in the activities of or acting as adviser to, any organization or association, or from taking part in any political activities; and</p> <p>(e) for prohibiting him from travelling beyond the limits of Malaysia or any part thereof specified in the order except in accordance with permission given to him by such authority or person as may be specified in such order.</p> <p>(6) Every restriction order shall continue in force for such period, not exceeding two years, as may be specified therein, and may include a direction by the Minister that the person in respect of whom it is made shall enter into a bond with or without sureties and in such sum as may be specified for his due compliance with the restrictions and conditions imposed upon him.</p> <p>(7) The Minister may direct that the duration of any detention order or restriction order be extended for such further period, not exceeding two years, as he may specify, and thereafter for such further periods, not exceeding two years at a time, as he may specify, either—</p>	<p>(8) Upon receipt of the report under subsection (7), the Public Prosecutor may apply to the Court for the person to be attached with an electronic monitoring device in accordance with the provisions in Part III for a period which shall not exceed the remainder of the period of detention allowed under subsection (5).</p> <p>(9) One week before the expiry of the period of detention under subsection (5), the police officer conducting the investigation shall submit the investigation papers to the Public Prosecutor.</p> <p>(10) This section shall have effect notwithstanding anything inconsistent with Articles 5 and 9 of the Federal Constitution and section 117 of the Criminal Procedure Code [Act 593].</p> <p>(11) Subsection (5) shall be reviewed every five years and shall cease to have effect unless, upon the review, a resolution is passed by both Houses of Parliament to extend the period of operation of the provision.</p> <p>(12) For the purpose of this section, “political belief or political activity” means engaging in a lawful activity through—</p> <p>(a) the expression of an opinion or the pursuit of a course of action made according to the tenets of a political party that is at the relevant time registered under the Societies Act 1966 [Act 335] as evidenced by—</p> <p>(i) membership of or contribution to that party; or (ii) open and active participation in the affairs of that party;</p>
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	<p>(a) on the same grounds as those on which the order was originally made; (b) on grounds different from those on which the order was originally made; or (c) partly on the same grounds and partly on different grounds: Provided that if a detention order is extended on different grounds or partly on different grounds the person to whom it relates shall have the same rights under section 11 as if the order extended as aforesaid was a fresh order, and section 12 shall apply accordingly.</p> <p>(8) The Minister may from time to time by notice in writing served on a person who is the subject of a restriction order vary, cancel or add to any restrictions or conditions imposed upon that person by that order, and the restrictions or conditions so varied and any additional restrictions or conditions so imposed shall, unless sooner cancelled, continue in force for the unexpired portion of the period specified under subsection (6) or (7)</p> <p>64. (1) Any police officer may without warrant arrest any person suspected of the commission of an offence against this Part. (2) The powers conferred upon a police officer by subsection (1) may be exercised by any member of the security forces, by any person performing the duties of guard or watchman in a protected place, and by any other person generally authorized in that behalf by a Chief Police Officer.</p> <p>73. (1) Any police officer may without warrant arrest and detain pending enquiries any person in respect of whom he has reason to believe—</p>	<p>the expression of an opinion directed towards any Government in the Federation; or the pursuit of a course of action directed towards any Government in the Federation.</p>
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	<p>(a) that there are grounds which would justify his detention under section 8; and</p> <p>(b) that he has acted or is about to act or is likely to act in any 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.</p> <p>(2) Any police officer without warrant arrest and detain pending enquires any person, who upon being questioned by the officer fails to satisfy the officer as to his identity or as to the purposes for which he is in the place where he is found, and who the officer suspects has acted or is about to act in any 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.</p> <p>(3) Any person arrested under this section may be detained for a period not exceeding sixty days without an order of detention having been made in respect of him under section 8:</p> <p>Provided that—</p> <p>(a) he shall not be detained for more than twenty-four hours except with the authority of a police officer of or above the rank of Inspector;</p> <p>(b) he shall not be detained for more than forty-eight hours except with the authority of a police officer of or above the rank of Assistant Superintendent; and</p> <p>(c) he shall not be detained for more than thirty days unless a police officer of or above the rank of Deputy Superintendent has reported the circumstances of the arrest and detention to the Inspector General or to a police officer designated by the Inspector General in that behalf, who shall forthwith report the same to the Minister.</p>	
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<p>Power to inform next-of-kin and consultation with legal practitioner</p>	<p>5. (1) When a person is arrested and detained under section 4, a police officer conducting investigation shall— <i>(a)</i> immediately notify the next-of-kin of such person of his arrest and detention; and <i>(b)</i> subject to subsection (2), allow such persons to consult a legal practitioner of his choice.</p> <p>(2) A police officer not below the rank of Superintendent of Police may authorize a delay of not more than forty-eight hours for the consultation under paragraph (1)<i>(b)</i> if he is of the view that—</p> <p><i>(a)</i> there are reasonable grounds for believing that the exercise of that right will interfere with evidence connected to security offence; <i>(b)</i> it will lead to harm to another; <i>(c)</i> it will lead to the alerting of other person suspected of having committed such an offence but who are not yet arrested; or <i>(d)</i> it will hinder the recovery of property obtained as a result of such an offence.</p> <p>(3) This section shall have effect notwithstanding anything inconsistent with Article 5 of the Federal Constitution.</p>
<p>Power to intercept communication</p>	<p>6. (1) Notwithstanding any other written law, the Public Prosecutor, if he considers that it is likely to contain any information relating to the commission of a security offence, may authorize any police officer—</p> <p><i>(a)</i> to intercept, detain and open any postal article in the course of transmission by post; <i>(b)</i> to intercept any message transmitted or received by any communication; or <i>(c)</i> to intercept or listen to any conversation by any communication.</p> <p>(2) The Public Prosecutor, if he considers that it is likely to contain any information relating to the communication of a security offence, may—</p>

