MANDATORY DETENTION AND TREATMENT OF DRUG USERS IN MALAYSIA: THE IMPLICATIONS FOR THE PRINCIPLES OF HUMAN RIGHTS.

A Thesis Submitted For the Award of the degree of Ph.D In Law, University of Kent (March 2010)

Sarina bt. Mohamed

ABSTRACT

The research framework is founded upon a critical analysis of the extent to which the legal process involved in the mandatory treatment and rehabilitation of drug users in Malaysia is consistent with the principles of human rights according to the national and international human rights instruments; the Malaysian Constitution and the UDHR respectively. The mandatory treatment is based upon the principles of punishment rather than rehabilitation. The arrest and detention of these drug users, which are salient features of the legal process raises the issue of serious violations of the human rights principles. To fulfill the true objective of the government's Drug Intervention Programme (DIP) through treatment and rehabilitation at *Puspen* centres, by reducing drug dependency and preventing relapse, treatment must be consistent with the principles of human rights for it to be effective. Data and information were gathered from empirical research through the application of various qualitative methods: these include a case study, direct observation, semi-structured and unstructured interviews with key stakeholders, focus group with former drug users and an analysis of case files. Findings revealed that the legal process of funneling 'suspected drug dependants' into treatment involved a series of breaches of the fundamental human rights principles that could not be justified. The scope of police powers with regard to the arrest and detention of 'suspected drug dependants' has been widely abused and such exercise of power has been without proper statutory safeguards to protect the rights of these individuals from such arbitrary arrest. Unnecessary prolonged period of detention have led to grave infringement of individual liberty whilst conditions of confinement and failure to provide medical assistance and medication-assisted treatment particularly during withdrawal symptoms have amounted to inhuman, cruel and degrading treatment. Lack of due process including denying the right to legal representation has caused severe legal implications upon the drug users. As a consequence, the flaw in the legal system has deprived them of their constitutional rights and in contravention of the international human rights principles. Recommendations are proposed for an immediate reform to the drug policies and procedures with paramount consideration towards a more humane and effective treatment.

ACKNOWLEDGMENTS

This research project would not have been possible without the support of many people. I would like to express my utmost gratitude to my supervisor, Professor Steve Uglow who was incredibly helpful and offered invaluable assistance, support and guidance that made this thesis become a reality. He will always be my mentor.

Special thanks also to Dr. Alex Stevens for sharing the literature and invaluable guidance throughout the duration of my study. My deepest gratitude to Lynn Risbridger for always being so supportive and accommodative; my friends Dr. Intan Murnira Ramli and her husband Sufian Jusoh who helped me during my most crucial moments; Ryoko Matsuno, Titi Rahmawati, Norbasheerah and her husband Fauzi, Mariciel, Melanie, Miranda and Jacqueline for simply being wonderful friends.

I wish to express my love and gratitude to my beloved family; my husband Long Md Nor Amran bin Long Ibrahim for always being there for me and my children Aliff, Aisyah, Ariff and Afiq who have all shared the great and bitter times together, whose constant love and understanding have kept me going.

I would also like to convey my thanks to the Ministry of Higher Education, Malaysia, Universiti Sains Islam Malaysia and the National Anti Drugs Agency for providing me with the financial means and necessary assistance in regards to the research project. Not forgetting also to Suriati and Ummi for making this thesis into a printable copy.

I would like to dedicate this thesis to my parents Hj Mohamed bin Hashim, Wan Nor Khasnah bt. Mohamed and my brother Mohamed Shariff bin Mohamed.

In loving memory of my mom Latifah bt. Abdullah...

TABLE OF AUTHORITIES

Malaysian Cases

International Cases

Malaysian Statutes

International Statutes

Treaties

International Declarations

TABLE OF ABBREVIATIONS

AADK	National Anti-Drugs Agency Malaysia
AHRC	Asian Human Rights Commission
AIR	All India Reporters
All ER	All England Law Report
ASEAN	Association of Southeast Asian Nations
BIONADI	National Drug Information System using Biometric Technology
B U L Rev	Boston University Law Review
BYU J Pub L	Brigham Young University Journal of Public Law
CLJ	Current Law Journal
Colum L Rev	Columbia Law Review
CPC	Criminal Procedure Code
Crim Just Rev	Criminal Justice Review
DST	Drug Substitution Treatment
DTTO	Drug Treatment and Testing Order
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EWDTS	European Workplace Drug Testing Society
GC	Gas Chromatography
GC/MS	Gas Chromatography/ Mass Spectrometry
HIV/AIDS	Human Immunodeficiency Virus/ Acquired Immunodeficiency Syndrome
HKL	Hospital Kuala Lumpur

HPLC	High Performance Liquid Chromatography
HRW	Human Rights Watch
IHRA	International Harm Reduction Association
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
INCB	International Narcotics Control Board
MLJ	Malayan Law Journal
MMT	Methadone Maintenance Treatment
NDP	Malaysian National Drugs Policy
NIDA	National Institute on Drug Abuse
PACE	Police and Criminal Evidence Act 1984
QCT	Quasi-Compulsory Treatment
RMP	Royal Malaysian Police
SUHAKAM	National Human Rights Commission of Malaysia
TLC	Thin Layer Chromatography
UDHR	Universal Declaration of Human Rights
UNAIDS	Joint United Nations Programme on HIV/AIDS
UNDCP	United Nations Drug Control Programme
UNGASS	United Nations General Assembly 20th Special Session
UNODC	United Nations Office on Drugs and Crime
UNICEF	The United Nations Children's Fund

U Pa L Rev	University of Pennsylvania Law Review
U Pitt L Rev	University of Pittsburgh Law Review
WHO	World Health Organisation

TABLE OF CONTENTS

Tables and Diagrams

Chapter 3

Chapter 5

Chapter 6

CHAPTER 1: INTRODUCTION

1. Aims and methodology

For the past 27 years, illicit drug use and addiction have been regarded by the Malaysian government as a security problem and a threat to the development and well being of the nation.[1] In 1983, the government officially declared that the drug abuse problem had become so serious that it could reach epidemic proportion if no strict measures were taken to curb it. As a result, the Malaysian National Drugs Policy (NDP) was implemented in the same year. The 1983 drug policy was later revised in 1996, in line with the United Nation's stance towards combating the drug problem, by incorporating a multi-faceted anti-drug strategy of the 'reduction of supply and demand' based on a consolidated and integrated approach, encompassing four main areas of concern: prevention through measures such as drug preventive education and dissemination of information on the dangers of drug misuse; enforcement through law enforcement agencies such as the police and customs; the compulsory treatment and rehabilitation of drug users; and strengthening regional and international cooperation.

The research project examines the extent to which the compulsory treatment of drug users in Malaysia is consistent with the fundamental principles of human rights. The research project has focused on the legal process of the compulsory treatment of drug users in Malaysia, in line with the laws and practices of arrest and detention under the Criminal Procedure Code (CPC) within the Malaysian criminal justice system. To deal adequately with the

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[1] National Narcotics Agency, *Kenali Dan Perangi Dadah* (1st edn Ministry of Home Affairs, Kuala Lumpur 1997).

research problem, it is necessary to address the issues that would be raised in accordance with the relevant stages of the legal process namely - arrest stage; detention stage and court proceedings.

The research framework is founded upon a critical analysis of the fundamental human right issues based on data and information gathered from the researcher's own empirical work. This would incorporate the rights of a drug user under relevant national and international human rights jurisprudence. Thus, the benchmark for this research project would be based upon national and international human rights standards, guaranteed under the Malaysian Constitution (the Constitution) and the Universal Declaration of Human Rights (UDHR)[2] respectively. Other relevant international instruments such as the International Covenant on Civil and Political Rights (ICCPR)[3] and the International Covenant on Economic, Social and Cultural Rights (ICESCR)[4] are also referred to. An analogy is also drawn from the European Convention on Human Rights ECHR.[5]

This research project employs the 'case study' method that involved a range of research methods leading to the collection of qualitative rather than quantitative data. Invaluable data were able to be collected from semi-structured and unstructured interviews with key stakeholders who were directly involved in the legal process for bringing drug users for compulsory treatment. These key stakeholders represent various government agencies such as the National Anti-Drugs Agency (AADK), Narcotics Division Royal Malaysian Police (RMP),

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[2] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A (III).
[3] ICCPR (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.
[4] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.
[5] European Convention on Human Rights (signed Rome 4 November 1950, entered into force 3 September 1953).

Pathology and Psychiatric Departments of the Hospital Kuala Lumpur (HKL) and the magistrates' court in Kuala Lumpur. A focus group facilitated by the researcher was also organised amongst former and recovering drug users (participants) in order to gain an insight of the participants' personal experience and perception of the police and the criminal justice system. Case files were also retrieved from the magistrates' court as secondary data.

2. The compulsory treatment of drug users

In 1983, a specific legislation, the Drug Dependants (Treatment and Rehabilitation) Act (1983 Act) was passed as an anti-drugs measure, which was implemented as part of the NDP to reduce the demand for illicit drugs. The objectives of the 1983 Act are to eliminate drug dependency and prevent relapse amongst drug users categorised as 'drug dependants'. The said Act laid down the legal procedures within the criminal justice system to funnel drug users to undergo treatment and rehabilitation at government run rehabilitation centres *vis-à-vis* a court-mandated order. Prior to 2009, these rehabilitation centres were referred to as the `one-stop' centre or known as the *Serenti* centres. The *Serenti* centres then changed their names to the *Puspen* (*Pusat Pemulihan Penagihan Narkotik*) centres.[6]

Compulsory or legally coerced treatment in the form of a court order is controversial by itself in that it falls within the realm of the criminal justice system. Arguably, the criminal justice system has been regarded as ideally placed to target drug treatment interventions because of the large number of problem

[6] The English translation for *Puspen* is the 'Narcotic Addiction Rehabilitation Centre'.

drug users that exists within it.[7] Hough asserts the criminal justice system as an important `conduit' through which drug offenders with drug problems are brought into treatment.[8] In a more recent review of the literature on coerced treatment, findings show that some drug intervention programmes within the criminal justice system can be effective in reducing illicit drug use and offending behaviours'.[9] Hall defines legally coerced drug [and alcohol] treatment as 'treatment entered into by persons charged with or convicted of an offence to which their [alcohol] or drug dependence has contributed'.[10] There is consistent evidence from empirical studies that coerced drug treatment within the criminal justice system achieves the same level of benefit as those engaged in voluntary treatment.[11] For instance, coerced treatment results in longer treatment retention of drug offenders; the longer the period in treatment, the better the outcome, and the greater the possibility to become abstinent.[12] Furthermore, coercing drug dependant offenders into treatment has been proven to be more cost effective than sentencing them to imprisonment. According to Stevens, coerced treatment can either be used as an alternative to imprisonment or diversion to treatment. The only difference is that the alternative to imprisonment is regularly used for drug offenders who have been convicted and would otherwise go to prison, whereas diversion to treatment applies at a very much earlier stage, ie pre-trial

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[7] James Inciardi cited in Robert MacCoun, Beau Kilmer and Peter Reuter, 'Research on Drugs-Crime Linkages: The Next Generation' www.ncjrs.gov/pdffiles1/nij. accessed 28 April 2007.

[8] Michael Hough, 'Problem Drug Use and Criminal Justice: A Review of the Literature' (1996) Central Drugs Prevention Unit, Home Office London.

[9] Tim McSweeney, Paul J.Turnbull and Michael Hough, 'The Treatment and Supervision of Drug-Dependent Offenders. A Review of the Literature Prepared for the UK Drug Policy Commission' (2008) Institute for Criminal Policy Research, King's College London.

[10] Wayne Hall, 'The Role of Legal Coercion in the Treatment of Offenders with Alcohol and Heroin Problems' (1997) p. 103, Australian and New Zealand Journal of Criminology 30 (2).

[11] *Hough, (n 8).*

[12] Anglin and Hser cited in M.Douglas Anglin, Michael Prendergast and D.Farabee, 'The Effectiveness of Coerced Treatment for Drug Abusing Offenders' (1998) Paper presented at the Office of National Drug Control Policy's Conference of Scholars and Policy Makers, Washington, DC March 23-25.

stage.[13] For example, in 2005 the UK government introduced 'Tough Choices' for testing on charge Class A drug users, required assessment and restrictions on bail as part of the government's strategy to tackle the illicit drug use and drug-related crime provide various options to drug offenders.[14]

3. Fundamental principles of human rights

Basically, Article 5 (1) of the Constitution states that 'no person shall be deprived of his life or personal liberty save in accordance with law'. In line with the Constitution, Article 3 of the UDHR guarantees that 'everyone has the right to life, liberty and security of the person'. Similarly, such a right is guaranteed also under Article 5 (1) of the ECHR where 'everyone has the right to liberty and security of person'. Amongst the provisions in the ICCPR that are of present interest are; where 'any person whose liberty is deprived, he or she shall be treated with humanity and with respect'.[15] Another important provision is found in Article 12 of the ICESCR, which states that 'every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity'.

4. Treatment must be consistent with the principles of human rights

In spite of the arguments in favour of compulsory treatment, these arguments are constantly being contested and not as convincing as suggested. The element of coercion underlying compulsory treatment has raised ethical dilemmas that

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[13] Statement by Alex Stevens, (Personal email correspondence 17 May 2007).
[14] *McSweeney, Turnbull and Hough, (n 9).*
[15] ICCPR, Art 10 (1).

involve 'a serious diminution in autonomy and liberty'.[16] Stevens et al argue that treatment for drug dependence is only consistent with human rights when the person gives their informed consent'.[17] Thus, treatment could not be more intrusive than the traditional criminal justice system and should not compromise the rights of a drug user.[18] Gostin propounds that for coerced treatment to be effective and ethical at the same time, there must be due process, client agreement and the period of treatment should not be longer than the punishment would have been for the offence committed.[19]

5. Classification of drugs

In Malaysia a 'dangerous drug' means any drug or substance which is for the time being comprised in the First Schedule'[20] and is regulated under the Dangerous Drugs Act 1952 (1952 Act). There are approximately 169 types of dangerous drugs listed under the First Schedule. The most commonly abused drugs in Malaysia are heroin, morphine, cannabis, amphetamine, methamphetamine and ketamine.

In the UK, illegal drugs are termed as 'controlled substances' under the Misuse of Drugs Act 1971 and are categorised into three classes – class A, B and C. Class A drugs are those considered to be the most harmful. Class A drugs include ecstasy, LSD, heroin, cocaine, crack, magic mushrooms (whether prepared or fresh), methylamphetamine (crystal meth) and other amphetamines if

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[16] Lawrence O.Gostin, 'Compulsory Treatment for Drug-dependent Persons: Justifications for a Public Health Approach to Drug Dependency' (1991) The Milbank Quarterly, Vol 69 No 4.
[17] Stevens et al,'On Coercion' (2005) International Journal of Drug Policy 16, 207-209.
[18] Melissa Bull, 'Just Treatment: a review of international programmes for the diversion of drug related offenders from the criminal justice system' (2003) A report prepared for the Department of the Premier and Cabinet, Queensland. School of Justice Studies QUT.
[19] Gostin cited in Alex Stevens, 'QCT Europe-Review of the Literature in English' (2003) EISS University of Kent www.kent.ac.uk/eiss/projects/qcteurope/papers.html.
[20] 1952 Act, s 2.

prepared for injection. Whilst cannabis, amphetamines, Methylphenidate (Ritali), Pholcodine are classified as class B drugs. Class C drugs are tranquilisers, some painkillers, GHB (Gamma hydroxybutyrate) and ketamine.

In the US, the most commonly abused drugs such as marijuana and cocaine are regulated under the Controlled Substance Act (CSA). Drugs of abuse are classified under five different Schedules – Schedules I, II, III, IV and V. For example, marijuana and heroin are listed under Schedule I whilst morphine and cocaine are listed under Schedule II.

6. Organisation of thesis

The research study has been divided into seven chapters. In order to provide a background to the issues and discussions highlighted in the research project, Chapter 2 begins by examining the typologies of drug use amongst the drug user population. A review on the international literature, focusing on previous studies of the compulsory treatment of drug offenders in other countries, such as the United States, England, Scotland and Australia is done as an analogy to the drug-using population in Malaysia. Following the above, the chapter will look at the type of treatment programmes implemented by the USA and the United Kingdom. Also, the chapter will consider the national and international studies on the compulsory treatment of drug users or drug offenders in providing effective treatment, and whether it is consistent with the principles of human rights guaranteed under the Constitution and the international human rights instruments. At the same time, this chapter also reviews the international literature, mainly on studies done in the USA, UK and Australia on drug use and

crime, in order to have a better understanding of the link between the two issues, which represents a gap in the Malaysian empirical research.

Chapter 3 provides a narrative description of the historical evolution of drug abuse in Malaysia, beginning from the opium trade in the 18th century. The evolution of drug abuse continues with the exodus of the Chinese immigrants to Southeast Asia and Malaysia as labourers in the late 19th century, which brought along the problem of opium addiction to the Malay Peninsula among the older group population. The 1970s depict heroin as the drug of choice among the youth generation, which sees a transitional change from opium addiction as discussed earlier. The rise in amphetamine-type-stimulant (ATS) abuse in Malaysia as the 21st century drug problem will also be considered. The second part of the chapter will examine in detail the Malaysian National Drugs Policy, including the relevant drug laws such as the Dangerous Drugs Act 1952 and the Drug Dependants (Treatment and Rehabilitation) Act 1983 and the formation of Association of Southeast Asian Nations (ASEAN). This will be followed by a discussion on the rhetoric 'War on Drugs' and the recent paradigm shift taken by the Malaysian government towards a more rehabilitative approach.

Chapter 4 will address the issues surrounding involuntary detention or civil commitment of drug users in Malaysia through the establishment of the *Puspen* centres. This chapter begins by examining the use of civil commitment and its rationales, particularly in the USA. It also considers the criticisms brought about by its practice especially in regards to the fundamental liberties of those who have been committed by the state. Based on the arguments that have put forward, the chapter concludes with a critical analysis on whether the Malaysian civil commitment is justified under the human rights provisions, specifically

those contained in the Malaysian constitution. A comparison is drawn with those countries whose human rights obligations are provided under the ECHR.

Findings from the research project derived from the case study are presented in Chapter 5, which also explains about the research methodology employed by the researcher in regards to the case study. A second part of this chapter will deal with the drug testing procedure under the compulsory treatment of drug users in Malaysia and the extent to which its compliance with the Ministry of Health, Malaysia's guidelines. Reviews of the Malaysian case laws are also discussed in the chapter.

Chapter 6 lays down the arguments with regard to the research problem, with a detailed account of the extent to which the legal procedures under the compulsory treatment of drug users in Malaysia are consistent with the principles of human rights. As has been mentioned earlier, focus will be particularly on areas of law and practice that constitute breaches of fundamental human rights principles enshrined in the Constitution and other international instruments. Those areas of concern are restriction on the right to liberty; inhumane, cruel and degrading treatment; and lack of due process. An analogy is also drawn from cases dealt by the European Court of Human Rights (ECtHR).

Finally, Chapter 7 concludes the research project's findings and analysis, and lists down the recommendations put forward by the researcher.

7. Concluding remarks

As a conclusion, it is hoped that this research project would be able to fill in the gap within the current empirical literature on the legal procedure involved in the compulsory treatment and rehabilitation of drug users in Malaysia. It is of utmost

importance that the Malaysian government as well as the judiciary uphold the principles of human rights enshrined in the Constitution and the international human rights instruments – UDHR, ICCPR and the ICESCR. Fundamental breaches of the human rights principles should not be tolerated. In order to safeguard the rights of drug users, the statutory provisions under the 1983 Act must be consistent with the principles of human rights. It is hoped that empirical data and information derived from this research project may be able to assist future research in the related areas involving the legal process of the compulsory treatment and rehabilitation of drug users in Malaysia.

CHAPTER 2: INTERVENTIONS WITH DRUG USERS. WHAT WORKS, WHAT DOESN'T WORK, WHAT'S PROMISING? A LITERATURE REVIEW

1. Introduction

This research project deals with drug addiction in Malaysia and the government's punitive prohibition approach in combating it. In order to eliminate drug dependence amongst its drug user population, the government has adopted the compulsory treatment and rehabilitation approach to its drug intervention (treatment) programme ie 'zero tolerance' or 'total abstinence'. According to the Drug Dependants (Treatment and Rehabilitation) Act 1983, a drug user who is categorised as a 'drug dependant is 'a person who through the use of any dangerous drug undergoes a psychic and sometimes physical state which is characterised by behavioural and other responses including the compulsion to take the drug on a continuous or periodic basis in order to experience its physic effect and to avoid the discomfort of its absence').[1] However, the revolving door syndrome of drug users who receive treatment at government drug rehabilitation centres, known as *Puspen,* over the past 27 years has made a mockery to the Malaysian government's drug intervention programme, which has been an essential component of the National Drugs Policy (NDP) to eliminate drug dependence and prevent relapse. According to a study by the United Nations Office on Drugs and Crime (UNODC), Malaysia's government drug rehabilitation centres, which have been categorised as 'military-style boot camps', have an '80 per cent relapse rate', but the figure is most likely to be '100 per

[1] 1983 Act, s .2

cent'.[2]

In Malaysia, the compulsory or mandatory treatment and rehabilitation of drug users is regulated within a legal framework and the criminal justice system. The Malaysian criminal justice system is based upon a traditional adversarial approach, encompassing the standard elements of crime, responsibility and punishment. As such, the elements of coercion and punishment form an important component in the compulsory treatment programme.

Coercion is an essential feature of the criminal justice system[3] but, when linked to allegedly rehabilitative programmes, it may well lead to controversies or ethical dilemmas[4] involving 'a serious diminution in autonomy and liberty'.[5] Regardless of the benefits derived from treatment, if it is administered under compulsion, it represents an intrusion into the rights and liberties of an individual. Thus, compulsory treatment raises the issue of infringing the fundamental principles of human rights as enshrined in the Constitution as well as in international instruments such as the UDHR, ICCPR and ECHR.

The data and information gathered from the research project's empirical work were used as a basis for a critical analysis of the Malaysian legal procedure with regard to the rights of a drug user under both the relevant domestic and also the international human rights jurisprudence. There have been several local studies, mainly focusing on measuring the efficacy of the treatment and rehabilitation

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[2] Nick Crofts, 'Drug Treatment in East and South East Asia: the need for effective approaches' (2006) UNODC Technical Resource Centre for Drug Treatment and Rehabilitation Australia.
[3] Philip Bean, *Drugs and Crime* (Willan Publishing, Cullompton 2002).
[4] Michael Hough, 'Problem Drug Use and Criminal Justice: A Review of the Literature' (1996) Central Drugs Prevention Unit, Home Office London.
[5] Lawrence O.Gostin, 'Compulsory Treatment for Drug-dependent Persons: Justifications for a Public Health Approach to Drug Dependency' (1991) The Milbank Quarterly Vol 69 No 4.

programme which adopts a multidisciplinary approach, a combination of the 'tough and rugged' and psychosocial.[6] However, very few of them have examined the legal process under the drug intervention programme (DIP) that involves the detention and disposition of drug users who come into contact with the criminal justice system. [7] It is these issues that will be discussed in the following chapters. Thus, the purpose of this literature review is to explore the insights of international studies on the mandatory treatment of drug users, in particular to those who have been arrested and in contact with the criminal justice system.

The chapter begins by examining the typologies of drug use within the drug user population. The research project will refer to previous studies done in the UK as an analogy to the drug-using population in Malaysia. Since the above section will incorporate some discussions on the drugs-crime nexus, the second section will review the international literature, mainly on studies done in the USA, UK and Australia specifically on drug use and crime in order to have a better understanding of the link between the two issues. It must be noted here that very few empirical research have been done in Malaysia with regard to this. Thus, a general understanding of the relationship between drug users and crime will be an essential part for future research. Third, the chapter will then go on to discuss the use and effectiveness of coerced treatment within the criminal justice system. The fourth section describes the Malaysian treatment programme and some of the treatment programmes that are being implemented by different countries such as Singapore,

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[6] Mahmood Nazar Mohamed, *'Rawatan dan Pemulihan Dadah di Malaysia: Cabaran Masa Kini'* (2004) *Kertas Ucaputama di Seminar Kebangsaan Pemulihan Penagihan dan Pengurangan Beban Dadah: Amalan Masa Kini,* Quality Hotel, Kuala Lumpur.

[7] Statement by Mahmood Nazar Mohamed Deputy Director of Operations, AADK Putrajaya Malaysia (Personal communication 8 December 2006).

Thailand, the UK and the USA, and compare them with the Malaysian compulsory treatment programme. Finally, the fifth section will conclude whether such treatment programmes are consistent with the principles of human rights.

2. Typologies of drug use

The effectiveness of government interventions in relation to drug misuse will vary considerably depending on the type of drug users being targeted. It is suggested in this research project that the Malaysian coercive approach is one that adopts a 'one size fits all' and is therefore less likely to be effective. The implication of a positive urine test is 'an automatic admission' to a *Puspen* centre. Reid and Costigan argue that based on the Joint United Nations Programme on HIV/AIDS (UNAIDS) and United Nations Drug Control Programme (UNDCP) reports on Malaysia, 'a person's drug use ranging from experimental and non-dependant to regular and dependent does not alter the involuntary treatment response'.[8] Thus, the treatment programme in Malaysia must be able to 'identify' the type of drug users suitable for treatment at the very beginning of the drug assessment process. This very important aspect that is lacking in the Malaysian DIP will be explored in greater detail in Chapter 5 of the research project. Therefore, it necessary to review the literature on typologies of drug use of other countries. These studies have also associated drug use with the element of crime.

[8] Gary Reid and G.Costigan, 'The Hidden Epidemic Revisited: A Situation Assessment of Drug Use in Asia in the Context of HIV/AIDS' (2002) p.131, The Centre for Harm Reduction, Fairfield Australia.

According to the AADK report,[9] there are two categories of drug users detected under the National Drug Information System using the biometric technology (BIONADI)[10] – new drug users (who are registered for the first time) and repeat drug users (who have been registered before). Between January and November 2009, 2,899 drug users were detected and the average ratio between these two categories is 5 new drug users to 4 repeat drug users. It was reported that the young adult population is the most at risk group, which represents 74.01 per cent of the total drug users detected during that period. The age group between 25-29 years old has the highest number of drug users (22.11 per cent), adult (23.56 per cent) and teens (2.43 per cent). The most popular reason for taking drugs, according to the report, is due to peer-group pressure (52.05 per cent). This is followed by experimental reason (18.38 per cent) and pleasure (15.66 percent). The drugs of choice reported are heroin (35.81 per cent), morphine (32.36 per cent), ATS (16.52 per cent) and cannabis (11.49 per cent).[11] However, the report did not state the type of drug use ranging from either experimental and non-dependant to regular and dependent. It can be assumed though that the repeat drug users may fall under the dependent category since they have been caught by the BIONADI more than once. However, as for the new drug users, they could either be experimental drug users or even problematic drug users who have not been detected before by the criminal justice system. Thus, it is essential that the BIONADI have a system, which can

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[9] National Anti-Drugs Agency Malaysia (AADK) report (November 2009).
[10] *'Pelaksanaan Sistem Maklumat Dadah Kebangsaan Berasaskan Biometrik (BIONADI)'. Arahan Pentadbiran AADK/PTM/1/2009* 31 March 2009 www.adk.gov.my/pdf/pekeliling/bionadi/PekelilingPTM.pdf accessed 20 February 2010.
[11] *AADK report (n 9).*

differentiate between experimental or recreational drug users and problematic drug users.

As to-date, Malaysia does not have official government statistics that link drug users with crime rates across the country. It has always been perceived that drug-related crimes are more associated with drug users than offenders who do not use drugs. Thus, it is pertinent to look at studies conducted in other countries. For example, in 2002, Hough, Sweeney and Turnbull conducted a review on drug use and crime in Britain.[12] The review suggested that basically there are four categories of drug users; overall population, known offending population, problem drug-using population and the criminally involved drug user population.

According to the above review, illicit drug use is common among the younger generation with cannabis and ecstasy as the drug of choice. This group represents approximately four million 'regular illicit drug users in Great Britain'.[13] This type of drug use is referred to as controlled recreational drug use. Wincup distinguishes recreational drug use from either experimental, or problematic drug use. Recreational drug use is more confined to cannabis and 'dance drugs'. They are not compulsive users and are able to control their drug use.[14] According to a 2000 survey by the British Crime Survey (BCS), 50 per cent of the population between the ages of 16 and 29 would have experienced recreational drug use at some time in

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[12] Michael Hough, Tim McSweeney and Paul Turnbull, 'Drugs and Crime: What are the links?' (2002) Evidence to the Home Affairs Committee Inquiry into Drugs, London www.drugscope.org.uk.
[13] ibid.
[14] Emma Wincup, 'Drugs, alcohol and crime' in Hale et al. (eds), *Criminology* (Oxford University Press, Oxford 2005) 203-222.

their life.[15] In contrast, there is a small minority who are problematic drug users ie dependent on drugs such as heroin or crack/cocaine.

According to Bean, the most commonly used drugs such as cannabis, amphetamines, heroin, cocaine, LSD and ecstasy may involve both recreational and problematic drug users.[16] But the majority of recreational use involves cannabis. Some recreational users may have used ecstasy but rarely used drugs such as heroin and crack.[17]

As for the drug users who are in the known offending population, Hough, Sweeney and Turnbull categorise them as drug users who are 'persistently involved in crime' and in contact with the police. According to the NEW-ADAM survey, 'property crime such as theft, burglary, robbery, handling stolen goods, drug dealing and undeclared earnings while claiming social security benefits' have been found to be the main sources of illegal income amongst the arrested persons who tested positive for illegal drugs.[18] Although the survey concluded that there was a link between the illicit use of heroin and crack/cocaine and offending, the authors argue that this is not conclusive because the samples used are small and drug test results need 'cautious interpretation'.[19]

The problem drug using population represents a small minority group of the total population of drug users in the UK ie less than five per cent of the regular drug users.[20] This category of drug users is heavily dependent on drugs such as heroin,

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[15] Ramsey et al cited in *Hough, McSweeney and Turnbull, (n 12).*
[16] *Bean, (n 3).*
[17] *Bean, (n 3).*
[18] Bennett cited in *Hough, McSweeney and Turnbull, (n 12).*
[19] *Hough, McSweeney and Turnbull, (n 12).*
[20] ibid.

crack/cocaine or amphetamines and is likely to be heavily involved in acquisitive crime.[21] According to the National Treatment Research Study (NTORS), more than half of the sample of opiate dependent users who sought treatment had reported being involved in crime prior to treatment.[22] According to the Advisory Council on the Misuse of Drugs (ACMD), 'problem drug misusers' are defined as:

> anyone who experiences social, psychological, physical or legal problems related to intoxification and/ or regular excessive consumption and/or dependence as a consequence of his/her own use of drugs or other chemical substances'.[23]

Hough, Sweeney and Turnbull suggest that problematic drug users are more involved in illicit drug use and property crime than other types of drug user. These problematic drug users tend to be associated with Class A drugs and have offending behaviours which could lead them to be in contact with the criminal justice system.[24] Problematic drug users are the ones most at risk of having serious health problems. With the increase of HIV/AIDS cases among drug users, the definition was extended to include 'anyone whose drug misuse involves, or could lead to, the sharing of injection equipment'.[25] The risks faced by problematic drug users are overdose, contracting viral infection such HIV and hepatitis, psychiatric and social problem with spouses and other family members. In 1986, a study was conducted on 164 injecting drug users (IDUs) who attended an Edinburgh clinic. Tests that were carried out 'for the presence of antibodies to the Human Immunodeficiency Virus (HIV)' indicated that 51 per cent of the respondents had become infected with the

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[21] *Hough, McSweeney and Turnbull, (n 12).*
[22] Gossop cited in *Hough, McSweeney and Turnbull, (n 12).*
[23] ACMD, Home Office UK.
[24] *Wincup, (n 14).*
[25] *Hough, (n 4).*

virus.[26]

According to Hough, those drug users with serious problems of dependency need substantial sums of money to finance their drug use. The drug habit 'locks' problematic drug users into acquisitive crimes and their criminal behaviour and drug using run parallel with each other.[27] Hough cited several studies in Britain - Edmunds et al, Parker and Bottomley and Hearnden et al, [28] which showed that a majority of dependent drug users spent more on drugs than what they earned as their legitimate income. As a result, their drug supply is funded through illegal activities such as theft, shoplifting, benefit fraud, loans often at exorbitant rates of interest, selling property, prostitution, drug dealing and other acquisitive crimes. Nevertheless, it would be wrong to assume that the drug use led to criminal activity or indeed vice versa. It is a complex picture and there are other causal factors that may contribute to this issue such as childhood upbringing, educational background and lack of job opportunities.[29]

As mentioned above, a study by Edmunds et al of a sample of 205 problematic drug users who had come into contact with the criminal justice system reported that the most common crimes committed are shoplifting (55 per cent), burglary (32 per cent) and selling drugs (34 per cent). A substantial number of the drug users (respondents) have previous convictions, with an average of 19

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[26] Neil McKeganey, 'Drug Abuse in the Community: Needle-Sharing and the Risks of HIV Infection' in Cunningham-Burley S. and McKeganey, *N.P.Readings in Medical Sociology* (Routledge, London 1990).
[27] Michael Hough 'Drug User Treatment within a Criminal Justice Context' (2002) Substance Use and Misuse Vol 37 Nos 8-10.
[28] Edmunds et al; Parker and Bottomley; Hearnden et al cited in *Hough (n 27).*
[29] *Hough, (n 27).*

convictions. Thus, it was concluded that most repeat offenders such as convicted prisoners or probationers have a serious problem with drug misuse.[30]

Finally, Hough, Sweeney and Turnbull identify the most chaotic end of the spectrum of problem drug users, that is, criminally involved and problematic drug users who have recently come into contact with the police. This group differs from the problematic drug users described above in that these drug users have a long criminal history prior to their drug-using career. They are mainly polydrug users with heroin and crack as drugs of choice. Most of them have been convicted for property crimes shoplifting and burglary. For instance, drug-using offenders on probation in London tend to spend a large amount of money on their drug habit, with an average of £362 a week prior to arrest.[31]

Looking at the Malaysian perspective, in particular to the research project, the primary focus will be on the non-recreational drug users. As has been mentioned earlier, there is a need to distinguish between recreational or experimental drug users and drug dependant users. This is because the drug dependant users are presumably the problematic ones and may be involved in criminal activities. As propounded by Hough, Sweeney and Turnbull (above), the drug habit 'locks' problematic drug users into acquisitive crimes.[32] However, at present, there is a lack of empirical research in Malaysia to link drug dependant users to the rising crime rate in the country.

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[30] Edmunds et al; Parker and Bottomley; Hearnden et al cited in *Hough (n 27).*
[31] *Hough, McSweeney and Turnbull, (n 12).*
[32] *Hough, McSweeney and Turnbull, (n 12).*

Since the above section has incorporated several useful discussions on the drugs-crime nexus, the next section will continue to examine the issue within more specific studies.

3. Link between drug use and crime

Contemporary researchers and drug policymakers recognise that the problem of drug addiction is a major contributor to many countries' high crime rate.[33] In many countries, including Malaysia, possession of illegal substances itself constitutes a criminal offence. This leads to a high price for drugs and hence, the addictive behaviour of drug users may lead them to committing crimes, such as petty thefts to illegally finance their drug supply. In more serious cases, these drug users also get involved in robbery, assault, or burglary.

In Malaysia, Abdul Rashid et al reported that 85 per cent of the drug users who had undergone treatment at *Puspen* centres suffered from relapse upon being released from the centres after completing their two year-programme.[34] The study reported that a majority of them had to leave their jobs when they were admitted into treatment at *Puspen*. Some of them who were interviewed reported that they had to resort to crime such as 'snatch theft, selling drugs, fraud, house breaking and homicide' after being released from *Puspen* simply to support themselves and their family. This reason could not be totally accepted as findings from the study revealed that most of them got themselves involved in criminal activities in order 'to support

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[33] G.Kothari, J.Marsden and J.Strang, 'Opportunities and Obstacles for Effective Treatment of Drug Misusers in the Criminal Justice System in England and Wales' (2002) The British Journal of Criminology Vol 42 No 2.

[34] Abdul Rashid et al, 'A Fifty-Year Challenge in Managing Drug Addiction in Malaysia' (2008) REVIEW JUMMEC Vol 11 No.1.

their addictive habit'.[35] Although there has been no official statistics on the link between drug use and crime, it may be argued that the tendency to commit crime may be related to the economic need to buy drugs through illegal income since most of them have been left jobless without any legal income.

Nonetheless, with the perception that drug users are usually associated with criminal activities, even though they have not committed any offence, they are regarded as criminals by society.[36] In this regard, the Malaysian government's response towards illicit drug use through the compulsory treatment programme has been punitive and repressive. This controversial issue will be the main thrust of this research project and will be discussed at greater length in the succeeding chapters.

The question is, can the rise in crime rates across the country be associated with drug users who have been in contact with the criminal justice system? Since there is a gap in the Malaysian empirical research with regard to this issue, there is a pressing need for further research to be done on the drugs-crime link. Thus, it is worth to look at various international studies on drug use and crime in order to gain a better insight on the two issues.

According to Bean, not all drug users are offenders and not all offenders are drug users. There may be an overlap but they are not identical populations.[37] Kaye et al assert that drug users are 'a heterogeneous group, within which drug use may

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[35] ibid.
[36] Mazlan et al, 'New Challenges and Opportunities in Managing Substance Abuse in Malaysia' (2006) Drug and Alcohol Review 25.
[37] *Bean, (n 3).*

either be a cause or consequence of criminal activity, varying between and within individuals over time.'[38]

Goldstein puts forward the hypothesis that some drug users engage in 'economically oriented crime' solely or mainly to finance their expensive drug use.[39] Since heroin and cocaine are expensive substances, drug users are primarily motivated to obtain money to buy these drugs. Goldstein refers to Bingham Dai's study of criminal records of over 1000 opiate addicts in Chicago. The finding revealed that 'the most common offenses for which these addicts were arrested were violations of the narcotics laws and offences against property'.[40]

In 1971, according to the US Bureau of Narcotics and Dangerous Drugs (BNDD), a large proportion of those arrested for theft were drug users. A study conducted by Hughes, Crawford, Barker, Schumann on hard-core addicts within the heroin using community revealed that 33 per cent of the respondents sell drugs to finance their drug use, 38 per cent commit non-drug related crime to support their drug habit, whilst 29 per cent depend primarily on legitimate income to buy drugs for self-use. The study also concluded that the majority of the heroin users were also drug dealers comprising of both 'big time' and street drug dealers. Some of the drug users also act as bag followers and touts who sell drugs on the street to other drug users. [41]

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[38] Kaye et al cited in Best et al, 'Crime and Expenditure amongst polydrug misusers seeking treatment: The connection between prescribed methadone and crack use, and criminal involvement' (2001) British Journal of Criminology 41.
[39] Paul J.Goldstein, 'The Drugs/Violence Nexus; A Tripartite Conceptual Framework' (1985) Journal of Drug Issues 15.
[40] ibid.
[41] P.T.Hughes, G.A.Crawford, N.W. Barker and S.Schumann 'The Social Structure of a Heroin Copping Community' (1971) American Journal of Psychiatry 128 (5): 43-50.

Nonetheless, in 1974, Gould argued that the relationship between drug use and crime has been based solely on common sense grounds and not on empirical evidence, and that the assumed relationship 'surprisingly has little direct evidence in its support'.[42] Gould quoted a report by the President's Commission on Law Enforcement and Administration of Justice[43] which commented that data gathered on the relationship between drug addiction and crime 'are fragmentary, tangential and often of dubious quality. The simple truth is that the addict's or drug users' responsibility for all non-drug offences is unknown'. [44] Thus, Gould claimed that, as possession of drugs is a crime, people are reluctant to divulge any information that may incriminate them. He added further that 'information about a person's addiction status does not usually become known to outsiders until that person has come into contact with a medical or law enforcement agency'.

According to Inciardi and McBride, in order to study the relationship between drugs and crime, researchers must focus 'within common parameter definitions' to establish the types of criminal behaviour.[45] For example, crimes against persons include homicide, manslaughter, rape, assault and battery. As for property crimes, they involve breaking and entering, larceny, auto theft, arson, vandalism and receiving stolen goods. On the other hand, victimless crime includes prostitution and gambling. Under the drug legislation, crimes that involve violation of the laws are possession or sale of dangerous drugs.

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[42] Leroy Gould, 'Crime and the Addict: beyond common sense' in James A. Inciardi and Carl D.Chambers (eds), *Drugs and the Criminal Justice System* (Sage Publication, Beverley Hills, California 1974).
[43] Task Force on Narcotics and Drug Abuse (1967) cited in *Gould, (42)*.
[44] ibid.
[45] Inciardi and McBride cited in Duane C. McBride and Clyde B. Mc Coy 'The Drugs-Crime Relationship: An Analytical Framework (1993) The Prison Journal, Vol 73 No 3.

McBride and McCoy posit that each drug has its own chemical structure and psychopharmacological effect. Thus, a particular drug such as opium, cocaine or marijuana could cause a drug user to have different types of criminal behaviour. Therefore, based on past history and current research, the major arguments in support of a drugs-crime relationship put forward by the authors are as follows:

a. The rate of drug using is high among the criminal population; and

b. There is a greater frequency of criminal activities amongst street drug users.[46]

3.1 Drug use amongst the criminal population

In the 1950s, it was reported that most of the prison inmates in the USA were drug users and that drug use was 'a component of a criminal culture'.[47] The 1960s and the 1970s saw the USA experiencing a drug epidemic with large numbers of cases of drug overdose, of drug related arrests and of treatment admissions.[48] This eventually led to various studies on drug use in the 1970s. In a study conducted by Mc Bride, more than half of the arrested persons and prison inmates had used marijuana and/or heroin.[49] Findings from other research also indicated the existence of the connection between drug use and crime. The era saw the advent of drug treatment interventions within the criminal justice system.[50] According to the Bureau of Justice Statistics,

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[46] Duane C. McBride and Clyde B. Mc Coy 'The Drugs-Crime Relationship: An Analytical Framework (1993) The Prison Journal Vol 73 No 3.
[47] Anslinger and Tompkins cited in *McBride and Mc Coy (n 46).*
[48] O'Donnell and colleagues cited in *McBride and Mc Coy (n 46).*
[49] McBride cited in *McBride and Mc Coy (n 46).*
[50] National Institute on Drug Abuse (NIDA) cited in *McBride and Mc Coy (n 46).*

more than 40 per cent of the state prison inmates in the USA had used illicit drugs before committing the offence that led to their incarceration.[51]

3.2 Frequency of criminal activities amongst street drug users

Surveys between the late 1960s and the early 1970s among the drug using population also showed that a majority of them had criminal records.[52] A study by McBride and Inciardi found that more than half of the drug users had been in prison before with 45 per cent had been incarcerated within the last 6 months.[53] In another study done by Inciardi et al, of street-injection users revealed that more than two-third of them had been incarcerated in the last five years with some still on parole.[54]

According to the USA National Household Survey, there is an overlap between drug using and criminal behaviours amongst the general population. Thus, based on empirical research, consistent results have shown that individuals who frequently use illicit drugs get involved in criminal activities.[55] In summing up, Mc Bride and Mc Coy conclude that findings from empirical research reveal that drugs-crime relationship is well founded. Nonetheless, Bean argues that such research must not be given too much weight in establishing a link between crime and drug use as the studies lacked control groups and the samples sizes were small.[56]

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[51] US Department of Justice cited in *McBride and Mc Coy (n 46).*
[52] Defleur and colleagues; Voss and Stephens cited in *McBride and Mc Coy (n 46).*
[53] McBride and Inciardi cited in *McBride and Mc Coy (n 46).*
[54] Inciardi et al cited in *McBride and Mc Coy (n 46).*
[55] NIDA cited in *McBride and Mc Coy (n 46).*
[56] *Bean, (n 3).*

A Home Office research[57] of arrested persons was done in five areas in England over a two-year period. 622 urine specimens were collected from the arrested persons. Findings showed that more than 50 per cent of the samples tested positive for illicit drugs. 46 per cent tested positive for marijuana, 25 per cent for alcohol, 18 per cent for opiates, 12 per cent for benzodiazepines, 11 per cent for amphetamines, 10 per cent for cocaine, and 8 per cent for methadone. 46 percent of those arrested reported that their drug use had some kind of connection with the offence they had committed. The main reason for their criminal activity was to find money to buy drugs. More than 40 per cent of the arrested persons said that they were polydrug users. Surprisingly, only one in five had ever received some kind of drug treatment for their drug problem. Hough claims that although drug use is rampant among those who were involved with the criminal justice system most of them did not get any help in regards to their drug dependence, health or other socio-economic problems.[58]

Bean and Wilkinson conducted a study on class A drug users in Nottingham.[59] Findings suggested that the 'drug use leads to crime' model involves an element of 'enslavement'. The authors argued that it cannot be determined for certain the types of crime committed by class A drug users but it is certain that drugs themselves caused the users to resort to crime, be it through 'economic necessity or growing out of norms and values of a drug subculture'.[60] The study also showed that

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[57] Trevor Bennett, 'Drugs and Crime: The Results of Research on Drug Testing and Interviewing Arrestees T Bennett' (1998) Home Office Research 183, Home Office London.
[58] *Hough, (n 4).*
[59] Philip T.Bean and Christine K.Wilkinson, 'Drug Taking, Crime and Illicit Supply System' (1988) British Journal of Addiction, 83: 533-539.
[60] ibid.

a number of drug users in Nottingham had relatively long periods of drug use prior to conviction. 20 out of the 37 users were taking drugs two years or more prior to their first conviction. Less than half had convictions before their drug use began. Thus for roughly half the users, criminality preceded drug use where as the reverse held true for the other half.

Research in the 1980s showed that robbery provided 'a ready access to cash' to fund heroin dependent offenders' drug use.[61] According to Chilvers and Doak, in the 1990s robbery has been marked as the most common crime committed in Australia amongst heroin dependent offenders.[62] In a study of drug use among police detainees by Makkai, Fitzgerald and Doak, findings indicated that drug use was widespread among these detainees. More than half of the respondents (detainees) who provided urine samples tested positive to at least one drug with cannabis and opiate as the drug of choice. [63] Other research has found that there is some kind of link between drug misuse and crime, although not a direct one. In a review by the Australian New South Wales Bureau of Crime Statistics and Research (BOCSAR) on drugs and property crime, it concluded that people who commit property crime have a tendency to be disposed to illicit drugs:

> The mere concurrence of illicit drug use and property crime, is not enough to vouchsafe the conclusion that illicit drug use causes property crime. It is possible that individuals disposed to involvement in crime are simply also disposed to illicit drug use.[64]

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[61] NSW Bureau of Crime Statistics and Research, *Robbery, final report* (Sydney 1987).
[62] Marilyn Chilvers and Peter Doak, P., *Drug Crime Prevention and Mitigation: A Literature Review and Research Agenda* (New South Wales Bureau of Crime Statistics and Research, Attorney General's Dept, Sydney 2000).
[63] Toni Makkai, Jacqueline Fitzgerald and Peter Doak, 'Drug Use Among Police Detainees Crime and Justice, (2001) Crime and Justice Bulletin No 49 www.lawlink.nsw.gov.au/lawlink/bocsar.
[64] *Chilvers and Doak, (n 62).*

The following sections will look at studies done on the Malaysian compulsory treatment programme as well as other countries' treatment programmes. From there, the chapter will continue to examine whether these programmes are consistent with the principles of human rights.

4. The use and effectiveness of 'coerced' treatment in the criminal justice system

4.1 Malaysia

Malaysia's compulsory treatment and rehabilitation programme is run by the government funded drug rehabilitation centres (*Puspen*), drug users are being treated within an institutionalised setting rather than community-based. As has been mentioned earlier in the Introduction section, Malaysia's compulsory treatment programme, which is based on coercion and punishment, has produced a very high relapse rate among its trainees. Thus, this section will examine the issues that have been raised by several local and international studies.

A review on the international literature revealed that there was little discussion as to the scientific basis for the introduction and evaluation of Malaysia's compulsory treatment programme. One of the most recent studies conducted by UNODC criticised the programme as being punitive and repressive, subject to prolonged period of detention and penalties instead of providing effective treatment.[65] As well as and perhaps as a result of being non-effective, the treatment programme has also led to certain harmful effects such as:

- Reinforce reason for drug use

[65] *Crofts, (n 2).*

- Build stronger peer groups – especially young
- Promote HIV and HCV transmission
- Lead to corruption of staff [66]

These above issues are not new but have been raised before in previous local studies. For example, in 1992, an evaluation study of the Tampin *Serenti (Puspen)* drug rehabilitation centre concluded that the twin-concept of the 'tough and rugged' and psychosocial approach had a negative impact on the delivery of the treatment programme as a whole. Conflicting philosophies arising from the twin-concept had led to physical abuse by the military staff and resentment by the trainees. Findings from the study revealed that 64.1 per cent of the respondents had returned to drug use within eight months after leaving the centre. The most common reasons for using drugs again reported were 'mixing with bad company, emotional problems and lack of will-power to abstain from drugs'.[67] The lack of opportunities after release such as finding a suitable job and minimal assistance by service providers in reintegrating former drug users into the community have also been said to contribute to the high relapse rate. In 2007, Vicknasingam and Mazlan reported that relapse rates of trainees within the first year of release from *Puspen* centres were between 70 to 90 per cent.[68] This was not surprising as the 'tough and rugged' approach is not an appropriate method of rehabilitating drug users. It must be highlighted here that the approach is still being practised in the *Puspen* centres. Such approach is similar to

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[66] ibid.

[67] V.Navaratnam, Foong Kin and Kulalmoli S, *An Evaluation Study of the Drug Treatment and Rehabilitation Programme at a Drug Treatment Centre* (Centre for Drug Research Monograph Series 7, Universiti Sains Malaysia, Penang 1992).

[68] B.Vicknasingam and Mahmud Mazlan, 'Malaysia Drug Treatment Policy: An Evolution from Total Abstinence to Harm Reduction' National Centre for Drug Research, University Sains Malaysia, Substance Abuse Research Centre, Johor, Malaysia (accessed through personal email correspondence 16 December 2007).

the shock incarceration programmes conducted in the USA during the 1990s, which was 'based on the US military's basic training (boot camps)' and were 'designed for young adult offenders, which were regarded an alternative to a longer term in prison'. According to a study by Bowery:

> An area of major concern for some researchers is that shock incarceration programmes are based on the 'traditional' military model which is no longer used by the US military. This earlier "traditional" military model had some highly unsatisfactory elements which have been discarded by the US military. As well there is appropriate method for deterring and rehabilitating young adult offenders.[69]

The prevalence of HIV among IDUs is very high in Malaysia. According to the Malaysian Ministry of Health, between 1986 and 2000, 76 per cent of all HIV/AIDS cases reported, were among IDUs.[70] It was reported that trainees in *Puspen* centres who were infected with HIV were being segregated but due to space contraints, the centres were not able to segregate trainees who have both the HIV and tuberculosis (TB) infections.[71] In a study on HIV risk reduction and HIV prevention in Malaysia, Chawarski asserts that Malaysia's drug prevention programme, which emphasised on 'criminal penalties' has failed and this resulted in a 'growing interest to explore medical treatment options, including agonist maintenance'. He proposed several recommendations to improve the 'criminal treatment of drug abuse' as follows:

- Provide "local evidence" of improved efficacy of medication maintenance over detoxification only"

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[69] Margaret Bowery, *Shock Incarceration in the US. A Literature Review* (Research Digest No 3, NSW Department of Corrective Services, Australia 1991).
[70] Ministry of Health Report cited in Gary Reid, Adeeba Kamarulzaman and Sangeeta Kaur Sran, 'Malaysia and harm reduction: The challenges and responses' (2007) International Journal of Drug Policy 18, 136-140.
[71] Gary Reid, Adeeba Kamarulzaman and Sangeeta Kaur Sran, 'Malaysia and harm reduction: The challenges and responses' (2007) International Journal of Drug Policy 18, 136-140.

- Train addiction specialists, drug counsellors, and other medical personnel
- Help expand access to treatment and improve treatment availability.[72]

The issues that have been raised above can be summarised as follows – Malaysia's compulsory treatment is based on a punitive and repressive approach. The treatment programme compels drug users to be detained for a long period of time. However, long retention did not prove to be an effective measure in ensuring the success of treatment. Due to the failure in providing effective treatment, this has eventually led to a revolving door syndrome amongst the *Puspen* trainees ie high relapse rate. As a result, treatment has done more harm than good – drug users return to their old habit in misusing drugs. The situation is made even worse with the high prevalence of HIV among IDUs. However, the above studies did not mention about a possible link between drug use and criminal activities amongst these drug users.

What does the research literature, especially that from the US and UK, tell us about the effectiveness of such coercive measures and, indeed, its ethical and legal basis? These points are discussed below.

4.2 International studies

Coercion is synonymous with the criminal justice system but exists at different levels of severity. Anglin et al. argue that the terminology found in the literature describing 'coerced treatment' constantly varies and has been used interchangeably, such as 'compulsory, mandated, involuntary, legal pressure and criminal justice

[72] Marek C.Chawarski, 'Behavioral Interventions for HIV Risk Reduction and HIV Prevention: An International Perspective' Yale University School of Medicine USA accessed 25 October 2008.

referral'.[73] Anglin et al further explain that drug users who are funneled into treatment coercively experience 'varying degrees of severity' at various stages of the legal process.[74]

Hall defines legally coerced drug (and alcohol) treatment as 'treatment entered into by persons charged with or convicted of an offence to which their (alcohol) or drug dependence has contributed'.[75] Thus, contemporary researchers suggest that the criminal justice system can be an 'important conduit' through which drug users with serious drug problems reach treatment.[76] It was reported that more than half of referrals to community-based treatment programmes in the US came from the criminal justice system.[77] According to De Leon, compulsory treatment is a `legal mechanism' for changing the behaviour of antisocial substance abusers[78] and that the criminal justice system is seen as 'ideally placed to target drug treatment interventions because of the large number of problem drug users that exists within it'.[79]

In the USA, referrals from the criminal justice system contribute approximately half of the clients who enter community-based treatment programmes.[80] Anglin, Prendergast and Farabee reviewed 11 studies and found that coerced treatment may be an effective source of treatment especially where these

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[73] M.Douglas Anglin, Michael Prendergast and D.Farabee, 'The Effectiveness of Coerced Treatment for Drug Abusing Offenders' (1998) Paper presented at the Office of National Drug Control Policy's Conference of Scholars and Policy Makers, Washington DC USA, March 23-25.
[74] ibid.
[75] Wayne Hall, 'The Role of Legal Coercion in the Treatment of Offenders with Alcohol and Heroin Problems (1997) Australian and New Zealand Journal of Criminology 30 (2).
[76] *Hough, (n 4).*
[77] *Anglin, Prendergast and Farabee, (n 73).*
[78] De Leon cited in *Anglin, Prendergast and Farabee, (n 73).*
[79] Inciardi cited in *Kothari, Marsden and Strang (n 33).*
[80] *Anglin, Prendergast and Farabee, (n 73).*

offenders stay in treatment for a longer period. They found that the longer the length of the treatment, the better the outcome, and the greater the possibility that the drug dependant offenders would not revert to drug abuse. Furthermore, moving these offenders into mandatory treatment programmes has been proven to be more cost effective than sentencing them to imprisonment.

A review on the American evidence on the effectiveness of legally coerced treatment for heroin dependence by Hall, concluded that community based treatments for heroin dependence are effective in reducing heroin use and crime, regardless of whether they are provided under 'legal pressure' or not.[81] The evidence is most persuasive for methadone maintenance treatment (MMT), therapeutic communities and outpatient counselling. Findings from various studies revealed that drug treatment, such as methadone maintenance treatment managed to reduce illicit drug use and crime. Hall cited a study conducted by Dole et al, which showed that former prison inmates who had been enrolled in methadone maintenance treatment in prison, were less likely to be involved in heroin use and crime a year after release from incarceration.[82]

Nonetheless, Hall argued that there is a need for caution as most of the evidence described above is based on observational studies only. There should be statistical evidence to substantiate such findings. Furthermore, the above studies were conducted in the 1950s, 60s and 70s and may not be applicable to the current

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[81] *Hall, (n 75).*
[82] Dole et al cited in *Hall, (n 75).*

situation in the USA, where prison overcrowding with its over-whelming number of drug offenders might well undermine the effectiveness of MMT.[83]

In a review of the literature on quasi-compulsory treatment (QCT) for drug dependence, Stevens cited Prendergast and colleagues, whose studies (78 studies of drug treatment in the USA between 1965 and 1996) concur that drug treatment is effective in reducing crime and drug use.[84]

Based on studies by Lurigio, Prendergast, Podus et al and Hough, Stevens also highlighted several factors relating to treatment effectiveness:[85]

- low drop-out
- high programme integrity
- evaluation of the treatment programme
- treatment lasts at least three months
- use of urine testing to assess drug use, especially at early stages of treatment
- for methadone treatment, an adequate daily dosage
- provision of aftercare.

In the UK, studies have also arrived at similar results. Empirical studies have shown that coercing drug users into treatment has proved to lead to far better outcomes than the outcomes for those who do not get treatment at all. Furthermore the outcomes from coerced treatment are 'no worse than those associated with voluntary treatment'.[86] Hough suggests that drug users must be brought into treatment as quickly as possible and be retained in treatment for at least three months to see positive results. Evidence also has shown that drug users benefit from

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[83] *Hall, (n 75).*

[84] Prendergast and colleagues cited in Alex Stevens, 'QCT Europe-Review of the Literature in English' (2003) EISS University of Kent www.kent.ac.uk/eiss/projects/qcteurope/papers.html.

[85] Lurigio, Prendergast, Podus et al; Hough cited in Alex Stevens, 'QCT Europe-Review of the Literature in English' (2003) EISS University of Kent www.kent.ac.uk/eiss/projects/qcteurope/papers.html.

[86] *Hough, (n 4).*

treatment in terms of reduced drug use and better health whilst crime rate is reduced for society's benefit.[87] Findings from a UK national longitudinal study under the Drug Treatment Outcomes Research Study (DTORS) reveal that 'harmful behaviours that are associated with problem drug use' may be reduced through 'care-coordinated treatment'.[88] More than 80 per cent of those who sought treatment had been retained for at least nine months or graduated from treatment. A study by Jones et al found that:

> Levels of drug use declined rapidly within the first three months of starting treatment, and then continued at the same rate, for up to six months. These findings support the validity of the national performance indicator of retention in treatment for at least three months, but suggest potential value in longer measures of retention than currently employed as well as the need for treatment facilities to focus on a continuing process of change.[89]

According to the National Treatment Outcome Research Study (NTORS), drug treatment is also more cost-effective than sentencing an individual to prison. It was estimated that 'for every £1 spent on drug treatment, a concomitant saving of £3 is made on criminal justice costs'.[90]

Motivation has an impact on improving the outcome of drug treatment.[91] This has also been discussed in the literature, Knight et al claim that both internal motivation and legal pressure have been found to increase retention, in other words

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[87] *Hough (n 27).*
[88] Jones et al, 'The Drug Treatment Outcomes Research Study (DTORS): Final outcomes report' (2009) Home Office Research Report 24, Home Office London.
[89] ibid.
[90] NTORS cited in Melissa Bull, 'Just Treatment: a review of international programmes for the diversion of drug related offenders from the criminal justice system' (2003) A report prepared for the Department of the Premier and Cabinet, Queensland. School of Justice Studies QUT.
[91] Alex Stevens, 'QCT Europe-Review of the Literature in English' (2003) EISS University of Kent www.kent.ac.uk/eiss/projects/qcteurope/papers.html.

stopping a drug user's reliance on drugs and reducing the relapse rate.[92] Young also supports this. His own study on the impact of perceived legal pressure on retention suggests that 'providing information to clients about conditions and contingencies of treatment participation and convincing them they will be enforced are effective coercive approaches'. [93] That the criminal justice system can provide such motivation is noted in a study by Werdenich and Waidner on the QCT system that is being implemented in six countries in Europe (Netherlands, Italy, Switzerland, Austria, Germany, England and Wales):

> The criminal justice system acts primarily as a motivational factor by offering addicted persons the possibility to undergo treatment as an alternative to prison or other criminal justice measures...theoretically speaking... to act as an external factor of social control and motivation until internal modes of control are developed or strengthened. To make the change from external control to internal control possible is the main issue of compulsory or quasi- compulsory treatment structures.[94]

In another study by Hall, the number of heroin users who were legally coerced to enrol in MMT programmes in Australia had increased considerably over the past few years.[95] However, Hall contended that such programmes must be able to strike a balance in benefiting both the heroin users and the community, for example, by reducing drug-related crime.

Although there is a body of evidence to show that coerced drug treatment can be effective in that it 'will yield benefits both to the users themselves, in reduced drug use and improved health, and to the broader community, in terms of reduced

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[92] Knight et al cited in *Stevens, (n 91).*
[93] Douglas Young, 'Impacts of Perceived Legal Pressure on Retention in Drug Treatment' (2002) Criminal Justice and Behaviour, Vol 29 No 1.
[94] Wolfgang Werdenich and Gabriel Waidner, Final Report on QCT – System Descriptions' (2003) European Commission, The Fifth Framework RTD Funding Programme, EISS, University of Kent.
[95] Wayne Hall, 'Methadone Maintenance Treatment as a Crime Control Measure' (1996) Crime and Justice Bulletin No 29 www.lawlink.nsw.gov.au/lawlink/bocsar.

crime', Hough noted that there could be some limitations to the findings as a result of the research methodology used by researchers in their respective studies. For instance, researchers rely heavily on self-report data and there are examples of sampling bias. Hough also underlined the high probability of 'implementation failure'. This may be due to a range of complex issues such as the situation where different agencies, notionally co-operating, have different objectives with different treatment philosophies. For example, one agency might emphasise abstinence as opposed to harm reduction policies and this clash could jeopardise the effectiveness of the treatment model.[96]

Nonetheless, legally coerced treatment within the criminal justice system has caused a 'polarisation of debates.'[97] On the one hand, are those who believe that legal coercion is justifiable as an external motivational factor for drug users to enter treatment, [98] while on the other hand, are those who argue on ethical grounds that coercion necessarily infringes fundamental principles of human rights.[99] Stevens et al. propound that since compulsory treatment means that a drug user is forced to enter treatment, irrespective whether the person consents to it or not, this is inconsistent with the principles of human rights. [100]

An issue that arises from the contemporary debate surrounding the legitimacy of coerced treatment is 'the removal of choice and decision making'.[101] It has been argued that coerced treatment raises ethical dilemmas that involve 'a

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[96] *Hough, (n 27).*
[97] Stevens et al.,'On Coercion' (2005) International Journal of Drug Policy 16, 207-209.
[98] Anglin and Maugh cited in *Anglin, Prendergast and Farabee, (n 73).*
[99] *Stevens et al., (n 97)*
[100] ibid.
[101] *Hough, (n 27).*

serious diminution in autonomy and liberty'.[102] Wild et al argue that mandated treatment undermine personal autonomy to a greater extent than treatment undertaken on the basis of personal choice.[103] They argue that the fundamental rights of an individual's personal autonomy should not be compromised. This is supported by Deci and Ryan's 'self-determination theory', which contends that people have a basic psychological need for autonomy.[104] Motivation and interest are enhanced when people perceive themselves as exerting choice, control and self-determination over their behaviours.[105]

To resolve this, it may be important to ensure that coerced treatment stops short of being a mandatory treatment and that treatment is no more restrictive of the liberty of offenders than a conventional and proportionate punishment. The process must not compromise the rights of the offender. According to Bull, 'it must not be more intrusive than the traditional criminal justice system response'.[106]

As has been mentioned earlier, placing individuals in drug treatments within the criminal justice system could be considered as ethically unacceptable because of the element of coercion involved.[107] Thus, for coerced treatment to be effective and ethical at the same time, Gostin proposes the following:

- subject to the agreement of the client (even if the alternative is prison)
- based on due legal process

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[102] *Gostin, (n 5).*
[103] Wild et al, 'Perceived Coercion Among Clients Entering Substance Abuse Treatment: Structural and Psychological Determinants (1998) Addictive Behaviours Vol 23 Issue 1.
[104] Deci and Ryan cited in Wild et al, 'Attitudes Toward Compulsory Substance Abuse Treatment: A Comparison of the Public, Counselors, Probationers and Judges' Views' (2001) Drugs: Education, Prevention and Policy Vol 8 No1.
[105] ibid.
[106] Melissa Bull, 'Just Treatment: a review of international programmes for the diversion of drug related offenders from the criminal justice system' (2003) A report prepared for the Department of the Premier and Cabinet, Queensland. School of Justice Studies QUT.
[107] De Miranda cited in *Kothari, Marsden and Strang, (n 33).*

- focused on those who are "seriously dependent on drug and susceptible to treatment"
- of no longer duration than the punishment would have been for the offence committed [108]

According to a 1986 study by the WHO, compulsory treatment 'was legally and ethically justified only if the rights of the individuals were protected by "due process", and if effective and humane treatment was provided'.[109] Gerstein and Harwood propound that coerced treatment could be more ethically justified if the element of 'voluntary interest' exists.[110] It is essential to ensure that coerced treatment is appropriate to the individual in question, because if treatment that is coerced happens to be ineffective, then there is no ethical justification for it.

The following section will look at some of the treatment programmes of other countries.

4.3 Treatment programmes in other countries

Thailand and Singapore's drug rehabilitation programme adopt a similar approach to the Malaysian treatment programme – punitive and repressive. Long-term detention in military-style institutions, 'often run by military or public security facilities and staffed by people with no medical training, these centres rarely provide treatment based on scientific evidence' and lack of due process are the key characteristics of the mandatory programmes of these ASEAN member states.[111]

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[108] Gostin cited in *Stevens, (n 91).*
[109] Porter et al, *The Law and Treatment of Drug and Alcohol Dependant Persons - A Comparative Study of Existing Legislation* (WHO, Geneva 1986).
[110] Gerstein and Harwood cited in *Hall, (n 75).*
[111] Human Rights Watch and International Harm Reduction Association, 'Drugs, punitive laws, policies, and policing practices, and HIV/AIDS' (2009) A briefing paper produced jointly by Human Rights Watch and the International Harm Reduction Association

There have been several referral and diversion to treatment programmes for drug offenders with drug dependence problem introduced in the USA and the UK. A number of studies done in these countries have shown that community-based treatments are more effective in helping these drug dependant offenders to overcome their drug problems. Amongst the types of treatment available under the community-based approach are drug counselling, drug education, self-help groups, substitute prescribing, harm reduction programmes such as needle exchanges and drug testing.[112] Research found that methadone maintenance programmes manage to reduce both heroin use and related crime. Hough cited studies conducted by Ward and Farrell et al and Ball and Ross, which concluded that methadone programmes that provide much higher dosage were found to be more effective than those with less dosage. The results were supported by studies conducted by Ward et al where doses of 60 mg or more have led to better retention rate and reduction in heroin use amongst clients. Caplehorn et al share a similar view in that its review held that a dosage of 80 mg could refrain a drug user from taking heroin as compared to those prescribed with only 40 mg methadone.[113] Heroin users were also found to commit less crime during treatment.[114]

As has been mentioned earlier, coerced treatment can either be used as an alternative to imprisonment or diversion to treatment. The only difference is that the alternative to imprisonment is regularly used for drug offenders who have been

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www.unhcr.org/refworld/docid/4b16420d2.html accessed 10 January 2010.

[112] Eley et al cited in *Bull, (n 106).*

[113] Caplehorn et al cited in *Hough, (n 4).*

[114] Jarvis and Parker cited in *Hough, (n 4).*

convicted and would otherwise go to prison, whereas diversion to treatment applies at a very much earlier stage, ie pre-trial stage.[115]

4.3.1 Thailand

Thailand's system of diversion into compulsory treatment for drug users is regulated under the Narcotic Addict Rehabilitation Act B.E. 2545 (2002). The aim of the 2002 Act is to divert people who are dependent on drugs away from prisons so as to reduce the number of prison population. Its implementation is based on the terms that 'people who are dependent on drugs should be treated as patients and not criminals'.[116] Ironically, one of the key features of Thailand's diversion programme is the detention of drug users in prison for up to 45 days whilst awaiting for their case to be assessed. The assessment includes:

- biological domains: a physical examination and urine testing;
- psychological domains: motivation, attitude, self-awareness, guilt and anti-social behaviour;
- social domains: family history, education, occupation, economy, personality, relationship, environment, criminal record, drug usage history, problems fro drug use and past drug treatment.[117]

According to Pearshouse, lack of proper facilities during the detoxification process and poor medical care and supervision for drug dependence withdrawal symptoms are evidence of Thailand's inhumane treatment programme.[118] The author interviewed a male drug detainee who had been detained in Lad Yao prison (a large prison in Bangkok, Thailand). According to him:

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[115] Statement by Alex Stevens, (Personal email correspondence 17 May 2007).
[116] Richard Pearshouse, 'Compulsory Drug Treatment in Thailand: Observations on the Narcotic Addict Rehabilitation Act B.E. 2545 (2002)' (2009) Canadian HIV/AIDS Legal Network.
[117] ibid.
[118] ibid.

