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Death, Drugs and Development: Malaysia’s Mandatory Death Penalty for Traffickers and the International War on Drugs

SIDNEY L. HARRING*

I. INTRODUCTION

If the Bush administration is engaged in a “war on drugs” in 1991 and the “drug war” has become a common way to characterize a massive package of legal measures to eradicate (or at least reduce) drug use, then it may be said that Malaysia began its drug war in 1975 when it first prescribed the death penalty for drug trafficking.¹ In 1983, it made the death penalty for trafficking in drugs mandatory.²

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1. Dangerous Drugs (Amendment) Act, 1975, § 39B, Act A293 (Malaysia) [hereinafter 1975 Act], amending Dangerous Drug Act 1952, Act 234 (Malaysia) [hereinafter 1952 Act]. It should be understood that the level of substantive justice in Malaysia is the equal of that in the United States. If anything, this study illustrates more significant parallels than differences. It is important, therefore, not to take criticisms of particular aspects of the Malaysian criminal justice system out of this context.


Since 1975, nearly three hundred persons have been sentenced to death for trafficking; by June, 1990 about one hundred persons had been hanged. Winning Edge in War Against Dadah, New Straits Times [hereinafter NST], June 28, 1990, at 9, col. 1. “Dadah” is the Malaysian word for opiate-based narcotics. Hundreds more suspected traffickers are currently detained without trial under a related measure, the Dangerous Drugs (Special Preventive Measures) Act, which is aimed specifically at traffickers who cannot be criminally convicted because of a lack of evidence. See Dangerous Drugs (Special Preventive Measures) Act, 1985, Act 316 (Malaysia) [hereinafter SPM Act].

All statistics in this article are from the Malaysian English-language press, primarily the NST, the country’s major daily newspaper. Official statistics concerning crime, police, and prisons are not published in Malaysia and are difficult to get from official sources. The NST is owned by the dominant United Malays National Organization Party (UMNO), and it has both
Malaysia's mandatory death penalty for trafficking and the extensive system of emergency provisions that supports the penalty raise many questions that have never been the subject of critical scholarly analysis. To include drug offenses among the most serious crimes is problematic, given the clear linkages between drug use and other social problems, and the fact that, regardless of the penalties prescribed, it is clear that drug trafficking is difficult, if not impossible, to control. For lawyers, Malaysia's war on drugs poses a serious threat to many fundamental ideals inherent in the rule of the law, such as the presumption of innocence and the importance of due process.

The impact of Malaysia's mandatory death penalty merits study, not only because Malaysia has held itself out to the world as an example of a country that is tough on drugs, but because of the significant effect the large number of drug cases and appeals have on the development of Malaysian criminal law and procedure. Moreover, Americans have been told that Malaysia's laws may be tough, but they work. As American policy-makers face their own losing war on drugs and turn to more draconian approaches, how well Malaysia's drug laws work could have significant policy implications for the United States.

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a highly professional standard of journalism, and access to official sources. Hence it may be regarded as an accurate source of both official statistics and official viewpoints. A request by the author for official statistics on arrests, trials, imprisonments, and executions under the Dangerous Drugs Act received no response.


4. There is no evidence that enforcement efforts have reduced drug consumption in any Western country. In the United States, anti-drug laws resemble the prohibition against alcohol of the 1920s, which was ineffective and undermined the criminal law. See generally J. Gusfield, Symbolic Crusade: Status Politics and the American Temperance Movement (2d ed. 1986); T. Duster, The Legislation of Morality: Laws, Drugs, and Moral Judgment (1972); J. Kaplan, Marijuana—The New Prohibition (1970).

5. Note that there is no "cruel and unusual punishment" provision in the Malaysian constitution, hence there are no constitutional limitations on the imposition of the death penalty in Malaysia. Federal Const. arts. 5-13 (Malaysia) (relating to fundamental liberties).

6. See infra note 32.

7. See infra notes 225-230 and accompanying text and table.


This article discusses Malaysian court rulings on the death penalty and the host of drug-related laws that the Malaysian Parliament has passed to accompany the penalty. I argue that the mandatory death penalty has not served the deterrent effect the Malaysian and other governments had conceived it might. Instead, the Malaysian courts have developed numerous exceptions to the penalty, exceptions that may have led to a counter-balancing increase in arrests on drug charges by the Malaysian police.

Section I of this article discusses the social background in Malaysia against which the drug legislation was enacted. Section II details the existing drug laws in order to show the place of the mandatory death penalty for drug trafficking in the Malaysian legal order. Section III analyzes the treatment of the death penalty and its accompanying statutory presumptions by the courts. Section IV discusses how the handling of drug cases by the police has influenced the development of the drug laws. Section V examines the statistics of mandatory death penalty enforcement in order to determine whether the penalty has been an effective deterrent. I conclude by arguing that Malaysia's drug war has not succeeded in preventing heightened drug use in the country, but suggest that an equilibrium has been reached between the legal and political systems which has resulted in far fewer actual executions than might have been the case in a country with a legal system less firmly rooted in traditional due process notions.

II. THE SOCIAL CONTEXT OF MALAYSIAN DRUG LAWS

Since gaining its independence in 1957, Malaysia has been in virtually continuous states of emergency. At first, these were instituted to provide the government legal means to combat communist insurgents. In recent years, however, emergency measures have been aimed at a wide range of critics of the government, including Christian activists, Muslim fundamentalists, trade union leaders, opposition party leadership, academics, native tribal leaders and environmentalists. In October 1987, leaders of many of these

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10. There are a number of studies of the communist insurgency in Malaya, which was the official name for Malaysia until 1963. See generally A. Short, THE COMMUNIST INSURRECTION IN MALAYA, 1948-1960 (1975); B. Kheng Cheah, RED STAR OVER MALAYA: RESISTANCE AND SOCIAL CONFLICT DURING AND AFTER THE JAPANESE OCCUPATION (1983).

Emergency measures are so much a part of current government policy that the December 1989 surrender of the Communist Party of Malaysia had no impact at all on the emergency measures. See Aznam, Farewell to Arms, FAR EASTERN ECONOMIC REVIEW, Dec. 14, 1989, at 36.

11. See generally R. Milne & D. Mauzy, POLITICS AND GOVERNMENT IN MALAYSIA (2d ed. 1986); G.P. Means, MALAYSIAN POLITICS (2d ed. 1976). For a full legal analysis of
groups were detained, some for up to two years, under the Internal Security Act (ISA).

Detentions were based on the flimsiest of charges, none having any relationship to the communist emergency.

The use of a mandatory death penalty has been an important element of these emergency measures, and currently there are seventeen offenses punishable by death, including possession of a firearm or bullet and using a gun to commit an offense.

Owing to its geographical position immediately to the south of the "Golden Triangle"—the drug production area of Burma, Laos and Thailand—Malaysia is a potential center for a major portion of the drug trade. Malaysia is also a major user nation with a very high rate of drug addiction. Historically, Malaysia's drug use is rooted in the Chinese community's use of opium, which was sanctioned and taxed by the British during its colonial rule over Malaysia.

Addiction spread into the Malay and Indian communities and


12. The Internal Security Act, 1960, Act 82 (Malaysia) [hereinafter ISA], is a copy of a British Colonial law which authorizes emergency powers such as detention without due process. There is a substantial body of Malaysian law on the ISA. In general, courts have consistently upheld the Act on the grounds that Parliament has plenary power in such areas. There is also a constitutional provision specifically granting wide internal security powers to the King in Parliament. FEDERAL CONST. arts. 149, 150 (Malaysia).


15. ISA, supra note 12, § 57 (being in unlawful possession of firearms or ammunition in any security area [currently, the entire nation is denominated such a security area]); Id. § 58, (for consorting with a person in unlawful possession of firearms or ammunition); Id. § 59 (offenses relating to military supplies).

16. Penal Code, F.M.S. Cap. 45, § 121 (1988) (Malaysia) (waging or attempting to wage war against the King, ruler, or governor); id. § 121A, (offenses against the person of the King); id. § 132, (abetment of mutiny, if mutiny committed in consequence).

17. Perhaps 80% of America's heroin comes from this area. Southeast Asia is Now No. 1 Source of US Heroin, N. Y. TIMES, Feb. 11, 1990, at 6, col. 1. On the origin of the Southeast Asian heroin trade, see generally A. McCoy, THE POLITICS OF HEROIN IN SOUTHEAST ASIA (1972); C.P. SPENCER & V. NAVARATNAM, DRUG ABUSE IN EAST ASIA (1981); Going After Asia's Drug Lord, ASIAWEEK, June 1, 1990, at 23.

became a major national problem in the 1970s and 1980s. The tradition of Chinese opium smoking was officially ignored, but the arrival of a western-type, youth-culture drug problem was offensive to many Malaysians, particularly the fundamentalist Muslims. As a result, strong anti-drug measures became popular with the Malay electorate.

Currently, Malaysia has 140,000 "registered" addicts. Since registration exposes a person to involuntary commitment to a prison-like rehabilitation center, many addicts choose not to register; it is


19. While almost all drug traffickers arrested in the 1970s and early 1980s were Chinese, many arrested in the late 1980s were Malay. In 1989, for the first time, the number of Malays tried in reported cases roughly equalled the number of Chinese. This estimate is based on the author's review of the ethnicity of surnames in the cases, a technique basically reliable in Malaysia because Malays, Chinese and Indians have distinct naming customs.

20. C. Muzaffar, infra note 28, at 1-28. The Malaysian government is secular, liquor is freely available and a gambling casino flourishes in the center of the country, but strong anti-drug measures appeal to Islamic fundamentalists. Other more explicitly Islamic legislation executed on behalf of the fundamentalists makes rigorous religious education compulsory for Muslim students through the university level.

21. Shivadas, More Want Death Penalty in the US, NST, Apr. 8, 1990, at 14. The article provides an elaborate defense of Malaysia's death penalty laws:

Malaysia has been attacked by do-gooders in other countries who suggest that because we have these so-called draconian laws economic assistance should be curtailed. . . . If human rights are being curtailed it is only of criminals. . . . The death penalty for dadah traffickers and those in possession of firearms for no other purpose than to commit terrorism or crime had been an intrinsic part of the Malaysian legal fabric borne [sic] out of necessity—the days of the Emergency (1948-1960) and the subsequent emergency of human degradation through dadah addiction. Our leaders have had to act quickly and decisively. Although there should be respect for the rights of an individual, a government has to work on the basis of the good of the majority.

Id.

Majid, Administration of Criminal Justice, reprinted in SURVEY OF MALAYSIAN LAW 176 (V. Sinnadurai ed. 1985) provides an academic's endorsement for the anti-drug measures:

The spirit of the Dangerous Drugs Act is indeed noble. No one would argue that anyone who is involved with dangerous drugs should escape punishment on the ground of inadequacies or technicalities of the law. Such person should be punished with death.

Id. at 177.


23. Drug Dependents (Treatment and Rehabilitation) Act 1983, Act 83 (Malaysia) [hereinafter Drug Dependents Act]. The Act provides for the registration of addicts and for the involuntary commitment of addicts to tightly controlled and disciplined residential treatment programs in guarded centers surrounded by walls. Detention for a period of up to two years can be authorized by any magistrate. Id. § 6(1)(a). Addicts may also be placed under
estimated that for every registered addict there must be at least two
who do not register.24 If these data are correct, Malaysia has one of
the world’s largest per capita populations of drug addicts and users, a
possibility vehemently denied by the government, but supported by its
own official statistics.25

Malaysia’s social fabric plays a role in the national perception of
the drug crisis. Despite official denials, Malaysia is an intensely
polarized society with serious racial, class and religious divisions.26
The population is composed of three major ethnic groups: Malay
(53%); Chinese (36%); and Indian, predominantly Tamil (11%).27
Malays, by law, are Muslim, and Islam is the state religion.28 The
current government—a coalition of Indian, Chinese and Malay par-
ties—is led by the United Malays’ National Organization (UMNO)
Party. In addition to this diverse ethnic and political mix, there are
wide class divisions.29

In addition to their religious objections to drug use, Malaysians
also have concerns about the effect drug use might have on national
development. For example, one official publication states: “As a
developing country committed to a modern and dynamic society,
Malaysia can hardly afford a young generation debilitated by drugs.
Her objective is to inculcate in her youths an automatic revulsion

the supervision of a rehabilitation officer for a minimum of two years. Id. § 6(1)(b). The
government concedes that these rehabilitation programs are not effective and that perhaps
80% of all those released return to drugs. Teaching Rehabilitation Center Inmates Better
Skills, Star, March 23, 1990, at 14; Rise in Number of Dadah Addicts Last Year, NST, March
17, 1990, at 9; A Ding-Dong Anti-dadah War, NST, Jan. 9, 1990, at 10.