<p>(a) require a communications service provider to intercept and retain a specified communication or communications of a specified description received or transmitted, or about to be received or transmitted by that communications service provider; or</p> <p>(b) authorize a police officer to enter any premises and to install on such premises, any device for the interception and retention of a specified communication or communications of a specified description and to remove and retain such evidence.</p> <p>(3) Notwithstanding subsection (1), a police officer not below the rank of Superintendent of Police may—</p> <p>(a) intercept, detain and open any postal article in the course of transmission by post;</p> <p>(b) intercept any message transmitted or received by any communication; or</p> <p>(c) intercept or listen to any conversation by any communication, without authorization of the Public Prosecutor in urgent and sudden cases where immediate action is required leaving no moment of deliberation.</p> <p>(4) If a police officer has acted under subsection (3), he shall immediately inform the Public Prosecutor of his action and he shall then be deemed to have acted under the authorization of the Public Prosecutor.</p> <p>(5) The court shall take cognizance of any authorization by the Public Prosecutor under this section.</p> <p>(6) This section shall have effect notwithstanding anything inconsistent with Article 5 of the Federal Constitution.</p> <p>(7) For the purpose of this section—</p> <p>“communication” means a communication received or transmitted by post or a telegraphic, telephonic or other communication received or transmitted by electricity, magnetism or other means;</p> <p>“communications service provider” means a person who provides services for the transmission or reception of communications.</p>		
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<p>Electronic monitoring device</p>	<p>7. (1) Upon application by the Public Prosecutor under section 4, the Court shall order the person to be attached with an electronic monitoring device for a period as the Court may determine but which shall not exceed the remainder of the period of detention allowed under subsection 4(5) for purposes of investigation.</p> <p>(2) The Court shall explain the operation of the electronic monitoring device and the terms and conditions of the electronic monitoring device to the person.</p> <p>(3) The person shall sign a form as specified in the Second Schedule and deposit the form with the Court.</p> <p>(4) The person shall be attached with an electronic monitoring device by a police officer.</p> <p>(5) The person shall comply with all the terms and conditions of the electronic monitoring device and shall report to the nearest police station at such time as specified in the form.</p> <p>(6) Any person who fails to comply with the terms and conditions under subsection (5) commits an offence and shall, on conviction, be liable to imprisonment for a term of not exceeding three years.</p> <p>(7) Any person who tampers with, or destroys, the electronic monitoring device commits an offence and shall, on conviction, be liable to imprisonment not exceeding three years and such person shall be liable to pay for any damage to the electronic monitoring device arising from his action.</p> <p>(8) Upon expiry of the period referred to in subsection (1), the person shall report to the nearest police station for removal of the electronic monitoring device.</p>
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<p>Detention pending exhaustion of legal process</p>		<p>(9) This section shall have effect notwithstanding anything inconsistent with Article 9 of the Federal Constitution.</p> <p>30. (1) Notwithstanding Article 9 of the Federal Constitution, if the trial court acquits an accused of a security offence the Public Prosecutor may make an oral application to the court for the accused to be remanded in prison pending a notice of appeal to be filed against his acquittal by the Public Prosecutor.</p> <p>(2) Upon application by the Public Prosecutor under subsection (1), the court shall remand the accused in prison pending the filing of the notice of appeal.</p> <p>(3) When the Public Prosecutor files a notice of appeal against the acquittal, the Public Prosecutor may apply to the trial court for an order to commit the accused remanded in custody of the police to prison pending the disposal of the appeal.</p> <p>(4) Upon application by the Public Prosecutor under subsection (3), the court shall commit the accused to prison pending the disposal of the appeal.</p> <p>(5) If the appeal of the Public Prosecutor is dismissed and the order of acquittal is affirmed, the Public Prosecutor may make an oral application to the court for the accused to be remanded in prison pending a notice of appeal to be filed against the decision of the Court of Appeal by the Public Prosecutor.</p> <p>(6) Upon application by the Public Prosecutor under subsection (5), the court shall remand the accused in prison pending the filing of the notice of appeal.</p> <p>(7) An accused committed to prison under this section shall be held until all appeals are disposed of.</p>
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The sections which give power to arrest and detain are the most important ones in the two Acts; the ISA 1960 and the SOSMA 2012. Under the ISA 1960, a person can be detained for up to sixty days, without warrant or trial and without access to legal counsel, on suspicion that “he has acted or is about to act or is likely to act in any manner prejudicial to the security of Malaysia or any part thereof or to maintenance of essential services therein or to the economic life thereof.”⁴¹ At the end of sixty days, the Minister of Home Affairs can extend the period of detention without trial for up to two years.⁴² This unjust detention can be renewed every two years without charge or an appearance before a court of law, effectively allowing for indefinite detention without trial. According to Ramdas Tikamdas,⁴³ under this law, the Minister of Home Affairs may detain a person for a period not exceeding two years (and renewable for two-year periods indefinitely) on the suspicion or belief that the detention of that person is necessary in the interest of public order or security and no grounds need be given by the Minister for the initial order or the extension. It is significant to note that in law, this is an executive detention order and not a detention pursuant to a judicial decision. According to de facto Law Minister, Nazri Abdul Aziz,⁴⁴ a total of 10,883 people were held under the ISA between 1960 and mid-2012.

As a result of the extensive power given by the sections in the ISA 1960, large groups of people have been arrested in the past. In the last 50 years, over 10,000 people have been detained under the ISA.⁴⁵ In 1987, *Operasi Lalang* saw the arrests of 106 persons under the ISA 1960 along with the revoking of the publishing licenses of two dailies, The Star and the *Sin Chew Jit Poh* and two weeklies, The Sunday Star and *Watan*. Prominent detainees include both political and non-political detainees such as opposition leader and DAP Secretary-General Lim Kit Siang, ALIRAN President Chandra Muzaffar, DAP Deputy Chairman Karpal Singh, MCA Vice President and Perak Chief Chan Kit Chee, PAS Youth Chief Halim Arshat, UMNO MP for Pasir Mas Ibrahim Ali, and UMNO Youth Education Chairman Mohamed Fahmi Ibrahim. In addition to these, other prominent non-political detainees include *Dong Jiao Zhong's* (Chinese Education Associations) Chairman Lim Fong Seng, Publicity Chief of the Civil Rights Committee Kua Kia Soong, and Women’s Aid Organisation leader Irene Xavier.⁴⁶

In total, 37 political activists and politicians were arrested. In addition, 23 social activists and 37 ordinary civilians were also arrested. Amongst them was a Malay

⁴¹ Section 8 (1), Section 64, Section 72 and Section 73, *Internal Security Act 1960*.

⁴² Section 8 (7) *Internal Security Act 1960*.

⁴³ Ramdas Tikamdas, *National Security and Constitutional Rights: The Internal Security Act 1960*. The Journal of the Malaysian Bar;2003, Vol XXXII (1), pp 89-92.

⁴⁴ Hansard (2012) Dewan Rakyat [House of Representatives] 17 April 2012 DR-14042012.

⁴⁵ *Malaysian Civil Liberties Movement (MCLM), 2013, ISA - Internal Security Act <mclm.org.uk/health/382-isa-internal-security-act.htm>Site accessed on 20.11.2014.*

⁴⁶ *Malaysian Civil Liberties Movement (MCLM), 2013, ISA - Internal Security Act <mclm.org.uk/health/382-isa-internal-security-act.htm>Site accessed on 20.11.2014.*

Christian called Hilmy Noor, who was accused of “disrupting the Malay culture by being a Christian.”⁴⁷ In 1991, seven opposition leaders in Sabah were arrested for their alleged plans to secede the state from Malaysia, allegedly known as Operation Talkak. All were either leaders or prominent members of the Kadazan Cultural Association (KCA), Institute for Development Studies (IDS), Sabah Foundation, and opposition party Parti Bersatu Sabah (PBS). In 2001, 6 political activists who were involved in the ‘Reformasi’ movement pushing for political reform and justice following the sacking and sham trial of ex-Deputy Prime Minister Anwar Ibrahim were detained under the ISA. They included Raja Petra Kamarudin, Tian Chua, Hishammudin Rais, Lokman Adam, Badrulamin Bahron and Saari Sungib.⁴⁸ After *Ops Lalang*, the Weeding Operation carried out in October 1987, the next intensely political and widespread use of the ISA 1960 occurred in the Reformasi era mass arrests during Anwar Ibrahim’s sodomy and corruption trials where Anwar himself was detained under the Act, and it was subsequently used to detain several of his key supporters and intimidate others.⁴⁹

In 2007, a number of Hindu Rights Action Force (Hindraf) leaders were arrested under the ISA and 5 were subsequently detained without trial.⁵⁰ This group had led large demonstrations in the capital, pushing for equal rights and opportunities for marginalised minority Indians.⁵¹ In 2008, Raja Petra Kamarudin, an outspoken political activist and respected blogger was arrested for the second time under the ISA for allegedly “insulting Islam and publishing articles on his website that tarnished the country’s leadership to the point of causing confusion among the people.”⁵² He was detained for 56 days. Around the same time, Tan Hoon Cheng, a journalist with leading daily *Sin Chew Jit Poh* was arrested for reporting on the perceived racist remarks of a leading UMNO politician. She was released after 18 hours.⁵³ Teresa Kok, opposition MP was also arrested under the ISA in 2008 for allegedly insulting Islam, an allegation that was later found to be baseless. She was released after 7 days. Cheng Lee Whee, a SUARAM human rights activist was also arrested in 2008 for allegedly insulting the police. He was released after 48 hours.⁵⁴ According to Whiting, apart from these mass detentions, the ISA 1960 has been used frequently but episodically since 1960, with the incarceration of suspected

⁴⁷ *Malaysian Civil Liberties Movement (MCLM), 2013, ISA - Internal Security Act <mclm.org.uk/health/382-isa-internal-security-act.htm>Site accessed on 20.11.2014.*

⁴⁸ *Malaysian Civil Liberties Movement (MCLM), 2013, ISA - Internal Security Act <mclm.org.uk/health/382-isa-internal-security-act.htm>Site accessed on 20.11.2014.*

⁴⁹ US Department of State, 2002; The Star, 12 April 2001; and SUHAKAM, 11 April 2001.

