

**MiDAS TALK 6/2013**

**SOSMA 2012: ITS IMPLICATIONS ON DEFENCE AND  
SECURITY**

**18<sup>TH</sup> DECEMBER, 2013**

**BY**

**TAN SRI ABDUL GANI PATAIL**

**ATTORNEY GENERAL**

**INTRODUCTION**

Ladies and gentlemen,

Assalamualaikum Warahmatullahi Wabarakatuh and a very good morning.

First of all, allow me to express my gratitude to Malaysian Institute of Defence and Security (MiDAS) for inviting me to this momentous

occasion. I am indeed very delighted to be here today at the Malaysian Institute of Defence and Security (MiDAS) Talk 6/2013.

I was asked to talk on The Security Offences (Special Measures) Act 2012, or SOSMA for short, which came into force on 31<sup>st</sup> July, 2012 particularly on its implication on defence and security.

SOSMA and Malaysia's security threat are interlinked. SOSMA addresses the security concern of Malaysia by classifying two chapters of the Penal Code as security offence i.e Chapter VI – Offences Against The State and Chapter VIA – Offences Relating to Terrorism. The two chapters are so directly linked to the matter of defence and security.

## **PROCEDURAL PROVISIONS OF SOSMA**

SOSMA 2012 has often been misconstrued as a substantive law that provides penal offences and their punishments. On the contrary, SOSMA as a procedural law only prescribes the method of trial to be followed and all matters incidental thereto such as arrest, investigation, bail, etc to implement the substantive law.

## ❖ Power of Arrest and Detention

SOSMA as a piece of procedural legislation has included a number of notable provisions that has huge influence on the matter of defence and security. Part II of SOSMA 2012 provides special powers for arrest and detention on security offences. On the power to make an arrest, section 4 of SOSMA empowers the police to extend the normal 24 hours arrest without remand up to 28 days for the purpose of investigation.

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. The exercise of these rights however, may be delayed for not more than 48 hours if there are any reasonable grounds for believing that the exercise of that right will interfere with evidence connected to security offence, or that it will lead to harm to another or that it will lead to the alerting of other person suspected of having committed such an offence but who are not yet arrested.

## ❖ Power to Intercept Communication

Modern investigation's techniques are incorporated in SOSMA 2012 such as the power to intercept communication. Such exercise is efficient not only upon procurement of high-tech gadgets and infrastructures but will become effective only with good coordination and sharing of intelligence amongst all relevant quarters.

The power to intercept communication under SOSMA 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, shall be immediately informed of interception and the exercise will be deemed to have acted under the authorization of the Public Prosecutor.

#### ❖ Special Procedures Relating to Sensitive Information

Most of the intelligence gathered on security offences is highly sensitive and classified as its exposure can compromise the ongoing operation and threatened the lives of people involved in it. Such is the reason behind the *un-readiness* of many enforcement agencies to allow the intelligence to be shared and adduced in courts of law. Nevertheless, it must be understood that the best evidence are often derived from the

classified information and helps in the prosecution of those accused under the offences. Having said so, protection of sensitive information especially when it involves matter of defence and national security is ensured under the provisions of SOSMA.

Part IV of SOSMA 2013 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 arises during trial.

In summary, the provisions under section 8 to section 10 in SOSMA will ensure that no classified or sensitive information to be exposed neither to the accused nor the public or to be revealed by the accused as his defence during trial. Should in any event the sensitive information must be disclosed then the trial will be held in camera so as to preserve its confidentiality.

Section 11 of the Act provides that no courts may compel the Public Prosecutor to produce any statements that contain sensitive information or summary of the sensitive information if the Home Minister

certifies that the production of the statement or summary is prejudicial to national security or national interest.

#### ❖ Denial of Bail

Section 13 of the Act provides that no bail shall be granted for a person charged with a security offence irrespective of whether such a person is under the age of eighteen-year-old, a woman or sick or an infirm person; being a category of people normally released on bail making it an exception for a no-bail-rule for those who are charged with security offences under Chapter VIA of the Penal Code.

#### ❖ Special Procedures relating to Protected Witness

Part VI of SOSMA 2012 provides for witness protection. Section 14 to section 16 of the Act enlisted special procedures relating to the manner a protected witness may give evidence in court, to be identified during the trial and the protection as to his identity. This is vital considering the extend of violence demonstrated in the LahadDatu's intrusion for example and the possibility of revenge by the followers or sympathizers of the accused simply cannot be ignored.