24. Hanging for Dadah, but Cheers for Cigarettes, Utusan Konsumer, Feb., 1990, at
15.

25. Id. The article reports that there are one-half million drug users in Malaysia. The
New York Times reports that the United States has one-half million users of heroin and six
million users of cocaine. Southeast Asia Is Now No. 1 Source of US Heroin, NST, Feb. 11, 1990,
at 6, col. 4. Assuming that Malaysia’s user population is closer to one-half million, such an
estimate would give Malaysia approximately the same per capita drug user population as the
United States.

26. In fact, the government is so intent on such denial that it may be illegal to allege that
there are such divisions. Section 73(2) of the ISA reads: “Any police officer may without
warrant arrest and detain . . . any person . . . who the officer suspects has acted or is about to
act in any manner prejudicial to the security of Malaysia . . . or to the maintenance of essential
services therein or to the economic life thereof.” ISA, supra note 12, § 73(2).

27. L. Comber, 13 May 1969: A Historical Survey of Sino-Malay Relations 89
(1983).


29. See generally K.S. Jomo, A Question of Class: Capital, the State, and Une-
ven Development in Malaya (1989); K.S. Jomo, Mahathir’s Economic Policies (2d
ed. 1989); K.K. Soong, Polarization in Malaysia: The Root Causes (1987); M. Amin &
M. Caldwell, Malaya: The Making of a Neo-Colony (1977). For a discussion provid-
ging great insight into patterns of change and conflict in a rural Malay village, see generally J.
Prime Minister Dr. Mahathir bin Mohamed, drawing a parallel with Latin American and other Southeast Asian countries, has also stated that the magnitude of drug use has led to a "security problem with implications for the country's continued viability and the maintenance of its national sovereignty." Thus, Malaysia, at least in its own eyes, has become the one country willing to take a stand against drugs.

III. Drug Legislation in Malaysia

Section 39B of the Dangerous Drugs Act of 1952 (1952 Act) provides for mandatory death for trafficking in drugs and is the most significant single piece of a series of legislative efforts designed to control illegal drug use in Malaysia. In addition, five other drug control acts have been passed, all of which have been amended numerous times.

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31. Id. at 24.
32. This was effectively underscored when, despite protests from the governments of Australia and Great Britain, Malaysia hanged Kevin Barlow and Brian Chambers in July 1986 for trafficking. This action portrayed Malaysia as a small country unafraid to stand up to major western powers. The Barlow-Chambers case focused world attention on Malaysia's drugs laws. Public Prosecutor v. Barlow and Chambers [1986] MALAYAN L.J. 104 (S.C. Kuala Lumpur 1985). For an account of this case see At the Eleventh Hour, ASIAWEEK, July 6, 1986, at 22; Dust to Dust, ASIAWEEK, July 20, 1986, at 52. To summarize their case briefly, Kevin Barlow and Brian Chambers, both Australian citizens, were arrested at Penang Airport for possessing 180 grams of heroin. The drugs were in Chambers's bag, carried by Barlow. Both denied knowledge of the drug, but failed to offer any explanation for its presence. They were convicted of trafficking and hanged. The two were among the first convicted under the mandatory death penalty provisions of section 39B of the 1952 Act. Barlow's mother wrote an account of the case, B. Barlow, A Long Way From Home (1988).

In addition to the Barlow-Chambers case, the election of Prime Minister Mahathir as Chairman of the International Conference on Drug Abuse and Illicit Traffic held in Vienna was the culmination of a major effort by the Malaysian government to promote its tough drug policies internationally. According to one analysis, Prime Minister Mahathir Mohamed actively sought out the chair of this organization to create a higher international profile for Malaysia's anti-drug efforts, in order to counteract adverse international publicity following from his increased domestic repression. CARPA, supra note 13, at xiv.

33. 1952 Act, supra note 1, § 39B(2).
34. These include the Dangerous Drugs Regulations of 1952, Law No. 555 (Malaysia); the Poisons Ordinance of 1952, Law No. 29 (Malaysia); the Drug Dependant's (Treatment and Rehabilitation) Act, 1983, Act 283 (Malaysia); the SPM Act, supra note 2; and the Dangerous Drugs (Forfeiture of Property) Act, 1988, Act 340 (Malaysia).

Some idea of how complex (and confusing) this arsenal of laws is can be gleaned from the fact that the 1952 Act has been amended nineteen times since 1952—seventeen times since 1971. A complete listing of the amendments to the 1952 Act can be found in Majid, supra note 2. The account of these amendments which follows relies largely on Majid's thorough research.
The drug acts' many amendments were adopted with little Parliamentary debate because the governing UNMO coalition holds a commanding majority in Parliament and the passage of its most important legislative measures is, consequently, routine. Although some Malaysian legal commentators have proposed that the various measures be consolidated into one act, the government is satisfied with its existing drug measures.

Intense legislative activity has created a haphazard and reactive set of drug laws. However, these laws clearly reveal three trends. First, whenever penalties have been changed, they have been increased. Second, there has been a consistent trend to relax the traditional due process standards of Malaysian law as they apply to drug defendants. This has been true to such an extent that detainees under the Dangerous Drugs (Special Preventive Measures) Act (SPM Act), as amended in 1990, have no recourse to the courts at all. Rather, they are simply detained for up to two years on the order of the Home Minister, who is currently the Prime Minister. There are also special provisions for searches and arrests without warrants, ready admission of 'cautioned statements' to police officers, use of agents-provocateurs, and a complex system of presumptions which has the effect of shifting a part of the burden of proof in a trafficking case to the accused. Third, the Malaysian government has consistently tried to make its legal arsenal against dangerous drugs among the world's strongest. In addition to the mandatory death penalty provisions of Section 39B, there are mandatory whippings forced

35. The UNMO Coalition held 148 of the 177 Parliament seats as of August 1990. 36. Drug Laws are Tough Enough: Megat Junid, NST, Mar. 22, 1990, at 3. One Malaysian legal scholar has observed, there is a "scissors and paste... cut and patch" quality to the body of drug laws that undermines their effectiveness:

Now more and more nations having drugs problems are following our models in dealing with drug offenses, i.e., by imposing a death penalty. But when they look at the cobweb surrounding our untidy drug laws, the first impression is always cast upon the lawmakers.... Let us do some housekeeping to consolidate all our drug laws into one simple code.... This is also to ensure that our students, teachers, police officers, lawyers, prosecutors and defence counsels, judges, the press, the laymen and the foreigners who are looking forward to us[ing] our law as a model will find our drug laws neat, clean and tidy.

Majid, supra note 21, at 78. 37. SPM Act, supra note 2, § 6(1). In theory, detainees have a few rights under the statute, but these are frequently unenforced. For example, a detainee has the right to receive a written list of allegations. Since there is no judicial review, however, a detainee has no way to compel the production of such a list. 38. 1952 Act, supra note 1, § 31A(1). 39. Id. § 37A. 40. Id. § 40A(1). 41. Id. § 37. 42. Id. § 39A.
rehabilitation in detention camps, and preventive detention under provisions approximating those of the ISA.44

A. The Dangerous Drugs Acts

The original 1952 Malaysian drug enactment, the 1952 Act, consolidated the existing drug laws from the individual Malay states.45

The Dangerous Drugs (Amendment) Act of 1975 (1975 Act)46 was the first of many amendments to the 1952 Act, and completely reorganized the law to provide the framework that exists today. The most important change was the addition of section 39B, providing that trafficking in dangerous drugs would be punishable by death, life imprisonment, whipping, or some combination of those penalties.47

The 1975 Act also increased sentences for possession of opium, requiring a mandatory whipping of at least three strokes if the opium weighed more than 250 grams.48

A new section of the 1975 Act, Section 37B, permitted the detention of addicts for treatment.49 It also made “cautioned statements” given to ordinary police or customs officers admissible at trial, a provision that violated existing due process standards in Malaysian law.50

Sessions Courts were given the power to impose all penalties under the Acts except death, which reduced the burden of the large number of drug cases on the High Court.51

44. SPM Act, supra note 2, §§ 3-6A.
45. To facilitate colonial control, the British created a fiction that Malaysian states were independent sultanates functioning under nominal British “resident advisors.” Thus, each state had its own code of laws. Beginning in the 1930s these codes were increasingly centralized under a “Federated Malay States” government that included a single system of courts. See generally R. BRADDELL, THE LEGAL STATUS OF THE MALAY STATES (1937).
46. See supra note 1.
47. The maximum sentence under the 1952 Act had previously been five years imprisonment. Majid, supra note 2, at 135.

Section 39A prohibits drug possession. 1952 Act, supra note 1, § 39A. Prior to the creation of § 39B prohibiting drug trafficking, section 39A established the major drug offense in Malaysia. Section 39A prosecutions still far outnumber section 39B prosecutions, and are primarily for the possession of smaller amounts of drugs than trigger section 39B “trafficking” presumptions. Rise in Number of Dadah Addicts Last Year, NST, March 17, 1990, at 9. In 1989 there were 688 arrests under section 39B and 950 arrests under section 39A. Id.
49. Id. § 37B.
50. Id. § 37A. Only police officers at the rank of Inspector or above may take these so-called “cautioned statements” under Malaysian law. M.K. MAJD, CRIMINAL PROCEDURE IN MALAYSIA 68 (1987).
51. Dangerous Drugs (Amendment) (No. 2) Act, 1975, § 41A, Act A318 (Malaysia), amending 1952 Act, supra note 1. Malaysia’s national court system is four tiered. At the lowest level are Magistrates that hear minor matters. Above Magistrates are the Sessions Courts that are the primary courts for both civil and criminal matters. The High Courts serve
The Amendment of 1977 (1977 Act)\textsuperscript{52} provided for the first in a series of statutory presumptions establishing some elements of the offense of trafficking.\textsuperscript{53} The 1977 Act deemed possession of 100 grams of heroin or morphine, an amount later amendments reduced to fifteen grams,\textsuperscript{54} 200 grams of cannabis or resin, 1,000 grams of prepared opium, or five kilograms of raw opium enough to prove an intent to traffic.\textsuperscript{55} It also provided for a broader definition of trafficking and permitted the use of testimony of agents provocateurs without corroboration in trafficking cases.\textsuperscript{56}

The presumptions now contained in the Malaysian drug laws are important aids to the State, even though the burden of establishing proof beyond a reasonable doubt remains on the prosecution.\textsuperscript{57} In all, there are ten presumptions set out in Section 37, but only a few of them are commonly used.\textsuperscript{58} Section 37(b) provides that a person is the occupier of the premises if he has “care and management” of the premises. Section 37(d), the most frequently used presumption, provides that “any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall . . . be deemed to have possession of such drug and shall . . . be deemed to have known the nature of such drug.”\textsuperscript{59} Section 37(f) presumes that the master of a ship or aircraft has knowledge of any drugs imported on such ship or aircraft.\textsuperscript{60} Section 37(g) provides that if any dangerous drug is concealed on any premises it is presumed to be with the knowledge of the occupier of the premises.\textsuperscript{61}

The state’s burden of proof was also reduced by the adoption of a definition of “trafficking” which includes possession.\textsuperscript{62} This definition

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\textsuperscript{52} Dangerous Drugs (Amendment) (No. 2) Act, 1977, Act A390 (Malaysia), amending 1952 Act, supra note 1.
\textsuperscript{53} Id. § 37.
\textsuperscript{54} Id. § 37(da).
\textsuperscript{55} Id.
\textsuperscript{56} Id. §§ 2, 40A.
\textsuperscript{57} M.K. MAJID, supra note 50, at 186.
\textsuperscript{58} See infra section IV.B. for a discussion of how these presumptions work in the courts.
\textsuperscript{59} 1952 Act, supra note 1, § 37(d).
\textsuperscript{60} Id. § 37(f).
\textsuperscript{61} Id. § 37(g).
\textsuperscript{62} Trafficking includes “manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, deliver-
essentially eliminates any difference in the criminal liability of users and dealers.\textsuperscript{63}

Restrictions of traditional due process continued with the Dangerous Drugs (Amendment) Act of 1978, which provided for the automatic elimination of bail for all offenses providing for more than five years' imprisonment under the Act\textsuperscript{64} and the elimination of bail for lesser offenses on the Public Prosecutor's written certification that it is "not in the public interest to grant bail" to the accused.\textsuperscript{65} Thus, even for defendants possessing small amounts of drugs, bail may be denied.\textsuperscript{66}

The Dangerous Drugs (Amendment) Act of 1983 provided for the mandatory death penalty for trafficking under section 39B.\textsuperscript{67} Moreover, it sharply reduced amounts in possession required to invoke the presumption of trafficking.\textsuperscript{68}

The quantities of drug possession at which the government may impose severe penalties, including life imprisonment in some instances, were reduced again under Section 39A of the Dangerous

\footnotesize{ing, procuring, supplying, or distributing any dangerous drug."} \textit{Id.} § 2 (definition of trafficking).