⁵⁰ *Malaysian Civil Liberties Movement (MCLM), 2013, ISA - Internal Security Act <mclm.org.uk/health/382-isa-internal-security-act.htm>Site accessed on 20.11.2014*

⁵¹ *Malaysian Civil Liberties Movement (MCLM), 2013, ISA - Internal Security Act <mclm.org.uk/health/382-isa-internal-security-act.htm>Site accessed on 20.11.2014*

⁵² *Malaysian Civil Liberties Movement (MCLM), 2013, ISA - Internal Security Act <mclm.org.uk/health/382-isa-internal-security-act.htm>Site accessed on 20.11.2014*

⁵³ *Malaysian Civil Liberties Movement (MCLM), 2013, ISA - Internal Security Act <mclm.org.uk/health/382-isa-internal-security-act.htm>Site accessed on 20.11.2014*

⁵⁴ *Malaysian Civil Liberties Movement (MCLM), 2013, ISA - Internal Security Act <mclm.org.uk/health/382-isa-internal-security-act.htm>Site accessed on 20.11.2014*

terrorists usually receiving less publicity than detention of opposition politicians, students, journalists, bloggers and public interest activists.⁵⁵

The assumption that we can make on this is that ISA 1960 does not discriminate. Anyone, at any time can be on the sharp end, simply for thinking or saying something which the government considers to be against the status quo.⁵⁶ The government, however, gives a very simplistic answer to this serious criticism. Some ministers in justifying the continued use of the ISA question why Malaysia should get rid of it when Western countries have followed by creating such laws too, and the countries comparison are the US and UK.⁵⁷ The truth in their defense cannot be denied for it is true that laws that allow for detention without trial, such as the USA Patriot Act 2001, and the UK's Terrorism Act 2006, came about as needful responses to the 11 Sept 2001 World Trade Centre attacks and the 7 July 2005 London bombings.⁵⁸ However, Loh⁵⁹ went on to highlight a key flaw in the comparison for an overview of the ISA 1960, Patriot Act and Terrorism Act shows that key differences lie in the safeguards and access to legal recourses for detainees to challenge their detention which is given emphasis in the other Acts. This is supported by the Bar Council Human Rights Committee Chairman, Edmund Bon who claims that such statements are shallow and motivated by political agenda for he asserts that the most unjust part of the ISA 1960 is the prohibition of judicial review on the minister's decision.

An analysis of the criticism against the ISA 1960 shows that it starts with the provision in the Act that gave arbitrary detention powers without warrant. The SOSMA 2012 also has similar provisions for arrest and detention. Under s. 4 of the SOSMA 2012, a police officer may arrest or detain without warrant any person whom he has reason to believe to be involved in an offence in this Act. However, unlike the ISA 1960, s. 4 (2) stipulates that a person who is arrested must be informed on the grounds of arrest by the police officer making the arrest. Further under s. 5, there is a requirement for the police officer conducting the investigation to notify the next-of-kin of the person arrested and also to allow the person to consult a legal practitioner of his choice. These sections allows for a positive view of the SOSMA 2012 but the positive changes are superficial for s. 5 (2) empowers a police officer who is not below the rank of Superintendent of Police to authorize a delay of 48 hours for the consultation. Besides these, there are other sections

⁵⁵ Some examples cited by Amanda Whiting of ISA detentions include: politicians – socialist party members (Straits Times (Malaysia), 6 September 1973), HINDRAF organisers in 2007 (Malaysiakini, 12 December 2007); student and academic protestors in 1974 (Means, 1991: 37); journalists – the editor of the New Straits Times in 1976, a senior journalist at Watan in the mid-1980s (Means, 1991: 56; New Straits Times, 18 October 1981); a socio-political blogger, a mainstream journalist and a DAP MP in 2008 (Aliran, 13 September 2008).

⁵⁶ *Malaysian Civil Liberties Movement (MCLM), 2013, ISA - Internal Security Act* <mclm.org.uk/health/382-isa-internal-security-act.htm> Site accessed on 20.11.2014.

⁵⁷ Loh, D, 2008, *What's wrong with the ISA?*. The Nut Graph, <<http://www.thenutgraph.com/what-is-wrong-with-the-isa/>> Site accessed 11.12.2014.

⁵⁸ Loh, D, 2008, *What's wrong with the ISA?*. The Nut Graph, <<http://www.thenutgraph.com/what-is-wrong-with-the-isa/>> Site accessed 11.12.2014.

⁵⁹ Loh, D, 2008, *What's wrong with the ISA?*. The Nut Graph, <<http://www.thenutgraph.com/what-is-wrong-with-the-isa/>> Site accessed 11.12.2014.

which show that SOSMA 2012 is also restrictive like ISA 1960. Section 6, for instance permits the interception of communication which may infringe personal liberty and the right to privacy. Further, s. 30 compels the court, upon application by the public prosecutor, to commit an acquitted person pending exhaustion of all appeals.

In comparison to the ISA 1960, these provisions are not that harsh. Under the SOSMA 2012, the police have powers to arrest and detain any person whom they have reason to believe is involved in security offences for only 28 days unlike the 60-days period, under the ISA 1960. However, under the SOSMA 2012, there is a new imposition that an electronic tracking device can be placed on released suspects. What is of serious concern is that the definition of “security offence” in the SOSMA 2012 is broad and vague. It includes “activity which is detrimental to parliamentary democracy”. Two important sections in the SOSMA 2012 which aim to ensure that the Act is not misused is seen in s. 4 (3), where it asserts that political belief or political activity of a person cannot be the sole reason for a person to be arrested and detained. This section must be read with s. 4 (12) which explains the meaning of ‘political belief or political activity’. The Act defines the phrase as engaging in a lawful activity through three means listed below:

the expression of an opinion or the pursuit of a course of action made according to the tenets of a political party that is at the relevant time registered under the Societies Act 1966 [Act 335] as evidenced by—

- (i) membership of or contribution to that party; or
- (ii) open and active participation in the affairs of that party;
- (b) the expression of an opinion directed towards any Government in the Federation; or
- (c) the pursuit of a course of action directed towards any Government in the Federation.

These provisions are also part of those which have brought forth criticism. According to Spiegel,⁶⁰ even the much-applauded language stating that “No person shall be arrested and detained...solely for his political belief or political activity” is less than it appears due to the SOSMA 2012’s definition of political activity and belief as opinion or action reflecting the views of a political party that is legally registered under the Societies Act. He went on to add that the Registrar of Societies, a political appointee, has unassailable power to refuse or delay registration ad infinitum—a power that has been used repeatedly for political ends such as denying registration to a newly formed political party and concludes that this may make those holding demonstrations for or against certain legislation to be committing a security offence.

⁶⁰ Spiegel, M, 14th June 2012, *Smoke and Mirrors: Malaysia’s “New” Internal Security Act*, Asia Pacific Bulletin, <http://www.hrw.org/sites/default/files/related_material/2012_Malaysia_EastWest.pdf> Site accessed 12.11.2014.

As indicated in Table 2, under s. 6 (1) of the SOSMA 2012, the Public Prosecutor may authorise any police officer ‘to intercept, detain and open any postal article in the course of transmission by post, to intercept any message transmitted or received by any communication; or to intercept or listen to any conversation by any communication’ if he is of the opinion that it is likely to contain information which is likely to relate to the commission of a security offences. These powers are extended under ss. 2 (a) and (b) to empower the public prosecutor to require a communication service provider to intercept and retain specified communication as well as authorizes a police officer to enter any premise and install any device for the interception and retention of specified communication. Besides these extensive powers of interception by the Public Prosecutor, a police officer not below the rank of Superintendent of Police can, under s.6 (3) (a), intercept, detain and open any postal article in the course of transmission by post; (b) intercept any message transmitted or received by any communication; or (c) intercept or listen to any conversation by any communication, without permission from the Public Prosecutor in ‘urgent and sudden cases’ (a phrase which is open for subjective interpretation) and this is given cognizance under ss. 6 (4) and 6 (5). Aingkarán Kugathasan⁶¹ compares s. 6 with Article 12 of Universal Declaration of Human Rights (UDHR) and Article 17 of International Covenant on Civil and Political Rights (ICCPR). Article 12 denotes that no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation while Article 17 of ICCPR also states the right to privacy and right to the protection of the law against such interference or attacks. The power given to the police to intercept communication under s. 6 is thus a clear violation of human rights under aforesaid international instruments. He went on to highlight the seriousness of this section. This power is most dangerous and certainly an invasion of privacy for it is done without the knowledge of the affected individual and with no stipulation as to the time frame that this invasion of privacy is permitted.⁶²

Although the Act does not specifically refer to social media, according to s. 6 (7) the term ‘communication’ means a communication received or transmitted by post or a telegraphic, telephonic or other communication received or transmitted by electricity, magnetism or other means, which gives police the power to intercept a wide range of communications, including electronic communications. If the police use the power under s. 2 (b) by entering premises and installing these devices to psychologically instill ‘fear’ and attempt to silence activists and other public figures, the ruling party (the government) can simply abuse the power to repress the opposition parties or movements.⁶³

⁶¹ Aingkarán Kugathasan, 2013, “War on terrorism versus civil liberties of individuals: An analysis of the Malaysian Security Offences (Special Measures) Act 2012”, Special Report” <http://www.monitor.upeace.org/archive.cfm?id_article=961> Site accessed on 24.11. 2014.

