Habeas Corpus Rights:
Canada, Egypt, France, Germany, Iraq, Italy, Japan, Pakistan, Russia, Saudi Arabia, Syria, United Kingdom, and Yemen

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COMPARATIVE SUMMARY

HABEAS CORPUS RIGHTS

Under the concept of habeas corpus as developed in Anglo-American jurisprudence, persons who are deprived of their liberty have the right to challenge through judicial inquiry the legality of their arrest or detention.

The right to challenge one's arrest or detention is now incorporated in international human rights standards.[*] This right may be exercised through the extraordinary process of habeas corpus in the countries which belong to the Common Law system, or through the normal procedural process, including appeals and motions for retrial in the civil law countries.

This report analyzes the right available to persons in Canada, Egypt, France, Germany, Iraq, Italy, Japan, Pakistan, Russia, Saudi Arabia, Syria, the United Kingdom, and Yemen to challenge the legality of their arrest or detention.

The writ of habeas corpus is available in Canada, Japan, Pakistan, and the United Kingdom. In the United Kingdom the importance and use of the writ has diminished considerably due to extensive statutory protections. In Pakistan the writ is recognized under Article 99 of the 1973 Constitution, which gives the High Court the jurisdiction to hear and dispose of the writ. In Japan the writ was introduced in the Constitution under the influence of the United States following World War II, but the United Nations Human Rights Committee has criticized Japan for Habeas Corpus Rules that impair its effectiveness. In Canada the Supreme Court ruled that the law requiring detention of persons deemed inadmissible to Canada on national security grounds must be amended to recognize the right of such persons to petition for habeas corpus relief.

The reports analyzing German and French constitutional and statutory guarantees against arbitrary detention conclude that such guarantees can be considered as comparable or equivalent to writs of habeas corpus.

The remaining countries have different constitutional and statutory provisions that allow the courts to review the legality of a person's arrest or detention. The implementation and enforcement of such provisions are not fully discussed in this report.

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[*] International Covenant on Civil and Political Rights, art. 9(4); American Convention on Human Rights, art. 7(6); Arab Charter on Human Rights, art. 14(6); and European Convention on Human Rights, art. 5(4).

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CANADA

HABEAS CORPUS RIGHTS

In 1982, Canada adopted the Canadian Charter of Rights and Freedoms. This constitutional document has much in common with the American Bill of Rights, but does contain some differences. Section 10 of the Charter states that "every one has the right on arrest or detention…to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful."[1] This right can be suspended by legislation.[2] While a law suspending *habeas corpus* can be challenged on constitutional grounds, the courts can uphold such a law if it finds that law to be "demonstrably justified in a free and democratic society."[3] However, even if a law suspending *habeas corpus* is declared to be unconstitutional by a court, that decision can be overridden by Parliament if it expressly declares that the impugned law shall operate notwithstanding the provisions of the Charter.[4] This provision was inserted in the Charter to preserve the principle of Parliamentary supremacy, but it has never been invoked on the federal level.

The substantive law in Canada respecting *habeas corpus* and other prerogative writs or forms of judicial relief was derived from the laws of England and Wales and still contains many similar substantive features. However, Canada has developed its own procedures for applying the principles of *habeas corpus*. In criminal cases, applications for writs of *habeas corpus ad subjiciendum* can be filed with a trial court and an appeal from the decision of that court can be taken to the highest provincial courts, the Courts of Appeal. A final appeal to the Supreme Court of Canada is possible if leave is obtained.[5] The Criminal Code states that "an appeal in *habeas corpus* matters shall be heard by the court to which the appeal is directed at an early date, whether in or outside of the prescribed sessions of the court."[6]

The Federal Court Act gives the Federal Court of Canada exclusive original jurisdiction to hear applications for writs of *habeas corpus ad subjiciendum* with respect to members of the

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[1] Constitution Act, 1982, pt. I, § 10(c), being Sched. B to the Canada Act, 1982, c. 11 (U.K.), *available at* http://laws.justice.gc.ca/en/Const/annex_e.html#I (last visited Jan. 7, 2009).