As a result of this definition and the presumption set forth in the preceding paragraph of text, by simply proving that a defendant is (a) the captain of a ship, and (b) that the ship carried more than fifteen grams of heroin, the prosecution has technically met its burden of proof on a charge of trafficking under section 39B, exposing the defendant to the mandatory death sentence and leaving the defendant with the burden of rebutting the presumption. This result would follow from the presumptions in sections 37(f) and 37(b).

\textsuperscript{63} Malaysian courts have recognized this fact and been troubled by it. The beginnings of a judicial remedy have been constructed through an affirmative "personal use" defense against trafficking charges. \textit{See} Cohen Lorraine Philips v. Public Prosecutor [1989] \textsc{Malaysian Current} L.J. 956 (S.C. Kuala Lumpur) discussed in \textit{infra} text accompanying notes 171-176.


\textsuperscript{65} 1978 Act, \textit{supra} note 64, § 41B(c).

\textsuperscript{66} These provisions are in conflict with the Criminal Procedure Code which provides that virtually all criminal defendants have a right to bail. Criminal Procedure Code (Amendment and Extension Act), 1976, § 387, Act A324 (Malaysia). The Federal Court has held that the Dangerous Drugs Act superseded the Criminal Procedure Code, thereby denying those charged under the Dangerous Drugs Act the right to bail. Public Prosecutor v. Chew Siew Luan [1982] \textsc{Malayan} L.J. 119 (F.C. Penang 1982).

\textsuperscript{67} 1983 Act, \textit{supra} note 2, § 39B.

\textsuperscript{68} \textit{Id.} § 39A. The Dangerous Drugs (Amendment) Act, 1984, added the possession of fifteen grams of monacetylmorphines to this list, and also specified various combinations of drugs that activated the presumption of trafficking. Dangerous Drugs (Amendment) Act, 1984, §§ 37(da), 37A, Act A396 (Malaysia), amending 1952 Act, \textit{supra} note 1.
Drugs (Amendment) Act of 1986. In addition, the punishment of mandatory whipping for everyone convicted under the Act was added as a penalty, replacing the optional sentence of whipping that had already been provided.

B. The Special Preventive Measures Act

While the 1952 Act and its amendments gave the state extensive legal powers to control trafficking, the government felt that it needed additional laws to control drug trafficking. Therefore, in 1985 the government extended the ISA to drug trafficking cases, so that traffickers against whom there is no evidence sufficient to proceed with a formal criminal trial can nevertheless be detained. The SPM Act also allows routine re-arrests of trafficking defendants who were acquitted by the courts.

The procedures for detention under the SPM Act allow any police officer, without a warrant, to detain any person whom he has reasonable grounds to suspect for a period of up to twenty-four hours. Subsequently, a police officer of Deputy Superintendent rank or higher may order further detention for up to sixty days. During this period the police may interrogate the detainee without providing even minimal protections against self-incrimination. At any time during this period, the Home Minister, at the request of the police, may require an inquiry and issue an order subjecting the accused to a number of restrictions, including detention for a period of two years. An “Advisory Board,” appointed by the Home Minister, was given some powers of review over these detentions, but this board in practice remains closely controlled by the Home Minister.

70. Id. § 39A.
71. ISA, supra note 12, § 8.
72. SPM Act, supra note 2, § 6(5)(b).
73. Id. §§ 3(1), 2(a).
74. Id. § 2(c).
75. Id. § 4.
76. Id. § 6(1)-(3).
77. Id. §§ 10-11. An example of how weak these procedural safeguards are and of the Malaysian judiciary's unwillingness to intervene in these inquiries can be seen in Inspector General of Police v. Rajoo s/o Ramasamy [1989] MALAYSIAN CURRENT L.J. 1039 (S.C. Kuala Lumpur 1988). The defendant alleged that the Inquiry Officer did not sufficiently investigate the evidence suggesting that defendant was a drug trafficker. The Supreme Court held that the legislature had not specifically required the inquiry officer to meet any particular investigatory standards in making his report. Id. at 1042-43. Rajoo was subsequently released, however, on a writ of habeas corpus on an issue involving the ISA Advisory Board’s failure to make a representation to the government within the statutory three month period. Star, Feb. 8, 1990, at 7.
These measures were controversial because they were an extension of anti-drug measures that had been used to detain opposition party leaders in 1987 and, therefore, elicited opposition reaction in Parliament. Nevertheless, a 1990 amendment to the SPM Act went further, completely removing all detentions under the Act from judicial review. This was accomplished by language prohibiting any "action, suit, or any other legal proceeding from being brought, instituted, or maintained in respect of any detention order." The amendment sent the Malaysian judiciary a message not to interfere with the executive's strong anti-drug measures. More importantly, it barred all writs of habeas corpus.

The government characterized the bill as simply preventing use of a loophole in the 1952 Act. The "loophole" in question had allowed courts, under writs of habeas corpus, to release prisoners held past the expiration of their terms; that is, held without legal authority. Such detention is a fundamental violation of due process. Abolishing judicial review of extended detention does not "plug" a loophole. Rather, it is an act that changes the very structure of the rule of law in Malaysia.

C. Other Laws Aimed at Drug Trafficking

The Dangerous Drugs (Forfeiture of Property) Act 1988 (Forfeiture of Property Act), which permits the seizure of property involved in drug trafficking, gives the state powerful civil weapons against the commercial bases of the drug trade. It is aimed at the huge profits amassed by large-scale drug dealers who are often immune from arrest because they are never found near any drug transactions.

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80. Id.
81. Coupled with the firing of the Lord President and two Supreme Court judges in 1988, the SPM Act cast a chill on judicial independence in Malaysia. Bill to Ensure Traffickers Remain Under Detention, NST, Mar. 6, 1990, at 1.
82. The writ had been used with some success by detainees under the SPM Act. For example, although the SPM Act specifies a two-year maximum period of detention, persons held under detention orders of more than two years were released by the courts on writs of habeas corpus. High Court Frees Four on Drug Charge, Star, Dec. 21, 1989, at 4. Tractor Driver on Drug Charge Freed, Star, Jan. 24, 1990, at 10. For a Supreme Court case releasing one of the drug detainees under one such "loophole" see Tan Hoon Seng v. Minister of Home Affairs, Malaysia [1990] MALAYAN L.J. 171 (S.C. Kuala Lumpur 1989).
83. See Bill Seeks to Plug Loopholes in Drugs Act, supra note 79.
84. Dangerous Drugs (Forfeiture of Property) Act, 1988, Act 340 (Malaysia).
However, the Forfeiture of Property Act is troublesome insofar as it presumes the guilt of the alleged trafficker and the illegal nature of the seized property.\(^{85}\) Additionally, it provides that "where the Public Prosecutor or any senior police officer has obtained any document or other evidence . . . ," such document will be admissible "notwithstanding anything to the contrary in any written law."\(^{86}\) This provision not only limits judicial review, but effectively invites the police to employ illegal methods of obtaining evidence. The Act also includes a very broad definition of criminal conspiracy.\(^{87}\) As under the 1952 Act, bail is denied to anyone charged under these measures.\(^{88}\) Finally, the Drug Dependents (Treatment and Rehabilitation) Act of 1983 (Drug Dependents Act) allows addicts to be involuntary committed to treatment programs and detained for up to three years.\(^{89}\) As noted above, such treatment of addicts is rarely effective in curbing drug abuse.\(^{90}\)

IV. THE JURISPRUDENCE OF MANDATORY DEATH IN MALAYSIA

This section addresses the question of how Malaysia's very strong arsenal of anti-drug laws has been applied by the Malaysian judiciary.\(^{91}\) Analysis of this question has three distinct parts. The

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85. Id. § 34.
86. Id. § 35.
87. Id. § 3. It prohibits as a conspiracy "entering into . . . any dealing in relation to any property, or using or causing to be used any property—(a) with the intention of promoting, managing, establishing, or carrying on any act . . . which constitutes a scheduled [criminal] offense; or (b) with the intention of facilitating or assisting in the promotion, management, establishment or carrying on of the act . . . referred to in paragraph (a)" carrying a penalty of five to twenty years imprisonment. Id.
88. Id. § 57.
89. Drug Dependents Act, supra note 23, § 6(1)(a).
90. Teaching Rehabilitation Center Inmates Better Skills, supra note 23.
91. Judges in Malaysia, at all levels, are appointed by the King on the advice of the Prime Minister (or, for Sessions Court judges, the Chief Justice) after required consultation with certain other government officials. M. SUFFIAN, INTRODUCTION TO THE LEGAL SYSTEM OF MALAYSIA 52-54 (1988). While the Malaysian judiciary is competent in the traditional skills of judicial interpretation, it has recently become a weak judiciary, wary of the executive branch of government, and willing to defer to the government on matters related to national emergencies and internal security. Although the Federal Constitution guarantees judicial independence, the judiciary is on clear notice to respect the power of the executive branch and to avoid making critical comments on general matters of public policy in Malaysia. Long-standing resentment between the two branches broke into open conflict and a full-scale constitutional crisis in 1988, when the highest ranking judge in Malaysia, the Lord President, and two other Supreme Court judges were dismissed because of their disagreement with government regarding their handling of a politically controversial case. See P. WILLIAMS, JUDICIAL MISCONDUCT (1990); S. ABAS, THE ROLE OF THE INDEPENDENT JUDICIARY (1988). A leading expert on Malaysian constitutional law has concluded that the removal of the judges was not justified under Malaysian law. Trindade, The Removal of the Malaysian Judges, 106 LAW Q. REV. 51 (1990).
first recounts the development of a presumptive mandatory death penalty in drug cases before the codification of the penalty in the 1952 Act. The second focuses on how the Malaysian courts have decided the drug cases brought under the mandatory death penalty provisions of section 39B. Finally, a third part treats a judicially-created defense to prosecuting traffickers for addiction.

A. The Judicial Creation of the Presumptive Death Penalty

The mandatory death penalty was initially a de facto creation of the judiciary rather than something that emanated from Parliament. Parliament had imposed a choice between a life sentence and the death penalty in the 1975 Act, but until 1980, the judiciary treated this as a mandatory life sentence. 92 However, in eight cases 93 handed down between 1980 94 and 1985 by the Federal Court and its successor the Supreme Court, the highest courts in Malaysia developed the doctrine that public policy mandated a presumptive death penalty for drug trafficking under section 39B by imposing death sentences in cases where lower courts had assigned life sentences. 95

The first of these cases was Lo Hock Seng v. Public Prosecutor. 96 Loh Hock Seng and Hong Hoo Chong were convicted in the High Court of Penang, on charges of selling 1550 grams of heroin. Loh was sentenced to life with seven strokes of whipping and Hong to life with fourteen strokes of whipping. Both defendants appealed to the Federal Court.

