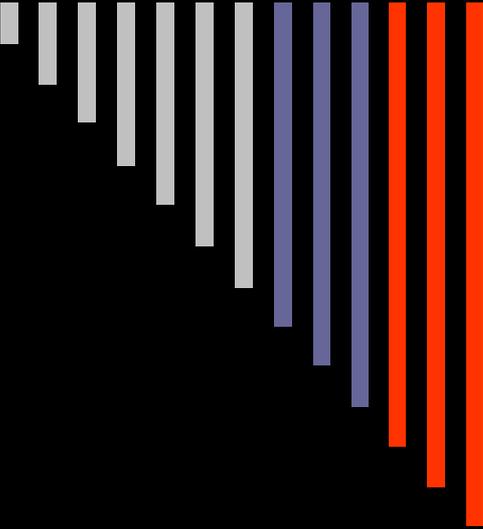


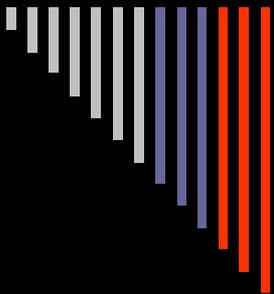
---



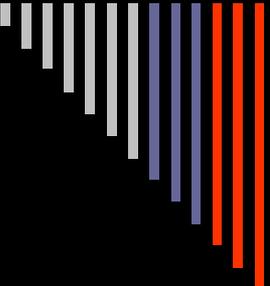
# **TERRORISM: PREVENTION & PUNISHMENT IN THE MALAYSIAN LEGAL SYSTEM**

**Emeritus Prof. Datuk Dr. Shad  
Saleem Faruqi  
UiTM, Shah Alam**

---



Internationally there is much disagreement about what amounts to "terrorism". A person hounded by some as a terrorist may be honoured by others as a freedom fighter. In fact there is an Alice in Wonderland quality about the term terrorism.

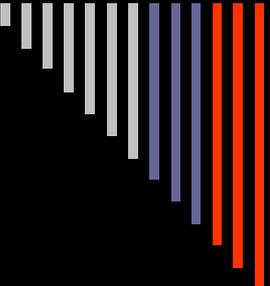


---

# CONSTITUTIONAL PROVISIONS IN MALAYSIA TO CONTROL TERRORISM

The Malayan Constitution was drafted at a time of communist insurgency. Understandably it contains a special provision (Article 149) to combat subversion, organized violence and acts and crimes prejudicial to the public. There is also a separate provision (Article 150) about declaration of emergency.

---

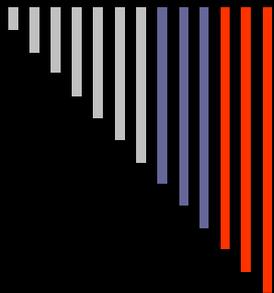


---

# MALAYSIAN STATUTORY PROVISIONS – THE PENAL CODE

Under the Penal Code, which is our most important criminal statute, 19 separate sections deal with offences relating to terrorism. A comprehensive broad-ranging definition of terrorism is supplied. Its broad elements are:

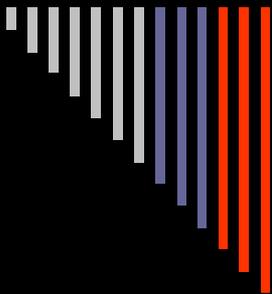
- The act or threat is made with the intention of advancing a political, religious or ideological cause;
-



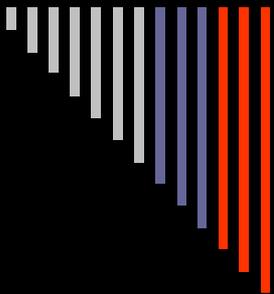
- Intended to intimidate the public
- Intended to compel the government to do or refrain from doing something
- Involves serious violence
- Involves serious risk to health or safety
- Involves serious damage to property



- Involves use of firearms, explosives etc
- Involves releasing of dangerous, hazardous, toxic or biological toxins
- Designed to disrupt computer, communication, banking, utilities, transportation systems;
- Prejudice to national security or public safety.

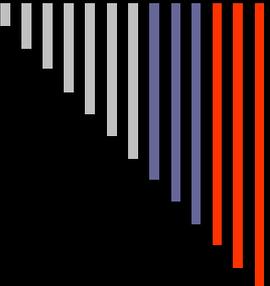


Under the Penal Code (sections 130C-130M) it is an offence to commit terrorist acts, provide devices to terrorist groups; recruit persons for terrorism; provide training for terrorism; soliciting property for terrorist purposes; provide facilities; direct activities; solicit or give support to terrorist groups; harbor terrorists; criminal conspiracy; and omitting to give information about terrorist acts.