⁶² Aingkarán Kugathasan, 2013, “War on terrorism versus civil liberties of individuals: An analysis of the Malaysian Security Offences (Special Measures) Act 2012”, Special Report” <http://www.monitor.upeace.org/archive.cfm?id_article=961> Site accessed on 24.11. 2014.

⁶³ Aingkarán Kugathasan, 2013, “War on terrorism versus civil liberties of individuals: An analysis of the Malaysian Security Offences (Special Measures) Act 2012”, Special Report” <http://www.monitor.upeace.org/archive.cfm?id_article=961> Site accessed on 24.11. 2014.

According to Tan Sri Abdul Gani Patail, modern investigation's techniques are incorporated in the SOSMA 2012 such as the power to intercept communication and he asserts that such exercise is efficient not only upon procurement of high-tech gadgets and infrastructures but he warns that this will become effective only with good coordination and sharing of intelligence amongst all relevant quarters.⁶⁴ He went on to highlight that under s. 6 (3) (c), the power to intercept can be done even without prior authorization by the Public Prosecutor in urgent and sudden cases where immediate action is required leaving no moment of deliberation. The Public Prosecutor nevertheless, should be immediately informed of the interception and the exercise will be deemed to have been acted under the authorization of the Public Prosecutor.⁶⁵ The Malaysian Bar Council is of the opinion that the Act serves to further erode citizen rights and individual protection by ceding to the police force rather than the judges the power to intercept communications and at trial, to keep the identity of the prosecution witnesses classified negates the process of cross-examination.⁶⁶ According to Nancy Shukri, similar provisions are also contained in s. 27A of the Dangerous Drugs Act 1952 (Act 234), s. 11 of the Kidnapping Act 1961 (Act 365), s. 43 of the Malaysian Anti-Corruption Commission Act 2009 (Act 694) and s. 116 C of the Criminal Procedure Code.⁶⁷ According to Bukit Mertajam MP, Steven Sim, due to the vagueness and broadness of the ground for executing interception, this provision is surely open to abuse especially against political dissent⁶⁸. He went on to stress that the act does not provide any guidelines on the "interception" and the "government can legally 'bug' any private communication using any method, including through trespassing to implement the bugging device and there is no stipulated time frame such invasion of privacy is to be allowed".

SUHAKAM too states that some of the provisions of the SOSMA 2012 could violate the human rights of detainees. They cited the following sections:

- Section 4 does not provide for judicial oversight when the detention period is extended up to 28 days.
- Section 5 allows the police to deny immediate access to legal representation for a period of up to 48 hours.
- Section 6 permits the interception of communication which may infringe personal liberty and the right to privacy.

⁶⁴ Abdul Gani Patail, 2013, *SOSMA 2012: Its Implications on Defence and Security*, <<http://midas.mod.gov.my/files/speech/Teks%20ucapan%20AG%20MIDAS%20TALK%202013.pdf>>. Site accessed on 14.11.2014 .

⁶⁵ Section 30 (4), *SOSMA 2012*.

⁶⁶ Kesatuan Penuntut Undang-Undang Malaysia (KPUM), 2014, *Law Today: Security Offences (Special Measures) Act 2012 [SOSMA]*. <<http://www.kpum.org/2014/03/law-today-security-offences-special-measures-act-2012-sosma/>> Site accessed on 12.11.2014.

⁶⁷ Nancy Shukri, cited in 16th June 2014, *Minister: Police can intercept communications if there is illegal element*, The Sun Daily, <<http://www.thesundaily.my/news/1083508>> Site accessed on 13.11.2014.

⁶⁸ No Author, 31 October 2013, *New Act Allows Government to Tap our Phones*, Malaysia Today, <<http://www.malaysia-today.net/new-act-allows-government-to-tap-our-phones/>> Site accessed on 20.11.2014.

- Section 30 compels the court, upon application by the Public Prosecutor, to commit an acquitted person pending exhaustion of all appeals.⁶⁹

The SOSMA 2012 also allows the police to gather information in violation of privacy laws⁷⁰ where statements from dead persons or persons that cannot be found can be admitted⁷¹ as evidence, to secure a conviction by lowering the standard of proof. This creates a court procedure that does not meet the requirements of a fair trial.⁷² The Act also allows the accused to be detained pending appeal even after the High Court has acquitted the accused. This is provided for under s. 30 (1) where the public prosecution has the power to compel the court to commit an acquitted person pending exhaustion of all appeals. This can be said to be an affront to due process and a degradation of the Rule of Law and a return to the rule of men. Should a suspect be acquitted despite all these roadblocks, the SOSMA 2012 preserves a way to detain individuals for years by simply filing appeals.⁷³ Spiegel went on to say that as long as the appeal process continues, an acquitted suspect may be detained or tethered to a monitoring device, a blatant denial of personal liberty that could potentially take years to resolve.⁷⁴ He concluded that although the process may be different, but the resultant detention without trial is no different than the ISA 1960's two-year renewable terms. In fact, from initial arrest to final appeal, a person may be kept under lock and key indefinitely. This is supported by Aingkaran Kugathanan, who criticizes s. 30 for the same reason.⁷⁵ If s. 30 is seen to be an affront to basic human right, s. 7 can be seen to further erode personal liberty. Under this section, the Public Prosecutor may make an application to the court for the person to be attached to an electronic monitoring device for a period not exceeding the period allowed under subsection 4 (5). In addition, there is a sunset clause in the bill that allows the 28-day detention period to be reviewed every five years.⁷⁶ Figure 1 shows the comparison period of detention without charge adopted in other nations where Malaysia and Britain tops the list.

⁶⁹ Suhakam, 2012, *Annual Report 2012*, <<http://www.suhakam.org.my/wp-content/uploads/2013/11/SUHAKAM-BI-2012.pdf>> Site accessed on 12.10.2014.

⁷⁰ S 6 (1), *SOSMA 2012*.

⁷¹ S 18, *SOSMA 2012*.

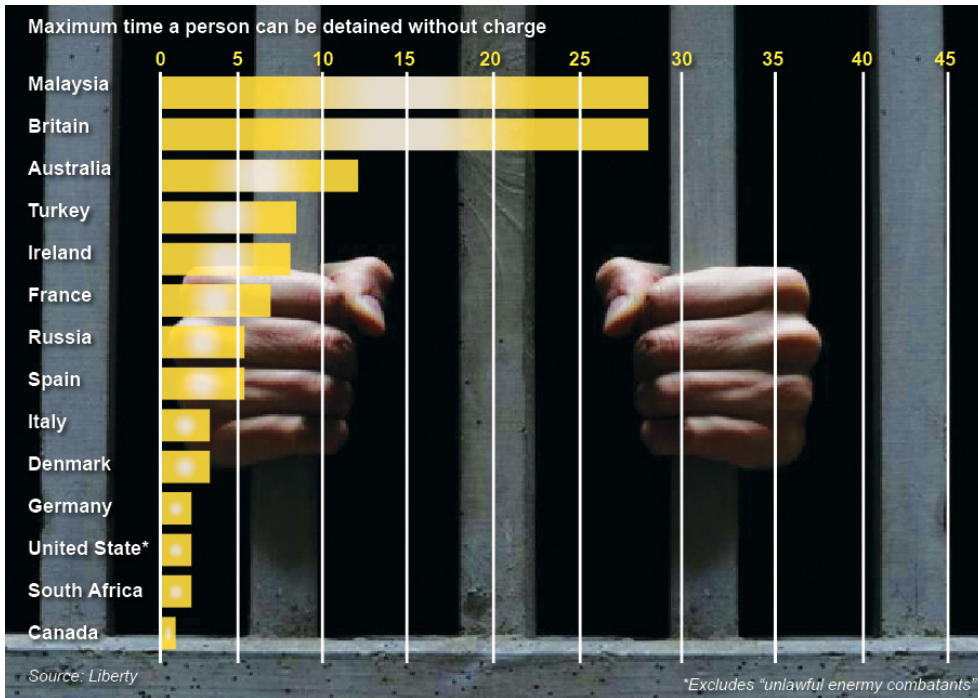
⁷² S 17, *SOSMA 2012*.

