

A **PREVENTIVE DETENTION UNDER THE  
DANGEROUS DRUGS (SPECIAL PREVENTIVE  
MEASURES) ACT 1985: ARE THE SAFEGUARDS  
REAL OR ONLY A SMOKE SCREEN?**

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by

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DRUG TRAFFICKERS

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Most drug traffickers that were convicted and given the death penalty under s 39B of the Dangerous Drugs Act 1952 were believed to be couriers or drug peddlers. The drug barons who mastermind trafficking are rarely apprehended for they do not physically carry drugs. On the other hand, the idea of lowering the criminal standard of proof for trafficking drugs to the civil standard would be greeted with hostility by the judiciary. The government decided that to combat the drug menace in the country, it is important that there must be a law to empower the Minister of Internal Security to issue an order for the detention without trial of any person suspected of involvement in drug trafficking.<sup>1</sup> The Malaysian government conceded that the Act may not succeed in completely overcoming the drug trafficking problem, but the important factor is the existence of a law that could combat drug trafficking.<sup>2</sup>

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DANGEROUS DRUGS (SPECIAL PREVENTIVE MEASURES) ACT 1985

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The Dangerous Drugs (Special Preventive Measures) Act 1985 [Act 316] ('SPMA') was passed by Parliament on the 30 May 1985.<sup>3</sup> The Act was

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1 Read the Parliamentary Debates of the House of Representatives, second and third reading of the Dangerous Drugs (Special Preventive Measures) Act 1984's Bill, 11 April 1985, pp 2023–2024, 2103–2105 and 2110. See also the Parliamentary Debates of the Senate, the second and third reading of the Dangerous Drugs (Special Preventive Measures) Act 1984's Bill, 24 April 1985, pp 128–130 and 132; Parliamentary Debates (House of Representatives) on the resolution to extend the Dangerous Drugs (Special Preventive Measures) Act 1985 for another five years, 25 April 2000, pp 39–89, at pp 39–41. On 11 May 2000, the Senate too passed a resolution to extend the same, pp 133–149.

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2 Read the Parliamentary Debates of the House of Representatives, second and third reading of the Dangerous Drugs (Special Preventive Measures) Act 1984's Bill, 11 April 1985, at p 2110.

made pursuant to Art 149(1)(f) of the Federal Constitution, which states that "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 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 Art 5 (liberty of the person), Art 9 (prohibition of banishment and freedom of movement), Art 10 (freedom of speech, assembly and association) or Art 13 (rights to property).<sup>4</sup>

The Act has a lifespan of five years and approval by Parliament is needed before its term can be extended. Article 149(2) of the Federal Constitution states that preventive detention laws are not meant to exist beyond their usefulness. The Act has been renewed uninterruptedly for the third time and would lapse in 2005 unless both the House of Representatives and the Senate again passed a resolution to extend it. It was first extended *vide* resolution by the House of Representatives and the Senate on 16 and 23 March 1990 respectively.<sup>5</sup> It was extended for the second time on 12 and 13 June 1995 when the House of Representatives and the Senate respectively passed another resolution, extending the Act for a further period of five years with effect from 15 June 1995. On 25 April and 11 May 2000, the House of Representatives and the Senate again passed a resolution to extend the Act for the third time. The Act is due to expire in 2005.<sup>6</sup> Upon its expiry, the authority shall forthwith release any person so detained or restricted.<sup>7</sup>

#### *Justification for its extension*

The reasons for the Act being extended again and again were that the drug trafficking chiefs and financiers have not been eradicated totally. The threat

3 Act 316/85 with effect from 15 June 1985 (PU (B) 305/85).

4 The Prime Minister was reported in the *New Straits Times* of 8 and 23 December 1978 to have said, when moving the amendments in both Houses that the new clause (f) in Art 149 of the Federal Constitution was proposed in order to deal effectively with trafficking and secret society activities – quoted from the case of *Chew Phang Oo v Timbalan Menteri Dalam Negeri, Malaysia* [1991] 1 MLJ 59. Paragraph (f) was added *vide* Act A442/1978, with effect from 31 December 1978. The overriding clause was made through an amendment of the Federal Constitution in 1981: See the Parliamentary Debate of the House of Representatives, the second and third reading of the Dangerous Drugs (Forfeiture of Property) Act 1988's Bill, 24 March 1988, at pp 62–63.

5 Parliamentary Debates of the House of Representatives: Motion to extend the duration of the Dangerous Drugs (Special Preventive Measures) Act 1985, 16 March 1990, pp 78–119. Read also the Parliamentary Debates (Senate): Motion to extend the duration of the Dangerous Drugs (Special Preventive Measures) Act 1985, 23 March 1990.

6 See the Parliamentary Debates of the House of Representatives, 25 April 2000, pp 39–89, as well as the Senate, 11 May 2000, pp 133–149.

7 Section 1(3), (4) and (5), Dangerous Drugs (Special Preventive Measures) Act 1985.

A they pose to the country and society is still real. With the Act, the government has the means to cut down their numbers and their activities of drug trafficking and financing, hence reducing and containing the problem.<sup>8</sup> The House of Representatives and the Senate extended it for the third time in April and May 2000 respectively. It was pointed out that apprehending the heads of the drug trafficking syndicates is difficult without physical evidence. Therefore, the only way to stem the supply of drugs to the end users is to detain them under this preventive law. Although this Act has been in force since 1985, it was evident that the number of cases received has not decreased. The drug menace must be contained if it is not to flourish and threaten the country.

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*Arrest and detention of suspected drug traffickers*

The Act would definitely prove handy to the enforcement officers whenever the case against the suspected drug trafficker has not a better than even chance of conviction, should he be charged for trafficking under the Dangerous Drugs Act 1952. In *Mohd Ali bin Mohd Radi v Director of Prison, Rehabilitation Centre, Pulau Jerejak, Pulau Pinang & Anor & Ors*, the applicants had been charged with trafficking in ganja (cannabis) under the Dangerous Drugs Act, but the prosecutor subsequently applied for their discharge not amounting to an acquittal. The applicants, however, were subsequently arrested under s 3(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985.<sup>9</sup> It was held in *Yeap Hock Seng v Minister of Home Affairs, Malaysia & Ors* that the fact that the applicants had been discharged in a criminal case did not mean that no valid arrest could thereafter be effected under a preventive detention law, nor that an order for preventive detention could not be made against the applicants in connection with that very incident. Accordingly, such order could not be characterized as being *mala fide*, because the circumvention of the ordinary process of law cannot by itself amount to *mala fide*. To hold otherwise would in most cases result in rendering virtually moribund and impotent the laws legally enacted to provide for preventive detention for a specified purpose.<sup>10</sup> In *Lee Fong Kooi v Minister of Home Affairs, Malaysia*, the brief facts were as follows: The applicant was convicted in August 1984 by the Crown Court in Reading, London, for a drug offence and was sentenced to seven years imprisonment from the date of his arrest. Having served his sentence and upon his release, he returned to Malaysia where he was arrested on arrival at the airport. The applicant, who applied for habeas corpus, argued that the detention order of the Deputy Minister under s 6(1) was devoid of any evidential substratum, namely that he had been involved in activities relating to, or involving trafficking of dangerous drugs. The

8 See the Parliamentary Debates of the House of Representatives: Motion to extend the duration of the Dangerous Drugs (Special Preventive Measures) Act 1985, 16 March 1990, pp 78–119, at pp 80–81 and 117.

9 [1989] 1 MLJ 248, High Court.

10 [1975] 2 MLJ 279.

court held that the questioning of the decision of the Minister in making a detention order under s 6(1) is clearly not allowed by s 11C(1).<sup>11</sup>

Under the Act, any person can be arrested and detained for investigations for up to 60 days if there are reasons to believe that he or she has been or is associated with any activity relating to or involving the trafficking of dangerous drugs. The Minister may subsequently issue a detention or restriction order for up to two years, if on the basis of the report submitted to him by the police and the Inquiry Officer, he is satisfied that it is necessary do so.<sup>12</sup> The order can be extended before its expiration for a further period not exceeding two years.<sup>13</sup> (See Table 1)

Table 1. Detention and Restriction under the Dangerous Drugs (Special Preventive Measures) Act 1985.

YEAR	ARREST	DETENTION	RESTRICTION	ACQUITTAL
1985	65	56	1	8
1986	218	183	19	16
1987	296	278	6	12
1988	446	391	20	35
1989	454	382	26	46
1990	566	397	77	92
1991	883	649	126	108
1992	816	613	126	77
1993	814	545	129	140
1994	747	464	183	100
1995	994	584	296	114
1996	1114	692	295	127
1997	1456	1,029	233	194
1998	1,738	—	—	—
1999	1,375	856	413	106
2000	1,637	949	590	98

11 [1990] 3 MLJ 172, High Court.

12 Sections 3(1) and 6(1), Dangerous Drugs (Special Preventive Measures) Act 1985.

13 Section 6 and 11A. See the case of *Wong Fook Nyen v Timbalan Menteri Dalam Negeri, Malaysia* [1988] 2 CLJ 274.

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2001	1,820	1,103	599	118
2002	2,057	845	842	162

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Source: Department of Narcotics, Royal Malaysian Police, Bukit Aman, Kuala Lumpur, with the kind assistance of the Assistant Commissioner of Police, Khalid Abu Bakar.

*Report of the Special Select Committee*

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When the Dangerous Drugs (Special Preventive Measures) Act 1985's Bill was tabled, the House of Representatives on 17 October 1984 resolved that the Bill, in accordance with the provisions of Standing Order 54(1) of the House of Representatives, be referred to a Select Committee known as the Special Select Committee ('the Committee') to study the Bill, express its opinion and observations and make recommendations on the provisions contained in the Bill. The Committee in its Report<sup>14</sup> noted the views of public organizations and individuals that indicated their concern on the drug menace that has been threatening the security of the country. Many raised various objections to the Bill pertaining to detention without trial in that it infringed upon basic human rights and the fundamental liberties of the citizen. The accumulative effect of the Bill, in addition to the Emergency (Public Order and Prevention of Crime) Ordinance 5 of 1969 and the Internal Security Act currently in force on preventive detention, would further erode the fundamental liberties and human rights guaranteed under the Constitution. They also feared that the police would abuse their wide powers. However, their common aim is to see the drug menace contained and reduced, if not completely eradicated.