> I was playing cards in the middle of the *soi* [side street] and the police came in the vehicle and arrested me and tested me. The result was purple [ie positive for drugs]. So I was kept at the police station for one day and then [went] to Lad Yao for 47 days, then to [a military camp].
>
> The conditions [in Lad Yao] were very crowded: no mosquito nets, not enough food, a lot of mosquitoes. You sleep on a cement floor. You have to sleep on your side. The food was brought in from another compound. They only gave [food] once: if it's finished, no more... Sometimes the guard would hit persons if there was a fight or if they found people using drugs.[119]

The central components of treatment are similar to the Malaysian twin-concept programme – vocational training, therapeutic community activities and physical exercise. Informed consent is insignificant and 'there is little or no adjustment of treatment to meet individual needs'.[120]

4.3.2 Singapore

The main legislation governing drug offences in Singapore is the Misuse of Drugs Act 1973 (MDA). MDA also regulates the mandatory treatment and rehabilitation programme in Singapore. The Director of the Central Narcotics Bureau 'may require any person whom he reasonably suspects to be a drug addict to be medically examined or observed by a Government medical officer or a medical practitioner' or to undergo a urine test. If as a result of the above procedures, that it is necessary for that person to undergo treatment and rehabilitation 'at an approved institution', the Director may order such person to be admitted to an approved institution between 6 and 36 months.[121]

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[119] ibid.
[120] ibid.
[121] Misuse of Drugs Act, Part IV (Singapore).

Singapore's drug rehabilitation programme is equally extreme as persistent drug users with previous records can be ordered to undergo a Long-Term (LT) imprisonment regime with a maximum period of imprisonment of 13 years as well as undergoing corporal punishment ie 12 strokes of the cane.[122]

4.3.3 United Kingdom

4.3.3.1 Arrest Referral Scheme

Arrest Referral Schemes are part of the Home Office's Crime Reduction Programme which took off in April 2000. By April 2002, all the Police Forces in England and Wales were providing the service.[123] According to the Home Office, every person arrested at a police station must be informed of an arrest referral scheme offered by the police station. This means that the person must be given an opportunity to see an independent drug worker. It is up to the person whether to accept the scheme or not. If that person agrees to accept treatment, he will have to undergo a 'confidential assessment process'. He will be assessed through an initial screening interview with the drug worker. Information provided by that person during the interview would be recorded in a Home Office monitoring form. The monitoring form consists as follows:

- Arrested person's socio-demographic characteristics
- Treatment history
- Drug use
- Information on offending behaviour

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[122] Central Narcotics Bureau, Singapore 'Treatment and Rehabilitation Regime' (2007) www.cnb.gov.sg accessed 24 November 2009.

[123] John O'Shea, Andrew Jones and Arun Sondhi, 'Statistics from the Arrest Referral Monitoring Programme from October 2000 to September 2002' (2003) Arrest Referral Statistical Update, Home Office London.

- Outcome of the process [124]

If the person is found to be suitable for treatment, he will be referred to a drugs treatment agency and also other programmes of help such as housing, employment or social services.

In his review of the literature on drug misuse and the criminal justice system, Hough describes that there are five stages where intervention can take place within the criminal justice system:

- Pre-arrest
- Between arrest and conviction
- Community sentence
- Custodial sentence
- After release from custody [125]

For the purpose of this research, focus will be on interventions at the pre-arrest stage and between arrest and conviction stage. The pre-arrest stage is where the police engage in street-level policing as part of a drug enforcement strategy to detect drug users suspected to be 'drug dependants'. The period between arrest and conviction is an opportunity to channel them into treatment. Although the best treatment programmes can be costly and time-consuming, Hough posits that 'the key elements of successful treatment' are that problematic drug users should enter treatment as soon as possible, for as long as possible in a positive and supportive environment.[126]

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[124] ibid.
[125] *Hough, (n 4).*
[126] *Hough, (n 4).*

Hough cited Murji's argument that low-level enforcement (street-level policing) would be able to 'remove heavy users, user-dealers, and deter novice users'.[127] Interventions at the pre-arrest stage can assist those who wish to seek treatment for their drug dependence but also paves the way for arrest referral schemes whereby drug information is disseminated to drug users and at the same time medical or other services can be provided to those who wish to seek treatment. In some areas in England and Wales, drug workers are stationed or on call to provide service. Hough referred to Turnbull et al:

> Problem users have flashes of wanting to quit, often at vulnerable periods of their lives. Arrest and detention represent precisely such a vulnerable point, providing an opportunity for constructive intervention. [128]

In 1995, Turnbull et al studied the 'Get it while you can' scheme in Brighton and Hove.[129] Three drug workers were employed under the scheme: they were working from an office located in the local magistrates court, two did four-hour shifts at Brighton police station and one at the court. One unique feature of the above scheme was that the drug workers had direct access to custody office staff. The evaluation study was conducted during a seven-month period with 250 participants. Most of them were detainees in police cells. Only a third of the participants were referred to treatment agencies. The rest of the participants had either refused help altogether or had sought help or advice from other sources.

Whilst another scheme called the Southwark Arrest Referral Scheme, disseminated information about drug agencies to arrested persons. Although referral

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[127] *Hough, (n 4).*
[128] Turnbull et al cited in *Hough, (n 4).*
[129] Turnbull et al cited in *Hough, (n 4).*

rates were rather low, with just 52 referrals, 34 joined the programme and half of the participants succeeded in being drug free at the time of the study.[130]

Although the objective of such schemes was to encourage drug users into receiving treatment, certain pitfalls were unavoidable. Dorn points out that some clients accepted treatment with the hope that they may get a caution instead of being charged by the police for the crime they have committed.[131]

4.3.3.2 Drug Treatment and Testing Order (DTTO)

In the United Kingdom, drug intervention programmes have been developed under the diversionary model and based in the community. It has, however, been a top down system whereby monitoring and evaluation of these programmes are conducted by the Home Office.[132] Adopting the community-based approach to drugs prevention, such programmes started off in the 1990s with the aim to 'inform, encourage and support communities in their resistance to drug misuse'.[133] In 1998, a type of community sentence was introduced under the Crime and Disorder Act 1998 called the Drug Treatment and Testing Order (DTTO) as part of the government's strategy to tackle 'the growing evidence between problem drug use and persistent acquisitive offending'[134]. DTTOs were supervised by the probation service and before an order is made, a court must be satisfied that the offender is a drug

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[130] Turnbull et al cited in *Hough, (n 4).*
[131] Dorn cited in *Hough, (n 4).*
[132] *Bull, (n 106).*
[133] *Hough, (n 4).*
[134] Michael Hough, Anna Clancy, Tim McSweeney and Paul J.Turnbull, 'The Impact of Drug Treatment and Testing Orders on offending: two-year reconviction results' (2003) Home Office Research Study 184, Home Office London.

dependant or has 'the propensity to misuse drugs'[135] (Since April 2005, DTTOs have been phased out and replaced with the Drug Rehabilitation Requirements).

Although the DTTO is a form of coerced treatment, the offender's consent is still required prior to undergoing treatment. Urine samples are collected from offenders through regular but random mandatory drug testing. The court will review the test results so that the offenders' progress can be monitored during treatment. Persistent failure to comply with the DTTO programmes may cause the drug offenders to be sent back to which court and face possible imprisonment. Findings from three DTTO pilot schemes in Croydon, Gloucestershire and Liverpool showed that only one in three of the DTTO pilot schemes had been successfully implemented and that various shortcomings were identified such as, 'ineffective inter-agency collaboration, lack of consistency in enforcement practises, insufficient sanctioning options for judges'.[136] A study by Hough et al, on the impact of DTTO pilot schemes based on reconviction rates revealed, *inter alia* –

- Overall two-year reconviction rates were 80 per cent for the 174 DTTO offenders for whom criminal records were located on the Home Office's Offenders Index database.
- Completion rates for DTTOs were low: of the 161 offenders for whom outcome information is available, 30 per cent finished their orders successfully and 67 per cent had their orders revoked.

The above study concluded that future DTTO programmes should improve on their retention rates, thus increasing the completion rates. At the same time, they should include a 'more timely, more responsive and more appropriate treatment than

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[135] Turnbull et al, 'Drug Treatment and Testing Orders: Final evaluation report' (2000) Home Office Research Study No 212, Home Office London.
[136] *Bull, (n 106).*

was often the case in the pilot projects'.[137]

However, the DTTOs in Scotland were proved to be more effective as they learn from the weaknesses of their English counterparts. In a study by Eley et al, it was reported that drug use and drug related offending were reduced since offenders entered a DDTO, 'with an average weekly expenditure of £57 on drug six months into a DDTO, compared with a weekly expenditure of £490 before being given an order'. The participants of the Scottish DTTO at Forth Valley believed that the DTTO experience 'had reduced their likelihood of continuing to use drugs'.[138] According to the Scottish drug court, the purpose of conducting regular and random drug testing among the DTTO participants are as follows:

- to inform the initial and continuing pattern of drug misuse;
- to augment information provided by the offender as to his/her drugs misuse;
- to inform clinical decisions with regard to treatment;
- To increase confidence in treatment on the part of the sentencer, provider, offender and wider community; and
- On occasion, to verify abstinence from specific substance misuse.

4.3.4 United States

4.3.4.1 Drug Court

The first drug court was initiated in Dade County, Miami, Florida in 1989 by Chief Judge Weatherington and his Miami team. The Dade County drug court was developed within the existing United State's adversarial system of justice.[139] According to Harrison and Scarpitti, the drug courts were different than the

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[137] *Hough, Clancy, McSweeney and Turnbull, (n 134).*
[138] Eley et al cited in *Bull, (n 106).*
[139] The Miami drug court model is different from the other drug courts which have existed earlier. The earlier drug courts are called fast track administrative courts ie their aim is to process drug cases more speedily through the system. *Bean, (n 3).*

traditional US courts in that the latter's objective is to punish the offenders on the basis of retribution and deterrence whereas the Miami drug court model is based on a rehabilitation model. [140] Nonetheless, the authors were concerned that, although drug courts may provide drug offenders with a better 'deal' in that they avoid being incarcerated, these offenders may also be at 'risk of more severe consequences than would have been incurred in a traditional court', due to consequences of non-compliance with the treatment programme sanctioned by the drug court. According to an evaluation study of the impact of two US D.C. Superior Court drug intervention programmes, participants who were randomly assigned drug felony defendants, were asked to signed contracts under such terms:

> ... agreeing to submit to twice-weekly urinalysis tests and report to court for sanctioning if they tested positive, submitted a tampered sample, or skipped a test. Sanctions included 3 days in the jury box for the first infraction, 3 days in jail for the second infraction, 7 days in detoxification for the third infraction, and 7 days in jail for subsequent infractions.[141]

From 1989 onwards, the Miami drug court model was widely replicated and generally adopted to fit local circumstances. Almost 10 years after the creation of the Miami drug court, there were drug courts in almost every state and the District of Columbia. By the end of 1999, the number of drug courts had risen to 425.[142]

The criminal justice system uses the defendant's arrest as an opportunity for intervention by persuading or compelling that person to enter and remain in

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[140] Lana D.Harrison and Frank R.Scarpitti, 'Introduction: Progress And Issues In Drug Treatment Courts' (2002) Substance Use & Misuse, Vol 37 Nos 12 and 13.
[141] Adele Harrell, Shannon Cavanagh and John Roman, 'Evaluation of the D.C. Superior Court Drug Intervention Programs' (2000) Research in Brief National Institute of Justice Office of Justice Programs: Washington DC USA.
[142] Drug Courts Program Office of the USA Department Of Justice www.ojp.usdoj.gov.

treatment. The defendant is presented with the choice to participate in drug user treatment as an alternative to traditional case processing, whether or not that includes incarceration. To quote the then Associate Chief Judge Herbert Klein:

> Putting more and more offenders on probation just perpetuates the problem. The same people are picked up again and again until they end up in the state penitentiary and take up space that should be used for violent offenders. The Drug Court tackles the problem head-on.[143]

It is important to note that in the USA, laws vary from state to state and one county to another. How a drug court is conducted varies considerably across the country. Basically, the drug courts share the same defining features, that is, they 'offer an intensive court-based treatment programme, as an alternative to the normal adjudication process'.[144] Nonetheless, as Inciardi explains 'no two drug courts are exactly alike'.[145] To quote Boldt:

> What makes these drug treatment calendars unique is the nonadversarial nature of their proceedings and the active and ongoing role that the drug treatment court judge plays-generally with the support of both the prosecutor and defence counsel-in working with the treatment provider and motivating the defendant to complete the treatment programme. Essentially, these 'drug courts' are not courts at all, but diversion-to-treatment programmes, which are supervised through regular (usually monthly) quasi-judicial status hearings at which the drug court judge enters into a dialogue with each defendant about his or her progress in the treatment/rehabilitation programme (Cooper and Trotter).[146]

The Dade County drug court itself did not claim to have achieved great success, but early research suggested that there were positive affects of drug court

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[143] Klein cited in Peggy Fulton Hora, William G.Schma and John T.A.Rosenthal, 'Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America' (1999) Notre Dame Law Review, 74 (2).
[144] James L.Nolan (ed), *Drug Courts in Theory and Practice* (Aldine De Gruyter, New York 2002).
[145] James Inciardi, Duane McBride and James Rivers, *Drug Control And The Courts* (Sage Publications, Thousand Oaks, California 1996).
[146] Boldt cited in *Nolan (n 144)*.

participation. Further comprehensive research studies have been undertaken and the general consensus is that 'drug courts produce significant economic, social and individual benefits'.[147] The growth of drug court programmes in the US was also due to increasing research studies on the linkages between drug use and crime. Findings from the ADAM (National Institute of Justice's Arrestee Drug Abuse Monitoring) programme, which has been testing arrestees (arrested persons) for a variety of drugs, revealed that more than 80 per cent of arrestees had tested positive for drugs.[148]

In 2001, Belenko reviewed 37 published and unpublished evaluations of 36 drug courts. Findings from the comprehensive review are as follows:

- Decrease in drug use while offenders are in the drug court programmes, compared to similar offenders not under such programmes
- Low re-arrest rates whilst in drug court programmes compared to re-arrest among similar offenders in non-drug treatment court programmes.
- High-level graduation rates compared to other outpatient treatment programmes.
- Reduction in recidivism rates.
- Drug courts appear to be more cost effective, compared to the traditional justice system. [149]

However, Belenko also criticised that various studies on drug courts lack scientific rigour ie vary considerably in terms of quality, comprehensiveness, use of comparison groups, and the definition of key variables such as recidivism.[150]

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[147] Justin Walker, 'International Experience of Drug Courts' (2001) The Scottish Executive Central Research Unit.
[148] ADAM cited in Cassia Spohn, R.K.Piper, Tom Martin and Erika Davis Frenzel, 'Drug Courts and Recidivism: The Results of an Evaluation Using Two Comparison Groups and Multiple Indicators of Recidivism' (2001) Journal of Drug Issues 31 (1) 149-176.
[149] Steven Belenko, 'Research on Drug Courts: A Critical Review 2001 Update' (2001) The National Center on Addiction and Substance Abuse at Columbia University.
[150] ibid.

Nevertheless, some authors have argued that these studies suffer from a number of limitations and that 'their conclusions should therefore be considered tentative'.[151] A 1997 report by the U.S. General Accounting Office (GAO) noted that the majority of the evaluations have omitted 'a comparison group, post-programme drug use or criminal behaviour, and followed drug court participants for a relatively short period of time'.[152]

Indeed, the treatment programmes highlighted above have taken a pragmatic approach through referral and diversion to treatment programmes in order to funnel drug dependant offenders into seeking treatment. These programmes were implemented in community-based settings following a least-restrictive approach even though regulated within a criminal justice framework. Thus, this form of treatment programmes could successfully fit in within Hough's proposed framework - 'the key elements of successful treatment' are that problematic drug users should enter treatment as soon as possible, for as long as possible in a positive and supportive environment.[153]

4.4 What can Malaysia learn from other treatment programmes?

Since the compulsory treatment does not seem to work in Malaysia, what can we learn from other countries? Although coerced treatment is placed within a criminal justice setting, if adequate and proper treatment is provided, taking into

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[151] USA General Accounting Office (GAO) cited in Cassia Spohn, R.K.Piper, Tom Martin and Erika Davis Frenzel, 'Drug Courts and Recidivism: The Results of an Evaluation Using Two Comparison Groups and Multiple Indicators of Recidivism' (2001) Journal of Drug Issues 31 (1), 149-176.
[152] ibid.
[153] *Hough, (n 4).*

consideration its therapeutic values, it may prove to be effective in reducing drug use as well as crime rates.

What seems to be lacking in the Malaysian compulsory treatment is the element of 'informed consent' ie drug users must be informed of the possible treatments available to them. Based on the international standard of human rights, a drug user must be informed of the following circumstances prior to accepting treatment:

- The diagnostic assessment
- The purpose, method, likely duration and expected benefit of the proposed treatment
- Alternative modes of treatment, including those less intrusive, and
- Possible pain and discomfort, risks and side-effects of the proposed treatment.[154]

There must be an agreement between a drug user with a drug problem and the service provider prior to treatment, albeit a constraint consent. Treatment must be tailored to suit the needs of every individual drug user. The 'one size fits all' treatment in Malaysia does not work. It needs to be therapeutic and matched to one's needs. The pragmatic approach of the arrest referral scheme in the UK allows for individual assessment of a drug user's level of dependence. This is important as suitable treatment can be provided. Regular monitoring and supervision of a drug user's progress during treatment is a crucial element to determine the success of treatment. Mandatory drug testing and regular supervision by the judge under a drug court model seems to be an effective mechanism towards providing treatment within

[154] Joanne Csete and Richard Pearshouse, 'Dependent on Rights: Assessing Treatment of Drug Dependence from a Human Rights Perspective' (2007) Canadian HIV/AIDS Legal Network.

a criminal justice setting, with the omission of the 'traditional adversarial' approach. Once drug use is reduced, this may well lead to a reduction in crime rate.

Drug users with a drug problem must be brought into treatment as soon as possible in a positive and supportive environment. Long periods of detention in 'military-style' regimes like the *Puspen* centres, as well as in Thailand and Singapore do not produce a positive and supportive environment for someone who is seeking treatment. In a study on Thailand's compulsory treatment programme, Pearshouse commented that the current programme should be evaluated on its efficacy, and at the same time prioritise on 'expanded access to affordable, evidence-based treatment that is voluntary'.[155]

The above regimes are a marked contrast to the community-based treatment in the UK and the USA. As has been considered earlier, arrest referral schemes and regular drug testing under the DTTO and drug court model are pragmatic approaches in dealing with problematic drug users.

Nonetheless, it must be noted that besides having institutionalised treatment centres like *Puspen*, the Malaysia government has now given way to harm reduction programmes such as the MMT and the needle and syringe programme. For instance, in 2006, the Ministry of Health initiated a six-month programme by which hypodermic needles and condoms were distributed to 1,200 IDUs in four cities. In February 2008, the Drug Service Centre, AADK set up a Methadone Maintenance Treatment (MMT) clinic at its centre. Although still at its induction phase, the clinic has 34 patients under its MMT programme. The clinic operates on a daily basis from

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[155] *Pearshouse, (n 116).*

8 a.m. till 11 a.m. Dispensing of methadone to registered patients is conducted daily by a registered pharmacist.

Recently, 600 private practitioners volunteered to provide Drug Substitution Treatment (DST) at their clinics. It was reported recently that according to the National Drug Substitution Treatment (NDST) statistics, the number of patients (drug users) seeking DST have increased throughout the years since DST was introduced, with approximately 17,930 patients as at June 2008. The statistics also indicate that the programme was accepted by patients with the number of registered patients doubling from 6,184 to 13,174 during the same period.[156] Nonetheless, although Malaysia has the highest rate of HIV infections related to injection drug use, information about the risks of HIV/AIDS and hepatitis infection and transmission is still lacking amongst drug users in Malaysia. As a consequence, these IDUs do not fall within the targeted group for receiving the antiretroviral treatment.[157]

The Malaysian medical fraternity has lauded the government's positive efforts to promote harm reduction. To cite Dr.Choong of the Sungai Buloh Hospital's Department of Medicine (Infectious Disease) Malaysia:

> We are hopeful that the harm reduction programme, both the free methadone as well as the needle exchange programme which has a strong prevention element, will make a bigger impact and we can reach the target. It is the first time we are witnessing a strong collaboration between government, police, rehabilitation officers at *Serenti* (*Puspen*) and NGOs. Harm reduction is too new to make a significant impact but the pilot project was successful. The challenge is always in scaling up because it involves community acceptance. There must also be interphasing with law enforcement. The centres in Kuala

[156] Federation of Private Medical Practitioners' Association of Malaysia (FPMPAM).
[157] *Mazlan et al., (n 36).*

> Lumpur, Johor Baru and Penang have been running for two years and we are seeing an improved understanding with the police force. [158]

5. Concluding remarks

The Malaysian government's punitive prohibition approach in dealing with the drug addiction problem through the compulsory treatment of drug users has failed to eliminate drug dependency and prevent relapse. This has been revealed by findings from various studies of the very high relapse rates recorded among government run drug rehabilitation centres or *Puspen*. As a result of the inefficacy of treatment, many drug users suffer from the 'revolving-door-syndrome'. Besides experiencing relapse, they might also be involved in criminal activities. However, due to the lack of official statistics on the drugs-crime link, there is no scientific evidence to substantiate such correlation between drug use and crime in Malaysia. Not all drug users are offenders and not all offenders are drug users. But, it can be strongly argued that drug users who fall under the category of problematic users are those who engage in criminal activities in order to support their drug habit.

The compulsory treatment and rehabilitation programme in Malaysia has paid very minimal attention to the issues affecting the principles of human rights. For instance, the long periods of detention in a 'military-style' regime is a clear violation of the human rights principles. Thus, there is an urgent need for the Malaysian government to review its compulsory treatment programme, which has led to the marginalisation and stigmatisation of drug users in Malaysia. The succeeding chapters will examine the legal elements of the compulsory treatment

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[158] Dr. Christopher Lee Kwok Choong of the Sungai Buloh Hospital's Department of Medicine (Infectious Disease) cited in Rathi Ramanathan, 'Changing attitudes', (2008) www.sun2surf.com. accessed 23 July 2008.

programme and analyse the extent to which they are inconsistent with the principles of human rights under the Constitution and UN human rights instruments.

CHAPTER 3: HISTORICAL EVOLUTION OF THE DRUG PROBLEM AND THE NATIONAL DRUG POLICY IN MALAYSIA

1. Introduction

This chapter begins by examining the history of drug abuse since the opium trade in the 18th century. The history continues to be explored following the exodus of the Chinese immigrants to Southeast Asia and Malaysia as labourers in the late 19th century, which brought along the problem of opium addiction to the Malay Peninsula among the older group population.

The chapter also seeks to discuss the advent of heroin abuse among the youth generation in the 1970s, a transition era from opium addiction to heroin abuse. The chapter will then consider the more recent substance abuse problem, that is, the rise in amphetamine-type-stimulants (ATS) abuse in Malaysia.

Moving on from the history of drug abuse, the chapter proceeds to discuss the Malaysian government's approach in dealing with the drug problem after it reached its peak in 1983. A number of sections in the chapter will focus on the theory and policy, the UN treaties on the international drug control and the formation of ASEAN.

The chapter will then critically examine the national drug policy under its four components in line with the UN guidelines. The four components are preventive measures, interdiction and enforcement, treatment and rehabilitation and regional cooperation. The fourth component will have been discussed in the earlier section under 'ASEAN', thus, will not be discussed again in this section.

Following the discussion on the drug policy, this chapter will examine the relevant drug laws in Malaysia and the impact of their enforcement upon drug

users. Finally, the last two sections of the chapter will conclude with the arguments put forward under the topics of the 'War on Drugs' and the 'government's paradigm shift towards a harm reduction approach'.

2. History of drug abuse

2.1 The opium trade in the 18th and 19 the centuries

The Asian region has experienced a problem of drug abuse ever since opium was exported to China in the late eighteenth century. McCoy described Europe's Industrial Revolution and colonisation of the East throughout the late 18th and 19th centuries as the historical cause 'that transformed China into a nation of addicts'.[1] After annexing much of northern India, English bureaucrats established a monopoly over Indian poppy cultivation in Bengal. During this period, the East India Company exported thousands of chests of smoker's opium annually to China, especially to the coast of China, which it traded for Chinese manufactured goods and tea. From the late eighteenth century, the British East India Company gained a monopoly over the opium trade and built an empire in Asia out of opium revenues.[2] The Chinese tried to ban the importation of opium. This led to the first Opium War from 1839 to 1842 when the British reacted to protect her interests. Subsequently, the British defeated China again in the second Opium War from 1856 to 1860 after which severe sanctions were imposed upon the Chinese government, which forced them to legalise the importation of opium.

The Chinese had failed to prevent the continual flow of opium imports from India and the amount of opium exported to China from India increased

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[1] Alfred W. McCoy, 'The Politics of Heroin in Southeast Asia' www.drugtext.org/library/books/Mcoy/book/18.htm accessed 26 January 2006.
[2] ibid.

from 4,800 tons in 1859 to 'an historic high of 6,700 tons in 1879'.[3] In the 19th century, opium addiction began to spread from the Chinese imperial bureaucracy and the army to the rest of the nation. According to McCoy, 'the growth of mass opium addiction throughout the nineteenth century prompted a rapid expansion of China's own opium production'.[4] Domestic cultivation of the opium poppy in China continued until the middle of the twentieth century, when the Government of China prohibited the practice. After the failure of efforts to prohibit opium trafficking and consumption in China, the habit of opium smoking spread. This lucrative trade had produced, quite literally, a country filled with drug users, as opium parlours proliferated throughout China in the early part of the nineteenth century. Opium addiction became a major problem. The aftermath of the Opium Wars also saw the migration of Chinese workers throughout the world. According to Trocki, the Chinese immigrant-worker consumers of opium 'probably constituted the first mass market in Southeast Asia'. Britain, like other colonial powers directly benefited from it by taxing opium in its colonies.[5]

Besides producing a massive population of drug users, by the mid 19th century opium had also become a major global commodity. By the 20th century, according to McCoy, 'opium and its derivatives, morphine and heroin, had become a major global commodity equivalent in scale to other drugs such as coffee and tea'.[6]

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[3] Alfred W.McCoy, 'Opium' www.a1b2c3.com/drugs/opi010.htm accessed 26 January 2006.
[4] *McCoy, (n 1).*
[5] Carl A.Trocki cited in Curtis Marez, *Drug Wars: the political economy of narcotics* (University of Minnesota Press, Minneapolis 2004).
[6] *McCoy, (n 3).*

2.2 *Opium addiction in the Malay Peninsula*

According to McCoy, the 'Southeast Asian opium trade began with the arrival of the Europeans'.[7] When the Dutch occupied Jakarta in the 17th century, they brought in Indian opium for the locals. However, the opium trade only began to expand in the 19th century when state-licensed opium dens were opened and 'became a unique Southeast Asian institution, spreading and sustaining addiction throughout the region'.[8] In 1930, Southeast Asia witnessed the mass opium abuse in the region with 6,441 government opium dens serving 542,100 registered smokers.[9]

The aftermath of the Opium Wars (1839-42, 1856-60) saw a massive migration of more than two million Chinese migrants travelling to labour recruitment centres in the Southeast Asian region. These Chinese migrants were opium smokers (one in every four males was an opium smoker). The Malay Peninsula (as Malaysia was then known) was no exception, when tens of thousands Chinese migrants came to work at the newly opened tin mines.[10] The research literature on opium consumption in Malaya during the colonial era has shown that the habit of opium smoking originated from the Chinese immigrants.

Traditionally, opium was used by the Chinese for treating illnesses, such as malaria and alleviating physical and mental stress.[11] Due to the poor living conditions in Malaya and the high morbidity and mortality rate during that time,

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[7] Alfred W.McCoy, *The Politics of Heroin: CIA Complicity in the Global Drug Trade* (2nd rev.edn, Lawrence Hill Books, Illinois 2003).
[8] ibid.
[9] *McCoy, (n 3).*
[10] Harumi Goto-Shibata, 'Empire on the Cheap: The Control of Opium Smoking in the Straits Settlement, 1925-1939' (2006) Modern Asian Studies Vol 40 Issue 1.
[11] Charas Suwanwela and Vichai Pshyachinda, 'Drug Abuse in Asia' (1986) Bulletin on Narcotics www.unodc.org/unodc/data-and-analysis/bulletin/index.html. accessed 10 February 2006.

these workers regarded opium as a 'panacea for all ills'.[12] However, with the opening of government opium dens, they became a very popular meeting place for these Chinese workers to indulge in opium smoking.[13]

2.3 Ganja addiction among the Indians and Malays

During the British colonisation in Malaya in the late 18th century, labourers were recruited from India to work in Malaya[14] and they introduced *ganja* smoking to the Malays. *'Ganja'* or cannabis sativa became popular amongst the Indians and the Malays who worked in the agricultural sector.[15] The Indians used a cone shaped clay pipe called 'pipe the *gosah*' to smoke *ganja* whilst the Malays rolled *ganja* in *'rokok daun'*, a dried leaf of the young *nipah* palm as a cigarette. Smoking *ganja* among the Malays later became an addiction as it gave them 'a sense of well-being or *'khayal'*, to overcome worry and fatigue, stimulated sexual desire and had an intoxicating effect'.[16]

2.4 International restriction on opium and the anti-opium laws

Before war broke out in Malaya in 1941, the use and sale of opium was controlled as a government monopoly. The British colonial government took over the control of the opium dens and established state-licensed opium dens in Malaya.[17] It was the policy of the monopoly to bring about a gradual reduction in the consumption of opium by users in accordance with the provisions of the

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[12] J.H.K.Leong, 'Cross-cultural influences on ideas about drugs' (1974) Bulletin on Narcotics www.unodc.org/unodc/data-and-analysis/bulletin/index.html accessed 10 February 2006.
[13] ibid.
[14] ibid.
[15] V.Navaratnam and C.P.Spencer, 'A study on socio-medical variables of drug-dependent persons volunteering for treatment in Penang, Malaysia' (1978) Bulletin on Narcotics www.unodc.org/unodc/data-and-analysis/bulletin/index.html accessed 10 February 2006.
[16] *Leong, (n 12).*
[17] National Narcotics Agency, *Kenali Dan Perangi Dadah* (1st edn Ministry of Home Affairs, Kuala Lumpur 1997).

international conventions such as The Hague Convention of 1912 and the Geneva Opium Agreement of 1925.

On 23 January 1912, the International Opium Convention was signed in the Hague by representatives from China, France, Germany, Italy, Japan, the Netherlands, Persia (Iran), Portugal, Russia, Siam (Thailand), the UK and the British overseas territories (including British India). Three years later, it entered into force in five countries. By the mid 1920s almost 60 countries had signed and ratified the Hague treaty and this number increased to 67 by 1949. The Hague Convention is an official declaration on the dangerous practices of opium smoking and the non-medical trade in opium and other drugs. It also encompasses the control of substances such as morphine, cocaine and heroin.[18]

However, worried by the limited effects as a result of the 1912 Hague Convention, the second Geneva Convention, the International Opium Convention was concluded on 19 February 1925. Also known as the 1925 Geneva Convention, its intention was:

> to impose global controls over a wide range of drugs, including, for the first time, cannabis – described as "Indian hemp" in Article 11 of the Convention. Articles 21-23 required parties to provide annual statistics on: drug stocks and consumption; the production of raw opium and coca; and the manufacture and distribution of heroin, morphine and cocaine.[19]

Nonetheless, despite the coming into effects of these Conventions, the drug problem continued to escalate. McAllister summarised the international situation at the end of the 1920s as follows:

> In addition to continued overproduction of opium inside China, statistical returns indicated that Chinese imports of manufactured drugs had skyrocketed. The European colonial powers continued to tolerate (and profit from) opium smoking through government monopolies. As Western European governments pressured pharmaceutical companies to

[18] UNODC www.unodc.org accessed 10 February 2006.
[19] Jay Sinha, *The History and Development of the Leading International Drug Control Conventions* (Parliamentary Research Branch, Canada 2001).

> conform to more stringent control standards, unscrupulous operators moved to states that had not ratified the [Geneva] International Opium Convention. Traffickers became more sophisticated in their operations, colluding with political and/or military brokers to avoid prosecution. Drug abusers and their suppliers acted as inventively as the diplomats and the bureaucrats; those wishing to circumvent the system altered their routes of acquisition to fit the new pattern.[20]

In Malaya, opium smoking, which was initially regarded as a social custom of the Chinese, could be contained and controlled by social custom, by administrative and legislative measures. In 1927, sales of opium through the monopoly totaled 30,000 lb. By 1935, they were reduced to 19,000 lb., and by 1938 to 15,000 lb.[21] There was a similar drop in the numbers of users - in 1929, there were 52,313 registered opium smokers in the Federated Malay States,[22] all of whom were reported to be Chinese. In 1930, as mentioned above, following a League of Nations report on opium smoking in the Far East, international pressure mounted upon the Malay States, *inter alia,* to curb the availability and the use of opium.

However, this international movement to promote gradual reduction of opium consumption came to a halt during the Japanese occupation from 1942 to 1945. The registers were disregarded, and anyone who could pay for it was allowed to smoke. But regulation returned after the Second World War. In February 1946, the Opium and *Chandu* Proclamation was passed which totally prohibited the sale and use of opium except for medicinal purposes. The Proclamation was introduced to replace various state enactments in Peninsular Malaysia dealing with opium and *chandu* (cooked opium).[23]

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[20] McAllister cited in *Sinha, (n 19).*
[21] The Director of the Central Narcotics Intelligence Bureau, Singapore, 'The Opium Treatment Centre, Singapore' (1957) Bulletin on Narcotics www.unodc.org accessed 11 February 2006.
[22] British-ruled territories of Peninsula Malaysia established in 1948.
[23] *The Director of the Central Narcotics, (n 21).*

This was followed in 1952, by the Dangerous Drugs Ordinance and the Poisons Act. The 1952 Ordinance replaced the earlier 1946 Proclamation on the prohibition of the sale and use of opium. The purpose of the Ordinance was 'to make further and better provision for the regulating of the importation, exportation, manufacture, sale and use of opium and certain other dangerous drugs and substance and for purpose connected therewith'.[24] The Dangerous Drugs Ordinance and other main drug legislations will be discussed separately and in more detail below.

2.5 Heroin abuse in Southeast Asia and Malaysia

Despite this history, until the 1960s, drug use, although always of concern, was not regarded as a major social problem in Malaysia. The drug user population was mainly confined to the traditional drug users i.e. opium users who were generally older and from the Chinese ethnic. But towards the end of the 1960s and early 1970s, drug use no longer became containable by traditional restraints. A combination of factors – the greater availability of drugs, the growth in the drug trade, and the interest of the young in a whole range of new psychotropic substances has resulted in an epidemic of drug abuse. By the 1970s, heroin had become the drug of choice for a younger predominantly male generation of users.[25] Heroin is still mainly imported from the Golden Triangle, the heroin-producing region.[26] The area covers a vast opium producing area of approximately 75,000 square miles (200,000 square kilometres) encompassing

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[24] The Ordinance was later revised in 1980, thenceforth assuming the name 'Act'.
[25] *Navaratnam and Spencer, (n 15).*
[26] Joint United Nations Programme on HIV/AIDS (UNAIDS) and United Nations Office on Drugs and Crime (UNDCP) 2000 cited in Gary Reid, Adeeba Kamarulzaman and Sangeeta Kaur Sran, 'Rapid Situation Assessment of Malaysia' (2004) www.hivpolicy.org/Library/HPP000991.pdf.

the borders of northern Thailand, North-Eastern Myanmar and the north-western part of the Lao People's Democratic Republic. Narcotics are illegally produced from raw opium in the refineries along the borders of these crop-producing countries and transported for sale on the illicit market.

> By the end of the 1950s, Burma, Laos, and Thailand together had become a massive producer, and the source of more than half the world's present illicit supply of 1,250 to 1,400 tons annually. Moreover, with this increase in output the region of the Far East and Southeast Asia quickly became self-sufficient in opium... By 1968-1969 the Golden Triangle region was harvesting close to 1,000 tons of raw opium annually, exporting morphine base to European heroin laboratories, and shipping substantial quantities of narcotics to Hong Kong both for local consumption and for re-export to the United States.[27]

Naturally, Malaysia's geographical proximity to the Golden Triangle made her a strategic transit point for this lucrative illicit drug trafficking as well as a target market.

Throughout Southeast Asia, the nature of the drug user population changed as they moved from opium as the drug of choice to heroin. Ironically, a study of narcotic addiction in Hong Kong, Thailand and Laos, between 1965 and 1975 has concluded that it was the passing of anti-opium laws by the British colonial governments that led to this shift. These laws, which banned the production, transport, sale and use of opium, led to a transition from opium addiction to heroin addiction among the drug using population.[28] Within a decade of the legislation, most of Hong Kong's drug users were using heroin. Many former opium users switched to heroin use, and all new users began to use heroin rather than opium.

> In many ways the British crown colony of Hong Kong resembled Marseille...Marseille was the heroin laboratory for Turkish opium, and

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[27] *McCoy, (n 7).*
[28] Joseph Westermeyer, 'The Pro-Heroin Effects of Anti-Opium Laws in Malaysia' (1976) Arch Gen Psychiatry Vol 33.

> Hong Kong played a similar role for Southeast Asia…Hong Kong, along with the Golden Triangle, seemed to be the emerging heroin-producing capital of the world in the early 1970s...[29]

The extent of the problem was considerable - by 1970 there were a reported 100,000 drug users in Hong Kong. In 1972, the U.S. Drug Enforcement Administration revealed that Hong Kong had '30,000 opium smokers and 120,000 heroin users, who consumed about 35 tons of opium annually, a remarkable amount that approached the level of total U.S. opiate consumption'.[30]

Suwanwela and Poshyachinda reported that the passing of the anti-opium law in Malaysia also forced the traditional opium smokers to switch to heroin.[31] These internal movements were reinforced in the late 1960s by the 'hippie culture' from the West making an impact upon Malaysia: the spread of modern mass communication meant that Malaysian youth were exposed to 'cultures' that accepted the experimental use of drugs and it has been suggested this escalated the drug problem.[32] A new generation, in their teens and twenties became drug users. Heroin addiction was not confined to only one ethnic group anymore, but has cut across all three Malaysian races; Malay, Chinese and Indian.[33] From 1970 to 1982, 42,977 new drug user cases were detected in Malaysia with an average of 3,306 cases per year.[34] According to Suwanwela and Poshyacinda:

> The emergence of the use of drugs among youth in Asia appears to be closely associated with the rise in drug use among youth in Western societies. Certain symbols of the youth subculture, such as blue jeans, rock and discotheque music and characteristic hair-styles, have become popular among young people in most countries and areas of Asia.[35]

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[29] *McCoy, (n 7).*
[30] ibid.
[31] *Suwanwela and Pshyachinda, (n 11).*
[32] Charles Maria Victor Arokiasamy and Patrick F.Taricone, 'Drug Rehabilitation in West Malaysia: An Overview of Its History and Development' (1992) Vol 27 No 11, 1301-1311.
[33] *Arokiasamy and Taricone, (n 32).*
[34] *National Narcotics Agency, (n 17).*
[35] *Suwanwela and Pshyachinda, (n 11).*

The end of the Vietnam War, in 1975, further exacerbated the drug abuse problem, which saw the withdrawal of the American servicemen from the Southeast Asian region. During the war, these American GIs who were addicted to heroin got their cheap and potent supply from the local drug suppliers. Between 1969 and 1970, laboratories in the Golden Triangle began to convert their production from the low-grade no.3 heroin to no.4 heroin as it 'appears to be due to the sudden increase in demand by a large and relatively affluent market in South Vietnam'. By the middle of 1971, the wholesale price of heroin rose drastically to $1,780 per kilo. It was reported that at least 25,000 American soldiers were heroin users.[36]

When the US forces left, there was an immediate over-supply of heroin. This left a vast gap to be filled and the drug suppliers then turned to the local market ie the younger generation.[37] The 1980s saw the epidemic of drug abuse and its associated problems spreading and affecting almost all countries of the world. However, the drug problem in Southeast Asia has been regarded as being more severe than in most other regions.

2.6 Drug abuse as a threat to national security

In Malaysia, the rise in illicit drug use and trafficking have led to a corresponding rise in corruption, criminal activities, violence and intimidation.[38] When illicit trafficking and drug abuse peaked in 1983, the then Malaysian Prime Minister, Dato' Seri Dr. Mahathir Mohamad declared '*dadah*' (dangerous drugs), as a

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[36] *McCoy, (n 7).*

[37] National Narcotics Agency, *'DADAH: Apa Anda Perlu Tahu'* (1st edn, National Security Council, Prime Minister's Office Kuala Lumpur 1992).

[38] Anti Narcotic Task Force (1990) cited in W.Y. Low, S.N. Zulkifli, K. Yusof, S. Batumalai and W. A. Khin, 'Knowledge, attitudes and perceptions related to drug abuse in Peninsula Malaysia: A survey report' (1996) Asia-Pacific Journal of Public Health 8 (2).

threat to national security.[39] Statistics by the Anti-Narcotics Task Force revealed that in 1983, 14,624 drug users had been identified as new cases with an average of 1,219 cases registered a month. Heroin was the drug of choice with 77.4 per cent out of the total registered drug users using heroin; 12.8 per cent used cannabis; 6.4 per cent used morphine; 7.2 per cent used opium and 3.8 per cent used other types of drug. According to the National Narcotics Agency:

> The nation's drug abuse problem would reach epidemic proportion if strict measures were not taken to combat the crisis; the drug addiction has been targeting the youth which represents the backbone and future hope of the nation; pervasive drug addiction and trafficking could threaten the socio-economic structure, spiritual and cultural fabric of the nation and eventually the integrity and security of the country.[40]

However the problem continued to escalate. In 1995, the National Narcotics Agency reported that about 13,140 drug users were registered as new drug users and 20,964 as recurring drug users. This latter figure indicated that 61.5 per cent of drug users who were treated for their drug dependence relapsed.[41] It was also reported that the total number of drug users in 1995 was the highest ever recorded since 1988. In spite of the government's efforts to tackle the drug problem, there were 235,495 drug users and offenders registered between 1988 and 2002.[42] However, the report also stated that the actual number of heroin users who did not register could be 2.5 times higher than the government figures.[43]

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[39] *National Narcotics Agency, (n 37).*
[40] *National Narcotics Agency, (n 17).*
[41] ibid.
[42] Marek C.Chawarski, Mahmud Mazlan and Richard S.Schottenfeld, 'Heroin dependence and HIV in Malaysia' (2005) Drug and Alcohol Dependence 82 Suppl. 1 S39-S42.
[43] Mahmood Nazar cited in *Chawarski, Mazlan and Schottenfeld, (n 42).*

By 2003, official statistics showed that the total number of new drug users for the past five years was 85,870.[44] In that same year, the then Deputy Prime Minister Datuk Seri Abdullah said in a press conference that 'efforts to combat the drug abuse had not been entirely successful' and declared 2003 as `The Year of Total War Against Drugs'.[45] Datuk Seri Abdullah stated that a new approach would be implemented to curb illegal production, trafficking, addiction and smuggling of drugs. The government hoped to achieve the objectives of its anti drugs campaign by `maximising power' through the combined efforts of the Ministry of Home Affairs, Ministry of Education, Ministry of Youth and Sports, and Ministry of Information, and at the same time 'getting all sectors in the society to involve in these efforts'.[46]

Thus, it can be seen from the above discussion, from the year 1983 when drug abuse was declared as a national security threat, to 2003 as `The Year of Total War Against Drugs', Malaysia's drug abuse problem, particularly heroin addiction, has never stopped rising in its number of drug users. The following section will discuss the rise of amphetamine-type-stimulants (ATS) in Malaysia as the 21st century substance of abuse.

2.7 Amphetamine-Type Stimulants (ATS) abuse

2.7.1 Illicit manufacturing and trafficking of ATS in Malaysia

As well as the issues surrounding the trafficking and use of heroin, the advent of the twenty-first century has also seen Malaysia as becoming a transit point for

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[44] *Parlimen Kesebelas, Penggal Pertama, Mesyuarat Kedua* (29 July 2004) www.parlimen.gov.my accessed 16 June 2006.

[45] 'Asian Drug Abolition Mania Spreading -- Malaysia Calls for 'Total War,' Drug Free Southeast Asia by 2015'. *Newsbrief* (1/31/03) stopthedrugwar.org/chronicle-old/274/malaysiamania.shtml accessed 12 May 2006.

[46] Abdul Razak, D., National Poison Centre, Universiti Sains Malaysia www.prn2.usm.my/mainsite/bulletin/2003/prn38.html accessed 20 June 2006.

the smuggling of Amphetamine-Type Stimulants (ATS) by international syndicates.[47] According to a report by the Colombo Plan Drug Advisory Programme, the manufacturing and illicit trafficking of ATS 'have increased significantly in the Asian region throughout the 1990s'.[48] The producing countries are believed to be China, Myanmar, and the Philippines.[49] The report did not state Malaysia as one of the producing countries, although in recent years there have been increasing reports of police seizures of synthetic drugs in the country. In April 2007, police raided a clandestine laboratory for processing drugs in an oil palm estate in southern Malaysia and confiscated 12kg of *syabu* worth RM2 million. 13 people were also arrested.[50] Recently, in March 2009, police uncovered a laboratory manufacturing psychotropic pills in Johore, in southern Malaysia. It was reported that the drugs seized were valued at RM61.3 million. Several people were arrested in relation to the raid including four foreign chemists from Taiwan allegedly brought in to process the drugs.[51]

2.7.2 The rise in ATS abusers

According to the UNDCP, 'ATS are the most abused synthetic drugs manufactured clandestinely. Though relatively new, they have quickly become a part of the mainstream illicit drug culture'.[52] ATS abuse has already made an impact in Malaysia amongst its drug abuse population. According to the AADK,

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[47] Al-Ghazali cited in Rohany Nasir, Fatimah Yusooff, Zainah Ahmad Zamani, Mohd Norahim Mohamed Sani, '*Pengenalan Tentang Dadah'* www.ippbm.gov.my accessed 23 May 2006.
[48] *ATS Prevention – A Guidebook for Communities, Schools and Workplaces* (The Colombo Plan Drug Advisory Programme , April 2003).
[49] ibid.
[50] 'Major Drug Bust' *News @ AsiaOne* www.asiaone.com.sg. accessed 13 January 2010.
[51] 'Malaysian Police Arrest Taiwan Men in Major Drug Bust' *TopNews.in* www.topnews.in/tree/Malaysia accessed 13 January 2010.
[52] United Nations General Assembly Special Session on the World Drug Problem (UNGASS), New York USA 8-10 June 1998.

'ATS were the second most common type of drugs consumed after the opiates group (including heroin, morphine, codeine and opium) in 2008'.[53] A recent report suggested that the total number of ATS abusers had increased considerably. Between January and November 2009, the AADK reported that 479 drug users that were apprehended tested positive for ATS, which includes ecstasy, *syabu* and amphetamine. Heroin still remained the drug of choice, with 1,038 drug users out of a total number of 2,899 people arrested for drug abuse.[54]

2.7.3 Implication of ATS abuse

The short-term effects of ATS abuse are listed as follows:

- Increased attention and decreased fatigue
- Decreased appetite
- Euphoria and rush
- Increased respiration
- Hypertension
- Aggression
- Risk taking (accidents, sexually transmitted disease). [55]

Long-term abuse of ATS may cause addiction and severe damaging effects to the human body. According to Mazlan, a regular intake of methamphetamine once or twice a week can cause dependence.[56] Symptoms such as violent behaviour, anxiety, confusion and insomnia may develop in chronic abusers.

> *Syabu*, or *ice,* is an extremely powerful addictive stimulant. It is developed from its parent drug, amphetamine, and has a more pronounced effect on the human central nervous system. *Ice* is smoked in a glass pipe like crack cocaine. The smoke is odourless, leaves a residue that can be re-smoked and produces effects that may continue for 12 hours or more... *Ice* has toxic effects. In animals, a single high dose of the drug has been shown to damage nerve terminals in the dopamine-containing regions of the brain. High doses can elevate body temperature

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[53] 'Do drugs control your life?' UNICEF Malaysia www.unicef.org/malaysia/aids accessed 23 February 2010.
[54] AADK Drug report, November, 2009.
[55] *ATS Prevention: A Guidebook (n 48).*
[56] Dr.Mahmud Mazlan, Addiction Medicine, Substance Abuse Centre, Muar, Johore, Malaysia.

> to dangerous, sometimes lethal levels, as well as cause convulsions... They also display a number of psychotic features, including paranoia, auditory hallucinations, mood disturbances and delusions.[57]

2.7.4 Treatment programme for ATS abuse

The rise in ATS abuse has led the AADK to plan a treatment programme specifically for ATS abusers at the *Dengkil Puspen* centre in Selangor by end of 2009.[58] In 2008, Mazlan commented that for metamphetamine addiction 'chances of recovery is good if hospitalisation and proper medication and psychosocial intervention is properly administered.' According to his personal experience in dealing with such cases, 'more than two-thirds recover after one year of treatment if medications and initial hospitalisation is utilised. Otherwise, the success rate would be less than 10 per cent'.[59]

3. Malaysia's prohibition approach to drug abuse

3.1 Theory and policy

To recapitulate from the above discussion on the Malaysian history of drug abuse, initially drug abuse was regarded as a social problem in the 1960s,[60] which then escalated into a crisis in the 1970s.[61] During that era, heroin dependence reached epidemic proportion and heroin continues to be the drug of

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[57] 'Addiction that may cost you your life' *News @ AsiaOne* www.asiaone.com.sg. accessed 17 January 2010.
[58] Mustapha, S.K. *'Penagih dadah sintetik diasingkan di Puspen Dengkil' Kosmo* (Alor Setar 21 October 2009) www.kdn.gov.my/paperarticle/Kosmo211009ms11.pdf accessed 23 October 2009.
[59] 'Burnt by Ice. Crystal metamphetamine is currently a popular drug among youths' *The Star* (11 June 2008) cited in www.myhealth.gov.my accessed 22 February 2009.
[60] G.Edwards and A.Arif, *Drug Problems in Socio Cultural Context: a Basis for Policies and Program Planning* (World Health Organisation, Geneva 1980).
[61] *Arokiasamy and Taricone, (n 32).*

choice among drug abusers in Malaysia until today.[62] As discussed earlier in the chapter, the extent of the problem received government recognition in 1983 when drug abuse was declared as a national problem, which had affected the security and stability of the nation.

The Malaysian government has adopted a punitive prohibition approach towards drug abuse and addiction. In order to have a better understanding of this approach, one must look at the theoretical and policy aspects underlying it. These are guided by the following two factors. First, the government assumes that the international community embraces a largely prohibitionist approach. This is seen by the role played by the International Conventions under the auspices of the United Nations (UN), which advocates a prohibitionist international drug control system. This has had its impact upon Malaysia's drug policy, which will be discussed at length in the following section. Second, it is necessary to recognise that drug use and drug control are components of 'a complex social and historical interaction process'.[63] Berridge describes drug policies as 'more than just a reaction to the present situation. They are historically and culturally framed, the tensions and the contradictions within them forged through long historical experience'.[64]

The following section will discuss the first factor. As for the second factor, which encompasses the historical and cultural framework - the historical evolution to Malaysia's drug abuse problem has been considered earlier and the cultural beliefs, which have evolved throughout the colonial era, will be discussed in Chapter 4 under Asian values.

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[62] *Chawarski, Mazlan and Schottenfeld, (n 42).*
[63] Lorenz Bollinger, 'Therapy Instead of Punishment for Drug Users – Germany as a Model?' (2002) European Addiction Research 8.
[64] Viriginia Berridge, 'Drug policy: Should the law take a back seat?' (1996) The Lancet Vol 347 Issue 8997 accessed 24 April 2006.

3.2 United Nations treaties on international drug control

Since the 1920s, the international community has sought to develop systems to control and prohibit a wide range of both traditional and synthetic psychoactive substances (including the cultivation of plants that were grown as the raw material of heroin, cocaine or cannabis).[65] The legal framework for the international drug control system is enshrined in three landmark United Nations treaties; the Single Convention on Narcotic Drugs 1961, the Convention on Psychotropic Substances 1971 and the Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988. The 1961 Convention codified all the existing drug control systems into one key instrument which limits the possession, use, sale, manufacture and production of drugs to only medical and scientific purpose, and to curtail illicit trafficking of narcotics through international cooperation.[66] Whilst the 1971 Convention seeks to control the abuse of psychotropic substances (including synthetic drugs), the 1988 Convention highlighted the problem of drug trafficking and laid down provisions against money laundering and for the diversion of chemicals used in illicit drug manufacturing.[67] Most of the UN member states have ratified these Conventions.[68]

Malaysia became a signatory to the Single Convention on Narcotic Drugs 1967[69] in August 1967. The Single Convention requires member states to adhere to the provisions stipulated in it, by implementing drug prohibition measures as part of their national policy, with the primary focus of incorporating and/or

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[65] International Narcotics Control Board www.incb.org accessed 14 March 2007.
[66] ibid.
[67] *UNODC, (n 18).*
[68] Marcus Roberts, Axel Klein and Mike Trace, 'Towards a Review of Global Policies on Illegal Drugs' (2004) The Beckley Foundation.
[69] As amended by the 1972 Protocol Amending the Single Convention on Narcotic Drugs 1961.

extending punitive criminal legislation in regard to trafficking, possession, use, manufacturing and production of drugs.[70] Article 4 of the Single Convention states:

> The parties shall take such legislative and administrative measures as may be necessary:
>
> a. to give effect to and carry out the provisions of this Convention within their own territories;
> b. to co-operate with other States in the execution of the provisions of this Convention; and
> c. subject to the provisions of this Convention, to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs.

Article 36 of the Single Convention states that any action contrary to the Convention 'shall be liable to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty'. The Single Convention paid less attention to the medical and social issues of drug abuse although Article 38 states that member states should:

> give special attention to and take all practicable measures for the prevention of abuse of drugs and for the early identification, treatment, education, aftercare, rehabilitation and social reintegration of the persons involved and shall co-ordinate their efforts to these ends.[71]

3.3 The Association of Southeast Asian Nations (ASEAN)

In the same year that Malaysia became a signatory to the Convention, ASEAN came into being. It initially comprised five nations, namely Indonesia, Malaysia, The Philippines, Singapore and Thailand. (Brunei joined later). Its objective was

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[70] *Sinha, (n 19).*
[71] ibid.

'to establish a zone of peace, prosperity and stability through social and economic cooperation within the Southeast Asian region'.[72]

In order to control drug abuse within the region, an ASEAN Regional Policy and Strategy in the Prevention and Control of Drug Abuse and Illicit Trafficking was adopted during the 8th ASEAN Drug Experts Meeting in 1984. The policy endorsed that the drug abuse problem within the region as a threat to national security, stability, prosperity and resilience. Realising the serious threat, the ASEAN regional anti-drug policies and programmes have come under the framework of transnational crime. Subsequently, the ASEAN Ministerial Meeting on Transnational Crime (AMMTC) was convened in 1997.

In 1998, ASEAN member countries endorsed a Joint Declaration for Drug-Free ASEAN at the 31st ASEAN Ministerial Meeting as a commitment to eradicate 'the production, processing, trafficking and abuse of illicit drugs in Southeast Asia by 2020'.

In July 2000, ASEAN Foreign Ministers agreed to extend the target of the Joint Declaration for a Drug-Free ASEAN from year 2020 to 2015 that affirmed the association's commitment 'to eradicate the production, processing, trafficking and use of illicit drugs in Southeast Asia'. They have also agreed that national anti drug laws should be at par as a continuous effort to combat illicit drug trafficking.[73]

The following section will look into the UN treaties' influence over Malaysia's national drug policy.

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[72] Chavalit Yodmani, 'The Role of the Association of South-East Asian Nations in Fighting Illicit Drug Traffick (1983) Bulletin on Narcotics www.unodc.org/unodc/data-and-analysis/bulletin/index.html accessed 10 February 2006.

[73] At the 33rd ASEAN Ministerial Meeting in 2000 cited in the Statement by H.E.Ambassador Hamidon Ali at the Third Committee of the 60th Session of the United Nations General Assembly New York USA 2005. www.aseansec.org.

4. National Drug Policy (NDP)

4.1 Introduction

According to the UNODC, drug control refers to:

> ...governmental laws and international regulations pertaining to the manufacture, distribution, and use of drugs. Drug policies are designed to affect the supply and/or the demand for illegal drugs locally or nationally. Policies may include education, treatment, laws, policing, and border surveillance'.[74]

At the 1998 UNGASS, the UN General Assembly adopted the Declaration on the Guiding Principles of Drug Demand Reduction.[75] Paragraph 4 of the Guiding Principles reads as follows:

> Extensive efforts have been and continue to be made by Governments at all levels to suppress the illicit production, trafficking and distribution of drugs. The most effective approach towards the drug problem consists of a comprehensive, balanced and coordinated approach, encompassing supply control and demand reduction reinforcing each other, together with the appropriate application of the principle of shared responsibility. There is now a need to intensify our efforts in demand reduction and to provide adequate resources towards that end.[76]

Further, paragraph 10 of the Guiding Principles explains the scope of the UNODC's concept of 'drug demand reduction', particular focus being on drug treatment:

> Demand reduction programmes should cover all areas of prevention, from discouraging initial use to reducing the negative health and social consequences of drug abuse. They should embrace information, education, public awareness, early intervention, counselling, treatment, rehabilitation, relapse prevention, aftercare and social reintegration. **Early help and access to services should be offered to those in need** (emphasis added).[77]

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[74] *UNODC, (n 18).*
[75] *UNGASS, (n 52).* Resolution II adopted as recommended by the Ad Hoc Committee of the Whole - Text of the draft resolution presented in A/S-20/4, chapter V, section A.
[76] ibid.
[77] ibid.

In 1983, the NDP was implemented following the government's declaration that the drug abuse problem is a threat to national security.[78] Prior to 1983, there was no specific policy on drugs as the drug abuse problem was regarded as a social problem. The NDP signalled the government's commitment to ensure the stability of 'the socio-economic structure, spiritual and cultural fabric of the nation and eventually the integrity and security of the country'.[79] The NDP was later revised in 1996, in line with the UN's stance towards combating the drug problem, by incorporating a multi-faceted anti-drug strategy of the 'reduction of supply and demand' based on a consolidated and integrated approach, encompassing four main areas of concern: prevention through measures such as drug preventive education and dissemination of information on the dangers of drug misuse; enforcement through law enforcement agencies such as the police and customs; treatment and rehabilitation of drug users; and strengthening regional and international cooperation.

The following section will examine the four components of the NDP and the extent to which they are effective in reducing the drug problems currently facing Malaysia.

4.2 Preventive measures

4.2.1 Preventive education

Prevention through education is a key component of the strategy underpinning Malaysia's existing drug policy, which is 'to generate a community that is free from drugs' (illicit drugs) and become a 'drug free society by 2015'.[80] Although

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[78] *National Narcotics Agency, (n 37).*
[79] ibid.
[80] *Reid, Kamarulzaman and Sran, (n 26).*

the Malaysian government has focused its efforts on enforcement and punishment, it has also declared its intention to create an environment to protect individuals and the community from drug use. According to the Malaysia Crime Prevention Foundation, 'education, prevention and enforcement are the key to succeed in tackling the drug menace'.[81] Primary and general prevention are based on demand reduction principles through education and dissemination of information on the dangers of drug abuse. Anti drug programmes have been applied in schools by promoting positive religious, moral and cultural attitudes and values to school children in order that they will reject drugs and embrace healthier lifestyles. Schools are the ideal starting point to provide cognitive, affective and skill components considered essential for effective prevention.[82]A module of drug education is incorporated in the teacher-training curriculum so as to provide all teachers with the basic knowledge of preventive education and essential skills to handle students at risks.

Besides schools, strong families are also seen as playing an important role in inculcating positive values amongst the young generation especially for teenagers.[83] Efforts have also been made by the state to get the general public to be more involved in programmes such as the drug awareness programme within the community. One of the objectives is to change community attitudes and perception about drugs. The stigma placed on the drug users is expressed in phrases such as 'drug addicts are parasites to the society' and 'once a drug addict always a drug

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[81] Lee Lam Thye, Malaysia Crime Prevention Foundation www.emcpf.org accessed 21 June 2009.
[82] Tay Bian How, 'Drug Prevention Education in Schools: the Malaysian experience' (1999) Drugs: Education, Prevention and Policy Vol 6 No.3.
[83] ibid.

addict.' The policy is to change such attitudes which otherwise could hinder the process of re-integrating former drug users into the society.[84]

The effectiveness of these initiatives can be judged from a recent nationwide survey. This was conducted to discover the extent of knowledge about HIV/AIDS among a total of 1075 young adults aged between 15-24 years. The result of the survey indicated that the great majority had sufficient general knowledge of the major routes of HIV transmission, but there was still a need to increase the level of knowledge and awareness of HIV/AIDS among the population. The study also proposed for the development of primary HIV/AIDS prevention programmes for young adults in Malaysia.[85]

The importance of such education-based policies is illustrated by the fact that Malaysia has the second highest HIV prevalence among the adult population in the Western Pacific region.[86] The HIV infection among IDUs in Malaysia has caused serious concerns for the past two decades.

In 2003, a study was conducted by the Malaysian Ministry of Health, which referred to data collected by the AADK in 2002. [87] The study revealed that 13.62 per cent of the total drug user population in contact with the criminal justice system were IDUs. In 2004, 1,448 HIV cases were found among 28 *Puspen* centre trainees.

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[84] W.Y. Low, S.N. Zulkifli, K. Yusof, S. Batumalai & W. A. Khin, 'Knowledge, attitudes and perceptions related to drug abuse in Peninsula Malaysia: A survey report' (1996) Asia-Pacific Journal of Public Health 8 (2).

[85] Li-Ping Wong, Caroline-Kwong Leng Chin, Wah-Yun Low and Nasruddin Jaafar, 'HIV/AIDS- Related Knowledge Among Malaysian Young Adults: Findings From a Nationwide Survey' (2008) Medscape Journal of Medicine 10 (6) :148.

[86] WHO Annual Report, 2003 cited in *Chawarski, Mazlan and Schottenfeld, (n, 42).*

[87] WHO Western Pacific Region, Ministry of Health Malaysia, University Utara Malaysia, 'Estimation of Drug Users and Injecting Drug Users in Malaysia' (2003) A study by the Ministry of Health Malaysia. In collaboration with University Utara Malaysia, with Technical and Financial Support of WHO.

Malaysia is currently facing a serious expansion of the HIV/AIDS epidemic, particularly among IDUs. It has been argued that government resources should focus on harm reduction programmes for IDUs and HIV risk reduction projects. To cite Mazlan et al:

> Despite the high prevalence of HIV and other infectious diseases in drug dependent individuals, relatively few HIV prevention efforts have targeted drug users in Malaysia. HIV risk reduction counselling is not provided routinely in drug treatment programmes, although drug treatment may provide a unique opportunity to educate this particularly vulnerable group about the risks of HIV infection and transmission.[88]

4.2.2 Integration into society

Another initiative which could be an effective measure for the government and the private sector to help drug users is to provide former drug users with suitable employment. Since drug users commit crimes such as snatch thefts and petty crimes to finance their drug habit, one possible solution of breaking the drug-crime cycle is by providing them with proper employment. A study by a group of drug addiction psychiatrists reported that 85 per cent of the drug trainees who were released from *Puspen* centres relapsed and got themselves involved in crimes such as 'snatch theft, selling drugs, fraud, house breaking and homicide' in order 'to support their addictive habit'.[89] The point that the researcher would like to make here is that if former drug users were given a better choice in life before and after being released from *Puspen,* such as employment opportunities, this could prevent them from reverting to their drug habit.

In Malaysia, it is very difficult for a former drug user or a drug trainee who has just been released from *Puspen* to get a job. One reason is because of

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[88] Mazlan et al, 'New Challenges and Opportunities in Managing Substance Abuse in Malaysia' (2006) Drug and Alcohol Review 25.
[89] Abdul Rashid et al, 'A Fifty-Year Challenge in Managing Drug Addiction in Malaysia' (2008) REVIEW JUMMEC Vol 11, No.1.

the stigmatisation of the phrase 'a drug addict is always a drug addict' being placed by society upon them. According to Buchanan, one of the biggest hurdles that these drug users have to endure in order to overcome their drug addiction is by breaking through the barrier of social exclusion.[90]

4.2.3 Random drug testing

The government's preventive measures are not solely educative. One of the government's initiatives in its drug prevention programmes has been to conduct preliminary urine tests among secondary school students aged between 15 and 19.[91] The AADK and the Malaysian Education Department conducted urine tests among 6,597 secondary school students from 31 participating schools. It was reported that one student tested positive for illegal drugs. Preliminary urine tests were also done among higher institution students here, of 601 students that participated, seven tested positive for illegal drugs.[92] Although these are small numbers, the prospect of mandatory drug testing in schools and colleges raises important issues of human rights. However, as of today, these government programmes continue to be implemented with full cooperation by the participating schools and institutions.

Such mandatory testing is also to be found in the workplace. In a 2004 study conducted by the Doping Centre, Universiti Sains Malaysia of 19,188 urine samples collected randomly from employees at their work place nationwide showed that 4.67 per cent tested positive; 2.4 per cent for cannabis, 1.55 per cent for morphine and codeine, 0.35 per cent bezodiazepines, 0.31 per cent

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[90] Julian Buchanan, 'Missing Links? Problem Drug Use and Social Exclusion' (2004) Social Inclusion Research Unit, School of Health, Social Care, Sports and Exercise Sciences, Glyndwr University Research Online.
[91] AADK Drug report, January 2009.
[92] ibid.

amphetamine and 0.06 per cent for alcohol.[93] It was reported in 2006 that 269 civil servants were involved in drug abuse: 134 cases from the army, 28 cases from the police and 107 from the general civil service.[94] In 2007, the Ministry of Human Resources Malaysia was reported to have urged more than 500,000 employers nationwide to conduct drug testing among their employees at the work place every six months.[95] This statement by the government was announced in conjuction with the comment by the Ministry's then Deputy Minister 'Currently, many employers do not emphasise urine tests and drug abuse cases were discovered when the users were involved in accidents'.[96]

It is important to note here that drug testing raises certain legal and ethical issues. For the purpose of the research project, these issues will only focus on drug testing amongst 'suspected drug dependants' apprehended by the criminal justice system, which will be discussed in greater detail in chapter 6 under the drug testing procedures.

4.2.4 Government budget

Malaysia's drugs preventive measures involve a substantial amount of government funds. This can be seen in the national budget allocated for them. Table 1 illustrates the government's allocated budget between 2003 and 2008:

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[93] Doping Centre, Universiti Sains Malaysia www.dccusm.com.
[94] 'Second chance for ex-drug addicts' *The Star Online* (Kuala Lumpur 19 June 2007) ocps.mpsj.gov.my/cms/documentstorage/com.tms.cms.document.
[95] Wansiti *'Uji air kencing pekerja enam bulan sekali' Utusan Malaysia* (19 June 2007) bpms.kempen.gov.my.
[96] *The Star Online, (n 94).*

Table 1- Government Budget for Drug Preventive Measures[97]

Year	Budget in Ringgit Malaysia (RM)
2003	91,295,000.00
2004	113,860,000.00
2005	120,789,000.00
2006	165,163,000.00
207	193,149,000.00
2008	246,246,000.00

From the above table, it can be concluded that between 2003 and 2008, the government have kept increasing its budget for drug preventive measures. The question that arises here is, have these measures been effective in reducing the drug problems in Malaysia? In a recent study by UNAIDS/APICT, revealed that the Malaysian government's spending on the above measures, including drug education in schools for a drug-free country have been unnecessary and were reported as 'low yield, counterproductive and non-empirical based'. [98] The report suggested that government funds should be channeled to more productive measures, for instance harm reduction programmes.[99] This has been highlighted earlier in the chapter. The study also commented that Malaysia's drug policy has 'unquestioningly' been 'oriented' by the prohibition-based UN Convention and

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[97] Ahmad Shobri, 'Amphetamine-Type-Stimulants Situation in Malaysia' (July 29-31 2009) Global Smart Programme Meeting for East Asia.
[98] Joint United Nations Programme on HIV/AIDS (UNAIDS) Asia Pacific Intercountry Team (UNAIDS/APICT) cited in Adrian Reynolds, 'Drug Policies: A Reflection of Understanding and a Framework for Action-Findings from a United Nations Drug Policy and HIV Vulnerability Research Study in Asia' (2001) Global Research Network on HIV Prevention in Drug-Using Population 4th Annual Meeting.
[99] ibid.

its ancillary guidelines, 'without probing the merits of their application or seeking evidence in relation to benefits and costs'.[100]

4.3 Interdiction and enforcement

Controlling the supply of illicit drugs by reducing the 'scope and scale of drug markets'[101] through tough enforcement strategies such as 'crop programmes in source countries, interdiction at the borders or targeting key individuals in trafficking organisations' are the conventional methods for disrupting the supply of illicit drugs to the market.[102] Disrupting the distribution channels and preventing illegal drugs moving from their 'source country to consumer countries'[103] is imperative to prevent them from reaching the local community.[104] The assumption is that if supply is restricted, demand will fall. Thus if the distribution process can be disrupted before reaching the consumers then there will be fewer people buying and using drugs.