In light of his several previous convictions for armed robbery, theft, house breaking, and possession of heroin, Hong Hoo Chong’s sentence was increased to death, the first time in thirty-two years the court had made such an enhancement. 97 Chief Justice Azlan Shah wrote:

92. There are no reported cases between 1975 and 1980 in which traffickers were sentenced to death.


95. This doctrine was imposed on the lower courts through the Supreme Court’s power to review sentences on the appeal of either party. See infra notes 99-102 and accompanying text.


97. Id. at 15.
[I]n view of the current and continuing upsurge of indulgence in dangerous and deleterious drugs . . . we feel the time has now come for some more vigorous element of deterrence to be brought to bear upon those trafficking in drugs . . . who are no less than engineers of evil and peddlers of death . . . . [They] should know they are in for the punishment prescribed by law to fit the crime.98

High Court judges interpreted the holding narrowly and originally understood Lo Hock Seng to apply only to the most serious cases, and then only in the absence of mitigating circumstances.99 However, subsequent Federal Court cases significantly expanded the scope of the ruling. In Chang Liang Sang,100 for example, the Federal Court stated:

[W]e would like to stress that in drug trafficking cases very little allowance can be made for the circumstances of individual offenders . . . . Other than in the most exceptional circumstances, a sentence of death should be imposed following a conviction for trafficking, in order to mark the gravity of the offense, to emphasize public disapproval, to serve as a warning to others, to punish the offenders, and most of all to protect the public.101

The full reasons for judicial creation of a presumptive death penalty cannot be known. The doctrine appears to be largely the creation of one powerful judge, Chief Justice Azlan Shah, now King of Malaysia.102 Perhaps he saw the reluctance of the judges to apply the statutory option of the death penalty as failing to provide adequate

98. Id. at 14.
101. Id. (emphasis added).
102. In the normal course of Malaysian politics the ranks of federal officers and the hereditary rules are separate. The Malaysian King is elected by the country's nine hereditary sultans from among their number to serve a five-year term as King. Although the King is a constitutional monarch with no real role in government, he serves as head of Islamic religious affairs in the federal territory and possesses substantial traditional authority.

Azlan Shah was fourth in the line of succession in a branch of the royal family of Perak that ordinarily would not have been due to rotate into the Sultan of Perak's throne. Consequently, he was educated in law in Great Britain, and began a long career in the Malaysian judiciary. After serving as Chief Justice and Lord President, several deaths in the Perak royal family caused him to ascend to the Sultan's throne. He became Sultan of Perak in 1984 and was elected King of Malaysia in 1989. A Man of Vision, NST, Apr. 19, 1990, § 2, at 6 (a short biography).
deterrence policy in the face of an international drug threat. It is also possible that the doctrine is the result of an activist judiciary, throttled in other important issues, asserting its power to shape public policy.

Parliamentary enactment of the mandatory death sentence arguably grew out of the Federal Court’s own inability to specify the appropriate “exceptional circumstances” that would justify a life sentence. In Public Prosecutor v. Saubin Beatrice, a French defendant was arrested with 534 grams of heroin concealed in twenty-two plastic bags in a secret compartment in her suitcase. She maintained that she had no knowledge of the drugs because a Chinese friend, whom she could not produce in court, had given her the suitcase. The trial judge rejected this defense, found her guilty and sentenced her to life. On appeal, the judge noted the heroin had a street value in Europe of $1.2 million, cited the presumptive death sentence and increased her sentence to death. On further appeal the Federal Court, in an unpublished opinion, reduced her sentence to life because of unstated “exceptional circumstances.”

It was impossible to determine what these circumstances were and most Malaysians quickly assumed the reasons were those that seemed obvious: white European women did not face a presumptive death sentence while Malaysian men and women of all races did. The Court has never again found such extenuating circumstances. In Public Prosecutor v. Tan Hock Hai, a High Court judge cited Saubin Beatrice for the proposition that he could individualize his sentence because of “extenuating circumstances.” In Saubin Beatrice, a different panel of the same Court stated that “a twenty-two year old foreign female courier who trafficks in heroin takes the same risk and does so at the same peril as a fifty-two year old local male counterpart, and the sex, age and origin of the offender would appropriately be more a matter for . . . clemency.” Nevertheless, the Federal Court in Tan

104. Id. at 308.
105. Id. at 307.
106. Id. at 314-15.
110. Tan Hock Hai [1983] MALAYAN L.J. 163, 164. There is a constitutional clemency process set forth in Part IV, article 42 of the Federal Constitution. FEDERAL CONST. art. 42 (Malaysia). Each state has a Pardons Board consisting of the Attorney General of the Federa-
Hock Hai still imposed the death sentence, denying the lower court judge's finding of “exceptional circumstances” on the grounds that it was unable to determine what constituted specific “exceptional circumstances” within the meaning of Saubin Beatrice.

The inconsistency in sentencing, in addition to the racial overtones of the Saubin Beatrice case, were the major impetus leading Parliament to codify the mandatory death penalty for traffickers. The government's stated reason for legislating the mandatory death penalty stressed the same deterrence and public policy bases that Justice Azlan Shah first set out in Loh Hock Seng. However, Parliament's codification deemed irrelevant the discretionary factors that a judge might properly take into account in sentencing and reversed its 1975 legislation allowing judges to choose sentences in trafficking cases.

The mandatory death penalty for traffickers is very popular and no longer presents a serious legal or political question within Malaysia. The Supreme Court upheld the law in Public Prosecutor v. Lau Kee Hoo. Following long established commonwealth law—under which many countries, including Malaysia, have mandatory death penalties—and quoting a Singapore case upholding Singapore's mandatory death penalty for trafficking, the Court took a straight-

tion, the Chief Minister of the State, and up to three other members appointed by the Sultan. This board makes recommendations to the Sultan. This process is secret and entirely discretionary, but it appears that a number of persons sentenced to death are ultimately pardoned. The courts, however, have refused to intervene in the clemency process, holding it is entirely a matter for the executive and the rulers. Karpal Singh v. Sultan of Selangor [1987] MALAYSIAN CURRENT L.J. 342 (H.C. Kuala Lumpur 1987). The High Court held that the matter of pardons was non-justiciable and clearly within the discretion of the Sultan. Id. at 346.

112. Id.
113. Phillips, supra note 107, at 151.
114. Majid, supra note 2, at 149.
115. Phillips, supra note 107, at 5, 22-23.

117. See supra notes 14-16 and accompanying text. Malaysia also had the death penalty under its customary law. An account of a traditional execution (although ordered by the British) can be found in J. McNAIR, PERAK AND THE MALAYS 202-09 (1882). The British brought their laws, which included the penalty of death by hanging, to Malaysia. An account of the first British trial and execution in Selangor can be found in Harring, Send Six Copies of the Penal Code: The Foundations of Colonial Law in Selangor, 1875-1880, INT'L J. OF THE SOCIOLOGY OF LAW (forthcoming 1991). Even without the mandatory death sentences imposed on traffickers, Malaysia has a large number of executions. During the eleven years 1970 through 1980, Malaysian courts sentenced 123 persons to death. Thirty-one were executed. Of these executions, eleven were under the Malaysian Penal Code (most likely for murder), seventeen under the ISA, two under the Firearms (Increased Penalties Act), and one for drug trafficking.

118. Ong Ah Chuan [1981] MALAYAN L.J. 64 (P.C. London 1980). This Singapore case was appealed to the Privy Council of the House of Lords and is cited by the Malaysian
forward positivist position: the matter of punishment for crimes is exclusively for Parliament. To the argument that this was "arbitrary," the court responded that all criminal classifications are, to a certain extent, "arbitrary," and thus, are not necessarily unconstitutional unless there is no basis justifying them. The death penalty is obviously intended to strike terror in the hearts of traffickers and to deter them from doing business in drugs. But it is also meant to terrorize the general population, not only presenting drug use as the equivalent of death, but also presenting the police and the state as omnipotent and fearsome. The image of the mandatory death penalty looms very large in Malaysian legal culture. Large posters with graphic images of hangman’s nooses and slogans "Dadah means Death" abound in Malaysia, while the headlines in the popular press are replete with notices of death sentences.

B. The Judicial Processing of Drug Trafficking Cases

The development of the mandatory death penalty as the only punishment for drug traffickers left judges with only one alternative to

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Supreme Court. Singapore law is very influential in Malaysia because of the two countries’ common colonial heritage. Singapore, historically a part of Malaysia, but independent since 1964, also takes a strong stand against trafficking. The Singapore "Misuse of Drugs Act," chap. 185, Statutes of Singapore (1985), was originally drafted in 1973, replacing the 1952 Act that is still in force in a modified form in Malaysia. The Singapore statute is much simpler than the Malaysia statute. It provides a narrower definition of trafficking, lacks the presumptions of the Malaysia statute, and provides death in fewer drug related offenses, limiting that penalty essentially to trafficking in over 30 grams of heroin or opium, or to the manufacture of certain illegal drugs. Singapore has hanged twenty-six people under its anti-drug laws since 1975, compared to Malaysia's 104. However, with only about 15% of Malaysia's population, Singapore has a higher per capita rate of drug executions. Tougher Drug Law to be Enforced, Star, Feb. 10, 1990, at 18. On the general political climate in Singapore see ASIAWATCH, SILencing ALL Critics: HUMAN RIGHTS Violations in SINGAPORE (1990).

119. ASIAWATCH, supra note 118, at 161.
120. Id. at 161-162.
121. An article entitled Mother of Five to Hang for Trafficking in Heroin was accompanied by a sad photograph of the trafficker in chains being led off to death row surrounded by a large number of police officers. Mother of Five to Hang for Trafficking in Heroin, NST, Oct. 28, 1989, at 5.
122. The focus of the next sections is on major areas of judicial interpretation of the various provisions of Malaysia’s mandatory death penalty for traffickers. This may lead to an impression that there is great judicial creativity in this area and that trafficking defendants receive a high level of due process. While any analysis of comparative due process is a complex matter (e.g., what is the actual level of due process in the average American case?), it has already been represented that Malaysia has a highly competent judiciary, well schooled in common law legal tradition, but conservative and positivistic in outlook. The following sections discuss major problem areas in Malaysia's drug laws as developed by this judiciary. It also follows that there are numerous areas of law where there are few problems and, in these areas, routine cases easily lead to the mandatory death sentence. The routine administration of section 39B in these cases can be expected to continue to lead to a high number of death sentences as long as these severe drug laws remain on the books.
imposing the death penalty—acquittal. Under Malaysian law this decision falls solely to the judge—there is no right to trial by jury except in murder cases.\(^{123}\)

At the close of the prosecution’s case, the judge must rule whether the prosecution has introduced sufficient evidence for there to be “cause to answer.” If the judge is satisfied that the prosecution has introduced sufficient evidence on every element of the case for which it has the burden of proof, the judge then shifts the burden to the defendant to show by a preponderance of the evidence that he or she lacked knowledge about the drugs.\(^{124}\) Effectively, the defendant must prove his innocence, a requirement that runs directly counter to common law criminal jurisprudence.

Even though there is no statutory requirement that the defendant have knowledge of the nature or location of the drugs at issue in order to be convicted,\(^{125}\) section 39B cases fall into a pattern in which knowledge has become the major single issue.\(^{126}\) Persuasively denying

\(^{123}\) A description of the law of the criminal trial process can be found in M.K. MAJID, supra note 50, at 213-38.