⁷³ Spiegel, M, 14th June 2012, *Smoke and Mirrors: Malaysia's "New" Internal Security Act*, Asia Pacific Bulletin, <http://www.hrw.org/sites/default/files/related_material/2012_Malaysia_EastWest.pdf> Site accessed 12.11.2014.

⁷⁴ Spiegel, M, 14th June 2012, *Smoke and Mirrors: Malaysia's "New" Internal Security Act*, Asia Pacific Bulletin, <http://www.hrw.org/sites/default/files/related_material/2012_Malaysia_EastWest.pdf> Site accessed 12.11.2014.

⁷⁵ Aingkaran Kugathanan, 2013, *War on terrorism versus civil liberties of individuals: An analysis of the Malaysian Security Offences (Special Measures) Act 2012*, *Special Report* <http://www.monitor.upeace.org/archive.cfm?id_article=961> Site accessed on 24.11. 2014.

⁷⁶ Gan Pei Ling, 18th May 2012, "SOSMA: Sizing up the new security bill" Selangor Times, <<http://www.selangortimes.com/index.php?section=insight&permalink=20120516152209-sosma-sizing-up-the-new-security-bill>> Site accessed 11.11.2014.



(Source: Aingkaran Kugathanan, 2013)

FIGURE 1: Comparison of the Period of Detention without Charge among Nations

Despite these harsh provisions, it must be noted that the new security Act does provide some considerations to basic human rights. Among these would be the necessity to inform next-of-kin and allow consultation with a legal practitioner. These requirements must be done immediately after the arrest and detention is done. Section 5 of the Act entitles any person arrested or detained to immediately notify his next-of-kin on the arrest and to consult a legal practitioner of his choice. However, according to s. 5 (2), the consultation can be delayed up to 48 hours by a police officer not below the rank of Superintendent of Police in four circumstances. Firstly, if he is of the view that there are reasonable grounds for believing that the exercise of that right will interfere with evidence connected to security offence; secondly it will lead to harm to another; thirdly, it will lead to the alerting of other person suspected of having committed such an offence but who are not yet arrested; or fourthly it will hinder the recovery of property obtained as a result of such an offence.⁷⁷ Despite the power given to delay the consultation, the provision of this Act is better in the sense that in the previous Act, there was no provision for such rights.

⁷⁷ S 5 (2), *SOSMA 2012*.

Table 3 shows the special procedures that the SOSMA 2012 caters for with regards to sensitive information. The sections that are related to these procedures are ss. 16, 28 and 29. These special procedures are not found in the ISA 1960.

Table 3: Trial Procedures Relating to Sensitive Information

AREAS	SECTIONS IN SOSMA 2012
Procedures related sensitive information	<p>8.(1)Notwithstanding section 51A of the criminal procedure code, if the trial of a security offence involves matters relating to sensitive information the public prosecutor may, before the commencement of the trial, apply by way of an ex parte application to the court to be exempted from the obligations under section 51A of the criminal procedure code.</p> <p>9.(1)if an accused reasonably expects to disclose or to cause the disclosure of sensitive information in any manner, in his defense, the accused shall give two days' notice to the public prosecutor and the court in writing of his intention to do so.</p> <p>10.(1) Upon receiving the notice under section 9 from the accused the court shall conduct a hearing in camera.</p>
Protected witness	<p>16. (1) Notwithstanding any written law to the contrary, any report through any means on a protected witness shall not reveal or contain—</p> <p>(a) the name;</p> <p>(b) the address;</p> <p>(c) the picture of the protected witness or any other person, place or thing which may lead to the identification of the protected witness; or</p> <p>(d) any evidence or any other thing likely to lead to the identification of the protected witness</p> <p>(2) Any person who prepares a report in contravention of subsection (1) commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding five years and also to a fine not exceeding ten thousand ringgit.</p>
Protection of informer	<p>28. (1) No complaint by an informer as to a security offence under this Act shall be admitted in evidence in any civil or criminal proceeding whatsoever, and no witness shall be obliged or permitted to disclose the name or address of any informer, or state any matter which might lead to his discovery.</p> <p>(2) If any books, documents or papers which are in evidence or liable to inspection in any civil or criminal proceeding whatsoever contain any entry in which any informer is named or described or which might lead to his discovery, the court before which the proceeding is had shall cause all such passages to be concealed from view or to be obliterated so far as is necessary to protect the informer from discovery, but no further.</p>
Access to detainees/ prisoners by police	<p>29. Notwithstanding any other written law, a police officer conducting an investigation under this Act shall be allowed to have access to any person whom he has reason to believe to be involved in a security offence who is—</p> <p>(a) being detained under any other written law; or</p> <p>(b) under confinement in prison, whether convicted or not.</p>

Table 3 shows the provisions in the SOSMA 2012 which caters for the special procedures related to sensitive information. These special procedures are not found in the ISA 1960. Having compared the SOSMA 2012 with the ISA 1960 in terms of definitions and powers of arrest and detention, it is noted that the SOSMA 2012 has some new additions, such as powers of interception and retention of communication as well as the use of electronic monitoring device. Another important difference that is found in the SOSMA 2012 which is not in the ISA 1960 is the section on trial procedures relating to sensitive information. This comprises of four key elements namely; procedures related to sensitive information, protected witness, protection of informer and access to detainees by the police. This is indicated in Part IV of the Act. Part IV of the SOSMA 2012 talks about special procedures in dealing with sensitive information as defined under section 3 of the Act to be disclosed and used as evidence in court either by the prosecution, the accused or in any event sensitive information which arises during trial.⁷⁸ As mentioned, the Act defines “protected witness” as a witness whose exposure will jeopardize the gathering of evidence or intelligence or jeopardize his life and well-being.⁷⁹ It is crucial to discuss s. 8 and s. 9 which deals with the procedures related to sensitive information. Section 8 deals with the procedures for the public prosecutor where the trial involves matters relating to sensitive information. This section empowers the public prosecutor to apply to the court by way of an ex parte application to be exempted from the obligation under s. 51 A of the Criminal Procedure Code. Section 9 on the other hand requires the accused to give two days’ notice in writing to the public prosecutor and the court should he intend to disclose or cease the disclosure of sensitive information.

According to Tan Sri Abdul Gani Patail, the provisions under ss. 8 - 10 in the SOSMA 2012 will ensure that no classified or sensitive information to be exposed either to the accused or the public or to be revealed by the accused as his defense during trial.⁸⁰ He went on to add that should in any event the sensitive information must be disclosed then the trial will be held in camera so as to preserve its confidentiality. Under s. 11 (4) of the SOSMA 2012, the court is denied the right to direct the Public Prosecutor to produce a document which contains sensitive information which arises during the trial. Abdul Gani Patail also highlights this section as contravening basic human rights. This is further reinforced by the Permatang Pauh MP, who stated that this process will be open to abuse as a witness who bears grudges towards the accused may produce biased testimonies yet he or she will not be cross-examined.⁸¹ This was supported by Fadhiah Nadwa Fikri⁸²

⁷⁸ Abdul Gani Patail, 2013, *SOSMA 2012: Its Implications on Defence and Security*, <<http://midas.mod.gov.my/files/speech/Teks%20Ucapan%20AG%20MIDAS%20TALK%202013.pdf>>. Site accessed on 14.11.2014. S 3, *SOSMA 2012*.