In the Report, the Committee noted that drug dealers deliberately endeavor to recruit members from among the susceptible and vulnerable. The lucrative nature of the business, as well as the geographical and strategic location of Malaysia along the drug routes from the Golden Triangle to the West and elsewhere, has made Malaysia a major transit point for drug trafficking. The Committee acknowledged that the present laws and procedures were inadequate to deal with drug trafficking. Those arrested, tried, convicted and sentenced to death for possession of dangerous drugs above certain limits under s 39B of the Dangerous Drugs Act 1952 were drug peddlers and couriers, who make up only a part of the machinery of drug trafficking. The Committee conceded that action could not be taken effectively against the syndicate operators and financiers as well

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14 Read the Parliamentary Debates of the House of Representatives, second and third reading of the Dangerous Drugs (Special Preventive Measures) Act 1984's Bill, 11 April 1985, pp 2021-2115. See also the Parliamentary Debates of the Senate, the second and third reading of the Dangerous Drugs (Special Preventive Measures) Act 1984's Bill, 24 April 1985, pp 103-138.

as other accomplices who did not physically carry or deal directly in drugs. These people had managed to escape arrest because of the criminal standard of proof, while their peddlers and couriers faced the death sentence. The Committee was fully aware that the Emergency (Public Order and Prevention of Crime) Ordinance 5 of 1969 was currently being used to detain persons suspected of involvement in drug trafficking. However, the detention period allowed under the Ordinance was limited to a maximum of two years only. The Committee concurred with the opinion of the enforcement and rehabilitation agencies that such a detention period was not an adequate deterrent. These detainees knew fully well that they could not be detained or restricted for more than the two-year period and could therefore 'look forward' to their previous 'lucrative activities'. The Committee felt that the prospect of indefinite periods of detention or restriction would not only cause anxiety and uncertainty, but would also be an effective deterrent to the individual concerned. Moreover, the 1969 Ordinance was not promulgated to deal specifically with the drug menace, but for securing public order, the suppression of violence and the prevention of crime involving violence. It was against the big group operators that the Bill was directed in particular. The Committee took note that the seizure of drugs has increased recently as a result of more effective and efficient enforcement of the law and of the mandatory death penalty imposed for possession of dangerous drugs under the Dangerous Drugs Act 1952. Nevertheless, there was still no sign of a decline in the volume of dangerous drugs being brought into the country. Further, the Internal Security Act of 1960 ('the ISA') was not meant for combating the drug menace but subversive elements like communists.<sup>15</sup> Whilst accepting the need for the Bill,<sup>16</sup> the Committee proposed amendments. The Bill shall

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15 The ISA was enacted in 1960 as Act No 18 of 1960 (revised on 1 January 1972 as Laws of Malaysia Act 82), replacing the Emergency Regulations 1948 (Ordinance No.10/1948). The 1948 Regulations repealed the earlier emergency enactments. The Regulations was aimed at confronting the Malayan Communist Party that was formed in 1930 in Malaya whose object was to establish the Communist Republic of Malaya. Due to their armed struggle, the High Commissioner declared a state of emergency on 12 August 1948 (Federation of Malaya, Govt Gazette Vol 1 No 12 of 1948). Preventive detention was introduced by the British authorities for countering communist insurgency in the Federation of Malaya. The 1948 Regulation was repealed when the Emergency ended on 30 July 1960. In justifying the promulgation of the ISA, the then Deputy Prime Minister Tun Abdul Razak said that there was still the risk of turmoil and subversion by the communists as they had not been completely eradicated despite the fact that they no longer posed a serious threat to the security of the country (House of Representatives — Parliamentary Debate, 21 June 1960).

16 One member of the seven-member committee who represented the opposition party did not support the Bill, as it deprived the accused person of his fundamental and constitutional right to a fair trial before a court of law to prove and establish his innocence.

A remain in force for a period of five years, unless extended by a resolution  
passed by both Houses of Parliament. The Committee felt that the time  
limit of five years was a necessary limitation where a law infringes on  
fundamental liberties and the rule of law. The Act should not therefore  
exist beyond its usefulness, or when the factors instrumental to its  
introduction no longer prevail. The Committee emphasized that  
B enforcement authorities need to be efficient and above all be fair and just  
at all times, because Parliament would object to the Act being extended in  
the event of abuse or misuse. The Committee recommended too that  
there be a legally qualified Inquiry Officer who is not a police officer to  
investigate and submit an independent report to the Minister. Further, it  
C was recommended that the recommendations of the Advisory Board when  
reviewing each case should bind the Minister.<sup>17</sup> The Special Select  
Committee believed that those safeguards incorporated in the Act struck  
a fair and proper balance between the need to combat the drug menace in  
the interest of national security and the concern for the fundamental  
liberties of the individual and the rule of law.<sup>18</sup>

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*Arrest and detention by the police*

E The Dangerous Drugs (Special Preventive Measures) Act 1985, being a  
preventive law, crudely gives police officers the typical power to make an  
arrest against any person without warrant and detain him in police custody  
for a period of up to 60 days, if they have reason to believe that such person  
has been, or is associated with, any activity relating to or involving the  
trafficking in dangerous drugs, as would justify his detention for a detention  
order under s 6(1) of the Act. In *Chong Kim Loy v Timbalan Menteri Dalam*  
F *Negeri (Deputy Home Minister), Malaysia & Anor*, the applicant was arrested  
on grounds that he had been involved in activities involving drugs and it was  
therefore necessary in the public interest to detain him. The words  
employed in the offence of drug trafficking were not mentioned in the  
grounds of arrest. It was held that no prejudice was however occasioned by  
the omission, as the applicant must have known that the activities alleged  
G against him were drug trafficking activities and indeed he had not gone on  
affidavit to say otherwise. It was also held as unnecessary to produce him  
within 24 hours before a magistrate. The arrest on grounds that he is liable  
to a detention or restriction order was also held to be good despite the fact

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17 House of Representatives, second and third reading of the Dangerous Drugs  
(Special Preventive Measures) Act 1984's Bill, pp 2021-2038 and 2102-2115  
and the approval of the Report of the Special Select Committee on the  
Dangerous Drugs (Special Preventive Measures) Act 1984's Bill, 11 April  
1985, pp 2021-2115. See also Senate's Parliamentary Debate, second and  
third reading of the Dangerous Drugs (Special Preventive Measures) Act  
1984, pp 101-110, 127-137.

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18 House of Representatives, second and third reading of the Dangerous Drugs  
(Special Preventive Measures) Act 1984's Bill.

that the arrest should have been on the ground that he is liable to a detention order and not a restriction order.<sup>19</sup>

There is no necessity for the arrested person to understand every word used by the arresting officer, but suffice if the quintessence is understood that he is involved in dangerous drug activities and has to be detained in the public interest.<sup>20</sup> During police detention for purposes of investigation, visit by counsel is not allowed, because the Committee felt that it would complicate the investigation process. The Committee reiterated the practice under the Criminal Procedure Code, which leaves the matter to the discretion of the police and that visits have always been allowed once investigation has been completed. In any case, the right to be represented by counsel when making representations to the Advisory Board exists.

A safeguard was, it seems, incorporated into the Dangerous Drugs (Special Preventive Measures) Act 1985 by the Committee. Although any police officer can make an arrest of a suspect, the authority of the following high-ranking police officers would be needed for extending the detention. A detention for more than 24 hours and 48 hours has to be authorized by a police officer of or above the rank of Inspector, or police officer of or above the rank of Assistant Superintendent respectively. If the detention period is more than 14 days to the maximum period of 60 days, a police officer of or above the rank of Deputy Superintendent of Police has to report the circumstances of the arrest and detention to the Inspector-General, or to a police officer designated by him who, in turn, as the case may be, shall forthwith report the same to the Minister.<sup>21</sup>

Section 3(2)(C) however does not use the word 'hours' but instead the word 'day'. It was held by the High Court in *Lim Yack Boon lwn Timbalan Menteri Dalam Negeri, Malaysia dan satu yang lain*, that the word 'day', should be interpreted subject to ss 3(2)(a) and 3(2)(b). Accordingly, time does not begin to run after midnight, but from the time the detention period under s 3(2)(b) expire.<sup>22</sup> In *Tan Boon Aun v Timbalan Menteri Dalam Negeri, Malaysia and Anor*, the application for habeas corpus was allowed by the High Court because there was a break in the chain of authorization, making the detention during the material period illegal. Strict compliance with the law is necessary especially in a matter of deprivation of liberty.<sup>23</sup> It is, however, submitted that compliance in stages is not what the Act envisages and is therefore not necessary. In other words, a Deputy Superintendent of Police is equally empowered to authorize a detention for less than 14 days. The important thing is that the

19 [1989] 3 MLJ 121, High Court.

20 *Lee Fong Kooi lwn Minister of Home Affairs, Malaysia dan satu yang lain* [1990] 3 MLJ 172, High Court.

21 Section 3(1) and (2)(a), (b) and (c) Dangerous Drugs (Special Preventive Measures) Act 1985. See also *Lim Kean Hong v Timbalan Menteri Dalam Negeri Malaysia & Anor* [1990] 1 CLJ 1161.

22 [1990] 3 MLJ 55.

23 [1991] 1 MLJ 55, High Court.



A ranking of the police officer shall not be inferior to the rank of the police officer authorized at the material time to detain him.

B There is also nothing in the Act to suggest that the authorization for detention must first be for 24 hours, then 48 hours to 14 days, before the 15 to 60-day maximum detention period can be evoked. In other words, upon his arrest and detention, he may, for purposes of investigation, be detained straight away for 60 days, provided the Deputy Superintendent of Police reports the circumstances of the arrest and detention to the Inspector-General, or to a police officer designated in that behalf, who then forthwith (and having applied his mind to the report) report the same to the Minister.<sup>24</sup> In *Ng Hong Choon v Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor*, there was no evidence (in the affidavit) to show that the Inspector General of Police, or a police officer designated by him, had forthwith reported to the Minister the circumstances of the arrest and detention, as required by s 3(2)(C), where the detention had exceeded 14 days. The Supreme Court subsequently held that the detention order issued by the Minister was invalid.<sup>25</sup> In *Yeow Boon Kee v Timbalan Menteri Dalam Negeri, Malaysia & Anor*<sup>26</sup> and *Nadarajan v Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor*,<sup>27</sup> it was held that what is material under s 3(2)(C) is that the report should be received by the Inspector General of Police, or the designated officer, but to whom it was addressed is a matter of general administrative practice in government departments. It is also not necessary for the police officer making the investigation to state in his affidavit that he had caused the report to be forwarded to the Minister and the Inquiry Officer. What is material is for the report to be forwarded. It is not material that the affidavit stated that it was forwarded to the Ministry of Home Affairs and not the Minister of Home Affairs, as in essence, it achieved the same results.<sup>28</sup>

E In *Ng Choon Mon v Timbalan Menteri Dalam Negeri, Malaysia & Anor* and another application, the court held that s 3(2)(c) merely requires the Deputy Superintendent to forthwith report to the Minister the circumstances of the arrest and detention, but the Minister's clearance for the further detention is not required.<sup>29</sup> The reporting, however, should not be done immediately, as the word 'forthwith', unlike the word 'immediate', connotes that the Deputy Superintendent had to apply his mind to the report before forwarding it to the Minister. The expression 'shall forthwith

H 24 See the case of *Tan Boon Aun v Timbalan Menteri Dalam Negeri, Malaysia* [1991] 1 MLJ 55 and *Lim Yack Boon lwn Timbalan Menteri Dalam Negeri, Malaysia dan satu yang lain* [1990] 3 MLJ 55.