\(^{125}\) The Public Prosecutor has argued, unsuccessfully, that Parliament intended section 39B to be a strict liability offense, with no knowledge requirement, but the Malaysian courts have uniformly rejected this interpretation, reading into the law a common law mens rea of specific intent to traffic in drugs. Public Prosecutor v. Saubin Beatrice [1983] MALAYAN L.J at 307, 313. A presumption of knowledge from possession also appears in section 37(d) of the 1952 Act. It follows that if Parliament intended section 39B to be a strict liability offense it did not need the presumption of knowledge from possession in section 37(d). In Public Prosecutor v. Goh Yeong Hock [1988] MALAYSIAN CURRENT L.J. 185, (H.C. Kuala Lumpur 1987), the trial judge specifically concludes that the Gohs’ defense of “no knowledge” has been established on a “balance of probabilities” rebutting the presumption of knowledge of section 37(d). Id. at 196.

\(^{126}\) This section is based on a study of all section 39B cases reported in either the Malay Journal Law or the Malaysian Current Law Journal, the two official Malaysian reporters. Both report selectively. While cases from all courts are occasionally reported, even Supreme Court opinions are printed only on a selective basis. The ordinary judgements of High Court judges are sometimes printed, while those of Sessions Court judges are rarely printed. Since the mandatory death penalty provision was added in 1983, Sessions Courts have not had jurisdiction over new section 39B cases because they are not empowered to pass the sentence of death. Public Prosecutor v. Hun Peng Khai [1984] MALAYAN L.J. 318 (R.Cr.J. Penang 1984). There were a number of cases dealing with Sessions Court section 39B cases following the enactment of the mandatory death penalty provisions. Most of these cases were disposed of in the Sessions Courts, thus saving the lives of many accused traffickers.

In all there are 122 reported section 39B cases, involving 150 defendants. Given the lack of official statistics, it is impossible to determine what proportion of the total number of cases brought this represents. There have been about 100 executions under section 39B and there are
knowledge can lead to acquittal. As noted above, section 37 of the 1952 Act allows knowledge to be presumed in a number of circumstances.\textsuperscript{127} This section examines three such types of frequently recurring circumstances: possession of drugs in hand-held bags of various sorts, possession of drugs in the accused's houses or rooms, and possession of drugs in automobiles.

A study of the functioning of the presumptions in section 37 demonstrates that they have been judicially restricted in several areas. While the prosecution is often able to secure convictions without the presumptions, ironically, the presumptions appear in some cases to have weakened the prosecution's case by discouraging thorough police investigations. On the other hand, the statutory presumptions may be unjust insofar as they increase the possibility of wrongful convictions. This is the inevitable result of the prosecution not having to satisfy the more rigid "beyond a reasonable doubt" standard of proof and the defendant having the burden to prove a lack of knowledge.

1. Drugs Found in Bags

Even though section 37(d) specifically provides that a person found in possession of a drug is "deemed to have known the nature of such drug,"\textsuperscript{128} the courts have weakened this presumption by reinserting a fairly narrow knowledge requirement into the law. In \textit{Public Prosecutor v. Goh Yeong Hock},\textsuperscript{129} Goh Yeong Hock and his wife were arrested in December 1983 at Subang Airport, Kuala Lumpur and charged with carrying 9,736.19 grams of heroin, one of Malaysia's reportedly about 200 convicts on death row awaiting execution, making some 300 persons convicted. There are no data on acquittals but my research shows that most pre-1986 cases resulted in convictions, while the current conviction rate has dropped to about 40\% acquittals. This would suggest that there have been perhaps 400 section 39B trials, of which 30\% have been analyzed in this section. In any case, this discussion does not purport to provide a study of all the cases but means instead to study a representative sampling.

There is a time-lag in the processing of section 39B cases of up to four or five years for initial trial, then another three or four years for an appeal. Under the Malaysian Constitution, the 1983 mandatory death penalty is not retroactive. Thus, cases are still being tried in which the accused does not face the mandatory death penalty, but rather faces the presumptive death sentence policy of \textit{Loh Hock Seng}, supra note 96, and some cases of persons arrested before April 1983 (and perhaps tried in 1987 or 1988) are still on appeal. Because of these cases, the Supreme Court will continue to have to set standards to determine which traffickers should receive a life sentence. Here, as elsewhere, the process of Malaysian justice is slow.

\textsuperscript{127} See supra notes 52-61 and accompanying text.
\textsuperscript{128} 1952 Act, supra note 1, § 37(d).
\textsuperscript{129} Public Prosecutor v. Goh Yeong Hock [1988] MALAYSIAN CURRENT L.J. 185. The two were arrested because of a coincidence that connected them to a large, international heroin trafficking operation. Narcotics police had been told that three persons (not the two accused) would be trafficking in heroin in new blue bags on a flight to London.
largest seizures. The Gohs’ bags had false bottoms that contained heroin, and the couple carried about $3,000 (US) in four different currencies.

The Public Prosecutor’s case was straightforward. The trial judge noted that, under the presumptions established by sections 37(d) and 37(da)(i) of the 1952 Act, the two had custody and control of the drugs. He thus presumed knowledge. The defendants claimed that they believed they were smuggling counterfeit US dollars to the United Kingdom, for which they were to be paid $5,000.

The trial judge applied a “balance of probabilities” standard to the couple’s rebuttal of the presumptions, a standard that places a higher burden on the defense. Describing one of the accused as a “backboneless construction worker,” the judge concluded that even “on a balance of probabilities . . . the two accused did not know the bags contained heroin” and acquitted. Because Goh admittedly believed that he was smuggling counterfeit money, thus establishing a general “guilty mind” intent, the case also illustrates that the intent requirement for trafficking is one of specific, and not merely general, intent.

The courts have struggled to define the knowledge requirement. In Public Prosecutor v. Badrulsham bin Baharom, the defendant was arrested walking to work carrying a bag containing 770 rolls of marijuana. He claimed that the bag belonged to a friend and that he did not know the bag’s contents. The defendant was heading for work four hours early, could not explain why the friend had asked him to get the bag, and was imprecise on other matters. The explanation given by the defendant was inadequate to balance the probabilities in his favor and he was convicted. Knowledge, the court held, in the absence of an express admission by the accused, may properly be determined through inference.

The courts have interpreted the knowledge requirement more strictly in other cases. In Public Prosecutor v. Moh’d. Nadzir bin Moh’d., the accused was riding as a passenger on a motorcycle that

130. Id. at 186.
131. Id. at 189-90.
132. Id. at 189-90.
133. Id. at 190.
134. Id. at 196.
136. Id. at 590-93.
137. Id. at 589.
was stopped for not having any lights.\textsuperscript{139} When the owner of the motorcycle fled, the accused realized that the motorcyclist had given him a package and suspected that it contained heroin.\textsuperscript{140} He threw the package to the side but was seen by two police officers, who recovered the package and found it to contain seventeen grams of heroin.\textsuperscript{141} Although the accused had no witnesses on his behalf and could not produce the alleged owner of the drugs, the trial judge acquitted on the grounds that the evidence had overcome the presumption under section 37(d) that the defendant knew the nature of the thing under his control to be heroin.\textsuperscript{142} Merely "suspecting" or "believing" it to be heroin was not "knowledge" sufficient to convict. Thus, the court weakened the presumption of knowledge by accepting defendant's lack of knowledge as a defense.

2. Drugs Found in Rooms and Houses

Section 37(g) states that "if any dangerous drug is found to be concealed in any premises, it shall be presumed . . . that the said drug is so concealed with the knowledge of the occupier of the premises."\textsuperscript{143} This too is a potentially powerful tool for the prosecution.\textsuperscript{144} However, judicially imposed requirements of exclusive occupation and questions whether drugs were truly concealed limit the impact of the presumption, aiding the "occupier" of a room or house.

\textit{Public Prosecutor v. Tan Seow Chuan}\textsuperscript{145} illustrates the particular difficulty caused by this presumption given the traditional Malaysian custom of living in large extended-family units. Tan Seow Chuan, a 69-year-old opium addict, faced trafficking charges because police found a considerable quantity of prepared and raw opium in a room of his house, together with the apparatus to process raw opium, a scale with traces of opium in its pan, and $3,305 in a locked box.\textsuperscript{146} Seven adults lived in four different rooms in this house; all had access to the room in which these items were found, but no one lived or slept in the room.\textsuperscript{147} Since the accused was senile, had difficulty walking and was cared for by his wife, the court held that he was not the

\begin{footnotes}
\item[139] Id.
\item[140] Id.
\item[141] Id.
\item[142] Id. at 240.
\item[143] 1952 Act, supra note 1, § 37(g).
\item[144] No search and seizure issues have been raised in drug cases because Malaysia has no exclusionary rule. See M.K. MAJID, supra note 50, at 43-56.
\item[146] Id. at 319.
\item[147] Id.
\end{footnotes}
"occupier" of the room and that, therefore, no statutory presumption followed. \(^{148}\) The term "occupier" was narrowly limited to the regular occupant of the one small room in which the opium was processed. Since no one lived in that room, the Public Prosecutor faced the anomaly of having found an opium factory in a house occupied by seven adults but being deprived of a defendant. \(^{149}\)

Another case held on appeal that a defendant caught in a house with drugs who admitted to living in the house but denied knowledge of the drugs should have been acquitted. \(^{150}\) The court said that because "appellant was not in exclusive occupation of the kitchen," no presumption applied. \(^{151}\) The requirement of "exclusive" occupation further restricts the operation of the presumption. \(^{152}\)

On the other hand, some courts have convicted even without finding exclusive care and maintenance. In Rosyatimah bte Neza, \(^{153}\) when police raided defendant's room, they found a red bag containing cannabis under her bed. When asked to whom the drugs belonged, she named her boyfriend. \(^{154}\) Evidence at trial clearly established that many people had access to the suite of rooms: four women lived there, each had a boyfriend, and the accused slept in the room with a number of different men. The court found that, although many people had access to the room, the defendant was presumptively in exclusive occupation and that, under the presumption, she must be convicted. \(^{155}\) The court went on, however, to split legal hairs in order to spare the defendant the death penalty and to convict her of possession only. The judge held that while the presumptions proved possession, he was satisfied that the defendant's testimony had rebutted the presumption that she was trafficking. \(^{156}\) The judge may have been moved to this ruling because a blood test showed defendant was not

\(^{148}\) Id. at 325.

\(^{149}\) Id.


\(^{151}\) Low Geok Yeok [1982] MALAYAN L.J. at 348.

\(^{152}\) The Court's holding of "exclusive" use limits the operation of the presumption in cases where the occupancy is not "exclusive" such as in rooming houses and shared dwellings — common means of housing in Malaysia.


\(^{154}\) Id. at 361.

\(^{155}\) Id. at 367.

\(^{156}\) Id. at 368.
using drugs. Nevertheless, under the wording of the law, he was well within his power to sentence her to death.

In Public Prosecutor v. Ahman bin Puteh,\textsuperscript{157} three defendants were arrested in a police raid on a house they occupied. A bag containing cannabis was found near a refrigerator in the rear of the house.\textsuperscript{158} The court held that under section 37(g)—the presumption that the “occupier” of the premises has knowledge of drugs concealed there—a finding that drugs were in plain view negates the possibility they were concealed.\textsuperscript{159} The court thus acquitted the defendants. This narrow construction, technically grounded in a strict interpretation of a penal statute, indicates the courts desire to narrow the scope of the presumption.