Under sections 130N to 130T the police have the power to suppress the financing of terrorist acts.

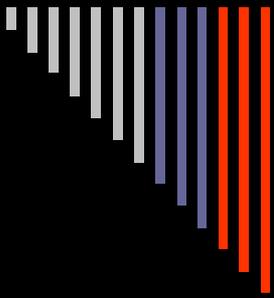
---



# **PREVENTION OF CRIME (AMENDMENT AND EXTENSION) ACT 2014**

The Internal Security Act was repealed in 2012 and replaced by SOSMA - a much more refined, and human rights compliant law. Regrettably the ISA has been revived by the Prevention of Crime (Amendment and Extension) Act 2014 (POCA) and the Prevention of Terrorism Act 2015 (POTA).

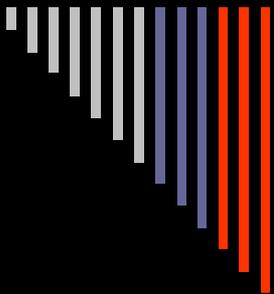
---



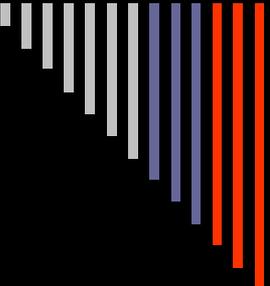
---

POCA revives the ISA's executive power to detain for two years and to renew the detention for further two year periods. The main differences between the ISA and POCA are that the power to detain for two years is not in the hands of the Home Minister but a high powered Prevention of Crime Board appointed by the King.

---



Further there is a provision for electronic monitoring. On the application of the Public Prosecutor, the Sessions Court may order the suspect to be fitted with an electronic monitoring device.

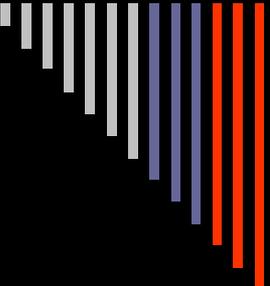


---

# **THE SECURITY OFFENCES (SPECIAL MEASURES) ACT 2012 & ITS COMPARISON WITH THE INTERNAL SECURITY ACT**

The Security Offences (Special Measures) Act 2012 (SOSMA) repealed the much reviled Internal Security Act (ISA). SOSMA's significance will take time to comprehend.

---

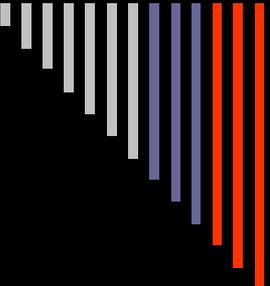


---

**Impact of SOSMA:** The repeal of the ISA strengthened the rule of law and constitutionalism in the country. It affirmed the validity of the principle that absolute discretion (as in the ISA) has no place in a democracy. Due to SOSMA the role of the judiciary was strengthened as the new law “judicialised” the process of dealing with suspects.

---

- 
- 
- The Act enhanced the legitimacy of the Government.
  - The “sunset clause” in s. 4(11) putting a time limit on some provisions enhances the powers of parliament to scrutinize the exercise of powers by the executive.
-

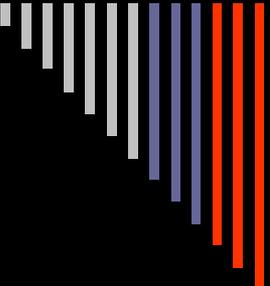


---

## **Police power of preventive detention under ISA & SOSMA**

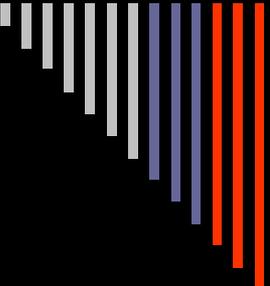
- ❑ **ISA:** Under section 73 ISA, preventive detention by the police was allowed up to 60 days.
  - ❑ **SOSMA:** Under section 4 detention is allowed initially for 24 hours and then extendable to maximum of 28 days. In lieu of detention up to 28 days the police may apply to the court to fit an electronic monitoring device on the suspect for a period not exceeding 28 days after arrest.
-