According to the US's experience on the drug control strategy, the White House commented as follows:

> Domestic and international law enforcement efforts to disrupt illicit drug markets are critical elements of a balanced strategic approach to drug control. By targeting the economic vulnerabilities of the illegal drug trade, market disruption seeks to create inefficiencies in drug production and distribution, resulting in decreased drug abuse in the United States. The impact of these efforts on illegal drug use has been demonstrated by the near-disappearance of certain once-popular drugs from U.S. society. For example, after an increase in LSD use during the 1990s, the reported rates of LSD use by young people have declined by nearly two-thirds since 2001, following the dismantling of the world's leading LSD manufacturing organization in 2000. MDMA (Ecstasy) use has made a similar dramatic turnaround since U.S. law enforcement partnered with the Netherlands to

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[100] ibid.
[101] *Roberts, Klein and Trace, (n 68).*
[102] Karim Murji, *Policing Drugs* (Ashgate, Aldershot 1998).
[103] *Roberts, Klein and Trace, (n 68).*
[104] *National Narcotics Agency, (n 17).*

disrupt several major MDMA trafficking organizations in recent years.[105]

Through the ASEAN regional cooperation, Malaysia employs stringent controls at border checkpoints of neighbouring countries such as Thailand, Indonesia and Singapore. These are exercised by law enforcement agencies comprising of the Anti-Smuggling Units of the RMP and the Royal Customs and Excise Department to prevent trafficking or smuggling of narcotics into the country. These agencies maintain bilateral cooperation with their counterparts, the Office of the Narcotics Control Board of Thailand and the Central Narcotics Bureau of Singapore.

Certainly disruption of supply has been a major focus of the Malaysian anti-drug programmes. It was reported in 2004 that a regional effort between the Chinese and Malaysian police force succeeded in identifying and closing an amphetamine-processing laboratory in Semenyih, Selangor (Malaysia).[106] According to a RMP statistic, from January to September 2006, the police seized approximately 217,427 ecstasy pills and 136.47 kilograms of *syabu*. The amount was relatively substantial compared to the amount of illicit drugs that were seized in 1998 when the corresponding figures for the entire year were just 7,191 ecstasy pills and 6.43 kilograms of *syabu*.[107] The report did not distinguish between seizures at border checkpoints or seizures in domestic clandestine laboratories. Both, of course, contribute to disruption of supply. As mentioned earlier in the chapter, the Malaysian police have uncovered several cases of clandestine laboratories for processing ATS drugs. Recently, the Royal Malaysian Police (RMP) seized 978 kg of high purity crystalline

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[105] USA National Drug Control Strategy (2007). www.whitehousedrugpolicy.gov.
[106] Andres cited in *Reid, Kamarulzaman and Sran, (n 26).*
[107] Royal Malaysian Police, Statistic Report (January-September 2006) www.rmp.gov.my.

methamphetamine or '*syabu*' in Johor Baru, Johore (Malaysia) just north of Singapore, 'busting one of the country's biggest drug trafficking operations'. [108]

For an overview of the quantity of drugs seized by the RMP, Customs and Ministry of Health Malaysia, Table 2 below indicates the quantity of several types of drug seized for the year 2009:[109]

Table 2 - Drug Seizures 2009

Type of Drugs	Quantity Seized
Heroin No.3(kg)	218.35
Cannabis (kg)	2,351.79
Syabu (kg)	1,159.66
Ecstasy (pills)	75,515
Ketamine (kg)	1,070.59
Cocaine (kg)	18.61

The enforcement police was given a significant boost in 2004 when the National Anti-Drugs Agency Act came into force. The Act empowers AADK officers to be employed for:

> the prevention, detection, apprehension, enforcement, investigation and prosecution of offenders involving dangerous drugs offences, treatment and rehabilitation of drug dependants, special preventive detention of persons associated with any activity relating to or involving the trafficking in dangerous drugs, forfeiture of property connected with any activity related to dangerous drugs offences and the collection of security intelligence relating to dangerous drugs activity.[110]

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[108] UNODC 'Malaysian Authorities Seize Massive 978 kg of '*Syabu*'' (2009) Global Smart Update.
[109] AADK Drug report, December 2009.
[110] National Anti-Drugs Agency Act 2004, s 3 (2).

The ground operation work (enforcement) by the AADK took full force only by the end of 2009. In February 2010, it was reported that 850 grammes of cannabis were seized by the AADK and the Malaysian Immigration Department in a six hours operation around Mantin and Nilai, Negeri Sembilan (Malaysia).[111]

4.4 Treatment and Rehabilitation

Alongside the educative and enforcement measures, the government has also aimed at rehabilitation of drug users. However, as this thesis suggests, the rhetoric of treatment disguises an essentially punitive approach to the problems of drug abuse in Malaysia. In 1983, the Drug Dependant (Treatment & Rehabilitation) Act (the 1983 Act) was passed providing for compulsory treatment and rehabilitation of drug users with the aims of eliminating drug dependency and preventing relapse. The treatment and rehabilitation programme is currently run by government drug rehabilitation centres or known as *Puspen* and are under the jurisdiction of the AADK, within the purview of the Ministry of Home Affairs. The programme incorporates a twin concept approach: the `tough and rugged' approach and the psychosocial approach. The programme runs for a maximum of two years, followed by another two years of supervision in the community. This topic represents the main thrust of the research project and will be discussed throughout the whole of the thesis in Chapters 4, 5, 6 and 7.

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[111] '*AADK Dan Imigresen Tahan 19 Lelaki Dan Rampas Dadah' Bernama.com* (Seremban 10 February 2010).

5. Malaysia's Drug Laws

This chapter has looked at the diverse and perhaps conflicting objectives that have informed Malaysia's drugs strategy over the past decades. This section looks in greater detail at how the Malaysia's drug laws evolved, as what the international commentators have suggested are among the toughest anti drug laws in the world.[112] The main drug statutes are the Dangerous Drugs Act 1952 (the 1952 Act), Drug Dependants (Treatment & Rehabilitation) Act 1983 (the 1983 Act), Dangerous Drugs (Forfeiture of Property) Act 1988, Dangerous Drugs (Special Preventive Measures) Act 1985 and Poisons Act 1952. For the purpose of the research project, focus will be on the development of the 1952 Act and the 1983 Act.

The 1952 Act remains the principal legislation for the control of dangerous drugs in Malaysia and has been referred to as 'the most important statute governing dangerous drugs in Malaysia'.[113] The Act was enacted based on a scheme similar to the UK Dangerous Drugs Act 1920. The Act consolidated 'a very unwieldy mass of legislation into one Ordinance'.[114] The 'unwieldy mass' previously comprised 15 enactments and ordinances.[115]

Historically, the Act has been amended several times in conjunction with the changing patterns of drug abuse and trafficking in the country.[116] The First Schedule of the Act lists down the dangerous drugs under the Act – 'dangerous

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[112] USA National Drug Control Strategy' (2002) www.whitehousedrugpolicy.gov.
[113] Mimi Kamariah Majid, 'Amendments to the Dangerous Drugs Act, 1952' (1988) Journal of Malaysian and Comparative Law Vol 131 PT 15.
[114] ibid.
[115] All 15 statutes repealed by the Ordinance are listed under the Third Schedule of the 1952 Act.
[116] K.C.Vohrah, 'Forfeiture of the profits and proceeds derived from drug trafficking: thoughts on future action in Malaysia (1984) Bulletin on Narcotics www.unodc.org/unodc/data-and-analysis/bulletin/index.html accessed 15 April 2006.

drug' under section 2 of the Act means 'any drug or substance which is for the time being comprised in the First Schedule'.

Pursuant to the Emergency (Essential Powers) Ordinance, (No.82) 1971,[117] a Minister is given the power to either add or remove a substance from, or vary the First Schedule of the Act, if he considers it expedient to do so, so long as it is in line with the United Nations' decision 'to alter any of the Schedules to the Single Convention...'. Subsequently, with the passing of the 1971 Ordinance, the whole of the First Schedule (originally three parts) was revised the same year. Amongst the most commonly abused drugs under the First Schedule are heroin, morphine, cannabis, amphetamine, methamphetamine, cocaine and ketamine.[118] Prior to 1973, drug offenders who were found guilty under the Act were liable to either a fine of RM5,000 or less or to imprisonment for a maximum period of two years or to both.[119] However, in 1973 a new section was added to incorporate more stringent penalties for certain offences under the Act. Where the subject matter involves 'heroin or morphine of five grammes or more in weight', the maximum sentence is now imprisonment for a maximum term of 14 years. Thus, the level of punishment depends on the quantity of the dangerous drugs found on a person.[120]

Two years later, several amendments were made to the Act, by virtue of the Dangerous Drugs (Amendment) Act 1975, making it even more draconian. From 1975 onwards, it shall be seen here that further amendments to the Act gradually increased the severity of the punishments in relation to drug offences and also drug users who are certified as 'drug dependants'.

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[117] Emergency (Essential Powers) Ordinance, (No.82) 1971 s 45.
[118] Ketamine was included in the First Schedule under the Dangerous Drugs (Amendment of the First Schedule) Order 2001.
[119] 1952 Act, s 39.
[120] Dangerous Drugs (Amendment) Act 1973, s 39A.

The following section, which will be divided into three sub-headings, will discuss the three elements incorporated into the 1975 Amendment Act. Firstly the increase in levels of imprisonment and corporal punishment, secondly the introduction of the mandatory death penalty and finally the compulsory treatment and rehabilitation programme at government run drug rehabilitation centres.

5.1 Increased penalties

First, the penalties were consistently increased. In 1975, the maximum penalty for offences committed against the Act was increased with the inclusion of the punishment of 'whipping of not less than six strokes'.[121] A year later a new section was incorporated into the Act, which provided for the restrictions on planting or cultivation of certain plants. Previously the Act had been silent on this matter. The section was introduced when seizures of cannabis plants and cannabis were made by the drug enforcement agency in some parts of the country. Anyone found guilty for cultivating or planting 'any plant from which raw opium, coco leaves, poppy straw or cannabis' shall be punished with imprisonment for life and with whipping of not less than six strokes.[122] In 1983, the maximum punishment was increased from 14 years to life imprisonment, with whipping of not less than six strokes.[123] Three years later, the Act was amended again so that if a person is found in possession of heroin, morphine or monoacetylmorphines weighing 'two grammes or more but less than five grammes', it was an offence under the Act, punishable with imprisonment for a term of two to five years and three to nine strokes of whipping.[124] If the subject

[121] Dangerous Drugs (Amendment) Act 1975, amendment to s 39A.
[122] Dangerous Drugs (Amendment) Act 1976, s 6B.
[123] Dangerous Drugs (Amendment) Act 1983, amendment to s 39A.
[124] Dangerous Drugs (Amendment) Act 1986, amendment to s 39A.

matter is 'five grammes or more in weight' of heroin, morphine or monoacetylmorphines, that person could be punished with a maximum sentence of life imprisonment and whipping of not less than 10 strokes.[125]

5.2 The death penalty

Second, the most punitive provision was passed in 1975 - the death penalty sentence for drug trafficking.[126] Alongside this new punishment, the Act incorporated a definition for the term 'trafficking'. 'Trafficking' in relation to a dangerous drug includes 'manufacturing, selling, giving, administering, transporting, sending, delivering, procuring, supplying or distributing otherwise than under the authority of this Ordinance or any other written law'.[127] In 1983, the death penalty became mandatory.[128] Section 39B of the Act states as follows:

> (1) No person shall, on his own behalf or on behalf of any other person, whether or not such other person is in Malaysia –
> (a) traffic in a dangerous drug;
> (b) offer to traffic in a dangerous drug; or
> (c) do or offer to do an act preparatory to or for the purpose of trafficking in a dangerous drug.
> (2) Any person who contravenes any of the provisions of subsection (1) shall be guilty of an offence against this Act and shall be punished on conviction with death.

Under section 37 of the 1952 Act, any person who is found in possession of '15 grammes or more in weight' of heroin, morphine or monoacetylmorphines, shall be presumed to be a drug trafficker.[129] Before the 'trafficking' definition in

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[125] 1952 Act, s 39A (2).
[126] SL Harding, 'Death, Drugs and Development: Malaysia's Mandatory Death Penalty for Traffickers and the International War on Drugs' (1991) Columbia Journal of Transnational Law.
[127] 1952 Act, s 2.
[128] Dangerous Drugs (Amendment) Act 1983.
[129] 1952 Act, s 37 (da) (i) (ii) (iii).

section 2 can be invoked, 'possession of the said drugs has to be proven'.[130] The statutory presumption of possession is laid down in section 37 (da) of the 1952 Act, which reads as follows:

> any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug.

In order for the presumption to take effect, the element of custody or control of anything whatsoever containing any dangerous drug must be proven.[131] The characteristics of 'custody' and 'control' was defined in *Leow Nghee Lim* v *Reg*:

> In essence, the presumption under 37 (d) works as follows: Once it is proved that a person has control and custody of a dangerous drug, he is deemed not only to be in possession of the drug but is also deemed to have knowledge of the nature of the drug until the contrary is proved. As such, without the evidence of custody or control, the rebuttable presumption of possession and knowledge cannot arise.[132]

Table 3 below shows the number of arrests made, between 2001 and 2009, for the drug offence under section 39B of the 1952 Act:[133]

Table 3 - Arrests Under s 39B Dangerous Drugs Act 1952

Year	2001	2002	2003	2004	2005	2006	2007	2008	2009
Number of Arrests	1,858	2,117	1,678	1,823	1,894	1,535	2,080	2,580	3,045

[130] Hisyam Abdullah @ Teh Poh Teik, *The Law on Drugs Possession and Trafficking in Malaysia* (Marsden Law Book, Kuala Lumpur 2006).
[131] ibid.
[132] [1956] 22 MLJ 28 (Malaysia) per Siti Norma Yaakob FCJ (as she then was).
[133] Royal Malaysian Police, Statistic Report (2007) www.rmp.gov.my and *AADK Drug report (n 109)*.

Between July 2004 and July 2005, there were 52 executions carried out in Malaysia. Of these, 36 were for drug trafficking.[134] Besides Malaysia, the majority of the ASEAN countries - Thailand, Singapore, Brunei Darussalam and Vietnam - have laws that provide for a mandatory death sentence for possession of relatively small amounts of narcotics. The Philippines abolished its death penalty law in 2006. However, the then Malaysian Deputy Minister in the Prime Minister's Department was quoted as saying in Parliament that the Malaysian government had no intention of abolishing the death penalty. He said that such provision was needed as a deterrent and to safeguard public interest. The Minister's statement was strongly opposed by the national human right activists as being 'baseless and cannot be justified by any facts or statistical proof'.[135] According to a movement - Malaysians Against Death Penalty (MADPET), studies conducted throughout the world on death penalties have failed to find convincing evidence to support capital punishment as being a more effective deterrent factor than long-term imprisonment. To cite MADPET:

> The Malaysian government ought to have conducted a thorough study on the effectiveness or ineffectiveness of the death penalty as a deterrent to serious crime before having a Deputy Minister, who is a lawyer, stand up in Parliament and attempt to turn a myth into an empirical truth. A recent television poll done by RTM 2 during the Hello on Two programme on 7/5/2006 showed that 64 per cent of Malaysians are for the abolition of the death penalty in Malaysia.[136]

At present, there are no statistics in Malaysia with regard to the effectiveness of capital punishment in the prevention of illicit drug use.

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[134] International Harm Reduction Association, 'New IHRA report calls for end to death penalty for drug offences' (2007) www.drugscope.org.uk/newsandevents/currentnewspages/IHRA-death-penalty.htm accessed 24 May 2008.
[135] The Malaysian Bar 'MEDIA RELEASE: Malaysia blindly accepts myths propagated by death penalty retentionists' (July 2006) www.malaysianbar.org.my accessed 24 May 2008.
[136] ibid.

5.3 The compulsory treatment and rehabilitation of drug users

Third, in 1975, the treatment and rehabilitation of drug users was introduced as a compulsory provision under the 1952 Act. The provision empowered the Ministry of Social Welfare (the Ministry in charge of treating and rehabilitating drug users at that time) to set up institutions approved by the government for treating drug users. Police officers and welfare officers were granted the right to detain individuals suspected as 'drug dependants' to undergo medical examination and if necessary to undergo rehabilitation at government approved rehabilitative institutions.

In 1977, the government amended the 1952 Act again by stipulating a minimum compulsory period of six months of institutionalised treatment at the centres, a period which may be extended for a further six months. [137] Alternatively, a drug user may be ordered to be under the supervision of a Social Welfare officer for two years.[138]

In 1983, the Drugs Dependant (Treatment and Rehabilitation) Act was passed. This was a legislation to meet the government's policy to reduce drug dependency among 'drug dependants' by getting them into treatment at government-run rehabilitation centres.[139] Several amendments were later made to the 1983 Act. As has been mentioned earlier in the chapter, the treatment and rehabilitation programme under the 1983 Act will be discussed in detail in the succeeding chapters.

In 2002, a punitive section was incorporated into the 1952 Act. Under the section, anyone who is found guilty of committing an offence under the Act, and

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[137] Dangerous Drugs (Amendment) Act 1977, Part VA.
[138] ibid.
[139] With the passing of the new 1983 Act, the preceding provision in regards to the compulsory treatment and rehabilitation of drug dependants under the Act was repealed.

has prior admissions to government drug rehabilitation centres or previous criminal convictions, shall 'instead of being liable to the punishment provided for that offence under the section under which he has been found guilty, be punished with imprisonment for a term which shall not be less than five years but shall not exceed seven years, and he shall also be punished with whipping of not more than three strokes'.[140] As of today, there are no official statistics on the number of convicted cases in relation to this provision. Nonetheless, the introduction of the above statutory provision seems to suggest that the compulsory treatment programme has not been entirely effective in eliminating drug dependency and preventing relapse under the NDP.

6. The Malaysian 'War on Drugs'

6.1 Prohibitionism

This chapter has demonstrated the punitive approach to drugs taken by the Malaysian government over the past 50 years. Malaysia is, of course, in step, with most other nations. From as early as the 20th century, drug abuse has been criminalised by most societies throughout the world. The common belief is that drug abuse is socially unacceptable because it causes the user to lose control of himself, often resulting in deviant behaviour, and potentially causing harm to himself or others. Societies often view drug addiction as quasi-criminal and there is a clear link between drug abuse and acquisitive crime.[141] The norm for all societies is to punish not just traffickers but also low level users.[142]

Prohibitionism is described as 'the array of laws, criminal justice practices and social evaluations that serve to suppress particular forms of drugs,

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[140] 1952 Act, s 39C.
[141] Jock Young, *The Drugtakers. The Social Meaning of Drug Use* (Paladin, London 1971).
[142] *Bollinger, (n 62).*

forbidding their use, production and sale'.[143]Prohibitionists prefer to embrace enforcement and punishment as a means of tackling the drug problem. Erickson argues that states found that they were able to exploit the concerns surrounding illicit drug use to further the social and political agenda of the government. The author criticised the Canadian government under the then Prime Minister, Brian Mulroney for publicly announcing the drug problem as an 'epidemic', which eventually led to the resurgence of drug prohibitionism in Canada from 1986 to 1992. To quote Erickson:

> The American President, Ronald Reagan, declared a new crusade against drugs, stating that "Drugs are menacing our society... there is no moral middle ground". Within two days, Prime Minister Brian Mulroney departed from his prepared text to announce that "Drug abuse has become an epidemic that undermines our economic as well as our social fabric".

Across the developed world, arguments for the legalisation of drug use have fallen on deaf ears. In the USA, proponents for the abolition of drug prohibition have a clear analogy when they look at the repercussions of its national alcohol prohibition from 1920 to 1933. The temperance movement sought to discourage people from drinking alcohol simply because it was dangerous and destructive to their lives. Temperance supporters contended that even moderate consumption of alcohol could lead to addiction.[144] According to Gusfield, 'prohibitionists were utopian moralists; they believed that eliminating the legal manufacture and sale of alcoholic drink would solve the major social and economic problems of American society'.[145] But the prohibition era witnessed many, if not most, American citizens violating the prohibition law and

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[143] Patricia Erickson, 'Recent Trends in Canadian Drug Policy: The Decline and Resurgence of Prohibitionism' (1992) Daedalus www.drugtext.org/library/articles/ericks5.html accessed 17 May 2007.
[144] Harry G.Levine and Craig Reinarman, 'Alcohol Prohibition and Drug Prohibition' (2004) www.cedro-uva.org/lib/levine.alcohol.html. accessed 17 May 2007.
[145] ibid.

many were sent to prison. Illegal manufacture and sale of alcohol was widespread. Problems included the adulteration of alcohol. Opponents of the prohibition law argued for the law to be repealed, especially in the context the Great Depression in the 1930s. They contended that by uplifting the ban on alcohol, the country's economy would improve and reduce the expanding illegal alcohol trade.

It can be concluded that prohibiting either sale of alcohol or drugs did not render the most effective solution to curb the problems created by them, such as alcohol or drug addiction. As a consequence to the prohibition approach, countries such the USA and Malaysia have waged a so-called war on drugs. This will be discussed in the next section.

6.2 The 'War on Drugs' – the USA and Malaysia

By analogy, in 1971, with the retreat of the American soldiers from Vietnam, the USA President Richard Nixon announced America's first ever 'war on drugs' with the slogan drugs are 'public enemy number one' and declared 'a full-scale attack on the problem of drug abuse in America'.[146] Today, the USA drug policy is the best-known example of the most prohibitive approach of dealing with the drug problem. McCoun and Reuter describe the country's enforcement strategies as stringent, punitive and intrusive.[147] The USA anti-drug laws provide long-term imprisonment for drug offenders, even for possession of small amount of

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[146] *McCoy, (n 3).*

[147] R. McCoun and P.Reuter, *Drug War Heresies: Learning from other vices, times and places* (Cambridge University Press, Cambridge 2001).

psychoactive substances.[148] The consequences brought about by these anti-drug laws can be similarly drawn to the alcohol prohibition in the 1920s (above).

Similarly, but on a lesser scale, Malaysia's relentless 'War on Drugs' and anti-drugs campaign for more than three decades has followed the USA inspired anti-drug slogan. 'The battle can only be won if everyone recognises it (that is, the drug abuse problem) as the nation's number one enemy'.[149] Since 1983, the Malaysian government has continued to adopt the punitive prohibition approach, emphasising tougher enforcement measures and more severe punishments for drug offenders, both traffickers and users.[150] This is amply illustrated by the statistics for arrests. From 1998 to 2006, 15,526 people were arrested for illicit drug trafficking. Between January 2007 and August 2007, another 1,462 people were arrested under the same offence, which upon conviction carries a mandatory death sentence. However, there are no official government statistics on the number of convicted cases. A total of 223,501 people were also arrested for other drug offences under the same Act.[151] These other offences are either possession of dangerous drugs[152] or self administration of dangerous drugs,[153] and if convicted shall be subject to harsh punishments such as incarceration ranging from two years to life imprisonment or corporal punishment (whipping).

This 'War on Drugs' has also been carried against drug users, even when there is no evidence of specific offences. In 2007, the Malaysian police arrested 159,490 people on suspicion of being a 'drug dependant'.[154] Drug addiction has

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[148] Harry G.Levine, 'The Secret of Worldwide Drug Prohibition' (Fall 2002) The Independent Review v.VII, n 2.
[149] Bernama 'Recognise Drugs As Nation's No 1 Enemy, Says Najib' (Kuala Lumpur 1 October 2005) www.bernama.com accessed 5 February 2006.
[150] *Reid, Kamarulzaman and Sran, (n 26).*
[151] Royal Malaysian Police, Statistic Report (2007) www.rmp.gov.my.
[152] 1952 Act, s 39A(1) and (2).
[153] 1952 Act, s 15 (1) (a).
[154] *RMP (n 151).*

always been viewed as social deviant behaviour and for the past three decades, society has refused to acknowledge it as a disease that needs to be cured.[155] In other words, the Malaysian society's reaction towards drug addiction has always been based on seeing it as a moral and legal issue rather than a public health concern.[156] Basing themselves on the prohibitionist view, until recently, the government disapproved of public health interventions such as substitution therapies, maintenance methadone programmes and needle and syringe exchange programmes .[157]

This view is reinforced by the fact that drug users, irrespective of whether they are recreational or problematic drug users are labeled as 'criminals' once they are brought into contact with the criminal justice system. The official rhetoric is that these drug users are coerced into getting treatment for their drug dependence problem and yet they are treated like criminals. This is evident from the military-style approach under the treatment and rehabilitation programme at *Puspen* centres.[158] This is an important issue affecting the principles of human rights. However, since the objective of the research project is to examine the legal process of the compulsory treatment system in Malaysia, only human rights issues pertaining to the arrest and detention of drug users prior to being committed to a *Puspen* centre will be discussed in the succeeding chapters.

There is some professional resistance to the punitive and moral tone. Drug users are usually stigmatised by society as being 'once a drug addict,

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[155] J.F.Scorzelli, 'Has Malaysia's Antidrug Effort Been Effective?' (1992) Journal of Substance Abuse Treatment, Vol 9.

[156] Adrian Reynolds, 'Drug Policies: A Reflection of Understanding and a Framework for Action-Findings from a United Nations Drug Policy and HIV Vulnerability Research Study in Asia' (2001) Global Research Network on HIV Prevention in Drug-Using Population 4th Annual Meeting.

[157] *Chawarski, Mazlan and Schottenfeld, (n 42).*

[158] Dr.Romzi Ismail, Universiti Kebangsaan Malaysia cited in Abdul Muin Sapidin,'*Harga perangi dadah*' (11 July 2006) www.pendamai.org.my/services/serv_archieve3.php

always a drug addict'.[159] The repercussion of social stigma against drug users, as reported by the Malaysian Medical Association (MMA) has discouraged these users from seeking treatment for their substance abuse. The MMA propounded that drug users should not be 'automatically criminalised' by sending them to *Puspen* centres, but should be given a choice to seek treatment elsewhere such as at general hospitals or private clinics.[160]

Such voices have had little effect. Although the 1983 Act has a provision for individuals who wish to seek treatment voluntarily, the implementation of the Act within the criminal justice system has deterred many drug users from seeking treatment voluntarily for fear of the prospect of being institutionalised at *Puspen* centres. The fact that they might lose their jobs or being stigmatised by society has become a barrier for them to seek treatment for their drug problem.

The resistance to the punitive regime for drug users has manifested itself in other ways. For the past few years, rioting and arson at *Puspen* centres as well as the escape of drug trainees have been on the rise. For example, between January and September 2006, a total of 337 trainees absconded from the *Puspen* centres nationwide.[161] Such incidents have been widely publicised by the media. According to Buchanan, drug use or drug users have always been portrayed in the media as 'the key causal factor in violent and abhorrent crimes'.[162]

The punitive approach to drug use is again reflected in the treatment of *Puspen* trainees who break the centre's rules or who abscond. Upon receiving a court-mandated order to enter a *Puspen* centre, a drug user is under the lawful custody of the centre. If he escapes from the centre, upon re-arrest, that person

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[159] *Reid, Kamarulzaman and Sran, (n 26).*
[160] *NST online* (1999) www.nst.com.my.
[161] AADK Drug report, January-October 2006.
[162] Julian Buchanan, Social Inclusion Unit, Glyndwr University, Wrexham, Wales (Copyright 2008).

shall be liable to five years imprisonment or to whipping not exceeding three strokes or to both.[163] This practice of corporal punishment in Malaysia has been criticised by many quarters, in particular SUARAM,[164] a non-governmental organisation (NGO) working towards the 'protection and realisation of fundamental liberties, democracy and justice'. According to SUARAM, flogging or whipping under Malaysia's penal system directly contravenes the fundamental human rights enshrined in Article 5 of the UDHR 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'.

In short, Malaysia's rhetorical war on drugs has waged a war against the drug users who are regarded as 'the convenient enemy'.[165] After almost three decades of waging the war with ever-increasing repressive legislation, there has been little impact upon the ever-increasing drug abuse problem, which still continues to be a national threat to the society. To cite Kazatchkine:

> Punitive approaches that over-burden criminal justice services are futile and counter-productive. What upsets so many of the harm reduction movement is the UN Commission on Narcotic Drugs' scandalous failure to appreciate how times have changed.[166]

At the IHRA's 20th International Conference, Kazatchkine was reported to have said that:

> a framework that focused exclusively on reduction of demand and supply was not acceptable and it was essential to continue to reject 'the myth that harm reduction promotes addiction'. By embracing harm reduction, countries moving from a law enforcement to public health approach were on the 'right side of history'...However some were still determined to swim against the tide and pursue the 'senseless war on drugs'.[167]

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[163] Drug Dependant (Treatment & Rehabilitation) Act 1983, s 19 (3).
[164] SUARAM www.suaram.net.
[165] Julian Buchanan and Lee Young, 'The War on Drugs – A War on Drug Users' (2000) Drugs: Education, Prevention Policy Vol 7 No 4.
[166] International Harm Reduction Association, 'Special Issue; Global Harm Reduction' (2009) IHRA 20th International Conference, Thailand.
[167] ibid.

The next section will discuss the current trend towards a harm reduction approach and see whether Malaysia is moving into that direction.

7. Paradigm shift: Punitive prohibition to harm reduction

Has there been a shift in the government's approach to drug abuse? In order to justify Malaysia's compulsory treatment of drug users, it must be proved that relapse rates amongst the participants can be substantially reduced. However relapse rates among drug trainees at *Puspen* centre have been reported to be more than 90 per cent.[168]

In 2003, the government announced that in view of the country's losing battle against its 'public enemy number one', there should be a policy shift from 'a punitive to a more rehabilitative approach'.[169] This suggests that the Malaysian government are adopting a more pragmatic approach, despite having always maintained a zero tolerance policy, with the aim of achieving a drug free society in line with ASEAN's common goal for a drug free ASEAN by 2015. To what extent have they taken on board the views of the NGOs, medical and other health professionals who are advocating a more pragmatic approach to reduce the harm caused by the government's drug prohibition policy still remains to be seen.

Proponents of harm reduction contend that committing drug users to drug rehabilitation centres involves a substantial amount of government resources that does not bring any benefit to the problems of drug dependence.

> With the lack of understanding of drug dependence and high levels of stigma, the relapse rate is very high – 90 to 100 per cent...Things could be

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[168] Nick Crofts, 'Drug Treatment in East and South East Asia: the need for effective approaches' (2006) UNODC Technical Resource Centre for Drug Treatment and Rehabilitation Australia.
[169] Abdullah Ahmad Badawi, Speech by Datuk Seri Abdullah Ahmad Badawi, National Anti-Drugs Day 29 March 2003.

> changed more positively if they changed from being compulsory to harm reduction. The system was as costly as it was ineffective: With the current approach of putting drug users in centres, 146.9m US dollars will be required from 2006-2015.[170]

Treatment should start from the point of arrest ie by providing treatment for withdrawal symptoms. Not only would this be a process towards 'an ongoing rehabilitation programme'[171] but as an external motivating factor for the drug dependants to successfully complete the treatment programme.[172]

Recent years have seen a gradual shift in the drug policy towards this more pragmatic approach on treatment for drug addiction.[173] According to Choong, government agencies are making positive efforts and advocating harm reduction programmes:

> We are hopeful that the harm reduction programme, both the free methadone as well as the needle exchange programme which has a strong prevention element, will make a bigger impact and we can reach the target. It is the first time we are witnessing a strong collaboration between government, police, rehabilitation officers at *Serenti* (*Puspen*) and NGOs. Harm reduction is too new to make a significant impact but the pilot project was successful. The challenge is always in scaling up because it involves community acceptance. There must also be interphasing with law enforcement. The centres in Kuala Lumpur, Johor Baru and Penang have been running for two years and we are seeing an improved understanding with the police force." [174]

Bollinger describes this 'intermediary level of development' as a 'medicalisation paradigm' in which 'softer control strategies' are being practiced within the objective of a drug-free society with the aim of raising the standard of

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[170] *IHRA, (n 166).*

[171] Alex Stevens, Christopher Hallam and Mike Trace, 'Treatment for Dependent Drug Use. A Guide For Policymakers' (2006) The Beckley Foundation.

[172] Wolfgang Heckmann, Viktoria Kerschl and Elfriede Steffan, 'QCT Europe Literature Review – Germany' (2003) www.kent.ac.uk/eiss/documents/pdf_docs/German.

[173] *Chawarski, Mazlan and Schottenfeld, (n 42).*

[174] Dr. Christopher Lee Kwok Choong of the Sungai Buloh Hospital's Department of Medicine (Infectious Disease) cited in Rathi Ramanathan, 'Changing attitudes', (2008) www.sun2surf.com accessed 23 July 2008.

public health and reducing harm to drug users.[175] Furthermore, scientific research has shown that the traditional prohibitionist drug control policy is unsuccessful in that it has caused more harm than good to drug users.

Malaysia's zero tolerance approach towards drug addiction has emphasised a 'single treatment modality' by which drug users are institutionalised for long periods rather than getting out-patient or community-based treatment.[176] Such a regimented-style of treatment implemented by the government has been criticised by many quarters as 'not an ideal approach' in that 'no single treatment will suffice for the different levels of addiction – novice, habitual, hardcore'. This can be illustrated by the low success rates of only 20 per cent recorded by *Puspen* centres.[177]

The Malaysian government have always stood firmly against the harm reduction approach in dealing with drug addiction. However, due to the increase in the number of HIV/AIDS cases in Malaysia, the government have decided to move away from the 'total abstinence' to a more 'moderate abstinence' approach in combating drug addiction. This seems to suggest a general acceptance of a harm reduction approach as a way of reducing the health problems. The government's 'top-down multi-agency' strategy for containing the spread of HIV/AIDS did not seem to work as incidence rates were high among drug users.[178]

In 2006, the Ministry of Health initiated a six-month programme by which hypodermic needles and condoms were distributed to 1,200 IDUs in four

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[175] *Bollinger, (n 63).*
[176] *Abdul Rashid et al, (n 89).*
[177] Paul Ravichandran, 'Helping The Addicts With Methadone' *Bernama.com* (Kuala Lumpur 21 April 2009).
[178] Balasingam Vicknasingam and Suresh Narayanan, 'Malaysian Illicit Drug Policy: Top-Down Multi-Agency Governance or Bottom-Up Multi-Level Governance (2008) www.issdp.org/lisbon.

cities. In February 2008, the Drug Service Centre, AADK set up a Methadone Maintenance Treatment (MMT) clinic at its centre. Although still at its induction phase, the clinic has thirty-four patients under its MMT programme. The clinic operates on a daily basis from 8 a.m. till 11 a.m. Dispensing of methadone to registered patients are done daily by a registered pharmacist.

In fact, as many as 600 private practitioners have volunteered to provide Drug Substitution Treatment (DST) at their clinics. It was reported recently that according to the National Drug Substitution Treatment (NDST) statistics, the number of patients (drug users) seeking DST have increased throughout the years since DST was introduced, with approximately 17,930 patients as at June 2008. The statistics also indicate that the programme was accepted by patients with the number of registered patients doubling from 6,184 to 13,174 during the same period.[179] Nonetheless, although Malaysia has the highest rate of HIV infections related to injection drug use, information about the risks of HIV/AIDS and hepatitis infection and transmission is still lacking amongst drug users in Malaysia. As a consequence, these IDUs do not fall within the targeted group for receiving the antiretroviral treatment.[180]

In light of the current trend towards a more pragmatic approach to the drug problem, it is hoped that Malaysia will continue to make further progress in order to achieve a drug free society by 2015. To cite Jelsma:

> Drug use: a clear trend is underway towards acceptance of harm reduction measures. Across the globe we find examples of policy shifts taking place in the direction of decriminalisation of drug use, introduction of needle exchange and substitution programmes, expansion of drug consumption rooms and heroin prescription, and incorporation of harm

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[179] Federation of Private Medical Practitioners' Association of Malaysia (FPMPAM).
[180] *Mazlan et al, (n 88).*

> reduction language in policy documents. There is no question about the direction policy trends are taking in this field.[181]

8. Concluding remarks

Malaysia has had a long history of drug abuse, as discussed in the earlier sections of the chapter. When the drug abuse problem reached its peak and became a national crisis in 1983, the national drug policy came into being and introduced several drastic measures in order to curb the drug problem. Punitive and severe punishments are being imposed on drug offenders, both drug traffickers and users under the draconian drug laws, particularly the 1952 Act and the 1983 Act. With particular focus on drug users who are ordered to undergo treatment at *Puspen* centres, the so-called rhetoric 'War on Drugs' grounded in prohibitionism has created a revolving door syndrome among the *Puspen* trainees. Serious health implications such as the high prevalence of HIV infection amongst IDUs have triggered the alarm bell causing the Malaysian government to reconsider shifting from its punitive prohibition approach to a more rehabilitative approach, such as harm reduction.

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[181] Martin Jelsma 'The UN Drug Control Debate: Current Dilemmas and Prospects for 2008'. Current Issues and Future Trends in UNODC (2005) 48th ICAA Conference. accessed 14 May 2008.

CHAPTER 4 : CIVIL COMMITMENT OF DRUG USERS IN MALAYSIA

1. Introduction

This chapter explores the issues surrounding involuntary detention or civil commitment of drug users in Malaysia in three inter-related sections. The first is the concept of civil commitment or involuntary detention of individuals by the state on the basis of civil rather than criminal law. The section looks at the use of and its rationales for civil commitment, particularly in the USA. It also considers the criticisms, which have been levelled at the practice, especially in regards to the fundamental liberties of those who have been committed by the state. The second section examines the principles underlying the Malaysian civil commitment and its development through the establishment of the *Puspen* centres. Finally the third section considers whether the Malaysian civil commitment is justified under the human rights provisions, specifically those contained in the Malaysian Constitution (the Constitution). A comparison is drawn with those countries whose human rights obligations are provided under the ECHR.

2. What is civil commitment?

The term 'civil commitment' refers to the involuntary detention by the state of its citizens who have not been charged with or convicted of crime under the criminal law. The WHO study defines civil commitment as an 'involuntary admission by judicial or administrative order, usually to an inpatient facility for

treatment of drug or alcohol dependence, on the grounds stated in the civil law'.[1] It necessarily involves a legal procedure that allows the state to compel non-criminal drug users to enter treatment programmes, which includes 'a residential period and an aftercare period in the community'.[2] Originally, civil commitment had been conceptualised in the mental health context wherein mental health patients were being involuntarily hospitalised for their mental disability.[3] Nowadays in Malaysia and in other jurisdictions, civil commitment is used both for the detention of the mentally ill and also for those who have a drug addiction problem.

The UK has never adopted this approach. Prior to the 1960s, opiate addiction was seen as a medical problem. The Dangerous Drugs Act 1920 allowed medical practitioners to prescribe heroine and morphine to patients 'so far as may be necessary for the exercise of his profession'. However in the late 1950s drug addiction became a concern in the UK when the number of registered drug users increased considerably. This led to the setting up of the first Brain Committee in 1961. When the situation became worse, the second Brain Committee reconvened in 1965. The Committee reported that the younger generation had become involved with drugs for pleasure and not, for example, becoming addicted for therapeutic reasons. As a result of this increase in addiction, the Dangerous Drugs Act 1967 came into force. Drug Dependence Units were set up within the London area to provide treatment for these drug users. Although local GPs could continue prescribing opiates to their patients,

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[1] Porter et al, *The Law and Treatment of Drug and Alcohol dependant Persons-A Comparative Study of Existing Legislation* (WHO, Geneva 1986).
[2] James A.Inciardi cited in Robert MacCoun, Beau Kilmer and Peter Reuter, 'Research on Drugs-Crime Linkages: The Next Generation www.ncjrs.gov/pdffiles1/nij.
[3] Lawrence O.Gostin, 'Compulsory Treatment for Drug-dependent Persons: Justifications for a Public Health Approach to Drug Dependency' (1991) The Milbank Quarterly Vol 69 No 4.

only 'specialist licensed doctors' were allowed to prescribe heroin and cocaine.[4] But there was no provision for the civil commitment of drug users. The Mental Health Act 1983 explicitly excludes drug addiction as a category of mental disorder. The Act allows for the compulsory detention of people with mental disorders, so that proper care and treatment can be given to them, and at the same time for the protection of other people.

In contrast to the position in the UK, civil commitment has been extensively used in the USA and 26 other countries.[5] In the USA,[6] civil commitment started in the early 20th century when the country was experiencing a serious narcotic problem among its population.[7] In 1935, the USA Narcotics Farm[8] at Lexington, Kentucky was set up for patients who were addicted to opiates by providing treatment facilities such as vocational and psychiatric therapies as well as straightforward withdrawal in order for them to lead a drug free life. In the hospital's first annual report, three proposals were put forward to improve the current programme:

i. Some means of holding voluntary patients until they reached maximum benefit from hospital treatment.
ii. Greater use of probation and parole, so that more prisoner patients could be discharged after having reached maximum benefit from institutional treatment.
iii. Provision for intensive supervision and aftercare in the community after discharge from the institution.[9]

The above proposals were never implemented. However, when the so-called narcotics farm had proved to be unsuccessful in achieving its objective,

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[4] B.Kidd and Roger Sykes, 'UK Policy' in Stark, Kidd and Sykes (eds), *Illegal Drug Use in the UK. Prevention, Treatment and Enforcement* (Ashgate, Brookfield 1999).
[5] *Porter et al, (n 1).*
[6] Most of the discussion in this section is based on a review of the literature through civil commitment programmes practiced in the United States.
[7] *Gostin, (n 3).*
[8] It was subsequently named the United States Public Health Service Hospital.
[9] John C.Kramer, 'The State Versus the Addict: Uncivil Commitment' (1970) 50 BUL Rev 1.

the proposals were employed to develop the basis of the more recent civil commitment programmes.[10] Based on this concept, mandatory treatment programmes for drug users were designed in the USA in the 1960s for persons involved in drug misuse, irrespective whether they had violated any federal laws. Basically, there were four types of categories of drug users who were involved in such programme: first, noncriminal drug users; second, drug offenders charged with crime but not convicted; third, drug offenders convicted of crime; fourth, drug users who volunteer themselves for treatment. Upon completion of the programme, these drug users or offenders would then be placed under a supervised outpatient treatment programme.[11]

One of the earliest civil commitment programmes established was the California Civil Addict Programme (CAP). CAP was begun in 1961 under the jurisdiction of the California Department of Corrections. Drug offenders convicted of a felony or misdemeanour could be committed to the programme. Although the purpose of CAP was said to be for the treatment, rehabilitation and supervision of drug offenders committed to the programme, according to Kramer, 'the programme has been virtually indistinguishable in operation from a prison programme'.[12] An evaluation of CAP revealed that CAP 'has become largely an extension of the punitive approach to the control of opiate addiction'.[13] Inmates of CAP would have to undergo treatment at a residential institution for a period of 18 months, subject to parole and thereafter released under strict

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[10] ibid.
[11] Abraham Abromovsky and Francis Barry McCarthy, 'Civil Commitment of Non-Criminal narcotic Addicts: Parens Patriae; A Valid Exercise of a State's Police Power; or an Unconscionable Disregard of individual Liberty?' (1976-1977) 38 U Pitt L Rev 477.
[12] *Kramer, (n 9).*
[13] ibid.

community supervision. The whole purpose of this civil commitment was, as put forward by the then Director of the Department of Corrections in 1961:

> ...first, to get the addict off the street. We hope to confine and treat them, and we recognise that it will be a continuous institutional treatment for some. The law does provide that the addict can be kept continuously off the streets if they are responsive to treatment. This new programme has this feature: it reduces contamination of others, and there is a lot of this going on... We can't release a C[alifornia] R[ehabilitation] C[entre] inmate in less than six months for a trial in the community. We don't intend... to release them unless we believe they have the right ideas about life and ideas about themselves, and with a real desire to make good.[14]

The therapeutic objective was in essence subordinated to the aim of keeping drug users off the streets. Based on the 'you use, you lose' expression, the inmates who could not stay away from drugs or became involved again in drug related crimes would be re-admitted to the institution.[15] These inmates could face up to a maximum of seven years at the institution and then return to court for disposition of the original charge[16].

One study revealed that CAP had a limited success rate in rehabilitating its so-called inmates.[17] Findings from the study revealed that during the first year of parole saw half of the inmates returning to the institution. After three years, about one in six of the inmates remained on parole ie five had violated parole conditions. The study concluded that addicts who failed in CAP 'will most likely spend more than half their (usually) seven year commitment incarcerated in a prison-like setting under the supervision of the Department of Corrections...'.[18] In a study by Anglin, empirical data showed that civil commitment was effective

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[14] Director of the Department of Corrections cited in *Kramer, (n 9)*.
[15] M.D.Anglin, 'The Efficacy of Civil Commitment in Treating Narcotic Addiction' in Leukefeld and Tims (eds), *Compulsory Treatment of Drug Abuse: Research and Clinical Practice.* (NIDA Research Monograph 86 Rockville, MD: Department of Health and Human Services USA 1988).
[16] W.H.McGlothlin, M.D.Anglin and B.D.Wilson, *An Evaluation of the California Civil Addicts Programme* (Services Research Monograph Series. Rockville, M.D: Department of Health, Education and Welfare USA 1977).
[17] *Kramer, (n 9)*.
[18] ibid.

if drug users were put on long term parole, between five to ten years 'so that their drug use and other behaviour can be closely monitored'.[19]

One controversial issue that arose out of CAP and other civil commitment programmes was the indefinite period of detention for addicts committed at the institution. This applied to both criminal and non-criminal drug users. For example, the New York and Massachusetts commitment programmes provided a maximum retention period of three years for non-criminal drug users, subject to no minimum period of institutionalisation.[20] Aronowitz criticised these programmes as a means to 'remove "undesirables" from society and to keep them in custody for long or indefinite periods during which there is little expectation of providing efficacious treatment'.[21]

The civil commitment of drug users in the USA quickly became a major topic of debate as it gravely concerned the infringement of a non-criminal drug user's constitutional rights. In the landmark case of *Robinson v California,*[22] a narcotic addict was convicted under a California statute, which held that being addicted to narcotics constituted a criminal offence. In that case, the appellant was convicted based on police testimony that the former was a 'drug addict'. The issue that arose from the verdict was that 'may a person be convicted of a crime and incarcerated for no other reason than his status as an addict?' The USA Supreme Court reversed the decision and held that any law that makes 'drug dependency, mental illness or leprosy' a criminal offence is unconstitutional in that it is 'a cruel and unusual punishment in violation of the Eighth and

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[19] *Anglin, (n 15).*
[20] Dennis S.Aronowitz, 'Civil Commitment of Narcotic Addicts' (1967) 67 Colum L Rev 405.
[21] ibid.
[22] 370 U.S. 660 (1962) cited in *Abromovsky and McCarthy, (n 11).*

Fourteenth Amendments'.[23] The Supreme Court also held that a minimum period of confinement 'as short as 90 days was cruel if it were imposed as punishment for an illness'.[24] Ironically, despite the dictum in *Robinson,* which explicitly recognised that addiction constitutes an illness[25], the California civil commitment law laid down a mandatory minimum term of confinement 'double the minimum sentence of the statute that the Supreme Court voided in Robinson'.[26] Nonetheless, the decision in *Robinson* later paved the way to the enactment of relevant statutes governing involuntary confinement of non-criminal drug users.

2.1 *Rationales for state intervention*

2.1.1 Parens patriae commitment

Kaplan[27] and Winick[28] have both propounded that one of the rationales behind civil commitment is that the state has the right to intervene coercively in the lives of its citizens when it exercises its *parens patriae* power (state paternalism). The state has a responsibility to intervene in the lives of people on the grounds that they are unable to make decisions adequately for themselves, for example, on the need to be hospitalised. Civil commitment may thus be justified either for reasons of the mental health of the detainee or more specifically for drug abuse. Winick states –

> When an individual is incompetent to determine his or her best interests, this power allows the government to substitute its decision-making for the patient's in order to avoid the harm that might otherwise result and to

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[23] cited in *Gostin, (n 3).*
[24] *Kramer, (n 9).*
[25] *Abromovsky and McCarthy, (n 11).*
[26] *Kramer, (n 9).*
[27] Leonard V.Kaplan, 'Civil Commitment. As You Like It' (1969) 49 B.U.L.Rev 33.
[28] Bruce J.Winick, 'A Therapeutic Jurisprudence Model for Civil Commitment' in Kate Diesfeld and Ian Freckelton (eds) *Involuntary Detention & Therapeutic Jurisprudence : International Perspective on Civil Commitment* (Ashgate Publishing, Burlington 2003).

> provide a beneficent intervention that the patient would have chosen for him or herself if competent.[29]

The state's *parens patriae* power to make decisions for its citizen, taking into consideration 'his or her best interest', raises the issue of competency. How does the state determine the competency of a person? Winick suggests that there should be 'a presumption in favour of competency', in that a drug user should be allowed to make a choice of the type of treatment that is suitable for him or her. Provided that there is no evidence to show that the choice made was based on mental illness, such as 'outright hallucinations or delusions', a person's choice of treatment should be respected and his competency should be presumed. Thus, the burden of persuading a drug user to accept treatment voluntarily, let alone of persuading a court to order involuntary commitment, should lie on the government.

Winick also stresses the point that the government's *parens patriae* power of 'compulsion and paternalism' should be minimised as much as possible and that voluntary treatment should be promoted. Treatment should be given in the 'least restrictive setting' in order to meet the aims of benefiting the drug user as well as the society as a whole:

> Unnecessary hospitalisation or unnecessarily lengthy hospitalisation can have the effect of depriving an individual of the ability to function in the community by producing a form of dependency.[30]

In *Lake v Cameron*,[31] the court which held that the state should 'explore community-based alternatives' before making the decision to commit a drug user to an institution, endorsed the doctrine of the 'least restrictive alternative' to

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[29] ibid.
[30] Goffman cited in *Winick, (n 28)*.
[31] (1966) 364 F.2d 657, 660 DC Cir cited in *Gostin, (n 3)*.

accommodate the state's *parens patriae* power under the civil commitment of drug addicts. By the 1970s, the 'least restrictive alternative' doctrine had become 'a major tool for moving committed patients out of state mental hospitals and into community settings' in that 'the state could not deprive persons of liberty to an extent unwarranted to meet its legitimate goals'.[32]

> Thus although the state may have had the power to commit persons with mental illness to inpatient treatment against their will to protect those persons or others, it could not do so when means less restrictive of liberty were available to accomplish the same ends. In short, if patients could be safely treated in the community, there was no warrant for their confinement in inpatient settings.[33]

2.1.2 *Police power commitment*

The *parens patriae* power was one rationale to justify civil commitment. The other traditional justification for state interventions is that it has the right to protect the community from some people with 'severe mental illness' who are likely to be 'dangerous to others in the imminent future'.[34] This police powers justification of state intervention was articulated by the USA Supreme Court in *Robinson* (discussed earlier), which held as follows:

> There can be no question of the authority of the state in the exercise of its police power to regulate the administration, sale, prescription and use of dangerous and habit forming drugs... The right to exercise this power is so manifest in the interest of the public health and welfare, that it is unnecessary to enter upon a discussion of it beyond saying that it is too firmly established to be successfully called in question.[35]

Notwithstanding the general justification expressed in the above judgment, a crucial question that arises here is, does the state have the right to detain an individual drug user in an institution without any evidence of being in

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[32] P.S.Appelbaum, 'Law & Psychiatry: Least Restrictive Alternative Revisited: Olmstead's Uncertain Mandate for Community Based Care' (1999) Psychiatric Services.
[33] ibid.
[34] *Winick, (n 28).*
[35] *Robinson* v *California* 370 U.S. 660 (1962) cited in *Abromovsky and McCarthy, (n 11).*

danger or a threat to society as a whole? Kaplan argues that the statutes that govern the involuntary treatment under the US civil commitment do not clearly define the meaning of 'dangerous to himself or others' or 'he is in need of treatment'. Such definitional omissions and defects within the statutes mean that many of the basic safeguards that protect the rights of the individual have been discarded.[36] (The basic safeguards under due process will be further discussed below).

Pursuing a similar line of argument, Goldstein and Katz raise the question of what acts are considered as dangerous and 'how probable it is that such acts will occur'.[37] The authors argue that the 'notion of dangerousness' can be extensively defined and gave several examples: serious crimes such as murder, arson and rape are categorised as crimes that involve a serious risk of physical harm; speeding in a motor vehicle is a minor crime, such an act may be considered as dangerous if it puts other motorists at risk; a person on a street who shouts offensive and racist words, thus being totally insensitive towards the people around him may not be physically dangerous, but because of their aberrant act, they may be categorised as dangerous and increasing the risk of public disorder or violence.

How do such examples relate to the drug user? According to a NIDA consensus, the medical eligibility criteria for a state to commit a drug user for involuntary inpatient treatment is that the person must be involved in dangerous activities which poses 'a serious public health danger, such as HIV infected intravenous drug users or commercial sex workers who continue to share needles

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[36] *Kaplan, (n 27).*
[37] Goldstein and Katz cited in Livermore et al, 'On the Justifications for Civil Commitment' (1968-1969) 117 U. Pa. L.Rev 75.

or have sexual intercourse'.[38] This stresses the risk to others whereas the practice of courts appears to be wider, emphasising the risk to the individual - Kramer suggests that the court can commit a person for compulsory treatment if the physician who conducted a medical examination on the person is of the opinion that the person is in 'imminent danger of becoming addicted'.[39] In order to determine 'with reasonable certainty' whether a person is in 'imminent danger of becoming addicted', the physician would have to refer to the person's 'recent drug use, amount of drug used, length of use and frequency of use'.[40]

Regardless of the theoretical justifications for detaining those engaging in dangerous or risk-taking activities, Winick argues that in practice such clinical predictions of 'dangerousness' have been shown to be highly inaccurate. Predictions are often based upon the observations and experiences of physicians (clinicians). These are subjective and are likely to be biased.[41] Nor have such approaches been scientifically tested and validated. Winick further argues that a substantial number of people who have been committed to undergo treatment do not actually come within the category of mentally incapable patients, and for this reason, civil commitment serves as more of a form of preventive detention by the state.

2.1.3 *Considerable flaws in the system*

Neither rationale convinces - civil commitment grounded in the rhetoric of 'paternalism' defeats the objective of a truly civil commitment, namely effective treatment. Further, without any proper safeguards, civil commitment with the

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[38] NIDA cited in *Gostin, (n 3).*
[39] *People* v *Victo*r, 62 Cal (1965) cited in *Kramer, (n 9).*
[40] *Kramer, (n 9).*
[41] Melton et al cited in *Winick, (n 28).*

underlying principle of preventive detention of unqualified persons is a serious deprivation of individual liberty. As a result, one of the flaws of the commitment programmes in the USA was that the courts when hearing such cases did not truly understand 'the clinical needs of patients' and that the commitment hearings were 'formal rituals in which judges merely rubber-stamped the recommendations of clinicians concerning commitment'.[42] Thus, the rationale for state interventions to protect the community from some people with 'severe mental illness' who are likely to be 'dangerous to others in the imminent future' could not be truly justified.

Both of these flaws are demonstrated in the case of *O'Connor v Donaldson*. In this case,[43] the respondent, a mental patient was hospitalised in a Florida state hospital for 15 years. The respondent alleged that the petitioner, the hospital's superintendent had 'intentionally and maliciously deprived him of his constitutional right to liberty' when his requests for release had been denied. The US Supreme Court held that it would be unconstitutional to commit a non-dangerous individual in an institution when he is capable of looking after himself or with the help of his family members. To quote Stewart J:

> A finding of 'mental illness' alone cannot justify a state's locking a person up against his will and keeping him indefinitely in simple custodial confinement. Assuming that the term can be given a reasonably precise content and that the 'mentally ill' can be identified with reasonable accuracy, there is still no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom.[44]

Obviously civil commitment entails a massive curtailment of liberty. On the experience of the USA civil commitment programmes is that drug users are

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[42] *Winick, (n 28).*
[43] 422 U.S. 563 (1975) cited in *Abromovsky and McCarthy, (n 11).*
[44] *Abromovsky and McCarthy, (n 11).*

confined for 'treatment' for an indefinite period of time, with a small likelihood of being successfully treated. A drug user would thus be locked up for being a drug user.[45] Commenting on Aronowitz's contention on the objective of civil commitment to remove 'undesirables' from society under a lengthy or indefinite period of detention 'during which there is little expectation of providing efficacious treatment',[46] Kramer gave an illustration of the commitment process by referring to the Los Angeles County.

> Here police have literally snatched 'known' addicts off the street; the policeman makes the declaration that the alleged addict was behaving suspiciously and states that to the best of the reporting officer's belief, he is an addict. A five or ten minute examination is performed in jail, usually by one or two physicians...Though the honesty of the examining physicians can by no means be impugned, it can be assumed that their retention by the Office of the District Attorney is based, in part, on their tendency to render, with reasonable frequency, the opinion that the patient is 'addicted or in imminent danger of becoming addicted'... Frequently, no symptoms of physical withdrawal are observed by the physician ; yet he may still be of the opinion that the patient 'is in imminent danger of becoming addicted'... It may be possible for an experienced physician to make a determination whether a particular person is in imminent danger of becoming addicted which accords with the court's definition; to make such a judgment with reasonable certainty, however, the physician would need a clear and accurate report of the person's recent drug use, amount of drug used, length of use and frequency of use. In practice, accurate history of recent drug use is not easily obtainable. The presence of needle marks and the statement of the arresting officer of apparent intoxication on the part of the alleged 'imminently addicted' is often sufficient to convince the examining doctor that the person before him has been using heroin regularly. The finding of imminent addiction should require either an admission of recent repeated use of opiates by the person being examined or other evidence of repeated use which goes beyond a mere likelihood.

It is most interesting to note that the Los Angeles County commitment process bears a similar resemblance to Malaysia's civil commitment process: The 'snatching' of 'suspected drug dependants' 'off the streets' based on the police

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[45] *Kramer, (n 9).*
[46] *Aronowitz, (n 20).*

officer's belief that they were involved in illicit drug use is a routine exercise by the Malaysian police; a brief and cursory medical examination of the suspect by a medical doctor during the assessment period without any symptoms of physical withdrawal observed by the doctor, yet the suspect could be confirmed to be a 'drug dependant'; unreliability of self report drug use by the suspect due to his unstable condition during detention. All these issues involve serious deprivation of individual liberty, which will be examined in great detail in Chapters 5 and 6.

From the above arguments, Wild *et al* suggest that such coerced treatment compromise the fundamental rights of an individual's personal liberty.[47] Such rights suggest that a drug user should have a right to decide upon the treatment that he or she should receive. It would be consistent with the principles of human rights if proper and adequate treatment were given to a drug user who has a drug problem with his consent.[48] Alongside this, many writers have argued that there must be other 'appropriate measures' necessary to protect the rights of individuals who are subject to compulsory treatment for drug dependence,[49] such as the right to counsel and right to a hearing. Kaplan underlined the importance of these basic safeguards:

> These safeguards, the right to counsel, more formal hearing, specific times for hearing and even automatic review, are certainly important steps. The safeguards make the process cleaner, they placate fears of railroading and help to relieve the stigma of guilt directed toward those caught in the process, and they often protect individuals, especially where there has been little reason for process invocation.[50]

In short, civil commitment programmes have been criticised not only for their lack of justifiable rationales but also for their lack of due process. Hickey

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[47] Wild, C. et al, 'Perceived Coercion Among Clients Entering Substance Abuse Treatment: Structural and Psychological Determinants' (1998) *Addictive Behaviors*, 23(1).
[48] Stevens et al, 'On Coercion' (2005) International Journal of Drug Policy 16, 207-209.
[49] *Porter et al, (n 1).*
[50] *Kaplan, (n 27).*

and Rubin commented that since civil commitment is punitive and involves the deprivation of a person's liberty, the due process safeguards provided under the criminal procedure should be observed by the state, when applying the civil commitment procedure. But, as the authors argue, the state avoids such procedural safeguards by characterising the proceedings as essentially civil in nature. To cite these authors:

> Civil commitment procedures... are in fact quasi-criminal, that is, they involve individuals who might be proceeded against criminally, or who may come before criminal courts, and are called civil only to enable the State to deal with persons by procedures less demanding than criminal procedure. The characterisation of these quasi-criminal commitment as civil, is a legal fiction based upon a myth of treatment. [51]

Thus the experience of civil commitment programmes in the USA demonstrate both the lack of a justifiable rationale as well as the avoidance of procedural safeguards which are fundamental to the protection of the detainees' human rights.

The USA experience of civil commitment has generated both case law and a wide research literature, which is of considerable value in examining the Malaysian civil commitment programme. This will be discussed in the following section.

3. Civil commitment : The Malaysian way

Civil commitment for the compulsory treatment of drug users has also been used extensively in Malaysia. It is a court mandated order for drug users who have been certified as 'drug dependants' after undergoing a drug assessment to undergo treatment and rehabilitation at a government drug rehabilitation centre or

[51] William L.Hickey and Sol Rubin, 'Civil Commitment of Special Categories of Offenders' in *Crime and Delinquency Topics: A Monograph Series* (Rockville MD: National Institute of Mental Health, USA 1972).

Puspen, for a period of two years and thereafter to undergo supervision by an officer at the place specified in the order for another period of two years.[52] Alternatively, the court may impose a community supervision order upon a drug user instead of a custodial order. This order is of two years duration and he or she is subject to strict conditions laid down by the statute.[53]

This section seeks to examine the development of the legislative framework of the Malaysian civil commitment programme and the extent to which it is compatible with the principles of human rights enshrined in both the Constitution and the UN treaties. First, the section begins with a brief description of the development of civil commitment in Malaysia. Second, there is discussion of the principles underlying the concept of civil commitment, and third, an examination of the fundamental principles of human rights guaranteed under the Constitution and the international human rights instruments.

3.1 Advent of Malaysia's civil commitment

Malaysia's civil commitment is based on the principles of punishment rather than rehabilitation as its roots are firmly within the criminal justice system. In 1975, a new section was introduced into the Dangerous Drugs Ordinance 1952 (the 1952 Act) which provided for the legal mandate for the rehabilitation of drug users in Malaysia.[54] The new provision gave the police and welfare officers the power to detain any individual whom they suspect to be 'drug dependants' in order that those individuals could undergo treatment and rehabilitation at government approved institutions. In the same year, to facilitate the drug intervention

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[52] 1983 Act, s 6 (1) (a).
[53] 1983 Act, s 6 (1) (b).
[54] Charles Maria Victor Arokiasamy and Patrick F.Taricone, 'Drug Rehabilitation in West Malaysia: An Overview of Its History and Development' (1992) Vol 27 No 11.

programme, the government set up drug rehabilitation centres at Bukit Mertajam, Kuala Kubu Bharu and Tampoi, gazetted seven hospitals as detoxification centres and 17 more as drug detection centres.[55]

In 1983, the Drug Dependants (Treatment & Rehabilitation) Act (the 1983 Act) was enacted to regulate the compulsory treatment and rehabilitation of drug users at government-run drug rehabilitation centres. As mentioned earlier, the court-mandated order under the 1983 Act provides for treatment of 'a period of two years and thereafter to undergo supervision by an officer at the place specified in the order for a period of two years ... or to undergo supervision by an officer at the place specified in the order for a period of not less than two and not more than three years.'[56] This comprehensive statute came about following a declaration by the Malaysian Prime Minister at the time that drug abuse was the country's 'public enemy number one'.[57]

In conjunction with the implementation of the 1983 Act, in the same year the first drug rehabilitation centre was set up in Tampin, Negeri Sembilan. The Tampin centre differed from the drug rehabilitation centres at Bukit Mertajam, Kuala Kubu Bharu and Tampoi because of its 'one-stop' centre concept – which had its own magistrate court (but not on a full-time basis), sick bay with two hospital assistants and dental service, a laboratory to conduct drug testing on trainees and a detoxification ward. The centre, which was called the *Serenti* centre, was originally a police field force camp that was subsequently converted into a treatment and rehabilitation centre to accommodate trainees who were in

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[55] National Narcotics Agency, *Kenali Dan Perangi Dadah* (1st edn Ministry of Home Affairs, Kuala Lumpur 1997).
[56] 1983 Act, ss 6 (1) (a) (b).
[57] *National Narcotics Agency, (n 55).*

need of treatment for their drug dependence.[58] In April 1983, the centre took in its first batch of 50 trainees who were former drug users (who had relapsed). The majority of the trainees (92 per cent) were admitted following a mandated court order, whilst voluntary trainees (8 per cent) were referred by Social Welfare officers.[59] Over the succeeding years, the government continued to build more *Serenti* centres. Recently, these centres changed their names to *Pusat Pemulihan Penagih Narkotik* (*Puspen).*[60] *Puspen* are highly structured residential institutions surrounded by a 12 feet high double fencing with barbed wires on top. There is a tight security at the main entrance of the centres. Each *Puspen* centre consists of hostel blocks to accommodate the trainees, a dining hall, a multi-purpose hall, a detoxification ward, agricultural land, and a sports field.

In 1983, the Tampin original *Serenti* centre was able to hold 505 trainees. Although there are now 28 *Puspen* centres across the country, with a current capacity placing a total of 6,658 trainees,[61] the excessive court-mandated orders *via* the civil commitment programme has led to serious overcrowding at several *Puspen* centres.[62] Rioting and escaping from *Puspen* centres have been on the rise in recent years, and it has been said that overcrowding was one of the reasons for the troubles.[63] The inevitable inference is that the government views the straightforward confinement of drug users for a minimum period of two years as the best way to tackle the drug problem.

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[58] The term trainee is used here in accordance with the term used by the original author.
[59] V.Navaratnam, Foong Kin and Kulalmoli S., *An Evaluation Study of the Drug Treatment and Rehabilitation Programme at a Drug Treatment* (Centre for Drug Research Monograph Series 7, Universiti Sains Malaysia, Penang 1992).
[60] Bernama, '*Semua Pusat Serenti Kini Dikenali Sebagai Puspen'* (Padang Besar, 10 February 2009) www.bernama.com accessed 24 March 2009.
[61] AADK Drug report, December 2009.
[62] ibid.
[63] S.Sharma, '50 drug rehab centre inmates escape in riot' *The Star online* (20 June 2009).

The ineffectiveness of such programmes and centres in treating drug users is also shown in Malaysia where despite the government's effort in funnelling drug users into institutionalised treatment, there is hardly any evidence of it achieving its objective in preventing relapse. As has been discussed in the previous chapter, 80 per cent or more of the *Puspen* trainees who were committed to the treatment programme go back to taking drugs upon being released from the centres.[64] This has led to the 'revolving door syndrome' of drug dependants who come into contact with the criminal justice system. If they are caught to be using drugs again, they will be re-institutionalised.

3.2 *Treatment and rehabilitation programme at Puspen centres*

Initially, the treatment and rehabilitation programme under the civil commitment was an experimental programme that incorporated a twin concept approach; the 'tough and rugged' and the 'social welfare approach'. The techniques of the first approach encompass military-style drills and physical exercises conducted by military personnel. The objective is to instil strict discipline among the trainees as part of the rehabilitation programme. It is anticipated that, on release, the trainees will apply this discipline to their everyday lives. On the other hand, the latter approach incorporates regular individualised counselling, group counselling as well as vocational, religious and recreational activities. These programmes were aimed to help trainees at solving their psychological and social problems caused by their drug dependence, and also to provide them with the necessary skills so that they would able to find jobs and support themselves when

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[64] Nick Crofts, 'Drug Treatment in East and South East Asia: the need for effective approaches' (2006) UNODC Technical Resource Centre for Drug Treatment and Rehabilitation Australia.

they return to society. The overall objective of the treatment and rehabilitation programme is to ensure that the trainee, upon his release from *Puspen*, 'will be totally free of drugs both mentally and physically...in which he learns to adjust to the desirability of living without drugs'.[65]

Two years after the first *Serenti* centre began its operation, the Centre for Drug Research in Penang, Malaysia conducted a follow up study on the trainees who participated in the programme. [66] According to the study, trainees who were committed for treatment came from under-privileged backgrounds and had experienced a series of psychological and social problems. Their drug dependency was seen as a symptom of a psychosocial maladjustment. Findings from the study showed that out of a total of 505 registered trainees in the centre, 326 were still undergoing treatment and rehabilitation (64.5 per cent), 37 (7.3 per cent) managed to complete the programme and were under aftercare programme, whilst 122 (24.2 per cent) absconded permanently. For the rest of the trainees, 8 (1.6 percent) of them were transferred to prison, 2 (0.4 per cent) died, 5 (1.0 per cent) transferred to other rehabilitation centres, 1 (0.2 per cent) was released before completion of his treatment due to medical grounds, and for 4 (0.8 per cent) there was no information on their whereabouts. According to the study, the main reason for the relatively high rate of absconding was that the trainees were unable to cope with institutional life, ie the military-style drills and strict disciplinary daily routines based on the `tough and rugged' approach. Morale among the trainees was low. These results were expected as most of the trainees had entered into treatment involuntarily. The twin concept approach led to 'conflicts and disunity between the military personnel and the social welfare

[65] *Navaratnam, Kin and Kulalmoli, (n 59).*
[66] ibid.

staff' and also contributed towards the poor success rate of the whole programme.[67] Despite more recent studies being carried out by international researchers revealing poor outcomes of the programme, the twin concept approach is still currently being practised in *Puspen* centres. For instance, a study by UNODC in 2006 indicated an 80 per cent relapse rate among drug users who received treatment at *Puspen* centres. Lack of opportunities after release and minimal assistance by service providers in reintegrating former drug users into the community were linked to the programme's failure. The government also confirmed this when the then Deputy Prime Minister Datuk Seri Abdullah publicly announced that 'efforts to combat the drug abuse had not been entirely successful'.[68]

As mentioned earlier, there are currently 28 government run drug rehabilitation centres (*Puspen*) across the country providing treatment and rehabilitation to 6,658 trainees with different categories of addiction ranging from newly detected to repeated cases.[69] 97.96 percent (6,522) represent the male trainees whilst the female trainees represent 2.04 percent (136) of the total *Puspen* residents.[70] Out of the total *Puspen* residents, 80.54 per cent (5,338) represent the Malays, 8.43 per cent (559) Chinese, 7.75 per cent (514) Indians, and 3.27 per cent (217) from the indigenous or minority ethnic group.[71] Based on

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[67] ibid.
[68] Newsbrief, 'Asian Drug Abolition Mania Spreading -- Malaysia Calls for 'Total War,' Drug Free Southeast Asia by 2015'. (2003) stopthedrugwar.org/chronicle-old/274/malaysiamania.shtml accessed 12 May 2006.
[69] New and repeated cases of drug users were derived from the National Anti Drug Information System (BIONADI).
[70] At present, there is only one *Puspen* centre to accommodate female drug users, which is situated at Bachok, Kelantan, Malaysia.
[71] *AADK Drug report (n 61).*

previous and current AADK statistics, the Malays represent the majority ethnic group of *Puspen* trainees across the country.[72]

The treatment and rehabilitation programme provided by *Puspen* centres consists of the following:[73]

a. **Detoxification** – Upon entering the centre, a trainee undergoes the 'cold turkey' detoxification process. In other words, the individual has no access to drugs whatsoever. This could sometimes lead to severe withdrawal symptoms. If a trainee is 55 years of age or above and / or has medical complications, he or she will be exempted from the detoxification process, and will be sent to a hospital for further treatment.
b. **Orientation** – A one-week period is devoted to making the trainee aware of the programme of services. This begins as soon as he has recovered both physically and mentally from the withdrawal symptoms.
c. **Physical Training** - Physical training continues throughout the trainee's stay and begins following orientation. It consists of a regimented military-style drill in the mornings and recreational games in the evenings.
d. Psychological services – Individual counselling is based on the trainee's needs, while group counselling is required of everyone. The objectives of counselling are for the counsellors to listen and understand the trainees' problems and help them solve them. These groups consist of 10 trainees and meet once a week. For those trainees with families and who give permission, family counselling is sometimes provided during parental or familial visits.
e. Religious instructions – It is compulsory for all Muslim trainees to attend the mosque during the Friday congregational prayer. Special arrangements are made for trainees of other faiths. However, religious instruction is not provided for them as uniformly and consistently as it is for the Muslims.
f. **Work Therapy / Vocational Training** – Gardening is the major form of work therapy, and trainees are provided an opportunity to participate in one of the following vocational training programmes; carpentry, TV/ radio repair, auto mechanics, shoe repairing, rattan furniture work, laundry work, tailoring or metal work. Thereafter, between the fourth and seventh month of the programme, trainees will be given job

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[72] AADK monthly reports. According to the Department of Statistics Malaysia, as at 2005, Malaysia's total population was 26.13 million. Since Malaysia is a multiracial society, there are three main ethnic groups and are distributed as follows: Malays and Bumiputras (indigenous groups) (62 per cent), Chinese (24 per cent), Indian (7 per cent) and others (7 per cent).