⁷⁹ Abdul Gani Patail, 2013, *SOSMA 2012: Its Implications on Defence and Security*, <<http://midas.mod.gov.my/files/speech/Teks%20Ucapan%20AG%20MIDAS%20TALK%202013.pdf>>. Site accessed on 14.11.2014.

⁸¹ Gan Pei Ling, 18th May 2012, “*SOSMA: Sizing up the new security bill*” *Selangor Times*, <<http://www.selangortimes.com/index.php?section=insight&permalink=20120516152209-sosma-sizing-up-the-new-security-bill>> Site accessed 11.11.2014

who represented Mohd Hilmi Hasim. She and the other lawyers argued that SOSMA 2012 is unconstitutional since it allows evidence which does not follow provisions in the Evidence Act. She went on to add that “Anyone can easily be convicted,” and the law is against Article 8 of the Constitution which guarantees equal protection of the law for every person. Under ss. 14 and 16, the identity of the witness is protected in a comprehensive manner where under s. 14 (4), the court may disallow any questions to be put forth to the witness’s identification and s. 16 (2) makes it an offence liable to imprisonment not exceeding ten thousand ringgit if any person prepares a report in contravention of s. 16 (1). According to Syukri Razab,⁸³ trials under SOSMA 2012 were one-sided, as s. 14 of the Act allowed public prosecutors to withhold the identity of prosecution witnesses from the accused and their lawyer. Syukri Razab⁸⁴ went on to add that “what has happened is that police are not only delaying family access, but the detainees are also not allowed to meet their family without permission from the investigating officer, even after the 48 hours have lapsed.” He said this when submitting the memorandum to SUHAKAM’s office in Kuala Lumpur. Besides protecting the identity of the witness, the Act also protects informers. Section 28 (1) states that no complaint by an informer as to a security offence under this Act shall be admitted in evidence in any civil or criminal proceeding and no witness shall be obliged or permitted to disclose the particulars of the informer which might lead to his identification. Section 28 (2) further empowers the court to conceal or obliterate any evidence in any books, documents or papers used as evidence which could lead to identification of the informer.

The following section discusses the findings from the analysis of the SOSMA 2102 with the Federal Constitution. Table 4 shows the findings.

⁸² Zurairi AR, 18th February 2013, “*Family challenges detention, claims law ‘unconstitutional’*”. The Malaysian Insider, <<http://www.themalaysianinsider.com/malaysia/article/family-challenges-sosma-detention-claims-law-unconstitutional#sthash.4MN2z9dn.dpuf1>> Site accessed on 16.11.2014.

⁸³ Jamilah Kamarudin, 19th May 2014, “*Security Offences Act violates human rights, says Suaram*”, The Malaysianinsider. <http://www.themalaysianinsider.com/malaysia/article/securities-offences-act-violates-human-rights-says-suaram#sthash.Pc7YRl18.dpuf>>. Sie accessed on 16.11.2014.

⁸⁴ Jamilah Kamarudin, 19th May 2014, “*Security Offences Act violates human rights, says Suaram*”, The Malaysianinsider. <http://www.themalaysianinsider.com/malaysia/article/securities-offences-act-violates-human-rights-says-suaram#sthash.Pc7YRl18.dpuf>>. Sie accessed on 16.11.2014.

TABLE 4: Analysis of SOSMA 2012 in relation to Malaysian Federal Constitution (FC)

Right Protected	Federal Constitution	Infringement under the SOSMA 2012
Supremacy of Federal Constitution	4 (1) This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.	S 4 (10) - Arts 5 and 9 of the FC S 5 (3) –Art 5 of the FC S 6 (6) – Art 5 of the FC S 7 (9) -Art 9 of the FC S 14 (1)
	<p>5. (1) No person shall be deprived of his life or personal liberty save in accordance with law.</p> <p>(2) Where complaint is made to a High court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him.</p> <p>(3) Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.</p> <p>(4) Where a person is arrested and not released he shall without unreasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey) be produced before a magistrate and shall not be further detained in custody without the magistrate's authority</p>	S 4 (1) S 4 (2) S 4 (4) S 4 (5) S 5 (2)
	<p>7.(1)No person shall be punished for an act or omission which was not punishable by law when it was done or made, and no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed.</p> <p>(2) A person who has been acquitted or convicted of an offence shall not be tried again for the same offence except where the conviction or acquittal has been quashed and a retrial ordered by a court superior to that by which he was acquitted or convicted.</p>	S 30 (1) –(7)

	<p>8. (1) All persons are equal before the law and entitled to the equal protection of the law.</p> <p>(3) There shall be no discrimination in favour of any person on the ground that he is a subject of the Ruler of the State.</p>	<p>S13 (1) S 8 (1) S 14 (1)</p>
	<p>9. (1) No citizen shall be banished or excluded from the Federation.</p> <p>(2) Subject to Clause (3) and to any law relating to the security of the Federation or any part thereof, public order, public health, or the punishment of offenders, every citizen has the right to move freely throughout the Federation and to reside in any part thereof.</p>	<p>S 7 (1) S 30 (1)</p>
	<p>10.(1)Subject to Clauses (2), (3) and (4) -(a) every citizen has the right to freedom of speech and expression; (b) all citizens have the right to assemble peaceably and without arms; (c) all citizens have the right to form associations.</p> <p>(2) Parliament may by law impose - (a) on the rights conferred by paragraph (a) of Clause (1),such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence; (b) on the right conferred by paragraph (b) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, or public order;</p> <p>(c) on the right conferred by paragraph (c) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, public order or morality.</p>	<p>S 6 (1) S 6 (2)</p>

	<p>13. (1)No person shall be deprived of property save in accordance with law.</p> <p>(2) No law shall provide for the compulsory acquisition or use of property without adequate compensation.</p>	
	<p>149. (1) If an act of parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation -</p> <p>(a) to cause, or to cause a substantial number of citizens to fear, organised violence against persons or property; or</p> <p>(b) to excite disaffection against the Yang di-Pertuan Agong or any Government in the Federation; or</p> <p>(c) to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence; or</p> <p>(d) to procure the alteration, otherwise than by lawful means, of anything by law established; or</p> <p>(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</p> <p>(f) which is prejudicial to public order in, or the security of, the Federation or any part thereof, any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of Article 5, 9, 10 or 13, or would apart from this Article be outside the legislative power of Parliament; and Article 79 shall not apply to a Bill for such an Act or any amendment to such a Bill.</p> <p>(2) A law containing such a recital as is mentioned in Clause (1) shall, if not sooner repealed, cease to have effect if resolutions are passed by both Houses of Parliament annulling such law, but without prejudice to anything previously done by virtue thereof or to the power of Parliament to make a new law under this Article.</p>	

As a general principle most of us agree that the Malaysian Constitution is the highest law in Malaysia but in reality, we also understand that it is not the absolute truth and we have no problem of accepting that the rights in the Constitution are couched in such a way that it allows the Parliament:

To make law which impose...on the rights...such restrictions as it deems necessary or expedient in the interest of the security of the federation or part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence".⁸⁵

According to Abdul Aziz Bari, the scenario in Malaysia can be compared with the First Amendment to the American Constitution which categorically provides, inter alia, that the "Congress shall make no law abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances".⁸⁶ According to Schwartz⁸⁷ this has always been regarded as fundamental by the American constitutional lawyers, something which serves as the basis of the political system; a character that makes their institutions symbols of freedom and equality. This is not available in the Malaysian scenario. Abdul Aziz Bari⁸⁸ went on to add that under the authority given by the Constitution, Parliament has passed laws such as the Sedition Act 1948, Printing Presses and Publications Act 1984 and Official Secrets Act 1971 and although the essence of the legitimacy of these laws could be accepted, what has triggered uneasiness and criticisms has been the way the laws have been used. In the same line, the new security Act, the SOSMA 2012 has been passed and again, it has become a debatable issue.