3. Drugs Found in Automobiles

It is unclear whether Parliament ever intended that parallel presumptions for “premises” should exist for automobiles. There is no specific presumption that the owner or person in care or management of a car has knowledge of drugs found in the vehicle. There is a limited presumption in section 37(h), which states that when a dangerous drug is found “concealed in any compartment specially constructed for this purpose on any vehicle” it is presumed to have been concealed with the knowledge of the owner.\textsuperscript{160} However, at least one court rejected an argument attempting to expand the general language of section 37(d), which provides that any person having “in his custody or under his control anything whatsoever containing any dangerous drug” applies to motor vehicles.\textsuperscript{161} While conceding that “anything whatsoever may have a wide import,” the court held that it was qualified and limited by the word “containing.”\textsuperscript{162} The court held that a car cannot be a “container of drugs” because that “would twist and overstretch” the language beyond its common usage.\textsuperscript{163} Thus, unless the drugs are actually found in a specially constructed compartment, the prosecution must fully prove trafficking in automobiles without

\textsuperscript{158} Id. at 489.
\textsuperscript{159} Id. at 492.
\textsuperscript{160} 1952 Act, supra note 1, § 37(h).
\textsuperscript{161} Syed Ali bin Syed Abdul Hamid [1982] Malay L.J. 132 (F.C. Kuala Lumpur 1981). Authorities stopped and searched Syed Ali’s car in a prearranged ambush. Hidden behind a backrest in the back seat were more than forty kilograms of raw opium. Appellant and his wife both denied knowledge of the drugs. The prosecutor failed to convince the court that the car constituted “anything containing” a drug under section 37(d).
\textsuperscript{162} Id. at 133-34.
\textsuperscript{163} Id.
the aid of statutory presumptions. To date, no court has found any car to be, or to have, a specially constructed compartment.

Furthermore, courts have rejected the argument that a car constitutes "premises" under section 37(g).164 "Premises" are defined to include "conveyances" which, in turn, would include a "ship, train, vehicle, aircraft, or any other means of transport by which goods can be carried."165 The holding that an automobile was either a "vehicle" or "any other means of transport," which in turn allowed knowledge to be presumed, was overturned in the Syed Ali case.166 The appellate court applied instead the common meaning of the word "premises," and stated that all definitions in the 1952 Act must be interpreted in context. Thus, the term "premises" was restricted by the phrase "occupier of the premises" appearing in the same paragraph.167 Since it is against common usage to refer to the person in control of a car as an "occupier," the court ruled that the legislature must have intended to restrict the definition of "premises" to its ordinary and usual meaning.168

C. Addiction as a Defense Against Trafficking

The broad definition of "trafficking"—which includes "possession," "receiving," "storing," "keeping" and "giving"—contains no exception for drug addicts.169 Under this definition, addicts possessing statutory minimum amounts of drugs could be considered traffickers. However, the Malaysian courts have held that addicts who hold drugs for their own personal use are guilty only of "possession," not of "trafficking." Possession, under section 39A, may be punished by life imprisonment, but it carries no death sentence.170

Lorraine Philis Cohen and her son Aaron, New Zealand nationals, were seized at the Penang Airport with 141 grams and 35 grams of heroin respectively, hidden in their underwear.171 Under the law, these amounts would be enough to presume intent to traffic.172 Both testified that they were drug addicts and the drugs were for their own

164. 1952 Act, supra note 1, § 37(g).
165. Id.
167. Id.
168. Id.
169. 1952 Act, supra note 1, § 2 (definition of trafficking).
170. Id. § 39B.
172. See supra notes 53-54 and accompanying text.
use.\textsuperscript{173} Ms. Cohen received the death penalty, her son life imprisonment, and both appealed to the Supreme Court.

The Public Prosecutor asserted that because the broad definition of trafficking includes carrying and keeping, it was not open to the judge to reduce the charge to possession.\textsuperscript{174} The judge disagreed, holding that "despite the wide definition of the word ‘trafficking’ in the Act . . . the definition sounds artificial and not in accordance with the ordinary meaning of the word ‘trafficking.’"\textsuperscript{175} The court held that the defense of "personal consumption" was available, contingent upon the facts of each case.\textsuperscript{176} The Cohens were sentenced to life imprisonment.

Similarly, in Public Prosecutor v. Abdul Kudus bin Japlus,\textsuperscript{177} the court applied this defense to a man caught with more than 15 grams of heroin, enough to earn him the death penalty.\textsuperscript{178} The accused claimed that half the heroin belonged to his brother, also an addict. This claim reduced the amount in his possession to 8 grams. The court convicted the defendant of possession only.\textsuperscript{179}

Since many drug transactions involve addicts, this judicially created "addiction" defense should be raised in future cases. Moreover, the court’s willingness to narrow the statutory definition of trafficking by referring to the "ordinary usage" of the word may well lead to further judicial limitations on the broad "trafficking" definition.

V. JUDICIAL CONTROL OF THE POLICE INVESTIGATIVE PROCESS

Evidence for the cases against alleged traffickers is prepared by Malaysia’s formidable police apparatus.\textsuperscript{180} In addition to legal questions, judges also face questions of fact concerning the professional responsibility, legality and honesty of underlying police investigative work. Setting high evidentiary and police professionalism standards for mandatory death cases makes sound legal and moral sense and

\textsuperscript{174} Id. at 959.
\textsuperscript{175} Id. at 959-60.
\textsuperscript{176} Id.
\textsuperscript{178} Id. at 311-13.
\textsuperscript{179} Id. at 317.
\textsuperscript{180} Malaysia is one of the most heavily policed societies in the world: in 1990 it had 80,000 police officers in a predominantly rural, conservative nation of 17,000,000 people. Police Review, Star, Mar. 17, 1990, at 1. About 20,000 men are attached to the Malaysian Police Field Forces (PFF), a paramilitary unit that had primary responsibility for fighting the communist insurgents. This force was re-deployed to fight drugs in December 1989. Id. See also PFF to Take on Smugglers and Dadah Traffickers, NST, Jan. 10, 1990, at 1.
serves to offset some of the advantages that the varying presumptions give police and prosecutors in presenting drug cases.

This section analyzes how the courts evaluate police evidence and control the police investigative process. Four distinct areas of judicial supervision of police activities are considered. The first is the court's decision to receive "cautioned statements," that is, potentially self-incriminating statements by defendants. The second examines how the courts treat evidence from "agents provocateurs," police officers or informers who traffic in drugs in order to gain evidence against other traffickers. The third area inquires into the courts' regulation of the integrity of police work in the gathering of evidence. The fourth looks at how courts treat evidence of police misconduct in the course of drug investigations.

These four areas of police conduct all require the Malaysian judiciary to carefully scrutinize police testimony in criminal cases. These problems of police misconduct reveal the danger of police overzealousness and illegality in the prosecution of drug cases, especially where the police are constrained by formal legal rules of evidence and due process. Such actions as the introduction into evidence of statements taken from defendants by police officers who do not speak the defendant's language\(^{181}\) suggest that many police officers do not respect the rights of defendants. However, the cases below illustrate that the Malaysian judiciary sets high standards of police conduct in investigations, standards that judges consistently are willing to enforce, even at the expense of having to sacrifice the convictions of major traffickers.

A. Judicial Admission of Cautioned Statements

Cautioned statements are self-incriminating statements made by a defendant to a police official after the defendant has been "cautioned" concerning the legal impact of such statements. Under Malaysian law no such statement is admissible unless it was made to a senior officer under carefully controlled circumstances.\(^{182}\) However, prosecutions under the 1952 Act are excepted from this rule, and cautioned statements are admissible when made (after arrest) to any police or customs officer.


The law that generally regulates cautioned statements includes specific safeguards to reduce the likelihood of abuse. The safeguards regulating the quality of such statements are provided for by the same law that regulates such statements and Malaysian courts are strict about not admitting legally defective statements. Ordinarily, the admissibility of cautioned statements is determined by the judge in each case after an ex parte hearing or "mini-trial" out of the presence of the jury. However, in Malaysian drug cases, the judge is the sole trier of fact. Since the judge becomes fully aware of the contents of the statement, a danger arises that he will be unconsciously influenced by it in reaching his decision. Thus, the standards of admissibility provide no protection.

The leading cautioned statement case is Krishnan v. Public Prosecutor\textsuperscript{183} in which the Supreme Court reversed a death penalty conviction and acquitted an admitted trafficker. Krishnan was approached in front of his house by police and ran inside. The police gave chase, caught him and conducted a search of the house. In an adjacent row-house, connected to the defendant's home by an open door, they found 237 packets of drugs. An officer asked Krishnan whether he had more drugs. When Krishnan responded affirmatively, the officer asked where. Krishnan pointed to the back of the house.\textsuperscript{184}

The Supreme Court held that an arrest had taken place when the officer chased Krishnan into the house, found the drugs and held him.\textsuperscript{185} At this point the Criminal Procedure Code § 113(1)(a)(ii) required the administration of a cautionary statement. No such statement was administered.\textsuperscript{186} The court wrote:

A person accused of one of the most serious crimes known to our law is . . . entitled to equal protection before the law, and one of those items of protection to which he is entitled is that his guilt must be proved in accordance or in a manner required by law.\textsuperscript{187}

The Krishnan case thus establishes that the Supreme Court will reverse and acquit traffickers whose procedural rights are violated by the police.\textsuperscript{188}

\textsuperscript{184} Id. at 294.
\textsuperscript{185} Id.
\textsuperscript{186} Id. at 294-95.
\textsuperscript{187} Id. at 295.
\textsuperscript{188} See, e.g., Public Prosecutor v. Mohd. Fuzi bin War Teh [1989] MALAYSIAN CURRENT L.J. 652, 653 (H.C. Kuala Lumpur 1989) where a trial judge held that a cautioned statement "should not be merely a mechanical exercise of just reading to the accused person"
Judicial stringency regarding cautioned statements has also been applied to other police testimony about defendants' statements. In *Public Prosecutor v. Shaik Anwar bin Abdul Jalil*, the prosecution sought to introduce police testimony that the defendant had admitted drug trafficking at the time of his arrest. Under Malaysian law, a spontaneous admission is not restricted by the rules governing cautioned statements. Officers may testify to defendants' spontaneous statements at the time of arrest. However in *Shaik*, the judge refused to admit the police testimony, holding that statements made to police officers should be clearly and carefully recorded and not paraphrased.

Given the inherent dangers, both of involuntariness when defendants are in police custody facing charges carrying a mandatory death penalty and of deliberate police efforts to increase evidence in weak cases, the courts need to be vigilant in determining whether to admit a defendants' statements. Ironically, though, the existence of a high judicial standard may pose a difficult problem for defendants whose cautioned statements are admitted. Once the court has been careful to admit only proper statements, there is a natural tendency to believe them. Such defendants are almost invariably convicted.

A final issue raised by the use of cautioned statements involves the level of judicial awareness that Malaysia is a multi-lingual, multi-cultural nation. In *Public Prosecutor v. Mohammed Zaki*, Mohammed gave a cautioned statement, but then denied it was made voluntarily. The court conducted a trial within a trial to determine the legality of the statement and held that the statement had not been properly administered on several grounds. The defendant was handcuffed to a chair, a circumstance which under Malaysian law belies the "voluntariness" of the statement, and the police conceded that the

but that it should be carefully explained, including its consequences. In that case, the sole fact that defendant was handcuffed rendered the statement involuntary. See also Tan Too Kia v. Public Prosecutor [1980] *Malayan L.J. 187* (F.C. Kuala Lumpur 1980), in which a Federal Court reversed the conviction of a defendant whose statement was beaten out of him on the narrow holding that once voluntariness became an issue it was incumbent on the prosecutor to call the police inspector who had allegedly led in the beating. Since the proof of the voluntariness of the confession had to be made "beyond a reasonable doubt" the failure of this officer to testify when he was readily available meant that the prosecution had failed to meet its burden.