[73] James F.Scorzelli, 'Assessing the Effectiveness of Malaysia's Drug Prevention Education and Rehabilitation Programs' (1988) Journal of Substance Abuse Treatment Vol 5.

> placement in accordance to the skills that they have acquired at the centre.

This programme has, on its face, significant elements of treatment and rehabilitation. Despite this, the objectives behind the programme have been more to do with segregation and internment of a problem population. Furthermore, within the centres themselves, Malaysia's civil commitment is based on the principles of punishment rather than rehabilitation. This can be seen in the following section which will discuss on the sanctions for non-compliance under the 1983 Act.

3.3 Sanctions for non-compliance

The sanctions under the 1983 Act are repressive and punitive. Even the Malaysian courts have consistently held that the 1983 Act is penal in nature, albeit having defined it as a 'social legislation'.[74]

> We appreciate that the provision of s 6 of the Act, is penal in character in the sense that a person can be ordered to reside in a rehabilitation centre for two years to undergo treatment probably against his will. At the same time we also appreciate that it is a provision designed for the rehabilitation of drug dependants. It a social legislation of sort. But we must not forget however that the same legislation confers summary powers on the magistrate and can seriously affect the freedom of an individual.[75]

To support this argument, this section considers the consequences of non-compliance with the 1983 Act at four stages in the process. Not only are the consequences repressive and punitive, they seriously affect the fundamental principles of human rights. Non-compliance may occur either at the arrest stage or when undergoing the civil commitment order. The stages are as follows:

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[74] In the English context, a social legislation means a civil legislation.
[75] *Ang Gin Lee* v *Public Prosecutor* [1991] 1 MLJ 498 per Hashim Yeop Sani CJ (Malaya).

- Mandatory drug testing upon arrest
- Lawful custody at *Puspen* centre
- Absconding from *Puspen* centre and re-arrested
- Mandatory compliance with supervision order

First, upon being arrested, if a person refuses to undergo a drug test at a police station or on-site drug testing, that person may be criminally prosecuted. If found guilty, he shall be liable to imprisonment for a period of not more than three months, or fine, or both. The provision with regard to the above is as follows:

> **Section 5 Obligation of suspected drug dependant to undergo tests procedures.**
>
> (1) For the purpose of tests under section 3 or 4, the person shall submit himself to all such acts or procedures as he may be required or directed to undergo by an officer, or by a government medical officer, or by a registered medical practitioner or by any person working under the supervision of such officer, government medical officer or registered medical practitioner, as the case may be.
>
> (2)Where any person fails to comply with any requirement or direction under subsection (1), he shall be guilty of an offence and shall, on conviction, be liable to be punished with imprisonment for a period not exceeding three months or with fine, or with both.

The consequence of a short-term of imprisonment is that a person may lose his job, put his family life at risk as well as the health implications of a prison sentence such as the risk of being in the same cell as a HIV infected inmate.[76]

Second, once admitted to a *Puspe* centre, a drug user (trainee) will be in 'lawful custody'.[77] This means that a trainee is subject to the rules and regulations of the centre. Committing an offence whilst at the institution has

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[76] WHO Annual Report 2003 cited in Mazlan et al., 'New Challenges and Opportunities in Managing Substance Abuse in Malaysia' (2006) Drug and Alcohol Review 25.
[77] 1983 Act, s 19 (1).

some serious consequences whereby a trainee may be ordered to undergo a prison sentence for a period of not more than three years or a fine. The offences stipulated under the Act are as follows:

> **Section 20 Offences by residents of Rehabilitation Centres and Aftercare Centres, and by supervisees.**
>
> (1) Where any person—
> (a) contravenes any term or condition lawfully imposed under this Act in relation to residence, treatment or rehabilitation at a Rehabilitation Centre; or
> (b) commits a breach of any rules relating to a Rehabilitation Centre, where no specific punishment is provided in such rules for such breach;
> (c) incites any resident of a Rehabilitation Centre to commit a breach of any rules relating to such Centre;
> d) uses any indecent, threatening, abusive or insulting words or gestures, or otherwise behaves in a threatening or insulting manner, against any person exercising any powers, discharging any duties or performing any functions in relation to the custody, treatment, rehabilitation, residence or supervision of any person under this Act, or against any person resident at a Rehabilitation Centre or against any employee or servant employed or engaged at any Rehabilitation Centre, or against any person lawfully visiting a Rehabilitation Centre or otherwise lawfully present at a Rehabilitation Centre, or assaults any person, employee or servant, as aforesaid,
>
> **shall be guilty of an offence and shall on conviction be liable to a fine or to imprisonment for a term not exceeding three years or to both** (emphasis added).

Third, as has been mentioned in the preceding chapter, rioting and escape from *Puspen* centres have increased considerably in recent years.[78] A trainee who absconds from the institution, upon be re-arrested, if found guilty, shall face a maximum term of five years imprisonment or whipping of not more than three strokes or both. The provision is as follows:

> **Section 19 (3) Lawful Custody**
>
> Any person who escapes from lawful custody... shall be guilty of an offence and shall, on conviction, be liable to imprisonment for a term not exceeding five years or to whipping not exceeding three strokes or to both.

[78] AADK Drug report, January-October 2006.

Fourth, a drug user who has been ordered by a magistrate to undergo 'supervision by an officer at the place specified in the order for a period of not less than two and not more than three years' shall comply with the following conditions below:

> **Section 6 (2) Magistrate's order which may be made on a drug dependant**
>
> (a) the person must reside in a State or Federal Territory or any area as specified in the order;
> (b) the person must not leave the area where he resides without the written permission of the Director General;
> (c) at the time specified in the order, the person shall report at the nearest police station or for a member of the armed forces at the place specified by an officer;
> (d) the person shall not consume, use or possess any dangerous drugs;
> (e) the person shall undergo such tests at such time and place as may be ordered by an officer; and
> (f) the person shall undergo any programme for the rehabilitation of drug dependants held by the Government.

If a drug user fails to comply with any of the above conditions under a supervision order, 'he shall be guilty of an offence and shall on conviction be liable to be punished with imprisonment for a period not exceeding three years or to whipping not exceeding three strokes or to both.[79]

In spite of the punitive sanctions being imposed by the 1983 Act, based on a recent report, as many as 16,000 (44 per cent out of a total of 36,000) ex-trainees who had been released from *Puspen* centres and prisons after completing their treatment, failed to register at the AADK office. According to an AADK official, the predominant reason behind this is because these ex-trainees have become involved in drugs again.[80]

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[79] 1983 Act, s 6 (3).
[80] Wan Syamsul Amly Wan Seadey, *'16,000 bekas penagih dadah gagal lapor diri' Utusan.com* 28 December 2007.

One important aspect of these sanctions is the practice of corporal punishment. This has received a lot of criticism from various quarters, both domestic and international. The practice of flogging or whipping under Malaysia's penal system is without doubt a grave contravention of the fundamental principles of human rights enshrined in Article 5 of the UDHR 'no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'. A report by SUARAM,[81] describes how flogging is administered:

> The flogger is taught how to swing the 1.09-metre cane at a minimum speed of 160 kilometres an hour and produce a force upon impact of at least 90 kilograms. Before flogging, the flogger puts on a surgical mask to protect his identity and also to prevent bits and pieces of flesh and skin hitting his face. The maximum strokes that could be inflicted at any one session are 24 strokes. If a person faints while being flogged, the session will be stopped and a medical officer will immediately attend to him. The flogging will then continue on another occasion. Officials said that even the most hardened gangsters cried out after the third stroke and those made of lesser stuff soiled their pants after the first stroke. The flogger is paid Ringgit Malaysia RM3 allowance for each stroke.[82]

However, a recent case that involves the punishment of whipping of an asylum seeker casts doubt about the constitutionality of this practice and this may well be analogous to cases involving drug users. In *Tun Naing Oo v Public Prosecutor*, a High Court set aside the sentence of two strokes of whipping against the applicant who was an asylum seeker from Myanmar. According to the facts of the case, he had been arrested by immigration officers at a shop. At that time he was selling computer accessories to a customer. The applicant was charged under the Immigration Act 1959/1963 for entering Malaysia without a valid pass. In setting aside the sentence of two strokes of whipping, Yeoh Wee Siam JC held as follows:

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[81] SUARAM or 'Suara Rakyat Malaysia' is a Malaysian NGO working towards the 'protection and realisation of fundamental liberties, democracy and justice'.
[82] *MalaysiaToday, (2004)* www.malaysia-today.net accessed on 30 January 2007.

(1) The punishment of 100 days' imprisonment imposed on the applicant by the Sessions court under s 6(3) of the Act was appropriate and legal. In fact, the applicant accepted such punishment and was not even applying for a revision of the sentence (see para 22).

(2) The sentence of two strokes of whipping was manifestly excessive since there was no evidence that the applicant committed a crime of violence or brutality at the time he was arrested. There was no doubt that he was present in Malaysia illegally but he was not carrying out any violent act; he was merely selling computer accessories to a customer, a very benign activity (see para 23).

(3) Further, from the *New Straits Times* press report dated 14 February 2005, the attorney general, as the public prosecutor of this country was not pressing for the sentence of whipping under s 6(3) of the Act unless the accused was a habitual offender or had been involved in crimes that threatened public order. In the present case, there was no evidence that the applicant was guilty of either or both of those two offences (see para 26).

(4) Going by humanitarian grounds, it is not humane to give an asylum-seeker or refugee two strokes of whipping. Such person is already running away from his own country to avoid pressure and persecution. It served no purpose to whip him and add to his suffering when, after serving the sentence of imprisonment, the applicant would be deported. In any event, the UNHCR was now seeking to assist the applicant and finally to get him resettled in a suitable country (see para 32).[83]

In light of the decision in *Tun Naing Oo*, it would seem that similar arguments may well be advanced in cases involving corporal punishment being imposed on drug users for non-compliance with the regime. Although it may be argued that these drug users can be considered as 'habitual offenders', but a majority of them are non-violent and 'have not committed a crime of violence or brutality' which has 'threatened public order' (quoting the phrase from Yeoh Wee Siam JC's judgment in *Tun Naing Oo*).

Despite the announcement by the government in 2003, to move towards a more rehabilitative approach in tackling the drug menace, Malaysia continues to impose severe penalties on drug users, especially those who have relapsed. From

[83] [2009] 5 MLJ 680. Criminal Application for Revision No. 43-9 of 2009 (Malaysia).

2002, if a person is found guilty of a drug offence under the 1952 Act,[84] and that person also has a re-admission track record at *Puspen,* he shall upon conviction, be punished with imprisonment for 'not less than five years but shall not exceed seven years, and shall be punished with whipping of not more than three strokes'.[85] The offence itself, is likely to carry a much lesser sentence. As has been mentioned in the preceding chapter, there are no official statistics on the number of convicted cases in relation to the above provision.

Another point worth noting here is that a person who is arrested for suspicion of being a 'drug dependant' can be charged with an offence under the 1952 Act,[86] for consuming or self-administrating a dangerous drug[87] as it is within the discretion of the Public Prosecutor. Under the CPC[88] 'the Public Prosecutor has the control and direction of all criminal prosecutions and proceedings'.[89]

As is apparent from the description of both the regime for detainees and also the sanctions that can be imposed, civil commitment in Malaysia is both punitive and repressive. In order to understand the concept of civil commitment in Malaysia, one has to take into consideration the overall context of the country's historical and cultural belief. Berridge suggests that drug policies are 'more than just a reaction to the present situation... They are historically and culturally framed, the tensions and the contradictions within them forged through

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[84] Offences under the 1952 Act, ss 10 (2) (b), 15 (1) (a) or 31 A.
[85] 1952 Act, s 39C.
[86] 1952 Act, s 15 (1) (a).
[87] Statement by ASP Chong Narcotics Division RMP (Personal communication 15 December 2006).
[88] CPC, s 376.
[89] However, mere existence of drugs as confirmed in the urine test by a medical practitioner is not sufficient evidence to convict a person under s 15 (1) (a) DDA1952. The prosecution must prove beyond reasonable doubt that 'the accused administers the drugs to himself...' *Public Prosecutor* v *Chan Kam Leong* [1989] 2 CLJ 311 (Rep).

long historical experience'.[90] The Malaysian civil commitment is grounded in the rhetoric of 'paternalism' wherein 'compulsion and preventive detention' do not just exist alongside that of treatment but supersede the objective of a pure civil commitment that is providing treatment to drug users. The evidence for such an argument is to be found in the principles and values reflected in the Malaysian preventive detention laws as well as in the rhetoric around the Asian values, which will be discussed in the following sections.

4. Preventive detention laws

Malaysia gained her independence on 31 August 1957. It became a federal constitutional monarchy with a parliamentary system of government and Westminster-style separation of powers; the executive, legislature and judiciary. It has a multiracial society of predominantly Malays, Chinese and Indians. During the British colonial era, Malaya (as Malaysia was then known) had been ruled under state of emergency powers from 1948 to 1960 following the Communist insurgency. The Emergency Regulations Ordinance was passed by the British colonial government and came into effect on 7 July 1948. It empowered the state authority to impose laws and regulations that were 'desirable in the public interest'. The key instrument of the emergency powers was the preventive detention law that allowed for the 'arrest, detention, exclusion and deportation' of any person whose act was in contravention with the Ordinance[91]. Such laws and regulations suspended individual liberties solely on the grounds of public interest, as assessed by the government, in order to safeguard the nation from terrorist insurgency that supported the Communist

[90] Berridge, V., 'Drug policy: Should the law take a back seat?' (1996) The Lancet Vol 347 Issue 8997.
[91] Emergency Regulations Ordinance 1948.

Party of Malaya. By the time Malaya gained its independence in 1957, 33,992 people had been detained under the 1948 Ordinance.

These powers of detention without trial survived the colonial period and became deeply entrenched within the Constitution and legal system of the country.[92] In 1960, when the government officially declared the end of the emergency period, a bill was passed for an 'act to provide for the internal security of the Federation, preventive detention, the preventive of subversion, the suppression of organised violence against persons and property in specified areas of the Federation and for matters incidental thereto'.[93] The Act was called the Internal Security Act 1960 (the ISA), which is the immediate successor to the 1948 Ordinance. The purpose of the ISA in relation to preventive detention was to supplement the ordinary law where necessary and 'to continue taking the necessary action to eliminate the remnants of the terrorist movement'.[94] Under the ISA, the Minister has the power to order the detention of any person if it is necessary to do so in order to 'prevent him from acting in any manner prejudicial to the security of Malaysia'.[95] The ISA also empowers the police to arrest and detain any person arrested for 'a period not exceeding 60 days without an order of detention'.[96] Even today, the ISA plays a significant role within the government legal system in the detention of individuals without trial.[97] Section 8 of the ISA states as follows:

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[92] Imtiaz Omar, *Rights, Emergencies and Judicial Review* (Kluwer Law International, The Hague 1996).
[93] Internal Security Act 1960 (Malaysia).
[94] A.B.Munir, 'Malaysia' in Andrew Harding and John Hatchard (eds), *Preventive Detention and Security Law: A Comparative Survey* (M.Nijhoff, Boston 1993).
[95] ISA 1960, s 8 (1).
[96] ISA 1960, s 73 (3).
[97] Soon after the September 11, 2001 terror attack on the United States, Malaysia's then Prime Minister, Abdullah Ahmad Badawi announced that the ISA has been justified as 'an initial preventive measure before threats get beyond control' (SUARAM, 2008). However, in April 2009, Malaysia's current Prime Minister Dato' Seri Najib Razak ordered the release of 13 ISA

Section 8. Power to order detention or restriction of persons

(1) If the Minister is satisfied that the detention of any person is necessary with a view to preventing him from acting in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof, he may make an order (hereinafter referred to as "a detention order") directing that that person be detained for any period not exceeding two years.

It has been reported that more than 10,000 people have been arrested and detained under the ISA.[98] Most of the detainees have been arrested simply because they were involved in 'political dissent and public debate'[99] or because they were part of a militant group.[100] In 2005, the Human Rights Watch (HRW) reported an incident that occurred at the Kamunting Detention Centre. More than 25 ISA detainees were involved in a riot at the centre. According to the report, the centre's prison guards assaulted the detainees after some detainees had refused to cooperate during a spot check at the prison cells. Human Rights Watch criticised the way in which the prison authorities had handled the incident and regarded the abuse as inhumane and degrading treatment in the form of 'physical and mental abuse, sexual humiliation, and public vilification without access to a serious complaint mechanism or having the opportunity to defend themselves'.[101]

Another preventive detention law similar to the ISA is the Dangerous Drugs (Special Preventive Measures) Act 1985 which empowers the police to arrest without warrant 'any person who has been or is associated with any activity related to or involving trafficking in dangerous drugs' and a detention

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detainees and a comprehensive review of the ISA with the formation of the Law Review Committee. Wong Chun Wai, 'Warming up to Najib' *thestaronline* (11 July 2009) accessed 11 July 2009.

[98] Human Right Watch, *Malaysia: ISA Detainees Beaten Up and Humiliated*, 26 September 2005 www.hrw.org accessed 16 June 2008.

[99] Poh-Ling Tan, 'Human rights and the Malaysian constitution examined through the lens of the Internal Security Act 1960' (2001) rspas.anu.edu.au/pah/human_rights/papers/2001/Tan.pdf accessed 17 November 2008.

[100] *Human Right Watch, (n 98).*

[101] ibid.

order may be issued by the Minister of Home Affairs against that person of up to two years 'in the interest of public order'. From 1998 to 2006, 17,701 people had been arrested under the 1985 Act.[102]

Thus, from what have been described above, the preventive detention laws that survived the colonial era and their modern counterparts have become deeply entrenched both in the government's approach to problems and also in the legal system itself. The practice of 'compulsion and preventive detention' against a certain group of individuals for the sake of, allegedly, protecting a wider population within the society can also be seen through the government's *parens patriae* power under the Malaysian civil commitment of drug users. To reiterate the researcher's assertion earlier, the Malaysian civil commitment that is grounded in the rhetoric of 'paternalism' has superseded the objective of a pure civil commitment. Thus, it will be argued that this approach is a clear violation of the fundamental principles of human rights enshrined under the Constitution.

5. 'Asian Values'

The preceding section argued that the acceptance of civil commitment within Malaysian society was founded, at least in part, on a history of the use of preventive detention, both in the colonial era but also in recent decades. The lack of resistance to such measures is, on the face of it, surprising but the muted criticism can be in part explained by a certain Malaysian resistance to the western human rights traditions and adherence to 'Asian Values'. As we shall see, there is a view, certainly within government, that western liberal notions of

[102] Royal Malaysian Police, Statistic Report (2007) www.rmp.gov.my.

human rights should not be taken as a yardstick by which to judge Malaysian law and practices.

In 1993, the Bangkok Declaration was endorsed at the Asian regional preparatory meeting for the Vienna World Conference on Human Rights. It expressed the aspirations and commitments of the Asian region in regards to human rights. In the 1993 Declaration, the general consensus amongst the Asian member states was to reaffirm their commitment to the human rights principles guaranteed under the UN Charter and the UDHR, as well as promoting the ratification of the ICCPR and the ICESCR. However the country representatives emphasised that there must be 'respect for national sovereignty and territorial integrity as well as non-interference in the internal affairs of states, and the non-use of human rights as an instrument of political pressure'.[103] Further to the above, the member states unanimously agreed as follows:

> ... while human rights are universal in nature, the human rights must be considered in the context of a dynamic and evolving process of international norm-setting, **bearing in mind the significance of national and regional peculiarities and various historical, cultural, and religious backgrounds** (emphasis added).[104]

The Southeast Asian governments, particularly, Malaysia, Indonesia and Singapore have advocated a distinctive set of 'Asian Values' which were '...human rights as understood through their Asian cultural heritage'.[105] What these governments proposed was that universal values could not take precedence over local cultural norms.

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[103] Bangkok Declaration 1993. The meeting was held in Bangkok from the 29 March to 2 April 1993 pursuant to the General Assembly resolution 46/116 of 17 December 1991 in the context of preparations for the World Conference on Human Rights.
[104] ibid.
[105] Anthony Langlois, *The Politics of Justice and Human Rights: Southeast Asia and Universalist Theory* (Cambridge University Press, Cambridge 2001).

According to the then Malaysian Prime Minister, Tun Mahathir Mohamad, who has always been an outspoken advocate of Asian values, in order to achieve an 'orderly society, societal harmony and respect for authority', the collective welfare of the nation should be given priority as opposed to individuals' rights as enshrined in such instruments as the UDHR.[106] Mahathir believes that the Western liberal notions of human rights should not be taken as a yardstick in the development of a democratic society.[107] In particular, the primacy of the individual of the Western society is incompatible with the Asian values. This was explained by M.A Sani:

> Universalism or Western liberalism, with their emphasis on the rights and freedoms of the individual is, in contrast, portrayed by Asian thinkers as producing crime-ridden societies in moral decay and with little social discipline or concern for the broader interests of community (Robison, 1996: 310). In Mahathir's (1995a: 16) words, "Democracies are only beginning to learn that too much freedom is dangerous". Mahathir urged the need to limit personal freedom for the sake of political stability and economic prosperity:
>
> For Asians, the community, the majority comes first. The individual and minority must have their rights but not at the unreasonable expense of the majority. The individuals and the majority must conform to the mores of society. A little deviation may be allowed but unrestrained exhibition of personal freedom which disturbs the peace or threatens to undermine society is not what Asians expect from democracy (World Youth Foundation, 1999: 105).[108]

Indeed Mahathir has constantly criticised the West for its hypocrisy in its pursuit of human rights. Two recent speeches exemplify to his mind Western double standards and hypocrisy:

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[106] Hassan and Lopez, 'Human Rights in Malaysia: Globalisation, National Governance and Local Responses' in Francis Loh Kok Wah and Joakim Öjendal (eds) *Southeast Asian Responses to Globalisation* (Institute of Southeast Asian Studies, Singapore 2005).

[107] Khoo Boo Teik, 'Nationalism, Capitalism and 'Asian Values' in Francis Loh Kok and Khoo Boo Teik (eds), *Democracy in Malaysia: discourses and practices.* (Curzon, Surrey 2002).

[108] M.A.Sani, 'Mahathir Mohamad as a Cultural Relativist: Mahathirism on Human Rights'. Paper presented to the 17 Biennial Conference of the Asian Studies Association of Australia in Melbourne, Australia 1-3 July 2008.

The recent wanton slaughter of innocent men, women and children in Gaza by Israel's military, supported principally by the United States, Britain and the European Union is another sordid example of the brutality of the strong against the weak and illustrates also the double standards, hypocrisy and the failure by the international community to condemn the crimes committed by the most powerful military power in the Middle-East against the long suffering defenseless Palestinians.[109]

Human rights is not for democratic people only. Every human life is sacred; every person has a right to live. Those who say that only democrats have a right to live in security are no less authoritarian than the dictators the democrats condemn. In fact in many cases authoritarian leaders or rulers have given their people a better life than some democrats whose countries have been made unstable and insecure because of the weaknesses and uncertainties of the democratic systems... What I am saying is sacrilege of course. But if we look at recent events we would not fail to notice that it is the democratic countries which have been quick to use violence, who have violated international laws and shown disregard for the very human rights they so strongly advocated. It is they who resort to wars, to killing people to achieve their national agenda. Truly they are hypocrites. [110]

Singapore shares a similar view with Malaysia, propounding in official papers and policies that the people's desire for a better standard of living as well as security and stability in the country must take precedence over the Western notion of democracy. To develop a democratic society, the development of the country's economy must be given priority. According to Senior Minister Lee Kuan Yew, 'whether in periods of golden prosperity or in the depths of disorder, Asia has never valued the individual over society. The society has always been more important'.[111]

Sharing common ground with Singapore and Malaysia is Indonesia. It is a member state of ASEAN and an 'oriental nation' and also disapproves the

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[109] Mahathir Mohamad, Speech by Tun Dr Mahathir bin Mohamad at the 'Forum on Gaza Genocide: Solution for Palestine', London 31 March 2009.
[110] Mahathir Mohamad, Speech by Tun Dr Mahathir bin Mohamad at the 'Criminalise War Conference and War Crimes Tribunal 2009' at Putra World Trade Centre, Kuala Lumpur, 28 October 2009.
[111] Lee Kuan Yew cited in *Langlois, (n 105).*

Western culture and emphasis on individual human rights. This can be seen in the statement made by its then Foreign Minister Ali Alatas during the 1993 World Conference on Human Rights:

> In Indonesia, as in many other developing countries, the rights of the individual are balanced by the rights of the community, in other words, balanced by the obligation equally to respect the rights of others, the rights of society and the rights of the nation. Indonesian culture as well as its ancient well-developed customary laws have traditionally put high priority on the rights and interests of the society or nation, without, however, in any way minimising or ignoring the rights and interests of individuals and groups. Indeed, the interests of the latter are always fully taken into account based on the principles of 'musyawarah-mufakat' (deliberations in order to obtain consensus), which is firmly embedded in the nation's socio-political system and form of democracy.[112]

The call by governments to uphold Asian values have become more strident and have been embedded within the social, political and cultural systems of the respective Southeast Asian countries. The insistence on such cultural relativity has much to commend it but at its worst, it is a discourse that justifies and legitimates systematic abuses of the civil rights of individuals.

In this context, it is useful to look at initiatives in the region of Southeast Asia to collaborate over drugs policy. As has been mentioned in the preceding chapter, the ASEAN's main objective is to create regional peace, prosperity and stability through social and economic cooperation. This has included efforts towards regional collaboration in drug abuse prevention and control. For instance, with the growing concern over the rising phenomenon of ATS abuse, the ASEAN member states agreed to put their efforts together to achieve 'a drug free ASEAN by 2015'. The Bangkok Political Declaration in Pursuit of A Drug-Free ASEAN 2015 stated:[113]

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[112] Ali Alatas cited in *Langlois, (n 105).*

[113] The Bangkok Political Declaration in Pursuit of A Drug-Free ASEAN 2015 was held in Bangkok, Thailand on 11-13 October 2000.

> Guided by the purposes and principles of the Charter of the United Nations and the political declaration of the United Nations General Assembly Special Session (1998):
>
> c. Emphasize the immediate need for all countries to place drug issues as one of the high priorities on their national development agendas;
>
> d. Affirm the need for an intersectoral plan of action with clear objectives, measurable targets, collectively owned by the international community, that will enable us to execute the necessary actions towards the achievement of our common goal of a drug-free ASEAN 2015…[114]

Regional collaboration efforts can be seen from the so-called 'war on drugs' approach taken by the ASEAN member states. For example, Thailand launched its 'War on Drugs' campaign in February 2003 under the former Prime Minister Thaksin Shinawatra which aimed to put drug traffickers 'behind bars or vanish without trace'.[115] This massive campaign resulted in thousands of drug abusers being sent to rehabilitation centres to undergo treatment. Under the Narcotic Addict Rehabilitation Act B.E. 2545 (2002), drug offenders who meet the eligibility criteria shall be diverted into treatment rather than being incarcerated. Since under Thai drug law, consumption and possession of illegal drugs are criminal offences, drug users are not treated as patients but like any other drug offenders.[116] Lack of due process and insensitivity towards individual liberty are the main characteristics of the Thai treatment system and, just like Malaysia's *Puspen* centres, they have been described as similar to a 'military style boot-camp'.[117]

This regional 'War on Drugs' is not just confined to the area of civil commitment. In Singapore, drug traffickers who are convicted under the Misuse

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[114] cited in www.aseansec.org/5714.htm accessed on 16 November 2009.
[115] Marcus Roberts, Mike Trace and Axel Klein, 'Thailand's 'War on Drugs' (2004) A Drugscope Briefing Paper Report No 5, The Beckley Foundation.
[116] Richard Pearshouse, 'Compulsory Drug Treatment in Thailand: Observations on the Narcotic Addict Rehabilitation Act B.E. 2545 (2002)' (2009) Canadian HIV/AIDS Legal Network.
[117] See Chapter 2.

of Drugs Act 1973, receive the death penalty. According to the Asia-Pacific Human Rights Network,[118] Singapore is purported to 'have the highest per capita execution rate in the world...70 per cent of which are reportedly for drug offences'. Its drug 'rehabilitation' programme is equally extreme as persistent drug abusers with previous records can be ordered to undergo a 'long-term imprisonment regime' with a maximum period of imprisonment of 13 years as well as undergoing corporal punishment.[119] Singapore has been said to have a high degree of social and political stability and attributes this achievement to its successful criminal justice system. To quote Singapore's then Attorney General:

> We should not be apologetic or defensive about a criminal justice system that is effective in reducing the incidence of crime in society. Fewer crimes mean more freedom for all. Individual rights are only meaningful in the context of an established social order. Without society, personal freedom and rights are meaningless... The criminal law is an instrument to protect the social order as well as individual rights. Individuals need freedom to lead fulfilling lives, but they can only do that if there exists a stable civilised social order. The criminal justice system should seek to balance the interests of the individual with the welfare of the general community.[120]

Thus, it can be seen here that the rhetoric of Asian values within the scope of collective welfare of the nation has overshadowed the civil and political rights of the individual. With regard to drug users, the repressive and abusive nature of the treatment programmes has caused them to forfeit their fundamental rights and their freedom. As a consequence, the true objective of providing treatment for drug users has been unachievable. In fact, it has become more controversial than ever and harder to justify.

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[118] Asia-Pacific Human Rights Network (2006) www.aphrn.org accessed 25 June 2009.
[119] Central Narcotics Bureau Singapore, 'Treatment and Rehabilitation Regime' (2007) www.cnb.gov.sg accessed 24 November 2009.
[120] Chan Sek Keong, 'Rethinking the Criminal Justice System of Singapore for the 21st Century' 12 Millenium Law Conference, 10-12 April 2000.

The following section deals with the main thrust of the research project, that is, the serious infringement of the Constitution with regard to the implementation of the civil commitment in Malaysia.

6. Infringement of constitutional rights

Malaysia's civil commitment approach through the implementation of the 1983 Act appears to be theoretically justifiable in bringing drug users into treatment within a criminal justice setting. In practice, this has not been so. Based on what has been discussed above, the system is seriously flawed and raises a number of issues involving serious infringements of the principles of human rights; unjustified detention and inhumane, cruel and degrading treatment of drug users (The individual issues will be discussed in greater detail in the following chapters). This section will outline the overall framework of the research project with regard to the constitutional rights of an individual. To do this, one must first look at the fundamental principles of human rights as they are enshrined in the UN treaties and how these are reflected in the Constitution itself. Thereafter, the section will discuss the general approach that the Malaysian courts take in interpreting these principles. The following section will provide an analogy from other countries in respect of their human rights obligation under the ECHR.

6.1 Fundamental liberties under the UN treaties

International instruments provide an important context in which to discuss the protection of human rights in individual countries. To what extent has Malaysia ratified and implemented such instruments?

In 1993, 171 member states, including Malaysia, adopted the Vienna Declaration and Programme of Action at the World Conference of Human Rights in Vienna, in which the Declaration renewed 'the international community's commitment to the promotion and protection of human rights' founded in the 1948 UN Charter.

> All human rights are universal, indivisible, interdependent and interrelated...While the significance of national and regional particularities and various historical, cultural and religious background must be borne in mind, it's the duty of States, regardless of their political, economic and cultural systems, to promote and protect human rights and fundamental freedoms.[121]

As a signatory, Malaysia is obliged to uphold these international human rights principles. Indeed they are also guaranteed under the Constitution. In accordance to the fundamental principles of human rights enshrined in the UDHR, *inter alia,* everyone has the right to life, liberty and security of the person[122] and no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,[123] or to arbitrary arrest, detention or exile.[124] Notwithstanding these rights, in exercising such rights and freedom, 'everyone shall be subject only to such limitations as are determined by law' so as to uphold 'morality, public order and the general welfare in a democratic society'.[125]

Malaysia has yet to ratify the ICCPR and the ICESCR, both being international instruments that emerged from the UDHR. ICCPR deals with the civil and political rights whilst the ICESCR deals with economic and social

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[121] World Conference on Human Rights, Vienna, 14-25 June 1993.
[122] UDHR, art 3.
[123] UDHR, art 5.
[124] UDHR, art 9.
[125] UDHR, art 29 (2).

rights.[126] Since Independence in 1957, there has not been much progress in relation to the human rights aspects in Malaysia. In 1994, 50 Malaysian NGOs comprising of human rights organisations, academic bodies, etc endorsed the Malaysian Charter on Human Rights (the Charter) as recognition of the fundamental human rights in terms of political, social, cultural and economic self-determination as enshrined in the UDHR and the Constitution.[127] Article 2 of the Charter states as follows:

> Human rights, be they economic, social, cultural, civil and political rights, are indivisible and interdependent. The protection of economic, social and cultural rights requires full respect by governments for the exercise by people of their civil and political rights.

In its Preamble, the Charter urged the Malaysian government to ratify and implement the ICCPR, the ICESCR and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[128] Articles 7 and 9 of the ICCPR reiterate the inalienable rights proclaimed by the UDHR whereby no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment or to arbitrary arrest, detention or exile respectively. In the context of the discussion on 'Asian values', it is interesting to note here that the ICCPR upholds the sovereignty of individual freedom at all times even during 'public emergency' whereby measures taken by the state parties must not be inconsistent 'with their other obligations under international law...'.[129] It must also be underlined here that Article 10 (1) of the ICCPR states that any person whose liberty is deprived, he or she shall be treated with humanity and with respect. In

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[126] Syed Hussin Ali, 'HR Debate 2008: Keynote Address' (July/December 2008) PRAXIS Chronicle of the Malaysian Bar.
[127] *Tan, (n 99).*
[128] The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984 resolution 39/46, entered into force 26 June 1987).
[129] ICCPR, art 4.

the case of an accused person, he or she must be 'segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons'.[130] He or she is entitled to rights guaranteed under articles 10 and 11 of the Universal Declaration of Human Rights (UDHR) ie right to a fair trial and right to be presumed innocent until proved guilty (as have been considered above). These inherent rights are also elaborated in Article 14 of the ICCPR in that all persons are equal before the courts and tribunals, have a right to a fair hearing including a right to be legally represented –

> ...to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it" (Article 14.3.d)

These international instruments provide an important yardstick to measure the human rights performance of individual countries. To what extent does Malaysia measure up to these standards? This will be examined in the following section.

6.2 *Fundamental Principles under the Constitution*

The Constitution promulgated on Independence in 1957, 'is the supreme law of the land and constitutes the grund norm to which all other laws are subject'.[131] The Constitution was written in accordance to the Indian Constitution,[132] wherein Part II of the Constitution entitled 'Fundamental Liberties' reflect the fundamental principles of human rights enshrined in the UDHR that protect individual rights such as the right to life and the right to liberty of the person.

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[130] ICCPR, art 10 (2) (a).
[131] Raja Azlan Shah cited in Tommy Thomas, 'Is Malaysia an Islamic State?' (2005) The Malaysian Bar www.malaysianbar.org.my/constitutionallaw/ismalaysiaanislamicstatehtml.
[132] *Munir, (n 94).*

Article 5 of the Constitution is highlighted as follows:

(1) No person shall be deprived of his life or personal liberty save in accordance with law.

(2) Where complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him.

(3) Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.

(4) Where a person is arrested and not released he shall without unreasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey) be produced before a magistrate and shall not be further detained in custody without the magistrate's authority.

Provided that this Clause shall not apply to the arrest or detention of any person under the existing law relating to restricted residence, and all the provisions of this Clause shall be deemed to have been an integral part of this Article as from *Merdeka* (Independence) Day. [133]

The court's interpretation of the meaning and the boundaries of individual liberty as a fundamental constitutional right are of utmost importance to this research project. The premise on which the research is founded is that a person with a drug dependency problem has rights that should be recognised by law as with any other citizen. It is prudent that the courts draw the attention of the legislature to the rights guaranteed under section 28A of the CPC which should

[133] Notwithstanding the above, such rights, including the fundamental rights guaranteed under Article 5, are not absolute rights. Article 149 of the Constitution allows Parliament, in the event of serious subversion or organised violence, to pass laws that may be contradictory to the fundamental rights safeguarded elsewhere in the Constitution. In addition, Article 150 of the Constitution empowers the *Yang di-Pertuan Agong* (Ruler of the State) to issue a 'Proclamation of Emergency' when there is reason to believe that there is a potential threat affecting 'the security, or the economic life, or public order in the Federation or any part thereof...' meaning that 'the government may invoke powers to override constitutional provisions'. Thus, the above provisions are permanent provisions by which they may be used in special circumstances 'which would otherwise be unconstitutional'. Since 1957, the Constitution has been amended on several occasions to suit the government's needs. Amendments to the Constitution require not less than two-third votes of the total members of each House of Parliament. Hence, the ruling party that holds the Parliament shall have unlimited powers. Some critiques have argued that when the doctrine of constitutional supremacy is being compromised, then there is a loophole within the system. *Tan, (n 99).*

also apply to drug users suspected to be 'drug dependants' remanded in police custody. This important provision will be discussed in greater detail in Chapter 6.

> The courts have a constitutional function to perform and they are the guardian of the Constitution within the terms and structure of the Constitution itself; they not only have the power of construction and interpretation of legislation but also the power of judicial review -- a concept that pumps through the arteries of every constitutional adjudication and which does not imply the superiority of judges over legislators but of the Constitution over both. The courts are the final arbiter between the individual and the State and between individuals *inter se*, and in performing their constitutional role they must of necessity and strictly in accordance with the Constitution and the law be the ultimate bulwark against unconstitutional legislation or excesses in administrative action.[134]

The Malaysian courts have referred to several English and Indian case laws with regard to the interpretation of 'individual liberty'. For instance, Raja Azlan Shah Ag LP (as he then was) held that the provisions of the Constitution must be 'construed broadly and not in a pedantic way --- with less rigidity and more generosity than other Acts'.[135] Reference was made to the English case of *Minister of Home Affairs* v *Fisher,*[136] where Lord Wilberforce delivered his judgment:

> A constitution is a legal instrument given rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms.

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[134] Harun J and Salleh Abas LP in *Lim Kit Siang* v *Dato Seri Dr Mahathir Mohamad* [1987] 1 MLJ 383.

[135] *Dato Menteri Othman bin Baginda & Anor* v *Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29 cited in Dato Gopal Sri Ram J (Court of Appeal), 'The Workman and the Constitution', 1 MLJ clxxii (2007).

[136] [1979] 3 All ER 21 cited in Dato Gopal Sri Ram J (Court of Appeal), 'The Workman and the Constitution' 1 MLJ clxxii (2007).

Sri Ram JCA commented about the interpretation of the 'right to life' having a deeper meaning in that it shall be construed to include the 'right to privacy'.[137] The judge quoted two Indian cases; in the first, *Kharak Singh* v *State of Uttar Pradesh,*[138] it was held that the 'right to life' under the Indian Constitution is as follows:

> If physical restraints on a person's movements affect his personal liberty, physical encroachments on his private life would affect it in a larger degree. Indeed, nothing is more deleterious to a man's physical happiness and health than a calculated interference with his privacy. We would, therefore, define the right of personal liberty in art 21 as a right of an individual to be free from restrictions or encroachments on his person, whether those restrictions to encroachments are directly imposed or indirectly brought about by calculated measures.[139]

In the second case, *R Rajagopal* v *State of Tamil Nadu,* the Indian Supreme Court interpreted the 'right to privacy' as an implied 'right to life and liberty' which also includes 'a right to be let alone' and 'a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education…'.[140]

In this regard, the Malaysian courts seem to be on par with the Indian courts in adopting a broad and generous approach to the meaning of a right to 'personal liberty'. In *Government of Malaysia & Ors* v *Loh Wai Kong*, Tun Suffian LP (as he then was) held as follows:

> Article 5(1) speaks of personal liberty, not of liberty simpliciter…In the light of this principle, in construing 'personal liberty' in art 5(1) one must look at the other clauses of this article, and doing so we are convinced that the article only guarantees a person, citizen or otherwise, except an enemy alien, freedom from being 'unlawfully detained'…It will be observed that these are all rights relating to the person or body of the individual, and do not, in our judgment, include the right to travel

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[137] Dato Gopal Sri Ram J (Court of Appeal), 'The Workman and the Constitution', 1 MLJ clxxii (2007).
[138] (1963) AIR SC 1295 per Subba Rao J and Shah J.
[139] ibid.
[140] AIR 1995 SC 264.

> overseas and to a passport...With respect, we agree with what Mukherjee J said at p 96 in Gopalan AIR 1950 SC 27:
>
> In ordinary language, 'personal liberty' means liberty relating to or concerning the person or body of the individual, and 'personal liberty' in this sense is the antithesis of physical restraint or coercion. Accordingly to Dicey, who is an acknowledged authority on the subject, 'personal liberty' means a personal right not to be subjected to imprisonment, arrest or other physical coercion in any manner that does not admit of legal justification: vide Dicey on Constitutional Law, Ed 9 pp 207-208. It is, in my opinion, this negative right of not being subjected to any form of physical restraint or coercion that constitutes the essence of personal liberty. [141]

This can also be seen in *Kwan Hung Cheong* v *Inspektor Yusof Haji Othman & Ors* where a suspect (plaintiff) was arrested without warrant by the police. He was granted a police bail bond subject to a condition that the plaintiff 'has to appear and report to the police at a police station on a fixed date and which condition is then extended for an indefinite period for so long as the case against the suspect is still under police investigation'. The plaintiff contended that 'the use of the police bail bond by the police (defendants) was an abuse of the powers entrusted to them under the Criminal Procedure Code thereby rendering their (the police) action unlawful, invalid, null and void'. In delivering his judgment, Yew Jen Kie JC held that the police bail bond mentioned above was unlawful and thus, constitutes a deprivation of the plaintiff's personal liberty in breach of Art 5 (1) of the Federal Constitution. The judge, who referred to Tun Sufian LP in the above case, *Government of Malaysia & Ors*, further held that personal liberty as '(1) liberty relating to the person or the body of the individual; and (2) the negative right of not being subjected to any form of restraint or

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[141] *Government of Malaysia & Ors* v *Loh Wai Kong* 2 MLJ 33 cited in *Kwan Hung Cheong* v *Inspektor Yusof Haji Othman & Ors* [2009] 3 MLJ 263 per Yew Jen Kie JC.

coercion'. With the above judgment, the High Court in that case granted the plaintiff's claim with costs against the defendants and damages to be assessed.

In the context of such cases, the practice of civil commitment in Malaysia has seriously infringed the Constitution in regards to the fundamental rights of the drug users. The implementation of the 1983 Act has failed to recognise and uphold the rights guaranteed by the Constitution, UDHR and the ICCPR. In fact, the rights of the detainees appear less than those who are being charged with a criminal offence. In short, the civil commitment programme entails a massive curtailment of liberty. Not only does the coercive approach defeat the whole purpose of rehabilitation, the regime is punitive and imposes punishments that are greater than those imposed for a drug-related offence. The programme achieves this by the wholesale infringement of individual rights.

To what extent does the Constitution provide adequate safeguard to individuals who are being deprived of their personal freedom and liberty and to what extent have the courts in relation to drug detainees upheld those safeguards? Article 5 (2) of the Constitution, as mentioned earlier, protects the rights of a person who has been arrested and detained in a criminal proceeding. To recapitulate, Article 5 (2) states that 'where a complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him'. But such protection does not apply in a civil commitment case. A drug detainee who has been unlawfully detained at a *Puspen* centre, does not have a right to appeal against a court order for his detention. This is pursuant to the judgment in *Ang Gin Lee* v

Public Prosecutor,[142] where it was held that a court mandated order for the compulsory treatment of drug dependants[143] does not fall under the definition of 'order pronounced by any magistrate's court in a criminal case or matter'. Thus, based on the above ground of judgment in *Ang Gin Lee*, a drug detainee is not entitled to appeal his case before the High Court as provided under the CPC.[144]

Nonetheless, a detainee may seek relief outside the normal channels for criminal proceedings by applying a writ of *habeas corpus.*[145] However, even this appears limited – in *Sathiyamurthi* v *Penguasa/Komandan Pusat Pemulihan Karangan Kedah,* this was an appeal case against an order for the appellant to undergo treatment and rehabilitation at the Pusat Pemulihan Karangan, Kedah for two years pursuant to the 1983 Act. The appellant filed a writ of *habeas corpus* in the High Court at Penang seeking his release. In delivering the judgment in that case, the Federal Court referred to the case of *Re Tan Boon Liat* where Lee Hun Hoe CJ (Borneo) held as follows:[146]

> In *The Reverend Thomas Pelham Dale's Case* (1881) Brett LJ observed at page 461 that:
>
> Then comes the question upon the *habeas corpus*. It is a general rule, which has always been acted upon by the Courts of England, that if any person procures the imprisonment of another he must take care to do so by steps, all of which are entirely regular, and that if he fails to follow every step in the process with extreme regularity the court will not allow the imprisonment to continue.[147]

The paramount consideration in an application for a writ of *habeas corpus* by a drug detainee against whom a compulsory treatment order has been

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[142] [1991] 1 MLJ 498.
[143] 1983 Act, s 6 (1) (a).
[144] CPC, s 307 (i).
[145] *Re Datuk James Wong Kim Min* [1976] 2 MLJ 245 per Lee Hun Hoe CJ Borneo.
[146] [1977] 2 MLJ 108 (Malaysia).
[147] ibid.

made, is whether there is justification for making the order.[148] The court may exercise its inherent jurisdiction to disallow such an application, albeit having a defect, if it appears that the detainee 'is a person who, on the merits, ought to be detained'. Thus, the question for the Court to determine here is whether the drug detainee is lawfully detained. If he is, the writ cannot be issued and if he is not, it must be issued. In that case, the Federal Court found that the objections raised by the appellant did not have any merit, thus dismissed the appeal.

In *Quan Kim Hock* v *Timbalan Menteri Dalam Negeri & Ors,* it was held that in an application for *habeas corpus*, the court is duty bound:[149]

> ... where a liberty of a person is involved – to go beyond the stated grounds and examine the record of inquiry in order to satisfy itself that the order made by the magistrate under the Act is in accordance with the law. Where the order cannot be held to be in accordance with the law, the order is bad and the person ordered to undergo treatment at a rehabilitation centre or supervision by an officer is entitled to be released forthwith.[150]

Thus, going back to the constitutional safeguards under Article 5 (2), it is imperative that where a drug detainee is being unlawfully detained, an effective remedy is available, ie by applying to a High Court, so that he may be released from the institution without further delay. Without such a right of appeal or review, such detention constitutes a violation of a person's fundamental rights and failure to ensure effective remedies in regards to such violation is itself a basic infringement of rights guaranteed under Art 2 of the ICCPR. Art 2 (3) states as follows:

> a) To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy...
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or

[148] [2006] MLJU 376.
[149] [1999] 7 CLJ 585 (Malaysia).
[150] ibid.

legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
(c) To ensure that the competent authorities shall enforce such remedies when granted.

Thus we can see that, while the Malaysian courts interpret the safeguards in the Constitution broadly, these protections as a rule are not extended to those detained under the civil commitment programme. The specific infringements of human rights will be discussed later in Chapter 6.

7. European Convention on Human Rights

This chapter has explored the approach of both the USA and Malaysian courts to the issue of civil commitment programmes. A further analogy may be drawn from the jurisprudence of the ECtHR enforcing the ECHR and the extent to which member states adhere to the principles promoted by the ECHR.

The ECHR came into force on 3 September 1953[151] when the Council of Europe sought to ensure adherence to the UDHR principles among its member states by having regard to 'the principles of the rule of law, and of the enjoyment of all persons within its jurisdiction of human rights and fundamental freedoms.[152] The ECtHR was subsequently established to try cases involving human right violations.[153] Any member state (state application) or individual (individual application) claiming to be a victim of a violation of the ECHR may lodge directly with the ECtHR in Strasbourg. Individuals bringing cases against the respondent state my present their own cases, but they should be legally represented once the application has been submitted. The Council of Europe has

[151] Cheney and others (eds) *Criminal Procedure and Human Rights Act 1998* (2nd edn Jordans, Bristol 2001).
[152] Statute of the Council of Europe, art 3.
[153] *Cheney and others, (n 151).*

set up a legal aid scheme for applicants who have insufficient means.[154] In 1998, the entry into force of the Eleventh Protocol to the ECHR confirmed the ECtHR as a single and full-time institution that represents a purely judicial system whereby making it a compulsory jurisdiction. This meant that the right of individual petitions may be automatically directed to the ECtHR and no longer depend on decisions by States. The ECtHR held that 'individuals now enjoy at the international level a real right of action to assert the rights and freedoms to which they are directly entitled under the Convention'. This right is applicable to persons, group of individuals and NGOs.[155] Although initially the United Kingdom disagreed with the ECtHR's formation, it has seen more than 135 cases being dealt with by the Court with 52 cases (as at October 1998) found in violation of the Convention.[156] In 2007, there were 41,650 applications made to the ECtHR and continued to increase to 49,850 caseloads by 2008. In the latter year, the ECtHR delivered 1,543 judgments.[157] This comprises an impressive jurisprudential resource for research into human rights issues.

As far as civil commitment programmes are concerned, Article 5 (1) of the ECHR states as follows:

> Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law.

Among the 'cases' described in Article 5 (1) are 'the lawful detention of a person after conviction by a competent court;[158] the lawful arrest or detention of a person for non-compliance with the lawful order of a court in order to secure

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[154] ECtHR Annual Report 2008 www.echr.coe.int.
[155] ibid. See *Mamatkulov and Askarov v. Turkey* [GC], nos 46827/99 and 46951/99, § 122, ECHR 2005-I.
[156] *Cheney and others, (n 151).*
[157] *ECtHR (n 154).*
[158] ECHR, art 5.1 (a).

the fulfilment of any obligation prescribed by law;[159] the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants'.[160] It is relevant to highlight here on the lawful detention 'of persons of unsound mind, alcoholics or drug addicts or vagrants' by which the phrase 'unsound mind' must be read in conjunction with Article 5 (4) of the ECHR. Article 5 (4) states as follows:

> Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

Thus, Article 5 (4) is an important procedural safeguard, particularly to mental patients who receive detention orders to remain in a secure hospital. The UK's Mental Health Act 1983 permits the detention of persons with mental disability in a hospital without their prior consent. However, Article 5 (4) of the ECHR protects such persons as such legislation involves 'a serious loss of individual liberty'[161]. In *HL* v *United Kingdom*, the ECtHR held that the English legislation governing the detention of mental health patients breached both Articles 5 (1) and 5 (4) of the ECHR.[162] In delivering the judgment, the ECtHR held as follows:

> The Court found striking the lack of any fixed procedural rules by which the admission and detention of compliant incapacitated patients was conducted... As a result of the lack of procedural regulation and limits, the Court observed that the hospital's health care professionals assumed full control of the liberty and treatment of a vulnerable incapacitated individual solely on the basis of their own clinical assessments completed as and when they considered fit... The Court therefore found that this absence of procedural safeguards failed to protect against arbitrary

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[159] ECHR, art 5.1 (b).
[160] ECHR, art 5.1 (e).
[161] G.Richardson, 'The European Convention and Mental Health Law in England and Wales: Moving beyond process?' (2005) International Journal of law and Psychiatry, 28.
[162] *HL* v *United Kingdom* Application no. 45508/99.

> deprivations of liberty on grounds of necessity and, consequently, to comply with the essential purpose of Article 5 (1). The Court therefore held, unanimously, that there had been a violation of Article 5 (1)... Finding that it had not been demonstrated that the applicant had available to him a procedure to have the lawfulness of his detention reviewed by a court, the Court held, unanimously, that there had been a violation of Article 5 (4).

The above decision in *HL* by the ECtHR should set as an example for the Malaysian courts when hearing drug user cases for unlawful detention through the application of the procedural safeguard guaranteed by Art 5 (2) of the Constitution -

> Where complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him.

Also relevant to the issue of detainees in *Puspen* is Article 3 of the ECHR, which states that 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'. This is supported by the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment which states 'All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person'.[163] The document further states that 'No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment'[164]. It is relevant to note here how the term

[163] UN Body of Principles, principle 1.
[164] UN Body of Principles, principle 6.

'cruel, inhuman or degrading treatment or punishment' is interpreted by the above document:

> ...to extend the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time.[165]

The 'cold turkey' detoxification for withdrawal symptoms without any form of medical assistance or drug substitution treatment for drug user during the detention period for drug assessment may well fall under the definition of 'cruel, inhuman or degrading treatment or punishment'.

In determining a person's civil rights against any criminal charges against him or her, every person has a right to a fair hearing, pursuant to Article 6 of the ECHR 'everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'. In this regard, every person who has been charged with a criminal offence has several rights guaranteed under Article 6 (3), *inter alia*, 'right to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require'. Access to fairness, lies in the 'independence and impartiality of the court', 'the openness of the proceedings' and 'the reasoned decision-making'.[166]

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[165] ibid.
[166] Steve Uglow, 'The Right to a Fair Hearing' in Cheney and others (eds) *Criminal Procedure and Human Rights Act 1998* (2nd edn Jordans, Bristol 2001).

8. Concluding remarks

From what has been discussed above, it can be concluded that the rationales behind the use of the civil commitment of drug users could not be justified. The procedure involves prima facie violations of the fundamental human rights guaranteed under the international human rights instrument - the UDHR, ICCPR or the ECHR, and in Malaysia's cases the Constitution. A more detailed account of the civil commitment procedure will be discussed in the succeeding chapters - Chapters 5 and 6.

CHAPTER 5: THE COMPULSORY TREATMENT OF DRUG USERS IN KUALA LUMPUR: A CASE STUDY

1. Introduction

The overall aim of the research project was to provide a detailed account of the legal process under the civil commitment or compulsory treatment and rehabilitation of drug users in Malaysia. This is pursuant to the Drug Dependants (Treatment and Rehabilitation) Act 1983 (the 1983 Act). Findings from the research project was used to examine the extent to which the laws and practices in regards to the compulsory treatment are inconsistent with the fundamental human rights principles enshrined in the Constitution and other international instruments.

What this chapter sets out to do and how it fits into this overall research project was that it was essentially a description of the legal and other processes leading to the imposition of a court-mandated order. It drew on the empirical work carried out by the researcher. It also raised issues of concern that existed at every stage of the process, including the drug testing procedure – although the human rights implications of these would be discussed at greater length in Chapter 6. The following section examined the methodological issues involved in the research project's case study.

2. Methodological issues involved in the 'Case Study' approach

This research project had utilised a research methodology, known as the 'case study'. The case study involved a range of research methods leading to the

collection of qualitative rather than quantitative data. Empirical studies or scientific inquiries can employ either one or a combination of research methodologies.[1] Choosing a particular method usually depends on the type of information required to answer a research question.[2] There are a wide variety of methods that are commonly used by social scientists in qualitative research; for example, participant observation, direct observation, case study, semi-structured and unstructured interviewing.[3]

Why choose a qualitative research method as opposed to a quantitative method? According to Morgan and Smircich, in order to determine whether a method is suitable for a particular research depends on 'the nature of the social phenomena to be explored'.[4] Travis propounded that criminal justice researchers employed the case study method to study 'crime causation' involving criminals' life histories. The classic example of such a landmark case study in criminology was Sutherland's 'The Professional Thief'.[5] Chic Conwell who was the author's informant, 'gave a candid and forthright account of the highly organised society... about the private lives and the professional habits of pickpockets, shoplifters and conmen and brings into focus the essential psychological and sociological situations that beget and support professional crime'.[6]

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[1] Lawrence F. Travis, 'The Case Study in Criminal Justice Research: Applications to Policy Analysis' (1983) Vol 8 No 2 Crim Just Rev 46.
[2] Sanders cited in *Travis, (n 1)*.
[3] William M.K. Trochim, 'Qualitative Methods' www.socialresearchmethods.net/kb accessed 7 January 2008.
[4] Morgan and Smircich cited in Khairul Baharein Mohd Noor, 'Case Study: A Strategic Research Methodology' (2008) American Journal of Applied Sciences 5 (11).
[5] Sutherland cited in Frank E. Hagan, *Research Methods in Criminal Justice and Criminology* (7th edn Allyn and Bacon, Boston 2006).
[6] 'The Professional Thief' cited in www.press.uchicago.edu/presssite/metadata accessed 6 January 2010.

Hence, the case study approach may provide valuable and useful evidence, which goes beyond mere quantitative data. It requires a better understanding of the whole process that is being researched. For instance, semi-structured interviews were conducted with key stakeholders where questions were careful constructed in order to generate data and have a better understanding of the National Drugs Policy (NDP).[7]

Notwithstanding the above, case study method has been criticised for not being able to 'address the issues of generalisability'.[8] Quantitative data derived from surveys, on the other hand, can be generalised to larger population. According to a study by Kleck, Tark and Bellows, 45 per cent of all empirical research in the field of criminology and criminal justice used survey methodology 'as a way of gathering information on crime, criminals and society's reaction to crime' as opposed to 12 per cent, which employed qualitative research, informal interviews and direct observation.[9] Surveys are able to measure a phenomenon and fragmented into common categories such as 'frequencies of behaviour, differences in attitudes, intensity of feelings, and so forth.'[10] Hoepfl states that quantitative method is used to test hypothetical generalisations;[11] data collected will be in the form of numbers that can be quantified and summarised, with the final result illustrated in 'statistical

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[7] See Chapter 3.

[8] Khairul Baharein Mohd Noor, 'Case Study: A Strategic Research Methodology' (2008) American Journal of Applied Sciences 5 (11).

[9] Gary Kleck, Jongyeon Tark and Jon J. Bellows, 'What methods are Most Frequently Used in Research in Criminology and Criminal Justice?' (2006) Journal of Criminal Justice 34.

[10] Fritz Scheure, 'What are Focus Groups; What is a Survey' (2004) www.whatisasurvey.info accessed 23 January 2007.

[11] Hoepfl cited in Nahid Golafshani, 'Understanding Reliability and Validity in Qualitative Research' (2003) The Qualitative Report, Vol 8 No 4 http://www.nova.edu/ssss/QR/QR8-4/golafshani.pdf accessed 3 September 2010.

terminologies'.[12] Maxwell argues that qualitative research is limited to internal generalisations as opposed to quantitative research, which incorporates both internal and external generalisations, and thus, the former lacks validity.[13]

However, Tellis defends the qualitative methodology by stating that case study is a 'triangulated research strategy'[14] by means of which multiple sources of data are applied in order to validate the research process.[15] Triangulation has been defined by Stake as 'the protocols that are used to ensure accuracy and alternative explanations'.[16] Hagan supports the use of triangulation by propounding that employing 'multiple methodologies' minimises the dispute over which research methods are the most desirable.[17] For example, field studies may comprise of a number of independent research methods to measure the same phenomenon, thereby making 'the greater the confidence attached to the findings'. Hagan illustrates this by citing the Project on Human Development in Chicago Neighbourhoods (PHDCN), which is a large-scale interdisciplinary study of how families, schools, and neighborhoods affect child and adolescent development, with particular focus on juvenile delinquency, adult crime, substance abuse, and violence. The PHDCN applied the 'triangulated strategy' which included 'a community survey, an observational survey, a survey of neighbourhood experts, police incident files, public health and other official

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[12] Charles cited in Nahid Golafshani, 'Understanding Reliability and Validity in Qualitative Research' (2003) The Qualitative Report, Vol 8 No 4 http://www.nova.edu/ssss/QR/QR8-4/golafshani.pdf accessed 3 September 2010.

[13] Maxwell in Glyn Winter, 'A Comparative Discussion of the Notion of 'Validity' in Qualitative and Quantitative Research' (2000) The Qualitative Report, Vol 4 Nos 3 & 4 http://www.nova.edu/ssss/QR/QR4-3/winter.html accessed 3 September 2010.

[14] Winston Tellis, 'Application of a Case Study Methodology' (1997) The Qualitative Report, Vol 3 No 3 http://www.nova.edu/ssss/QR/QR3-3/tellis2.html accessed 21 April 2008.

[15] Yin cited in *Tellis, (n 14).*

[16] Stake cited in Tellis *(n 14).*

[17] Frank E. Hagan, *Research Methods in Criminal Justice and Criminology* (7th edn Allyn and Bacon, Boston 2006).

records...'.[18] Its first community survey (1994-1995) was done by household interviews with 8,782 adult Chicago residents from 343 neighborhood clusters.

Murji employed the case study approach in his investigation of drug referral schemes in Leicestershire (England).[19] One of the methods used by Murji was the interviewing of a custody officer from the Leicestershire police force. The custody officer was asked about the difficulties faced by the police in implementing the referral scheme through the dissemination of referral leaflet. Murji recorded the interview as part of the case study:

> Some of them aren't interested, they won't accept it [the leaflet], they don't want advice – you've got to catch them at a certain stage. They don't consider they've got a problem, they don't consider it's wrong... We don't get a lot of cannabis users here, well, it varies from three, five, six a month and a lot of them don't really think they've got a problem, they're not interested. We can't always say to them, look, you know it's not going to do you any good, we are not necessarily the right agency to be saying those things, depending on the circumstances some will respond to it, some won't, most won't, they don't really want to know (Custody Officer L).[20]

What the above case study by Murji has demonstrated, was the value of adopting a systematic way of looking at 'a particular occurrence in its natural setting'. For the research project, the way in which the legal process took place involving drug users was the 'particular occurrence', and the police station was the 'natural setting' for the 'particular occurrence'.

To sum up, the research project's case study proved to be productive in generating data as it allowed different methods and sources to be used: the quality of the data was enhanced through a triangulation method. The qualitative

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[18] ibid.
[19] Karim Murji, *Policing Drugs* at page 106 (Ashgate, Aldershot 1998).
[20] ibid.

research that was undertaken enabled the researcher to gather 'comprehensive' and 'flexible' data from which the information was analysed and reported.

> Case study...a method for learning about a complex instance, based on a comprehensive understanding of that instance obtained by extensive description and analysis of that instance taken as a whole and in its context.[21]

3. Employing the 'Case Study' methodology

What constitutes a case study? According to Yin, the case study method is 'an empirical inquiry that investigates a contemporary phenomenon within its real-life context; when the boundaries between phenomenon and context are not clearly evident; and in which multiple sources of evidence are used'.[22] Yin proposed four instances for the application of a case study model:

a. To explain complex causal links in real-life interventions;
b. To describe the real-life context in which the intervention has occurred;
c. To describe the intervention itself;
d. To explore those situations in which the intervention being evaluated has no clear set of outcomes.[23]

Similarly, Sellitz, Jahoda, Deutsch and Cook define a case study on a wider scope:

> It should be clear that we are not describing what is sometimes called the 'case- study' approach, in the narrow sense of studying the records kept by social agencies or psychotherapists, but rather the intensive study of selected instances of the phenomenon in which one is interested. The focus may be on situations, on groups, on communities. The method of study may be the examination of existing records; it may also be unstructured interviewing or participant observation or some other approach.[24]

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[21] USA General Accounting Program Evaluation and Methodology Division 'Case Study Evaluations' (November 1990) www.gao.gov/special.pubs accessed 15 May 2007.
[22] Yin cited in Susan K. Soy, 'The Case Study as a Research Method' Unpublished Paper, University of Texas at Austin.*fiat.glsis.utexas.edu.*/~ssoy/usesusers/l391d1b.htm accessed 14 November 2009.
[23] Yin cited in *Tellis (n 14)*.
[24] Sellitz, Jahoda, Deutsch and Cook cited in *Travis, (n 1)*.

Feagin, Orum & Sjoberg posit that 'case study is an ideal methodology when a holistic, in-depth investigation is needed'.[25] Various methods of data collection may be used in a case study; 'surveys, in-depth interviewing, participant observation, content analysis and experiments'.[26] As has been suggested earlier, the use of a variety of methods of data collection can be extremely beneficial to the research project. During this research project, the researcher was able to collect data from semi-structured and unstructured interviews with key stakeholders, from focus groups and official sources. Through this, it was possible to gain an informative, yet nuanced, view of the perceptions of the police and the criminal justice system from a range of viewpoints.

One of the most significant features of a good case study is that there must be 'appropriate instance selection'.[27] Tellis explains that selecting cases are essential so as to maximise whatever information that can be obtained during the period of time available which focuses on issues that are 'fundamental to understanding the system...'.[28] Queen believes that in order to understand the system, the case study should begin by an 'examination of single situations, persons, groups, or institutions as complex wholes in order to identify types and processes'.[29]

This research project examined the legal process affecting drug users involved under the government's drug intervention programme (DIP). It did so

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[25] Feagin, Orum and Sjoberg cited in Winston Tellis, 'Application of a Case Study Methodology' (1997) The Qualitative Report, Vol 3 No 3 http://www.nova.edu/ssss/QR/QR3-3/tellis2.html accessed 21 April 2008.
[26] *Hagan, (n 17).*
[27] ibid.
[28] *Tellis, (n 14).*
[29] Queen cited in Katharine Jocher, 'the Case Method in Social Research' (1928) Social Forces Vol VII No 2.

through official documents and also through direct observation, a series of structured and semi-structured interviews as well as focus group. The research project acknowledged the gap or lack of research in the mandatory treatment of drug users in Malaysia from the legal perspective. Hence, data were analysed by employing a methodology that included a 'comparative analysis'[30] of drug user cases decided by the Malaysian courts, with particular reference to writ of *habeas corpus* cases. It is pertinent to refer to judicial decisions in order to determine legal matters or issues that arise from the research findings. For example, judicial interpretation of what constitutes 'personal liberty' pertaining to the detention of drug users at *Puspen* centres and whether, the legal process infringes the principles of human rights of these drug users. (These will be discussed in more detail below and in the following chapter).

Findings from the data provided a better understanding on why a particular instance arose out of the 'conditions and their relationships',[31] that is, the legal process and the stakeholders involved in the legal process under the DIP. As mentioned above, the stakeholders were the most reliable source of information for the case study. For instance, the researcher was briefed on the police standard operating procedure in regards to the arrest of suspected drug dependants at the police station.

The following section will be sub-divided into six sub-headings. All six methods were employed in the case study.

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[30] Ian Dobinson and Francis Johns, 'Qualititative Legal Research' in Mike McConville and Wing Hong Chui (eds), *Research Methods For Law* (Edinburgh University Press Ltd, Edinburgh 2007).
[31] Susan K.Soy, 'The Case Study as a Research Method' (1997) Unpublished Paper, University of Texas at Austin.*fiat.glsis.utexas.edu./*~ssoy/usesusers/l391d1b.htm. accessed 14 November 2009.