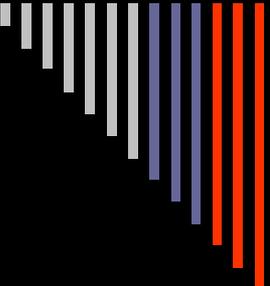
---



## Ministerial power of preventive detention

- ISA: under section 8 Minister could detain for 2 years and renew the detention again and again for 2 years each. There was no maximum period of detention.
-

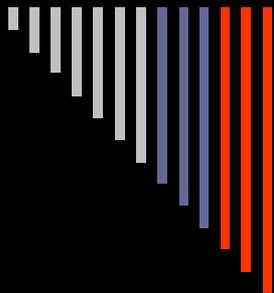
- 
- Minister could act independently of the police and did not have to wait for a recommendation by the police under section 73.
  - SOSMA: Minister's power to detain has been totally abolished. The Minister is now not involved in the detention at all. Matter is left to the police.



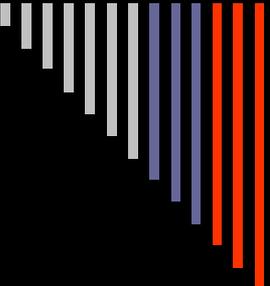
---

## Role of the judiciary

- ISA: Under the ISA courts had acquired the power to review the adequacy of the grounds of police discretion but no power to review the subjective discretion of the Minister except on procedural grounds. The police and the Minister were accusers, prosecutors and adjudicators all combined in one.
-



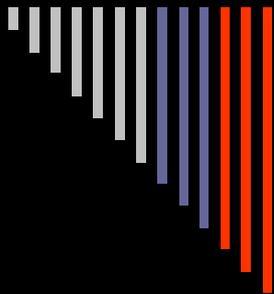
- SOSMA: Courts have no role in the first 28 days of detention. But when the person is charged and brought to trial, judicial procedures will apply fully. The courts will determine the guilt or innocence of the accused.



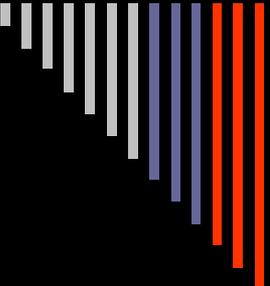
---

## Advisory Board

- ISA: Within 90 days of an arrestee making a representation to the Board, or such time as the YDPA allowed, the Board had to send its recommendations to the YDPA. The Board had no power to adjudicate, only to recommend. Its advice was not binding on the Minister.
-



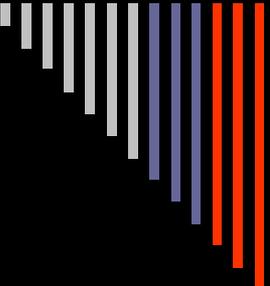
- SOSMA: The whole process has been judicialised. The role of the Advisory Board has been taken up by the High Court after the 28 days of police investigation. The decision of the court is binding on the police.



---

## Withholding of evidence

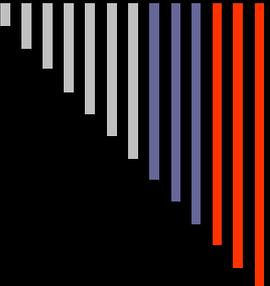
- ISA: On grounds of national security etc. the Minister could withhold evidence from the Advisory Board.
  - SOSMA: The decision on withholding evidence on the government's request is in the hands of the court. If evidence is withheld, a summary of the evidence must be supplied to the accused.
-



---

## Lawyers

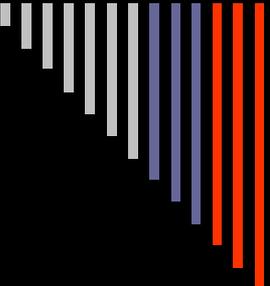
- ISA: The law was silent. Barring two or three cases, it was presumed that Art 5(3) is not applicable to ISA detentions. If lawyers were allowed, it was only after long delays
  - SOSMA: Now lawyers must be allowed after a maximum period of 48 hours after arrest
-



---

## **Right of family to be informed**

- ❑ ISA: There was no provision to keep the family informed.
  - ❑ SOSMA: Under s 5(1)(a) the next of kin must be immediately notified of the arrest and detention.
-