As shown in Table 4, the supremacy of the Constitution has been undermined by some sections of the SOSMA 2012 which stipulates that the law supersedes anything in the Constitution especially Article 4. According to Article 4 (1) of the Federal Constitution, the Constitution is the supreme law and anything passed which is inconsistent with it shall be void. Among the sections that contravene are s. 4 (10): this section shall have effect notwithstanding anything inconsistent with Articles 5 and 9 of the Federal Constitution and s. 117 of the Criminal Procedure Code [*Act 593*], s. 5 (3): this section shall have effect notwithstanding anything inconsistent with Article 5 of the Federal Constitution, s.

⁸⁵ Article 10(1)(a), Federal Constitution.

⁸⁶ Abdul Aziz Bari, "*Freedom of Speech and Expression in Malaysia After Forty Years (Part 1)*", <<http://anwarite.tripod.com/freespeech.html>>. Site accessed on 21.11.2014.

⁸⁷ Schwartz, B, "*American Constitutional Law*", Cambridge University Press, United Kingdom, 1955.

⁸⁸ Abdul Aziz Bari, "*Freedom of Speech and Expression in Malaysia After Forty Years (Part 1)*", <<http://anwarite.tripod.com/freespeech.html>>. Site accessed on 21.11.2014.

6 (1): notwithstanding any other written law, the Public Prosecutor, if he considers that it is likely to contain any information relating to the commission of a security offence, may authorize any police officer to intercept communication, s. 6 (6): this section shall have effect notwithstanding anything inconsistent with Article 5 of the Federal Constitution, s. 7 (9): this section shall have effect notwithstanding anything inconsistent with Article 9 of the Federal Constitution, s. 14 (1): notwithstanding Article 5 of the Federal Constitution and s. 264 of the Criminal Procedure Code, where at any time during the trial of a security offence, any of the witnesses for the prosecution refuses to have his identity disclosed and wishes to give evidence in such a manner that he would not be seen or heard by both the accused and his counsel, the Public Prosecutor may make an oral application to the court for the procedures in this section to apply, s. 16 (1): notwithstanding any written law to the contrary, any report through any means on a protected witness shall not reveal or contain information regarding the said witness, s. 26 (1): notwithstanding any Rule of Law or any other written law to the contrary, in any proceedings against any person for a security offence (a) no witness shall be regarded as an accomplice by reason only of such witness having been in any manner concerned in the commission of the security offence or having knowledge of the commission of the offence; and (b) no agent provocateur shall be presumed to be unworthy of credit by reason only of his having attempted to abet or abetted the commission of a security offence by any person if the attempt to abet or abetment was for the sole purpose of securing evidence against such person, s. 26 (2): notwithstanding any Rule of Law or any other written law to the contrary, and that the agent provocateur is a police officer whatever his rank, any statement, whether oral or in writing made to an agent provocateur by any person who is subsequently charged with a security offence shall be admissible as evidence at his trial and s. 30 (1): notwithstanding Article 9 of the Federal Constitution, if the trial court acquits an accused of a security offence the Public Prosecutor may make an oral application to the court for the accused to be remanded in prison pending a notice of appeal to be filed against his acquittal by the Public Prosecutor.

The common phrase used in these sections which underline the supremacy of the Federal Constitution is that the section is said to have effect “notwithstanding anything inconsistent with an article in the Federal Constitution”. These phrases are clear indications of how SOSMA 2012 contradict the supremacy of the Constitutions. Although these may raise concerns, the government aims to defend the need for these kinds of law. In a nationally televised speech on Malaysia Day in September 2011, Prime Minister, Datuk Seri Najib Tun Razak called for Malaysia “which practices functional and inclusive democracy, where peace and public order are safeguarded in line with the supremacy of the Constitution, the Rule of Law and respect for basic human rights and individual rights.”⁸⁹ However he added that there had to be “checks and balances ... between national security and personal freedom,” and ensuing reforms have favored security

⁸⁹ Human Rights Watch, “*World Report 2013*”, <<http://www.hrw.org/world-report/2013/country-chapters/malaysia?>> Site accessed on 9.11.2014.

over internationally recognized human rights.⁹⁰ On the other hand, Lawyers for Liberty calls for caution against placing offences from the Penal Code and the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (ATIP) as suggested by some parties when amending the SOSMA 2012.⁹¹ It believes that these amendments reflect an attempt to widen the very draconian ambit of security offences in Malaysia. It went on to state that the inclusion of these offences would widen the ambit of security offences under the SOSMA 2012 and will allow the state to derogate from its responsibilities in upholding constitutional rights and standards of fair trial.

It must be noted that s. 6 (6) treads directly on Article 5 of the Federal Constitution no less – which deals with the fundamental liberty of a person – by asserting that it is to have effect notwithstanding anything inconsistent with Article 5.⁹² Md Zubair Kasem Khan too supports the findings that there are a number of sections in the SOSMA 2012 which undermines the supremacy of the Federal Constitution. Among these are s. 4 (10) where W- Surveillance is said to have effect notwithstanding anything inconsistent with Articles 5 and 9 of Federal Constitution, Section 5(3) where it is stated that a delay of notifications shall have effect notwithstanding anything inconsistent with Article 5 of Federal Constitution, s. 6 (6) where the power of the police officer or public prosecutor to intercept communications is said to have effect notwithstanding anything inconsistent with Article 5 of Federal Constitution and s. 7 (9) where special procedures relating to electronic monitoring device is said to have effect notwithstanding anything inconsistent with Article 9 of Federal Constitution.⁹³ Md Zubair Kasem Khan⁹⁴ went on to state that it is noted that there is no such provision to ensure the confidentiality of this personal report. Some certainty in this aspect is warranted because the officer deals with data in electronic form, which is more prone to leak, disclosure or security threats. Last but not least, it is observed that there is no provision that confers rights to a suspected criminal offender to appeal or contest the ruling to wear this electronic monitoring device or otherwise to ask the reason why he needs to wear such device. Under s. 14 (1) it is stated that “Notwithstanding Article 5 of the Federal Constitution and Section 264 of the Criminal Procedure Code, where at any time during the trial of a security offence, any of the witnesses for the prosecution refuses to have his identity disclosed and wishes to give evidence in such a manner that he would not be seen or heard by both the accused and his counsel, the Public Prosecutor may make an oral application to the court for the

⁹⁰ Human Rights Watch, “*World Report 2013*”, <<http://www.hrw.org/world-report/2013/country-chapters/malaysia?>> Site accessed on 9.11.2014.

⁹¹ Yesuda, M, 5th March 2013, “*SOSMA amendments needless, dangerous*”, <<http://www.freemalaysiatoday.com/category/opinion/2013/10/23/sosma-amendments-needless-and-dangerous/>> Site accessed on 11.11.2014.

⁹² No Author, 31 October 2013, “*New Act Allows Government to Tap our Phones*”, Malaysia Today, <<http://www.malaysia-today.net/new-act-allows-government-to-tap-our-phones/>> Site accessed on 20.11.2014.

⁹³ Md. Zubair Kasem Khan, 2014, “*Electronic Surveillance And Privacy Concern In Malaysia: A Quest For Consensus*” <<http://www.slideshare.net/zubairrumi9/electronic-surveillance-and-privacy-concern-in-malaysia-a-quest-for-consensus>> Site accessed on 13.11.2014.

⁹⁴ Md. Zubair Kasem Khan, 2014, “*Electronic Surveillance And Privacy Concern In Malaysia: A Quest For Consensus*” <<http://www.slideshare.net/zubairrumi9/electronic-surveillance-and-privacy-concern-in-malaysia-a-quest-for-consensus>> Site accessed on 13.11.2014.

procedures in this section to apply”. In such cases, the public prosecutor can hold an inquiry in camera in the absence of the accused and his counsel. This contravenes Article 5 (3) of the Federal Constitution where the person detained has the right to be defended by a legal practitioner of his choice. By denying access to cross-examination of the witness by the defense council is an inhibition of proper defense procedure.