3.1 Direct Observation

As has been mentioned, the main objective of the research project was to examine the legal process affecting the drug users. This is the pre-trial stage within the criminal justice system where a drug user is arrested, detained and medically assessed by a government medical doctor ore registered practitioner. Upon being certified by the doctor as a person who is dependent on drugs, they will be brought before a magistrate who may order them to be admitted into a *Puspen* centre or undergo supervision within the community, pursuant to the 1983 Act. The pre-trial stage consists of the following natural settings, which are listed in chronological order:

- Arrest at DW police station
- Detention at JHT detention centre
- Medical examination at KLH drug unit centre
- Court proceeding at JD magistrate's court

The case study was based on the observational studies conducted at these four natural sites situated in Kuala Lumpur. Hagan defines observation as:

> a strategy of data collection in which the investigator attempts to examine the activity of subjects while keeping her or his presence either secret or to a minimum, so as not to interfere. This may take the form of laboratory observations or more 'naturalistic' field observations.[32]

Direct observation was distinguished from participant observation in that the observer (in this case the researcher) did not participate in the study as she wanted to be as 'unobtrusive as possible so as not to bias the observations'.[33]

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[32] *Hagan, (n 17).*
[33] *Trochim, (n 3).*

Briefly, individuals who are arrested by the police for suspicion of being involved in illicit drug use are brought into a police station to undergo a drugs test. At the police station, the arrested persons will be compelled to give his or her urine sample that will be provisionally tested at the station. DW police station was chosen for the observational study site because it has one of the highest arrest rates of drug users brought in for mandatory drug testing around the Kuala Lumpur city area.[34] The study also included an observation of the police standard operating procedure (SOP) conducted at DW police station. The observations were recorded manually that is by field-note taking. Hagan posits that a good investigator should record observations as often as possible, even those that appear trivial, because it may be these very unimportant details that later provide the key to some important facet of the study. He further argues that observational studies tend to be exploratory in the initial stage and this makes note-taking essential as he cited Webb et al. 'the palest ink is clearer than the best memory.'[35]

If the provisional drugs test shows a positive result for any illicit drug use, the arrested persons will be remanded in custody at a temporary police lock-up, ie a detention centre. For the second study site, JHT detention centre was chosen because it was the main detention centre for all drug users arrested for suspected illicit drug use (for the purpose of this section drug users under remand will be referred to as drug detainees) remanded by the police around the Kuala Lumpur area.[36] During the remand period, the drug detainees will undergo a

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[34] Statement by Mas Anuar, AADK Officer (Personal Communication 15 June 2008).
[35] *Hagan, (n 17).*
[36] Since 2009, a new detention centre at Bukit Jalil has been allocated to accommodate drug detainees arrested around the Kuala Lumpur area.

medical examination by a government medical officer at the KLH drug unit centre located at the Psychiatric Department of the Kuala Lumpur general hospital. The researcher decided to conduct the third study at the centre as the drug assessment process is an essential part of the statutory provision under the 1983 Act. Once the drug assessments have been completed on each drug detainee, those who are certified as 'drug dependants' by the medical officer will be brought before a magistrate at the magistrate's court for an order to be made either for compulsory treatment at a *Puspen* centre for a maximum period of two years and thereafter supervision in the community for two years or supervision in the community for two years.[37]

For the fourth observational study on court proceedings, JD magistrates' court was chosen because it is Kuala Lumpur's main court complex where most of the drug user cases were being dealt with.

All four of the observational studies were recorded via field note taking. Tape recording was not allowed at these sites due to the sensitivity of the situations. The researcher was briefed by the respective agencies prior to the observations on the prohibition of using tape recorders. Although tape recording was more practical, the researcher did not object, as she wanted the observations to run smoothly without any hold ups by the agency personnel (See details in section 3.2 Observational Protocol).

In addition to these observations, in 2007 the researcher had the opportunity to enter a *Puspen* centre that was situated not far from the city of Kuala Lumpur. The centre was a highly structured residential institution surrounded by a 12 feet high double fencing with barbed wires on top. There was

[37] 1983 Act, s 6 (1) (a) (b).

tight security at the main entrance of the centre. The centre consisted of hostel blocks to accommodate the trainees (they include both court mandated and voluntary based drug users), a dining hall, a multi-purpose hall, a detoxification ward, agricultural land, and a sports field. However this research project focused on the legal process up to the making of a court order and, while the visit was important contextually, it had no relevance for obtaining research data. All the case files of *Puspen* drug trainees were kept at the magistrate's courts.

3.2 Observational Protocol

Prior to the observational studies, formal letters were sent out to the respective government agencies seeking permission to conduct the research. They are as follows:

- For the observational study at DW police station, a formal letter was sent to the Deputy Director of the Narcotics Division, Bukit Aman RMP Headquarters and a copy of the approval letter by the Deputy Director was then sent to the Head of Narcotics Division, DW police station;
- For the observational study at JHT detention centre, a formal letter was sent to the Director of the AADK, Putrajaya;
- For the observational study at HKL drug unit centre, a formal letter was sent to the Director of the Psychiatric Department, HKL.

All three government agencies approved the researcher's request for observational study and did not have any objections. The only restriction was that the researcher was not permitted to have direct contact with the drug detainees, such as conducting interviews with them.

- For the observational study at JD magistrates' court, no formal permission was required, since drug user cases are dealt with in open court. However, the researcher had a brief meeting with one of the magistrates (who normally presides over drug user cases) prior to the court proceeding. Similar to the above restriction, the researcher was not allowed to communicate with the drug detainees as they were under police remand.

The study was further enhanced by employing a combination of different methods using a triangulated research strategy:[38] firstly by incorporating data from case files; secondly by gathering information from semi-structured and unstructured interviews with key stakeholders and thirdly from focus group discussion. The purpose of collecting data from a variety of different sources was to enable the researcher to test findings from one source against those from other sources.

3.3 Semi-structured interviews

According to Mason, interviews have been regarded 'as one of the most commonly recognised forms of qualitative research method'.[39] Qualitative interviewing encompasses 'in-depth, semi-structured or loosely structured forms of interviewing'.[40] Clearly the key stakeholders are an important source since they are directly involved in the drug intervention programmes. Obtaining information from them through semi-structured interviewing seems to be the

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[38] *Tellis, (n 14).*
[39] Mason, J., *Qualitative Researching* (2nd edn, Sage Publications, London 2007).
[40] ibid.

most appropriate research method. This is because qualitative or semi-structured interviewing involves one-to-one interactions and as Burgess defines it as 'conversations with a purpose'.[41] Such interviews are a social situation whereby 'people's knowledge, views, understandings, interpretations, experiences, and interactions are meaningful properties of the social reality which the research questions are designed to explore'.[42] It was the researcher's experience that, in such interviews, it was possible to explore issues in depth, test interviewees' confidence in the system and a better understanding of the government's drug intervention policy.

The semi-structured interviews were conducted with key personnel from various government agencies who were directly involved in the legal process for bringing drug dependants for compulsory treatment. The selection of the key stakeholders was on a similar basis to the observational study.

Firstly, from the stage of arrest to the detention of drug dependants, the police are the key personnel where information and invaluable data could be attained. The researcher carried out semi-structured interviews, in particular, with two police officers - one from the Narcotics Division at the RMP Headquarters in Bukit Aman, Kuala Lumpur and the other who was in charge of the Narcotics Division at the DW police station, Kuala Lumpur. The information derived from talking and listening to these officers' duties and experiences generated important data – for example, the researcher was informed by the police officer from *Bukit Aman* that at present, there were no official statistics on the drugs-

[41] Burgess cited in *Mason, (n 39).*
[42] *Mason, (n 39).*

crime link in Malaysia.[43] This information confirms that there is a gap in the national empirical research on the relationship between drugs and crime. In another matter, he also said that there was a lack of communication between the police and the AADK in regards to the detention of drug detainees under the drug intervention programme. For example, the police have exercised their duties under the *Ops Tapis* by arresting a considerable number of people suspected to be drug dependants. According to the officer, due to the excessive number of arrests, *Puspen* centres have become overcrowded over the years, thus, many of the drug detainees were given supervision orders within the community instead. The officer further said that for the year 2005, based upon the Narcotics Department statistic, only 3,096 drug detainees were admitted to *Puspen,* as compared to 15,330 who were given supervision orders. When asked about the reason for the high relapse rate among *Puspen* trainees, the officer claimed that these trainees were not totally rehabilitated before being released to undergo supervision within the community.

Information with regard to the police groundwork ie SOP was provided by the Chief Investigation Officer of the Narcotics Division, DW police station. The SOP will be discussed further in the following section.

Secondly, since the compulsory treatment of drug users falls under the responsibility of AADK, interviewing key personnel from the Agency is essential. A semi-structured interview was conducted with the AADK's Chief Operating Officer at his office in Putrajaya, Selangor. The main objective of the interview was to gain a better insight in regards to the government's drug

[43] The interview was conducted much earlier prior to the fieldwork ie 15 December 2006 at the Narcotics Division, Bukit Aman RMP Head Quarters, Kuala Lumpur.

intervention programme as part of the National Drug Policy with regard to the compulsory treatment and rehabilitation of drug users.

Semi-structured interviews were also conducted with the rehabilitation officers from the AADK branches in Kuala Lumpur. These officers' primary jobs include assessing drug users through interviewing and making recommendations to the magistrate on the most suitable treatment for them. Usually, the rehabilitation officers have a good rapport with the drug users.

Third, semi-structured interviews were also conducted with two government biochemists from the Pathology Department, Kuala Lumpur Hospital. These were undertaken with the more limited aim of gaining a better understanding of the laboratory procedures in regards to the handling of urine samples and their test results.

3.4 Unstructured Interviews

An unstructured interview may be defined as follows:

> direct interaction between the researcher and a respondent or group... although the researcher may have some initial guiding questions or core concepts to ask about, there is no formal structured instrument or protocol... the interviewer is free to move the conversation in any direction of interest that may come up.[44]

The advantage of conducting the above observational studies was that the researcher also was in a position to conduct unstructured interviews with the relevant stakeholders. According to Robson:

> When you are involved with a programme, perhaps observing what is happening when it is in operation, opportunities commonly arise to have brief discussions with programme staff, or with managers, or clients. Such conversations can be invaluable in developing an understanding of

[44] *Trochim, (n 3).*

> what is going on, and these various persons' perceptions about this. At an early stage of involvement, your agenda is likely to be exploratory. As you develop and refine the evaluation questions to which you seek answers, these conversations can be more closely focused. [45]

At the DW police station, the researcher was able to make several inquiries pertaining to the on-site urine test procedure and the SOP as a whole. The inquiries were made through unstructured interviewing with the investigation police officers involved in the arrest and drugs test operation.

At the JHT detention centre, whilst observing the AADK officers interviewing the detainees, the researcher took the opportunity during the short intervals between each detainee's interview to ask the interviewers (AADK officers) questions. This was done in order to seek clarification on what the researcher had been observing at the JHT detention centre.

During the observational study at the HKL drug unit, the researcher managed to interview the officer in charge of the unit before the drug detainees arrived for the medical examination. He briefly explained the procedure in regards to the drug detainees' medical examination. Medical officers who performed the medical examinations were also interviewed (the issues that were raised during the interview will be discussed below.

Prior to the observational study at the courtroom, the researcher took the opportunity of conducting a short interview with the magistrate who normally presides over drug user cases. From the interview, the researcher obtained useful information with regard to matters affecting the right to appeal under the CPC. Section 307 (i) of the CPC provides that 'any person who is dissatisfied with any

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[45] Colin Robson, *Small –Scale Evaluation: Principles and Practice* (1st edn Sage Publications, London 2000).

judgment, sentence or order pronounced by a magistrate's court in a criminal case or matter to which he is a party may prefer an appeal to the High Court against such judgment, sentence or order'.[46] According to the decision in *Ang Gin Lee* v *Public Prosecutor*:

> an order made under section 6 (1) (a) of the Drug Dependants (Treatment and Rehabilitation) Act 1983 is not an order pronounced by a magistrate's court in a criminal case or matter to which the applicant is a party under section 307 (i) of the Criminal Procedure Code and therefore the applicant has no right to appeal.[47]

This is because the compulsory treatment of drug users in Malaysia is governed by the 1983 Act, which is a social legislation.[48] In that case, the applicant and three others were ordered by the Miri magistrate to undergo treatment at a *Serenti (Puspen)* centre in Kuching for two years. The applicant filed a notice of appeal to the Miri High Court against the order of the magistrate. In delivering his judgment, Denis Ong J held that the High Court was not in a position to exercise its revisionary and supervisory powers because the magistrate's court order 'is not an order pronounced by a magistrate's court in a criminal case or matter' (above) and dismissed the appeal. This 'no right to appeal' in a drug user case will be discussed further in Chapter 6.

3.5 Focus Group

This research project also employed a focus group. According to Lederman, this is 'a technique involving the use of in-depth group interviews in which participants are selected because they are a purposive, although not necessarily

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[46] *Ang Gin Lee* v *Public Prosecutor* [1991] 1 MLJ 498 per Denis Ong J.
[47] ibid.
[48] ibid.

representative, sampling of a specific population, this group being "focused" on a given topic'. [49] Thus, the composition of the focus group (by the researcher) was based on the homogeneity of the participants.[50] They comprised of former and recovering drug users who had been in contact with the criminal justice system and had been admitted into *Puspen* before. The aim of the focus group was to retrieve data and information from drug users who had undergone the legal process involving the compulsory drug assessment under the DIP.

The focus group facilitated by the researcher was held at a local AADK service centre in Kuala Lumpur. This centre organises rehabilitative programmes for recovering drug users such as 'counselling, countering relapse sessions, skills training, community integration and job placement'.[51] The centre is also a meeting place for former and recovering drug users to sit together to discuss matters concerning the programmes conducted at the centre and other related issues. At the moment, it also provides residence for female recovering drug users released from *Puspen*. The researcher was able to get the help of the rehabilitative officer in charge of the centre to recruit participants for the focus group. Seven individuals volunteered to participate in the focus group. Three of the participants (males) had successfully abstained from drug taking for more than seven years and are now working with AADK as rehabilitative counsellors. There were three female participants; one of them was a resident at the centre. A second female participant whose boyfriend had been arrested by the police for illicit drug use but had never herself been involved with drugs decided to

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[49] Lederman cited in Fatemeh Rabiee, 'Focus Group Interview and Data Analysis' (2004) Proceedings of the Nutrition Society, 63 accessed 12 January 2007.
[50] *Scheure, (n 10).*
[51] Bernama, ' War Against Drugs: A Never Ending Story for KL's AADK' (Kuala Lumpur 30 January 2006) www.bernama.com accessed 15 September 2010.

participate in the focus group as she wanted to talk about her boyfriend's experience. The third female participant had also recovered from her drug use for a few years and was now helping with the rehabilitative programmes at the centre. The last participant was a male aged 55 years old and was still in the process of recovering from his drug use problem. All the participants (except for the second female) were a 'hardcore drug user' that is they had been taking drugs for at least 10 years and were involved with the police and admitted to *Puspen* several times.

The purpose of having the focus group as opposed to interviewing the participants individually or by conducting a survey was because of two reasons. First, the focus group was conducted locally ie in Malaysia. Due to the time constraint on the researcher's part, who had to travel from the United Kingdom to Malaysia for the research project, individual or group interviews were not possible. Second, the researcher believed that a group discussion would generate more information and interesting data beyond what the researcher had envisaged. To quote Lee Atwater, 'the conversations in focus groups gives you a sense of what makes people tick and a sense of what is going on with people's minds and lives that you simply can't get with survey data'.[52] Thomas et al also propound that focus group interviews have an advantage over one-to-one interviews in that the multiplicity of data generated through the group discussions 'are often deeper and richer...'.[53]

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[52] Cited in *Scheure, (n 10).*

[53] Thomas et al cited in Fatemeh Rabiee, 'Focus-group interview and data analysis' (2004) Proceedings of the Nutrition Society, 63. accessed 12 January 2007.

It must be noted here that prior to conducting the focus group, consent was obtained from each participant (by signing a consent form).[54] The researcher also assured the participants that information derived from the discussion would be treated with strict confidentiality.

Although the samples were relatively small for the qualitative study, the researcher had gained significant insights and participants' perception of the DIP. Issues such as the participants' experiences while using drugs and how the police whilst in custody had treated them were discussed. At the same time, the researcher was able to gain an insight of the participants' perceptions of the police and the criminal justice system. According to Scheure, 'qualitative data derived from focus groups are extremely valuable when vivid and rich descriptions are needed'.[55] In this research project, the information from the focus group participants with regard to their ability to stay off drugs, their employment situation, criminal behaviour, and tendency for relapse was invaluable. It could be also helpful in formulating official programme goals or revising programme emphasis in order to help drug dependants eliminate their dependency on drugs.

To ensure the accuracy of data gathered, the focus group was tape recorded with prior consent of the participants. It must be noted here that all the participants to the focus group were briefed about the nature and purpose of the project and had signed a consent form prior to taking part in the focus group (A copy of the consent form can be found in the Appendix).

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[54] See Appendix.
[55] *Scheure, (n 10).*

An 'interpretative approach' was used to analyse data derived from the discussion. Blaikie describes interpretative approach as:

> Interpretivists are concerned with understanding the social world people have produced and which they reproduce through their continuing activities. This everyday reality consists of the meanings and interpretations given by the social actors to their actions, other people's actions, social situations, and natural and humanly created objects. In short, in order to negotiate their way around their world and make sense of it, social actors have to interpret their activities together, and it is these meanings, embedded in language, that constitute their social reality.[56]

These 'social actors' described by Blaikie above, in relation to the current research are the participants themselves ie former drug users who are the 'primary data source' with the 'insider view' of how the DIP was being implemented and whether it had achieved its objectives in eliminating drug dependency and preventing relapse among the registered drug users, particularly *Puspen* trainees. Data retrieved for the case study were analysed by listening to the discussion that was recorded; they were then transcribed and translated from the Malay language into English. Raw data were coded as part of the analysis in order to find 'commonalities, differences, patterns and structures'.[57] The transcripts were perused several times in order to link themes that involved infringements of the human rights principles arising from the legal process. A number of quotations (excerpts) were selected from the transcripts to validate major issues that arise (discussed in the following chapters).[58]

The benefits of using a focus group in qualitative research was that with the researcher's restricted time limit, invaluable data (as discussed earlier) were

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[56] Blaikie cited in *Mason, (n 39).*
[57] Seidel and Kelle cited in Tehmina N.Basit. 'Manual or Electronic? The Role of Coding in Qualitative Data Analysis' (2003) Educational Research Vol 45 No 2.
[58] Tehmina N.Basit. 'Manual or Electronic? The Role of Coding in Qualitative Data Analysis' (2003) Educational Research Vol 45 No 2.

able to be collected faster at a lower economic cost to the researcher.[59] The group discussion was able to 'create an atmosphere where more responses can take place'[60] as it was conducted at a regular meeting place for former and recovering drug users. Nonetheless, the researcher admitted that there were also limitations to the focus group. Due to the time constraint, budget and availability of resources, the researcher was not able to employ an assistant to assist with the discussion, such as to ensure that the tape-recording of the whole session ran smoothly, handling latecomers or other interruptions and assisting in data analysis with the researcher.[61] Having the above factors would have eased the researcher's tasks in completing the research project much earlier.

3.6 Case files

The researcher was able to obtain permission from the court to review 43 personal files of drug detainees. These files were from the list of case files that were still on-going i.e. pending court proceeding. Furthermore, the researcher had observed these drug detainees (43 of them) during the interview session held at JHT detention centre. These files had provided data in the form of important dates such as date of arrest, period of detention and urine test results that signify the elements of the legal process for the compulsory treatment of drug dependants. The researcher had used these secondary data alongside that generated from the researcher's own case study. Hagan summarises the use of secondary data source:

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[59] Anthony J. Onwuegbuzie, Nancy L. Leech and Kathleen M.T. Collins, 'Innovative Data Collection Strategies in Qualitative Research' (2010) The Qualitative Report Vol 15 No 3 www.nova.edu/ssss/QR/QR 15-3/nwuegbuzie.pdf accessed 15 September 2010.
[60] Butler cited in *Onwuegbuzie, Leech and Collins, (n 59).*
[61] Krueger and Casey cited in *Onwuegbuzie, Leech and Collins, (n 59).*

> Reanalysis of historical records, precinct and court records, and such documents as the Uniform Crime Reports (UCR), given certain recognised limitations, can make excellent use of data that, although gathered for other purposes, can be used to address research concerns in criminology and criminal justice.[62]

For instance, an average period of a drug detainee's detention from the time he was arrested until his case was being disposed was revealed through an analysis of secondary data derived from case files.

4. Fieldwork

4.1 Arrest of suspected drug dependants at the DW Police Station[63]

This is the first stage of the legal process under the 1983 Act whereby any person whom the police or rehabilitation officer 'reasonably suspects to be a drug dependant' may be arrested and compelled to undergo a drugs test.[64] Usually a drugs test will be held at a police station within 24 hours of the arrest.

The observational study took place in one day. The researcher arrived at the DW Police station at approximately 11.15 a.m. Before being allowed to conduct the observation, the researcher was asked to see the Chief Investigation Officer of the Narcotics Division at his office. As mentioned earlier, the researcher had an interview with the Chief Officer. The officer briefed the researcher on the police's routine enforcement exercise carried out around the city on suspicious individuals who might be involved in drug use. He also explained about the legal procedure following an arrest.[65]

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[62] *Hagan, (n 17).*
[63] The observational study was conducted at the DW Police Station on 30/06/2008 between 11.15 a.m. and 12.15 p.m.
[64] 1983 Act, s 3.
[65] The interview lasted for 20 minutes.

After interviewing the Chief Officer, the researcher was taken to a room called the Inquiry room. The researcher noticed that at the front of the room was a banner showing the standard operating procedure (SOP) that must be followed by all police officers when conducting an arrest. The standard procedure for the arrest of 'suspected drug dependants' is based on the same SOP that applies to all individuals who are arrested by the police for suspicion of committing non-drugs offences.[66]

During the day, the researcher was able to observe the way in which the police dealt with drug users who had been arrested following a police raid. Nine individuals, all of them male, were brought to the DW police station after being arrested for suspicion of being drug dependants. A police officer who was in charge of the arrests told the researcher that these nine arrested persons were the first batch of suspected drug dependants to be brought in on that day. All the arrested persons were handcuffed and were escorted by two police officers to the Inquiry room for their urine samples to be taken. The arrested persons were asked to sit on the floor at one corner of the Inquiry room.[67] (Being asked to sit on the floor is a normal practice in Malaysia. It would be seen as a degrading treatment if a police suspect is asked to sit on the floor in a British police station).

The researcher had been told that part of the SOP was that all arrested persons who were brought in must be briefed about the procedures by the police officer in charge before the police actually collect the urine. From the

[66]Statement by the Chief Investigation Officer, Narcotics Division, DW Police Station (Personal Communication 30 June 2008.
[67] The researcher sat at the other corner of the Inquiry room to observe the SOP.

researcher's observation, this had not been done by the police officers involved. When asked why was this not formally done, one of the police officers told the researcher that these arrested persons were already aware of the procedures, as they had gone through the same before ie implying that most of the arrested persons had been arrested before for suspicion of being 'drug dependants'.

This highlights a general problem about the information that is given to arrested persons. For example, informing people of the grounds for their arrest at the time of the arrest is a constitutional right guaranteed under Article 5 (3) of the Constitution; 'where a person is arrested he shall be informed as soon as may be of the grounds of his arrest...'. Furthermore, the National Human Rights Commission of Malaysia (SUHAKAM) has reported about the lack of information given to detainees, not only about the grounds for their arrest but also their rights on arrest. Thus, SUHAKAM have recommended in its Law Reform Report as follows:

(i) The constitutional right in Art 5 (3) be strictly applied at all times.

(ii) The arrested person also be given information as to the procedure he will be subjected to and his rights in relation to the right to counsel, remand proceedings, interrogation while in custody, being charged in court and the right to bail. Such information could be provided in a leaflet using simple language for detainees who are literate. For those who are illiterate, the information should be explained to them in a language they understand.

(iii) The procedure outlined in the proposed leaflet be strictly followed and the rights upheld at all times.[68]

Is this a particular problem for drug users who are perhaps an especially vulnerable group? During the focus group discussion facilitated by the

[68] SUHAKAM, 'Law Reform Report' (2001) www.suhakam.org.my accessed 13/08/2007.

researcher, one of the points that were discussed was about the giving of information by the police to arrested persons. According to one of the participants, the police had informed him that his drug test result was positive only after being detained for 14 days. He told the researcher:

> P1: My parents had reported me to the police. At 4 a.m., the police came to the house and took me away. I was taken to the police station. The police took my urine that morning. The same police officer that had arrested me took my urine. The police kept me at the lock-up. The next day I was taken to the court to be remanded. The third day, I was taken to the hospital. A doctor interviewed me. The doctor asked me how long I had been taking drugs and if I had any illnesses. After that, I was sent back to the lock-up. On the fifth day, an AADK officer came and interviewed me at the lock-up. I was detained at the lock-up for 14 days. I was given 14 days by the magistrate. **Only on the 14th day, I was told that I had tested positive.** The police do not ask you whether it is your first time taking drugs. They would only ask you 'did you take it or not?' (emphasis added).[69]

The above issues will be discussed further in Chapter. 6. Going back to the case study, the arrested persons were then asked to give their identification cards (I/C) to a police officer so that he could write down their names and addresses in a Drugs of Abuse Testing (DOA) form. The researcher was told by the officer that the DOA form is important because it is the police form that is submitted together with the arrested person's urine sample to the Pathology Department, Kuala Lumpur Hospital for confirmation of the on-site test results. The documentation procedure (mentioned above) is part of the SOP. An arrested person whose urine sample had tested positive would have to sign the DOA form. From the researcher's observation, consent is irrelevant here as undergoing a drug test is mandatory pursuant to the 1983 Act. Thus, the police do not require the consent of a suspect for his urine sample to be taken. In fact refusal to

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[69] Excerpt from the research project's focus group. See Appendix.

undergo a drug test is an offence under the said Act, and that person could be liable to be punished with imprisonment for a period not exceeding three months or with fine, or with both'.[70] A participant from the focus group relayed his own experience during a urine test after being arrested by the police:

> P2: If a person were caught for suspicion of being a drug addict, the police would normally assume that the person was aware that he has committed an offence. **There is no request for consent before your urine is taken.** After our urine is taken, we will be sent to see a police officer for us to fill up a form (emphasis added).[71]

4.1.1 On-site drug test

Once the police had completed the documentation procedure, each arrested person was given a urine sample bottle initially packed in a sealable plastic bag.[72] The arrested persons were then asked to go into the toilet of the Inquiry room one at a time so that the collection of urine sample could be done (the handcuffs were removed for this purpose). A male police officer stood guard outside the toilet to ensure that urine was properly collected by each of the arrested persons. This was to avoid any adulteration or tampering of the samples. After collecting the urine, the arrested persons were handcuffed again and ordered to sit on the floor until the whole process was completed. During the observation period, there were two arrested persons who had not been able to collect their urine. They were ordered by the police officer in charge to shower in another room next to the toilet. After a few minutes of waiting, they were able to collect their urine samples in the shower room. It should be noted here that at this juncture, the researcher did not watch the collection of urine sample due to the sensitivity of the circumstances as

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[70] 1983 Act, s 5 (2).
[71] Excerpt from the research project's focus group. See Appendix.
[72] A urine specimen bottle costs RM 8.20 each (at the time the observational study was conducted).

the researcher is a female and the arrested persons were all males. The researcher only watched what had transpired after each urine sample was collected.

After each sample had been collected, the bottle was closed by screwing the cap. Again, this was done by a police officer to avoid any tampering or adulteration of the samples. An on-site drugs test was immediately carried out in another room by a police officer for each sample that had been collected. The test procedure was done by twisting the lock (located at the bottom of the bottle) clockwise once. The bottle was then tilted to allow the urine to flow into the cassette that was attached to the bottle. Thereafter, the bottle was left for five minutes on a flat surface.

One of the police officers showed a bottle containing one of the arrested person's urine samples to the researcher. The officer said that it would normally take about five minutes to obtain the result. To ensure that there was no confusion or mix-up amongst the urine samples, each sample bottle had been numbered. The researcher was shown the numbering of the bottles by the officer. As has been mentioned earlier, the researcher had observed that each of the urine sample bottles was kept in another room adjacent to the Inquiry room. There were obviously weaknesses in such a procedure that might result in mix-ups between samples. One safeguard in the SOP is that a urine test has to be witnessed by the arrested person whose sample is being tested. From the researcher's observation, the police did not carry this out properly as the urine sample bottles were kept in another room and the arrested persons did not get to witness the procedure.

4.1.2 Test results

The nine urine samples took approximately 45 minutes to collect. Subsequently one of the police officers who had carried out the urine test informed each of the arrested persons of their test results. From the nine samples, seven had tested positive for either opiates or cannabis, whilst two had tested negative. The two arrested persons whose samples had tested negative were immediately released (ie handcuffs were removed) unconditionally and their identification cards (ICs) were returned back to them. The seven arrested persons whose specimen tested positive still remained handcuffed.

4.1.3 Chain of custody

Observations were only possible up to the point of the urine test. The subsequent stages of the SOP were not conducted in the presence of the researcher. This was because the procedure must be conducted by a higher rank police officer who was on another duty at that time. Hence, it could not be ascertained whether the subsequent procedures were properly done by the police officer in charge.

A female police officer then took the opportunity to explain the following stages of the SOP. According to her, the urine sample bottles, which had positive urine samples, would be labelled accordingly and the owners of the samples, ie the arrested persons, would be asked to sign on the labelled bottles. All these were done as safeguards to prevent any mix-ups. Diagram 1 indicates the label descriptions for each bottle.

Diagram 1 - Label Descriptions

1. Report number:
2. Arrested person's name:
3. I/C number:
4. Date of birth:
5. Signature:
6. Date Specimen taken:
7. Received by:

These sample bottles would then be sealed with the 'Royal Malaysian Police' seal in front of the arrested persons. This was to ensure that the bottle contained the arrested person's urine sample. It must be noted here that the researcher was not able to observe whether the seven arrested persons had actually signed the labelled bottles before they were sent to the Pathology Department.

Once sealed, the bottles would then be handed over to the Supervising Officer (Inspector and above) and then to the Investigating Officer (IO) for safekeeping. Normally the urine sample bottles would be kept in a refrigerator before being transported to the Pathology Department, Kuala Lumpur Hospital for confirmation on the same day. The IO who must be an officer not below the rank of Sergeant shall be responsible for the security of the bottles. It is imperative to highlight here that the 'chain of custody' must not be broken. As has been indicated earlier, every arrested person whose urine sample had tested positive must sign a DOA form. It must be noted here also that the researcher was not able to observe this procedure.

It seems that there are weaknesses in the chain of custody at an earlier point – the sample is given but the suspect is not asked to sign any form or the bottle at this point; the samples are then held in a separate room and there is no

independent view of the testing procedure; only after the test proves positive is the suspect firmly linked with the sample. The police could surely make errors that are impossible to discover – mix up positive sample from A with the negative sample from B. Such errors could lead to further negative implication such as discrepancy between a drug detainee's self-report drug use and urine test report. This issue and other issues relating to drug testing will be discussed in the succeeding section on drug testing procedures.

4.1.4 Remand order

The consequence of a positive provisional test would mean that an arrested person shall be produced before a magistrate so that an order could be obtained to either detain him further for a period not exceeding 14 days or the magistrate may release him on bail.[73] Under section 4 of the 1983 Act, the reason for a remand order is to enable the test procedure to be completed, if the test cannot be completed or the result of such test cannot be obtained within 24 hours. In practice, under normal circumstances, as has been seen, it takes approximately five minutes to obtain the result.

Thus, according to the police officer from DW police station (referred to earlier), the purpose of getting a magistrate order for a 14-day remand period is to enable the urine test result to be confirmed by the Pathology Department and for an arrested person to undergo a medical examination by a government medical officer. Upon being granted the order, the police officer told the researcher that the seven arrested persons whose urine sample tested positive, would be sent to the JHT detention centre for a remand period of not more than

[73] 1983 Act, s 4 (1) (a) (b).

14 days. The other two suspects whose urine samples had tested negative were discharged and released.

4.1.5 Additional data from case files

The researcher gathered further data from drug detainee files that had been submitted by the AADK to the magistrate court.[74] As mentioned earlier, 43 individual files of drug detainees were retrieved from the court. These files were specifically chosen because the researcher had observed the 43 drug detainees during the interview session held at JHT detention centre. These were all cases where the urine sample had been confirmed to be positive for drugs by the Pathology Department and where the detainees had undergone a medical examination. These detainees were still held in detention whilst waiting for the magistrate's court to fix a date for the court proceedings.

An analysis was done based on the data that were collected. The case files involved two batches taken from two different arrest periods. The first batch of drug detainees (35) had their urine samples collected at DW police station.[75] Out of the 35, 30 had been collected on the same day of arrest, whilst 5 collected on the next day. The reason given by the police was that the 5 arrested persons had been arrested during the night and collection of urine sample was only done the next morning.

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[74] The researcher had sought the assistance of a court clerk to retrieve the case files from the magistrate court.

[75] The arrest dates were between 4 May 2008 and 7 May 2008.

The second batch of drug detainees (8) had their urine samples collected at DW police station on the same day of their arrest.[76]

All 43 samples had been sent to the Pathology department's laboratory for confirmation on the same day that they were collected. From the files, test results for all the samples were confirmed on the following day. Thus, confirmation of a urine sample only took one day to be done. It is significant to highlight here that urine samples collected should be tested as soon as possible so that detection could be done ie to determine a positive result. This is because some ingested drugs do not stay long in the body from the time of drug use.[77] For example, heroin or morphine could only be detected within two to four days, depending on the frequency of drug use.[78] Cannabis will stay in the blood stream (urine) for approximately two to seven days for a casual drug user. However, if a drug user is a chronic user, cannabis would stay at least up to 30 days in the blood stream.[79]

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[76] The arrest date was on 8 May 2008.
[77] Joseph E.Manno, *Interpretation of Urinalysis Results* (NIDA Research Monograph 73, 1986).
[78] Ann H.Crowe and Shay Bilchik, 'Drug Identification and Testing Summary' (1998) American Probation and Parole Association and Office of Juvenile Justice and Delinquency Prevention www.ncjrs.gov/html/ojjdp accessed 20/05/2008.
[79] ibid.

4.2 Detention at the JHT Detention Centre[80]

After being processed at the police station and upon being granted a remand order by a magistrate, suspected drug dependants are then sent to a temporary police lock up or known as the detention centre. This is the second stage of the legal process where these suspected drug dependants (drug detainees) are being detained for a period of not more than 14 days. Study of the additional 43 case files suggest that detainees will stay at least nine days in the detention centre. The periods for the case disposition of a drug detainee before being ordered by the magistrate to undergo compulsory treatment are as follows:

- 23 cases – 12 days in detention before case being heard[81]
- 6 cases – 11 days in detention before case being heard[82]
- 5 cases – 10 days in detention before case being heard[83]
- 9 cases – 9 days in detention before case being heard[84]

The above data indicated that the average period for detention for the drug detainees were between 9 and 12 days. This result suggests that the police strictly conform to the statutory provision under the 1983 Act that states 'the Magistrate shall, if the officer reports to the Magistrate that it is necessary to

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[80] The detention centre was also called the Jalan Hang Tuah (JHT) Police Station lock-up. The centre was located at the heart of the city centre within a colonial-era building which used to be the Pudu Prison, a prominent landmark in Kuala Lumpur. The prison was built by the British colonial government 113 years ago. Over the years, the prison had been overpopulated with hardcore convicts including those on death row. Between 1960 and 1993, 180 convicts were brought to the gallows. In November 1996, the Prison was finally closed down for re-development. All inmates were then moved to the Sungai Buloh Prison. However, a few years ago, the prison was gazetted as the detention centre for those arrested for drug offences. This includes drug users suspected of being 'drug dependants'. *Star Metro* (17 June 2008) accessed 19/06/2008. In 2009, the JHT detention centre was finally demolished for a development project. Drug detainees are now sent to a new detention centre in Bukit Jalil. Statement by Mas Anuar, AADK officer (Personal communication 19 December 2009).

[81] 1st batch – arrested on 4 May 2008 and case heard on 16 May 2008; 2nd batch – arrested on 8 May 2008 and case heard on 20 May 2008.

[82] Arrested on 5 May 2008 and case heard on 16 May 2008.

[83] Arrested on 6 May 2008 and case heard on 16 May 2008.

[84] Arrested on 7 May 2008 and case heard on 16 May 2008.

detain him for the purpose of undergoing tests, order him to be so detained for such period not exceeding 14 days to undergo tests...'[85] Notwithstanding the above provision, it may be argued that the prolonged detention period, while within the letter of the law still infringes the fundamental liberty of a drug detainee. This is discussed further in chapter 6.

As has been mentioned earlier at the arrest section, the purpose of the detention was to enable the test results to be confirmed by the Pathology Department and for the drug detainees to undergo a medical examination.

Two AADK officers were assigned on that day to interview or take statements from drug detainees at the JHT centre.[86] Upon arrival, the officers had firstly checked their list of drug detainees that were to be interviewed on the day with the list kept by the police at the detention centre. According to the AADK's list, there were 45 detainees to be interviewed. However, under the JHT police detention centre's list (which had been updated) indicated that only 36 were available for interview (35 males and one female). According to the police, nine drug detainees had either been unconditionally released or bailed by family members. Section 4 1983 Act allows the magistrate, upon granting a remand order, to provide bail, 'with or without surety, to attend at such time and place as may be mentioned in the bond...'

According to one of the AADK officers, it was normal that AADK officers were not informed beforehand by the police on the status of the released detainees. This suggests that the system lacks transparency whereby AADK officers or even family members of the detained persons are not being informed

[85] 1983 Act, s 4 (1) (b). This provision is also in line with the SOP.
[86] The observational study was conducted at the JHT detention centre on 13 May 2008 between 11 a.m. and 1.20pm.

of the legal status or whereabouts of the detainees. This issue has been raised in the research project and will be discussed in chapter 6.

Once the final list had been confirmed, the officers and the researcher took their seats behind the iron bars surrounding the courtyard at the detention centre.

4.2.1 Interviewing drug detainees

It took approximately 10 to 15 minutes for the police to escort the drug detainees from their cells to the courtyard (Neither the AADK officers nor the researcher were allowed to enter beyond the iron bars of the courtyard). All the drug detainees wore lock-up uniforms (orange t-shirts and dark trousers) and were bare-footed. There were also other groups of drug detainees arrested by the police from other police stations around the city who had been called for interviewing with their respective AADK branch officers. All of them either sat or squatted on the floor of the courtyard under the hot sun, as it was almost noon.

The majority of them, particularly the older ones looked frail, thin and unhealthy. Most of them looked very scruffy with body odour (The researcher could sense an unpleasant smell coming from the drug detainees when they approached the iron bar to be interviewed). Some had crew cut hair whilst the rest had unkempt hair. Some even had tattoos made on their bodies. According to one of the drug detainees who had a tattoo on his arm (whom the researcher had a chance to ask when he moved closer to the iron bars for his interview) he said that he had tattooed his prison number on his arm whilst in detention. One of the AADK officers then told the researcher that tattoo making was a common practice among drug detainees whilst in detention. It must be noted here that

tattoo making raises concern over the use of non-sterile utensils in a detention centre, such as sharing needles, which runs the risk of transmitting infectious diseases such as HIV/AIDS.[87] Malaysia has the second highest HIV prevalence within the Western Pacific regions and also 'the highest proportion of HIV infections related to injecting drug use'.[88]

Once all the drug detainees had assembled in front of the iron bars, the officers called the drug detainees by their names according to the list. Upon being called, these detainees sat in front of the iron bars facing the officers. Each detainee was asked questions according to the AADK's interview form. A copy of the interview form was given to the researcher as reference. Diagram 2 illustrates the main contents of the interview form.

Diagram 2 - Interview Form

a. Personal details – name, I/C number, address, contact telephone number, age, date and place of birth, sex, race, religion
b. Family details – father, mother, next of kin's names, address of next of kin, relationship with next of kin, age, marital status, employment, income, number of children
c. Level of education
d. Employment – unemployed/employed, type of job, monthly income
e. Record of drug use – type of drug used, method of using, frequency, how long have been using drugs, reason for using drugs, amount spent on drugs
f. Health record – HIV positive / TB / Hepatitis A,B,C
g. Physical condition – injecting marks, tattoo, physical disability
h. Record of treatment and rehabilitation i. Criminal record

[87] HIV Transmission Fact sheet www.aidsvancouver.org accessed 17 February 2010.
[88] Mazlan et al, 'New Challenges and Opportunities in Managing Substance Abuse in Malaysia' (2006) Drug and Alcohol Review 25, 473-478.

The researcher noticed that at the bottom of the form, there was a column for the detainee to sign or thumbprint to confirm that all information provided as true. However, the researcher observed that this requirement was not exercised on that day. This meant that a drug detainee did not get a chance to go through and confirm whether the officers had written down the details correctly in the interview form. The researcher raised this as a concern because the information derived from the interview form would be used as reference by the AADK rehabilitation officer in the preparation of a drug dependant's social report. Once the social report has been prepared, it would be difficult at this point to rectify any wrong information because the report would not be shown to the drug dependants. In the social report, the rehabilitation officer would make a recommendation to a magistrate whether a drug dependant should undergo treatment at a *Puspen* centre or receive a supervision order within the community. A magistrate is duty bound to rely on the recommendation of a rehabilitation officer before making an order. Section 6 of the 1983 Act states as follows:

> **the Magistrate shall upon the recommendation of a Rehabilitation Officer** and after giving such person an opportunity to make representations (emphasis added):
>
> (a) order such person to undergo treatment at a Rehabilitation Centre specified in the order for a period of two years and thereafter to undergo supervision by an officer at the place specified in the order for a period of two years; or
>
> (b) order such person to undergo supervision by an officer at the place specified in the order for a period of not less than two and not more than three years.'

The above argument is perhaps another example of the weaknesses in the system – while the SOP have built in safeguards, these are frequently ignored by the officers, whether the police or the AADK.

In *Majistret, Mahkamah Majistret Rawang & Anor* v *Gurdeep Singh a/l Atma Singh,*[89] *Kang Hwee Gee J* held that it is the duty of the rehabilitation officer 'to make a proper and accurate inquiry on the status of the detainee before he submits his recommendation to the magistrate'. However the court is not bound to accept the recommendation of the rehabilitation officer. In *Gopinathan a/l Subramaniam lwn Menteri Dalam Negeri & Ors* it was held that the magistrate has the discretion whether to follow the recommendations of the rehabilitation officer or not.[90]

Based on the focus group discussion, the researcher gained the impression that drug detainees usually have a good rapport with the AADK officers who interview them whilst in detention. A probable reason for this was because they knew that these officers would make recommendations on their behalf and that the magistrate would consider such recommendations during the court proceeding. The participants recognised this:

> P3: The court only conveys the order...it all depends on the AADK officer's recommendation.

Another stated:

> P2: When the AADK officer came to interview me, I told him...I told him that I had a job and if the court sends me to a rehab centre, I would lose my job. I am finished. The officer normally would take this into consideration. He (officer) would recommend to the magistrate that I be

[89] [2000] 6 MLJ 112 (Malaysia).
[90] [2000] 1 MLJ 65 cited in *Habib bin Hasan lwn Timbalan Menteri Dalam Negeri Kementerian Dalam Negeri, Malaysia & Yang Lain-Lain* [2004] 6 MLJ 580; see also *Hasli bin Sulong v Officer In Charge & Anor* [2005] MLJU 408.

> given a community supervision order. For arrested cases, the officers' recommendation is the most important. During the court proceeding, the magistrate would not know which rehab centre is available. The officer would make the recommendation to the magistrate. Then, the magistrate decides whether to send us to a rehab centre or be under community supervision.[91]

It must be emphasised that at the time of the interviews, drug detainees would normally be in a very vulnerable state, physically and mentally. However, from the researcher's observation, the AADK officers did not consider these conditions in their social reports. This state of vulnerability raises concerns over the accuracy of the information gathered from such interviews. Such inaccuracy may lead to possible discrepancies between the social report and urine test report. This can be seen in several case laws that will be discussed in the next section. The research project suggests that AADK officers check previous admission records to *Puspen* or medical records, if any, as reference prior to making the social report.

The interviewing session had lasted for about two hours. At the end of the session, the detainees were escorted back to their cells. It must be borne in mind that they were all held in unshaded conditions for the whole period. Again, this is a normal practice in Malaysia but may not be in other countries as it may give rise to human right issues such as inhumane, cruel and degrading treatment of detained persons.

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[91] Excerpt from the research project's focus group. See Appendix.

4.2.2 Conditions in the cells

The researcher was not permitted to enter the cells of the detention centre and was unable to verify at first hand the conditions under which the detainees were held. However, this important aspect can be established by referring to a report by SUHAKAM based on its visits to several police lock-ups in Kuala Lumpur and the state of Selangor.[92] The report made the following criticisms:

> (a) **Overcrowding in cells**
>
> The cells were so crowded that all detainees could not sleep at the same time. Some had to sit up while others slept. Arrested persons were placed together - drug addicts, persons suspected of various crimes including drunk drivers and wife batterers, and civil rights activists.
>
> (b) **No bedding; dirty blanket provided**
>
> Detainees had to sleep on the cement floor. Again this was substantiated by our visit to lock-ups. For some detainees a dirty blanket was provided but this usually used to lie on rather than to cover themselves. The police reason for not providing blankets is the fear that the detainees may use them to hang themselves.
>
> **(c) Lack of privacy in using toilet facilities**
>
> SUHAKAM alleged that the lack of privacy in using toilet facilities was deliberate so as to embarrass and humiliate detainees.
>
> **(d) No water for toilets; unbearable stench in cells**
>
> Detainees alleged that water was sometimes not available resulting in an unbearable stench in the cells. The SUHAKAM visit to x lock-up confirmed that water shortage and/ or poor water pressure and the resulting stench was a problem faced by the police station.[93]

It is fair to generalise that these conditions exist in all detention centres in Kuala Lumpur. Based on the report, SUHAKAM made proposals for improvements to be made on the basic facilities in the police lock-ups such as a

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[92] These police lock-ups were not confined to drug detainees only.
[93] *SUHAKAM, (n 68).*

proper water supply, toilet facilities, bedding and clothing. Lack of such facilities raises serious issues of degrading and inhumane treatment, thus breaching fundamental rights under the Constitution and UN treaties. SUHAKAM have also recommended that the Lock-Up Rules 1953[94] 'be reviewed and brought up-to-date' so as to meet with the United Nations Standard Minimum Rules for the Treatment of Prisoners.[95] The Lock-Up Rules 1953 and its related issues will be discussed at greater length in Chapter 6.

The physical condition of drug detainees was likely to be poor and they would often be suffering from withdrawal symptoms. It is important to note here that there should be a right to receive proper and adequate treatment during the period of detention. This is in accordance to the UN Standard Minimum Rules highlighted by SUHAKAM:

> The medical officer shall see and examine every prisoner as soon as possible after his admission and thereafter as necessary, with a view particularly to the discovery of physical or mental illness and the taking of all necessary measures; the segregation of prisoners suspected of infectious or contagious conditions; the noting of physical or mental defects which might hamper rehabilitation, and the determination of the physical capacity of every prisoner for work.[96]

Nonetheless, such provision for treatment is not a current practice in the Malaysian drug intervention programme, which relies on the 'cold turkey'

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[94] Lock-up Rules 1953 is regulated under s 8 (3) Prison Ordinance 1952. The Prison Ordinance 1952 was subsequently repealed in 1995 with the coming into force of the Prison Act (Act 537). Notwithstanding the 1995 Act, all subsidiary legislation, regulations made under the Ordinance shall continue to remain in force and to have effect until amended, repealed, rescinded, revoked or replaced by the Act (s 68). Ku Chin Wah, 'Police Lock-ups' (2003) Journal of the Royal Malaysia Police Senior Officers' College mpk.rmp.gov.my/jurnal/2003/policelockups accessed 24 June 2007.

[95] United Nations Standard Minimum Rules for the Treatment of Prisoners (adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

[96] UN Standard Minimum Rules, rule 24.

method.[97] For instance, a participant talked about his experience in a detention centre:

> P3: The AADK officer came to see us on the seventh day... During those seven days, we only saw the police. There was no treatment, if we were having withdrawal symptoms, the police just let us be.[98]

This is perhaps another example of an inadequate system – however, whereas the SOP have theoretical (if ignored) safeguards, there are no such provisions to ensure proper conditions which put the health and safety of detainees directly at risk.

4.2.3 Medical examination to confirm drug dependence[99]

As part of the statutory provision under the 1983 Act, drug detainees are compelled to undergo a medical examination by a government medical officer during the period of detention. This is provided under section 5 (1) of the 1983 Act where 'for the purpose of tests... the person shall submit himself to all such acts or procedures as he may be required or directed to undergo by an officer, or by a government medical officer, or by a registered medical practitioner... as the case may be'. Although the on-site and confirmatory drug tests will have shown that the detainee has used drugs, physical dependence must be established. This is so that the medical officer could determine and certify whether they were dependent on drugs or not. Normally, drug detainees detained at the JHT detention centre would be escorted to the drug unit of the Psychiatric Department, Kuala Lumpur general hospital, by the police for the medical

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[97] The cold turkey method will be discussed further in Chapter 6.
[98] Excerpt from the research project's focus group. See Appendix.
[99] The observational study at the HKL drug unit, Psychiatric Department, Kuala Lumpur general hospital was conducted on 29 August 2007 between 3.30 p.m. and 4.20 p.m.

examination. The drug unit is responsible for applications submitted by relevant government agencies for the confirmation of drug dependence of drug detainees under remand. For cases brought in by the police, the unit is responsible for applications from five police stations. For the purpose of establishing dependence several criteria will be employed:

i. Evidence of drug abuse history; drug use period, type of drug abused, frequency of use
ii. Evidence of physical dependence; withdrawal symptoms like anxiety, craving, sleep difficulties, vomiting, muscle ache, body temperature and pupil size;
iii. Evidence of psychological dependence- based on criteria in 1 and 2.[100]

The purpose of conducting an observational study at the drug unit was to obtain a better understanding of the procedure involved. Normally, there would be an average of 30 cases per day submitted by the police. However, on the day of the observation, there were only 16 cases as only 1 police station had submitted a request. The researcher recorded the observation via field note taking. Tape recording or interviewing any of the police detainees was strictly forbidden under the Psychiatric Department's regulations.

At about 3.30 p.m. 16 detainees (all males) arrived at the drug unit escorted by a plain-clothes policeman. They were heavily handcuffed together and were asked to sit outside the examination room while waiting for the medical officer to arrive. Some of them had to sit on the floor, as there were not enough seats to accommodate all of them. At all times, the detainees were on handcuffs. All of them wore police lock-up uniforms. Approximately five minutes later, two medical officers arrived. The first batch of the drug detainees (5) was called and

[100] Medical Examination of a Drug Dependant Form (JP23-Rev1/01) Drug Unit, Psychiatric Department, Kuala Lumpur general hospital.

was brought into the examination room. All of them stood in front of the medical officers. They were still handcuffed together. Each drug detainee was called by their full names and was asked about their drug misuse, withdrawal symptoms etc. by one of the officers. The medical officers had followed the criteria required under the Medical Examination form (above).[101] One of the medical officers recorded the information in the medical examination form of each drug detainee. The other officer only observed.

The researcher had expected a physical examination to be conducted by the doctor on the drug detainees that is the normal procedure between a doctor and a patient. However, there was no physical examination done on these drug detainees. The whole procedure (after the final batch of detainees was called) lasted for about 30 minutes. The detainees were then taken away by the police officer. Given the significance of this stage, the whole process seemed speedy and rather cursory. Upon completion of the examination, the researcher took the opportunity to ask the medical officer who conducted the examination a few questions in relation to the procedure.

First, why were the drug detainees not physically examined, for example, the taking of blood pressure or the examination of the skin for any injection marks that were part of the requirements stated in the Medical Examination form? According to the doctor, the drug detainees had already been in detention at the police lock up for about 11 to 14 days. By the time they were brought to the hospital for examination, they would no longer have any withdrawal symptoms. This assessment was more or less correct - based on the researcher's

[101] ibid.

analysis of 32 case files, the average period taken for a drug detainee to be called for a medical examination was between nine to 11 days.

Second, how does a medical officer distinguish between a person with a drug problem and a person who is a recreational drug user? The officer said that there was a thin line differentiating the two. Usually a medical officer would rely on the confirmatory urine test report from the Pathology Department. The final decision would be upon the magistrate to decide whether to make an order for a drug user who has been certified as a 'drug dependant' to undergo treatment at the *Puspen* centre or supervision within the community. The researcher did not pursue this but this seemed to indicate that the medical officer did not fully appreciate the significance of the examination and the report. Before making an order whether to commit a drug user for compulsory treatment, besides relying on a rehabilitation officer's recommendation, a magistrate will normally inspect the medical certificate prepared by a medical doctor for each case. Thus, it is important to ensure the validity of a medical certificate, as it will be tendered in court as evidence, albeit not conclusive, that a drug user is certified as a 'drug dependant'.

Thirdly, the researcher asked the officer about the statement made by one of the drug detainees who said that his laboratory report of his urine sample indicated that it had been tested positive for morphine, when in fact he denied taking any morphine. The officer said that it was a dilemma that most medical officers had to encounter. Once the confirmatory test showed a positive result, then it is considered as conclusive evidence. The officer's statement contradicted the statement in the 'Medical Examination of a Drug Dependant' form, which states as follows:

> A person is certified as being DRUG DEPENDENCE base on the criteria in section (V) where there may or may not be any sign or symptom of physical dependence depending on the time lapsed between the last dose of drug taken and the time of examination. **A positive urine result (Confirmation Test), by itself, is not sufficient to certify a person as being Drug Dependence** (emphasis added).[102]

The significance of a medical certificate in determining the validity of a magistrate's order was decided in a High Court case of *Quan Kim Hock* v *Timbalan Menteri Dalam Negeri & Ors.*[103] In that case, the applicant was arrested and subsequently ordered to undergo treatment at the the *Serenti (Puspen)* centre in Gambang, Pahang for two years and thereafter to undergo supervision of a rehabilitation officer for another two years. The applicant applied for a writ of *habeas corpus*. Allowing the application, Nik Hashim J held that the medical certificate in that case was defective and invalid as the doctor who signed the certificate did not indicate clearly in it whether he was certifying it in his capacity as a government medical officer or a registered medical practitioner.[104] The doctor also failed to name the drug or drugs through the use of which the applicant became a drug dependant.

The requirement for a medical examination again looks like a substantial safeguard for those who are liable to a court mandated order. Again it appears that it is more of a theoretical safeguard, a matter of formally ticking boxes rather than a serious medical examination. It must be stressed upon here that a medical examination by a government medical officer or registered medical practitioner is mandatory upon a drug user 'suspected to be a drug dependant' under the 1983

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[102] *Form (JP23-Rev1/01), (n 100).*
[103] [2000] 5 MLJ 65 (Malaysia).
[104] 1983 Act, s 2 defines a 'registered medical practitioner' as a medical practitioner registered under the Medical Act 1971.

Act.[105] Thus, the doctor must be accountable in providing accurate information in regards to a person's drug dependency, since it would affect his or her individual liberty if a court order to undergo compulsory treatment is imposed. Also, from the researcher's analysis of the medical certificates retrieved from case files, revealed that some of the certificates were not dated and did not even have the medical officer's signature. These are serious technical defects in a medical certificate by which its legality can be challenged in a court of law.

4.3 Court Proceedings at the JD Magistrate's Court[106]

4.3.1 Legal representation

After confirmation by a medical officer that a drug detainee is drug dependent, the next stages of the legal process are the court proceedings. The magistrate has to decide whether to order the detainee to undergo treatment at *Puspen* centre for a maximum period of two years and thereafter supervision in the community for two years or supervision in the community for two years.

Normally, court proceedings for drug user cases are conducted in open court. This allowed the researcher to observe proceedings. Observations were recorded via field note taking. The researcher was advised by the police officers at the court that tape recording was not allowed, even though it was an open court. The observations took place in a single day. At approximately 3.20 p.m. seven male drug detainees (drug users) were brought in from JHT detention centre under the strict supervision of two plain-clothes police officers. All of them were handcuffed together and wore police lock-up uniforms. All of them

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[105] 1983 Act, s 5 (1).

[106] The observational study was conducted at JD Magistrate's court on 20/08/2007 between 3.20 p.m. and 4.20 p.m.

looked very scruffy and frail - it must be remembered that they had been remanded in police custody for approximately 12 days at the detention centre.

A rehabilitation officer from the AADK was also present in court. Before the proceedings began, the rehabilitation officer gave a copy of the confirmatory urine test report by the Pathology Department to each of the detainees. These detainees were asked whether they could read and understand the report. Six of the detainees either nodded or said that they agreed with the reports. However one detainee seemed rather surprised when he read the result of the report and said that he wished to contest the report. It appeared that up to this point, the drug detainees had been asked to confirm the report only verbally. Even at this stage, no signatures for approval or consent were requested from the detainees.

The magistrate commenced the proceedings at approximately 3.40 p.m. The rehabilitation officer began by briefing the magistrate on all the seven cases listed on that day. The magistrate then began calling each of the drug detainees by their full names. He explained the circumstances of the proceeding to them and said that he would be making an order either to send them to a *Puspen* centre or be given a supervision order.

Each detainee was then given the opportunity to speak up before the magistrate and state whether they wanted to be sent to the *Puspen* centre or undergo community supervision. Out of the seven drug detainees, only two were represented by their lawyers. As for the other five, they were not represented. However, the representation was not to contest the drug case brought against them but for the issue of disposition, namely that the detainee would not have to undergo a court-mandated order at a *Puspen* centre but instead was permitted to

undergo a supervision order within the community. This is what is called 'for mitigation purposes'.

During the court observations, the magistrate did not inform the detainees of their statutory rights to legal representation. As mentioned earlier in the chapter, the right to a legal representation is a statutory provision under section 6 (1) 1983 Act that provides a drug detainee the right to contest a case and to legal advice.

In Malaysia, the Legal Aid Bureau provides free legal aid to the general public.[107] However, in cases involving drug users, legal aid is only available for mitigation purposes (for instance, the two cases from the case study mentioned above); it is provided only when the drug user pleads guilty.[108] If a drug user wishes to contest his case, for example, if he disputes the urine test report, then he would have to engage his own lawyer.

In Malaysia, drug users are not well informed of their rights to counsel or to legal aid, albeit subject to a guilty plea. Due to the lack of information and knowledge, drug users are being deprived of their constitutional rights. This flaw in the legal system appears to be inconsistent with Article 5 (3) of the Constitution - 'where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice'. Furthermore, Article 14 of the ICCPR states that all persons are equal before the courts and tribunals, have a right to a fair hearing including a right to be legally represented. Article 14.3.d stipulates as follows:

> to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this

[107] This is pursuant to the Legal Aid Act 1971 (Malaysia).
[108] Statement by a Legal Aid Bureau officer (Personal communication on 21 August 2008).

> right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

4.3.2 Legal aid

The above observations with regard to drug users support recent criticisms in relation to the provision of legal services in Malaysia. In a recent report by the Malaysian Bar Council, legal aid in Malaysia has been criticised as lagging behind provision in other countries such as Taiwan and the Phillipines.

> A study of the legal aid services provided by other countries shows that in Malaysia, the Government is not doing enough to serve the needs of those people who require legal services but are not able to afford it. Any legal aid scheme that does not extend its services to provide legal representation to an arrested person cannot be taken seriously and it is respectfully pointed out that the Government Legal Aid Bureau is one such scheme. Though, it may be that, the Legal Aid Bureaus in some States do make prison visits and provide legal advisory services to the prisoners, these Bureaus do not undertake the criminal defence of the accused in court as there are restrictions placed in their scope of work by the Legal Aid Act 1971.[109]

Legal aid is particularly important with regard to drug users. They are especially vulnerable with a low-level of education and ill-equipped to represent themselves in a court of law. One participant's perception of the legal system probably reflects a common belief amongst most drug users in Malaysia:

> P3: At the court, we were not legally represented. We were only asked 'Is there anything that you wish to say? Do you plead guilty or not guilty? Do you wish to appeal?' We are aware that if we were arrested as suspected drug addicts without having any stuff (drugs) found on us...if our urine tested positive, we would be sent to a rehab centre. Our friends in the lock-up would tell us. If drugs were found on us, we know that we would go to prison. If we plead guilty we will definitely get a 13 months prison sentence.[110]

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[109] Ravi Nekoo, 'LEGAL AID IN MALAYSIA' (2009) The Malaysian Bar Webpage www.malaysianbar.org.my accessed 20 January 2010.

[110] Excerpt from the research project's focus group. See Appendix.

During the court proceeding, the researcher had a chance to speak to a family member of one of the drug detainees who was sitting at the public gallery in the JD court. According to her, she had sought for legal assistance for her husband (one of the two drug detainees who was represented) from the Legal Aid Bureau that was situated at the JD court complex. She got to know about the service centre only on that day itself from one of the AADK officers who was present during the court proceeding. At the court proceeding, the lawyer who represented her husband had pleaded to the magistrate, in mitigation, for a supervision order to be given to his client. He informed the court that his client had recently got a job and could lose it if he were to be admitted to a *Puspen* centre. The magistrate rejected the lawyer's mitigation and ordered that the drug detainee be admitted to a *Puspen* centre. The decision was made because the detainee had a previous admission record as he was recently released from another *Puspen* centre.

4.3.3 Case Disposition

Going back to the court proceedings, all the drug detainees had pleaded to the magistrate not to be given an order to undergo treatment and rehabilitation at the *Puspen* centre. They preferred to be given community supervision. One detainee gave reason that he was the sole breadwinner in the family and had many children. He already has a permanent job. Another drug detainee said that he was suffering from chronic tuberculosis and would rather be given a supervision order. From the researcher's observation, all of them seemed to be familiar with the on-going court proceeding and the conditions that they would face if they

were sent to the *Puspen* centres. It is presumed that these detainees had been arrested before by the police on several occasions for drug misuse and have received treatment at a *Puspen* centre. Prior to making an order for mandatory treatment, the magistrate consulted the rehabilitation officer on every case. The magistrate took approximately 40 minutes to dispose all (seven) the cases. The verdict on that day was that five drug detainees were ordered to undergo treatment and rehabilitation at the *Puspen* centres, whereas the other two received supervision within the community orders. The magistrate made the orders following the recommendations by the rehabilitation officer.

4.3.4 Previous admissions/ criminal records

Data gathered from case files showed that only 8 drug users out of the 43 cases had no previous experience with the criminal justice system. The breakdown was as follows:

- 21 cases where drug users had been committed to *Puspen* centre before and/ or had undergone supervision within the community.
- 13 cases where drug users had been committed to *Puspen* centre and/ or had undergone supervision within the community and also had received prison sentence.
- 1 case where a drug user had never been ordered to undergo treatment at any *Puspen* centre but had received a prison sentence.
- 8 cases where drug users had neither a previous court-mandated order nor a prison sentence.

As a whole, the case study suggests that there are flaws within the legal process with regard to the compulsory treatment of drug users. Current practices

do not accord either with the constitutional safeguards or with international standards. Drug users in Malaysia are being denied of their rights to be legally represented and to a fair hearing. Thus, due process is lacking in the system.

During the case study, the researcher came across various issues affecting the drug testing procedure. Since drug testing forms an integral part of the compulsory treatment programme, it will be examined from its scientific perspective in the following section. The section will also discuss the legal and ethical implications brought about by the imposition of mandatory drug tests upon a drug user. It will also consider the relevant Malaysian case laws in regards to the drug testing procedure.

5. The Drug Testing Procedure

5.1 Introduction

The basic objectives underlying the government's drug intervention programme are to eliminate drug dependency and prevent relapse among drug users in Malaysia.[111] Ever since the treatment and rehabilitation of drug users became mandatory by virtue of the 1983 Act, drug testing has been widely used as a criminal justice tool, compelling drug users into treatment programmes. As the case study revealed, drug testing (with the urine test being the most common procedure) is regularly used by the police to screen for individuals who had recently ingested drugs as well as to detect relapsed (repeat) drug users. These

[111] National Narcotics Agency, *Kenali Dan Perangi Dadah* (1st edn Ministry of Home Affairs, Kuala Lumpur 1997).

individuals may or may not have come into contact with the criminal justice system.[112]

As was discussed in the previous chapter, almost 160,000 people were arrested in 2007 under the *Ops Tapis*.[113] This very large number of arrests and the wide-scale use of drug (urine) testing as a purportedly useful mechanism,[114] demonstrates the Malaysian government's commitment to devote significant resources to meet the objective of a drug free society by 2015.[115] This chapter discusses whether the commitment of such resources to mandatory testing and internment has been or is likely to be efficient or effective. One aspect of this must be the need to ensure the integrity of the drug testing procedure from the point of collection of urine to the disposition of the test results. Any questions about the integrity of the procedures necessarily has serious implications for a substantial number of people who are detained by the police and who may or may not be involved in the use of illegal drugs.

From the analytical standpoint, several issues have emerged from the case study that needs to be addressed in this chapter. These issues will be discussed under the following sub-headings:

- Chain of custody procedure
- Interpretation and reporting of test results
- Infringement of individual rights

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[112] As has been discussed in the previous chapter, a person may be arrested for suspicion of being a drug dependant, even if he has not committed any crime.

[113] This is a routine police enforcement exercise that involves the apprehension of individuals whom the police suspect as being involved in illegal drug use.

[114] According to Mieczkowski and Lersch, drug testing can also generate information that may be applied to planning treatment programmes. Tom Mieczkowski and Kim Lersch,'Drug Testing in Criminal Justice: Evolving Uses, Emerging Technologies' (1997) National Institute of Justice Journal, Issue No 234 www.ojp.usdoj.gov.

[115] The Bangkok Political Declaration in Pursuit of A Drug-Free ASEAN 2015 cited in *www.aseansec.org/5714.htm* accessed on 16 November 2009.

Prior to discussing the above issues, it is pertinent to lay down the key features of the 1983 Act in regards to the drug testing procedure, which will be the following section.

5.2 Key features of the 1983 Act in relation to drug testing

The most significant features of the procedure under the 1983 Act are:[116]

- Any person whom the police or rehabilitation officer 'reasonably suspects to be a drug dependant' may be taken into custody to undergo a drug test;
- Drug testing (on-site, namely the police station) of a suspect must take place within 24 hours;
- However, if the test cannot be completed or the result of such test cannot be obtained within 24 hours, the suspect must be produced before a magistrate to obtain an order either to detain him further for a period not exceeding 14 days or to be released on bail. The magistrate may release him on bail, with or without surety, to attend at such time and place as stated in the bond, to complete the test procedures;
- Subsequent to the drug test, if the test result is positive, the suspect will be medically examined by a government medical officer or registered medical practitioner as part of the test procedures;
- If the suspect fails to comply with any of the above procedures, he will be guilty of an offence and upon conviction, will be liable with imprisonment for three months or less or fine or both.

All the above features have either been discussed earlier in the preceding sections of this chapter or will form part of the discussion in the succeeding

[116] 1983 Act, ss 3-5.

chapter (Chapter 6). The following section will examine the type of drugs analysed by the National Drug Centre under the National Drug Detection Programme. This section is important to the research project because the results from the laboratory procedure partly determines whether a drug user is a confirmed drug dependant and subject to a court-mandated order to undergo treatment at a *Puspen* centre.

5.3 Drug testing procedure

5.3.1 Testing Methods

In 2002, the Ministry of Health Malaysia came out with its Guidelines For Testing Drugs Of Abuse In Urine (MOH guidelines)[117] to regulate drug detection procedures in Malaysia under the National Drug Detection Programme. Under the programme, the National Drug Centre (Pathology Department), Kuala Lumpur Hospital provides facilities for the screening and confirmation of urine samples for drugs such as morphine, cannabis, amphetamine type stimulants (ATS) and ketamine.[118] Morphine, heroin, codeine, ketamine and amphetamine-type-stimulants (ATS) such as methamphetamine and amphetamine are categorised as 'dangerous drugs' under the First Schedule of the Dangerous Drugs Act 1952.[119] The centre caters for samples brought in by government agencies such as the police, AADK officers or the armed forces.

As has been mentioned earlier, there are two types of drug analysis methods conducted at the centre under the National Drug Detection Programme

[117] Circular No: 6/2002. As of February 2010, the guidelines are currently still under revision.
[118] State hospitals (secondary centres) throughout the country also provide screening facilities for morphine, cannabis and ATS.
[119] See Chapter 1.

– the preliminary screening and the confirmatory test. All urine samples for preliminary screening of opiates and cannabinoids use the EMIT Enzyme Multiplied Immune Test, ie the immunoassay method recommended by the Ministry of Health Malaysia.[120] EMIT is also used to screen for Amphetamine-Type Stimulants (ATS). The accuracy of a urine test will depend on the ability of the preliminary screening test that uses the immunoassay method to identify 'a single-chemical component in a mixture of chemicals and biological materials'.[121] This characteristic is referred to as the 'specificity' of the urine test. Screening tests are inexpensive but it could be costly if tests are done on a frequent basis.

To reduce the incidence of false results, it has been recommended that preliminary test results should be confirmed by confirmatory tests (second test) using a different methodology.[122] Under the MOH guidelines, all urine samples that have tested positive for opiates and cannabinoids[123] are to be verified by a confirmatory test in which the recommended methods are Thin Layer Chromatography (TLC), Gas Chromatography/ Mass Spectrometry (GC/MS), High Performance Liquid Chromatography (HPLC) or Gas Chromatography (GC). For urine samples that have tested positive for ATS, the recommended methods are Gas Chromatography/ Mass Spectrometry (GC/MS) or High Performance Liquid Chromatography (HPLC). It should be noted here that the recommended cut-off levels for a confirmatory test is much lower than the ones

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[120] Ministry of Health Malaysia, *Guidelines For Testing Drugs Of Abuse In Urine* (Ministry Of Health Malaysia 2002).
[121] Hawks (1986), cited in Eric D.Wish and Bernard A.Gropper, 'Drug Testing by the Criminal Justice System: Methods, Research, and Applications' (1990) 13 Crime and Just, 321.
[122] Eric D.Wish and Bernard A.Gropper, 'Drug Testing by the Criminal Justice System: Methods, Research, and Applications' (1990) 13 Crime and Just, 321.
[123] The term 'cannabinoid' is in accordance to the *MOH Guidelines, (n 120)*.

recommended for a preliminary test. For example, if the amount of cannabis found in an arrested person's urine sample is above 25 nanograms per millilitre (ng/mL), then the urine test sample shall be confirmed to be positive in the urine test report. The cut off level is much lower than the cut off level in the preliminary test, which is 100 ng/mL. The recommended cut-off levels of selected drugs are illustrated in Table 1 below.