In general, evidence of protected witness shall be given in such manner that he would not be visible to the accused and his counsel, but would be visible to the court; and if the witness fears that his voice may be recognized, his evidence shall be given in such manner that he would not be heard by the accused and his counsel. The court may also disallow such questions to be put to the witness as to his name, address, age, occupation, race or other particulars or such other questions as in the opinion of the court would lead to the witness's identification.

Section 28 of the Act provides for the identity of the informer to be equally protected. No record that may compromise the identity of a protected witness may be allowed to be made. Any breach of this provision may result to a custodial sentence for a term of not more than 5 years and shall also be liable to a fine of not more than RM10,000.00.

In PP v. HASSAN HJ. ALI BASRI [2013] 1 LNS 717 wherein Kpl Hassan, an RMP personnel attached to the Special Branch (SB) and a Semporna local was charged under section 130M of the Penal Code for hiding information relating to the impending intrusion by the so-called

“Royal Sulu Sultanate Army” in KampungTanduo, LahadDatu, Sabah, the High Court Judge has granted "protected witness" status to two prosecution witnesses who were thenceforth known as Protected Witness No. 1 (P.W. 1) and Protected Witness No. 2 (P.W. 2). The Judge has also made the following ruling:

*“I deliberately did not record the questions I posed to the witnesses or their answers during the inquiry in the notes of proceedings as that could give clues to their identity. It should be noted that even during cross-examination, questions that could lead to the identification of a protected witness are barred (see section 14(4) of the SOSMA). When the protected witnesses gave evidence, they were not visible to the accused and his counsel. The protected witnesses had been placed in a secured room in the court premises. The secured room was connected to the Open Court via a video and audio link. The video images were displayed only on the computer screen of the Judge. The audio link was made available to the Judge, DPP and the court interpreter. The questions of the DPP and counsel for accused were posed to the protected witnesses through the court interpreter who relayed the questions through the audio link to the protected witnesses. The answers of the witnesses were also relayed back to the court through the same manner. This*

*procedure was adopted in order to comply with section 14(3) that I reproduced above.”*

Kpl. Hassan was found guilty on 6<sup>th</sup> of August, 2013 and was sentenced to 7 years of imprisonment by the High Court in Kota Kinabalu.

❖ Protection of Informer

SOSMA also provides for the protection of informer and under section 28 it is provided that no complaint by an informer as to a security offence under the 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.

Sub-section (2) of section 28 further provides that 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.

#### ❖ Evidence

Part VII of SOSMA 2012 covering section 17 to section 26 are enacted to enable the admission of evidence in court contrary to the normal criminal proceedings.

Section 20 provides for all documents seized during a raid or in the course of investigation and the contents of the documents shall be admissible as evidence whereas section 22 make way for search list of all documents and things seized during a raid to be admissible as evidence in court to prove the existence of the documents and things seized that were not produced in court due to the nature of the documents and things.

Section 23 further provides for the non-production of the actual exhibit protected under sections 8 and 11 shall not be prejudicial to the

prosecution's case. These provisions under SOSMA helps to preserve the confidentiality of any sensitive documents intended to be used by the prosecution during the trial without the necessity of having it tendered and risked of being compromised with.

In any case where a person is charged for a security offence, any information obtained through an interception of communication under section 6 shall be admissible as evidence at his trial and no person or police officer shall be under any duty, obligation or liability or be in any manner compelled to disclose in any proceedings the procedure, method, manner or any means or devices, or any matter whatsoever with regard to the manner the interception is being carried out. This is to ensure that the method of operation is not exposed and dampen future operations.

Another departure from standard practice under SOSMA 2013 is that evidence of the identification of an accused or other person prior to the trial shall be admissible as evidence even though the identification was by photographs or other methods or held in circumstances in which the witness identifying the accused or other person is not visible to such

accused or other person. This makes an exemption for the witnesses especially protected ones from risk of exposing their identities to the accused should they were required to identify the perpetrators through a normal identification parade.

These departures from the general rule on admissibility of evidence during trial are made in recognition of the fact that these provisions will come in handy to assist investigation and gathering of evidence in ground zero when the offensive is still ongoing. In the LahadDatu' intrusion for instance, the investigative officers (IO) from the RMP were tested for the first time to carry out investigations and making sure that every piece of evidence gathered is preserved when at the same time members of the Armed Forces were engrossed in the operations to flush out and disarm the intruders.

TheLahadDatu's standoff posed serious threat to the security and sovereignty of our Nation; as such failure to bring those responsible to justice is not an option. Having said so, there are few notable obstacles in the application of SOSMA in the investigative side. In order to remedy that, section 17 expressly excludes the provisions in Evidence Act 1950 where there is inconsistency of Part VII of SOSMA and Evidence Act.