25 [1994] 3 MLJ 285.

26 [1993] 2 MLJ 359, High Court.

27 [1994] 2 MLJ 657.

28 See also *Chin Chong Nang v Menteri Hal Ehwal Dalam Negeri, Malaysia* [1991] 2 CLJ 1126 and *Dahari Bin Busu v Menteri Hal Ehwal Dalam Negeri, Malaysia* [1991] 2 CLJ 1128.

I 29 [1990] 1 MLJ 38, High Court. The same was also decided in *Chong Kim Loy v Timbalan Menteri Dalam Negeri, Malaysia & Anor* [1989] 3 MLJ 121, High Court.

report' the same to the Minister rather than 'shall forthwith submit such report that he had received from the police officer' to the Minister, would mean that the legislature had intended a two-tier decision or application-of-mind process be carried out before the report reaches the Minister. Hence, if such officer is of the view that the detention should cease, he may so order, otherwise the detention may continue beyond the 14 days, but not more than 60 days. In *Ng Choon Mon*, it emerged that the designated officer after receiving the report, had immediately, that is to say automatically, without any interval of time, reported the circumstances of the arrest and detention of the detainees to the Minister. The designated officer therefore had acted as a rubber stamp, merely forwarding the reports to the Minister and for that reason the habeas corpus applications were allowed.<sup>30</sup>

#### *The police's pre-arrest report*

The Royal Malaysian Police (RMP) too, has a Standing Order to ensure the fair arrest and detention of a person suspected as having association with any activity relating to or involving the trafficking in drugs. An arrest under the Dangerous Drugs (Special Preventive Measures) Act 1952 shall be executed only after obtaining the approval of the Director of the Narcotics Department or its deputy. The Narcotics Department in the RMP main headquarters at Bukit Aman, which literally means 'serene hill', is located in the capital (Kuala Lumpur) and oversees police conduct in the investigation, arrest and detention of suspected drug traffickers. Typically, when information is received that any person is involved with drug trafficking (scheduled drugs), statements are taken from witnesses or from persons directly involved in drug trafficking with that person (say John). The identity of the person would be established (through intelligence) including the locality where he operates. The implication has to be direct, in that the person making it is directly involved in drug trafficking with John. Normally, statements from three persons are required, whether witnesses and or the accomplices who could implicate John. The statements are recorded by a different police officer of or above the rank of Inspector to avoid bias. The police have to make a write-up of their objectives in their application and furnish evidence to justify the arrest of John. The statements are processed and a summary of evidence or a pre-arrest report by the police is made at the state and federal level (Detention Department) before an application to the Director of the Narcotics Department at Bukit Aman is submitted for an approval to arrest John. At Bukit Aman, the Detention Department (which may also have conducted its own investigation on John) would process the application. If there is enough evidence, a minute is prepared and forwarded to the director for approval. The application will be turned down if the evidence is insufficient and reasons are provided for the rejection. If the Director approves it, he would return the minute and John could be arrested. It also follows that only the Director or

30 *Lee Guan Seng v Timbalian Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor and another application* [1992] 2 MLJ 878, High Court.

- A the deputy of the Narcotics Department could order for the release of the detainee within the possible 60-day detention period. In the latter case where the detainee is released, no report needs to be submitted to the Inquiry Officer and the Minister.<sup>31</sup> It should also be noted that a Standing Order is not an Act or Regulation and would not have any legal significance.
- B The brute power of the police to keep a person who is suspected of drug trafficking for 60 days without authorization from a magistrate, under the pretext of carrying out investigations is undeniably extreme. A 60-day detention period is excessive, given that a write-up has already been made for the purpose of the arrest. In other words, a decision to detain had already been decided upon. The suspected drug trafficker is highly likely to be detained for 60 days as a prelude to the two-year detention or restriction order. Detaining a person for 60 days for investigations is in itself an affront to human dignity when guilt is still in issue. His career, mortgage and hire purchase obligation, just to name a few, are put on the edge of a precipice. The untold damage it causes to the detainee as a person, his family and friends is indeed enormous and his innocence may never be known. To make matters worse, no compensation is given after such a significant detention period, purportedly for the purpose of investigation. It must be noted that during this period, technically no contact whatsoever with lawyers, family, relatives or employers is possible. Having no right of access to a legal counsel during the 60-day period on the pretext of investigation is indescribably extreme and more so when the police had in fact concluded investigations. To make matters worse, the place of detention is not the prison, but the police lockup, hence the facilities and the safeguards against mistreatment may not be satisfactory. Further, it is only after having spent numerous days in a detention camp, by reason of the Minister's detention order, that a detainee then gets to see his lawyer or representative for purposes of representing him before the Board. The important thing to note is that the arrest was not made for the purpose of prosecuting him in an open court, where he may be defended by a lawyer of his choice, but solely for the purpose of detaining him without trial. It is of crucial importance that the weight and admissibility of the evidence will not be scrutinized by a judge. The risk is the lack of impartiality, because the police, being an interested party may give undue weight to the evidence they obtain. Against all these backdrops, it would be naïve to hold that the arrest and detention of any person in police custody is not arbitrary.
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I 31 (1) An e-mail inquiry to Superintendent of Police Khalid Abu Bakar, Staff Operation Officer of the Narcotic Department of the Federal Territory of Kuala Lumpur (Jan 1998).  
(2) Assistant Superintendent of Police Ravichandran of Detention Department, Bukit Aman, Kuala Lumpur (March 1998).

The length of the detention period would warrant that there should be provisions to require the police to obtain authorization for further detention period. The authorization should preferably come from a High Court judge in open court. This is important because in criminal cases, the application to further detain an accused for more than 24 hours under s 28 of the Criminal Procedure Code is normally made in the magistrate's chamber (in the privacy of his office or behind closed doors) and not in open court. This practice enables the police to effectively prevent lawyers from getting notice of such application. The question arises whether the accused has been given an opportunity to see a lawyer, or whether the police had denied the accused access to legal counsel.

### *Police investigation*

The police officer making an investigation may examine any person supposed to be acquainted with the facts and circumstances of the case. The purpose of the investigation is to satisfy the Minister that a detention order under sub-s (1) of s 6 should be made and to enable the Minister to furnish a statement to the detained person of the grounds and allegation of facts upon which the order is based, so that the detained person may be able to make representations to an Advisory Board ('the Board').<sup>32</sup> A statement given by any person acquainted with the facts of the case must be signed by the maker or affixed with his thumbprint after it has been read to him in the language in which it was made and he has been given an opportunity to make any corrections.<sup>33</sup> This ensures that police officers do not concoct statements from witnesses in the course of their investigation. It is also to enable the Minister to have access to properly recorded statements, in order to satisfy himself before he makes an order.<sup>34</sup> There need not be a specifically-named investigating officer, for the police normally work in teams.<sup>35</sup>

The investigating officer shall cause a copy of the complete report of the investigation to be submitted to an Inquiry Officer (appointed under s 5) and to the Minister, within such periods as may be prescribed by the Minister by regulations made under the Act.<sup>36</sup> In the case of *Ng Choon Mon v Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor and another application*, the court held that in the absence of any regulations and time period, the submission of the investigation report to the Inquiry Officer and the Minister under s 3(3) should be done before the 60-day detention period under s 3 lapses. The Minister is not under any compulsion to do so, due to the words

32 Section 4(1) Dangerous Drugs (Special Preventive Measures) Act 1985.

33 Section 4(5) Dangerous Drugs (Special Preventive Measures) Act 1985.

34 House of Representatives, second and third reading of the Dangerous Drugs (Special Preventive Measures) Act 1984's Bill, 11 April 1985.

35 *Ng Choon Mon v Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor and another application* [1990] 1 MLJ 38, High Court.

36 Section 3(3) Dangerous Drugs (Special Preventive Measures) Act 1985. Section 2 defines 'Minister' to mean the Minister charged with the responsibility for internal security.

- A 'may be prescribed by the Minister's regulations'.<sup>37</sup> The fact that no period has been prescribed by the Minister, within which the reports are to be submitted by the investigating officer or the Inquiry Officer, does not by itself vitiate the process leading to the detention order made by the Minister. The court took note of the reasons why parliament leaves it to the discretion of the Minister to fix the period. The Minister has to take into consideration the amount of work and time that the police and the Inquiry Officer need to complete their respective investigation and inquiry. A simple and straightforward case may take a few days to complete, while a complicated one may take longer. If the Minister fixes a time period for the investigating police officer to submit his report under s 3(3) or the report by the Inquiry Officer under s 5(4), that period may not be sufficient where the case will involve lengthy investigation or inquiry and this may result in the reports not being complete, in the sense that matters which ought to be investigated or inquired into are left out. This will impose difficulty on the Minister in deciding whether to issue a detention order.<sup>38</sup> Be that as it may, it is submitted that it is technically legal for the investigating officer to submit his report, even when the suspected drug trafficker's 60-day detention period under police custody expires. That however, means that the suspected drug traffickers have to be released from police custody first when the 60-day period expires. It does not however, prejudice the Minister from subsequently making an order against them under s 6, when the requisite reports have been submitted to him. This makes more sense in ensuring that both reports should be submitted to the Minister, advisedly before the 60-day police detention expires, who then makes his decision so that there is no break in the detention process.