Thus, in summary, under s. 4 (1), a police officer may, without warrant, arrest and detain any person whom he has reason to believe to be involved in security offences, and under the s. 4 (2), the person arrested under subsection (1) shall be informed as soon as may be of the grounds of his arrest by the police officer making the arrest. Further, under s. 4 (3), it is stated that no person shall be arrested and detained under this section solely for his political belief or political activity Under s. 4 (4), the person arrested and detained under subsection (1) may be detained for a period of twenty-four hours for the purpose of investigation but under s. 4 (5), a police officer of or above the rank of Superintendent of Police may extend the period of detention for a period of not more than twenty-eight days, for the purpose of investigation. Further, under s. 5 (2), the Superintendent of Police may authorize a delay of not more than forty-eight hours for consultation if certain condition prevail’. All the sections discussed are in breach of Article 5 of the Federal Constitution. Article 5 (1) states that no person shall be deprived of his life or personal liberty save in accordance with law, Article 5 (2) gives authority for the court to intervene and order the person to be brought before the court if a complaint is made to a High Court or any judge that a person is detained unlawfully. Article 5 (3) imposes a rule that the person who is arrested must be informed on the grounds of his arrest and should be allowed to consult a legal practitioner of his choice. Article 5 (4) imposes a condition on the police to produce the person arrested before a magistrate within twenty four hours. Thus, an analysis of the sections in the SOSMA 2012 are clearly in violation of all the stipulations under Article 5 of the Federal Constitution. Despite the clear stipulation as to the invalidity of laws passed which supersede the Federal Constitution, the validity of these sections are upheld by Article 150 which allows the enactment of laws during a period of ‘emergency’ when there is imminent danger which threatens the security or public order in the Federation. Article 150 (6) states that laws made in such a condition are valid as seen in the words, “no provision of any ordinance promulgated under this Article, and no provision of any Act of Parliament which is passed while a Proclamation of Emergency is in force and which declares that the law appears to Parliament to be required by reason of the emergency, shall be invalid on the ground of inconsistency with any provision of this Constitution”.

Further, in defense to the claim that some of the sections in the SOSMA 2012 seems to contravene the rights upheld in the Malaysian Federal Constitution, it must be noted that Article 149(1) had laid out six areas in which any law enacted is valid even though it could be inconsistent with articles on personal liberties in Articles 5, 9, 10 or 13 of the Federal Constitution.⁹⁵ In the same article, it was stated that the six

⁹⁵ No Author, (2014), “*Something amissing about SOSMA*”, <<http://anotherbrickinwall.blogspot.com/2014/05/something-amissing-about-sosma.html>>. Site accessed on 31.10.2014.

areas could tantamount to the definition of national security; involvement in organized crime, uprising against King, racial incitation, unlawful overthrow of government, and anything involving public order. Thus, in essence, it cannot be said to contravene Federal Constitution. Amidst these ongoing debates, a new line of argument has been brought forth by lawyers of Malay rights group, Perkasa which claims that the government's recent abolition of the controversial ISA 1960 is unlawful.⁹⁶ Perkasa president, Datuk Ibrahim Ali said the ISA 1960 was enacted to protect Article 149 of the Federal Constitution, but its replacement, the SOSMA 2012, does not have the same scope as the ISA 1960. He went on to say that the SOSMA 2012 cannot act against those who insult the position of the Malay rulers and Islam.⁹⁷

IV. CONCLUSION

The responsibility to safeguard and ensure public safety is foremost and always on the shoulder of the government and one of the biggest transformations that have been made is the repeal of the ISA 1960 and the enactment of its replacement, the SOSMA 2012. The ISA 1960 was abolished after 50 years since it was enacted. Our Prime Minister, Datuk Seri Najib Tun Razak stated that this is in line with the nation's effort to ensure public safety, and to maintain peace, harmony and prosperity of the nation. Thus, the enactment of the SOSMA 2012 is to guarantee safety among the public. However, many claim that it is just a new name and the situation has not changed much in comparison to the draconian ISA 1960. Whiting's,⁹⁸ in her essay, demonstrates that the legislative changes fell well short of the reforms that had long been demanded by the Malaysian Bar and civil and political rights campaigners who have rightly been deeply concerned about the health of Malaysian democracy and the erosion of constitutional governance and the rule of law. The analysis of the SOSMA 2012 in line with the ISA 1960 and the Federal Constitution proves that there are transgressions from basic human rights. Among the key findings which shows these transgression would be the broad definitions given in the SOSMA 2012 such as the phrases 'security offences' under s. 3 of the Act and 'protected witness' under s. 3. These wide definitions have raised concern as some critics believe that they provide immeasurable power to the government to decide what is and what is not a security offence and also control over information access and hearing procedure that the defendant and his counsel have (protected witness).⁹⁹

The findings also show that the concerns raised against the ISA 1960 has not been resolved as the provisions in the SOSMA 2012 are more restrictive and violate more

⁹⁶ Zurairi AR, 18th February 2013, "*Family challenges detention, claims law 'unconstitutional'*". The Malaysian Insider, <<http://www.themalaysianinsider.com/malaysia/article/family-challenges-sosma-detention-claims-law-unconstitutional#sthash.4MN2z9dn.dpuf1>> Site accessed on 16.11.2014.

⁹⁷ Zurairi AR, 18th February 2013, "*Family challenges detention, claims law 'unconstitutional'*". The Malaysian Insider, <<http://www.themalaysianinsider.com/malaysia/article/family-challenges-sosma-detention-claims-law-unconstitutional#sthash.4MN2z9dn.dpuf1>> Site accessed on 16.11.2014.

⁹⁸ Whiting, Amanda, *Emerging from Emergency Rule? Malaysian Law 'Reform' 2011-2013*. Australian Journal of Asian Law, 2013, Vol 14 No 2, Article 9: 1-55.

⁹⁹ S 16, SOSMA 2012.

rights. The most obvious sections that show that the concerns raised against the ISA 1960 has not been addressed are s. 5 (2) and s. 6 where under the first, consultation with a legal practitioner can be delayed for 48 hours at the authority of a police officer not below the rank of Superintendent of Police while under the latter, the police is given the authority to intercept communication infringing personal liberty and right to privacy. The section that can be considered as the worst is s. 30 which compels the court to continue the detention of a person who has been acquitted until the exhaustion of all appeals (which could be a very lengthy duration) if there is an application to do so from the public prosecutor. The analysis of the SOSMA 2012 in reference to the Federal Constitution has highlighted a number of sections which violate the rights upheld in the Federal Constitution. Among these would be ss. 4 (10), 5 (3), 6 (1), 7 (9), 14 (1), 16 (1), 26 (1), 26 (2) and 30 (1) where the use of phrases such as 'this section shall have effect notwithstanding anything inconsistent with' a specific Article in the Federal Constitution are clear evidences of these contraventions.

Despite the findings that indicate the SOSMA 2012's failure to address the criticism raised against the ISA 1960 and the fact that there are evidences that some of its sections have violated the rights upheld in the Federal Constitution, it is important to view these violations in reference to Articles 149 and 150 of the Federal Constitution. Article 149 empowers the Parliament to enact laws to combat acts of subversion by only utilizing a simple majority procedure. The legality of these laws are never questioned even though they are in violation to the guarantees of freedom of movement, personal liberty, freedom of speech, assembly and association; and right to property. The only exception to this extraordinarily wide power is that emergency laws may not touch the constitutional provisions concerning Islamic law, Malay custom and native custom of East Malaysia (Sabah and Sarawak), citizenship, language or religion (arts 150 (6), (6A)). On the other hand, Article 150 empowers the Parliament to legislate on any matters even if it contradicts the Federal Constitution in times of emergency. However, the danger of this provision was noted Raja Aziz Addruse¹⁰⁰ who asserted that 'exceptional laws are liable to be abused and fundamental liberties abridged', and that the Emergency 'has spawned regulations that are contrary to the spirit of the Federal Constitution and quite possibly violate the fundamental rights as guaranteed by the constitution'.

Thus, it can be concluded that there are clear evidences that the SOSMA 2012 has not eliminated the criticism made against the ISA 1960 and that the provisions are in breach of human rights upheld in the Federal Constitution. The initial analysis of the provisions in the SOSMA 2012 has shown that there are violations of some fundamental human rights upheld in the Federal Constitution as seen in the wide definition given to some of the terms used in the act which could lead to the possibility of misuse by the Government.

¹⁰⁰ Raja Aziz Addruse (1969) 'Editorial: The Constitution, Parliamentary Democracy and the Emergency', 3(3) INSAF, July; Raja Aziz Addruse (1969) 'Editorial', 3(4) INSAF, October.