The principle of *generaliaspecialibus non derogant* applies in Section 17 of SOSMA: where a specific provision in a specific statute overrides a general provision in a general statute. Therefore, any subsequent provision come under Part VII of SOSMA is not invalidated by the Evidence Act due to its inconsistency.

#### ❖ Detention Pending Exhaustion of Legal Process

Under Section 30 of SOSMA, it is provided that 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. Upon application by the Public Prosecutor under subsection, the court shall remand the accused in prison pending the filing of the notice of appeal. 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. Upon application by the Public Prosecutor under subsection (3), the court shall commit the accused to prison pending the disposal of the appeal.

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. 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. An accused committed to prison under this section shall be held until all appeals are disposed of.

Continued detention upon application of the Public Prosecutor pending disposal and exhaustion of appeal process is one of the most distinct features of SOSMA 2012. This is necessary as to ensure that no chances for a person accused of the security offence to flee the jurisdiction especially if he is a non-citizen. Should there be no such safeguard under SOSMA, the defence and security of our Country would be in jeopardy.

A person detained under SOSMA 2012 may also be released after being arrested and 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) which is twenty-eight days for purposes of investigation. The suspect can be effectively monitored with the assistance of the monitoring device and the incident such as in YazidSufaat's case where his accomplice HalimahbintiHussin, a religious teacher who was charged with abetting Yazid in the same case was issued with a warrant of arrest by the Court of Appeal for her failure to appear in court after she was released by the High Court.

## **SECURITY OFFENCES UNDER PENAL CODE**

Alongside the enactment of this legislation, major amendments to the Penal Code and Criminal Procedure Code were also made. The intention of these amendments is to make consistent the provisions of the Penal Code and Criminal Procedure Code with the SOSMA. The amendments to the Penal Code provide for new offences including activity detrimental to parliamentary democracy, sabotage, espionage and organized crime as well changes to the existing provisions on conspiracy. Amendments were also proposed to the Criminal Procedure Code to bring in line the provisions of the SOSMA. These amendments principally touch on interception, definition of 'communication', search

and seizure without warrant, attachment of an electronic monitoring device, meaning of an electronic monitoring device and access to computerized data.

The introduction of these parallel amendments to Malaysia's Penal Code is aimed to enhance its counterterrorism capacities following the introduction of SOSMA to replace the ISA. The Code was amended to introduce 13 new offences into Chapter VI (Offences Against the State). 7 of these are new offences namely activity detrimental to parliamentary democracy, attempt to commit activity detrimental to parliamentary democracy, dissemination of information, sabotage, attempt to commit sabotage, espionage and attempt to commit espionage. Section 124D, 124E, 124F, 124G, 124I and 124J deal with offences which used to be in the Internal Security Act 1960 but with modifications.

There are two chapters under the Penal Code that provide for security offences. Chapter VI ranging from section 121 to section 130A covers offences against the State while Chapter VIA starting from section 130B to section 130T spells out offences relating to

terrorism. Offences listed under both of these chapters are extra-territorial in nature.

## **SECURITY OFFENCES UNDER PENAL CODE**

Section 3 defines “security offences” to mean the offences specified in the First Schedule. Two categories of security offences are listed in the First Schedule. Both categories are also found in the Penal Code. The first category is “Offences against the State” which appears in Chapter VI of the Penal Code, that is, from Sections 121 to 130A. The second category is “Offences relating to Terrorism” which can be found in Chapter VI A of the Penal Code, that is, from Sections 130B to 130T.

“Offences against the State” includes waging or attempting to wage war against the Yang di-Pertuan Agong, Rulers or Yang di-Pertuan Negeri (“the Rulers”), hurting the Rulers, deposing the Rulers, overthrowing by criminal force the government of Malaysia or of any of the states, assaulting Members of Parliament or State Legislative Assemblymen in their exercise of their duties and activity detrimental to parliamentary democracy. All these offences share a common theme of force being used or intended to be used in order to obtain their

objectives, which are to overthrow the government or to harm members of the different branches of government.

“Offences relating to terrorism” concern acts of “terrorist”, who is defined as a person who commits or attempts to commit any terrorist act or participates in or facilitates the commission of any terrorist act. Section 130B (2) of the Penal Code defines a “terrorist act” to mean “an act or threat of action within or beyond Malaysia” where -

- act done or threat made with the intention of advancing a political, religious or ideological cause; and
- act or threat is intended or may reasonably be regarded as being intended to:
  - i. intimidate the public or a section of it; or
  - ii. Influence or compel any government, whether in Malaysia or elsewhere, or any international organization to do or refrain from doing any act.