Under the National Drug Detection Programme, TLC is the most common method used to confirm tests for preliminary screening of opiates and cannabinoids. One of the reasons for using the TLC method is because it is relatively inexpensive compared to other methodologies, for instance, GC/MS. Due to the large volume of requests for urine testing, it is not practical to use GC/MS to confirm the samples.[124] TLC seemed to be more appropriate since it is one of the earliest technologies for screening a wide range of drugs and could test more than one drug simultaneously.[125] However, with the more recent technology of screening test using immunoassay, TLC is considered out-dated. It is pertinent to highlight in the research project of Wish and Gropper's study published way back in 1990, which commented on the disadvantages of the TLC method:

> Thin-layer chromatography generally is a less sensitive technique than immunoassays tests. Research has shown that compared with one such test – EMIT – TLC underdetects certain drugs (especially opiates and cocaine) by as much as two-thirds. Finally, because TLC is a subjective test, requiring a decision by a technician, the technique is not very specific and should be confirmed by other methods... Nonetheless, the substantial disadvantages of TLC techniques make them less attractive screening tests than the newer immunoassay techniques.[126]

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[124] Statement by a government biochemist, Pathology Department, National Drug Centre, Kuala Lumpur Hospital (Personal communication 15 July 2008).
[125] *Wish and Gropper, (n 122).*
[126] ibid.

It is worth noting also that TLC was used as a preliminary screening method in other countries like the USA. Confirmation was done by either Gas Chromatography/ Mass Spectrometry (GC/MS) or Gas Chromatography (GC).[127]

From what have been discussed above, in regards to the sensitivity, specificity and cross-reactivity of immunoassays, it certainly raises the question as to the reliability and accuracy of TLC in being 'sufficiently foolproof to minimise arbitrary or erroneous decisions'.[128] Notwithstanding the above comments, the National Drug Centre still uses the TLC method in its confirmatory test procedure.

5.3.2 Recommended Cut-Off Levels

Generally, immunoassay can be extremely sensitive, with an accuracy level of between 97 to 98 per cent[129] and can detect a specific drug in the body after one or more days of ingestion. The sensitivity of a urine test is the 'minimum concentration of a drug that can be reliably detected in a urine sample'.[130] Sensitivity is measured in nanograms per millilitre (ng/mL) urine. The Ministry of Health, Malaysia has recommended the cut-off levels for the most common drugs detected in Malaysia. This is illustrated in Table 1 below. The recommended cut-off levels of the type of drugs mentioned below are an indication of the concentration level of a specific drug in the urine sample usually 'set above the minimum sensitivity limit'.[131]

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[127] ibid.
[128] Philip Bean, *Drugs and Crime* (Willan Publishing, Cullompton 2002).
[129] ibid.
[130] *Wish and Gropper, (n 122).*
[131] ibid.

Table 1- Recommended Cut-Off Levels[132]

Preliminary Screening Test

a.	Opiates	-	300ng/mL
b.	Cannabinoids	-	100ng/mL
c.	ATS	-	1000ng/mL

Confirmatory Test

a.	Morphine	-	200ng/mL
b.	Cannabis	-	25ng/mL
c.	ATS	-	500ng/mL

A positive test indicates that the amount of drug present is above the cut-off level. On the other hand, a negative test indicates that the amount of drug is below the cut-off level. Since cut-off levels measure the concentration level of a drug, it is important that the cut-off levels are reliable so as not to produce false positives. False positives can occur when cut-off levels are too low.[133] Another possibility is that there could be 'cross-reactivity' among certain drugs ie 'the ability of a substance other than the drugs in question to produce a positive result'.[134]

Conversely, a cut-off level that is too high could allow a drug user's urine test to be negative by which the immunoassay may not be sufficiently sensitive to detect a particular drug. This could be possible if the drug user consumes only a small dose or did not take drugs frequently enough to be detected by the test, hence producing a negative test result.[135] It could also be that the urine sample was collected too long after the drug was ingested in the blood stream which

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[132] *MOH Guidelines, (n 120).*
[133] Ross Coomber, 'Literature Review for the Independent Inquiry into Drug Testing at Work' [2003] University of Plymouth www.drugscope.org.uk accessed 26 July 2008.
[134] Trevor Bennett, 'Drugs and Crime: The Results of Research on Drug Testing and Interviewing Arrestees' [1998] Home Office Research Study 183, Home Office London.
[135] *Manno, (n 77).*

could not be detected by the test. Different types of drug stay in the body at different lengths of time.[136] The general rule is that drugs tend to stay longer in the body when they are consumed continuously or on a habitual basis.[137] Table 2 illustrates the duration of detectability of selected drugs commonly abused in Malaysia.

Table 2 - Approximate duration of detectability of selected drugs[138]

Drug	***Duration of drug detectability***
Amphetamine	2-4 days
Methamphetamine	2-4 days
Methadone	2-4 days
Opiates (heroin, codeine, morphine)	2-4 days
Cannabinoids (marijuana) Casual use Chronic use	 2- 7 days Up to 30 days

The next section, that is the chain of custody is of utmost importance in a drug testing procedure. The integrity of the chain of custody of a procedure must always be of priority and never broken.

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[136] *Crowe and Bilchik, (n 78).*
[137] *Manno, (n 77).*
[138] These are only general guidelines. Many variables should be considered in interpreting duration of detectability. *Crowe and Bilchik, (n 78).*

6. Chain of custody[139]

In order to ensure the validity, accuracy and reliability of drug testing and its results, it is imperative that the integrity of the chain of custody in terms of collection and handling of every urine sample is maintained from the very beginning. Hence, in line with the MOH guidelines, best practice should at all times be observed by all parties involved under the National Drug Detection Programme. This includes, *inter alia*, laboratory personnel, collection and transportation of samples personnel, the police department, armed forces, rehabilitation centres and AADK.

Best practice should be observed from the start. To begin with, it is important that the documentation process that forms the initial stage of the chain of custody process is properly done in accordance with the MOH guidelines. The chain of custody forms shall be executed as follows:

> Chain of custody forms/records shall be properly executed by an authorised collector upon receipt of the laboratory samples. Handling and transportation of urine samples from one authorised individual or place to another shall always be accomplished through chain of custody procedures. Every effort shall be made to minimise the number of persons handling the specimens.[140]

Under the MOH guidelines, only authorised and trained personnel are allowed to collect urine samples.[141] These personnel shall be responsible for 'collecting, labelling, packaging and transporting of samples, ensuring that the collection and storage procedures have the proper documentation and security methods necessary'.

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[139] The term is used for 'the process of documenting the handling and storage of the urine sample from the time the donor gives it to the collector until it is destroyed'. EWDTS, 'European Laboratory Guidelines for Legally Defensible Workplace Drug Testing Version 1.0' (2002) www.ewdts.org/guidelines.html accessed 28 July 2008.

[140] Referral Procedure (b) Collection Site. *MOH Guidelines, (n 120)*.

[141] This shall apply to all government agencies personnel (as mentioned in the main text).

For further clarification on the documentation and security matters, the MOH guidelines were compared to the guidelines of the European Workplace Drug Testing Society (EWDTS), which states that in order 'to ensure the proper identification and integrity' of a urine sample, the following stages must be documented:[142]

- The verification of the identity of the donor
- The proper identification of the specimen with its donor.
- Ensuring that no adulteration or tampering took place.
- Ensuring that no unauthorised access to the specimen was possible.
- The secure transfer of the specimen to each person handling it.

When these 'best practice' safeguards are compared with the chain of custody process (as observed at the DW police station), several issues are raised, in particular in relation to the Drugs of Abuse (DOA) Testing form.[143]

It is important that key information in the DOA form is properly recorded; the arrested person's name; identification card (IC) number; date of birth; date of collection of urine sample; police report number and the names and signatures of all persons who had custody of the urine sample. It must be emphasised also that the urine sample bottle must always be labelled with the arrested person's name and signature, IC number, report number, date specimen taken and sealed with the RMP seal. These requirements are imperative to ensure 'the verification of the identity of the donor and the proper identification of the specimen with its donor'. The purpose of strict compliance with the chain of custody process, including during transit from the collection site (police station)

[142] EWDTS, 'European Laboratory Guidelines for Legally Defensible Workplace Drug Testing Version 1.0' (2002) www.ewdts.org/guidelines.html accessed 28 July 2008.
[143] This is also called the chain of custody form.

is to prevent any adulteration or tampering of the specimen and to ensure that the sample correctly belongs to its rightful donor (arrested person).

However, as has been highlighted earlier, these formal requirements are not always observed in practice. For example, the arrested person should witness the on-site urine test done by the police. However, this requirement had not been observed by the police. In addition, collected urine samples should also be 'sealed in the presence of the donor' (arrested person).[144] Whenever this is not done, there is the possibility of procedural error during the chain of custody. For instance, such omissions might lead to unsealed bottles, tampering with bottles, barcode mismatch or improper documentation received with the urine sample. Adherence to the guidelines is necessary to ensure the integrity of the urine sample.

Every urine sample collected and transported to the Pathology Department must be accompanied by a DOA form. The arrested person who has given his urine sample must sign the DOA form. The MOH guidelines stipulate that 'the donor shall be asked to read and sign a statement *'Akuan Pemberi'* certifying that the urine sample identified as having been collected from him or her is in fact that sample he or she has provided'.[145] It is important to underline here that, taking into consideration the wordings of the DOA form, once the form is signed, it becomes proof that the arrested person (donor) has consented to the giving of the urine sample and is satisfied with the collection procedure. As has been argued in the preceding chapter, the police appeared to place little significance upon this important factor, that is, they did not ensure that the donor

[144] Referral Procedure (c) (viii) Collection Procedure. *MOH Guidelines, (n 120).*
[145] Form PER (LAB)-SS 301 B. Referral Procedure (c) (ix) Collection Procedure. *MOH Guidelines, (n 120).*

was not only consenting to the giving of the urine sample but also was expressly seen to consent.

Thus, the question that needs to be raised here is what is the legal status of a consent form in such circumstances? Consent forms have been used throughout history as a 'simple release of liability' by professionals such as physicians, institutions etc. A consent form may be defined as 'a legal document in hospital treatment, in which patients acknowledged that they agreed to the proposed medical procedures and would not hold physicians liable for any resulting ill effects'.[146] This becomes ethically problematic in dealing with cases involving the treatment of drug users, particularly where treatment is involuntary and coerced. Stevens et al state that informed consent is an essential feature of a treatment process so as to be consistent with the principles of human rights.[147] They also cited Bull in her review of international programmes for diversion to treatment within the criminal justice process, which note that 'informed consent is a key element of good practice in diversion from imprisonment internationally'. Bull further argues:

> The process must not compromise the rights of the offender. It must not be more intrusive than the traditional criminal justice system response. Participation is only with informed consent.[148]

Therefore, although the requirement of a complete DOA form duly signed by the donor is a pre-requisite under the MOH guidelines, there is no statutory provision to ensure that this complies with best practice principles.

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[146] Berg et al, *Informed Consent: Legal Theory and Clinical Practice* (2nd edn Oxford University Press, New York 2001).
[147] Stevens et al., 'On Coercion' (2005) International Journal of Drug Policy 16, 207-209.
[148] Melissa Bull, 'Just Treatment: a review of international programmes for the diversion of drug related offenders from the criminal justice system' (2003) A report prepared for the Department of the Premier and Cabinet, Queensland. School of Justice Studies QUT.

Ethically, the principle of informed consent should be incorporated into drug testing procedures in accordance with Principle I of the Nuremberg Code 1947. The Code which was derived from the judgment of the war crimes tribunal at Nuremberg lays down a general standard of ethical medical behaviour for the post World War II human rights era. The principles established by the Code have now been incorporated into the general codes of medical ethics.[149] Principle I of the Nuremberg Code states as follows:

> The voluntary consent of the human subject is absolutely essential. This means that the person involved should have legal capacity to give consent; should be so situated as to be able to exercise free power of choice, without the intervention of any element of force, fraud, deceit, duress, over-reaching or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved as to enable him to make an understanding and enlightened decision.[150]

Moving down the chain of custody, once the urine samples arrived at the laboratory, the laboratory personnel are duty-bound to ensure that the arrested persons have signed the DOA form. Laboratory personnel will reject any samples with unsigned DOA forms.[151] It is worth to note the 'rejection criteria' under the MOH guidelines:

> Any sample that does not meet the criteria for testing should be rejected and signed by officer in-charge of the laboratory.
>
> (a) The rejection criteria are as follows:
>
> i. Name/ identification card (IC) number on the bottle and the form do not tally.

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[149] British Medical Journal (1996) No 7070 Vol 313 www.cirp.org/library/ethics/nuremberg. accessed 13 February 2010.

[150] Larry Gostin and Jonathan Mann, 'Toward the Development of a Human Rights Impact Assessment for the Formulation and Evaluation of Public Health Policies' in Kasia Malinowska-Sempruch and Sarah Gallagher (eds), *War on Drugs, HIV/AIDS and Human Rights* (The International Debate Education Association, New York 2004).

[151] Statement by a government biochemist, Pathology Department, National Drug Centre, Kuala Lumpur Hospital (Personal communication 15 July 2008).

ii. Bottle is not sealed or seal is broken.
iii. Leaking bottle.
iv. Unsealed or unlocked container.
v. Request form is not signed by requesting officer.
vi. Insufficient sample.
vii. Request form without departmental stamp of requesting officer.
viii. Any other reasons appropriately identified by the receiving personnel.

(b) Records of sample rejection shall be maintained.

(c) The request form shall be returned to the requesting officer through the dispatch personnel or posted with reasons.

(d) Rejected samples unsuitable for testing shall be disposed by the testing laboratory.

The 'rejection criteria' do not specifically mention about incomplete DOA forms, including unsigned forms by the donor. Although it may be implied under item (a) (viii) - 'any other reasons appropriately identified by the receiving personnel', this is a matter that should be expressly written in the guidelines and strictly adhered to. By comparison, the EWDTS guidelines stipulate that there must be evidence of a 'written informed consent of the individual to the analysis of the specimen'.[152]

As explained earlier in the case study, the laboratory will only test drugs upon request by the government agencies. The most common drugs tested are morphine and cannabis. However, the trend is now changing with ATS becoming more accessible and popular.[153] It is likely that a wider choice of psychoactive drugs will be included in the 'request for testing' of the DOA form.[154] Notably,

[152] *EWDTS Guidelines, (n 137).*
[153] Gary Reid, Adeeba Kamarulzaman and Sangeeta Kaur Sran, 'Rapid Situation Assessment of Malaysia' (2004) www.hivpolicy.org/Library/HPP000991.pdf.
[154] *Statement by a government biochemist, (n 151).*

heroin, codeine and ATS are classified as 'dangerous drugs' under the First Schedule of the 1952 Act.

Once the urine samples arrive at the laboratory, the laboratory personnel shall inspect 'the containers or packages' containing the urine samples to ensure that they have not been tampered with and make sure that all necessary forms are filled up. Upon accepting the samples, the personnel shall acknowledge receipt 'by filling slips found at the bottom of request forms which are then returned to the dispatch personnel immediately or to the requesting officer by post'.[155] These procedures are to ensure that the chain of custody remains intact.

In line with the evolving drug trends ie the rise in ATS abuse and the modern technology of drug testing, the Ministry of Health should re-evaluate the present guidelines so as to keep up with the current challenges of modern day drug abuse. The chain of custody must be strictly adhered to in order to ensure the validity, accuracy and reliability of drug testing and its results. The integrity of the chain of custody of a procedure must always be of priority and never broken as it forms part of the due process. Moreover, a person's individual liberty depends on it. As Meyers rightfully summarises drug testing in relation to due process:

> ...many of those who lose their liberty as a result of a positive drug test may be victims of a test which falsely reports drug use if the defendant simply consumed one of many common medicines, or if certain basic mistakes or mixups occurred in the court's drug-detection laboratory... such drug programmes can and should be challenged as a clear violation of due process...[156]

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[155] Reception of Samples, *MOH Guidelines, (n 120)*.

[156] Peter H.Meyers, 'Pretrial Drug Testing: Is It Vulnerable To Due Process Challenges?' (1991) 5 BYU J Pub L 285.

7. Interpretation of test results: Self-report drug use v test report

While adherence to chain of custody protocols is an important factor in preventing injustice, there are also significant issues surrounding the interpretation of test results, particularly the problem of false positives. The main target group of the government's drug intervention programme is the regular drug users who may or may not be categorised as the problematic ones.[157] Findings from the case study showed that on-site drug testing in the police station is unlikely to be able to distinguish a recreational or experimental drug user from a chronic drug user. According to Wish and Gropper, 'the group of individuals with positive test results will consist of a heterogeneous collection of experimental users, occasional users, chronic users, and persons who may not be users at all but have been erroneously labelled as such'.[158] Such undifferentiated results can mean that occasional users may also have to undergo detention at police lock-ups for a substantial length of time. However, as discussed in the earlier section of this chapter, if there was a system of keeping a record of drug user profiles at the police station, by which drug test results can be matched with repeated (relapsed) drug user profiles, such information could be used to differentiate a chronic or problematic user from a first time user. It must be borne in mind that a single drug test does not measure the level of drug involvement of a person.[159] Positive test results do not tell us how frequent the detainees use drugs, whether on a regular, daily or intermittent basis.

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[157] See Chapter 2 for discussion on the term 'problematic drug user'.
[158] *Wish and Gropper, (n 122).*
[159] ibid.

Information gathered from interviewing drug detainees in respect of their drug misuse can be very useful in assessing that person's drug intake. To what extent can such self-reporting be relied upon? Findings from 43 case files provide data comparing self-report drug use by drug detainees with their urine test reports:

- 19 drug detainees admitted using heroin but test results confirmed all positive for morphine
- 5 drug detainees admitted using morphine and test results confirmed all positive for morphine
- 7 drug detainees admitted using cannabis but test results confirmed all positive for morphine
- 3 drug detainees admitted using *'ice'* (metamphetamine) but test results confirmed all positive for morphine
- 2 drug detainees admitted using cough syrup but test results confirmed both positive for morphine
- 1 drug detainee admitted he was under medical prescription but test result confirmed him positive for morphine
- 1 drug detainee admitted using cannabis and test result confirmed him as positive for cannabis
- 5 drug detainees denied using drugs but test results confirmed all positive for morphine

Out of the total 43 self-report drug use, only 5 were found to have the same results as their urine test reports. Although the above finding may not be a valid comparison to indicate the reliability of self-report drug use, it has thrown up several possible reasons for the disparity between self-report drug use and

urine test reports. The first reason is that people will under-report drug use. Studies have shown that individuals involved with the criminal justice system tend to under-report their recent drug use for fear of disclosing incriminating evidence, usually involvement with illegal drugs.[160] Based on the case files analysed in this research project, more than half of the drug detainees had either been previously admitted to the *Puspen* centres or had previous criminal records. Re-admittance to *Puspen* or to prison, having been charged with a drug offence, is definitely something to be feared. The penalties are severe - it must be borne in mind that a magistrate's order to undergo treatment at a *Puspen* centre carries a maximum period of two years of institutionalised treatment and rehabilitation and thereafter a further two years of supervision within the community. Furthermore, a drug offender who already has two previous admissions to *Puspen* or two previous convictions for a drug offence under the Dangerous Drugs Act 1952, if found guilty, shall be punished with imprisonment for a period between five to seven years, and three strokes of whipping.[161] As has been mentioned earlier, during the court proceedings, a majority of the drug detainees had appealed to the magistrate for supervision in the community order rather than be sent to the *Puspen* centres for treatment.

A second reason for the disparity might be that the test is revealing legal prescribed drugs or legitimately purchased from a chemist. A drug user could be under a medical prescription when arrested by the police. During the interview session at the JHT detention centre, one drug detainee admitted that he was a psychiatric patient at a government hospital and had been under medical

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[160] *Wish and Gropper, (n 122).*
[161] 1952 Act, s 39C.

prescription when the police arrested him. His test result confirmed that he was positive for morphine. However, the extent to which this is a major factor is disputable, especially as any detainee claiming this might also have ingested illegal drugs prior to their arrests.

Third, findings from the case files have raised significant issues about the way in which drugs are metabolised in the body, which can lead to false positives. For example, two detainees said that they had taken cough syrup (medicines) but their urine test report confirmed them as positive for morphine. One possible reason for this disparity could be because morphine, heroin and codeine belong to the same group of psychoactive drugs called opiates. Morphine and codeine are derived from opium poppy seed[162] whilst heroin is a semi-synthetic derivative (diacetylmorphine) of morphine.[163] Both morphine and codeine are prescription drugs and are used as analgesic to relief pain and cough suppression.[164]

In accordance with the MOH guidelines, urine samples which have been tested positive for the following drugs by the Pathology Department shall be reported as follows:

Opiates	: Morphine
Cannabis	: 11-nor-delta-9-tetrahydrocannabinol-9-carboxylic acid.
ATS	: Amphetamine, 3,4-Methylene Dioxymethamphetamine (MDMA), Methylenedioxy-Amphetamine (MDA) or Methamphetamine.

[162] Christian Staub et al, 'Detection of Acetycodeine in Urine as an Indicator of Illicit Heroin Use: Method Validation and Results of a Pilot Study' (2001) Clinical Chemistry, 47:301-307.
[163] *Manno, (n 77).*
[164] ibid.

Thus, urine samples from heroin users that were confirmed as positive shall be reported as positive for morphine.[165] The reason for this is because when heroin is administered into the human body, it breaks down first to monoacetylmorphine and subsequently metabolises into morphine. Both heroin and monoacetylmorphine vanish quickly whilst morphine stays longer in the blood stream.[166]

It has been reported that the detection of morphine in the urine can arise from the intake of heroin or codeine. This problem of false positives is especially important in regard to codeine. Codeine is categorised as a dangerous drug in Malaysia.[167] Recently, the Ministry of Health Malaysia imposed restrictions on the sales of codeine-based cough mixtures due to the widespread of codeine addiction.[168] It has been reported that 'some over-the-counter allergy and cold medicines' could generate a positive result for opiates.[169] For instance, codeine once in the body, metabolises into morphine, which produces cross-reactivity. Cross reactivity means the ability of a substance other than the drugs in question to produce a positive result. [170]

Another reason for the disparity between self-report drug use and the outcome of the drug tests may be linked to polydrug use among drug detainees. In the case study, seven drug detainees admitted that they had taken cannabis but their urine test results reported positive for morphine. This is slightly different from the above argument as cannabis and morphine are two different types of

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[165] *Statement by a government biochemist, (n 151).*
[166] *Manno, (n 77).*
[167] Dangerous Drugs Act 1952, First Schedule.
[168]Dzulkifli Abdul Razak, National Poison Centre, Universiti Sains Malaysia www.prn2.usm.my/mainsite/headline/poison/nov2000.html
[169] *Wish and Gropper, (n 122).*
[170] *Bennett, (n 134).*

drugs. Cannabis is derived from the cannabis plant and is also called marijuana or *ganja*. A possible explanation for this disparity is that these drug detainees could be polydrug users.

> Poly-drug use is 'the use of more than one drug, simultaneously or at different times. The term polydrug user is often used to distinguish a person with a varied pattern of drug use from someone who uses one kind of drug exclusively.[171]

In recent years, the number of polydrug users in Malaysia has increased compared to the late 1980s. According to a report, heroin users tend to mix heroin with other types of illicit drugs such as cannabis, morphine and codeine based cough mixtures.[172]

From the above findings, it can be concluded that self-report drug use alone cannot be relied upon to determine the type of drugs used by a drug dependant. Drug testing (confirmatory test) is an important mechanism to validate self-report drug use. Limitations such as false positives should be avoided. Thus, there should be stricter guidelines by the Ministry of Health to overcome such problems.

In short, to ensure that the chain of custody of the drug testing procedure is not broken, correct interpretation and accurate reporting of testing results are the fundamental elements to an effective drug testing within the drug intervention programme. Obviously it is paramount that procedural errors or discrepancies should be avoided. However to what extent have the courts policed this area? The next section will deal with the legal and ethical issues in relation to the implication of drug testing results.

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[171] MCDS (2004) cited in Josh Sweeney, 'Poly-drug users in the Criminal Justice System' (2009) Australian Institute of Criminology www.aic.gov.au.
[172] *Reid, Kamarulzaman and Sran, (n 153).*

8. Legal and ethical issues

The most general issue is the very legality of detention for the purpose of carrying out a drug test but there have been a number of court cases challenging the legality of the detention which have argued that the detention is unlawful because of a range of procedural errors by the police and other stakeholders. To rightly cite Meyers:

> Since a positive drug test result can lead to incarceration or other drastic impacts upon a defendant's liberty, pre-trial drug testing procedures should be as reliable and fair as possible. These are core values that due process has long protected when an individual is threatened with a loss of liberty as a result of government action.[173]

According to the Ministry of Health, many court-mandated orders for the treatment and rehabilitation of drug dependants were struck down by the High Court as a result of the way test results were reported.[174] For instance, prior to 2002, positive test results for cannabis dependants were reported as 'positive for cannabinoid'. The phrase 'positive for cannabinoid' had led to the government agencies and the courts treating the suspect as having taken illegal drugs. However this was a misinterpretation as 'cannabinoid' was not listed as a dangerous drug under the First Schedule of the Dangerous Drugs Act (DDA) 1952.

As in *Sures A/L Perumal* v *Public Prosecutor*, the appellant was sentenced to 24 months imprisonment for breaching a supervision order under the 1983 Act.[175] The appellant was confirmed to be a 'drug dependant' for 'cannabinoid'. The appellant appealed against the sentence at the High Court,

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[173] *Meyers, (n 156).*
[174] *Circular No: 6/2002, (n 120).*
[175] [2001] 2 MLJ 106.

which held that the conviction was unlawful since 'cannabinoid' was not categorised as a dangerous drug under the First Schedule of the DDA. VT Singham JC allowed the appeal. Following the decision in *Sures* above and other similar cases, from 2002 onwards, urine test results that tested positive for cannabis are now reported as positive for '11-nor-delta-9-tetrahydrocannabinol-9-carboxylic acid', which is a dangerous drug under the First Schedule of the DDA (This was mentioned earlier in the preceding section of the chapter).

Another important issue, which has been the ground for dispute dealt with by the courts, is the validity of a medical certificate to confirm that a person is a drug dependant. The certificate of drug dependency is known as 'Form 2' and is governed under the Drug Dependants (Treatment and Rehabilitation) (Forms) Rules 1998.[176] A medical officer must fill up the form 'having carried out the necessary tests'[177] by stating whether the person he had examined is or is not a 'drug dependant'. The officer must also state the type of drug(s) 'through the use of which he became a drug dependant'.[178] In *Quan Kim Hock v Timbalan Menteri Dalam Negeri & Ors*, an applicant who had been detained at *Gambang Serenti (Puspen)* centre applied for a writ of *habeas corpus* for his release.[179] One of the grounds relied upon by him was that 'the doctor certifying the applicant to be a drug dependant failed to name the drug or drugs the applicant was supposed to be dependent on'. Delivering the judgment in that case, *Nik Hashim J* held as follows:

> The dangerous drug or drugs through the use of which the person became a drug dependant must be stated in the space provided for in Form 2. If it

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[176] See Appendix.
[177] Form 2 - Certificate of drug dependency.
[178] ibid.
[179] *Quan Kim Hock v Timbalan Menteri Dalam Negeri & Ors* [1999] 7 CLJ (Malaysia).

> is not determinable what type of drug he is dependent on, the relevant sentence must be deleted accordingly. Without a medical certificate, an order under s.6 of the Act may not be made. Thus, it is crucial that the medical certificate must be valid in law. It must be self-sufficient, free from any defects, certain in terms, and above all, it must not contain any further statement other than that required in Form 2 which might appear to be doubtful and contradictory with the contents of the certificate.[180]

A similar issue arose in *Rosselan bin Suboh v Menteri Dalam Negeri & Anor,* the applicant had been detained at the Tampin *Serenti (Puspen)* centre to undergo treatment and rehabilitation for his drug dependence.[181] He challenged the court order for his detention at the centre as unlawful and thus null and void, on the basis that there was a discrepancy between the medical certificate issued by the medical doctor and the social report of the rehabilitation officer. The medical doctor had certified that the applicant was dependent on morphine, whereas the social report stated that the medical officer had confirmed the applicant to be a 'heroin dependant'. Allowing the application for a writ of *habeas corpus*, Low Hop Bing J of the High Court in that case held as follows:

> The order made by the magistrate was under the circumstances absolutely unsustainable as the discrepancy was so fundamental as to have affected its legality having struck at its very objective of treating and rehabilitating drug dependants.[182]

The above cases suggest that the courts are meticulous in ensuring that proper procedures are observed and in so doing are in some measure protecting the liberty of the individual as guaranteed by the Constitution. However such cases are few and far between because most of the drug detainees are poor and

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[180] ibid.
[181] *Rosselan bin Suboh v Menteri Dalam Negeri & Anor,* [2005] 2MLJ 660 (Malaysia).
[182] ibid.

have few resources, without which they are unable to sustain a legal challenge to their detention.

The following section illustrates the ethical considerations encountered whilst conducting the case study for the research project.

9. Ethical considerations

A case study raises several ethical issues as it involves human beings as participants. Hence, in criminal justice research, numerous bodies have developed their code of ethics. For instance, the National Advisory Committee on Criminal Justice Standard and Goals drafted its Ethical Principles for Criminal Justice Research:

> The intent… is not to propose a rigid set of guidelines for each researcher to follow. Rather, the principles and recommendations call attention to contemporary issues that neither policymakers nor researchers may have considered in a systematic manner. **The application of these principles and recommendations must be tailored to the needs of each individual research project according to the unique conditions that surround it** (emphasis added).[183]

Throughout conducting the research project, the researcher had come across various instances where ethical issues arose. This section deals with these issues and how the researcher dealt with each of them.[184]

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[183] *Hagan, (n 17).*

[184] The University of Kent's School of Social Policy, Sociology & Social Research (SSPSSR) Research Ethics Advisory Group requires a research student whose research project encompasses ethical implications involving human participants to meet the ethical standards of conduct. The four main ethical principles of research raised by the Advisory Group are non-maleficence (not causing harm), beneficence (doing good), autonomy (treating people with respect and enabling them to make their own choices), and justice (who will be advantaged and disadvantaged by the research). Hence, prior to the research, an application was submitted to the above Advisory Group for ethical review. The proposed research project was subsequently approved on 26 November 2006.

To begin with, the researcher sought the approval of the relevant government agencies involved in the project, as has been described in the observational protocol section earlier. To recapitulate, the agencies are as follows:

- AADK
- Narcotics Division, Royal Malaysian Police
- Psychiatric Department, Kuala Lumpur general hospital
- Magistrate court

The researcher had relied on the guidelines for obtaining informed consent provided under the Institutional Guide to DHEW Policy on Protection of Human Subjects. The six elements in the guidelines are as follows:[185]

- A fair explanation of the procedures to be followed, and their purposes, including identifications of any experimental procedure
- A description of any attendant discomforts and risks that can be expected
- A description of any benefits reasonably to be expected
- A disclosure of any appropriate alternative procedures that might be advantageous for the subject
- An offer to answer any inquiries concerning the procedures
- Instruction that the person is free to withdraw consent and discontinue participation at any time without prejudice to him or her.

Amongst the elements that were referred to in the research project are as follows:

a. A fair explanation of the procedures to be followed, and their purposes, including identifications of any experimental procedure

At the beginning of the research project, the researcher had assured all key stakeholders/ participants that the interviews (semi-structured and unstructured) and the focus group discussion would be conducted only for the purpose of the

[185] USA Department of Health, Education and Welfare cited in *Hagan, (n 17).*

research project and not for any other reasons. The researcher also assured them that the information provided by them would not jeopardise them in any way whatsoever. Whatever information obtained during the research, subsequent data analysis, presentation and publication were handled with strict confidentiality and the identity of the key stakeholders/ participants would remain anonymous.

The interviews were recorded via field-note taking by the researcher and all data were kept in a safe place in order to protect the confidentiality of the information and the identity of the key stakeholders/ participants.

b. A description of any attendant discomforts and risks that can be expected

Whilst the key stakeholders were interviewed at their respective offices, the focus group was held at the AADK Drug Service Centre. The venue was chosen based on the recommendation of the AADK rehabilitation officer (who is in charge of the Centre) since according to her, the Centre is a usual meeting place for both former and recovering drug users coming for counselling. Choosing the most appropriate venue for the discussion is of utmost importance because the researcher wanted the participants to be comfortable in a relaxed atmosphere so that the objective of the discussion could be achieved. The focus group was successfully conducted with full cooperation from its participants.

Prior to organising the focus group, the researcher had anticipated that there could be some 'power imbalances' between the researcher and the participants of the focus group. This could be well understood as the participants were former drug users who had been involved with the criminal justice system. Thus, to avoid such circumstances from occurring, the researcher took the

initiative to gain the trust of the participants before conducting the discussion. The researcher believed that such problem could be overcome once the participants were fully informed about the nature and purpose of the project and by building up rapport and securing trust between the researcher and the participants. The researcher explained to the participants that the whole intention of the research is to provide a better understanding of the government's drug intervention programme within the criminal justice system from the participants' perspective, and that any risks involved, if any, would be up to a minimal.

With regard to the issue of language and culture, the researcher did not face with any problem. This is because the interviews and focus group discussion were held in the Malay language (national language) and, although the key stakeholders and participants were from the Malay, Chinese and Indian ethnic backgrounds, all of them understood and could speak good Malay. Thus, problems such as not understanding and incapable of answering the questions in Malay did not arise.

c. A description of any benefits reasonably to be expected

It should be noted here that all incentives, whether monetary or otherwise that may represent an unethical inducement to participation (interviews and focus group) was not initiated from the very beginning of the project. It must be stressed here that all participants came on their own free will. The purpose is to help out in whatever they can by providing information through their own personal experiences in dealing with drug dependence and involvement with the legal system. The researcher was well aware that due to the sensitive nature of the research project and in recognition of possible participant concerns in relation

to the confidentiality of information obtained through the interview and discussion process, the researcher assured them that the participants would be informed as to how the research findings were to be disseminated.

d. Instruction that the person is free to withdraw consent and discontinue participation at any time without prejudice to him or her.

Throughout the whole of the research project, the researcher always bore in mind that the autonomy of each and every participant would not be compromised in order to make this project a success. A consent form was distributed amongst the focus group participants.[186] Nonetheless, every now and then the researcher kept on reminding the participants that all information and/ or data gathered from the discussion would be confidentially held for the purpose of the research project only. The researcher also re-assured the participants that any questions raised during the discussion that may cause any feeling of discomfort or stress to the participants, would be discarded.

10. Concluding remarks

This chapter has demonstrated that the relevant authorities are failing to ensure strict compliance with the MOH guidelines with regard to drug testing procedures. Best practice is rarely observed and furthermore there are few safeguards to protect suspects (drug users) from the false positives that the drug testing procedure throws up. The government's drug intervention programme has clearly placed a burden on an individual's personal autonomy. This important

[186] See Appendix.

principle will be discussed in greater detail in Chapter 6. However this chapter has shown that the courts can provide some safeguards, if not with the issue of false positives, at least in ensuring that the relevant agencies observe best practice protocols and do not deprive individuals of their liberty except in strict compliance with such protocols.

CHAPTER 6: EFFECTS OF COMPULSORY TREATMENT IN REGARDS TO THE FUNDAMENTAL RIGHTS OF DRUG USERS IN MALAYSIA

1. Introduction

The compulsory treatment of drug users in Malaysia involves prima facie violations of the fundamental rights guaranteed under the Malaysian Constitution. This chapter will examine the statutory provisions[1] in regards to the legal process of compulsory treatment alongside the laws and practices of arrest and detention under the Criminal Procedure Code (CPC). The focus will be particularly on areas of law and practice that constitute breaches of fundamental human rights principles enshrined in the Constitution and other international instruments. Those areas of concern are as follows:

- Restriction on the right to liberty
- Inhumane, cruel and degrading treatment
- Lack of due process

The chapter will be drawing on the findings of the research project as well as looking at the decisions made by the Malaysian courts in regards to arrest and detention cases. It will also consider the relevant jurisprudence under the UDHR, the ICCPR, the ICESCR and the ECHR. It is significant to emphasise here that although not directly binding, the UDHR is extensively regarded as 'having acquired legal force as customary international law since its adoption in 1948'.[2] Notwithstanding the fact that Malaysia is not a signatory to the ECHR,

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[1] Drug Dependants (Treatment and Rehabilitation) Act 1983, ss 3-6.
[2] Article 19 Global Campaign for Free Expression, 'MEMORANDUM on the Malaysian Sedition Act 1948' London July 2003.

the research project has provided an analogy drawn from it, with regard to the ECHR's provisions of the human rights principles. This is because transjurisdictional instruments, such as the ECHR, play an important role in analysing other countries' legal system,[3] particularly countries that do not comply with the international human rights standards.

2. Restrictions on the right to liberty: Arrest and detention

The issues that we will be considering in this section are:

- Criteria for the arrest of drug users
- Unnecessarily prolonged periods of detention

2.1 Arrest

2.1.1 Fundamental principles of human rights affecting arrest

Once a person is arrested and detained in police custody, his individual liberty and personal freedom are infringed. Article 5 (1) of the Constitution, which requires that 'no person shall be deprived of his life or personal liberty save in accordance with law' protects the physical freedom and privacy of an individual. This provision guarantees that any deprivation of liberty shall only occur in accordance with the law. This inherent right is also guaranteed under Article 3 of the UDHR where 'everyone has the right to life, liberty and security of the person'. Similarly, such a right is guaranteed under Article 5 (1) of the ECHR where 'everyone has the right to liberty and security of person'. With these protections, 'no one shall be subjected to arbitrary arrest, detention or exile'.[4]

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[3] Mike McConville and Wing Hong Chui (eds), *Research Methods For Law* (Edinburgh University Press Ltd, Edinburgh 2007).

[4] UDHR, art 9.

As has been considered in the previous chapter, Malaysia has an obligation to uphold the principles of human rights both under its Constitution and, being a member of the UN, under the UN human rights treaties. It is pertinent to note here also that Malaysia has yet to ratify the ICCPR and the ICESCR. This is because both the ICCPR and the ICESCR had emerged from the UDHR by which two-thirds of the articles in the former deal with civil and political rights.[5] Amongst the provisions in the ICCPR that are of present interest are; where 'any person whose liberty is deprived, he or she shall be treated with humanity and with respect'[6] and if a person has been accused of an offence or in need of treatment, he shall be dealt with separately from a convicted person.[7] Whilst Article 12 of the ICESCR is also of equal importance where 'every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity'.

2.1.2 Arrest under the Criminal Procedure Code

The laws and procedures in regards to the arrest of police suspects in Malaysia are regulated under the CPC. Routine police enforcement exercises such as *Ops Tapis*, employ the powers under section 23 for a police officer to make an arrest without an order of a magistrate and without a warrant on several circumstances. It is paragraph (a) of the section that is of immediate interest:

> *(a)* any person who has been concerned in any offence committed anywhere in Malaysia which is a seizable offence under any law in force in that part of Malaysia in which it was committed or against whom a reasonable complaint has been made or credible information has been received or **a reasonable suspicion exists** of his having been so concerned; (emphasis added).

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[5] Syed Hussin Ali, 'HR Debate 2008: Keynote Address' (July/December 2008) PRAXIS Chronicle of the Malaysian Bar.
[6] ICCPR, art 10 (1).
[7] ICCPR, art 10 (2) (a).

Particular attention is made to the phrase 'against whom a reasonable suspicion exists'. At this point, reference should also be made to the main text of the Malaysian criminal law procedure[8] that deals with the issue of 'arrest based on a reasonable suspicion.' This has been considered in a series of cases. In a Privy Council case of *Shaaban & Ors. v. Chong Fook Kam & Anor*,[9] Lord Devlin sought to define the meaning of 'suspicion':-

> Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: 'I suspect but I cannot prove'. Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end. When such proof has been obtained, the police case is complete; it is ready for trial and passes on to its next stage...By allowing 15 days after arrest for investigation, the Code shows clearly that it does not contemplate prima facie proof as a prerequisite for arrest.

Lord Devlin further differentiated between prima facie proof and reasonable suspicion:

> There is another distinction between reasonable suspicion and prima facie proof. Prima facie proof consists of admissible evidence. Suspicion can take into account matters that could not be put in evidence at all ... Suspicion can take into account also matters which, though admissible, could not form part of a prima facie case.[10]

This was an appeal case against the decision of the Federal Court, which awarded the respondents the sum of $ 2,500 each for false imprisonment. Timber fell from the trailer of a lorry, which hit the windscreen of a car, causing the death of one of the two men in the car. The lorry did not stop. The police arrested the respondents, whom they suspected that one of them was driving the lorry. The respondents were interrogated after the arrest and denied that they were at the place of the accident. The police were not satisfied with the respondents'

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[8] Mimi Kamariah Majid, *Criminal Procedure in Malaysia* (University of Malaya Press, Kuala Lumpur 1999).
[9] [1969] 2 MLJ 219.
[10] ibid.

explanation and decided to take them to the police station for further investigation. The Privy Council held that the test adopted by Suffian FJ (Federal court) was incorrect because he had not distinguished between reasonable suspicion and *prima facie* evidence. In delivering its judgment the Council held that 'the police were entitled to arrest if a reasonable suspicion existed of the respondents being concerned in the offence of reckless driving and dangerous driving causing death; it is unnecessary for the police to show that there was *prima facie* proof of such offence…'.[11] However, the police's power to arrest on reasonable suspicion must not be ordinarily exercised but is an executive discretion.

> In the exercise of it many factors have to be considered besides the strength of the case. The possibility of escape, the prevention of further crime and the obstruction of police enquiries are examples of those factors with which all judges who have had to grant or refuse bail are familiar.[12]

The English case of *Lodwick v Sanders*[13] is similar to the *Shaaban* case (above). In that case, the court was of the opinion that an officer's act in detaining a lorry driver and his lorry 'to ascertain whether the vehicle was stolen', was in the execution of his duty, despite having no evidence on which suspicion of theft could be based'.[14] Uglow argues that in regards to *Lodwick's* case, suspicion must be founded 'on objective grounds that will satisfy the court …'.[15]

In *Mahmood v Government of Malaysia & Anor*, it was held that the

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[11] Lord Devlin in *Shaaban (n 8)*.
[12] ibid.
[13] [1985] 1 All ER 577 .
[14] ibid cited in Cheney and others, *Criminal Procedure and Human Rights Act 1998* (2nd edn Jordans, Bristol 2001).
[15] Steve Uglow, 'The Investigation of Crime' in Cheney and others (eds) *Criminal Procedure and Human Rights Act 1998* (2nd edn Jordans, Bristol 2001).

question whether there existed sufficient grounds to raise a reasonable suspicion is a question of fact for the court to decide.[16] With regard to this, the Federal court in *Ramly & Ors v Jaafar* held that the question whether there was reasonable and probable cause must be determined objectively on the evidence before the court.[17]

It is worth mentioning an Indian Supreme court case of *Joginder Kumar vs Respondent: State of UP* that discusses the abuse of power of arrest by the police, affecting the fundamental right to personal liberty and freedom.[18] In this case, the respondent, a Senior Superintendent of Police took the petitioner into custody for enquiries in relation to a criminal case. When the brother of the petitioner made enquiries about the petitioner, the respondent lied to the brother when he told him that the petitioner would be released on the same day. The police had detained the petitioner for five days, which the petitioner held as unlawful since he was not taken before a magistrate for an order of detention. In laying down the judgment, MN Venkatachalliah J (former CJ of India) held as follows:

> No arrest can be made because it is lawful for the police officer to do so. The existence of power to arrest is one thing. The justification for exercise of it is quite another. The police officer must be able to justify the arrest apart from the power to do so. Arrest and detention in the police lock-up of a person can bring upon incalculable harm to the reputation and self-esteem of a person. No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a police officer in the interest of the constitutional rights of a citizen and perhaps in his own interest that no arrest is made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter.

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[16] [1974] 1 MLJ 103 (Malaysia).
[17] [1968] 1 MLJ 209 (Malaysia).
[18] 1994 AIR 1349 1994 SCC (4) 260 (India).

This was a classic case of arbitrary arrest and detention by the police. Although a police officer is empowered by statute to make an arrest, 'there must be some reasonable justification in the opinion of the officer effecting the arrest that such arrest is necessary and justified'.[19] Thus, the courts have consistently held that improper conduct by the police invariably infringes the constitutional rights of an individual to his personal freedom. This right that protects any individual from arbitrary arrest and detention is enshrined in Art 5 Constitution as well as in Article 9 of the UDHR. It is a constitutional right that is routinely violated by the actions of the police under s 23 of the CPC.

2.1.3 Arrest under the Drug Dependants (Treatment and Rehabilitation) Act 1983 (1983 Act)

Basically, under the statutory provision in relation to the compulsory treatment of drug users in Malaysia, the police are empowered to arrest individuals whom the police reasonably suspect to be 'drug dependants'. This is under section 3 of the 1983 Act that states 'an officer may take into custody any person whom he reasonably suspects to be a drug dependant'. The word 'an officer' means that any 'rehabilitation officer or any police officer'[20] who has such reasonable suspicion may arrest that person and require him to undergo a drugs test either on site or at the police station.[21] At this juncture, it is imperative to highlight here that the statute does not define the meaning of 'reasonably suspects'. The most recent statistics by the Royal Malaysian Police shown below indicate the number of people who have been arrested under the *Ops Tapis*. *Ops Tapis* is a routine police enforcement exercise that involves the apprehension of individuals whom

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[19] ibid.
[20] 1983, Act s 2.
[21] Statement by ASP Chong, Narcotics Division, RMP (Personal communication 15 December 2006).

the police suspect as being involved in illicit drug use. As can be seen in Table 1 below, nearly 160,000 people were arrested in 2007. When compared to the *Puspen* centres across the country, which can only accommodate 9,350 trainees,[22] the number of people arrested by the police for suspicion of being a 'drug dependant' from 1998-2007 is considered as excessive. This raises serious concern as to whether the police are abusing their power in regards to section 3 and whether this may entail a breach of Art 5 (1) Constitution in regards to the fundamental freedom of an individual. Moreover, arbitrary arrest by the police is a violation of Art 9 UDHR where 'no one shall be subjected to arbitrary arrest, detention or exile'.

Table 1 - 1998 - 2007 Number of Arrests under the Ops Tapis[23]

Year	***Number of Arrests under Ops Tapis***
1998	74,452
1999	80,453
2000	80,893
2001	90,488
2002	98,345
2003	137,159
2004	136,805
2005	133,982
2006	144,550
2007	159,490

[22] AADK Drug report, 26-31 January 2009.
[23] Royal Malaysian Police Statistic Report (2007) www.rmp.gov.my.

Much has been said about the police arresting people simply because they have a quota to fulfil. Csete and Pearshouse claim:

> In many countries, people who use drugs are systematically and relentlessly subjected to a range of severe human rights abuses. Laws on illicit drugs in many countries are so repressive that it is impossible to enforce the law without violating the rights of people who use drugs. **They are often the first and easiest targets for police when arrest quotas need to be filled or when police engage in extortion** (emphasis added).[24]

In the focus group for this research project, participants were asked about their perceptions on the objective of police raids. Comments from the focus group discussion included:

> P2: The police just want to fill up the quota. One day they have to arrest about 10 suspects. It does not matter whom, as long as there are 10 people. If you have money, you stand a chance to be released. Drug matters in Malaysia, you cannot solve… because drug goes along with corruption. Those arrested are only drug users…they are the small fries. Once, the police caught me and I had 'one packet' with me. The police could charge me with possession of drugs for own consumption. At the police station, they asked me if I had RM300… to cover up. The police officer at that time said that I could be charged with a more serious offence…for being a drug pusher. I could get a 15 months prison sentence and whipping. But because I could not afford to pay them RM300, I was charged and sentenced to 15 months imprisonment. I did not have a track record (previous conviction) but they still charged me.
>
> P4: My view is that the police's job is only to make arrests just to fill up the quota. The police's approach is unprofessional. They only arrest people (drug users). When a family member applies for police bail, that person is released. Next week, he will be arrested again if there happened to be a raid. When the police see a familiar face, they would mark us. It is up to the police whether they want to arrest us or not. The legal system in Malaysia is like this. It only looks good on paper.[25]

Such allegations indicate a serious abuse of police powers under section 3, not only involving causing significant violations of human rights but ones that can also heighten the risks of corruption and extortion. Csete and Pearshouse

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[24]Joanne Csete and Richard Pearshouse, 'Dependent on Rights: Assessing Treatment of Drug Dependence from a Human Rights Perspective' (2007) Canadian HIV/AIDS Legal Network.
[25] Excerpts from the research project's focus group. See Appendix.

rightly suggest that, 'people who use illegal drugs are often not recognised by law or society as full human beings deserving of human right'.[26]

According to the research project case study, the police usually arrest suspects on the basis of tip-offs from the public or through 'police observation of suspicious individuals'.[27] Suspicious individuals include those having physical characteristics such as scruffy hair and clothing, red and droopy eyelids and unusual behaviour - for instance, lurking around abandoned buildings and dark back alleys. The research project was unable to ascertain whether Malaysian police officers have basic training in identifying this group of people through physical signs and symptoms of drug abuse. Nonetheless, at this point, it is pertinent that the police force should acquire such skills. This is essential, as it would reduce the cost of on-site screening test on suspects who do not meet the requirement of being a 'drug dependant'. For instance, in the USA Los Angeles Police Department, 'drug recognition techniques' are being taught to law enforcement officers as basic skills in detecting illicit drug use amongst juveniles. Listed below are 12 steps in the drug recognition process:-[28]

- Drug history
- Breath alcohol test
- Divided attention psychophysical tests
- Medical questions and initial observations
- Examination for muscle rigidity
- Examination for injection sites
- Examination of vital signs
- Darkroom examination
- Examination of the eyes
- (Youth's) statements and additional observations by staff
- Opinions of the evaluator
- Toxicological examination.

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[26] *Csete and Richard Pearshouse, (n 24).*

[27] Statement by Sergeant Osman, Narcotics Division RMP (Personal communication 15 June 2008).

[28] Ann H. Crowe and Shay Bilchik, 'Drug Identification and Testing Summary', (May 1998) American Probation and Parole Association and Office of Juvenile Justice and Delinquency Prevention www.ncjrs.gov/html/ojjdp.

However, it must be borne in mind that such training in 'police suspiciousness' may lead to undue concentration on such characteristics and to police stereotyping 'of likely offenders become self-fulfilling prophecies as people with those characteristics are disproportionately questioned or arrested, leading to a vicious cycle of deviance amplification'.[29]

Another related finding from the case study that requires attention is the fact that the police do not keep records of the profiles of those arrested. At present, police stations do not have a system of keeping records of those who have been arrested for suspicion of being a 'drug dependant'. Most of the police suspects are familiar faces who have been involved with routine police raids ie *Ops Tapis*. It is presumed that this type of suspects is a recidivist within the criminal justice system. A preliminary finding of this research is the need for every police station to keep proper and systematic records. The police would be able to identify recreational or experimental drug users or recidivist drug users and at the same time monitor the extent and pattern of drug misuse among this group of people. Such data could also be very useful in understanding better the correlation between drug abuse and criminal behaviour among drug offenders.[30]

2.1.4 Analogous provisions

The right against arbitrary arrest is enshrined in Article 5 of the ECHR. Article 5 also guarantees that anyone who has been victimised by arrest or detention that contravenes the provisions of the article 'shall have an enforceable right to

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[29] Jock Young cited in Robert Reiner, *The Politics of the Police* (3rd edn OUP, Oxford 2000).
[30] V.Navaratnam, V. Balasingam and Hilal H.Othman, 'Research Report Malaysia' in Taylor (ed), *I – ADAM In Eight Countries: Approaches and Challenges* (U.S. Department of Justice Office of Justice Programs, Washington DC 2002).

compensation'.[31] In Malaysia, individuals or drug users who have been subjected to arbitrary arrest, following an *Ops Tapis* exercise, are not entitled to claim for compensation under the Constitution. Hence, it is relevant for the research project to look at the ECHR and the judicial review mechanism of the ECtHR in deciding cases on breach of individual liberty. A good example is the UK. Being a member to the ECHR, the UK is implicitly obliged to comply with the provisions of the Convention.[32] Thus, although the UK Human Rights Act 1998 has not incorporated the ECHR into English law, public authorities such as the police are under a duty to abide by the provisions guaranteed under the Convention. Section 6 (1) of the 1998 Act states that 'it is unlawful for a public authority to act in a way which is incompatible with a Convention right.[33] The principles underlying the ECHR in regards to the stage of police investigation are as follows:

a. legality: the exercise of police powers should be in accordance with statutory or common law which is clear and accessible and the powers themselves must not be ordered haphazardly, irregularly or without due or proper care;
b. necessity: the interference should be necessary and likely to produce results or material to aid an investigation;
c. proportionality: the exercise of police powers must bear an appropriate relationship to the seriousness of the event. In any case, the interference must be balanced and due weight and consideration given to individual rights;
d. accountability: the exercise of police powers should be subject to the supervisory control of a judge in accordance with the rule of law, but other safeguards might suffice if they are independent and vested with sufficient powers to exercise an effective and continuous control.[34]

In the UK, the law on police powers has been codified in the Police and

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[31] ECHR, art 5 (5).
[32] Cheney and others, *Criminal Procedure and Human Rights Act 1998* (2nd edn Jordans, Bristol 2001).
[33] 1998 Act, s 6 (3) states 'public authority' includes – (a) a court or tribunal, and (b) any person certain of whose functions are functions of a public nature.
[34] *Uglow, (n 15).*

Criminal Evidence Act (PACE) 1984 (as amended) with its key element of maintaining the right balance between the powers of the police and the rights and freedoms of the public. These powers are expanded upon in codes of practice promulgated under section 66 of the 1984 Act. Thus, at this juncture it is worth looking at PACE Codes of Practice, in comparison to section 23 of the CPC. To what extent do the Codes exemplify the human rights aspects of police power, particularly in regards to stopping, arresting and detaining on the grounds of 'reasonable suspicion'?

According to Code A of PACE, *inter alia,* stop and search powers enable the police to 'confirm suspicions about individuals without exercising their power of arrest'. Nonetheless, the police must justify 'the use or authorisation of such powers'.[35] Reasonable grounds for suspicion depend on the circumstances in each case. The test is on an objective basis based on facts, information, and/ or intelligence. It must not rely solely on personal factors, for instance, if the person is known to have a previous conviction. Reasonable suspicion also cannot depend on 'generalisations or stereotypical images of certain groups or categories of people as more likely to be involved in criminal activity'.[36] Code A also gives an illustration that reasonable suspicion can sometimes rely on the fact that the behaviour of a person causes the police to be suspicious; 'if an officer encounters someone on the street at night who is obviously trying to hide something, the officer may (depending on the other surrounding circumstances) base such suspicion on the fact that this kind of behaviour is often linked to stolen or prohibited articles being carried[37]... Targeting searches in a particular area at specified crime problems increases their effectiveness and minimises

[35] Code A, s 1.4.
[36] Code A, s 2.2.
[37] Code A, s 2.3.

inconvenience to law-abiding members of the public'.[38]

One aspect of 'reasonable suspicion' is the extent to which an officer is entitled to rely on information that he or she has received from others. In *O'Hara* v *Chief Constable of RUC*,[39] a police constable said in his evidence that prior to the arrest of the appellant, he had attended a briefing at Strand Road Police Station about an operation to search houses for weapons or other evidence, and to arrest a number of people in connection with the murder of Mr. Kurt Koenig under section 12 (1) of the Prevention of Terrorism (Temporary Provisions) Act 1984. The appellant was arrested and later released without being charged with any offence. In an action against the chief constable, he claimed damages for wrongful arrest. The question was whether the constable objectively had reasonable grounds for suspecting that the appellant was involved in the murder. Dismissing the appeal, the House of Lords in *O'Hara* held as follows:

> ... the test laid down by section 12(1) to determine whether reasonable grounds for the suspicion to justify arrest existed was partly subjective, in that the arresting officer must have formed a genuine suspicion that the person being arrested had been concerned in acts of terrorism, and partly objective, in that there had to be reasonable grounds for forming such a suspicion; that such grounds did not have to be based on the officer's own observations but could arise from information he had received, even if it was subsequently shown to be false, provided that a reasonable man, having regard to all the surrounding circumstances, would regard them as reasonable grounds for suspicion, but that a mere order by a superior officer to arrest would be insufficient to afford reasonable grounds for suspicion; and that, accordingly, although the evidence was sparse, the judge and the Court of Appeal had applied the correct test and, in the circumstances, had been entitled to infer the existence of reasonable grounds for suspicion.

Lord Diplock made the following general observations in *O'Hara*:

> My Lords, there is inevitably the potentiality of conflict between the public interest in preserving the liberty of the individual and the public interest in

[38] Code A, s 2.4.
[39] [1997] 2 WLR 1 (HL).

> the detection of crime and the bringing to justice of those who commit it. The members of the organised police forces of the country have, since the mid-19th century, been charged with the duty of taking the first steps to promote the latter public interest by inquiring into suspected offences with a view to identifying the perpetrators of them and of obtaining sufficient evidence admissible in a court of law against the persons they suspect of being the perpetrators as would justify charging them with the relevant offence before a magistrates' court with a view to their committal for trial for it. The compromise which English common and statutory law has evolved for the accommodation of the two rival public interests while these first steps are being taken by the police is two fold: (1) no person may be arrested without warrant (ie without warrant (ie without the intervention of a judicial process) unless the constable arresting him has reasonable cause to suspect him to be guilty of an arrestable offence; ... (2) a suspect so arrested and detained in custody must be brought before a magistrates' court as soon as practicable . . .[40]

Also in *O'Hara*, Article 5 (1) (c) of the ECHR was considered in that the provision 'contemplates a broader test of whether a reasonable suspicion exists and does not confine it to matters present in the mind of the arresting officer'. Article 5 (1) (c) states as follows:

> Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> > (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; . . .[41]

The laws and procedures on arrest in Malaysia apply to both individuals suspected to be involved in a criminal offence and those suspected of being a 'drug dependant'. The scope of police powers in regards to arrest is very wide and has been subjected to abuse. This brings about a serious injustice to drug users who are already being marginalised by society. These drug users are in a

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[40] ibid.
[41] ECHR, art 5 (1) (c).

more vulnerable position than a suspected criminal, since the 1983 Act does not provide any safeguards from police arbitrary arrest. The section concludes that although the basic principles of procedural justice apply across many jurisdictions, where police powers are constrained by the courts to protect from arbitrary arrest, the police practice in Malaysia are in danger of infringing the fundamental principles of human rights.

The following section will look into the next stage of the criminal process – the remand proceedings and determine whether such procedure violates the principles of human rights.

2.2 Detention

2.2.1 Fundamental principles of human rights affecting detention

The key issue here is that once a person is being arrested, the police as soon as possible shall inform that person of the grounds of his arrest and that person should be dealt with expeditiously. These are rights guaranteed under Articles 5 (3) and (4) of the Constitution.

> Article 5 (3) states:
>
> (3) Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.
>
> Article 5 (4) states:
>
> (4) Where a person is arrested and not released he shall without unreasonable delay, and in any case within 24 hours (excluding the time of any necessary journey) be produced before a magistrate and shall not be further detained in custody without the magistrate's authority.

Thus, failure by the police to conform to these provisions is a clear violation of the constitutional rights.

2.2.2 Detention under the CPC

Prior to discussing the detention of those suspected of being 'drug dependants', it is necessary to consider detention in normal criminal cases. The detention or remand in police custody of an arrested person is codified under the CPC. Section 28 lays down the procedure on how an arrested person should be dealt with:

> (1) A police officer making an arrest without warrant shall without unnecessary delay and subject to the provisions herein as to bail or previous release take or send the person arrested before a Magistrate.
>
> (2) No police officer shall detain in custody a person arrested without a warrant for a longer period than under all the circumstances of the case is reasonable.
>
> (3) Such period shall not in the absence or after the expiry of a special order of a Magistrate under section 117 exceed 24 hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate.

The key elements of section 28 of the CPC are that upon arrest, the police shall 'without unnecessary delay' produce the arrested person 'before a Magistrate'[42] and that person shall not be detained in police custody 'for a longer period than under all the circumstances of the case is reasonable'[43]. The general rule is that an arrested person shall not be kept in custody for a longer period than 24 hours.[44]

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[42] CPC, s 28 (1).
[43] CPC, s 28 (2).
[44] CPC, s 28 (3).

It is important to highlight here a recent amendment to this section.[45] Prior to the amendment, sections 28 (1) and (3) read 'before a magistrate's court'. This means that an arrested person must be brought before a magistrate at the magistrate's court during working (official) hours. Thus, if a person is arrested during the weekends or public holidays, that person cannot be brought before the magistrate until the next working day ie Monday. Hence, he or she may have to be detained for a longer period than the 24-hour rule.[46] Both Art 5 (4) of the Constitution and section 28 CPC emphasise that where a person is arrested, he shall be produced before a magistrate without unreasonable delay, and in any case within 24 hours (excluding the time of any necessary journey) and shall not be further detained in custody without the magistrate's authority.

However there was an important exception to this principle under section 117 of the CPC, which permitted an arrested person to be detained beyond 24 hours so as to enable the police to complete their investigation where such investigation cannot be completed within that period. This significantly affects the individual freedom of an accused person that would otherwise amount to a breach of Article 5 (4).[47] The important 2006 amendment has significantly changed this.

Prior to 2006, section 117 of the CPC allowed the police to detain an arrested person for investigation purposes for a period of not more than 15 days. However, this power under the section has been widely abused by the police. According to a report by Amnesty International Malaysia on the implementation

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[45] Criminal Procedure Code (Amendment) Act 2006, s 6.
[46] B. Sidhu, 'Amendments To The Criminal Procedure Code: Radical Or Piecemeal Legislation?' (2007) 7 MLJ liii.
[47] ibid.

of the Royal Commission to Enhance the Operation and Management of the Royal Malaysia Police:

> Remand hearings (held after 24 hours custody) continued to be treated as an administrative formality to assist the police. Lawyers and relatives have repeatedly described being not informed or misdirected by police as to where detainees are being held and the time and location of remand hearings. There were reports stating that remand proceedings were often held in chambers secretly rather than in an open court.
>
> Remand orders were also continued to be issued to transfer an accused from one police station to another, with fresh remand applications made each time in relation to different offences, resulting in long period of remand detention. The current culture is still a breeding ground for the practice of 'arrest first, investigate later' which was highlighted by the Royal Commission.[48]

In its report, the Royal Commission held that the 15 days period should be reviewed. It recommended that the detention period for an arrest without warrant should be shortened to a maximum of seven days and not more than 24 hours for an arrest with warrant. In conjunction with the Royal Commission's recommendation, section 117 was subsequently amended in 2006[49] as follows:

> (1) Whenever any person is arrested and detained in custody and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 28 and there are grounds for believing that the accusation or information is well founded the police officer making the investigation shall immediately transmit to a Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case and shall at the same time produce the accused before the Magistrate.
>
> (2) The Magistrate before whom an accused person is produced under this section may, whether he has or has no jurisdiction to try the case, authorize the detention of the accused in such custody as follows:
>
> > (a) if the offence which is being investigated is punishable with imprisonment of less than fourteen years, **the detention shall not be more than four days on the first application and shall not be more than three days on the second application;** (emphasis

[48] Amnesty International Malaysia and Suaram, 'Report card on the implementation of the Royal Commission's recommendations after 2 years' (2007) www.aimalaysia.org accessed 25 July 2008.
[49] Criminal Procedure Code (Amendment) Act 2006.

added) or

(b) if the offence which is being investigated is punishable with death or imprisonment of fourteen years or more, **the detention shall not be more than seven days on the first application and shall not be more than seven days on the second application** (emphasis added).

(3) The officer making the investigation shall state in the copy of the entries in the diary referred to in subsection (1), any period of detention of the accused immediately prior to the application, whether or not such detention relates to the application.
(4) The Magistrate, in deciding the period of detention of the accused person, shall take into consideration any detention period immediately prior to the application, whether or not such detention relates to the application.

(5) The Magistrate in deciding the period of detention of the accused shall allow representations to be made either by the accused himself or through a counsel of his choice.

(6) If the Magistrate has no jurisdiction to try the case and considers further detention unnecessary he may order the accused person to be produced before a Magistrate having such jurisdiction or, if the case is triable only by the High Court, before himself or another Magistrate having jurisdiction with a view to transmission for trial by the High Court.

(7) A Magistrate authorizing under this section detention in the custody of the police shall record his reasons for so doing.

In *Hashim bin Saud* v *Yahya bin Hashim & Anor,* Harun J highlights that the power under section 117 rests solely on the magistrate and not the police:

> The purpose of a detention under section 117 CPC therefore is to enable the police to complete investigations. The detention itself is subject to judicial control. The power to detain rests squarely and fully on the magistrate not the police. The magistrate is required to satisfy himself in every occasion if detention is at all necessary and if so to determine the length of time actually required to complete the investigation...If he orders detention he must record his reasons for doing so...[50]

Section 117 should be treated as an exception to section 28. As has been cited earlier in the Amnesty International report (above), this is because in

[50] [1977] 1 MLJ 259.

practice, remand proceedings are considered as an administrative formality by the police in order to assist them in their investigations. This so-called formality, upon being granted by the magistrate (remand order) has been widely abused by the police.[51] The significance of sections 28 and 117 of the CPC in regards to an accused person's individual liberty and freedom was reiterated in the celebrated case of *Re The Detention of R Sivarasa & Ors*:

> Sections 28 and 117 have been inserted into the CPC for a good reason, so that the detention by the police of a person beyond 24 hours after his arrest is not as a result of an executive act but as a result of a judicial decision in consonance with art 5(4) of the Federal Constitution.[52]

In that case, the High Court held that the magistrate had not appreciated the strict nature of section 117 of the CPC when allowing the application for an extension of the detention period by the police in respect of the suspects. The magistrate did not refer to the copy of 'the entries in the diary' as the police had failed to transmit a copy as required by the provisions in the CPC.[53] KC Vohrah J held that:-

> Section 117 of the CPC also requires that there be grounds for believing that the accusation or information is well founded for the police officer to make his application for detention. These grounds are subject to judicial scrutiny. It has to be stressed that a magistrate ought not give a remand order in police custody without his satisfying himself as to its necessity and that the period of remand also ought to be restricted to the necessities of the case. If the necessities of the case for remand or further remand are not shown, no remand should be made.[54]

In *Re: Syed Mohamad b. Syed Isa; Mohd Rosdi bin Jaafar; Thiagarajah A/l Palaniandy; Rajis A/l Seeni Deen & Ors*, a suspect in a snatch theft case was

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[51] *Amnesty International Malaysia and Suaram, (n 48).*
[52] [1996] 3 MLJ 611 (Malaysia).
[53] CPC, s 117 (1).
[54] *Re The Detention of R Sivarasa & Ors* [1996] 3 MLJ 611 (Malaysia).

arrested on February 2, 2001.[55] He confessed to committing the offence together with another person. The suspect was put in the lock up on the same day and later brought to the magistrate's court for remand. The reason given in the application for remand was that the police had not been able to arrest the other suspect and recover the theft items. The police in its application requested a 14 days remand period for further investigation. Abdul Wahab Patail J (Kuala Lumpur High Court) raised the issue of the time between the arrest and appearance before the magistrate where the police had done nothing to complete the investigation, although the suspect had been cooperative.

> The suspect was held in custody with no investigation being done over the weekend. If the police department and investigating officers carry out no investigations during weekends, then effort should be made to record his statement quickly, and release on bail to appear the following Monday for follow up investigations. While it is clear the police need time to complete investigations, nothing was shown on the entries to support a conclusion that the remand of the suspect himself is necessary to do so... the Magistrate should take this into account and order a shorter period of remand of two or three days only. The public interest is better served if suspects know they can be released earlier if they cooperate. The public perception towards law enforcement would also likely improve if the police were seen to respond to cooperation...the order of remand of 6 days is revised to 3 days from February 5, 2001.[56]

The judge also held that section 117 may only be used 'if investigation is conducted diligently' and not 'at leisure' for the purpose of further investigation or other offences. Hence, the court clearly underlined the gravity of a remand order against an accused person and stressed that the magistrate should apply the conditions strictly. Remand proceedings involve the deprivation of an accused person's liberty. Unless it can be justified that under the law the accused person should be remanded, then the detention shall be considered as unlawful, hence,

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[55] [2001] MLJU 163 (Malaysia).
[56] *Re: Syed Mohamad b. Syed Isa; Mohd Rosdi bin Jaafar; Thiagarajah A/l Palaniandy; Rajis A/l Seeni Deen & Ors* [2001] MLJU 163 (Malaysia).

violating Article 5 (1). The constitutional provisions of the fundamental liberties guaranteed under Article 5 shall at all times be adhered to and the police should take all the necessary measures to ensure that these rights are protected and not violated.[57] This was also emphasised by Abdul Wahab Patail J in *Re: Syed Mohamad b. Syed Isa* (above) who stressed on the significance of section 117 of the CPC in relation to the right of a person's individual freedom in that '…remand orders should not be taken lightly or as a matter of mere formality … The importance of these reasons is best understood from the perspective that a remand order deprives a person of his personal liberty, a fundamental right guaranteed by the Federal Constitution.'[58] There is a clear and compelling analogy here with the rights of a person suspected of being a 'drug dependant'.