- F The Special Select Committee in their report did mention the concern of the public over the length of the detention period for investigation, but after a careful study of the investigation procedure, was convinced that reducing the period allowed for investigation could in fact hamper investigation and cause injustice to both the individual and society. The Committee noted the thorough and meticulous investigation procedure used by the police. It called for the cross-checking of information received, compilation of reports and preparation of statements. The Special Select Committee in fact recommended that investigation should be only for 42 days, thereafter a report should be submitted to the Inquiry Officer and the Minister. The Inquiry Officer would then have 16 days to conduct an independent investigation and submit his report to the Minister, who would then have two days to make a decision.<sup>39</sup> The Committee's recommendation for that allocation of time is to this date, non-existent.
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37 [1990] 1 MLJ 38, High Court. See also *Lock Wee Kock v Menteri Hal Ehwal Dalam Negeri & Anor* [1993] 3 MLJ 691 and *Poh Chin Kay v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* [1990] 2 MLJ 297.

38 Section 6(1) Dangerous Drugs (Special Preventive Measures) Act 1985; *Lock Wee Kock v Menteri Hal Ehwal Dalam Negeri & Anor* [1993] 3 MLJ 691, Supreme Court.

39 House of Representatives, second and third reading of the Dangerous Drugs (Special Preventive Measures) Act 1984's Bill, 11 April 1985, p 2030.

*Inquiry Officer*

The function of the Inquiry Officer is to conduct an inquiry into police investigation and submit an independent report to the Minister. The Inquiry Officer must be a legally qualified person but not a police officer.<sup>40</sup> Under s 3(2)(c) of the Dangerous Drugs (Special Preventive Measures) Act 1985, the police may detain an arrested person for a period not exceeding 60 days. During this period, the police investigating officer must complete his investigation by examining and recording statements from the arrested person and others acquainted with the facts and circumstances of the case, collect documents or other things material to the investigation, complete his report and finally, submit one copy each to the Inquiry Officer and the Minister. The Inquiry Officer, upon receiving the report, shall inquire whether there are reasonable grounds for believing that such person has been, or is associated with any activity relating to or involving the trafficking in dangerous drugs. The Inquiry Officer then prepares his report and submits it to the Minister as required under s 5(4).<sup>41</sup> In this respect, he is given wide investigating and judicial power enumerated under s 5(3) of the Act for the purpose of making his report and submitting it in writing to the Minister within such prescribed period under the Act. Again, there is an absence of regulations specifying the length of the period during which the report should be submitted to the Minister as required under s 5(4) of the Act. The legal position is the same, as in the case with the report of the investigation police officer just discussed above. The Minister is under no compulsion to make regulations specifying a time limit for the submission of the report, because of the permissive nature of the words '...as may be prescribed by the Minister by regulations...'. Submitting the report to the Minister within 60 days would however ensure that there is no break in the detention process, although it would not appear legally necessary.

In conducting his own inquiry, the Inquiry Officer has discretion on whether he needs to inquire or investigate the veracity of the investigation report by calling witnesses or requiring the production of documents. That would depend primarily on whether, having regard to the complete report and the supporting materials submitted to him by the investigating police officer, he could be satisfied that there were reasonable grounds for it. In other words, the Inquiry Officer could merely rely on the investigation report and accordingly, make his report to the Minister, if from the complete report of investigation submitted to him under s 3(3), he is satisfied that there are reasonable grounds for believing that the person has been, or is associated with any activity relating to or involving the trafficking

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40 Section 5, Dangerous Drugs (Special Preventive Measures) Act 1985; House of Representatives, second and third reading of the Dangerous Drugs (Special Preventive Measures) Act 1984's Bill, 11 April 1985; The Inquiry Officer is an officer in the Attorney General Department, assigned to the Ministry of Home Affairs.

41 See *Lock Wee Kock v Menteri Hal Ehwal Dalam Negeri & Anor* [1993] 3 MLJ 691.

A in dangerous drugs.<sup>42</sup> It should be emphasized that the Inquiry Officer's task  
is not to contradict the investigation report for the sake of contradicting, but  
to see that the report has a factual basis. The likelihood is that the Inquiry  
Officer would have to concur and submit like report, if he is not prepared  
to go to great lengths to verify the findings in the report. This could be so  
B given the fact that their numbers are so limited in relation to the  
overwhelming numbers of cases under the Act.

The Minister therefore has two reports upon which he could base his  
decision. The investigating and judicial power of the Inquiry Officer who  
conducts the inquiry into police investigation, ensures that the Minister will  
have a balanced report upon which he may base his decision. This is a  
C safeguard against police misconduct. The Minister therefore seems to play a  
passive role in the detention or restriction of any person. Further, the Minister  
would most probably give more weight to the report submitted by the Inquiry  
Officer, using it to assess the police investigation report. However, an obvious  
D risk involved in this procedure is that the Inquiry Officer and the Minister  
may simply assume the correctness of police investigations. What will  
probably happen is that the police will, in their report, emphasize that on the  
evidence they have, the detainee is involved in trafficking. The Inquiry Officer  
is likely to reproduce the investigation report because he will probably  
question the same witnesses, who will give a similar account. There is no need  
for him to conduct an independent investigation if he is satisfied with the  
E police report. Common sense suggests that the Inquiry Officer will believe the  
words of the police and police witnesses against the words of the detainee.  
The Minister would then generally agree to the police and Inquiry Officer's  
report, so that the suspect is inevitably detained indefinitely. Although an  
Inquiry Officer is a legally qualified person, he is still responsible to the  
Attorney General, who initiates prosecution at the instance of the police  
F investigations. He is also a government civil servant. Hence, in the detention  
of the suspected drug trafficker without trial, where the government has an  
interest, his independence may still be questioned. It is also not known how  
thorough the Inquiry Officer's investigations are. It is crucial that an Inquiry  
Officer should be appointed on the recommendation of the Bar Council from  
among its senior professional members. This suggestion, however sensible, is  
G however incompatible with the Bar Council's stand against preventive laws.  
The Act is not a reflection of the public will but is the will of the executive.  
Nowhere in the Special Select Committee's Report is it mentioned that the  
Malaysian Bar Council endorses the Bill. In fact, as was mentioned in the  
report, many people expressed serious concern about it. As I will explain  
later, the report by the police and the Inquiry Officer and the subjective  
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42 Section 5(3) Dangerous Drugs (Special Preventive Measures) Act 1985;  
Supreme Court case of *Inspector General of Police & Ors v Rajoo s/o Ramasamy*  
I [1989] 1 MLJ 416 and followed by the High Court in the case of *Chong Kim  
Loy v Timbalan Menteri Dalam Negeri, Malaysia* [1989] 3 MLJ 121 and *Ng  
Choon Mon v Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor and  
another application* [1990] 1 MLJ 39. The same was also decided in *Low Soon  
Mooi v Menteri Hal Ehwal Dalam Negeri & Anor* [1989] 2 MLJ 350.

satisfaction of the Minister's decision are absolutely immune from scrutiny by the detainee's representative. The fate of the suspect is sealed from the moment he is arrested and detained for the purpose of investigation.

*Detention order and restriction order*

The Minister, if he is satisfied that it is necessary in the interest of public order to detain a person, may by a detention order direct that the person be detained for a period not exceeding two years.<sup>43</sup> Alternatively, the Minister may make an order with such restrictions and conditions (restriction order) for a period not exceeding two years where detention is considered unnecessary, but is nevertheless necessary that control and supervision should be exercised, or that restrictions and conditions should be imposed upon him, in respect of his activities, freedom of movement, or places of residence, or employment.

It is worth noting that the word 'may' in s 6(1) and 6(3) indicates that the Minister is not obliged to issue a detention or restriction order, even if the reports indicated that such person has been or is associated with any activity relating to or involving the trafficking in dangerous drugs. The police investigation report does not bind the Minister. The purpose of this check and balance is to prevent arbitrary arrest by any police officers devoid of unfounded information or basis or because of personal enmity.

The subjective satisfaction of a Minister is not open to judicial review, save in regard to any question on compliance with any procedural requirement in the Act governing such act or decision. In other words, the decision of the Minister could not be attacked on the ground that he was not justified in being 'satisfied'.<sup>44</sup> The government's position was that the Minister's decision was based on the report of both the Police Officer and the Inquiry Officer. That being so, it mattered that the Minister's decision should not be something to debate upon, as the Minister had in mind the security and the harmony of the people and the country. It also ensures that the government (Executive) would not be crippled, hence ensuring that measures directed at maintaining security for the people and the country would not be ineffective.<sup>45</sup>

The expression 'has been or is associated with any activity relating to, or involving the trafficking in dangerous drugs' contained in s 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 should be read conjunctively, as both alternatives refer to one and the same object.<sup>46</sup> In *Ng*

43 Section 6(1) Dangerous Drugs (Special Preventive Measures) Act 1985.

44 Section 11C, introduced in the Dangerous Drugs (Special Preventive Measures) Act A738/89. See *Lim Thian Hok v Minister of Home Affairs* [1993] 1 MLJ 214, High Court.

45 Read the Parliamentary Debates (House of Representatives) second and third reading of the Dangerous Drugs (Special Preventive Measures) (Amendment) Act 1985, 27 June 1989, pp 128-147, at pp 130-131 and 144.

46 *Lim Thian Hok v Minister of Home Affairs & Anor and other applications* [1993] 1 MLJ 214, High Court.