Under Section 130 B(3) an act or threat of action includes causing death, serious bodily injury, serious damage to property, use of firearms,

interference with any computer or communication systems, interference with police, or actions which prejudice national security or public safety. The specific terrorist offences provided for in the Penal Code from sections 130C to 130T include committing terrorist acts, providing explosives, recruiting persons to join terrorist groups, providing training or facilities to terrorists, giving of support, directing terrorist activities and criminal conspiracy.

In a nutshell, both Chapter VI and VIA of the Code provides us with adequate provisions for both high intensity conflict and low intensity conflict to tackle security offences and to prevent security breach.

The notorious Al-Mau'nah's case of PUBLIC PROSECUTOR v MOHD AMIN BIN MOHD RAZALI & ORS for example, is one of the cases where the charges were framed under this section and tried under ESCAR - Essential (Security Cases) Regulations which was introduced on October 4, 1975 prior to SOSMA.

The Al-Mau'nah's incident was Malaysia's largest military weapon heist that turned into a hostage crisis and a 5-day standoff with the

police and army. On July 2nd 2000, 15 men disguised as high-ranking army officers stole over 100 military-grade weapons and thousands of ammunition rounds from two Malaysian army camps. Police suspect the weapons were for regional terrorist groups. But not far from the crime scenes, Sauk villagers report gunfire behind their school.

Two Special Branch police officers were sent to investigate but end up as hostages instead. In the unfolding crisis, more hostages are taken, two of them tortured and murdered.

Malaysian police and army intelligence reveal the Al-Ma'unah, an Islamic deviationist cult responsible for the heist and hostages. Psychological warfare is used to persuade the cult to surrender peacefully. But an ultimatum from Prime Minister Dr Mahathir Mohamad to end the hostage crisis by Day 5, leads to a police-army confrontation with Mohamad Amin, leader of Al-Ma'unah.

The court held among others that the specific role played by an accused person in a rebellion or in the staging of an insurrection, as in the present case, was not a vital ingredient to be proved. All the accused

persons, as members of the Al-Ma'unah group who had gathered at Bukit Jenalik regardless of their degree of involvement, were responsible in the commission of the offence of waging war against the Yang di-PertuanAgong. Its leader Mohd Amin Bin Mohd Razali and 2 of his right-hand men were sentenced to death while sixteen other Al-Mau'nah members are now serving life-imprisonment.

The following are some other offences under Chapter VI of the Code that involve high intensity conflicts:

- Section 121A Offences against the person of the Yang di-PertuanAgong, Ruler or Yang di-Pertua Negeri.
- Section 122 Collecting arms, etc., with the intention of waging war against the Yang di-PertuanAgong, a Ruler or Yang di-Pertua Negeri.
- Section 123 Concealing with intent to facilitate a design to wage war.

- Section 125 Waging war against any power in alliance with the Yang di-PertuanAgong.
- Section 125A Harboursing or attempting to harbour any person in Malaysia or person residing in a foreign State at war or in hostility against the Yang di-PertuanAgong.
- Section 128 Public servant voluntarily allowing prisoner of State or war in his custody to escape.
- Section 129 Public servant negligently suffering prisoner of State or war in his custody to escape.
- Section 130 Aiding escape of, rescuing, or harbouring such prisoner.

Offences involving low intensity conflict among others are offences relating to terrorism, espionage, sabotage and activity detrimental to parliamentary democracy (subversive).

The provisions in SOSMA were invoked for the first time in the case of YazidSufaat, HalimahbintiHussien and Muhammad Hilmi bin Hasim upon their arrest for the offence of promoting the commission of terrorists act under section 130G(a) of the Penal Code.

The High Court Judge Kamardin Hashim however, ruled that the Act could not be used against the three, as it went beyond the scope of Article 149 of the Federal Constitution, which covered only domestic terrorism. He also ruled that SOSMA could not be used as a procedure to prove the charge against Yazid, 49, Muhammad Hilmi, 33, and Halimah, 52.