2.2.3 Rights of an arrested person under section 28A CPC

Prior to its amendment in 2006, the CPC had been silent in regards to the rights of an arrested person. With the amendment, a new section 28A was introduced stipulating the rights of an arrested person when taken into custody.[59] The research project explored the extent to which this section applies to (or should apply to) a suspected 'drug dependant' who is detained under the 1983 Act, as the Act is silent on this important aspect of human rights. Firstly under normal criminal procedure, section 28A states as follows:

> (1) A person arrested without a warrant, shall be informed as soon as may be of the grounds of his arrest by the police officer making the arrest.

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[57] Malaysian Constitution, Part II – Fundamental Liberties.
[58] [2001] MLJU 163.
[59] Criminal Procedure Code (Amendment) Act 2006, amendment of s 7 - The Code is amended by inserting after section 28 the following section: Rights of person arrested.

(2) A police officer shall before commencing any form of questioning or recording of any statement from the person arrested, inform the person that he may—

(a) communicate or attempt to communicate, with a relative or friend to inform of his whereabouts; and

(b) communicate or attempt to communicate and consult with a legal practitioner of his choice.

(3) Where the person arrested wishes to communicate or attempt to communicate with the persons referred to in paragraphs (2)(a) and (b), the police officer shall, as soon as may be, allow the arrested person to do so.

(4) Where the person arrested has requested for a legal practitioner to be consulted the police officer shall allow a reasonable time—

(a) for the legal practitioner to be present to meet the person arrested at his place of detention; and

(b) for the consultation to take place.

(5) The consultation under subsection (4) shall be within the sight of a police officer and in circumstances, in so far as practicable, where their communication will not be over heard;

(6) The police officer shall defer any questioning or recording of any statement from the person arrested for a reasonable time until the communication or attempted communication under paragraph 2(b) or the consultation under subsection (4), has been made;

(7) The police officer shall provide reasonable facilities for the communication and consultation under this section and all such facilities provided shall be free of charge.

(8) The requirements under subsections (2), (3), (4), (5), (6) and (7) shall not apply where the police officer reasonably believes that—

(a) compliance with any of the requirements is likely to result in—

(i) an accomplice of the person arrested taking steps to avoid apprehension; or

(ii) the concealment, fabrication or destruction of evidence or the intimidation of a witness; or

(b) having regard to the safety of other persons the questioning or recording of any statement is so urgent that it should not be delayed.

(9) Subsection (8) shall only apply upon authorization by a police officer not below the rank of Deputy Superintendent of Police.

(10) The police officer giving the authorization under subsection (9) shall record the grounds of belief of the police officer that the conditions

> specified under subsection (8) will arise and such record shall be made as soon as practicable.
>
> (11) The investigating officer shall comply with the requirements under subsections (2), (3), (4), (5), (6) and (7) as soon as possible after the conditions specified under subsection (8) have ceased to apply where the person arrested is still under detention under this section or under section 117.

The above provisions establish the basic safeguards for an arrested person who is further detained in police custody, which apply in normal criminal procedure. These are also of great significance when we come to consider the position of a drug user detained under the 1983 legislation. The first safeguard is under subsection (1) of s 28A; an arresting officer is required to inform an arrested person 'as soon as may be' of the grounds of his arrest. This provision mirrors the constitutional right guaranteed in the first limb of Article 5 (3) Constitution which states that 'where a person is arrested he shall be informed as soon as may be of the grounds of his arrest…'.

The right to be informed of the ground of a person's arrest has been established under common law and referred to by the Malaysian Federal Court. In *Christie* v *Leachinsky*,[60] it was held that 'a citizen is entitled to know on what charge or on suspicion of what crime he is seized' and this was referred by the Federal Court in *Abdul Rahman* v *Tan Jo Koh* :

> In *Christie* v *Leachinsky*, it was held that a person arrested on suspicion of committing an offence, is entitled to know forthwith the reason for his arrest and that if the reason was withheld, the arrest and detention would amount to false imprisonment, until the time he was told the reason. It would follow therefore from this proposition that a person arrested without being told the reason is entitled to resist the arrest and any force used to overcome the resistance would amount to assault.[61]

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[60] [1994] 2 All E.R.
[61] [1968] 1 MLJ 205 cited in Jerald Gomez, 'Rights of Accused Persons-Are Safeguards being Reduced?' [2004] 1MLJ xx.

This provision is also pertinent in drug user cases and should not be treated lightly by the police. An arrested person under suspicion of being a 'drug dependant' has every right to know the ground for his arrest. It must be reiterated here that withholding information during arrest and coercing a person into taking a drugs test is a serious violation of his individual liberty guaranteed by the Constitution.

The second important safeguard is legal representation. Section 28A (4) gives the right to an arrested person to consult a lawyer. In line with the second limb of Article 5 (3) Constitution, he or she 'shall be allowed to consult and be defended by a legal practitioner of his choice'. To cite Suffian LP in a Federal Court case of *Ooi Ah Puah* v *Officer in Charge Criminal Investigation Kedah/Perlis*:

> The presence of a lawyer when an individual is questioned or arrested promotes accountability because lawyers serve as a check-and-balance, on the spot, against excess and abuse by law enforcement officers. Law enforcement agencies command far more physical and tangible power than any other public service agency, and hence a mechanism for accountability is all the more necessary...these provisions must be zealously safeguarded.[62]

Section 28A also protects the privacy of an arrested person and his lawyer during consultation 'in so far as practicable' at the detention centre. The section also specifically states that the police shall provide the necessary assistance for such communication and consultation free of charge. However, it must be pertinent to underline here that the amendment does not provide for compulsory legal aid to an arrested person immediately upon his arrest. This is because the Legal Profession Act 1976 does not have a provision for this, as is normal practice in the United Kingdom and many other jurisdictions. In the UK,

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[62] [1975] 2 MLJ 198.

public funding in a form of advice and representations at all stages of the criminal process is provided under the Legal Aid Act 1988.[63] Although the National Human Rights Commission of Malaysia (SUHAKAM) has proposed for the implementation of compulsory legal aid in Malaysia, there is still no further development so far.[64]

Therefore, access to legal advice still remains a problem – despite being a signatory to the UDHR, Malaysia still does not act in accordance with the Body of Principles for the Protection of All Persons Under Any Form of Detention which stipulates that 'a person shall not be kept in detention without being given effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law'.[65] The Body of Principles further provide that 'if a detained person does not have a legal counsel of his own choice, he shall be entitled to have a legal counsel assigned to him by a judicial or other authority in all cases where the interests of justice so require and without payment by him if he does not have sufficient means to pay'.[66] The problems faced by police detainees and their lawyers were demonstrated on 7 May 2009, after a candlelight vigil in Kuala Lumpur. In that incident, the police detained a group of people alleged to have been involved in it. Also detained were five members of the Bar Council Legal Aid Centre who had gone to the police station to find out about the detainees. In defence, the Bar Council President said that the lawyers 'were in the course of carrying out their professional obligations as advocates

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[63] *Cheney and others, (n 32).*
[64] SUHAKAM, 'Follow-up Forums on the Right to an Expeditious and Fair Trial' (2006) www.suhakam.org.my accessed 14 August 2007.
[65] Body of Principles, principle 11.
[66] Body of Principles, principle 17.

and solicitors' and the arrests by the police 'were clearly a form of harassment to obstruct the lawyers from discharging their responsibility to provide legal representation to their detained clients'. He further alleged that the police's action was in breach of section 28A (4) CPC, which had affected the 'fundamental right of lawyers to have access to their clients'.[67] A public inquiry was subsequently held by SUHAKAM with the aim:

> to ascertain, among others, whether the detention and arrest of the lawyers was a denial of legal representation, a breach of Art 5 of the Federal Constitution and section 28 of the Criminal Procedure Code, which is tantamount to a violation of human rights'.[68]

Pursuant to the public inquiry, SUHAKAM found that the arrest of the five lawyers on 7 May 2009 by the police 'to be unlawful, unjustified and a violation of their human rights in contravention of Art 5 (3) of the Constitution and s 28A CPC'.[69] Thus, in regards to access to legal advice or representation, the problem is far greater for those detained under suspicion of being 'drug dependants'. This important aspect of a drug user's constitutional rights will be discussed in greater detail below (Right to Legal Representation under the 1983 Act).

2.2.4 Detention under the 1983 Act

Upon arrest, a suspected 'drug dependant' must undergo a drugs test within 24 hours of his arrest.[70] However, if the test cannot be completed or the result of

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[67] 'Lawyers had right to defend clients' *The Sun* (used by permission) The Malaysian Bar webpage www.malaysianbar.org.my accessed 20 May 2009.
[68] Bernama, 'SUHAKAM adjourns inquiry after getting 'hot under the collar'' (Kuala Lumpur 8 February 2010) www.bernama.com accessed 8 February 2010.
[69] Press Release: 'SUHAKAM Affirms Right to Legal Representation, Bar Council Legal Aid Centre Lawyers Vindicated' The Malaysian Bar webpage www.malaysianbar.org.my accessed 18 May 2010.
[70] 1983 Act, s 3 (2).

such test cannot be obtained within 24 hours, the suspect must be produced before a magistrate. This is either to obtain an order to detain him further for a period not exceeding 14 days or to allow the magistrate to release him on bail, with or without surety, to attend at such time and place as stated in the bond, to complete the test procedures.[71] The purpose of the detention is to ascertain whether the suspect is a 'drug dependant' in accordance to the 1983 Act, so that an order by the court could be made for that person to be treated for his drug dependence at a *Puspen* centre. Here, under the statutory provision, for a magistrate to make an order, he or she must find that it is 'necessary to detain the suspect for the purpose of undergoing tests', so long as the detention period does not exceed 14 days.[72] During that period, an assessment will be conducted to determine whether the suspect is a 'drug dependant' or not. This includes a confirmatory drug test done at the laboratory, a medical examination by a registered medical doctor and an interview session with the AADK officer.

Findings from the case study show that although in some cases test may be completed within 24 hours, the results cannot be obtained on the same day. As a result, the suspects will have to be produced before a magistrate for an order to further detain the suspects.[73] During the research project focus group, participants were asked about their personal experiences upon arrest and detention. One participant explained his experience:

> P1: My parents had reported me to the police. At 4 a.m., the police came to the house and took me away. I was taken to the police station. The police took my urine that morning. The same police officer that had arrested me took my urine. The police kept me at the lock-up. The next day I was taken to the court to be remanded. The third day, I was taken to

[71] 1983 Act. s 4 (1) (a) (b).
[72] ibid.
[73] ibid.

> the hospital. The doctor interviewed me. The doctor asked me how long I have been taking drugs and if I had any illness. After that, I was sent back to the lock-up. On the fifth day, an AADK officer came and interviewed me at the lock-up. I was detained at the lock-up for 14 days. I was given 14 days by the magistrate. Only on the 14th day, I was told that I had tested positive. The police do not ask you whether it is your first time of taking drugs. They would only ask you 'did you take it or not?'[74]

The research project analysed the number of days taken to complete the whole process. Based on data gathered from the case files, the time frame for a drug user to be assessed from arrest to receiving a court-mandated order to undergo compulsory treatment is normally between 9 to 12 days. This is within the 14 days allowed by the statutory provision.[75]

An on-site screening test at a police station can be completed within approximately one hour on the day of arrest. However when the arrest is during the night, screening could only be done on the following day. Once the urine specimen has been collected, it is sent to the Pathology Department on the same day. Usually, the urine test results can be obtained on the next day. Suspects whose urine tested positive would be sent to a temporary police lock-up ie a detention centre on the same day of arrest.[76] However interviewing the detainees at the detention centre was only done after six to nine days. Normally, the detainees would be brought for their medical examination after the interview session with an AADK officer. Data from the case files revealed that this would normally be either on the 9th, 10th or 11th day of detention.

The fact that a suspect who has not been criminally charged, is detained for a period of 9 to 12 days solely for the purpose of awaiting the result of a drugs test and to undergo a medical examination is undoubtedly controversial in

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[74] Excerpt from the research project's focus group. See Appendix.
[75] 1983 Act. s 4 (1) (a) (b).
[76] Prison Act 1995 s 7 (1) - A police lock up is for the confinement of persons remanded or sentenced to a short term of imprisonment not exceeding one month.

that it is an infringement of a person's liberty guaranteed under Article 5 (1) of the Constitution. It should be borne in mind here that under the civil commitment (compulsory treatment of drug users) procedure, the detention of drug users should only be for a short period and once treatment such as detoxification has been given, they should be released immediately.[77]

The whole legal process in regard to the compulsory treatment of drug users is based upon the police standard operating procedures. This is because the 1983 Act does not stipulate specific measures that must be followed by the government agencies involved ie the police and the AADK. Therefore, from the point of arrest and throughout the assessment period, a drug user will be dealt with in accordance with the Malaysian criminal law and procedure, bearing in mind that at all times, the right of an individual is guaranteed under Article 5 of the Constitution. Although there is no mention of the word 'procedure' in Article 5 (1), it shall be construed that the phrase 'in accordance with law' incorporates procedure.

In *Re Tan Boon Liat @ Allen*, Lee Hun Hoe CJ held as follows:

> the expression 'in accordance with law' in Art 5 of our Constitution is wide enough to cover procedure as well. Here the point is not whether the question of procedure is more important under one Constitution than under the other. If the expression 'in accordance with law' were to be construed as to exclude procedure then it would make nonsense of Art 5.[78]

In that case, Lee Hun Hoe CJ referred to *The Reverend Thomas Pelham Dale's Case*:[79]

> Brett LJ observed at p 461: Then comes the question upon the habeas corpus. It is a general rule, which has always been acted upon by the

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[77] Porter et al, *The Law and Treatment of Drug and Alcohol Dependant Persons-A Comparative Study of Existing Legislation* (WHO, Geneva 1986).
[78] [1977] 2 MLJ 108 cited in Gopal Sri Ram J (Court of Appeal) in 'The Workman and the Constitution', (2007) 1 MLJ clxxii.
[79] [1881] 6 QBD 376, 461,469 and 470.

> Courts of England, that if any person procures the imprisonment of another he must take care to do so by steps, all of which are entirely regular, and that if he fails to follow every step in the process with extreme regularity the court will not allow the imprisonment to continue. Cotton LJ in supporting this stated at p 469: I quite agree with Brett LJ, that when persons take upon themselves to cause another to be imprisoned, they must strictly follow the powers under which they are assuming to act, and if they do not, the person imprisoned may be discharged, although the particulars in which they have failed to follow those powers may be matters of mere form. Here, however, the departure from the correct procedure is not, in my opinion, a mere matter of form, but is a matter of substance.

Thus, if a person who has been arrested and detained under police custody is subject to improper conduct by the police that is non-compliance by the police of the relevant procedures during arrest and remand proceedings, then that person's detention is unlawful. Inevitably, an unlawful detention leads to an infringement of personal liberty and freedom guaranteed under Article 5 of the Constitution. Thus, it is necessary to look at the relevant provisions in the CPC as well as police practices in order to see the extent to which the rights against unlawful detention of drug users are being protected.

Quite a number of people detained under the 1983 Act have applied for a writ of *habeas corpus*: this is in accordance to the protection guaranteed under Article 5 (2) of the Constitution; 'where complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him'.

In *Che Ibrahim Che Ismail* v *Menteri Hal Ehwal Dalam Negeri Malaysia & Anor*, the applicant was arrested by the police on suspicion of being a 'drug dependant'.[80] He was produced before a magistrate on 24 April 2000 and remanded further until 30 April 2000 for 'purposes of undergoing medical test to

[80] (2002) 2 CLJ (Malaysia).

ascertain whether he was a drug dependant or otherwise'. By the end of the detention period, the applicant had still not completed the medical test. It was reported that the medical test was only conducted on 20 August 2000, which was more than four months after being arrested (the magistrate had released the applicant on bail with surety). Based on the medical test report, the magistrate subsequently ordered the applicant to undergo treatment and rehabilitation for a period of two years and subsequently police supervision for another two years. The applicant had filed a writ of *habeas corpus* for his unlawful detention at the *Puspen* centre on the grounds that, *inter alia*, 'the medical report, based on an examination conducted way out of time, contravened the Act, and thus was flawed'. In this case, the High Court judge granted the writ of *habeas corpus.* In his judgment, Suriyadi Halim Omar J held as follows:

> Pursuant to article 5(3) of the Federal Constitution, a person arrested shall be informed as soon as may be of the grounds of his arrest. In this case the detainee (applicant) was only medically tested on 20 August 2000. There was some doubt as to whether that test was in relation to a totally new set of facts or based on the original arrest. Surely by the time the hospital had checked on the detainee (applicant) in August, any drugs consumed on 24 April 2000 would have dissipated. Not only was no explanation supplied pertaining to this doubt but also the cause of the delay. That being so, bearing in mind the harsh and draconian repercussion on the detainee (applicant), for any non-compliance of the law, the court must construe that shortcoming in a manner most favourable to the detainee (applicant).

Thus, it is significant to note here from the above case that where a person who has been unlawfully detained for purposes under the 1983 Act, and then ordered to undergo treatment at a *Puspen* centre is a clear contravention of Article 5 of the Constitution, 'no person shall be deprived of his life or personal liberty save in accordance with law'.

2.2.5 Similar provisions

It is interesting to note that in 2007, the Royal Commission proposed for a Code of Practice – 'A Principles and Code of Practice Relating to the Arrest and Detention of Persons' to be adopted by the Royal Malaysian Police (RMP) for the prevention of torture and abuse of detainees. Failure by the police to comply with the Code while performing their public duty shall be subject to disciplinary proceedings. One of the main points that had been proposed by the Commission was for an independent custody officer, who shall be responsible for the 'welfare and custody of every detainee, procedures for police interview including tape recordings, video surveillance and access to lawyers'.[81] However, as of today the recommendation has yet to be implemented by the RMP.

Ensuring the safeguarding of a suspect's rights when detained at a police station or in other detention centres presents many problems. This issue has been thoroughly discussed above, with a selection of related judicial reviews of non-compliance with the provisions enshrined under the Constitution. Thus, Code of Practice C, PACE is an example of how the UK has sought to resolve the issue. Code C stipulates as follows:

> 3.1 When a person is brought to a police station under arrest or arrested at the station having gone there voluntarily, the custody officer must make sure the person is told clearly about the following continuing rights, which may be exercised at any stage during the period in custody:
>
> (i) the right to have someone informed of their arrest as in section 5;
> (ii) the right to consult privately with a solicitor and that free independent legal advice is available;
> (iii) the right to consult these Codes of Practice. See Note 3D

Hence, it is the duty of a custody officer to ensure that any detention is compliant with Article 5 of the ECHR and further that the detained person is

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[81] *Amnesty International Malaysia and Suaram, (n 48).*

aware of his rights as stated above. This provision is consistent with Article 6 (3) of the ECHR, which states as follows:

> Everyone charged with a criminal offence has the following minimum rights :
>
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
> (b) to have adequate time and facilities for the preparation of his defence;
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has no sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same condition as witnesses against him;
> (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

These rights are enhanced for the vulnerable. Code C stipulates that if a person is arrested who may be 'mentally disordered or otherwise mentally vulnerable';[82] an assessment of that person's state of mind shall take place at the police station as soon as possible by 'an approved social worker and a registered medical practitioner'.[83] That person shall not be detained further once the assessment has been completed. This has implications for drug users.

The mental health case of *X* v *UK*,[84] has important implications which could be applied to those detained under the Malaysian 1983 Act. In that case, a mental patient challenged the validity of his continued detention order at a secure hospital pursuant to section 37 of the Mental Health Act 1983.[85] The case was brought before the ECtHR which held that the 'the procedures involved in the review of this patient's continued detention were in breach of Article 5 (4) of the ECHR that protects the right of a person whose liberty has been deprived by

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[82]Mental Health Act 1983, s 136.
[83] Code C, s 3.16.
[84] [1982] 4 EHRR 188.
[85] *Cheney and others (n 32).*

arrest or detention through legal proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful'....'.[86] As a consequence of the ECtHR's decision in *X* v *UK* (above), several amendments were made in regards to the continued detention procedures under the Mental Health Act 1983, i*nter alia* –

> these amendments provide that on the coming into force of the Act, Mental Health Review Tribunals will be empowered to consider the substantive grounds for the continued detention of a restricted patient, and will be required to order discharge where appropriate.[87]

The significance of the decision in *X* v *UK* in relation to Malaysia's case is that procedures which are inconsistent with the principles of human rights, for instance, unnecessary prolonged detention of drug users, should be reviewed, if not repealed. It must be stressed upon here that any legal procedures must not in any way compromise the principles of human rights, to the extent that they amount to serious violations of these principles.

The following section will discuss the consequences of a continued detention in police custody, with primary focus on the inhumane, cruel and degrading treatment experienced by drug users in Malaysia.

3. Inhumane, cruel and degrading treatment

Extended detention can have serious consequences for a drug detainee (drug user). According to Gomez, the prolonged detention of detainees whilst under police custody beyond 24 hours in Malaysia amounts to mistreatment:

> Long remand periods have been identified as a contributing cause to ill-treatment, poor emotional and physical health of those detained, and shockingly, deaths in custody'. [88]

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[86] ibid.
[87] cited in *Cheney and others, (n 32).*
[88] Jerald Gomez, 'Police Powers and Remand Proceedings' [2003] 2MLJ cxxix.

Prolonged detention of detainees raises several issues such as improper treatment of detainees by the police and the lack of medical facilities for those who suffer from withdrawal symptoms. Such issues inevitably affect the fundamental principles of human rights, which protect against inhumane, degrading and cruel treatment.

3.1 Fundamental principles of human rights against inhumane, cruel and degrading treatment

The Malaysian Constitution does not have a provision proscribing 'inhumane, degrading and cruel treatment', and so it is important to draw the attention to other international human rights instruments. It should be underlined here that the safeguards enshrined under Article 5 of the Constitution must be read together with other principles of human rights 'to the extent that it is not inconsistent with the Constitution'.[89] This interpretative principle can be seen in *D.H. and Others* v *the Czech Republic*,[90] where the ECtHR referred to the ICCPR, the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Rights of the Child when making its decision on issues relating to discrimination, racial segregation and apartheid. The international instruments which have a provision proscribing 'inhumane, cruel and degrading treatment' include Article 5 of the UDHR, which states that 'no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'. Articles 7 and 9 of the ICCPR further reaffirm this right where no one shall be subjected to torture or to cruel, inhuman or degrading treatment

[89] Human Rights Act, s 4 (4) (Malaysia).
[90] [GC] no. 57325/00 (13 November 2007) cited in European Court of Human Rights Annual Report 2008 www.echr.coe.int.

or punishment or to arbitrary arrest, detention or exile respectively. Such right is also guaranteed under Article 3 of the ECHR as an absolute right.[91]

In regards to the above rights, it is necessary to discuss what constitutes the minimum threshold of 'cruel, inhuman and degrading treatment'. The Malaysian courts, in interpreting these rights, should adopt the same benchmarks as other international courts, such as the ECtHR. The purpose is to be able to establish whether such ill treatment received by the drug detainees has violated the principles of human rights enshrined under the Constitution as well as the international human rights standards. As mentioned in the previous chapter, degrading treatment should be interpreted widely. This approach is seen in the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment that described 'cruel, inhuman or degrading treatment or punishment' as follows:

> ...to extend the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time.[92]

The following section will consider the 'lock up' rules and the conditions of detention and in particular, medical treatment to assess whether Malaysia violates its own national or the international standards.

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[91] Article 3 of the ECHR states that 'no one shall be subjected to torture or to inhuman or degrading treatment or punishment'.
[92] UN Body of Principles, principle 6.

3.2 *Lock-Up Rules 1953*

Following a magistrate's order to detain a drug user for purposes of undergoing a drug test,[93] that person will be remanded in custody at a detention centre, which is actually a temporary police lock-up. (For the purpose of this section, a drug user shall be referred to as a drug detainee). As has been discussed earlier in the chapter, a drug detainee will normally be detained between 9 to 12 days at the detention centre (based on the findings from the case study). At this juncture, it is necessary to look at the Lock Up Rules 1953 (1953 Rules),[94] which regulate the administration of all police lockups in Malaysia. The 1953 Rules also apply to a drug detainee, whose detention is for undergoing a drug assessment to confirm whether he is a 'drug dependant'. The aim of this section is to examine whether the police conform to the provisions of the 1953 Rules and whether the Rules themselves conform to international standards.

Findings from the case study reveal that all the drug detainees wore lock-up uniforms (orange t-shirts and dark trousers). When they were called to be interviewed by the AADK officer, they came from their cells to the courtyard bare-footed. Physically they looked thin, scruffy and frail. The interview took approximately two hours under the hot sun. Since the researcher was not allowed to observe the conditions of the drug detainees inside the detention centre, reports by SUHAKAM on Internal Security Act (ISA) detainees were examined as the 1953 Rules also apply to ISA detainees. Rule 94 of the Internal Security

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[93] 1983 Act, s 4.

[94] Lock-up Rules 1953 is regulated under s.8 (3) Prison Ordinance 1952. The Prison Ordinance 1952 was subsequently repealed in 1995 with the coming into force of the Prison Act (Act 537). Notwithstanding the 1995 Act, all subsidiary legislation, regulations made under the Ordinance shall continue to remain in force and to have effect until amended, repealed, rescinded, revoked or replaced by the Act (s 68). Ku Chin Wah, 'Police Lock-ups' (2003) Journal of the Royal Malaysia Police Senior Officers' College mpk.rmp.gov.my/jurnal/2003/policelockups accessed 24 June 2007.

(Detained Persons) Rules 1960 states as follows:

> Where the place of detention of a detained person is a lock-up appointed under section 8 of the Prison Ordinance, 1952, these rules shall not apply to such detained person or to such lock-up but the Lock-Up Rules, 1953, shall apply to such detained person in such lock-up.[95]

Under the 1953 Rules, all remand prisoners or detainees at police lock-ups are accorded the same treatment. Detainees are given three meals a day in accordance with the food rations provided in prisons. They are required to wear standard attires, namely shorts and a collarless t-shirt. No bedding is provided, except for blankets and the detainees have to sleep on the cement floor of the lock-up.

3.2.1 Ill-treatment

There are too many cases of ill treatment of detainees whilst in police custody.[96] In one of its public inquiries into the conditions of detainees whilst in detention, SUHAKAM applied the above UN Body of Principles as its guideline and stated as follows:

> slapping of detainees, forcible stripping of detainees for non-medical purposes, intimidation, night interrogations, and deprival of awareness of place and the passage of time, would certainly fall within the ambit of cruel, inhuman and degrading treatment, by virtue of the need to interpret this term so as to extend the widest possible protection to persons in detention.[97]

According to the RMP statistics, between 2003 and 2007, 1,535 persons died in prisons, rehabilitation centres and immigration detention centres.[98] In

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[95] SUHAKAM, 'Report of the Public Inquiry into the Conditions of Detention under the Internal Security Act 1960' (2003) www.suhakam.org.my accessed 18 December 2009.
[96] SUHAKAM, 'Law Reform Report' (2001) www.suhakam.org.my accessed 18 December 2009.
[97] ibid.
[98] cited in The Malaysian Bar webpage www.malaysianbar.org.my accessed 15 November 2009.

2010, the total prison population (including remand prisoners) is 36,040 across 31 prisons in the country.[99] In 2003, the Police Watch and Human Rights Committee of the Asian Human Rights Commission conducted a report on Malaysia with regard to the death and torture of detainees whilst in custody. It revealed that the detainees had received 'inhumane, degrading and cruel treatment'. Some extreme cases have even led to death in custody. Based on the report, more than two deaths were reported every month in police lock-ups and the figure is just 'the tip of the iceberg'.[100] It was reported that the actual figure could be at least one person killed or died per week as many cases were either unreported or families were unaware of such deaths.[101] Another report by the International Harm Reduction Association[102] indicate that human rights abuses in regards to the treatment of drug users are common in Asian and former Soviet Union countries.

> Flogging, chaining, isolation without medication, forced labour for 19 hours a day, psychiatric experimentation without informed consent - these are just some of the methods that countries employ to 'treat' drug users. These measures ... are not based on any evidence of effectiveness and violate fundamental human rights, including the right to health and the right to be free from torture and cruel, inhuman and degrading treatment and punishment.[103]

In short, the conditions in police temporary lock-ups in Malaysia are appalling. The standards are far below the standards stipulated by the UN Standard Minimum Rules for Treatment of Prisoners. Based on the above reports

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[99] 'Home Ministry to Study Overcrowding in Prison' Official Website of Chief Secretary to the Government of Malaysia www.pmo.gov.my/ksn/?frontpage/news/detail/3049 accessed 24 August 2010.
[100] AHRC, 'Malaysia: Death And Torture In Custody' (2003) www.ahrchk.net/ua/mainfile.php/2003/458 accessed 15 November 2009.
[101] ibid.
[102] IHRA, 'Special Issue; Global Harm Reduction' (2009) IHRA 20th International Conference, Thailand.
[103] ibid.

and the researcher's own findings, it can be concluded that drug detainees in Malaysian lock-ups are subject to inhumane, cruel and degrading treatment.

3.2.2 Medical treatment

A specific aspect of the condition of detention is, of course, medical treatment. The Rules also provide for medical assistance or the right to treatment for detainees upon entering a lockup - 'a medical officer shall visit each lockup whenever requested to do so by the officer-in-charge, and he shall enter in the Journal his comments on the state of the lockup and the prisoners confined therein'.[104] According to rule 10, a medical officer shall examine every detainee (prisoner) as soon as that detainee arrives at the detention centre in order to confirm that he or she is fit to be incarcerated. The medical officer shall also visit the lock up whenever requested to do so.[105] Rule 14 also states that the prison authorities should inform detainees of the availability of medical assistance. Both rules are in accordance with the UN Standard Minimum Rules:

> The medical officer shall see and examine every prisoner as soon as possible after his admission and thereafter as necessary, with a view particularly to the discovery of physical or mental illness and the taking of all necessary measures; the segregation of prisoners suspected of infectious or contagious conditions; the noting of physical or mental defects which might hamper rehabilitation, and the determination of the physical capacity of every prisoner for work.[106]

The extent to which medical assistance is provided to drug detainees could not be ascertained by the research project. Furthermore, the AADK social

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[104] The Inspector-General's Standing Order (IGSO) A120 para 32 requires the OCPD to request the local medical officer of health to inspect all gazetted lockups once a week. Ku Chin Wah, 'Police Lock-ups' (2003) Journal of the Royal Malaysia Police Senior Officers' College mpk.rmp.gov.my/jurnal/2003/policelockups accessed 24 June 2007.
[105] Lock Up Rules, rule 38.
[106] UN Standard Minimum Rules, rule 24.

report[107] does not mention the general health of drug detainees whilst in custody, whether they experience withdrawal symptoms or whether they are given any form or type of treatment or medical assistance. However one of the participants in the focus group talked about his experience when being remanded at a police lock up:

> P3: The AADK officer came to see us on the seventh day (at the detention centre). After that, we were brought to see the doctor (medical examination). During those seven days, we only saw the police. There was no treatment, if we were having withdrawal symptoms, the police just let us be.[108]

For this group of drug detainees, withdrawal symptoms are likely to be a common experience. A British study of drug detainees in police custody reported that more than half of the respondents admitted to getting withdrawal symptoms from a drug after more than 12 hours of not using it. A small number of them felt withdrawal symptoms within six hours of last using a drug. Polydrug users (heroin and cocaine) experienced more withdrawal symptoms than single drug users (heroin).[109] Withdrawal symptoms tend to last between 7 to 10 days.[110]

Arrested persons who are detained in police station lock ups should get the same standard of medical care as any other member of the public. According to Article 12 of the ICESCR 'every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity'. In fact, the state is under the obligation:

> to respect the right to health by, *inter alia*, refraining from denying or limiting equal access for all persons, including prisoners or detainees,

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[107] This report is normally prepared by an AADK officer based on an interview with a drug detainee. See Chapter 5 for further information.
[108] Excerpt from the research project's focus group transcript. See Appendix.
[109] Michael Gregory, 'Characteristics of drug misusers in custody and their perceptions of medical care' (2007) Journal of Forensic and Legal Medicine 14, 209-212.
[110] Royal College of Psychiatrists and the Royal College of Physicians, *Drugs: dilemmas and choices* (Gaskell, London 2000).

> minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative health services; abstaining from enforcing discriminatory practices as a State policy...[111]

A person who is under the influence of drugs may require emergency care especially if he or she is experiencing withdrawal symptoms. According to Porter et al, drug users confined under civil commitment for purpose of treatment should be given treatment even whilst in police custody.

> A drug dependent person may be incapacitated while under the influence of drugs and in need of medical care. He may also require emergency care as a result of acute withdrawal symptoms and be in need of detoxification. Treatment for such alcohol or drug emergencies should be for short periods only. The person should be immediately released from detention on the completion of medical treatment (detoxification). [112]

Based on the information received by the researcher from the police, drug detainees in police custody have to undergo withdrawal symptoms without any forms of relief or medication.[113] This form of detoxification is called the 'cold turkey' method. A former drug user in his book describes his personal experience of the 'cold turkey':

> Actual withdrawal starts when the last fix wears off but there is no pain just yet, rather a sense of exhaustion that leads to falling asleep. Withdrawal symptoms break the sleep after which sleep does not return generally for at least 10 to 14 days. The gnawing craving for that fix is unbearable, soon yawning sets in with the eyes tearing and the nose running and the jaw hurting. There is severe discomfort, the joints begin to hurt, the back especially. Soon there is bowel movement and you start to purge and vomit...[114]

In medical terms, detoxification is defined as follows:-

> a medically supervised procedure intended to insure a safe, effective, and humane transition to a drug or alcohol free state. Failure to initiate detoxification of physiologically dependent persons following cessation

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[111] ICESCR, General Comment No 14 (2000).
[112] *Porter et al (n 77).*
[113] *Statement by Sergeant Osman, (n 27).*
[114] Christopher A.Sekar, *Handbook on Addiction Counseling* (2nd edn Izmo Graphics Associates 2005). The author is currently a Certified Substance Abuse Counsellor for Gleneagles Medical Centre, Kuala Lumpur.

> of use results in the onset of acute withdrawal. The nature and intensity of withdrawal symptoms vary depending on the substance, duration, and quantity of use. Symptoms range from mild discomfort to severe pain and death. Cocaine and stimulant withdrawal symptoms range from mild dysphoria to severe irritability, sleep disturbance, depression, and frank psychosis. Opiate withdrawal typically begins with yawning, lacrimation, and rhinorrhea and progresses to nausea, vomiting, diarrhea, abdominal pain, myalgias, fever, tachycardia, and hypertension.[115]

In other words, the detoxification process is a process that supports 'safe and effective discontinuation of opiates while minimising withdrawals'.[116] It is essential that the drug users be supervised whilst undergoing detoxification.[117] Different drugs may cause different forms of withdrawals. On the one hand, withdrawal from heroin or morphine may lead to severe discomfort, fever, runny nose, diarrhoea, fine muscle tremor.[118] On the other hand, withdrawal from drugs such as benzodiazepines and barbiturates can be more hazardous or life threatening.[119]

Besides detoxification, another form of treatment is where other drugs are being used as a substitute to lessen the pain and suffering during withdrawal. Such an approach also enables drug users to be 'integrated into an ongoing rehabilitation programme'.[120] For instance, countries such as England, Scotland and Australia provide oral treatment such as opiate substitution treatment for drug offenders in incarceration. In Malaysia there is the National Methadone

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[115] Fiscella et al, 'Benign Neglect or Neglected Abuse: Drug and Alcohol Withdrawal in US Jails', (2004) Journal of Law, Medicine and Ethics Vol 32.
[116] Department of Health (England) and the devolved administrations, *Drug Misuse and Dependence: UK Guidelines on Clinical Management* (Department of Health (England), the Scottish Government, Welsh Assembly Government and Northern Ireland Executive, London 2007).
[117]Gemma Kothari, John Marsden and John Strang, 'Opportunities and Obstacles for Effective Treatment of Drug Misusers in the Criminal Justice System in England and Wales' (2002) The British Journal of Criminology Vol 42 No 2 412-432.
[118] *Sekar, (n 115).*
[119] Alex Stevens, Christopher Hallam and Mike Trace, 'Treatment for Dependent Drug Use: A Guide for Policymakers' (2006) Beckley Foundation.
[120] ibid.

Maintenance Therapy (MMT) project that has produced positive results, for instance, reducing the risk of HIV infection amongst injecting drug users (IDUs) and relapse rates.[121] Such results are striking when compared to drug users who received treatment at *Puspen* where 80 to 100 per cent had gone back to using drugs.[122] Quite recently, another treatment programme called the Methadone Drug Substitution Therapy (MDST) was initiated by the University Malaya Centre of Addiction Sciences (UMCAS) to complement the MMT programme. The main targeted group is the heroin users with the objective of placing 75,000 drug users on the MDST programme by 2015.[123] However, despite such innovative developments, there is no such provision for drug users under remand, thus, the government should consider providing opiate substitution therapy.

Another health issue of serious concern is the transmission of HIV/AIDS among incarcerated persons in prison. As has been discussed in the previous chapter, Malaysia has the second highest HIV prevalence among the adult population in the Western Pacific regions.[124] Most of them are injecting drug users (IDUs). In 2003, a study of HIV infection was conducted among drug trainees in *Puspen* centres.[125] Self-administered questionnaires were used to gather information from drug trainees. The total response rate was 89 per cent. The study revealed that 67 per cent of the respondents had used drugs by injection. Out of the total IDUs, 95 per cent had cleaned their needles before re-use. However, 93 per cent had lent their needles to a close friend. Another local

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[121] 'Helping The Addicts With Methadone' *Malaysian National News Agency (Bernama)* 21 April 2009 www.bernama.com.my.
[122] Nick Crofts, 'Drug Treatment in East and South East Asia: the need for effective approaches' (2006) UNODC Technical Resource Centre for Drug Treatment and Rehabilitation Australia.
[123] R.S.Kamini, 'New Centre to Treat Addicts' *New Straits Times* 9 April 2009.
[124] WHO Annual Report 2003 cited in Mahmud Mazlan, Richard S.Schottenfeld and Marek C.Chawarski, 'New Challenges and Opportunities in Managing Substance Abuse in Malaysia' (2006) Drug and Alcohol Review 25, 473-478.
[125] Z.Wahab, 'Epidemiology and behavioural study of HIV infection among drug users in Peninsula Malaysia' (2003) Ministry of Health Malaysia.

study that was conducted in Muar, Johore revealed that from the 157 heroin users who sought treatment, 19.2 per cent were diagnosed as being infected with HIV seropositive, whilst a greater number of users (89.9 per cent) had hepatitis C and 21.4 per cent suffered from hepatitis B and tuberculosis (TB).[126] However, it is not known whether these users had ever been admitted to *Puspen* centres or prisons before. According to a study conducted among IDUs in Bangkok, the likelihood of transmission of the HIV infection is far greater amongst IDUs who are in prison.[127] However, another study revealed that the period prior to incarceration that is during detention at police cells have a higher risk for HIV infection:

> Sharing needles while in the police holding cell was an independent risk factor for prevalent HIV infection. Although previous studies have indicated that sharing injecting equipment while incarcerated is a key risk factor for HIV infection in Thailand, the exact time of infection could not be determined in these studies. To our knowledge, our study is the first to pinpoint excess risk during the holding period before incarceration. This finding confirms our hypothesis that high risk exposures such as borrowing needles and injecting drugs with multiple partners in the holding cell are probably attempts to alleviate the severe symptoms of drug withdrawal. A possible confounding factor is that prisoners in holding cells in Bangkok may have more opportunity to inject owing to lower security at this stage of their remand.[128]

Based on what has been discussed above, it can be concluded that the 1953 Rules have not provided an effective regulatory regime in that they have not been fully adhered to by the authorities. The issues affecting the health and general well being of drug detainees in the Malaysian police lock ups have been

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[126] Mahmud Mazlan, Richard S.Schottenfeld and Marek C.Chawarski, 'New Challenges and Opportunities in Managing Substance Abuse in Malaysia' (2006) Drug and Alcohol Review 25, 473-478.

[127] Kachit et al, 'Incarceration and risk for HIV infection among injection drug users in Bangkok' (2002) Journal of Acquired Immune Deficiency Syndromes Vol 29 Issue 1.

[128] Buavirat and colleagues cited in Richard Pearshouse, 'Compulsory Drug Treatment in Thailand: Observations on the Narcotic Addict Rehabilitation Act B.E. 2545' (2002) Canadian HIV/AIDS Legal Network.

significantly neglected and should be seriously reviewed by the government. As has been considered earlier (above), the UN Standard Minimum Rules states that access to medical service and psychiatric care should be given to 'every prisoner as soon as possible after his admission and thereafter as necessary...'.[129] Such care and treatment according to the Body of Principles for the Protection of All Persons Under Any Form of Detention should be as of right that is provided free of charge.[130]

'Cold turkey' detoxification without any form of relief or medication is serious mistreatment that brings about significant implications for the drug detainees. These include 'needless pain and suffering, medical morbidity, and in some instances, death'.[131] Lack of proper medical treatment may cause the detainee to be incapacitated and may not be able to function normally.[132] The mental state of a detainee especially during the critical period mentioned above may impair his or her ability to cope with the interview session. This could have an adverse effect on the information given during the interview such as 'self-incriminating answers and false confessions'.[133]

It must be highlighted here that the issue of pain and suffering of drug detainees due to the 'cold turkey' detoxification and lack of medical treatment has not been judicially reviewed by the Malaysian courts. Thus, it is significant to address this issue by looking at a fairly recent UK case, where six drug offenders (claimants) in a British prison took legal action against the Home Office for alleged negligent treatment amounting to assault, as a result of the

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[129] UN Standard Minimum Rules, rule 24.
[130] UN Body of Principles, principle 24.
[131] *Fiscella et al, (n 116).*
[132] *Porter et al, (n 77).*
[133] Sophie E.Davison and Michael Gossop, 'The Management of Opiate Addicts in Police Custody' (1999) Med Sci Law Vol 39 No 2.

'cold turkey' detoxification that they had gone through whilst in prison. The claimants had previously been under 'alternative treatment' prior to incarceration. They also claimed that their rights had been infringed, as they did not give consent during detoxification. It was reported that the Home Office had 'reluctantly decided to settle [the matter] out of court to minimise costs to the taxpayer'. The report also stated the remarks made by the then Shadow Home Secretary that 'the government did not want to be "embarrassed by losing such a case under its own human rights legislation"'.[134]

Therefore the conditions encountered by drug detainees, including overcrowding and violent acts as well as the 'cold turkey' experience and lack of adequate medical assistance lead to the conclusion that the detention regime (including police lock ups and *Puspen* centres) falls within the ambit of 'inhumane, cruel and degrading treatment' which clearly violates Article 5 of the UDHR, Articles 7 and 9 of the ICCPR and Article 3 of the ECHR. It is clear that the implementation of the compulsory treatment of drug users in Malaysia has not been consistent with the principles of human rights. Citing the UNODC and WHO:

> drug dependence treatment services should comply with human rights obligations and recognise the inherent dignity of all individuals. This includes responding to the right to enjoy the highest attainable standard of health and well-being, and ensuring non-discrimination . . . [a]s any other medical procedure, in general conditions drug dependence treatment, be it psychosocial or pharmacological, should not be forced on patients. Only in exceptional crisis situations of high risk to self or others, compulsory treatment should be mandated for specific conditions and period of time as specified by the law.[135]

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[134] BBC News 'Payments for prison 'cold turkey'' (13 November 2006) news.bbc.co.uk accessed 1 June 2008.

[135] UNODC and WHO cited in S.Takashashi, 'Drug Control, Human Rights and the Right to the Highest Attainable Standard of Health: By No Means Straightforward Issues' (2009) Human Rights Quarterly Volume 31 No 3.

Thus the Malaysian government has the obligation to ensure that the DIP of drug users is consistent with the principles of human rights. The inherent right of these drug users to enjoy the highest attainable standard of health and well-being must not be compromised in any way. They also have the right to be informed of the types of treatment available for them and to decide on such treatments. In short, compulsory treatment of drug users must be consistent with the fundamental principles of human rights in order to justify coercive treatment.[136] Such treatment could only be justified if effective, adequate and humane treatment is available.[137]

3.3 Overcrowding in Puspen centres

Under the UN Standard Minimum Rules,[138] each prisoner is entitled to a minimum standard of accommodation:

> Where sleeping accommodation is in individual cells or rooms, each prisoner shall occupy by night a cell or room by himself. If for special reasons, such as temporary overcrowding, it becomes necessary for the central prison administration to make an exception to this rule, it is not desirable to have two prisoners in a cell or room.[139]
> Where dormitories are used, they shall be occupied by prisoners carefully selected as being suitable to associate with one another in those conditions. There shall be regular supervision by night, in keeping with the nature of the institution.[140]
>
> All accommodation provided for the use of prisoners and in particular all sleeping accommodation shall meet all requirements of health, due regard being paid to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation.[141]

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[136] Stevens et al, 'On Coercion' (2005) International Journal of Drug Policy 16, 207-209.
[137] *Porter et al (n 77).*
[138] UN Standard Minimum Rules for the Treatment of Prisoners, 30 August 1955, www.unhcr.org.
[139] UN Standard Minimum Rules, rule 9 (1).
[140] UN Standard Minimum Rules, rule 9 (2).
[141] UN Standard Minimum Rules, rule 10.

One specific aspect of the conditions of detention that needs immediate attention is the overcrowding of drug trainees in *Puspen* centres. Overcrowding causes dissatisfaction amongst the detainees due to unsatisfactory accommodation and poor hygiene, etc. As a result, rioting and absconding from *Puspen* centres become rampant (this issue has been highlighted in the previous chapter). According to the 2009 AADK report, 10 out of the 28 *Puspen* centres across the country had over-reached their capacity. For example, Benta *Puspen* centre has a capacity to accommodate 150 trainees, but as at January 2009, it has 226 trainees.[142] As at November 2009, the AADK took drastic measures to overcome this problem by temporarily stopping the intake of new trainees into these overcrowded centres.[143]

It is worth noting here also the Council of Europe Committee for the Prevention of Torture (CPT)'s comment on overcrowding in prison:

> An overcrowded prison entails cramped and unhygienic accommodation; a constant lack of privacy (even when performing such basic tasks as using a sanitary facility); reduced out-of-cell activities, due to demand outstripping the staff and facilities available; overburdened health-care services; increased tension and hence more violence between prisoners and between prisoners and staff.[144]

3.4 Parallel provisions

How would these forms of mistreatment of drug users in Malaysia be dealt with if they occurred in the UK? Here, it is useful to look at cases decided by the ECtHR, which discuss the general principles with regard to 'inhumane, cruel and degrading treatment'. According to Article 3 of the ECHR, 'no one shall be subjected to torture or to inhuman or degrading treatment or punishment'. It is pertinent to refer to the cases (explained below) as to what constitutes

[142] *AADK Drug report (n 22).*
[143] AADK Drug report, November 2009.
[144] cited in *Cheney and others (n 32).*

'inhumane, cruel and degrading treatment'. In *Ireland v UK*, the Irish government filed an application alleging that the UK had deprived a certain number of persons of their freedom 'to specific treatment by special powers (arrest, detention and internment without trial)'.[145] In that case the ECtHR introduced the notion of 'minimum threshold of severity' under the scope of Article 3. Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum level is based on all the circumstances of the case, such as the duration of treatment, its physical and/ or mental effects and in some cases, the sex, age and state of health of the victim. The ECtHR held that standing against a wall for long periods, sleep deprivation and deprivation of food and drink were a form of inhuman treatment.[146] In a Turkish case, the ECtHR held in *Salih Tekin v Turkey*[147] that:

> ... holding the applicant blindfolded in a cold, dark cell and inflicting treatment that left wounds and bruises on his body violated the prohibition on torture, inhuman or degrading treatment or punishment.[148]

One case with particular resonance to drug detainees in Malaysia is *McGlinchey and Others v UK*, where the Court also referred to the 'minimum level of severity' requirement in order to determine whether the complaint falls within the scope of Article 3. [149] In that case, the applicants filed a complaint at the Court that their mother 'had suffered inhuman and degrading treatment in prison prior to her death'. The complaint was that the prison authorities had not provided the deceased with proper medication when she was suffering from heroin withdrawal symptoms. The ECtHR held that there had been a violation of

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[145] [1978] 2 EHRR 25.
[146] ibid.
[147] [1998] HRCD 646.
[148] cited in *Uglow, (n 15).*
[149] ECHR 50390/99.

Article 3 and the applicants were awarded EUR 22,900 in respect of non-pecuniary damage and EUR 7,500 for costs and expenses.[150]

Similarly in *Kudla v Poland,* the applicant alleged that he did not receive the appropriate psychiatric treatment when he was in detention. [151] The case was dealt with within the scope of Article 3. The ECtHR held that there had been no violation of Article 3. Nonetheless, the ECtHR confirmed the following judgment:

> Under Article 3 of the Convention the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance.[152]

As has been suggested earlier in the chapter, Code of Practice C, PACE 'will normally conform to Article 3'.[153] Under Code C, detainees who are suspected to be under the influence of drugs, including alcohol, and who 'may experience harmful effects within a short time of being deprived of their supply...' should be given clinical treatment and attention. It is the duty of the custody officer to ensure that these detainees get the appropriate treatment 'as soon as reasonably practicable'.[154] This provision applies even if the detainee makes no request for clinical attention base on the observation of the custody officer. Annex H of Code C lists down the guideline to be followed by the custody officer.

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[150] ibid.
[151] Application No: 30210/96.
[152] ibid.
[153] *Uglow, (n 15).*
[154] Code C, s 9.5.

Annex H – Detained Person: Observation List

1. If any detainee fails to meet any of the following criteria, an appropriate health care professional or an ambulance must be called.

2. When assessing the level of rousability, consider:
Rousability- can they be woken?
• go into the cell
• call their name
• shake gently

Response to questions- can they give appropriate answers to questions such as:
• What's your name?
• Where do you live?
• Where do you think you are?

Response to commands- can they respond appropriately to commands such as:
• Open your eyes!
• Lift one arm, now the other arm!

3. Remember to take into account the possibility or presence of other illnesses, injury, or mental condition, a person who is drowsy and smells of alcohol may also have the following:
• Diabetes
• Epilepsy
• Head injury
• Drug intoxication or overdose
• Stroke

The civil commitment in Malaysia has gravely disregarded the 'individual rights and needs' of a drug user requiring treatment for his or her drug problem. The procedures for the mandatory treatment of drug users, which results in the practise of inhumane, cruel and degrading treatment, should be abolished. As mentioned earlier in the chapter, the Malaysian Constitution does not have a provision proscribing inhumane, degrading and cruel treatment. The ECHR and PACE Code provide adequate safeguards for the individual when the state has failed to abide by the principles of human rights, in particular to

providing proper treatment to a detained person. Priority must been given to the needs of the individual to ensure that they do not come to harm.

4. Lack of due process

4.1 Principles of Due Process

Arrest and remand proceedings invariably interfere with the fundamental freedoms protected under the Constitution. Unless it can be justified that the accused person should be remanded by law, then the detention of that person is unlawful and thus violates Article 5 (1) of the Constitution; 'no person shall be deprived of his life or personal liberty save in accordance with law'. The phrase 'in accordance with law' necessarily brings into play the notion of due process and the principles of fairness. These principles must be strictly observed in any criminal proceeding that involves the determination of a person's individual liberty.[155] It must be borne in mind that in order to determine a fair hearing, such rights must be established from the very beginning of the entire criminal process, ie police conduct from the point of arrest, including any investigative procedures as well as the treatment of detainees during detention.[156]

Articles 5 (2) and (3) of the Constitution are safeguards that protect the rights of a person who has been arrested and detained in a criminal proceeding. To recapitulate, Article 5 (2) states that 'where a complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him'. Article 5 (3) provides that 'where a person is arrested he shall be informed as soon as may be

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[155] Lawrence O.Gostin, 'Compulsory Treatment for Drug-dependent Persons: Justifications for a Public Health Approach to Drug Dependency' (1991) The Milbank Quarterly Vol 69 No 4.
[156] *Uglow, (n 15).*

of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice'. These constitutional rights are in line with the UN treaties; Article 10 of the UDHR states that 'everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal...' and Article 11 requires that 'everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence'. Article 14 of the ICCPR also stipulates that all persons are equal before the courts and tribunals, have a right to a fair hearing including a right to be legally represented:

> To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.[157]

Similarly, Article 5 (4) of the ECHR requires that a person 'who is deprived of his liberty by arrest and detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful'. Article 5 (5) then guarantees that a person who is a victim of arrest or detention in contravention of the provisions of this article 'shall have an enforceable right to compensation'.

4.2 Right to Legal Representation

Under the 1983 Act, a drug user who is certified by a registered medical officer to be a 'drug dependant' shall be brought before a magistrate for an order to be

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[157] ICCPR, Art 14.3.d.

made in regards to treatment and rehabilitation for his or her drug dependence. Prior to making the order, 'the magistrate shall upon the recommendation of a rehabilitation officer' give the drug user 'an opportunity to make representations'.[158] This provision is parallel to the provision under the CPC where an arrested person who is charged with a criminal offence shall be entitled to a right to be legally represented. This form of safeguarding a person's individual right requires that '...the magistrate in deciding the period of detention of the accused shall allow representations to be made either by the accused himself or through a counsel of his choice...'[159]

From the observational case study, during court proceedings the magistrate will normally give a drug user an opportunity to make representations. Usually, a drug user will appeal to the magistrate by stating that he does not wish to be admitted to a drug rehabilitation centre but prefers to be given a supervision order instead. During the focus group, one of the topics that was discussed was about the information provided by the rehabilitation officer on what usually transpires during the court proceedings:

> P2: When the AADK officer came to interview me, I told him...I told him that I had a job and if the court sends me to a rehab centre, I would lose my job. I am finished. The officer normally would take this into consideration. He (officer) would recommend to the magistrate that I be given a community supervision order. For arrested cases, the officers' recommendation is the most important. During the court proceedings, the magistrate would not know which rehab centre is available. The officer would make the recommendation to the magistrate. Then, the magistrate decides whether to send us to a rehab centre or be under community supervision.[160]

Findings from the case study reveal that the majority of the drug users funnelled through the criminal justice system are usually legally unrepresented

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[158] 1983 Act, s 6 (1).
[159] CPC, s 117 (5).
[160] Excerpt from the research project's focus group transcript.

unless family members decide to engage the service of a lawyer. Most of the time, they are not aware about the legal aid service provided by the state's legal aid bureau. Nonetheless, legal aid is only accessible if a drug user admits in court to being a 'drug dependant', in other words he pleads guilty. Usually a junior lawyer or a law student doing his pupillage would be asked to handle the case since it is non-contested and for mitigation purposes only.[161] One of the focus group participants who seemed to have gone through the procedure several times relates his personal experience:

> P3: At the court, we were not legally represented. We were only asked 'Is there anything that you wish to say? Do you plead guilty or not guilty? Do you wish to appeal?' We are aware that if we were arrested as 'suspected drug dependants' without having any stuff (drugs) found on us…if our urine tested positive, we would be sent to a rehab centre. Our friends in the lock-up would tell us. If drugs were found on us, we know that we would go to prison. If we plead guilty we will definitely get a 13 months prison sentence.[162]

Therefore, due to lack of information, these drug users are often left to deal with the magistrate on their own without any knowledge of a possible legal recourse. This gap in the legal provision contravenes with Article 5 (3) of the Constitution in that these users are denied access to consult and be defended by a legal practitioner of his choice. To quote Gomez:

> The right to be heard would be of little consequence if it does not encompass the right to be heard by counsel. The laymen in society are not familiar with the science of law. To make this hearing fair and meaningful, the accused must be able to exercise the right to consult and be defended by a legal practitioner of his choice at this hearing. How is he to consult if he has no access to counsel within the first 24 hours of detention?[163]

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[161] Statement by Legal Aid Bureau officer (Personal communication 20 June 2008).
[162] Excerpt from the research project's focus group transcript.
[163] Jerald Gomez, 'Rights of Accused Persons – Are Safeguards Being Reduced', (2004) 1 MLJ xx.

Thus, at this juncture, it is imperative to highlight here of the importance of the right of a drug user to be allowed access to a lawyer immediately upon arrest. As has been discussed earlier, Article 5 (3) states 'where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice'. This provision has been supported by the judgment in *Ooi Ah Puah* and the rights of an arrested person by virtue of section 28A of the CPC (discussed earlier in the chapter). In cases where there is no lawyer present, a magistrate must enquire from a drug user if he wishes to make any complaint regarding his arrest and detention.

4.3 *Judicial Reviews*

The provision that empowers a magistrate to make an order for committing a drug user for treatment or to undergo supervision within the community is section 6 of the 1983 Act, which states as follows:

> **Section 6. Magistrate's order which may be made on a drug dependant**
>
> (1) Where a person who has undergone the tests referred to in section 3 or 4 and, in consequence of such tests, is certified by a government medical officer or a registered medical practitioner to be a drug dependant, the officer shall produce him, or cause him to appear before a Magistrate, and the Magistrate shall upon the recommendation of a Rehabilitation Officer and after giving such person an opportunity to make representations—
>
> (a) order such person to undergo treatment and rehabilitation at a Rehabilitation Centre specified in the order for a period of two years and thereafter to undergo supervision by an officer at the place specified in the order for a period of two years; or
>
> (b) order such person to undergo supervision by an officer at the place specified in the order for a period of not less than two and not more than three years.

In a drug user case, a magistrate must ensure that all procedures are complied with, as any error, albeit minor may have serious implications for the drug user. As a consequence, an unlawfully detained drug user may challenge the magistrate's court order. However, pursuant to the judgment in *Ang Gin Lee* v *Public Prosecutor,*[164] it was held that a court mandated order for the compulsory treatment of drug users[165] does not fall under the definition of 'order pronounced by any magistrate's court in a criminal case or matter', hence there is no right of appeal against such order as provided for under the CPC.[166] The magistrate's order is a rehabilitative order by virtue of the 1983 Act, which is social legislation. As a result, a detainee who had been unlawfully detained must seek relief outside the normal channels for criminal proceedings by applying a writ of *habeas corpus.*[167] The authority for this is the case *Re Datuk James Wong Kim Min,* which held as follows:

> Where the 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 order which deprives him of his liberty.[168]

It is without doubt that the statutory provisions contained in the 1983 Act are draconian in nature. Therefore, it is important to look at how the High Courts deal with cases under the Act, in particular on matters that affect the fundamental freedom and individual liberty guaranteed under the Constitution. In the celebrated case of *Sanuar Kamarudin bin Ahmad* v *Menteri Hal Ehwal Dalam Negeri Malaysia & Anor*[169], *Nik Hashim JC* held that 'the provision of section 6 of the Act is penal in nature, affecting the freedom of the individual. This must

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[164] [1991] 1 MLJ 498 per Denis Ong J.
[165] 1983 Act, s 6 (1) (a).
[166] CPC, s 307 (i).
[167] *Ang Gin Lee, (n 165).*
[168] [1976] 2 MLJ 245 per *Lee Hun Hoe* CJ Borneo.
[169] [1996] 5 MLJ.

be well appreciated by the magistrate before exercising his summary powers under the Act'. In this case, an application was made by *Sanuar Kamarudin bin Ahmad* for a writ of *habeas corpus* against his detention order to undergo treatment and rehabilitation for two years and thereafter to undergo after care supervision of a rehabilitation officer for another period of two years under the 1983 Act. In the application, he contended that the police, medical and rehabilitation officer's reports were not tendered in court as evidence to support the order that was made against him. In an action for judicial review, the High Court held that the detention was unlawful and the person detained (applicant) was to be released forthwith.

In that case, the High Court laid down the following conditions precedent that must be strictly conformed before making an order:

1. Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest (see Art 5 (3) of the Federal Constitution);
2. The person to be detained is certified by a government medical officer or a registered medical practitioner to be a drug dependant (see s 6 (1) of the Act);
3. The person to be detained must be given the opportunity of making representations and not merely appeals and pleas (see s 6 (1) of the Act; *Hoo Thian Siong* v *PP*);[170]
4. The magistrate must consider a report by a rehabilitation officer –
   (a) a copy of such report must be supplied to the person to be detained; and
   (b) such report must be read out and explained to him (see s 6 (3) of the Act; *Re Haji Sazali*);[171]
5. In making the order, the magistrate must have regard to the circumstances of the case, and the character, antecedents, age, health, education, employment, family and other circumstances of the person to be detained (see s 6 (4) of the Act; *Re Haji Sazali*);[172]
6. The magistrate must keep a record of the proceedings and the fact that the conditions precedent in sub-ss (1), (3), (4) and (5) of s 6 are complied with[173] (see *Re Roshidi bin Mohamed*).

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[170] [1988] 2 MLJ 401.
[171] [1992] 2 MLJ 864.
[172] ibid.
[173] These subsections of s 6 were subsequently repealed following the amendment to the 1983 Act by the Drug Dependants (Treatment and Rehabilitation) (Amendment) Act 1998.

Failure to follow these conditions may lead to the magistrate's order being null and void. It was further held in the case that 'where the detention cannot be held in accordance with the procedure established by the law, the detention is bad and the person detained is entitled to be released forthwith'.[174]

In *Mohd Shahriman Mohd Khairil* v *Public Prosecutor & Anor*,[175] a magistrate who had earlier made an order to place a drug user (the applicant) at a drug rehabilitation centre was held by the High Court to have failed to comply with the statutory requirements resulting in 'procedural and evidential flaws' in the process which 'constitutes a serious transgression of the fundamental liberties of a citizen'. The applicant applied for a writ of *habeas corpus* for his release. According to *Suriyadi Halim Omar J*, there were three 'procedural and evidential flaws' found in the case through the magistrate's notes of proceeding. The flaws were as follows:

1. Section 6 of the 1983 Act requires that an applicant be given 'an opportunity to make representations'. From the notes of proceedings, it could not be ascertained whether the applicant understood the meaning of 'representation'. This created doubts in the mind of the judge;

2. It is a mandatory requirement under the statute for a magistrate to consider first, the report prepared by the rehabilitation officer and second, the circumstances of the case, i.e. the character, antecedents, age, health, education, employment, and family of the applicant prior to making an order. A copy of the same must be supplied to the applicant and regardless of his educational background shall be read out, with the contents explained to him so that he would be aware of what is brought against him.

3. In delivering his judgment, Suriyadi Halim Omar J said that 'by virtue of that right of representations he may thenceforth challenge anything thrown at him and perhaps escape the more severe sentence or even escape completely all the charges'. In this case, the magistrate had failed to supply a copy of the social report to the applicant for

[174] *Sanuar* had referred to the earlier cases of *Ang Gin Lee* and *Re Datuk James Wong Kim Min*.
[175] [1998] 2 CLJ 855 (Malaysia).

him to consider. Thus, the benefit of the doubt must lean in favour of the applicant;

4. The proceeding requires that a certificate of drug dependency be tendered in court. However, in this case, there was ambiguity whether the document that was submitted to the court was a certificate regarding the status of the applicant based on the urine report or a urine report of the applicant. Again, it was held that the benefit of the doubt must lean in favour of the applicant.[176]

Based on the above contentions, the judge held that the magistrate had 'missed out all those legal requirements' (as stated above). He then issued a writ of *habeas corpus* to the applicant and cited *Choor Singh J* in *Daud bin Salleh* v *The Superintendent, Sembawang Drug Rehabilitation Centre*:

> The liberty of the subject is involved and legislation affecting a person's liberty must be strictly construed and strictly complied with. There must not be any relaxation of the vigilance of the court in seeing that the law is duly observed especially in a matter so fundamental as the liberty of the subject.[177]

It is pertinent to highlight here, based on the judgment in *Mohd Shahriman,* a magistrate is duty-bound to give a drug user an opportunity to make representations during the court proceeding. Since the term 'representation' has not been properly defined by section 6, Suriyadi Halim Omar J in *Mohd Shariman* held that 'representation' goes beyond the right to appeal or making a plea in that there should be a right to challenge with regard to the following matters, *inter alia,* 'the drug test, medical certificate, the evidence pertaining to the circumstances of the case, the rehabilitation officer's report and the right to make submissions or appeals generally favourable to himself'.[178]

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[176] ibid.
[177] [1981] 1 MLJ 191 (Malaysia).
[178] *Mohd Shahriman, (n 176).*

In *Hoo Thian Siong* v *Public Prosecutor*[179] an application to set aside the magistrate's order to detain the applicant at the *Serenti (Puspen)* centre for two years for suspicion of being a 'drug dependant' was made at the High Court. The application was made on the grounds that the applicant was not represented by counsel during the court hearing. It was held in the High Court per Mustapha Hussain J:

> It is clear even without reference to Article 5(3) of the Federal Constitution, it is incumbent on the learned magistrate to give the applicant the opportunity of making representations... The Act specifically enacted the words 'giving such person an opportunity to make representations'. Making representations is not the same as making appeals or pleas. Making representations here means the right to protest, which by necessary implication and reading it in the context of Article 5(3) of the Federal Constitution, is a right to challenge whatever is being brought against him. In any event, there is no record that the applicant here was given that opportunity of making representations, not merely making appeals and pleas. This is a case of deprivation of liberty and it was said in *Re Datuk James Wong Kim Min: Minister of Home Affairs, Malaysia & Ors* v *Datuk James Wong Kim Min* that strict compliance with the statutory requirements must be observed. It is evident this was not observed in the proceedings before the learned magistrate on 13 April 1987. *Serenti* is not a Butlin's holiday camp. Though it is for the applicant's good, still it is a deprivation of his liberty. On this ground alone, the order of the learned magistrate made under section 6(1)(a) of the said Act is invalid. The court therefore set aside the order of the learned magistrate.[180]

Therefore, as can be seen the High Courts have been assiduous in protecting the rights of drug users but of course this only avails to a small number of them who have the means and resources. As has been discussed earlier and also from the case study, most of the drug users are left without any redress to due process.

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[179] [1988]1 CLJ 176 (Malaysia).
[180] ibid.

4.4 Post Amendment

Following the decision in *Sanuar* section 6 of the 1983 Act was amended in 1998.[181] The courts have taken a different approach in regards to the above statutory requirements. Post 1998, the magistrate shall no longer consider the conditions precedent discussed earlier. The magistrate is now duty bound to apply the objective test in that 'upon receiving the recommendation of the Rehabilitation Officer', he shall make an order either to commit the drug user to a drug rehabilitation centre or a supervision order, bearing in mind the social objective of the 1983 Act ie the treatment and rehabilitation of drug users.

In *Majistret, Mahkamah Majistret Rawang & Anor* v *Gurdeep Singh a/l Atma Singh*,[182] the applicant applied for a writ of *habeas corpus* for the release of his son who had been detained under the 1983 Act. In his application, the applicant contended that his son was not afforded the opportunity to make representations and there was a discrepancy between the rehabilitation officer's report and the certificate of drug dependency. In delivering his judgment, *Kang Hwee Gee J* applied the objective test approach following the 1998 amendment whereby the magistrate is now duty bound to make an order either to commit the 'drug dependant' to a drug rehabilitation centre or a supervision order, upon receiving the recommendation of the rehabilitation officer.

Since the magistrate is now statutorily bound to rely on the rehabilitation officer's recommendations, it is also the rehabilitation officer's duty to 'make a proper and accurate inquiry on the status of the detainee before he submits his recommendation to the magistrate'.[183] At this juncture, an important issue that needs to be raised in respect of the amendment is the accuracy of the

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[181] Drug Dependants (Treatment and Rehabilitation) (Amendment) Act 1998.
[182] [2000] 6 MLJ 112 (Malaysia).
[183] ibid, per *Kang Hwee Gee J.*

rehabilitation officer's report. This issue has been discussed earlier in the previous chapter. It is highlighted here again as the implication of inaccurate information with regard to a drug user's social report may lead to an improper order by the magistrate.

According to *Suriyadi Halim J* in *Muhammad Attam bin Abdul Wahab* v *Minister of Home Affairs & Anor*, an order pursuant to section 6 'is draconian in nature in that it confines a person without due process, the magistrate is expected to consciously apply his mind over the matter'.[184] Thus, the amended Act has to some extent been less favourable in terms of safeguarding a drug user's right to due process. Moreover, since there is no compulsory legal aid in Malaysia for drug detainees, they are now in a more defenseless position.

The above discussion has shown that there is clearly a lack of due process in the civil commitment of drug users in Malaysia. As a result, the commitment process has proved to be inconsistent with the principles of human rights guaranteed under the Constitution and international human rights instruments. Although a drug user may seek legal recourse by applying for a writ of *habeas corpus*, it still does not guarantee that his constitutional rights are protected. The following section will consider the extent to which SUHAKAM function as an independent advisory body to the government pertaining to human right matters.

5. National Human Rights Commission (SUHAKAM)

The position of drug users under the 1983 legislation is just one, albeit important, example of the lack of proper protection of human rights in Malaysia. However there have been important developments over the past decade although progress

[184] [2001] 1 AMR (Malaysia).

has not been as substantial as international groups such as Amnesty International would like.