A *Choon Mon v Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* and another application, the detention order omitted to state the Minister's satisfaction that their detentions *were necessary in the interest of public order*. It was held to be a defect in form only and not of substance.<sup>47</sup> Prior to  
B the detention order should be the date the order is made and signed by the  
Minister, because of the wording 'from the date of such order'.<sup>48</sup> That  
rendered the detention of suspected drug traffickers invalid, if the order  
specified that it was to take effect on a different date.<sup>49</sup> The predicament was  
overcome by revoking the order under s 11B(1) and subsequently issuing  
under s 11B(2) a fresh order of the same kind to the one revoked.<sup>50</sup>

C Section 6(5) of the Dangerous Drugs (Special Preventive Measures)  
Act 1985 gives the Minister the power to make a detention or restriction  
order against any person, notwithstanding that immediately or at any time  
before his arrest and detention for the purpose of investigation, the person  
is currently undergoing or is no longer subject to a detention or restriction  
D order under the Emergency (Public Order and Prevention of Crime)  
Ordinance 5 of 1969. The grounds for the detention may be the same as,  
similar to or different from his detention or restriction under the Ordinance.  
The reason for it is because prior to the introduction of a new s 7A in the  
Ordinance, detention or restriction was limited to two years only, whereas  
E under the Dangerous Drugs (Special Preventive Measures) Act 1985, the  
Minister can indefinitely extend the detention or restriction order for  
another term.<sup>51</sup> In making and submitting the investigation report to the  
Minister and the Inquiry Officer as required by s 3(3) of the Act, the  
investigating police officer is entitled to utilize the report already at  
hand under the Ordinance, for which such person was detained, in  
F addition to the powers to investigate given under s 4 of the Act. The latter  
is not necessary, but if resorted to, such statements shall be included in the  
report.<sup>52</sup> However, his rights to make representations to the Advisory  
Board, which shall within three months consider his representations and  
make recommendations thereon to the Yang Di Pertuan Agong (His

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- 47 [1990] 1 MLJ 38, High Court. A similar decision was given in *Chong Kim Loy v Timbalan Menteri Dalam Negeri, Malaysia & Anor* [1989] 3 MLJ 121, High Court.
- 48 Deleted by the Dangerous Drugs (Special Preventive Measures) (Amendment) Act A766/1990, with effect from 3 April 1990.
- H 49 See the Supreme Court case of *Tan Hoon Seng v Minister of Home Affairs, Malaysia* [1990] 1 MLJ 171. Followed in the High Court case of *Lim Yack Boon lwn Timbalan Menteri Dalam Negeri, Malaysia* [1990] 3 MLJ 55.
- 50 See *Chang Ngo v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor and other applications* [1990] 2 MLJ 221, High Court. See also s 6A of the Act.
- 51 Section 6(5) was introduced in the Dangerous Drugs (Special Preventive Measures) (Amendment) Act A629/1985.
- I 52 Section 3(3A) Dangerous Drugs (Special Preventive Measures) Act 1985, introduced in the Dangerous Drugs (Special Preventive Measures) (Amendment) Act A629/1985.

Majesty),<sup>53</sup> and the obligations of the Board to review his case in any event, but not earlier than 12 months from the date of the order or direction and in any case, not later than three months before the lapse of such order or direction, it is submitted, remains unaffected.<sup>54</sup>

Like the Minister, His Majesty's decision is not open to judicial review.<sup>55</sup> An anomaly would arise if the grounds of detention were similar, and another anomaly would arise if it were otherwise. If it were similar or the same, then the representations would be futile because the Board's recommendations to His Majesty could not have been any different from the previous recommendation: that the suspect is involved in the trafficking of controlled drugs. If it were different, then the grounds for the previous detention or restriction would be malicious and groundless. Also, if he is no longer subject to the detention or restriction order under the Ordinance, or has just been released, then his arrest and detention by the police on reasonable suspicion that he is involved in drug trafficking can no longer be true, as in the case of *Lee Fong Kooi*.<sup>56</sup> Such arrest and detention is therefore arbitrary and undermines the credibility of the police pre-arrest report purportedly designed to ensure that the arrest of a suspected drug trafficker is done 'justifiably'.

#### *Representations to an advisory Board*

A person issued with a detention order shall at the time he is being served with the detention order be informed of his right to make representations to the Advisory Board ('the Board') and be furnished with a statement in writing of the grounds and the allegations of fact on which the order is based and any other particulars, he may, in the opinion of the Minister, reasonably require for his representations against the order to the Board.<sup>57</sup> The above provisions of the Dangerous Drugs (Special Preventive Measures) Act 1985 is to keep in line with Art 151 of the Federal Constitution, which requires the authority ordering any detention under preventive detention law to inform the person detained as soon as possible of the grounds of his detention, the allegations of fact on which the order is based, except the disclosure of those facts which would work against national interest, and the opportunity of making representations against the order. The allegations of fact would logically refer to the report submitted to the Minister by the Inquiry Officer under s 5(4) and the investigation police officer under s 3(3)

53. Sections 9 and 10 Dangerous Drugs (Special Preventive Measures) Act 1985.

54. Section 11 Dangerous Drugs (Special Preventive Measures) Act 1985.

55. Section 11C Dangerous Drugs (Special Preventive Measures) Act 1985. See also s 6A.

56. [1990] 3 MLJ 172, High Court.

57. Section 9 Dangerous Drugs (Special Preventive Measures) Act 1985. See also s 5 Emergency (Public Order and Prevention of Crime) Ordinance 1969, which is similar.

A of the Act. The right to make a representation to the Board, however, does not accrue to person subjected to a restriction order.<sup>58</sup>

B The case of *Huzir bin Hassan v Ketua Polis Daerah, Polis Di Raja Malaysia, Johor Bahru*,<sup>59</sup> showed that the allegations of fact are privileged files, including the recommendations of the Board to His Majesty. Neither the detainee nor his lawyer will ever fully know how the police, the Inquiry Officer and the Minister arrived at the conclusion that the detainee was involved in the trafficking of drugs. In the case, the accused made two police statements, one of which was not cautioned, taken under the special provision of the Dangerous Drugs (Special Preventive Measures) Act 1985, in contrast to the other cautioned statement made under the Criminal Procedure Code.

C This was because there were two investigations simultaneously conducted, namely under the Criminal Procedure Code which resulted in the applicant being charged under s 39B (trafficking) of the Dangerous Drugs Act 1952 and also a separate investigation under the preventive measures Act, with a view to submit a report to the Minister and the Inquiry Officer. It was argued by the respondent that to allow the applicant the documents would run contrary to national interest, the document being an 'intelligence' in the fight against the drug menace, a document being equivalent to Special Branch files. The court held that s 76 of the Evidence Act (Act 56) presupposes the existence of the right to inspect and accordingly, gives a right to inspect a public document only to those having the right to inspect. Section 14 of the Dangerous Drugs (Special Preventive Measures) Act 1985 however, protects the Minister, members of the Board, the Inquiry Officer, or any public servant from having to disclose facts or to produce documents they consider to be against the national interest.

D The police officer, when serving the detention order on the person concerned, shall at the same time inform the detained person of his right to make representations against the detention order and provide him with him with two copies of Form 1 in the schedule, or three copies, if the detained person states that he intends to engage an advocate to represent him, so that if and when he appears before the Board, he will be in a position to refer to it and if he so wishes to make oral supplementation. Without his own copy, therefore, he might well be at a disadvantage in proceedings before the Board. One copy is to be kept by the detained person and the other two are to be forwarded to the secretary of the Board through the officer in charge of the police district where the detention order was served, or to the officer in charge of the designated place of detention. At the designated place of detention, the officer in charge shall again, as soon as practicable, remind the detained person of his right to make representations.

H More than one language or dialect may be used to explain or inform the detainee, so long as he understands the grounds of his detention. The

I 58 Section 9 (1) and (2) Dangerous Drugs (Special Preventive Measures) Act 1985. See also s 4(4) and 11 Emergency (Public Order and Prevention of Crime) Ordinance 1969, which are similar.

59 [1991] 1 MLJ 445, High Court.

representations in Form 1 can be in writing, stating the grounds of objections to the detention order, or the reasons why the detention order should cease. Where the form is not sufficient to contain the grounds and the reasons, it may be written on a separate piece of paper to be attached as an annexure to Form 1. The detained person may indicate in the same Form whether he intends to appear personally or through his representative or both. The secretary upon receipt of Form 1, shall appoint a time and place for the consideration of the representations by the Board and shall cause a notice thereof in Form II in the schedule to be served on the detained person and his advocate, if such advocate is named in Form 1. The detained person either in person or with his advocate or represented by his advocate, as the case may be, may address the Board orally to substantiate or amplify the grounds or reasons given in Form 1 or where none is present, the written representations made in Form 1 only. Where a detained person refuses to accept service of any document to be served on him under the Dangerous Drugs (Special Preventive Measures) Act 1985, or the regulations made hereunder, the officer in charge of the police district where the detention order was served shall forthwith inform the Secretary of such refusal and it shall be presumed that the detained person is not making any representation against his order of detention. A detained person who refuses to accept service of any document at the first instance is still entitled to request the officer in charge to serve Form 1 on him. The officer shall on such request serve three copies of Form 1 on the detained person and thereafter inform the Secretary of such service.<sup>60</sup> The applicants will be released if the grounds of their detention are not appropriately or satisfactorily explained or informed, either upon arrest, upon service of the detention order or when they are brought to the place of the detention.<sup>61</sup>

In *Puvaneswaran v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor*, the detainee was served with only a copy of Form 1 and was also informed of his right to make representations to the Advisory Board by the police officer and an investigating officer attached to the Anti-Secret Societies Department. The court held that under r 3(2), there is an obligation imposed upon the officer-in-charge of the detention centre to enquire whether he intends to engage an advocate, for unless such an enquiry is made, the officer could not possibly know whether or not to provide a detainee with two or three copies of Form 1. There was however no evidence that the officer had made an attempt to do so. A distinction was made between procedural requirements that are of direct relevance to the detention order and those that are not. If the requirements are vital and go to the root of the matter, they would be mandatory and therefore a breach thereof cannot be condoned. If the requirements are not mandatory, they would be directory only and a breach thereof could be 'condoned', provided there is substantial compliance with

60 Rules 3, 4 and 5 of the Dangerous Drugs (Special Preventive Measures) (Advisory Board Procedure) Rules 1987. See also Rule 3 of the Emergency (Public Order and Prevention of Crime) (Procedure) Rules 1972.

61 *Lim Thian Hok v Minister of Home Affairs* [1993] 1 MLJ 215, High Court.