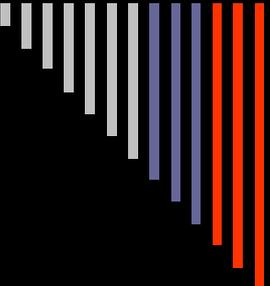


---

## Appeal

- ISA: There was no appeal from the advice of the Advisory Board or the decision of the Minister.
  - SOSMA: Under SOSMA as the trial is in the High Court, appeals against conviction will lie to the Court of Appeal and the Federal Court.
-

---



# THE PREVENTION OF TERRORISM ACT 2015

1. The immediate background of this Act that a number of Malaysians were getting involved in the so-called Islamic state. The ISA and the Emergency Ordinance had been repealed earlier and the government felt that a new law to combat terrorism was needed.
-



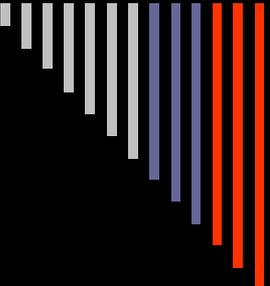
2. POTA was enacted under Article 149 of the Constitution. This means that its provisions may violate the fundamental rights in Article 5 (personal liberty), Article 9 (freedom of movement), Article 10 (speech, assembly and association) and Article 13 (right to property).



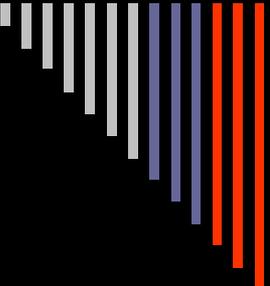
3. The law is directed at those engaged in “commission” or “support” of terrorist acts. The definition of “terrorist acts” is the same as in the Penal Code. However, the terms “commission” and “support” are not defined precisely.

- 
- 
4. The procedure of preventive detention is that the police may detain without warrant up to 60 days for investigation without any charge (the investigation period). The sixty days include –
- 24 hours of arrest prior to production before a Magistrate (s. 3);
  - 21 days of remand for police investigation by order of Magistrate (s. 4(1)(a)); and
  - 38 days of inquiry by an Inquiry Officer who is not a police officer (s. 4(2)(a) and s. 9(2)).
-

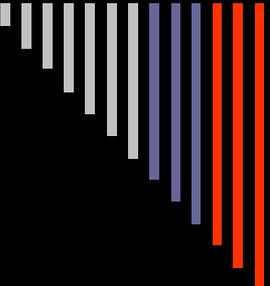
- 
- 
5. In contrast with SOSMA, there is no judicial review of the decision to detain; no due process to the suspect in that he does not get to defend himself before a court as under SOSMA after 28 days. Under POTA, the Magistrate concerned has no discretion. Affirmation by the investigating officer is sufficient to justify the remand.
-

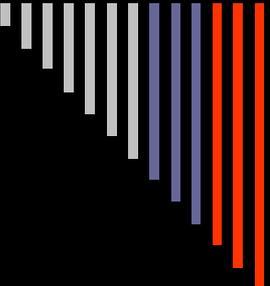
- 
6. In conducting the investigation, the police officer is not constrained by legal rules of evidence or criminal procedure. He can secure evidence in any way he sees fit.
  7. The safeguards of Article 5(3) i.e. right to know the grounds of arrest and to be allowed to consult and be defended by a legal practitioner of his choice do not apply. No access to counsel is allowed. No reasons are supplied. Basically the police arrest first, investigate afterwards.
-

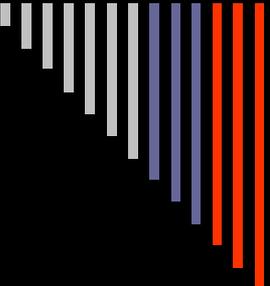
- 
- 
8. The safeguard of Article 5(4) i.e. right to be produced before a Magistrate within 24 hours, however, applies (s. 3(3)).
  9. However, (and this is something positive) unlike the ISA the power to detain preventively for two years lies not with the Minister but with an executive-appointed Prevention of Terrorism Board of 6 to 9 members.
-

- 
- 
10. The head of the Board must have legal experience of at least 15 years. Members of the Board are appointed by the YDPA and have no security of tenure.
  11. A negative feature is that like the ISA, indefinite detention without trial is possible.
-

- 
- 
12. Like the ISA the Act allows preventive detention up to two years at first instance and renewal for indefinite number of times thereafter. There is no limit to the number of years of detention.
  13. Before the Board there is no right to legal representation.
  14. The Board's decision is final and there is no judicial review at any stage except on questions of procedure.
-