The first initiative to enhance the protection and promotion of human rights in Malaysia was the establishment of a National Human Rights Commission, SUHAKAM in 1999 under the Human Rights Commission of Malaysia Act (the 1999 Act). Among the key functions of SUHAKAM are as an advisory body to the government in regards to human right matters during the formulation and implementation of legislation and as an independent inquiry body dealing with complaints affecting the infringement of human rights. It must be noted here that 'regard shall be had to the UDHR to the extent that it is not inconsistent with the Constitution'.[185] In 2001, SUHAKAM published its first Law Reform Report, which focused on the rights of remand prisoners – an issue of main concern among NGOs and human rights groups in Malaysia for the past few decades.[186] The report highlighted several breaches of the fundamental rights of remand prisoners; lack of information upon arrest, denial of the right to legal representation and unnecessarily prolonged periods of detention.[187] Subsequently, SUHAKAM released another report, concerning the right to be tried without undue delay, explicitly stipulated in Articles 9(3) and 14(3)(c) of the ICCPR.[188] Among the issues that were discussed in the report was the right to counsel and legal advice:

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[185] *Human Rights Act (n 89).*

[186] Johan Saravanamuttu, 'Human Rights Practice – Regression rather than Progression' (2001) www.aliran.com accessed 2 January 2008.

[187] *SUHAKAM, (n 96).*

[188] Art 9 (3) states 'anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment'. Art 14 (3) (c) states 'In the determination of any criminal charge against him,

> The right to consult counsel and receive legal advice is a general right and should be afforded to all accused persons. The lack of communication between lawyers and accused persons in police custody obstructs a lawyer from obtaining instructions from his client. This could jeopardise issues of bail and the plea of guilty and may also give rise to objections on the admissibility of the statement given by an accused person, rendering an even longer trial for the accused person. As such, SUHAKAM reiterates its recommendation in its Report on the Rights of Remand Prisoners that arrested persons should be entitled to consult counsel and receive legal advice on all matters relating to their detention as guaranteed in Article 5 (3) of the Federal Constitution. The right should be an unfettered right and exercisable immediately upon arrest. [189]

In 2008 alone, SUHAKAM received 1,136 complaints seeking intervention with 44 complaints against the police that were:

> related to abuse remand procedures where a suspect was moved from one police district to another for further detention; inaction over reports lodged; brutality during interrogation; and failure to inform family members of the arrest'. [190]

SUHAKAM also proposed that the police force have a human rights training programme for its officers in order to 'expand their understanding of their role in combating crime while respecting human rights'. In cases, which involved police abuse of remand prisoners whilst in detention, SUHAKAM commented on this recommendation:

> Law enforcement officials should be aware of the fact that as agents of the State, they are required to conduct themselves in a manner which evinces understanding and absolute respect of the prohibition against torture, cruel, inhuman and degrading treatment or punishment. Appropriate training should be provided to all law enforcement personnel in order to create greater awareness of their obligation to absolutely refrain from torture, cruel, inhuman or degrading treatment or punishment. [191]

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everyone shall be entitled to the following minimum guarantees, in full equality: (c) To be tried without undue delay'.

[189] *SUHAKAM, (n 64).*

[190] SUHAKAM Annual Report 2008 cited in Shaila Koshy, 'Cops should respect individual's right to counsel: SUHAKAM' (16 June 2009) *thestar.com.my.*

[191] ibid.

In 2005, the Royal Commission to Enhance the Operation and Management of the Royal Malaysian Police (the Royal Commission) submitted a report containing 125 recommendations to the then Prime Minister 'as a response to reports of patterns of violations by police officers including fatal shootings, excessive use of force, ill-treatment, torture and deaths in custody'.[192] Corruption and human rights violations were the major areas of concern raised by the Royal Commission in regards to the conduct of the Royal Malaysian Police. In its 607 page report, the Royal Commission recommended, *inter alia* the following:

a) Setting up an independent body to monitor the police;
b) Ensuring that arrest, detention and investigations are done according to established human rights standards;
c) Amending and repealing laws that undermine human rights and facilitate ill-treatment and torture.[193]

However, the Royal Commission's proposal to set up an Independent Police Complaints and Misconduct Commission (IPCMC) for an independent review of the police force with regard to abuse of power and violation of human rights did not get the government's approval. As a result the proposed bill was not tabled in Parliament. This had caused immense dissatisfaction among various quarters, particularly human right groups and NGOs. Instead, the government introduced a Special Complaints Commission Bill headed by the Inspector General of Police. The bill did not receive much support. In fact, Amnesty International in disapproving the bill, lamented that the bill defeated 'the true intention of the Royal Commission to improve the professionalism of the force and to ensure that doctrines, laws, rules and procedures are observed and implemented by the police'.[194] There should be a proper check and balance mechanism for police accountability on behalf of the public. Any such

[192] *Amnesty International Malaysia and Suaram, (n 48).*
[193] ibid.
[194] ibid.

mechanism must be independent and vested with sufficient powers to exercise an effective and continuous control.

In 2008, the government finally introduced the Enforcement Agency Integrity Commission Bill, which replaced the Special Complaints Commission Bill.[195] SUHAKAM lauded the government's move towards reinstating public trust in the enforcement agencies by ensuring that procedures and regulations are followed. An excerpt of the bill, describing the functions of the Commission is shown below:

> **Enforcement Agency Integrity Commission Bill**
> **Functions of the Commission**
>
> 4. (1) The functions of the Commission are as follows:
>
> (a) to receive complaints of misconduct from the public against an enforcement officer or against an enforcement agency in general and to investigate into and conduct hearings on such complaints;
> (b) to formulate and put in place mechanisms for the detection, investigation and prevention of misconduct by an enforcement officer;
> (c) to protect the interest of the public by preventing and dealing with misconduct of an enforcement officer;
> (d) to provide for the auditing and monitoring of particular aspects of the operations and procedures of an enforcement agency;
> (e) to promote awareness of, enhancement of, and education in relation to integrity within an enforcement agency and to reduce misconduct amongst enforcement officers;
> (f) to assist the Government in formulating legislation, or to recommend administrative measures to the Government or an enforcement agency, in the promotion of integrity and the abolishment of misconduct amongst enforcement officers;
> (g) to study and verify any infringement of enforcement procedures and to make any necessary recommendations relating thereto; and
> (h) to make site visits to the premises of an enforcement agency, including visiting police stations and lockups in accordance with the procedures under any written law, and make any necessary recommendations relating thereto.
>
> (2) The Commission shall have power to do all things expedient or reasonably necessary for, or incidental to, the performance of its

[195] Bernama 'Integrity Commission Bill for Parliament' (Kuala Lumpur 17 June 2009) www.bernama.com.

functions.

In July 2009, the Enforcement Agency Integrity Commission Act 2009 was officially gazetted. However, there has not been much progress with regard to its implementation.[196]

On the international side, SUHAKAM had also been criticised by the International Coordinating Committee of Human Rights Institutions (ICC) for not being able to meet up with the standard of a human rights institution. In April 2008, the ICC in its reaccreditation exercise gave notice to SUHAKAM:

> to provide in writing, within a year...the documentary evidence deemed necessary to establish its continued conformity with the Paris Principles, failing which, SUHAKAM would be downgraded from its current 'A' status to 'B'. SUHAKAM's lack of conformity with the Paris Principles[197] raises serious questions and doubts regarding the Malaysian government's commitment to uphold the promotion and protection of human rights in the country.[198]

In its notice, the ICC highlighted the issue with regard to the process of appointment of SUHAKAM's commissioners under the 1999 Act, which lacks transparency.[199] Following the ICC's notice, a bill was subsequently passed by the Malaysian government, which sought:

> to amend the Human Rights Commission of Malaysia Act 1999 (Act 597) to make the process of appointment of the members of the Human Rights Commission of Malaysia (Commission) more transparent'.[200]

Section 5 of the 1999 Act was amended which requires the Prime Minister to consult the committee referred to in the amended Act prior to tendering his advice to the *Yang di-Pertuan Agong* (Malaysian Ruler). The

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[196] Andrew Khoo, 'Who Guards the Guardians? The *Rakyat* Must Police the Police' (2010) The Malaysian Bar Webpage www.malaysianbar.org.my accessed 12 May 2010.
[197] The Paris Principles are the international standards for an independent and effective national human rights institution (NHRI).
[198] SUARAM, September, 2008 www.forum-asia.org.
[199] SUHAKAM, 'No Downgrading from 'A' Status For SUHAKAM' (January- June 2009) SUHAKAM Bulletin www.suhakam.org.my.
[200] Human Rights Commission of Malaysia (Amendment) Act 2009 www.parlimen.gov.my.

amendment is as follows:[201]

Substitution of section 5

2. The Human Rights Commission of Malaysia Act 1999 [*Act 597*], which is referred to as "the principal Act" in this Act, is amended by substituting for section 5 the following section:

Members of the Commission and term of office

5. (1) The Commission shall consist of not more than twenty members.

(2) The members of the Commission shall be appointed by the Yang di-Pertuan Agong on the recommendation of the Prime Minister who shall, before tendering his advice, consult the committee referred to in section 11A.

(3) The members of the Commission shall be appointed from amongst men and women of various religious, political and racial backgrounds who have knowledge of, or practical experience in, human rights matters.

(4) A member of the Commission shall hold office for a period of three years and is eligible for reappointment once for another period of three years.

(5) The Prime Minister may determine suitable mechanisms, including appropriate key performance indicators, to assess the performance of the members of the Commission in carrying out their functions and duties under this Act.

(6) Such assessment shall be taken into consideration-

(a) by the Prime Minister before tendering his advice to the Yang di-Pertuan Agong for the reappointment of any member of the Commission under subsection (4); and
(b) for the removal of any member of the Commission under section 10.

Following the coming into force of the 2009 Amendment Act, the ICC reconfirmed SUHAKAM's 'A' status on the 22 January 2010.[202]

In summing up, Malaysia still lags behind in providing established and accepted mechanisms for safeguarding human rights. Although there are positive

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[201] ibid.
[202] The 'A' status denotes full compliance and the 'B' status denote non-full compliance with the Paris Principles.

measures moving towards a right direction, but still at a very slow pace. This continues to impact upon particular populations such as drug users who are still being marginalised, through routine denial of rights and failure to provide adequate protections as guaranteed under the Malaysian Constitution. As commented by SUHAKAM on the inherent rights of an individual:

> Any impediments to the effective realisation of the right to an expeditious and fair trial necessarily violate not only the right to personal liberty, but also the right of victims to "effective remedy" and "prompt redress". It also undermines the confidence of the public in the justice system, it means wasted man hours spent waiting in Court, it compromises the veracity and accuracy of evidence and witnesses, it causes stress and anxiety to victims of the crime, the accused person, family members of the accused and the victim and litigants themselves and it could affect the economic progress of Malaysia in general.[203]

6. Concluding remarks

Based on the above arguments, the legal process of the compulsory treatment of drug users in Malaysia incorporate elements that breach the fundamental principles of human rights – random arrest of individuals suspected to be 'drug dependants'; unnecessarily prolonged periods of detention; lack of medical treatment for detained drug users; ill-treatment whilst in detention and overcrowding resulting in inhumane, cruel and degrading treatment; and denial of due process. Although the Constitution provides the necessary safeguards against such violations, drug users continue to be marginalised and stigmatised as if they were second-class citizens. Thus, it is important that the government revise its current DIP so that the impact of the legal process on the drug users

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[203] *SUHAKAM, (n 64).*

'results in less restriction of liberty, is less stigmatising and offers better prospects for the future of the individual and the society'.[204]

[204] Gilbert Gerra and Nicholas Clark, 'From Coercion to Cohesion: Treating Drug Dependence Through Healthcare, Not Punishment' Discussion Paper Based on A Scientific Workshop, UNODC Vienna, October 28-30, 2009.

CHAPTER 7: CONCLUSION AND RECOMMENDATIONS

1. Conclusion

Malaysia's drug intervention programme in response to the 'war on drugs' campaign initiated in 1983 has focused on drug control strategies through rigorous enforcement and severe punishment on drug users. The 'zero-tolerance' or total abstinence approach has marginalised the most vulnerable section of the population that is, the drug users. Besides being marginalised, drug users have also been stigmatised by society as being 'parasites to society' and 'once a drug addict always a drug addict'. Such stigma would definitely hinder the process of integrating these drug users back into society.[1]

Malaysia's compulsory treatment of drug users have backfired in that it has failed to achieve the objectives of the treatment programme under the National Drugs Policy (NDP), that is, to eliminate drug dependency and prevent relapse. Due to this, the poor outcomes have resulted in the 'revolving-door-syndrome' amongst drug users after leaving the government drug rehabilitation centres (*Puspen*) ie a high record of relapse rates from *Puspen* centres and a substantial number of drug users who breached their supervision orders. As was reported by the AADK in 2007, 16,000 drug users who were ordered to undergo supervision orders either upon release from *Puspen* or a magistrate's order pursuant to section 6 (1) (b) of the Drug

[1] W.Y. Low, S.N. Zulkifli, K. Yusof, S. Batumalai & W. A. Khin, 'Knowledge, attitudes and perceptions related to drug abuse in Peninsula Malaysia: A survey report' (1996) Asia-Pacific Journal of Public Health 8 (2) : 123-129.

Dependants (Treatment and Rehabilitation Act) 1983 (1983 Act) had failed to register at the AADK centres nationwide.[2]

Although the criminal justice system has been arguably regarded as the most important 'conduit' by which drug users are brought into treatment,[3] the research project revealed that the Malaysian drug intervention programme (DIP) has brought about serious violations of the principles of human rights, which is inconsistent with the Malaysian Constitution and other international human rights instruments. There is a need to emphasise here that treatment must be consistent with human rights in order to make it acceptable.

The legal process has been subjected to arbitrary arrest of drug users suspected to be 'drug dependants'. The 1983 Act does not specify in its provision the criteria for a police suspect who may be eligible to receive treatment at a government rehabilitation centre ie *Puspen* centre. To recap, according to section 3 (1) of the 1983 Act, a police officer may arrest 'any person whom he reasonably suspects to be a drug dependant'. As has been considered earlier in Chapter 6, the excessive number of people arrested by the police for suspicion of being a 'drug dependant' raises serious concern over abuse of police power, which eventually led to a violation of Article 5 (1) of the Constitution where 'no one shall be deprived of his life or personal liberty save in accordance with law'. It must be noted here that arbitrary arrest by the police is also a breach of Article 9 of the UDHR where 'no one shall be subjected to arbitrary arrest, detention or exile'. It is worth highlighting MN Venkatachalliah J (former CJ of India) again from the Indian Supreme court

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[2] Wan Syamsul Amly Wan Seadey. *'16,000 bekas penagih dadah gagal lapor diri' Utusan Online* (28 December 2007).

[3] Michael Hough 'Drug User Treatment within a Criminal Justice Context' (2002) Substance Use and Misuse Vol 37, Nos 8-10, 985-996.

case of *Joginder Kumar vs Respondent: State of U.P.* with regard to arbitrary arrest:

> No arrest can be made because it is lawful for the police officer to do so. The existence of power to arrest is one thing. The justification for exercise of it is quite another. The police officer must be able to justify the arrest apart from the power to do so. Arrest and detention in the police lock-up of a person can bring upon incalculable harm to the reputation and self-esteem of a person... Denying a person of his liberty is a serious matter. [4]

From the case study, it can be seen that the *Ops Tapis* (routine police enforcement exercise to detect suspicious individuals involved in illicit drug use) is done on a random basis and those who test positive during a drug test shall be detained further for drug assessment. It is not appropriate to detain an individual for the purpose of undergoing a drug assessment based solely on the result of a preliminary drugs test. It must be noted that the 1977 WHO Report requires that there must be 'clear statutory definitions of person eligible for treatment'.[5]

The unnecessarily prolonged period of detention (9 to 12 days) solely for the purpose of drug assessment also breaches the principles of human rights. Drug users have to endure with poor and unsatisfactory conditions in the detention centre such as overcrowding and hygiene problem. Article 5 of the UDHR states that 'no one shall be subjected to torture or to cruel, inhuman and degrading treatment or punishment'. Articles 7 and 9 of the ICCPR reaffirm this human rights principle. During the detention period, findings also revealed that there is no proper treatment for drug users suffering from withdrawal symptoms. They are forced to undergo the 'cold turkey' detoxification, without any form of medication or relief treatment.

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[4] 1994 AIR 1349 1994 SCC (4) 260 (India).
[5] 1977 WHO Report cited in Porter et al, *The Law and the Treatment of Drug and Alcohol-dependent Persons-A Comparative Study of Existing Legislation* (WHO, Geneva 1986).

Detoxification using the 'cold turkey' method has been described as a terribly daunting experience for a drug user to undergo whilst in detention. Although the Constitution does not have a provision proscribing 'inhumane, degrading and cruel treatment' but under such circumstances, lack of proper treatment could well fall under the definition of 'inhumane, degrading and cruel treatment'. Drug users in police custody should get the same standard of medical care as any other members of the public. It is worth reiterating Article 12 of the ICESCR, which states that 'every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity'. Furthermore, a person who is under the influence of drugs may require emergency care especially if he or she is experiencing withdrawal symptoms. According to Porter et al, drug users should receive proper treatment even whilst in police custody:

> A drug dependant person may be incapacitated while under the influence of drugs and in need of medical care. He may also require emergency care as a result of acute withdrawal symptoms and be in need of detoxification. Treatment for such alcohol or drug emergencies should be for short periods only. The person should be immediately released from detention on the completion of medical treatment (detoxification). [6]

It is imperative that effective treatment is provided to individuals who directly benefits from it. It must be noted that in Malaysia, the injecting drug users (IDUs) represent the majority of HIV infected persons and yet only a small fraction of them actually receive antiretroviral treatment.[7]

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[6] Porter et al, *The Law and the Treatment of Drug and Alcohol-dependent Persons-A Comparative Study of Existing Legislation* (WHO, Geneva 1986).

[7] Oppenheimer et al cited in Mahmud Mazlan, Richard S.Schottenfeld and Marek C. Chawarski, 'New challenges and opportunities in managing substance abuse in Malaysia' (2006) Drug and Alcohol Review 25, 473-478.

Findings from the case study (direct observation and case files) also showed that the relevant authorities have failed to ensure strict compliance with the Ministry of Health (MOH) guidelines with regard to drug testing procedures. Failure to comply with the MOH guidelines breaks the chain of custody, thus diminishes the integrity of the chain of custody, which is supposed to form as a safeguard against violation of human rights. For example, the police have failed to ensure that the arrested persons (drug users) witness the on-site urine test done by them. This is to prevent any mix-ups of urine samples. The procedure where Drug of Abuse (DOA) forms must be signed by the donor (drug user) (to certify that the urine sample belongs to him and as proof that he has consented to the giving of the urine sample, and is satisfied with the collection procedure) has also been disregarded by the relevant authorities, namely the service providers, ranging from the police, the AADK and the hospital. It must be stressed upon here that the element of consent is an important aspect for a treatment programme to be consistent with the principles of human rights.[8]

The case study found that government medical doctors did not properly discharge their duty in the medical examination of drug users during the drug assessment. As has been described earlier in the previous chapter, these doctors did not take the medical examination procedure seriously, which is supposed to be a substantial safeguard for drug users who are liable to a court mandated order.

Findings also revealed that there is lack of due process in the whole legal system, where drug users are being deprived of their rights to legal

[8] Stevens et al, 'On Coercion' (2005) International Journal of Drug Policy 16, 207-209.

representation (legal advice and legal aid). The failure by the police and the AADK to inform the drug users of their rights to legal representation has deprived them of their constitutional rights guaranteed by Art 5 (3) of the Constitution – 'Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice'. Article 10 of the UDHR states that 'everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal…'. The lack of compulsory legal aid in the Malaysian legal system has added further to the failure in adhering the right to due process.

Urine test reports and certificate of drug dependency, which are tendered in court as evidence of a drug user's dependency on drugs, are important documents relied upon by the magistrate when making an order pursuant to the 1983 Act. Thus, it is crucial to ensure that the validity of the two documents is intact and free from any defects. Finding from the case study revealed that a drug user would only be shown a copy of his urine test report on the day he is brought to court (It cannot be confirmed at this point whether the certificate of drug dependency is shown to the drug user at all). Thus, any discrepancies that may arise from either of the documents, such as the type of drug by which a drug user is dependent on, cannot be raised and disputed by that person prior to the magistrate making the order.[9] Either way, these drug users will be at the losing end, since they have no resources to engage a lawyer or access to legal aid, unless they plead guilty. Drug users

[9] See *Sures A/L Perumal v Public Prosecutor* [2001] 2 MLJ 106 and *Quan Kim Hock v Timbalan Menteri Dalam Negeri & Ors* [1997] 7 CLJ (Malaysia).

under the criminal justice system in Malaysia are the 'most vulnerable or marginalised section of the population, in law and in fact'.[10]

It should be emphasised here that drug users who come into contact with the criminal justice system are not all criminals (with a criminal record). They may not also have a drug addiction problem at all. For those with a drug problem, then they should be brought into treatment as soon as possible. In Malaysia, a drug user who is coerced into treatment *vis-a-vis* the criminal justice system would have to undergo a legal process similar to that of an arrested person who has been charged with a criminal offence.[11] As has been discussed in the preceding chapter, Malaysia's compulsory treatment of drug users is based on a traditional adversarial system whereby suspected 'drug dependants' are 'proceeded against criminally'. Thus, the compulsory treatment of drug users in Malaysia has put a heavy restriction on their liberty. Coercing a drug user to enter treatment should not compromise his or her fundamental freedom. The Malaysian government should take into serious consideration these human rights violations and revamp its DIP. Such measures must be evidence-based and not rely simply on populist views.

The post-2005 era has witnessed a paradigm shift in the treatment of drug addiction in Malaysia in that the government's approach is gradually shifting from a punitive to a more rehabilitative approach.[12] Medical professionals and proponents of harm reduction laud such positive changes in

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[10] Joanne Csete and Richard Pearshouse, 'Dependent on Rights: Assessing Treatment of Drug Dependence from a Human Rights Perspective' (2007) Canadian HIV/AIDS Legal Network.
[11] The Inspector General of Police may issue Standing Orders (Inspector General's Standing Order (IGSO)) in the form of a standard operating procedure (SOP) with regard to the apprehension of any individual arrested in suspicion of a criminal offence pursuant to s.97, Police Act 1967.
[12] Abdullah Ahmad Badawi, Speech by Datuk Seri Abdullah Ahmad Badawi, National Anti-Drugs Day 29 March 2003. See also Chapter 2.

the government's drug policy as it opens up an 'important opportunity to develop, implement and disseminate effective treatments'.[13]

2. Recommendations

In light of the above, coerced treatment offered within the Malaysian DIP can still be an effective way of bringing drug users with a drug problem into treatment, so long as it is evidence-based and does not compromise the fundamental principles of human rights. The government's paradigm shift towards a harm reduction approach should benefit all drug users seeking treatment for their drug dependence problem. In line with this current trend and based upon the findings of the research project, the Malaysian government should take radical measures to put a stop to the continuous violation of the human rights principles by closing all the *Puspen* centres in Malaysia and replace them by opening up community-based treatment centres under the responsibility of the AADK. Such centres should provide a community-based treatment programme ie integrating drug treatment and rehabilitation programmes into the community ranging from detoxification through to aftercare. The objective of such a programme is to provide a humane public health and efficient approach to drug abuse, that is, through a harm reduction approach rather than 'a drug-free' society based on a total abstinence approach. The recent implementation of the Malaysian government's CURE and CARE 1Malaysia centre which provides open access services to all drug users is a good example of a community-based

[13] Mahmud Mazlan, Richard S.Schottenfeld and Marek C.Chawarski, 'New challenges and opportunities in managing substance abuse in Malaysia' (2006) Drug and Alcohol Review 25, 473-478.

treatment model.[14] The underlying principle is so that the 'pathway into treatment service' is moved away from the criminal justice process that has brought about serious infringements of the fundamental rights of drug users in Malaysia.

In conjunction with the recent implementation of the National Anti-Drugs Agency Act 2004, whereby the 2004 Act empowers the AADK personnel to enforce, exercise, discharge and perform the powers, duties and functions under the 1983 Act,[15] it is proposed that the AADK officers take over the functions of the police under the proposed drug intervention DIP. Referral for drug users to attend community-based treatment programmes could be conducted at the existing AADK service centres across the country instead of the police stations. The purpose is to help drug users gain access to treatment without getting involved with the criminal justice system. This is to ensure that the rights of all eligible participants, ie drug users are being rightly protected.

The research project recommends possible measures to be incorporated into the 'referral service' prior to admission into the community-based treatment programme. These recommendations were based on the researcher's observational studies at the Glasgow drug court, Scotland and the methadone maintenance therapy (MMT) clinic, Kuala Lumpur.

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[14] AADK website www.adk.gov.my/pdf/CnC.pdf. See also Noor Hazwan Hariz, 'Rehab clinics with a difference' New Straits Times (27 September 2010).
[15] National Anti-Drugs Agency Act 2004 Act, s 6.

2.1 Clear eligibility criteria and a targeted population

There must be a clear eligibility criteria and a targeted population[16] for the DIP. Only drug users with a drug dependence problem should be coerced into receiving treatment. It is proposed that drug users with a drug problem are funnelled into treatment through a referral scheme similar to the 'Arrest Referral Service' that is being practised in England and Scotland. In a study by Edmunds et al of Arrest Referral Services in South London, Derby and Brighton, concluded that:

> Of all the agencies dealing with drug misuse, the police and the courts probably come into contact with problem drug users to the greatest extent. Whilst they can catch this population, however, there is little evidence that conviction and punishment does anything to reduce their drug use. By contrast there is quite good evidence that properly resourced and appropriately tailored intervention by drug agencies can substantially reduce drug use and drug-related crime (see Hough, 1996 for a review). Increasingly, therefore, referral schemes are being set up to serve as a bridge between the criminal justice system and treatment services.
>
> This study provides good evidence that arrest referral schemes can be effective in reducing drug use and drug-related crime. The schemes are designed to put problem drug users in touch with treatment agencies following arrest. When they are successful, they draw forward in time the reduction and cessation of drug use which inevitably will occur at some stage in drug users' careers.[17]

In Malaysia's case, the AADK should be given full responsibility in handling the DIP. This would divert drug users with a drug problem who have not committed any other crime except for being involved in illicit drug use, away from the criminal justice system. For the purpose of the research project, the

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[16] United Nations Office in Drugs and Crime (UNDCP), 'Improving Inter-Sectoral Impact in Drug Abuse Offender Casework, (1999) cited in Melissa Bull, 'Just Treatment: a review of international programs for the diversion of drug related offenders from the criminal justice system' (2003) A report prepared for the Department of the Premier and Cabinet, Queensland. School of Justice Studies QUT.

[17] Edmunds et al, 'Arrest Referral. Emerging Lessons from Research' (1998) Home Office London.

recommendation is based upon the Scottish Arrest Referral Scheme that is being currently practised in Scotland.[18] It must be reminded here that the Scottish scheme applies to drug offenders who have been charged with a drug offence and pleaded guilty. However, for this research proposal a similar scheme can be applied to non-criminal drug users[19] in Malaysia. They are as follows:

> **What is an Arrest Referral Service?**
>
> Arrest Referral is an intervention aimed at people who have been arrested and whose offences may be linked to drug use. The intervention may range from the giving of information to assessment and referral to appropriate services.
>
> **Aims and Objectives**
> The purpose of an Arrest Referral service is to offer an opportunity to drug users who have been arrested to engage with drug treatment and/ or other appropriate services with a view to reducing their offending behaviour.

The Glasgow drug court has an agreed set of criteria for the referral of drug using offenders to treatment. Reference is made to the researcher's observational study conducted at the Glasgow drug court:[20]

> **Target Group**
> Primarily offenders aged 21 years or older would be the appropriate age group to be considered suitable for the drug treatment court (DTC). These offenders are sufficiently mature and motivated to undergo the rigorous treatment under the DTC system. Although the DTC criteria are equally applicable to men and women, the ratio seems to suggest that more men than women are being tried in the DTC.
>
> **How the DTC works – The Fast Track Procedure**
> From the referral stage, the police sift all custody cases according to **an agreed set of criteria**. A large proportion of those arrested by the

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[18] Patricia Russell and Paul Davidson, 'Arrest Referral. A Guide to Principles and Practice' (2002) Effective Interventions Unit, Scotland.

[19] Non-criminal drug users here mean drug users with a drug problem who have not committed any other crime except for being involved in illicit drug use.

[20] See Appendix - Observational study report, 'The Glasgow Drug Treatment Court Scotland' (6 June 2006).

> police are likely to be involved with drugs. These offenders usually commit crime to get money to buy drugs. They commit crimes such as house-breaking, car thefts, small drug-dealings, etc (emphasis added).

Based on the observational study (as referred above), the key elements of the eligibility criteria set out by the Scottish drug court are that a drug using offender must be non-violent[21] and sufficiently mature to understand the nature of the drug treatment that he is being coerced into entering. He or she must not be involved in violent behaviours such as having committed murder or robbery. Another important criterion is that the nature of a person's drug dependence 'must be susceptible to treatment'. Also, a person who has a mental illness may not be able to fall under the criteria of an eligible person to receive treatment.

It must be noted here that the drug treatment programmes in England and Scotland are part of a diversion to treatment scheme, whereby a drug offender may have a choice, albeit a constraint choice, whether to be punished with imprisonment or accept treatment ie community based treatment. In England, the DTTO provided referral to treatment to potential candidates after being rigorously assessed by a selection team responsible for the programme. The DIP in Malaysia can replicate the abovementioned scheme to suit the needs of its drug users who have a drug problem.

A very useful local example that can also be emulated is the National Methadone Maintenance Therapy (MMT) programme, which lays down a

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[21] According to a National Institute of Justice report, drug courts in the United States may only process non-violent offenders, but many drug courts that are wholly state funded or locally funded accept some violent offenders. Richard S.Gebelein, 'The Rebirth Of Rehabilitation: Promise and Perils of Drug Courts' (2000) Sentencing and Corrections. Issues For The 21st Century. No 6, National Institute of Justice.

comprehensive set of eligibility criteria for its participants.[22] For a drug user with a drug problem to be eligible for the MMT programme, he or she 'must be an opioid user and not a polydrug user, 18 years of age or older and does not suffer from any acute psychiatric disorders'. What is most interesting about this guideline is that in order to be eligible for the programme, there must be an 'informed consent' by the individual ('Informed consent' is discussed in more detail below). This pre-requisite is a marked contrast to the present compulsory treatment programme in which consent is immaterial.

One of the key features of the Arrest Referral Service is its proactive intervention whereby a trained arrest referral worker or drug worker will be accessible during the arrest stage (at a police station) to offer advice and help with the aim of referring the arrested person to treatment.[23] This type of early intervention has been proven to be very effective not only in Scotland, but also in England.[24]

The research project recommends that such proactive intervention be applied in Malaysia's DIP. At least two Rehabilitation officers from the AADK must be assigned at a referral site to undertake referral cases. One officer shall carry out the on-site urine test on a drug user and the other shall conduct a screening interview with the drug user to determine whether he or she is suitable for referral or not. The Rehabilitation officer will check the background of the drug user for any criminal record, previous admission at *Puspen* or with any other treatment services. Thus, it is imperative that a

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[22] Ministry of Health Malaysia, *National Methadone Maintenance Therapy Guideline* (1st edn 2005, Ministry of Health Malaysia Putrajaya, Malaysia).
[23] *Russell and Davidson, (n 18).*
[24] ibid.

record is kept on the profiles of these drug users who come into contact with the AADK.

It is proposed that a screening interview should take into account the following factors:

- drug user's level of motivation to change or undergo treatment;
- present and past nature of drug misuse;
- criminal record, if any;
- educational, social and employment background etc.
- drug user's general health and well-being

The above information is important to form part of an ongoing decision-making process so that a suitable treatment plan could be developed for the drug user. It is interesting to note here that such information should be updated over time to reflect the drug user's progress. This has been recommended in the USA Drug Court Programme guideline:

> Information gathered during screening and assessment process describes the unique characteristics of each participant (drug user). It forms the basis for personal interaction with drug court staff, enables decision makers to place participant in the most appropriate programme available, and enables staff to determine if additional supports and services are needed to promote the participant's progress and success. In addition, the information provides a basis from which to measure participant progress, to identify the need for programme enhancements, and to identify areas in which the programme is effectively addressing participant needs.[25]

Once, the above information has been gathered from the screening interview, the Rehabilitation officer would decide whether the drug user is eligible for treatment. A medical doctor or a psychiatrist may also be present at the referral site so that a medical examination could be done on the drug user.

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[25] Roger H.Peters and Elizabeth Peyton, 'Guideline for Drug Courts on Screening and Assessment' (1998) Prepared for the American University Justice Programs Office in association with the USA Department of Justice, Office of Justice Programs, Drug Courts Program Office.

In short, to ensure that a referral service can run smoothly, there must be a good collaboration between the relevant government agencies acting as stakeholders; comprising of the National Anti-Drug Agency officials, medical doctors, psychiatrists and other possible service providers. The common goal is not to punish the participants (drug users) but to be able to provide them with the most suitable treatment programme. According to Russell and Davidson, a successful partnership encompasses the following:

> Successful partnership working is vital to the establishment and success of an Arrest Referral service. The partnerships need to function well at all levels to ensure ongoing co-operation. One important component of such success is the availability of adequate resources and, in particular, the availability of adequate treatment and support services.[26]

2.2 Informed consent

The research project proposes that an 'informed consent' criterion should be incorporated into the referral service prior to the admission into treatment of a community-based treatment programme. It must be emphasised that 'treatment for drug dependence is only consistent with human rights when the person gives their informed consent'.[27] As highlighted earlier in the previous chapter, the following circumstances must be established prior to accepting treatment so as to be consistent with the international standards of human rights:-

- The diagnostic assessment
- The purpose, method, likely duration and expected benefit of the proposed treatment
- Alternative modes of treatment, including those less intrusive, and
- Possible pain and discomfort, risks and side-effects of the proposed treatment.[28]

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[26] *Russell and Davidson, (n 18).*
[27] *Stevens et al, (n 8).*
[28] *Csete and Pearshouse, (n 10).*

This is to ensure that despite being coerced into treatment, drug users are given the opportunity to decide on the type of treatment that they should receive. A good example of 'an informed consent' criterion is the provision stipulated in the National Methadone Maintenance Therapy (MMT) guidelines, which are as follows:[29]

> **Informed Consent and Agreement for Treatment**
> The physician should discuss the risks and benefits of the use of methadone with the patient and, with appropriate consent of the patient, family members, or guardian. The patient should receive methadone from only one physician. The physician should employ the use of a written agreement between physician and patient addressing such issues as:
>
> (1) alternative treatment options;
> (2) regular toxicology testing for drugs of abuse and therapeutic drug levels (if available and indicated);
> (3) number and frequency of all prescriptions refills and reasons for which drug therapy may be discontinued (ie violation of agreement).
>
> **Informed Consent and Patient Information**
> Obtain informed consent to methadone treatment in writing from the patient before commencing treatment. For patients to make a fully informed decision, they should be provided with written information about:
>
> - the nature of methadone treatment
> - other treatment options
> - programme policies and expectations
> - consequences of breaches of programme rules
> - recommended duration of treatment
> - side effects and risks associated with taking methadone
> - risks of other drug use
> - the potential impact of methadone on their capacity to drive or operate a machinery
> - the availability of further information about treatment

2.3 Drug test must be completed within 24 hours

An on-site drug test is an essential feature that should be conducted during the referral service. It must be completed within 24 hours from the time a person

[29] *Ministry of Health Malaysia, (n 22).*

is brought into referral at any AADK service centre. From the case study, findings revealed that this could be accomplished.[30] This is to ensure that the drug testing procedure does not restrict a drug user's liberty. AADK officers acting as drug referral workers shall be stationed at the AADK service centre. A medical doctor may also be present at the referral site.

2.4 Proper treatment for withdrawal symptoms

The research project proposes that drug users be given proper treatment for their withdrawal symptoms under the community-based treatment programme rather than putting them under the 'cold turkey' detoxification method ie no treatment at all. As has been mentioned earlier in the previous chapter, detoxification involves:

> A medically supervised procedure intended to insure a safe, effective, and humane transition to a drug or alcohol free state. Failure to initiate detoxification of physiologically dependent persons following cessation of use results in the onset of acute withdrawal.[31]

For instance, buprenorphine that was initially introduced in Malaysia in November 2001 can be used for detoxification, subject to strict regulations and proper guidelines.

> Buprenorphine (Suptex) has been shown to work better than other medications for treating withdrawal from opiates, and can shorten the length of detox. It may also be used for long-term maintenance like methadone.[32]

Moreover, if substituted therapy was successfully introduced at an earlier stage, then it may be used for long-term treatment. For instance, the

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[30] See Chapters 5 and 6.

[31] Fiscella et al., 'Benign Neglect or Neglected Abuse: Drug and Alcohol Withdrawal in U.S. Jails', (2004) Journal of Law, Medicine & Ethics Vol 32.

[32] Medline Plus, 'Opiate Withdrawal' USA National Library of Medicine and the National Institute of Health www.nlm.nih.gov/medlineplus/ency/article accessed 2 February 2010.

methadone maintenance treatment (MMT) clinic that started off in Kuala Lumpur as a government pilot project in 2008 uses methadone as a substituting therapy to treat opioid users. The objective is to help these patients (who must be registered with the AADK service centre) reduce their dependence on heroin. From the researcher's observational study on the MMT clinic, 33 clients had registered under the pilot programme. The clinic, which is situated at the AADK service centre, operates on a daily basis from 8am – 11 am. Each day a pharmacist dispenses methadone to registered patients. The minimum dosage is 20 milligrams for each patient. In order to qualify for the programme, an opioid user has to be carefully assessed by a registered physician or a psychiatrist who specialises in addiction psychiatry. Several criteria have to be met before a user could register as a patient at the clinic. This is provided under the 2005 National Methadone Maintenance Therapy Guideline.[33]

2.5 Proper drug assessment (medical examination)

It is proposed that proper medical examination of drug users at AADK centres be performed by psychiatrists who specialise in addiction psychiatry rather than government medical doctors (GPs) who do not have the necessary expertise in the field.

The above recommendations are based on the principle that a drug user's personal liberty must at all times be protected as enshrined in the Malaysian Constitution and the UN's international human rights instruments. It has been proven from the government's mandatory treatment and

[33] *Ministry of Health Malaysia, (n 22).*

rehabilitation programme at *Puspen* centres that punishment is not the appropriate response to treating a drug user with a drug problem and that coerced treatment should not compromise the principles of human rights.

3. Future research

As has been mentioned earlier in the previous chapter, there is a gap in the Malaysian empirical research on the drug-crime link. Since drug use has been perceived as being one of the contributing factors for the increase in crime rates in Malaysia, and also drug users have frequently been connected with acquisitive crime, such as snatch theft etc, there is a pressing need for a comprehensive study on the issue.

In order to gain more insight of the drug-crime nexus in Malaysia, it is proposed that the Malaysian government revive the International Arrestee Drug Abuse Monitoring (I–ADAM) programme that was supposed to begin its pilot project in Penang a few years ago.[34] The I-ADAM programme is an extension of the Arrestee Drug Abuse Monitoring (ADAM) programme, developed and operated by the National Institute of Justice, USA Department of Justice. I-ADAM is a collaborative effort of eight countries; the USA, South Africa, Scotland, the Netherlands, Malaysia, England and Wales, Chile and Australia, working together to address drug-related issues in their own countries. The Malaysian project was discontinued because the US Department of Justice had a change of policy and could not fund the project.[35]

In Malaysia's case, the project was supposed to involve several police

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[34] Visweswaran Navaratnam, Vicknasingam Balasingam and Hilal Hj.Othman, 'Research Report Malaysia' in Taylor (ed), *I – ADAM In Eight Countries: Approaches and Challenges* (USA Department of Justice Office of Justice Programs, Washington DC 2002).

[35] Statement by Vicknasingam Balasingham (personal email correspondence 15 September 2006).

stations in Penang whereby data collectors would come to these stations to collect data on the number of people arrested by the police daily. An interview would be conducted with the 10th arrested person brought in and that person would be asked to undergo a urine test, subject to his consent. Amongst the specific objectives of the project were as follows:

1. Identify the extent of alcohol and other drugs (AOD) use among recent arrestees (arrested persons) in Penang;
2. Identify patterns of substances abuse among arrestees in Penang;
3. Investigate the extent of alcohol and substance abuse among cases referred to the hospital by police (for example, automobile accidents where alcohol or drugs may have contributed);
4. Obtain a profile on arrestees (example., sociodemographic data, arrest history, types of offences);
5. Investigate the correlation, if any, between AOD use and crime;
6. Develop and validate reporting techniques such as self-report and biological measures (urine testing)
7. Develop specific intervention techniques for various sectors. For example, health, criminal justice, welfare, corrections).

GLOSSARY OF DRUG TERMS[1]

Abstinence

The total avoidance of a behaviour or substance, especially with regard to food, intoxicating drinks, or drugs. State of being drug free; may apply to a particular drug or to all drugs.

Addict

A nebulous term that generally refers to one who habitually uses drugs, especially morphine or heroin, to the extent that cessation causes severe physical or psychological trauma or both.

Addiction

A chronic, relapsing disease characterised by compulsive drug-seeking and abuse and by long-lasting chemical changes in the brain. The user has adapted physically and/ or psychologically to the presence of the drug and would suffer if it were withdrawn abruptly.

Amphetamine

Stimulant drugs whose effects are very similar to cocaine. Amphetamine, dextroamphetamine, methamphetamine, and their various salts are collectively referred to as amphetamines. In fact, their chemical properties and actions are so similar that even experienced users have difficulty knowing which drug they

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[1] These are not formal definitions but are obtained from independent sources which are directly involved in drug addiction:

a. USA Department of Health and Human Services, Substance Abuse and Mental Health Services Administration. Division of Workplace Programs www.workplace.samhsa.gov/glossary/glossary_drugs.aspx.
b. The Royal College of Psychiatrists and the Royal College of Physicians, *Drug. Dilemmas and Choices* (Gaskell, London 2000).
c. *Guide to Drug Abuse Research Terminology, Research Issue 26* (USA Department of Health and Human Services, National Institute on Drug Abuse 1982).
d. National Anti-Drugs Agency Malaysia booklet on '*Dadah*' (dangerous drugs).
e. WHO Western Pacific Region, Ministry of Health Malaysia, University Utara Malaysia, 'Estimation of Drug Users and Injecting Drug Users in Malaysia' (2003) A study by the Ministry of Health Malaysia. In collaboration with University Utara Malaysia, with Technical and Financial Support of WHO.

have taken. Methamphetamine is the most commonly abused.

Analgesics

A group of medications that reduce pain. Some of these medicines are also used just before or during an operation to help the anesthetic work better. Codeine and hydrocodone are also used to relieve coughing. Methadone is also used to help some people control their dependence on heroin or other narcotics. Narcotic analgesics may also be used for other conditions as determined by your doctor. Narcotic analgesics act in the central nervous system (CNS) to relieve pain. Some of their side effects are also caused by actions in the CNS. These medicines are available only with your medical doctor's or dentist's prescription. For some of them, prescriptions cannot be refilled and you must obtain a new prescription from your medical doctor or dentist each time you need the medicine. In addition, other rules and regulations may apply when methadone is used to treat narcotic dependence.

Barbiturates

Drugs that fall under the depressant category and are used medicinally to relieve anxiety, irritability and tension. They have a high potential for abuse and development of tolerance. Depressants produce a state of intoxication similar to that of alcohol. When combined with alcohol, the effects are increased and risks are multiplied. Other drugs that fall under the depressant category include methaqualone, tranquilisers, chloral hydrate, and glutethimide.

Cannabinoids

Chemicals that help control mental and physical processes when produced naturally by the body and that produce intoxication and other effects when absorbed from marijuana.

Cannabis

The botanical name for the plant from which marijuana comes.

Cocaine

A powerfully addictive stimulant that directly affects the brain. The pure chemical, cocaine hydrochloride, has been an abused substance for more than 100 years, and coca leaves, the source of cocaine, have been ingested for thousands of years. Cocaine is generally sold on the street as a fine, white, crystalline powder, known as "coke," "C," "snow," "flake," or "blow." Street dealers generally dilute it with such inert substances as cornstarch, talcum powder, and/or sugar, or with such active drugs as procaine (a chemically-related local anesthetic) or with such other stimulants as amphetamines.

Crack Cocaine

The street name given to the freebase form of cocaine that has been processed from the powdered cocaine hydrochloride form to a smokable substance. The term "crack" refers to the crackling sound heard when the mixture is smoked.

Crystal meth

Methamphetamine

Dependence

See addiction.

Depressants

Drugs used medicinally to relieve anxiety, irritability and tension. They have a high potential for abuse and development of tolerance. Depressants produce a state of intoxication similar to that of alcohol. When combined with alcohol, the effects are increased and risks are multiplied. Drugs that fall under the depressant category include barbiturates, methaqualone, tranquilisers, chloral hydrate, and glutethimide.

Drug

A chemical compound or substance that can alter the structure and function of the body. Psychoactive drugs affect the function of the brain, and some of these may be illegal to use and possess. In reality, alcohol and nicotine are both psychoactive substances (drugs).

Detoxification

The process by which drug withdrawal is managed in a dependent user, usually under medical supervision.

Drug abuse

The use of illegal drugs or the inappropriate use of legal drugs. The repeated use of drugs to produce pleasure, to alleviate stress, or to alter or avoid reality (or all three).

Ecstasy (MDMA)

A stimulant that combines the effects of amphetamines and hallucinogens. MDMA is a synthetic, psychoactive drug with both stimulant (amphetamine-like) and hallucinogenic (LSD-like) properties. Street names for MDMA include Ecstasy, Adam, XTC, hug, beans, and love drug. Its chemical structure (3-4 methylenedioxymethamphetamine, "MDMA") is similar to methamphetamine, methylenedioxyamphetamine (MDA), and mescaline - other synthetic drugs known to cause brain damage. MDMA also is neurotoxic. In addition, in high doses it can cause a sharp increase in body temperature (malignant hyperthermia) leading to muscle breakdown and kidney and cardiovascular system failure.

Gamma Hydroxy Butyrate (GHB)

GHB has been given nicknames such as Grievous Bodily Harm, G, Liquid Ecstasy, and Georgia Home Boy. In 1990, the Food and Drug Administration banned the use of GHB except under the supervision of a physician because of reports of severe side effects, including euphoric and sedative effects similar to the effects experienced after taking Rohypnol (the "date rape" drug.)

Hallucinogens

Drugs that cause hallucinations - profound distortions in a person's perceptions of reality. Under the influence of hallucinogens, people see images, hear sounds, and feel sensations that seem real but do not exist. Some hallucinogens also produce rapid, intense emotional swings. LSD (an abbreviation of the German words for "lysergic acid diethylamide") is the drug most commonly identified with the term "hallucinogen" and the most widely used in this class of drugs.

Heroin/Morphine

A highly addictive drug. Heroin is processed from morphine, a naturally occurring substance extracted from the seedpod of the Asian poppy plant. Heroin usually appears as a white or brown powder. Street names for heroin include "smack", "H", "skag" and "junk". Other names for morphine include "M.Tab", "White Sulfate", "Monkey", "Dreamer" or "Morphon".

Ice

Cocaine; crack cocaine; smokable methamphetamine; methamphetamine; methylenedioxymethamphetamine (MDMA); phencyclidine (PCP).

Injecting drug users (IDUs)

A drug addict who with purpose and intent intraveneously injects the psychoactive substances into his/her body with the aid of syringe and needle to gain the effect of the drug.

Injection

A method of administering a substance such as a drug into the skin, subcutaneous tissue, muscle, blood vessels, or body cavities, usually by means of a needle.

Ketamine

A central nervous system depressant that produces a rapid-acting dissociative effect. It was developed in the 1970s as a medical anesthetic for both humans and animals. Ketamine is often mistaken for cocaine or crystal methamphetamine because of a similarity in appearance. Also known as K, Special K, Vitamin K, Kit Kat, Keller, Super Acid, and Super C, Ketamine is available in tablet, powder, and liquid form. So powerful is the drug that, when injected, there is a risk of losing motor control before the injection is completed. In powder form, the drug can be snorted or sprinkled on tobacco or marijuana and smoked. The effects of Ketamine last from one to six hours, and it is usually 24-48 hours before the user feels completely "normal" again.

Lysergic Acid Diethylamide (LSD)

An hallucinogenic drug that acts on the serotonin receptor. LSD was discovered in 1938 and is one of the most potent mood-changing chemicals. It is manufactured from lysergic acid, which is found in ergot, a fungus that grows on rye and other grains. LSD, commonly referred to as "acid," is sold on the street in tablets, capsules, and, occasionally, liquid form. It is odorless, colorless, and has a slightly bitter taste and is usually taken by mouth. Often LSD is added to absorbent paper, such as blotter paper, and divided into small decorated squares, with each square representing one dose.

Marijuana

A green, brown, or gray mixture of dried, shredded leaves, stems, seeds, and flowers of a plant. All forms of marijuana are mind-altering. In other words, they change how the brain works. They all contain THC (delta-9-tetrahydrocannabinol), the main active chemical in marijuana. They also contain more than 400 other chemicals.

Medication

A drug that is used to treat an illness or disease according to established medical guidelines.

Meth

Methamphetamine

Methamphetamine

A powerfully addictive stimulant that dramatically affects the central nervous system. The drug is made easily in clandestine laboratories with relatively inexpensive over-the-counter ingredients. These factors combine to make methamphetamine a drug with high potential for widespread abuse. Methamphetamine is commonly known as "speed," "meth," and "chalk." In its smoked form, it is often referred to as "ice," "crystal," "crank," and "glass." It is a white, odorless, bitter-tasting crystalline powder that easily dissolves in water or alcohol. The drug was developed early in this century from its parent drug, amphetamine, and was used originally in nasal decongestants and bronchial

inhalers. Methamphetamine's chemical structure is similar to that of amphetamine, but it has more pronounced effects on the central nervous system. Like amphetamine, it causes increased activity, decreased appetite, and a general sense of well-being. The effects of methamphetamine can last six to eight hours. After the initial "rush," there is typically a state of high agitation that in some individuals can lead to violent behavior.

Opium

Derived from young poppy pods.

Raw opium: The milky white latex produced from cuts made on a young poppy pod. It will gradually thicken and turn brown when exposed.

Prepared opium: Opium mixed with water and heated till it thickens. It is brownish black.

Phencyclidine (PCP) Also known as "angel dust" and is a hallucinogen. It is available illegally as a white, crystalline powder that can be dissolved in either alcohol or water.

Physical dependence

An adaptive physiological state that occurs with regular drug use and results in a withdrawal syndrome when drug use is stopped; usually occurs with tolerance.

Polydrug use

Use of more than one drug by the same individual. Drugs may be combined to enhance their sought after effects or minimize unwanted ones.

Prescription drugs

Make complex surgery possible, relieve pain for millions of people, and enable many individuals with chronic medical conditions to control their symptoms and lead productive lives. Most people who take prescription medications use them responsibly. However, the non-medical use of prescription drugs is a serious public health concern. Nonmedical use of prescription drugs like opioids, central nervous system (CNS) depressants, and stimulants can lead to abuse and addiction, characterised by compulsive drug seeking and use.

Problem drug use

Implies that either the pattern of drug taking, or the route of administration, is causing significant physical, psychological, or social problems for the user.

Psychoactive drug

A drug that changes the way the brain works ie affects mood, thought processes or perception.

Recreational drug use

A term describing the hedonistic use of drugs and implying, not always correctly, that there is no significant associated harm.

Relapse

In drug abuse, relapse is the resumption of drug use after trying to stop taking drugs. Relapse is a common occurrence in many chronic disorders, including addiction, that require behavioral adjustments to treat effectively.

Route of administration

The way a drug is put into the body. Drugs can enter the body by eating, drinking, inhaling, injecting, snorting, smoking, or absorbing a drug through mucous membranes.

Shabu (syabu)

Combination of powder cocaine and methamphetamine; crack cocaine; methamphetamine; methylenedioxymethamphetamine (MDMA). A type of stimulant drug. Asyabu has no medicinal value. Top quality syabu is crystal white followed by reddish white and the lowest quality has a bitter taste. The street name for syabu is "ice".

Stimulants

A class of drugs that elevates mood, increases feelings of well-being and increases energy and alertness. These drugs produce euphoria and are powerfully rewarding. Stimulants include cocaine, methamphetamine, and methylphenidate (Ritalin).

THC (Tetrahydrocannabinol)

Delta-9-tetrahydrocannabinol; the main active ingredient in marijuana, which acts on the brain to produce its effects.

Withdrawal syndrome

The physiological and psychological response to the sudden absence of a drug on which the individual had become dependent. Symptoms are usually the opposite of those produced by the drug itself, and unpleasant.

Ya Ba

A pure and powerful form of methamphetamine from Thailand; "crazy drug".

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APPENDICES

FOCUS GROUP TRANSCRIPT

Q: Responses to a general discussion on personal experiences upon arrest and detention

P1:[1] My parents had reported me to the police. At 4 a.m., the police came to the house and took me away. I was taken to the police station. The police took my urine that morning. The same police officer who had arrested me took my urine. The police kept me at the lock-up. The next day I was taken to the court to be remanded. The third day, I was taken to the hospital. I was interviewed by the doctor. The doctor asked me how long I have been taking drugs and if I had any illness. After that, I was sent back to the lock-up. On the fifth day, an AADK officer came and interviewed me at the lock-up. I was detained at the lock-up for 14 days. I was given 14 days by the magistrate. Only on the 14th day, I was told that I had tested positive. The police do not ask you whether it is your first time of taking drugs. They would only ask you 'did you take it or not?'.

Q: As the discussion proceeded, participants were asked about the interviews with AADK officers.

P2:[2] When the AADK officer came to interview me, I told him...I told him that I had a job and if the court sends me to a rehab centre, I would lose my job. I am finished. The officer normally would take this into consideration. He (officer) would recommend to the magistrate that I be given a community supervision order. For arrested cases, the officers' recommendation is the most important.

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[1] P1 has totally recovered from his drug addiction and now runs a support group for ex-drug addicts.
[2] P2 is currently a facilitator for the AADK after-care programme. He was formerly a hardcore drug addict.

During the court proceedings, the magistrate would not know which rehab centre is available. The officer would make the recommendation to the magistrate. Then, the magistrate decides whether to send us to a rehab centre or be under community supervision.

P3: The court only conveys the order…it all depends on the AADK officer's recommendation.

Q: The issue of informed consent was also highlighted during the group discussion. Participants were asked whether informed consent was given prior to the urine test.

P2: If a person were caught on suspicion of being a drug addict, the police would normally assume that the person is aware that he has committed an offence. There is no request for consent before your urine is taken. After our urine is taken, we will be sent to see a police officer for us to fill up a form.

Q: The issue of whether treatment was given whilst in detention was also one of the main topics of discussion.

P3: The AADK officer came to see us on the seventh day… During those seven days, we only saw the police. There was no treatment, if we were having withdrawal symptoms, the police just let us be.

Q: Participants were asked about their perception on the objective of police raids.

P4:[3] My view is that the police's job is only to make arrests just to fill up the quota. The police's approach is unprofessional. They only arrest people (drug addicts). When a family member applies for police bail, that person is released. Next week, he will be arrested again if there happens to be a raid. When the police see a familiar face, they would mark us. It is up to the police whether they want to arrest us or not. The legal system in Malaysia is like this. It only looks good on paper.

P2: The police just want to fill up the quota. One day they have to arrest about ten suspects. It does not matter who, as long as there are 10 people. If you have money, you stand a chance to be released. Drug matters in Malaysia, you cannot solve… because drugs goes along with corruption. Those arrested are only addicts…they are the small fries. Once, I was caught by the police. I had 'one packet' with me. The police could charge me with possession of drugs for own consumption. At the police station, they asked me if I had RM300… to cover up. The police officer at that time said that I could be charged with a more serious offence…for being a drug pusher. I could get a fifteen months prison sentence and whipping. But because I could not afford to pay them RM300, I was charged and sentenced to fifteen months imprisonment. I did not have a track record (previous conviction) but they still charged me.

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[3] P4 used to be a hardcore drug addict, but he is now an AADK officer.

P5: My boyfriend was arrested by the police and he was tested positive. He was remanded for two weeks. He said that he was given a lot of privileges during his detention at the lock-up because he was a masseur. The police asked him to do massages for them and they gave him good food. The police also supplied him with heroin. Without heroin, how could he do the massage?

Q: Participants were asked about their experience during court proceedings as to whether they were legally represented.

P3: At the court, we were not legally represented. We were only asked 'Is there anything that you wish to say? Do you plead guilty or not guilty? Do you wish to appeal?' We are aware that if we were arrested as suspected drug addicts without having any stuff (drugs) found on us…if our urine tested positive, we would be sent to a rehab centre. Our friends in the lock-up would tell us. If drugs were found on us, we know that we would go to prison. If we plead guilty we will definitely get a thirteen months prison sentence.

PARTICIPANT'S CONSENT FORM[1]

The focus group is being undertaken as part of a student's (Sarina bt. Mohamed) research project conducted at one of the universities in the United Kingdom. The purpose of the focus group is to gather information on participants' experience and perception during arrest and remand in police custody prior to undergoing treatment and rehabilitation at the *Serenti (Puspen)* centre.

All information obtained from the discussion, including the name and identity of each participant will remain anonymous and will be treated with confidentiality. Participation is totally on a voluntary basis. You are free to withdraw from the focus group at any time if you wish.

I truly understand the objective of this focus group and freely volunteer to take part.

Signed.

.....

[1] This is an English translation of the original Malay language copy.

BORANG PERSETUJUAN UNTUK MENYERTAI TUMPUAN GERAKAN (KUMPULAN PERBINCANGAN)

Tumpuan gerakan ini adalah sebahagian daripada kajian yang sedang dilakukan oleh seorang pelajar (Sarina bt. Mohamed) di sebuah universiti di United Kingdom. Tumpuan gerakan ini bertujuan untuk mengumpul maklumat dari para peserta mengenai pengalaman masing-masing semasa ditangkap dan di bawah tahanan reman polis sebelum menjalani rawatan dan pemulihan di Pusat Serenti (Puspen).

Segala maklumat yang diterima, termasuk nama dan identiti para peserta akan dirahsiakan dan akan disimpan oleh pelajar dengan sebaik mungkin. Penyertaan adalah secara sukarela dan tiada paksaan. Para peserta boleh menarik diri dari tumpuan gerakan ini pada bila-bila masa sahaja sekiranya anda mahu.

Saya faham dengan jelas tentang objektif tumpuan gerakan ini dan dengan secara sukarela ingin mengambil bahagian.

Tandatangan.

.....

THE GLASGOW DRUG TREATMENT COURT, SCOTLAND

Glasgow Sheriff Court, Carlton Place, Glasgow.
[Observational visit conducted on the 6th June 2006]

Introduction

Scotland's first Drug Treatment Court (hereinafter referred to as DTC) was established in the Glasgow Sheriff Court in October 2001 and a second DTC was established in Fife in August 2002. Historically, the first DTC began in Miami, Florida in 1989. The increase in drug arrests following the United States "War on Drugs" policies in the late 1980s resulted in a huge backlog of cases and this led to the creation of the first DTC in Miami, Florida. Today, there are more than 500 Drug Courts in the United States and other countries such as Australia, Scotland, Ireland, Canada and Brazil have also established their own Drug Courts based on the Miami Drug Court model.

Aim and Objectives of the DTC

The aim of this report is to describe briefly how the DTC in Glasgow, Scotland works based on the "Miami DTC model" using its existing legislation.

- reduce the level of drug-related offending behaviour;
- reduce or eliminate offenders' dependence on or propensity to use drugs; and
- examine the viability and usefulness of a DTC in Scotland using existing legislation, and to demonstrate where legislative and practical improvements might be important.[1]

Target Group

Primarily offenders aged 21 years or older would be the appropriate age group to be considered suitable for the DTC. These offenders are sufficiently mature and motivated to undergo the rigorous treatment under the DTC system. Although the DTC criteria are equally applicable to men and women, the ratio seems to suggest that more men than women are being tried in the DTC.[2]

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[1] The Glasgow Drug Court in Action: The First Six Months (Research Findings No.70 2003).
[2] Research Findings No.70/2003.

How the DTC works – The Fast Track Procedure

- **Stage one**. From the referral stage, the police sift all custody cases according to an agreed set of criteria. A large proportion of those arrested by the police are likely to be involved with drugs. These offenders usually commit crime to get money to buy drugs. They commit crimes such as house-breaking, car thefts, small drug-dealings, etc.
- **Stage two**. These cases will be brought to the attention of the Procurator Fiscal[3]. The Procurator Fiscal decides which cases identified by the police should proceed for initial assessment for drug court suitability.
- **Stage three**. The Procurator Fiscal refers to the Social Work Department. The offender will be interviewed by a social worker who will then consider whether the offender is a suitable candidate for the DTC. The offender will also be referred to the defence agent who will receive instructions on intended plea and explains the nature, operation and expectations of the DTC.
- **Stage four**. The Procurator Fiscal convenes a multi agency screening group to consider all cases brought before it that day from the Fiscal. The screening group comprises of the Procurator Fiscal, defence agent (lawyer), social worker, police officer and, on occasion, an addiction worker.
- **Stage five**. Potentially suitable cases will be referred to the DTC Judge (Sheriff) by the Procurator Fiscal. This is after a guilty plea has been tendered by the offender in the custody court.[4] The Judge (Sheriff) continues the case, normally on bail, for four weeks to the DTC for social enquiry and addiction assessments and with the offender's consent a drugs test.
- **Stage six**. The DTC will hear the case, consider the reports and sentence the offender. Where it makes a community-based treatment order, the order, treatment, supervision and testing will commence with immediate effect.
- It is emphasised that the whole process **(from stage one to four)** should be completed within 24 hours (one lawful day) and **stages five and six** within 4 weeks.
- Offenders have the right to have their defence agent present during reviews and hearings with legal aid available in association with the DTC.[5]

DTC Orders

Since the DTC operates within the framework of existing legislation, the Judge (Sheriff) has the same powers and range of sentences as the normal Judge (Sheriff) in the summary court. Normally, a community based order with a drug treatment requirement will be imposed subject to the consent of the offenders. Most of the offenders are prolific offenders who have been in and out of prison on numerous

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[3] The equivalent to a Public Prosecutor in England.
[4] The normal referral route into the Glasgow DTC applies to those who plead guilty in the custody court immediately following the commission of the offence.
[5] Report of a Working Group for Piloting a Drug Court in Glasgow, May 2001.

occasions. By accepting the DTC order, they will be avoiding further imprisonment though they still need the additional motivation to ensure compliance with the specific order imposed upon them.

Treatment

Treatment within the DTC system is tailored to suit the needs of each individual offender. There are three available types of treatment and will be applied according to individual cases: abstinence, methadone maintenance and methadone reduction. Methadone maintenance and methadone reduction will be not be available as treatment options in isolation but only as part of an integrated treatment plan. An addiction worker will prepare a relapse prevention strategy to help the offender get off drugs. Most offenders who are being prescribed with methadone substitute prescription, during the initial stages, they are given relatively high dose of methadone to stabilise their addiction and bring them down gradually.

Treatment services are provided both in-house and by external service providers under the National Health Service (NHS). The DTC treatment service providers are called the Supervision and Treatment Team and are made up of a social worker, addiction worker and medical staff i.e. either a doctor or a nurse.

A key component of DTC orders is drug testing[6]. Offenders are tested twice weekly at the beginning of the order. Results from the tests will be recorded by the DTC Treatment and Supervision Team. It is believed that regular drug testing is a significant factor in sustaining motivation amongst the offenders and also an effective mode to ensure compliance with the DTC orders.

Reviews

DTC cases are reviewed once a month in the initial stages of the sentence. Prior to the afternoon open court review hearing, the Judge (Sheriff) normally attends a pre-court review where he sits with the Procurator Fiscal, defence agent (on occasion) and members of the Supervision and Treatment Team to discuss the cases. The morning meeting provides the Judge (Sheriff) with very useful information about the offender's progress with the treatment he is provided with. During the review hearing, there will be a strong degree of dialogue between the Judge (Sheriff) and the offender. The Judge (Sheriff) generally praises the offender if he has done well and also giving words of encouragement, or rewards the offender, such as giving fewer reporting requirements or having less frequent drug tests or in certain cases quashing the original conviction from the file.

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[6] Frequent urine testing is used to monitor an offender's alcohol or other drug use so as to measure treatment effectiveness. (10 Key Components of DTC)

Nevertheless, there are sanctions for non-compliance, whether for continuing drug use or failing to attend the treatment sessions etc. These may include additional drug testing or to some extent, sending the offender to prison for as long as 3 months without prejudice to the continuation of the DTC Order.

Conclusion

The two DTC in Scotland, particularly in Glasgow have attempted to adapt the characteristics of the United States DTC model to fit into the Scottish criminal justice system i.e. within the traditional legal culture. The Scottish DTCs have extended their existing practices beyond their traditional court system.

First, the role of the Judge (Sheriff) is expanded – to respond to each offender's positive efforts as well as to their non-compliance. The DTC Judge (Sheriff) has a more proactive role to play as a team leader. The direct dialogue between the Judge (Sheriff) and the offender requires a strong degree of commitment by the Judge (Sheriff) in that greater emphasis is put on his personality to interact with the offender in open court. Not all judges would be comfortable to speak direct with the offenders or even have a round-table discussion with other members of the Supervision and Treatment team.

Second, the non-adversarial approach within the criminal justice process whereby lawyers from both sides are required to adopt an equal stance, that is, assisting the offender to be rid of his or her drug problem by undergoing treatment.

Third, the success of a DTC rests on the team approach with the establishment of a partnership between the justice and treatment systems by providing appropriate treatment, court-based monitoring programme, regular court appearances and sanctions to correct non-compliance including regular drug testing.

Sarina bt.Mohamed
PhD Student,
Kent Law School,
University of Kent,
Canterbury,
Kent, England.

FORM 2

DRUG DEPENDANTS (TREATMENT AND REHABILITATION) ACT 1983

(Subsection 6(1))

CERTIFICATE AS TO DRUG DEPENDENCY

To:

The Magistrate,
Magistrate's Court,

.....

I, ..., a *government medical officer/registered medical practitioner, having carried out the necessary tests upon ..... Identity Card No. ..... aged ..... years of ..... certify that he *is/is not a drug dependant within the meaning of the Act. **The dangerous drug/drugs through the use of which he became a drug dependant *is/are

.....

Dated.....

.....

Medical Officer/Registered Medical Practitioner
(Official Stamp)

C.C.:

Rehabilitation Officer.....

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* Delete whichever is not applicable.
** Delete if the person is not a drug dependant or if it is not determinable what type of drug he is dependent upon.

FORM 3

DRUG DEPENDANTS (TREATMENT AND REHABILITATION) ACT 1983

(Paragraph 6(1)(*a*) and subsection 6(2))

ORDER TO UNDERGO TREATMENT AND REHABILITATION AT A REHABILITATION CENTRE AND TO UNDERGO SUPERVISION

Whereas,.....
Identity Card No. ..... aged ..... years of .....
.....
(hereafter referred to as "the said person"), is certified by .....
....., a *government medical officer/registered medical practitioner to be a drug dependant within the meaning of the Act;

And whereas upon the recommendation of the Rehabilitation Officer, and after giving the said person an opportunity to make a representation, I, ..., a Magistrate at ..... order the said person—

(*a*) to undergo treatment and rehabilitation at ..... Rehabilitation Centre for a period of two years; and

(*b*) thereafter to undergo supervision by *Rehabilitation Officer/police officer/provost officer/commanding officer for a period of two years under the following conditions:

(i) the said person shall reside in the area of.....;

(ii) the said person shall at all times inform the officer of his place of residence and shall not change his place of residence or leave the area where he resides without the written permission of the Director General;

(iii) the said person shall report at the ..... (as designated by the Magistrate) not later than 72 hours after his discharge from the Rehabilitation Centre and on the ..... of every calendar month between 8.00 a.m. and 6.00 p.m.;

(iv) the said person shall not consume, use or possess any dangerous drugs;

(v) the said person shall undergo such tests at such time and place as may be ordered by the officer; and

(vi) the said person shall undergo any programme for the rehabilitation of drug dependants held by the Government.

Given under my hand and the seal of the Court at .....
on .....

.....
(*Magistrate*)

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* Delete whichever is not applicable.

FORM 4

DRUG DEPENDANTS (TREATMENT AND REHABILITATION) ACT 19[illegible]

(Paragraph 6(1)(a) and subsection 7(2))

ORDER OF SUPERVISION

Whereas..... .....
Identity Card No. .... years of .....
....
(hereafter referred to as "the said person"), is certified by a *government medical officer/registered medical practitioner to be a drug dependant within the meaning of the Act.

And whereas upon the recommendation of the Rehabilitation Officer and after giving the said person an opportunity to make a representation, I, ..., a Magistrate at ..... order the said person to undergo supervision by *Rehabilitation Officer/police officer/provost officer/commanding officer for a period of **..... years under the following conditions:

(*a*) the said person shall reside in the area of .....;

(*b*) the said person shall at all times inform the officer of his place of residence and shall not change his place of residence or leave the area where he resides without the written permission of the Director General;

(*c*) the said person shall report at the ..... (as designated by the Magistrate) not later than 72 hours from the date of this order and on the ..... of every calendar month between 6.00 a.m. and 6.00 p.m.;

(*d*) the said person shall not consume, use or possess any dangerous drugs;

(*e*) the said person shall undergo such tests at such time and place as may be ordered by the officer; and

(*f*) the said person shall undergo any programme for the rehabilitation of drug dependants held by the Government.

Given under my hand and the seal of the Court at .....
on .....

.....
(*Magistrate*)

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* Delete whichever is not applicable.
** State period.