- A the requirements read as a whole and provided no prejudice ensues. The requirements of r 3 for the delivery to a detainee the requisite number of copies of Form 1 in which the grounds for his detention appear are not just a concession, but a right designed to enable and not just to assist him in making representations to the Advisory Board.<sup>62</sup> The same was decided in *Aw Ngoh*
- B *Leang v Inspector General of Police & Ors*, following the case of *Puvaneswaran*, when one instead of the minimum two copies of Form 1 was given to the detainee. Any non-compliance with the mandatory requirements for the protection of this right would vitiate any order of detention made even if no real prejudice has ensued to the detainee.<sup>63</sup> Minor errors in the form however, will not be fatal to the detention order. Forms were made to facilitate compliance with the rules and are not substantive law where the *de minimis non-curat lex* principle is applicable.<sup>64</sup>
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*Recommendations to the Yang di Pertuan Agung*

- D The detention cannot be sustained unless the Board, on receiving the representations of the detainee, considers it and thereafter makes its recommendations to His Majesty within three months, or such longer period allowed by Him.<sup>65</sup> It should be noted that the word 'from the date of receiving the representations' means that time only starts to run when the Board receives the representations. In *Re Tan Boon Liat*, the Supreme Court
- E held that the detention under the Emergency (Public Order and Prevention of Crime) Ordinance 1969 was unlawful due to the failure of the Advisory Board to consider the representations of the detainees and make recommendations thereon to His Majesty within three months of the detention order.<sup>66</sup> In *Rajoo s/o Ramasamy v Inspector General of Police*, the court held that if any extension is to be granted, it should be granted before
- F the expiry of the period of three months because of the express injunction of Art 151(1)(b) of the Federal Constitution that no person shall otherwise continue to be detained. In this case, the representations were made on 22 May 1988 but the recommendations were made to His Majesty on 27 March 1989 upon an extension granted on 28 February 1989 by His Majesty, which was over eight months later. Therefore, the detention was
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62 [1991] 3 MLJ 28, High Court.

63 [1993] 1 MLJ 65, Supreme Court.

64 *Shaharudin bin Idris v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor and other applications* [1993] 1 MLJ 204, High Court.

H 65 Section 10(1) Dangerous Drugs (Special Preventive Measures) Act 1985. Article 151(1)(b) of the Federal Constitution requires the Advisory Board to make recommendations to His Majesty within three months from the date of representation. Section 12 of the Internal Security Act 1960 and s 6 of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 too are similarly worded.

I 66 [1977] 2 MLJ 108, Supreme Court. The word 'detention order' was amended to 'from the date of receiving such representations, or within such longer period as the Yang Di-Pertuan Agong may allow' (Act A706/88).

ultra vires the provisions of the Federal Constitution and the application for a writ of habeas corpus was granted.<sup>67</sup> The court reiterated that in preventive detention, strict compliance of the law must be a rule of thumb and a detainee in the course of his detention should take advantage of this by technically vitiating the order.<sup>68</sup> Lee Hun Hoe CJ (Borneo) in *Minister of Home Affairs, Malaysia & Ors v Datuk James Wong Kim Min*,<sup>69</sup> in a matter of preventive detention law had said:

Preventive detention is, therefore, a serious invasion of personal liberty. Whatever safeguard that is provided by the law against the improper exercise of such power must be zealously watched and enforced by the court. In a matter so fundamental and important as the liberty of the subject, strict compliance with statutory requirements must be observed in depriving a person of his liberty. The material provisions of the law authorizing detention without trial must be strictly construed and safeguards, which the law deliberately provides for the protection of any citizen, must be liberally interpreted. Where the detention cannot be held to be in accordance with the procedure established by the law, the detention is bad and the person detained is entitled to be released forthwith. Where personal liberty is concerned, an applicant in applying for a writ of habeas corpus is entitled to avail himself of any technical defects which may invalidate the orders which deprives him of his liberty.

#### *Finality of His Majesty's decision*

His Majesty, having considered the Board's recommendation, may give the Minister such directions as he thinks fit regarding the order made by the Minister. His decision shall then be final and shall not be called into question in any court or be open to judicial review, except on procedural compliance.<sup>70</sup> In *Teh Hock Seng v Minister of Home Affairs & Anor*, the court held that s 10(2) does not lay down any procedural requirements as to how or when the direction is or should be made. Therefore, it is not a procedural requirement that His Majesty must give the Minister the direction within a reasonable time and was, therefore, not open to judicial review. As such, the writ of habeas corpus was not allowed.<sup>71</sup> This was affirmed in the case of *Lee*

67 [1990] 2 MLJ 87, Supreme Court.

68 See, for example, *Tan Hoon Seng v Minister of Home Affairs, Malaysia & Anor* [1990] 1 MLJ 171, *Rajoo s/o Ramasamy v Inspector General of Police & Ors* [1990] 2 MLJ 87, *Poh Chin Kay v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor and other appeals* [1990] 2 MLJ 297, in all of which the detainee succeeded on purely procedural or technical grounds.

69 [1976] 2 MLJ 245.

70 Section 10(2) and 11(c) Dangerous Drugs (Special Preventive Measures) Act 1985; see also s 6, Emergency (Public Order and Prevention of Crime) Ordinance No 5 of 1969.

71 [1990] 3 MLJ 191, High Court. Section 11C(1) states that save in regard to any question on compliance with any procedural requirement, there shall be no judicial review in any court of and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the YDPA.

A *Fong Kooi Iwn Minister of Home Affairs, Malaysia dan satu yang lain.* The High Court, in dismissing the habeas corpus application, held that the condition that the recommendation of His Majesty has to be made within a reasonable time is not a procedural requirement that can be challenged in an application for judicial review based on s 11C(1), which only allows for judicial review to be made on any question pertaining to the compliance of the procedural requirement.<sup>72</sup> The High Court in *Zakaria bin Jaafar v Menteri Hal Ehwal Dalam Negeri & Ors* held that the communication of the directions regarding the recommendation of the Board by His Majesty to the Minister could be implied. In this case, the fact that the detention orders were extended was in itself an evidence of communication.<sup>73</sup> Although His Majesty is not bound by the recommendation of the Board, he is obliged to be bound by it considering that he appoints the members of the Board.

Technically, it is His Majesty and not the Minister who has the final say on whether a person should or should not be detained. However, the truth is that He acts on advice and is only a 'rubber stamp'. His Majesty will feel obliged to rely on the recommendation of the Board, which in turn feels obliged to rely on the report submitted by the Inquiry Officer and the police and acted upon by the Minister to detain the detainee. Like the Board, the Inquiry Officer too, has little if any reason to disagree with the report of the investigating police officer.

E *Advisory Board*

The Board consists of three members and the chairman shall be, has been or is qualified to be a judge of the Federal Court, Court of Appeal or the High Court.<sup>74</sup> This constitutional requirement lends assurance that the rules of evidence and procedures are being adhered to 'substantially' so to speak, ensuring a 'fair trial' coupled with the fact that the person detained or restricted shall have the right to be represented by an advocate. The proceeding before the Advisory Board for representations or review shall be *in camera* and decisions are arrived at by a majority of votes. In the case of a split decision due to any member of the Board refraining from voting, the determination by the chairman shall prevail. The Board may regulate its own procedure, and having regard to considerations of security, determine in its discretion whether the evidence of the witness or police officer is to be made in the presence of the detained person and or his representatives and whether any document or other information should likewise be made available or disclosed. The Board has powers for the summoning and examination of witnesses, the administration of oaths and affirmations and for compelling the production of documents.<sup>75</sup> Any detained person taken

72 [1990] 3 MLJ 172. It was also similarly held in *Liew Kim Swee v Menteri Dalam Negeri, Malaysia* [1991] 1 CLJ 53. Section 11C was introduced in the Dangerous Drugs (Special Preventive Measures) (Amendment) Act A738/89.

I 73 [1989] 3 MLJ 316.

74 Article 151(2) Federal Constitution.

75 Section 12 Dangerous Drugs (Special Preventive Measures) Act 1985.

before the Board while he is outside the place of detention is deemed to be in lawful custody.<sup>76</sup>

The criticism against the representation procedure is the apparent lack in transparency because the Advisory Board convenes behind closed doors. It is not a court and therefore the Criminal Procedure Code and the Evidence Act do not apply to it. The report of the Inquiry Officer and the police are claimed to be intelligence reports and in no way can the detainee's representative scrutinize that files that supposedly contain the allegation of facts.<sup>77</sup> That also means that the detainee's lawyer is quite at a loss as to who and what to examine or cross-examine. Further, the chairman need not necessarily be a judge, but suffice if he has been or is qualified to be one. There is also no statistic of the representations' rate of success. The Act is a deliberate barrier against seeing justice being done and goes beyond the kind of drastic measures the public had warranted. It is strongly urged here that the Board should consist of a Judge of the Court of Appeal acting as chairman and two senior criminal court registrars.

#### *Review of the order by the advisory Board*

The Advisory Board shall also review all detention orders, restriction orders or directions that are in force, but not earlier than 12 months from the date of such order or directions and in any case not later than three months prior to their expiration. The Minister may also at any time direct the Board to review any order or directions made under the Act. This would apply to cases where the Minister thinks that his decisions have not been correctly made. The Board shall submit a written report of every such review of the orders or directions to the Minister before their expiration.<sup>78</sup> At the time and place of review, the detained or restricted person may appear either in person or with his advocate, or be represented by his advocate before the Advisory Board.<sup>79</sup> The Special Select Committee in its report opined that to allocate more review would be too burdensome a task for the Board because of numerous cases. Such a course would be impractical and could result in hasty decisions being taken.<sup>80</sup>

The Minister may continue the detention or restriction for the remaining part of the two-year period, if the Board so recommends. The

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76 Rules 6, 7, 8, 9 and 10 of the Dangerous Drugs (Special Preventive Measures) (Advisory Board Procedure) Rules 1987.

77 See *Huzir bin Hassan v Ketua Polis Daerah, Polis Di Raja Malaysia, Johore Bahru* [1991] 1 MLJ 445, High Court.

78 Section 11 Dangerous Drugs (Special Preventive Measures) Act 1985. See also ss 6, 7 and 9 Emergency (Public Order and Prevention of Crime) Ordinance 1969.

79 Rule 6 Dangerous Drugs (Special Preventive Measures) (Advisory Board Procedure) Rules 1987.

80 Read the Parliamentary Debates of the House of Representatives, second and third reading of the Dangerous Drugs (Special Preventive Measures) Act 1984's Bill, 11 April 1985.



- A Board cannot, however, report to the Minister that in their opinion, the two-year maximum detention or restriction period should be extended.<sup>81</sup> The Dangerous Drugs (Special Preventive Measures) (Amendment) Act A629/1985 took away the word 'or be extended' and 'or extend' with effect from 18 December 1985. Section 11A and 11B were added, which gives the
- B Minister the power to extend or revoke his order. However, in *Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors v Chua Teck*, it was held that the Board in recommending the extension of the detention order, although ultra vires, could not in itself vitiate the Minister's detention order, as the Minister is not obligated to the report, provided that the Minister's decision to extend is not under s 11(4) but under s 11A.<sup>82</sup> Although s 11A gives the
- C Minister the power to extend an order, it was illogical for the judge in that case to suggest that the decision of the Minister was not made under s 11(4). Section 11(4) only enables the Minister to continue the order for the remaining period, but not to extend it for another term.