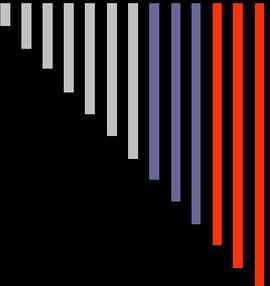
- 
- 
15. The Board is appointed by the executive and its independence is a matter on which different opinions are bound to exist.
  16. The suspect has no presumption of innocence.
  17. This right (to judicial review on the ground of procedural ultra vires) may not amount to much because the Board determines its own procedure.
-

- 
- 
18. A person remanded in custody may be released but shall be produced before a Sessions Court for the execution of a bond or police supervision (for 59 days). An electronic monitoring device may be fitted for 59 days.
  19. Like the Restricted Residence Enactment, the Board may order restricted residence up to five years, require suspect to report to the police or limit the suspect's access to communication.
-

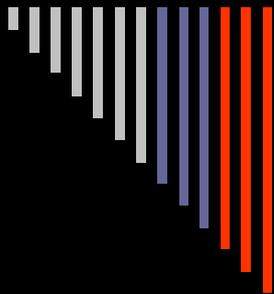
- 
- 
20. Electronic monitoring devices may be required to be worn by persons under a restriction order to ensure that they remain in permitted areas and do not enter prohibited areas.
  21. A Register under the Registration of Criminals and Undesirable Persons Act 1969 [Act 7] containing the fingerprints and photographs of persons detained or restricted will be created. Those who are found to be in constant contact while under restriction may be imprisoned for five to fifteen years.
-



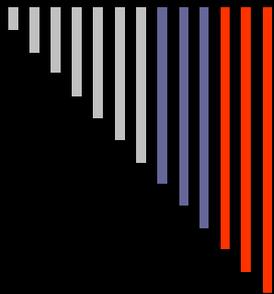
22. A person on the Register will be liable to double the jail term or whipping if convicted for any offence.



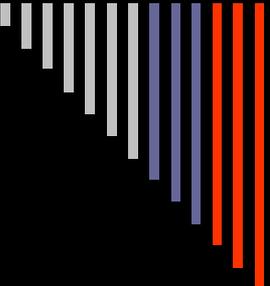
23. Some important safeguards in POTA (compared to the ISA) are first, that no person shall be arrested and detained solely for his political belief or political activity (s. 4(3)). However, in the absence of judicial review, how can this limitation be enforced? Second, every case of arrest by the police under this Act must be handed over to an independent Inquiry Officer who shall not be a police officer (s. 9(2)). Third, the Inquiry Officer shall communicate to the detainee the “substance of the evidence so far as he may consider it compatible with the public interest or the need to protect a witness or his family or associates...”



- ISA where the Minister could act independently of the police and did not have to wait for a recommendation by the police under section 73, under POTA, the Board cannot act on its own. It must wait for the Inquiry Report.



- Fifth, the power to detain for two years has been taken away from the Minister and assigned to the Board. Sixth, the Board does not merely advise as under the ISA. It has power to adjudicate. It can order release of the detainee. Seventh, under POTA there is no death penalty as under some provisions of the ISA.

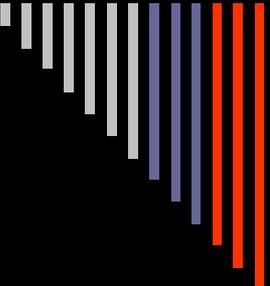


---

# OTHER RELATED ACTS OF PARLIAMENT ON TERRORISM

- Terrorism can also be prosecuted under the Aviation Offences Act 1984 (Act 307); Anti-Money Laundering and Anti-Terrorism Financing Act 2001 [Act 613] and the Special Measures Against Terrorism in Foreign Countries Act 2015.
-

---



# NEED FOR HOLISTIC APPROACH

- Terrorism cannot be defeated by a mere law and order approach. Tough counter-terrorism measures, intelligence operations and military measures must be accompanied by a holistic approach that promotes conditions conducive to prevention of conflicts and peaceful resolution of differences.
-

- 
- Terrorism can only be combated if its ideological appeal is neutralized. All societies need to counter radicalization and de-legitimize ideologues and theocrats who distort race and religion to gain power and justify heinous crimes. This is a challenge for the education system.
  - In Muslim societies including Malaysia, promotion of sectarian divisions by some religious and political fanatics is providing fertile ground for extremist ideas and criminal motivations. A strong, coherent counter-narrative is needed.
-