190. *Id.* at 2.
191. *Id.* at 5-6
192. More than ten languages are spoken in Malaysia: Malay, Thai, Tamil, Hindi, English, at least five Chinese dialects, and a number of tribal languages.
final version that they introduced in court was not in the "exact words of the accused."194 Most damaging was the revelation that Mohammed and the interrogating officers did not speak the same language. Mohammed’s first language was Thai, although he understood one Malay language well enough to trade.195 The Federal Court addressed the same issue in dicta (after acquitting the defendant on other grounds), in Tan Too Kia v. Public Prosecutor.196 The defendant in that case spoke the Chinese Teochew dialect and claimed not to understand the Hokkien dialect in which he had been interrogated. The court stated that:

generally speaking it is desirable that a suspect be interrogated in a language in which he is at home; but we would not go further by saying that if his mother tongue is Teochew he must be interrogated only in Teochew . . . . To do so would unnecessarily tie up the hands of the police in remote parts of the country . . . . This is a multi-racial and multi-lingual country, and we cannot shut our eyes to the fact that many Malaysians have not one, but two mother tongues, and while they are master of no particular language, yet converse easily in several languages for every day purposes . . . . In most cases a suspect is not being asked about concepts and abstract ideas, to express which he needs to be questioned and to speak in a language he is most at home in; but about events and concrete things. About these he may be questioned and is expected to give his own version only in language of the kind ordinarily used in the bazaar.197

While this holding attempts to deal pragmatically with the difficulties Malaysian police face in a multi-lingual society, to equate the level of understanding necessary for a criminal investigation with that which suffices in a bazaar can only be offensive to notions of due process. A criminal defendant’s rights are “concepts and abstract ideas” that deserve a higher level of consideration in the context of an interrogation.

194. Id. at 307.
195. Id.
197. Id. at 188.
B. Judicial Supervision of Agents Provocateurs

The practice of using agents provocateurs—police agents who commit crimes in order to get others to do so as well—is dangerous due to potential police overzealousness.\(^{198}\) The 1952 Act, however, states that testimony of an agent provocateur must be accepted without corroboration on the same basis as that of any other witness.\(^ {199}\) It also means that if the judge finds the testimony suspicious, he can simply ignore it.\(^ {200}\) Despite the liberal provisions relating to their testimony in the 1952 Act, agents provocateurs are used often in Malaysia.

In general, Malaysian courts trust agents provocateurs, possibly because they are used primarily in drug arrests, a type of case that may involve a standard of police discipline above that of ordinary cases.\(^ {201}\) In Public Prosecutor v. Padi bin Abdullah,\(^ {202}\) the defendant was captured "red-handed" selling cannabis to an agent provocateur who had alerted the police to the transaction. The exchange of money and drugs was seen clearly by three police officers.\(^ {203}\) The accused claimed that the agent was carrying the drugs. The court asserted that the agent's testimony was confirmed by the police officers and sentenced the defendant to death.\(^ {204}\)

C. Judicial Supervision of the Integrity of Police

A number of drug traffickers have been acquitted due to the failure of the police to account properly for evidence (always drugs) from the point of arrest to trial. The opinions on such "chain of evidence" cases have been emphatic in their criticism of the quality of police

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199. 1952 Act, supra note 1, § 40A.

200. See, e.g., Public Prosecutor v. Abu Bakar bin Abdul Malek Mohd. Yunus a/l Sumania [1990] Malaysian Current L.J. 1179 (H.C. Kuala Lumpur 1990). Here the trial court dismissed a Myanmarese citizen's drug trafficking charges on grounds that the testimony of the agent provocateur was not believable. When the prosecution failed to produce other witnesses, the defendant was acquitted. However, the man was rearrested under the SPM Act as he left the courtroom following his acquittal. Given that the detainee was arrested in November 1986, held without bail pending his trial, and will now be held for two years of preventive detention, he will serve about six years in prison, in spite of his acquittal. Brief Taste of Freedom for Myanmarese Businessman, NST, Feb. 10, 1990, at 5.

201. Because of the importance of drug cases in Malaysia, it is likely that police administrators assign a higher level of organization and direction to the investigation of such cases. However, there has not been nor is there likely to be a study of how various kinds of police investigations are directed. See supra note 2.


203. Id. at 61.

204. Id.
work, and have come from courts at all levels, including the Supreme Court.

The major Supreme Court chain of evidence case is *Teoh Hoe Chye*. Two defendants were arrested in a large-scale drug investigation involving their sale of 1,608.7 grams of heroin to an undercover agent. From the place of arrest, both defendants and the evidence were taken to the office of one Superintendent Low, arriving there about 5:20 p.m. Soon thereafter, Low handed the drugs to Superintendent Lim. Lim locked the heroin in a cabinet and went to dinner, not returning until 7:40 p.m. At that point a chemist arrived to conduct necessary tests on the drugs. The Supreme Court held that there was a break in the chain of evidence which led to doubt about whether the drugs introduced at trial were those drugs seized from defendants. How the drugs were transferred from Low to Lim, what happened to the drugs during the two hour hiatus while Lim was at dinner, and whether the drugs were consistently under lock and key were considered to be critical, unanswered questions. The court held that “where a doubt as to the identity of an exhibit arises, a failure to adduce evidence to provide the necessary link in the chain of evidence would be fatal to the prosecution case.”

This holding has often been repeated in chain of evidence cases, a number of which expose poor quality police investigatory practices. The case of *Sebastiano Pavone*, an Australian, is illustrative. Although caught “red-handed” carrying 1105 grams of an off-white substance, the defendant was acquitted because of a discrepancy in testimony as to the nature of the substance, a break in the chain of evidence, and a discrepancy regarding the amount of the substance. “The prosecution,” wrote the judge, “did not get . . . the chemist . . . or anybody else to explain what appears to be a difference in opinion of what that plastic packet contained.” The court blamed these problems on “some pretty shoddy investigations on the part of the police.”

While these cases show that the courts require careful adherence to the rules of evidence in drug cases, a trivial error does not necessar-

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206. *Id.* at 229-30.
207. *Id.* at 230.
209. *Id.* at 424-26.
210. *Id.* at 425.
211. *Id.*
ily lead to reversal. In *Public Prosecutor v. Phon Nam*, the Public Prosecutor neglected the required procedural measure of serving a copy of the chemist's report on the accused. Although the prosecutor remembered the mistake and asked the judge for permission to reopen his case to introduce the evidence, the trial judge denied the motion, holding that the "Public Prosecutor must prove every element of the case without the aid of the court." The Supreme Court reversed, holding that while the powers under section 405 of the Criminal Procedure Code provide that a judge "may" admit fresh evidence in the interests of justice, a judge "must admit fresh evidence when it appears essential to the just decision of a case."

D. Judicial Control of Police Misconduct

Malaysia has a history of rough police behavior stemming from its communist emergency. Charges of police abuse—violence against drug suspects, frame-ups, and general misconduct of all sorts—frequently arise in drug cases. While the Malaysian judiciary is willing to respond to such misconduct, much of it is beyond the range of the courts because it either goes unseen or can only be testified to by discredited drug defendants.

The most insipid form of deviant police conduct involved in drug law enforcement is the planting of drugs on arrested suspects when no evidence is found in the course of searching them. The courts have


213. *Id.*

214. Public Prosecutor v. Phon Nam [1989] *Malaysian Current LJ.* 7 (S.C. Kuala Lumpur 1988). See also Public Prosecutor v. Ong Tee [1983] *Malayan LJ.* 407 (A.Cr-J. Seremban 1980). In *Ong Tee*, a trial judge's acquittal of a defendant on possession charges because the chemist had testified that the drug was "heroin" and not "heroin within the definition of the Dangerous Drugs Act" was set aside on appeal. The court held that heroin was a well-known substance and that the description given was adequate to make out a prima facie case.

215. The ISA detainees of the October 1987 crackdown on the political opposition reported dozens of abuses of citizens' rights on the part of the police, including both physical and psychological abuse. The documentation of police abuse of ISA detainees is extensive. See also *CARPA*, *supra* note 13, at 78-81. See generally *International Mission of Lawyers to Malaysia: The Report* (1983).

216. The large number of officers who apparently cooperated in presenting the perjured case raises serious questions of the widespread nature of police dishonesty in drug cases. In general, police corruption seems to be very widespread in Malaysia. See, e.g., Public Prosecutor v. Mak Hing [1988] *Malaysian Current LJ.* 482 (H.C. Kuala Lumpur 1988), in which the court acquitted the defendant after uncovering false testimony on the part of three officers and a cover-up scheme by others to conceal the perjurer's testimony. See *infra* notes 217-224 and accompanying text.
found this behavior common. In *Public Prosecutor v. Mak Hing*,\(^{217}\) the accused's version of his arrest was totally at odds with that of the police. According to the police, the accused was "behaving in a suspicious manner" while riding a motorcycle, and was stopped by three officers. They seized a plastic bag from his hand containing forty-one grams of heroin and morphine.\(^{218}\)

In his defense, the defendant claimed to be searching for drugs beside the road because someone had told him drugs were hidden there. He said that the police searched him but found nothing on him or in the area. After his arrest and removal to a police station, he was driven back to the scene of the arrest, where the officers found a plastic bag of drugs.\(^{219}\) Confused by inconsistent statements by the police and the defendant as well as by the inability of the police to produce their diary from the evening of defendant's arrest, the judge acquitted the defendant.\(^{220}\)

Courts are often reluctant to accuse police officers directly of misconduct or dishonesty. Frequently, they simply allude to problems of police dishonesty and decide in favor of the defendant on other grounds. For example, in *Gan Kee Tian*,\(^{221}\) the police gave three different versions of the process that had led to their finding heroin in the defendant's house. The judge disposed of the case by acquitting on the ground that the prosecution had failed to show that the accused had "custody or control" of the heroin as required by section 39(d), but made clear that the quality of the police evidence was "far from satisfactory" and that he did not believe the police.\(^{222}\)

As serious as the perjury cases are the repeated charges of police brutality and physical violence against prisoners, whether perpetrated out of anger or in order to force "cautioned statements." Charges of police brutality are very difficult to prove because the victims lack credibility.\(^{223}\) Most often, when the accused in a drug case raises an issue of police brutality, the court does not take cognizance of it. Judges have raised the issue, but usually only in the context of revers-


\(^{218}\) *Id.* at 484.

\(^{219}\) *Id.* at 485-86.

\(^{220}\) *Id.* at 486-90. See also *Public Prosecutor v. Wong Kiew Meow* [1989] *Malaysian Current L.J.* 496 (H.C. Kuala Lumpur 1988) (judge held that the defendant was the victim of an elaborate police trap set for another person).


\(^{222}\) *Id.* at 407.

\(^{223}\) However, such charges were successfully raised in *Public Prosecutor v. Wong Moy* [1988] *Malaysian Current L.J.* 521, 530.
ing a case or discharging a defendant on other grounds.\textsuperscript{224} However, charges of police dishonesty are frequently raised in drug cases, often because this is the only defense open to a suspect caught "red-handed." That judges are willing to face such issues and have found defendants' charges to be true bespeak the integrity of the judicial system.

VI. A Statistical View of the Death Penalty

The cases cited in this article illustrate the determination of a conservative judiciary to apply common law standards of due process to Parliament's mandatory death penalty for trafficking. After a five-year period during which the judiciary led Parliament toward the mandatory death policy, the judiciary now seems to be retreating from that position. However, in absolute numbers, Malaysia's prosecutions and convictions under the death penalty are increasing. Since 1985 there have been more than 200 mandatory death sentences in drug trafficking cases.\textsuperscript{225} At least 200 persons are on death row awaiting execution.\textsuperscript{226}

Since 1983, well over 2,000 people have faced section 39B charges.\textsuperscript{227} In 1989 alone, 680 persons were arrested for trafficking under section 39B.\textsuperscript{228} The Malaysian judiciary clearly faces an enormously difficult problem in the processing of these cases, even without confronting the moral questions posed by the death penalty. The impact of this large number of cases on the legal process, however, is not equally clear.

In the context of the continuing rise in trafficking arrests, it may well be that no matter what kinds of interpretations of the statute judges apply in processing these cases, death sentences will increase, or at least will remain at a high level.\textsuperscript{229} On the other hand, there is

\textsuperscript{224} Out of the 122 cases considered here, the claim of excessive use of force was made in 12, or about 10%.