- D The Minister is however obliged to revoke the order if the Board is of the opinion that the detention or restriction should cease.<sup>83</sup> This provides an avenue for an early release of the detainee or restrictee. It is actually up to the Advisory Board to recommend to the Minister the cessation of the detention or restriction order. It seems that the Minister's role over the detention or restriction of any person appears passive all along. Thus, when
- E the Board in reviewing a case recommends that the order should cease, the recommendation shall bind the Minister. The review is a safeguard against unwarranted or unfounded detention or restriction of the person detained or restricted. The Special Select Committee concurred with the view that the role of the Board should not be merely advisory, as in the case of the
- F Emergency (Public Order and Prevention of Crime) Ordinance No 5 of 1969, or the Internal Security Act 1969 (ISA), because detainees under those Acts had been known to refuse to appear before the Board as they consider it a futile exercise.

- G On looking deeper, one will note that the whole exercise is a farce. The very Board that in the first place declined to recommend to His Majesty that the detainee be released, pursuant to his representations against the Minister's order, cannot be expected during the review of that order to come to an opinion that it should cease. Releasing a detainee early only fortifies the argument that the whole thing is arbitrary because his guilt cannot be proven. The opportunity to seek review provides no advantage to a detainee and only offers false hope.
- H

81 Section 11(4), Dangerous Drugs (Special Preventive Measures) Act 1985; *Lim Yack Boon v Timbalan Menteri Dalam Negeri, Malaysia & Anor* [1990] 3 MLJ 55.

I 82 [1990] 1 MLJ 104, Supreme Court. Likewise, the court in *Ng Choon Mon v Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia Anor* [1990] 1 MLJ 38 also acknowledged this legal position.

83 Section 11(3) Dangerous Drugs (Special Preventive Measures) Act 1985.

*Extension*

During the duration of the detention order, the Minister may extend it for a further period not exceeding two years, commencing immediately upon the expiration of its then current duration, but not before, on or at some other dates.<sup>84</sup> In such a case, the Minister shall set out in the direction the grounds for the extension, which need not necessarily be the same as that of the original order or the extended order.<sup>85</sup> In *Ng Choon Mon v Timbalan Menteri Dalam Negeri*, the grounds for extending the detention in the direction stated that *it was necessary in the interest of public order*. The grounds in the initial detention order had stated that the detention was aimed towards preventing the detainee from engaging in activities involving or relating to the trafficking of dangerous drug. The ground for extending the detention was held to be different and too wide-ranging in that it even encompasses subversives, foreign spies, nation wreckers and big-mouthed religious extremists as well as drug and arms traffickers. This was held to be a legal defect in that the applicant had not been told specifically the grounds for the further detention, rendering the extended detention invalid. The applicant's habeas corpus was allowed. The Court further held that in all preventive detention, any applicant could take advantage of any technicality that could render his detention invalid.<sup>86</sup>

There will not be another representation to the Board (apart from the review) if the extension is on similar grounds. In cases where the grounds for the first extension differs from the grounds of the initial detention order, or the grounds for the second extension differs from the grounds in the first extension, the detainees shall again be entitled to make representations to an Advisory Board and subsequently have his order or directions reviewed.<sup>87</sup> In *Khor Hoi Choy v Menteri Dalam Negeri, Malaysia*, the extension was on the same grounds and the court held that a second representation was not required.<sup>88</sup>

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84 Section 11A(1) Dangerous Drugs (Special Preventive Measures) Act 1985, introduced in the Dangerous Drugs (Special Preventive Measures) (Amendment) Act A629/85. See *Hong Siew Sin & Anor v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* [1990] 2 MLJ 90, Supreme Court, decided on 16 February 1990. This decision prompted a retrospective amendment to the Act by the Dangerous Drugs (Special Preventive Measures) (Amendment) Act A766/90 (s 11B), to render previous extension that commenced on a date otherwise than immediately upon the expiration of its current duration to be valid retrospectively.

85 Section 11A(aa), (bb) and (cc) Dangerous Drugs (Special Preventive Measures) Act 1985.

86 [1990] 1 MLJ 39, High Court. See also *Minister of Home Affairs, Malaysia & Ors v Datuk James Wong Kim Min* [1976] 2 MLJ 145.

87 Section 11A(3) Dangerous Drugs (Special Preventive Measures) Act 1985.

88 [1986] 2 MLJ 312. See also s 11A(3), SPMA. See also *Yap Chin Hock v Minister of Home Affairs & Anor and another applications* [1989] 3 MLJ 423, High Court.

A It should be noted that the role of the Inquiry Officer is dispensed with where the detention or restriction order is extended by the Minister. Further, the grounds for the second or third extension and so on need not be the same. In other words, the Minister, on his own motion, or at the 'instigation' of the police, may simply extend the detention without having to consult the Inquiry Officer. Further, it defies common sense to extend the order on different grounds, as it is an indication that the allegations of fact in the earlier order were a hoax and malicious. If it is extended on the same ground, what good will another review do, when the earlier review had upheld that the detention or restriction should continue?

C *Revocations*

The Minister may at any time revoke any detention order or directions, whether extended, suspended or otherwise.<sup>89</sup> In *Poh Chin Kay v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor and other appeals*, the court held that the use of the words 'any order' in s 11B(1) embraced all orders, whether valid or invalid.<sup>90</sup> This power to revoke an order is without prejudice to his power to make a fresh detention order, restriction order, or a fresh direction, in respect of the person against whom the order or direction is revoked, was made or given<sup>91</sup> and regardless of whether a fresh investigation report under s 3(3) and from Inquiry Officer under s 5(4) has not been submitted.<sup>92</sup> In *Goh Ah Bah lwn Timbalan Menteri Dalam Negeri, Malaysia dan satu yang lain*, the Supreme Court, overturning the decision of the High

89 Section 11B(1) [inserted vide Act A629/85]. See *Poh Chin Kay v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor and other appeals* [1990] 2 MLJ 297, Supreme Court and *Chang Ngo v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor and other applications* [1990] 2 MLJ 221, High Court.

90 *Poh Chin Kay v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor and other appeals* [1990] 2 MLJ 297, Supreme Court; *Tan Hoon Seng v Minister Of Home Affairs, Malaysia* [1990] 1 MLJ 171, Supreme Court; *Chang Ngo v Menteri Dalam Negeri, Malaysia* [1990] 2 MLJ 221, Supreme Court; *Lai Ah Fatt v Timbalan Menteri Dalam Negeri, Malaysia & Anor* [1990] 2 MLJ 312, High Court.

91 Section 11B(2) Dangerous Drugs (Special Preventive Measures) Act 1985, introduced in the Dangerous Drugs (Special Preventive Measures) (Amendment) Act A707/88, with effect from 19 December 1985 and later amended by Act A766/90 retrospectively on 19 December 1985. The Minister could revoke the Orders as per s 11B(1) and make a fresh order as per s 11B(2). The amendment was necessary because of the Supreme Court's decision in *Tan Hoon Seng v Minister of Home Affairs, Malaysia & Anor and other appeal* [1990] 1 MLJ 171, which held that it is not permissible under s 6(1) of the Act for the Minister to specify a commencement date of detention or restriction different from the date of the detention or restriction order. See also the Supreme Court cases of *Hong Siew Sin v Menteri Hal Ehwal Dalam Negeri & Ors* [1990] 2 MLJ 90 and *Poh Chin Kay v Minister for Home Affairs* [1990] 2 MLJ 297.

92 Section 6A(2), with effect from 3 April 1990, inserted vide Act 766/1990 SPMA. See *Goh Ah Bah v Timbalan Menteri Dalam Negeri & Anor and other appeals* [1991] 1 MLJ 495, Supreme Court.

Court, held that a fresh order or fresh direction made under s 11B (2) must correspond with the original order or direction revoked. A fresh detention order therefore may be made only to replace a detention order that was revoked and a fresh restriction order or direction may be made only to replace a restriction order or direction revoked. In other words, a fresh direction can be issued only to replace an existing direction that has been revoked.<sup>93</sup> However, where the Minister proposes to make an order under s 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985, instead of the saving provision of s 11B(2) which would be the case where the fresh order or fresh direction does not correspond with the original order or direction revoked under s 11B(1), then the report of the investigating police officer and the Inquiry Officer cannot be dispensed with.<sup>94</sup> In the latter case, the right to make representations and to a review by the Advisory Board under s 9, 10 and 11 respectively shall again accrue to such person.

As can be seen, the claim that the Board's report during a review to cease the order is binding on the Minister is in reality a sham. The Minister can easily make a fresh detention or restriction order despite having revoked the same.

*Jointly and severally*

Section 22(3) and 23<sup>95</sup> of the Dangerous Drugs (Special Preventive Measures) Act 1985 have the effect of providing for the use of rules, regulations and directions under the Emergency (Public Order and Prevention of Crime) Ordinance No 5 of 1969 with such modifications as deemed expedient for the purposes of the Act, until such time when it is revoked or replaced by rules, regulations or directions of the Act itself. Section 25 states that the Act is in addition to and not in derogation to the

93 [1991] 1 MLJ 495. It was likewise earlier decided by the High Court in *Chew Phang Oo v Timbalan Menteri Dalam Negeri, Malaysia* [1991] 1 MLJ 58.

94 See *Goh Ah Bah v Timbalan Menteri Dalam Negeri & Anor and other appeals* [1991] 1 MLJ 495, Supreme Court; *Chew Phang Oo v Timbalan Menteri Dalam Negeri, Malaysia* [1991] 1 MLJ 58, High Court; *Poh Chin Kay v Menteri Hal Ehwal Dalam Negeri, Malaysia* [1990] 2 MLJ 299, Supreme Court, where a fresh investigation report under s 3(3) and fresh inquiry report under s 5(4) would be needed in a case where the detention order or direction is made afresh [s 6(1) or 6(3)], in contrast to a fresh detention order, restriction order or direction made under the saving provisions of s 11B(2), where it could be dispensed with. The same was also decided in *Lai Ah Fatt v Timbalan Menteri Dalam Negeri, Malaysia & Anor* [1990] 2 MLJ 312, High Court and *Chang Ngo v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor and other applications* [1990] 2 MLJ 221, High Court.