The decision was appealed by the Attorney-General's Chambers and the Court of Appeal has ordered the terrorism case of former Internal Security Act (ISA) detainee YazidSufaat to be remitted back to the Kuala Lumpur High Court and to be heard before a new High Court Judge. The panel led by Justice Abu SamahNordin allowed the prosecution's appeal against the Kuala Lumpur High Court's decision to acquit and discharge Yazid and cafeteria helper Muhammad HilmiHasim

of charges of promoting acts of terrorism in strife-torn Syria. The panel, which also included Justices Zawawi Salleh and Azhar Mohamed ruled among others that the learned judge had erred in his interpretation of the charges and failed to give cognizance that the charge against the respondents (Yazid and Muhammad Hilmi) are within the scope of Article 149 of the Constitution. The Court of Appeal had also, on May 31, issued a warrant of arrest for Halimah, who is the second respondent in the prosecution's appeal and has so far failed to appear in court.

Yazid who graduated from the California State University, Sacramento in 1987 with a degree in biochemistry served in the Malaysian army as a medical technician, reaching the rank of Captain was detained under the ISA in 2001 for seven years on suspicion of being involved with the Jemaah Islamiyah militant group believed to be one of al-Qaeda's main anthrax researchers.

Another example of offence relating to terrorism prosecuted under SOSMA is Public Prosecutor v. Kpl/D Hassan bin Hj. Ali Basri. Kpl Hassan, an RMP personnel attached to the Special Branch (SB) and a Semporna local was charged under section 130M of the Penal Code for

hiding information relating to the impending intrusion by the so-called “*Royal Sulu Sultanate Army*” in Kampung Tanduo, Lahad Datu, Sabah. He was found guilty on 6<sup>th</sup> of August, 2013 and was sentenced to 7 years of imprisonment by the High Court in Kota Kinabalu.

PUBLIC PROSECUTOR v ATIK HUSSIN BIN ABU BAKAR & 29 OTHERS is another case involving Lahad Datu’s intrusion wherein twenty-two accused are charged with the offence of waging war against the Yang di-Pertuan Agong and as members of a terrorist group. One of the accused is charged under section 130E of the Penal Code for recruiting persons to be members of terrorist groups and under section 130K for harbouring persons committing terrorist acts. Five other accused are charged under section 130KA while the rest of them are charged under section 130K read with section 511 of the Penal Code. The case is scheduled for trial at the High Court in Kota Kinabalu on January and February, 2014.

It is undeniable that one of the most effective ways to gather data and information about the enemy or potential enemy is by infiltrating the enemy's ranks. This is the job of the spy (espionage agent). Spies can

bring back all sorts of information concerning the size and strength of an enemy army. They can also find dissidents within the enemy's forces and influence them to defect. Nearly every country has very strict laws concerning espionage, and the penalty for being caught is often severe. In order to further strengthen the law to combat security offences, espionage has also been made as a security offence after the amendment to the Penal Code with the insertion of Section 124M and section 124N in Chapter VI.

Section 124K and section 124L in Chapter VI of the Penal Code made an offence any act of sabotage or any act preparatory thereto shall be punished with imprisonment from fifteen years up to life imprisonment.

The Code was also amended by inserting section 124B and 124C that made it a criminal offence for any activity detrimental to parliamentary democracy or any attempt to commit activity detrimental to parliamentary democracy which was an offence under the repealed Internal Security Act. Section 124B provides for whoever, by any means, directly or indirectly, commits an activity detrimental to parliamentary democracy shall be punished with imprisonment for a term which may

extend to twenty years. Any attempts to commit an activity detrimental to parliamentary democracy or does any act preparatory to it is punishable with imprisonment for a term which may extend to fifteen years under section 124C.

We shall not forget the case of Karam Singh s/o Kaher Singh where the Legal Adviser of the Malayan Workers' Welfare Society (MWWS) was detained under section 8(1)(a) of the ISA for openly support the armed struggle of the illegal Communist Party of Malaya (CPM) and assisted one Zainuddin Karim a leading member of an organisation known as the Pusat Perjuangan Kebangsaan Rakyat Malaysia, an illegal pro-Indonesian underground organisation dedicated to the violent overthrow of the Malaysian Government by providing him with funds to secretly exfiltrate to Indonesia to join forces with the anti-Malaysia elements there in their 'crush MALAYSIA' campaign.

## **CONCLUSION**

In conclusion, the introduction of SOSMA 2012 empowers the Armed Forces and other enforcement agencies in this Country to acquire and develop intelligence on internal and external threats to the

nation. SOSMA's implication to the defence and security cannot be underestimated. In essence SOSMA was designed to address the very issue at the heart of defence and security. Malaysian security forces namely the Armed Forces and the Police must truly understand and appreciate the operation of SOSMA in the legal landscape in order to assist prosecutors in cases involving act of warfare, terrorism, subversive, espionage and sabotage.