\textsuperscript{225} There were thirty-four death sentences in 1987, fifty-six in 1988, and forty-four in the first ten months of 1989. There are no official reports of criminal justice statistics in Malaysia. Sufficient statistics have been released to the press to permit a general picture of the pattern of section 39B enforcement to emerge. See 44 Pushers Got Death This Year, NST, Nov. 4, 1989, at 4; Big Money the Lure, Its Death When Caught, NST, Jan. 1, 1990, at 4; 59 Suspected Dadah Leaders Held in Kedah, NST, Nov. 5, 1989, at 6; 1,169 Held for Dadah Last Year, NST, Jan. 18, 1990, at 3; 27 Foreigners Still in Death Row, NST, Jan. 18, 1990, at 3; At the Eleventh Hour, ASIAWEEK, supra note 32.

\textsuperscript{226} Winning Edge in War Against Dadah, NST, June 28, 1990, at 9.

\textsuperscript{227} 59 Suspected Dadah Leaders Held in Kedah, supra note 225; 1,169 Held for Dadah Last Year, supra note 225.

\textsuperscript{228} Rise in Number of Dadah Addicts Last Year, supra note 23.

\textsuperscript{229} This conclusion is based on the author's reading of 122 reported cases contained in the Malayan Law Journal and the Malaysian Current Law Journal, all the § 39B cases off-
evidence that the proportion of convictions under section 39B is declining, from nearly 90% in reported cases in the mid-1980s to about 60% by 1988 and 1989.\textsuperscript{230} Unless one is willing to assume—wrongly, this author believes—that the quality of police evidence or prosecutorial preparation has dropped, this decline can be due only to the unwillingness of judges to convict defendants under charges leading to mandatory death sentences. Analyzing reported cases for the entire period since section 39B was adopted in 1975, we see the results in Table I.

In 1987 the number of acquittals rose sharply, while the number of convictions remained the same, causing the conviction rate to drop to 61% from 78%. The conviction rate stood at 60% in 1988, then fell to 56% in 1989. In 1989, appellate judges reduced a mandatory death sentence to life for the first time since 1983\textsuperscript{231} (the year the death sentence became mandatory), and began creating common law exceptions to the mandatory death sentence.\textsuperscript{232}

Charges are also being dropped by the police more frequently. There were 680 section 39B arrests in 1989 but only 44 convictions in the first ten months of the year.\textsuperscript{233} It seems that the police are arresting at least ten times the number of people they ultimately try. In addition to judicial reluctance to apply the death penalty, it is possible there is a deliberate police policy of over-arresting people on section 39B charges, perhaps because people who are arrested can be helpful in other investigations.\textsuperscript{234} It is also possible that the large proportion of acquittals has induced the police or Public Prosecutor to drop many cases before trial.

As matters stand, the government has not publicly criticized the judiciary’s processing of section 39B cases, a circumstance that suggests some balance has been struck. However, the fact that the judiciary has not been the object of criticism by the executive for its handling of drug cases may signify either that the judiciary has read

\textsuperscript{230} These figures come from statistics compiled by the author.
\textsuperscript{231} \textit{Trafficker Escapes the Gallows}, NST, Jan. 4, 1990, at 4.
\textsuperscript{232} This judicial remedy is inconsistent with the court’s earlier policy statements justifying the mandatory death penalty. \textit{See supra} notes 92-121 and accompanying text.
\textsuperscript{233} The sources of these data are cited in \textit{supra} note 225. In the United States, by way of contrast, on the average about 50% of those charged are brought to trial, although this figure is undoubtedly lower in drug arrests. \textit{See supra} note 47.
\textsuperscript{234} There is no plea bargaining allowed for under § 39B but it seems that in practice some charges are reduced to possession in exchange for testimony. No actual statistics are available. \textit{See supra} note 2.
### Table I

**Reported* Drug Trafficking (39B) Cases, 1979-1989**

<table>
<thead>
<tr>
<th>Year</th>
<th>Dispositions***</th>
<th>Comments</th>
<th>Total Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>1979</td>
<td>Convictions 1</td>
<td>life sentence</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>Acquit/rev 1</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Procedural**** 1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1980</td>
<td>Convictions 2</td>
<td>one death</td>
<td>4</td>
</tr>
<tr>
<td></td>
<td>Acquit/rev 1</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Procedural 1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1981</td>
<td>Convictions 1</td>
<td>life, increased to death</td>
<td>4</td>
</tr>
<tr>
<td></td>
<td>Acquit/rev 2</td>
<td>death on appeal</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Procedural 1</td>
<td>reduced to poss.</td>
<td></td>
</tr>
<tr>
<td>1982</td>
<td>Convictions 3</td>
<td>2 life, one death</td>
<td>7</td>
</tr>
<tr>
<td></td>
<td>Acquit/rev 4</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Procedural 1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1983</td>
<td>Convictions 8</td>
<td>5 life, 3 death</td>
<td>7</td>
</tr>
<tr>
<td></td>
<td>Acquit/rev 2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1984</td>
<td>Convictions 2</td>
<td>one life, one death</td>
<td>5</td>
</tr>
<tr>
<td></td>
<td>Acquit/rev 2</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Procedural 2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1985</td>
<td>Convictions 18</td>
<td>5 life, 13 death</td>
<td>12</td>
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<td>28</td>
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* 39B Drug Trafficking cases reported in either Malayan Law Journal or the Current Law Journal. Listed by year of reporting. Cases appearing in different courts are listed only once, at the time of final disposition.

** Includes all 39B cases reported. Although the Act became law in 1975, no cases were reported until 1979.

*** The disposition of each offender is recorded in all cases with multiple offenders. Thus, the total number of offenders is higher than the total number of cases.

**** Procedural disposition covers cases in which no judgment of guilt or innocence is entered. Most of these cases involved either right to bail or removal from Sessions Court to High Court. No final disposition is reported for any of these cases.
the political winds carefully or that it has been too cautious in trying and reviewing dangerous drug cases. It is also possible that the government simply does not object to a large number of acquittals and reversals in drug cases; while it is committed to the idea of a "mandatory" death penalty for traffickers, surely the specter of hundreds of executions a year is not the kind of international image that Malaysia really wants.

Thus, the existing legal arrangement is functional. As it is easy for the police to arrest and detain more than 1,000 people a year on trafficking charges, the police gain an effective investigative tool as well as a law capable of inflicting a great deal of fear in the drug community. Later, a well-developed system of judicial review sifts these cases down to 60 to 70 death sentences. Finally, after more years of convicts waiting in jail, an appeals process filters this number down still further.  

Whether this system serves as an effective deterrent is a critical question with both a domestic and international component. As previously stated, Malaysia has a serious internal drug problem, with one of the world's highest rates of drug use. Based on official statistics, Malaysia's rate of drug addiction has increased since 1975. There is, therefore, little evidence that section 39B has had a demonstrable effect on drug use in Malaysia.

A major impetus to the provision of the mandatory death penalty for trafficking was to rid Malaysia of foreigners using Malaysia, par-

235. Similarly, Hay, Property, Authority and Criminal Law, reprinted in D. Hay, Albion's Fatal Tree 17 (1975), argues that the seventeenth century British law's promise of severe punishment, coupled with frequent use of mercy, served to legitimate an authoritarian legal system.

236. There is now much literature on deterrence in America, often cited in American death penalty cases. See, e.g., Furman v. Georgia, 408 U.S. 238, 345-54 (1972) (dissenting opinion); Ehrlich, The Deterrent Effect of Capital Punishment: A Question of Life and Death, 65 Am. Econ. Rev. 397 (1975), makes the strongest case for the death penalty as a deterrent. Whether such literature has any relevance to Malaysia's vastly different culture is an open question.

237. See supra notes 22-25 and accompanying text. Mandatory urine testing of representative populations shows the incidence of drug use to be very high. For example, random tests of 350 government servants in Penang in December 1989 and January 1990 found 22 using drugs (6.2%). The individuals, mostly clerks, were committed to drug rehabilitative centers for two years. 22 Civil Servants Fail Urine Tests for Drugs in Penang, Star, Mar. 18, 1990, at 7. A similar random test of 5,500 police officers (about 7% of the force) found 21 to be using drugs (0.04%). Hannif: 21 Cops Hooked on Dadah, NST, Jan. 7, 1990 at 5. Note, however, that the police tested were all from a remote and traditional area of the country (the East Coast), while the clerks were from Malaysia's second largest city, a major drug center.

238. For a study of drug use patterns in Malaysia, see generally R. Lee, The Social Processes of Drug Use and Rehabilitation in Malaysia (1986); Rise in Number of Dadah Addicts Last Year, supra note 23; Addicts Spend $900 Million on Dadah, supra note 22.
ticularly Penang, as a trafficking center. Since 1983, twenty-five foreigners have been executed for trafficking in Malaysia. Currently, twenty-seven foreigners are awaiting execution. Whether there has been a deterrent at all to foreigners trafficking drugs, whether Malaysia's drug laws have been the deterrent, or whether foreigners simply find Thailand—which has better international air connections than Malaysia as well as substantial corruption, and is part of the Golden Triangle—a more convenient trafficking center are all unanswered questions.

VII. CONCLUSION

Drug penalty cases increasingly have come to define the criminal law in Malaysia. Drug cases now provide many of the common law precedents that define Malaysian criminal law. These precedents, however, weaken the integrity of the law since judges seem to contrive surreptitious devices to save the lives of individuals they feel are wrongly accused or do not deserve death. At the same time, there is no question that the judges have made more principled attempts to provide a measure of due process for section 39B defendants. The courts have been creative in providing effective controls over the potential for injustice in the process of mandatory death trials. The high level of acquittals speaks to the integrity of the judicial process. In fact, it is clear that Malaysia's "mandatory death penalty for trafficking" is, in reality, not mandatory because so many trafficking arrests lead to dispositions other than the death penalty.

The judiciary has developed a number of legal devices that remove from defendants the threat of mandatory death by hanging, for example, by finding defendants guilty of "possession" but not of trafficking. As the process works out, the state gets its perceived deterrent benefit of the threat of mandatory death, but is spared both much of the difficulty of administering it and the international embarrassment of too many executions. This outcome might explain why

239. MALAYSIAN FEDERAL DEPARTMENT OF INFORMATION, MALAYSIA'S STAND ON DRUG ABUSE WELL ACCEPTED (1987).

240. Three of these have been Westerners, two Australians and one Briton. Eight have been from Hong Kong, six have been Singaporean, three Thai, three Filipino, and two Indonesian, indicating a pattern of importation of drugs into Malaysia for domestic or regional use. The Noose for an American? NEWSWEEK, supra note 8. A graphic drawing featuring a hangman's noose, a prison cell and the number of foreigners hanged for trafficking appeared under the heading Dadah Doesn't Pay, NST, Feb. 6, 1990, at 1.

241. Only one of these is a Westerner, a New Zealand national. 27 Foreigners Still in Death Row, NST, Jan. 18, 1990, at 3.

the government has not attacked the judiciary for the high level of acquittals and yet, at the same time, has reacted strongly to judicial review of SPM Act cases. The government may care more about its emergency detention powers, which allow it to detain numerous alleged traffickers, than about the number of death sentences carried out.

The actual data on Malaysia's operation of its mandatory death penalty for drug traffickers demonstrate that Malaysia's solution to the drug problem is not effective, nor is it one that other countries should emulate. While it is impossible to say what would have happened in Malaysia without the enactment of section 39B, domestic drug use remains at the high levels it reached before the enactment of the mandatory death penalty. Malaysia's experience demonstrates the application of a "drug war" model to the drug problem. In spite of draconian measures—including over a hundred executions, hundreds of death penalties imposed, the conversion of a huge paramilitary police force from fighting communists to fighting drugs, emergency trial processes that circumvent many due process protections, and a police force unfettered by search warrants—hundreds of thousands of Malaysians are still dependent on drugs, and tens of thousands of Malaysians are trafficking in drugs to meet those needs.

Drug wars, like many other wars, originate in failed social and political policy. Drug use is deeply rooted in social problems. Addressing the causes of these problems is distinct from conducting a drug war to combat their manifestations. Malaysia has been unable to investigate and counter the causes of drug use, as has the United States and most other countries. However, the lesson of Malaysia's failed war on drugs is that other approaches to drug problems should be tried because sanctioned state violence under the rubric of a mandatory death penalty does not solve the problem.