95 Section 23 was inserted by the Dangerous Drugs (Special Preventive Measures) (Amendment) Act A629/1985, with effect from 15 June 1985 (retrospective). Earlier, the High Court had on 28 September 1985, in *Khor Hoi Choy v Menteri Dalam Negeri, Malaysia & Ors* [1986] 312, held that it was wrong for the Advisory Board to follow or adopt the Public Order and Prevention of Crime (Procedure) Rules 1972.

- A Ordinance.<sup>96</sup> This means that any person who is associated with any activity relating to or involving the trafficking in dangerous drugs could be lawfully detained under both laws. Thus, it is naïve to hold that the Act is a sunset legislation. It in fact bolsters the Ordinance in detaining suspected drug traffickers without trial. It follows that the non-extension or the demise of the Act makes no meaning whatsoever, if its twin, the Ordinance, remains in full force and effect.
- B

### *Analysis*

- C The use of preventive laws is repugnant, by any standard. There is little, if any justification for having them, much less for using them, whether then or now for the purpose of combating drug trafficking. It defies human rights and perpetuates human wrong to do so. The safeguarding provisions on arrest and detention, the investigations, the report by the police and the Inquiry Officer, the Minister's order, the representations and review are only a smokescreen. It is an Act that by the subtle turn and twists of its provisions attempts to hide its repugnancy from public outcry. The right to a fair trial and the presumption of innocence is paramount and sacred and should be part of the way forward in eradicating the drug problem. It has been shown above that the system deprives suspected traffickers of the opportunity of having a fair hearing and provides them with few meaningful opportunities to appeal. That such an Act has been extended again for the third time beyond May 2000 for another five-year term is a reflection of the ineffective enforcement of drug laws, namely the Dangerous Drugs Act 1952 and the Dangerous Drugs (Forfeiture of Property) Act 1988, sluggish treatment and rehabilitation strategies and lack of preventive education. Therefore, the fact of not charging a person who is suspected of involvement in the trafficking of drugs under the Dangerous Drugs Act 1952 in itself raises the suspicion that the prosecution's case obviously has not a better than even chance of conviction, if the person is charged and tried under the Act.
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- G The lack of transparency and accountability in justifying an arrest and detention only encourages complacency, inefficiency and high-handedness on the part of the police when enforcing the law against drug trafficking. The truth of their allegations or case cannot be verified or tested. The purported safeguards only ensures that 'justice is seemed to be done' and not the oft-quoted slogan 'justice must be manifestly seen to be done'.

- H There are in fact more than adequate provisions in the Dangerous Drugs Act 1952 to secure a conviction if proper investigations are

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I 96 Inserted in the Dangerous Drugs (Special Preventive Measures) (Amendment) Act A629/1985, with effect from 15 June 1985 (retrospective), *Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor v Mohd Zamri b Mohd Arrifin* [1990] 1 MLJ 102, Supreme Court. See also the case of *Re Tan Boon Liat* [1976] 2 MLJ 83.

conducted. The higher degree of standard of proof in a criminal case is understandable, given the gravity of the charge and the consequences of the punishment and it applies to all criminal cases. It is consistent with the presumption of the accused's innocence until proven guilty. An accused is entitled to an acquittal, should there exist any reasonable doubt in the prosecution's case. The Dangerous Drugs Act 1952 has taken these matters into account by relaxing the procedures and evidence for purposes of investigation and proof. Sections 36 to 37A of the Dangerous Drugs Act 1952 relate to evidence. The burden of proof that one has a licence, authorization, exception or defence lies on him.<sup>97</sup> The use of presumption to aid proof is basically in s 37. Section 37(d) presumes (until proven otherwise) that a person who has dangerous drugs in his custody or control has possession and knows the nature of such drug. If the prosecution proves that the defendant has custody or control of the dangerous drugs, the onus is then on the accused to rebut the presumption on the balance of probabilities that he was not in possession of the dangerous drugs or that he did not know the nature of such drug.<sup>98</sup> The typical police power with respect to search, entry, seizure, inspection and various presumptions to aid proof were available well before 1983 under the Act. Bail has generally been made unavailable to a suspected offender since 1978. In 1983, offences under the Dangerous Drugs Act 1952 were deemed as seizable (arrestable), which requires no warrant of arrest. The credibility of the evidence of agents provocateur was provided for in 1977 and protection to informers was also already available. Evidence by way of interception of communications was made admissible in 1983. Thus, the police force has at its disposal all of the state of the art technological equipment to do overt and covert investigations, surveillance and so forth for evidence purposes. All these provisions would in all probability facilitate investigations. If drug traffickers are a main threat to the society, it makes more sense then to charge and prosecute them under the Dangerous Drugs Act 1952. On conviction, they will be put away for good; after all the punishment of offences under the Act carries lengthy custodial sentence and therefore has more deterrent effect. The prosecution should also distinguish the offence of possession from that of trafficking. While it may be true that more often than not, possession of the physical evidence would be necessary where an accused is charged with the offence of possession, the case is not the same where the accused is charged with trafficking. Physical possession is just one element of evidence. A case of trafficking can be proven against the accused even without possession of the physical evidence through other modes of proof such as testimonial, documentary and circumstantial evidence.

In 1988, the Dangerous Drugs Act (Forfeiture of Property) Act 1988 was enacted. The forfeiture Act makes it an offence to use any property for purposes of any drug trafficking activities and the laundering of illegal

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97 Section 36 Dangerous Drugs Act 1952. See also ss 105 and 106 of the Malaysian Evidence Act.

98 *PP v Yuvaraj* [1970] AC 913.

A proceeds of drugs trafficking. The punishment is between five and 20 years, hence like the Dangerous Drugs Act 1952, this Act provides stiffer penalties than the preventive Act. The then Deputy Home Minister, when tabling the forfeiture Bill, stated that preventive detention is not effective. The preventive Act was again extended by the House of Representatives on 25 April 2000 and by the Senate on 11 May 2000 for the third time and it is now due to expire in 2005. It was again conceded in the motion that the number of cases received under the preventive Act has not decreased.

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C Given that no country has yet identified an effective deterrent against drug trafficking, the focus must be upon the financial rewards of crime in tandem with prosecution under the Dangerous Drugs Act 1952. Under the forfeiture Act, any person who deals with properties with a view to promote and establish drug trafficking activities, or directly or indirectly launders such properties, knowing or having reason to believe that such property or any part thereof is the illegal proceeds of drug trafficking shall be guilty of that offence and shall be sentenced to imprisonment for a term between five and 20 years. The properties that are the subject matter of the offence are likewise confiscated. Further, the forfeiture Act identifies the drug traffickers' criminal assets in order to facilitate their confiscation. This makes it no longer safe for drug traffickers and financiers to deposit bags full of cash into bank accounts, or live luxurious lifestyles with no apparent source of legitimate income. Such suspicious behaviour would be reported to the proper authorities. Malaysia's Dangerous Drugs (Forfeiture of Property) Act 1988 and the Money Laundering Act 2001 that was recently passed criminalize the laundering of drug proceeds.

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F Malaysia subscribes to the 1998 Vienna Convention against Illicit Traffic in Narcotics Drugs and Psychotropic Substances and fully acknowledges the growing menace of international crimes and its associated money laundering operations (particularly in the area of drug trafficking). These demonstrate the need for mutual legal assistance and require parties to take legislative and administrative measures to promote cooperation.<sup>99</sup> Malaysia sees international cooperation as one positive way to combat the drug problem, which is a global problem. The Asia Pacific Group on Money Laundering ('the APG') was established in Bangkok and is based in Sydney, Australia. The APG currently consists of 19 member states and also has several 'observer' jurisdictions. Malaysia became an APG member on 31 May 2000 and hosted the APG 4th Annual General Meeting on 22 May 2001.<sup>100</sup> It reflects Malaysia's commitment to curbing money laundering within Malaysia and in the Asia Pacific region, in consonance with the Financial Action Task Force ('the FATF') on Money Laundering that was founded in July 1989 by the G7 Summit in Paris to examine measures to

99 See Art 7.1 and 2.1 respectively of the 1988 Vienna Convention against Illicit Traffic in Narcotics Drugs and Psychotropic Substances.

I 100 Mandarin Hotel, Kuala Lumpur. See the welcome remarks by Y.Bhg. Dato Dr Zeti Akhtar Aziz, Governor, Bank Negara (Central Bank) Malaysia - [www.bnm.gov.my/spch/22001/0522.htm](http://www.bnm.gov.my/spch/22001/0522.htm).

combat money laundering. Although Malaysia is not a member of the FATF, the APG is an FATF-style regional group having identical aspirations and objectives.

The Dangerous Drugs Act 1952 and the Dangerous Drugs (Forfeiture of Property) Act 1988 must synchronize their punishments to deliver a better deterrent effect. In combination with the proportionate punishment relative to the offence under other drug laws, they should strike at the point where it hurts most, namely profits from supply, however small. This approach ensures better security to society. It preserves the view that drug misuse and drug activities are offences which must be stopped, while at the same time recognizing that the confiscation of the proceeds of drug trafficking is essential, as funds removed from circulation cannot be reused to finance further criminal enterprises. It also removes the incentive to commit crime.

Finally, the Dangerous Drugs Act 1952 is a coherent piece of legislation and provides a more than adequate system, procedurally and evidentially, to deal with drug offenders and to curb and eradicate the drug menace. It facilitates investigations and aids the admissibility of evidence. There is a trial in accordance with criminal procedure and the law of evidence in force against any person charged for a drug offence. Good legislation is one thing, but the efficacy, ingenuity, resourcefulness, professionalism and sufficiency of manpower of the authorities in enforcing it is another. Effective enforcement is often thought to be the best deterrent; heavy penalties do not work well if there is a real prospect of not getting caught. The lack of the above qualities might somehow explain why the Malaysian government suggests that 'the way forward' lies instead in the use of preventive detention and excessively severe drug laws in terms of detection, enforcement and punishment.

The Human Rights Commission of Malaysia in its maiden Annual Report for 2000, which was tabled before the Parliament, acknowledged and emphasized that detention without trial constitutes an infringement of Arts 3, 9 and 10 of the Universal Declaration of Human Rights 1948.<sup>101</sup> The Commission in its Annual Report concluded that there must be a more transparent and accountable government that protects and promotes human rights. Detention without trial is one of several issues that the Commission has identified as deserving of priority attention.

Note: It is assumed that the figures in 1998 represent only arrests made by the authorities.

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101 Article 3 (the right to life, liberty and security of person), Art 9 (the right against arbitrary arrest, detention or exile) and Art 10 (the right to a fair trial in determining his rights and obligations and of any criminal charge against him).