[2] *Id.* § 33

[3] *Id.* § 1.

[4] *Id.* § 33.

[5] Criminal Code, R.S.C. ch. C-46, § 784 (1985), as amended, *available at* http://laws.justice.gc.ca/en/showtdm/cs/C-46?noCookie (last visited Jan. 7, 2009).

[6] *Id.*

Canadian Forces serving outside of the country.[7] Appeals can be taken first to the Federal Court of Appeal and then to the Supreme Court of Canada with leave.[8] In these cases, the provincial courts are not involved.

In *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350, 2007 S.C.C. 9, *available at* http://scc.lexum.umontreal.ca/en/2007/2007scc9/2007scc9.html (last visited Jan. 7, 2009), the Supreme Court reviewed the law allowing the government to detain persons deemed to be inadmissible to Canada on national security grounds. These persons were not charged with any crimes and the Supreme Court recognized their right to seek a writ of *habeas corpus*. The Supreme Court did not rule that all such detentions were unconstitutional, but that the detainees had a right to have their cases reviewed by an independent counsel. Thus, persons suspected of having ties to terrorist organizations were granted the right to seek a writ of *habeas corpus* and Parliament was required to amend its laws allowing for detentions of persons deemed to be inadmissible.[9] Whether Parliament's response will survive further judicial scrutiny is an outstanding question that will likely be taken up by the Supreme Court at a later date.

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[7] Federal Courts Act, R.S.C. ch. F-37, § 18 (1985), as amended, *available at* http://laws.justice.gc.ca/en/showdoc/cs/F-7/bo-ga:s_17/20090105/en?command=home&caller=SI&search_type=all&shorttitle=federal%20courts%20act&day=5&month =1&year=2009&search_domain=cs&showall=L&statuteyear=all&lengthannual=50&length=50&noCookie (last visited Jan. 7, 2009).

[8] *Id.*

[9] An Act to Amend the Immigration and Refugee Protection Act, 2008 S.C., ch. 3, *available at* http://www2.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Parl=39&Ses=2&Mode=1&Pub=Bill&Doc=C-3_4 (last visited Jan. 13, 2009).

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EGYPT, IRAQ, SAUDI ARABIA, SYRIA, AND YEMEN

HABEAS CORPUS RIGHTS

Under the legal systems of Egypt, Iraq, Syria, Saudi Arabia, and Yemen, detainees generally have the right to challenge the legality of their detention by:

1. Petitioning the investigative judge prior to referring the case to the trial court;[1]

2. Petitioning the trial court after referral;[2] and

3. Filing an appeal after conviction when such an appeal is allowed.[3]

The above-mentioned countries, except Saudi Arabia, are members of the International Covenant on Civil and Political Rights, which gives persons deprived of their liberty the right to challenge the legality of their detention.

None of these countries have an additional extraordinary process similar to the writ of habeas corpus that allows unlimited access to the courts to challenge the legality of detention.

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[1] *See*, *e.g.*, the Criminal Procedures Laws of Egypt, art. 144; of Yemen, arts. 76 & 194; and of Saudi Arabia, arts. 73 & 120.

[2] Trial courts always have general jurisdiction to dispose of criminal cases, including the ordering of the release of detainees.

[3] *See*, *e.g.*, the Criminal Procedures Law of Yemen, art. 414; and of Saudi Arabia, art. 8.

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FRANCE

HABEAS CORPUS RIGHTS

Executive Summary

France does not have a so-named writ of habeas corpus. Its Constitution, however, sets forth several guarantees against arbitrary detention and the Code of Criminal Procedure contains procedural safeguards implementing these guarantees. In addition, the Penal Code provides for harsh penalties for judges or civil servants who have ordered or tolerated arbitrary detention.

I. Constitutional Guarantees

The preservation of liberty is proclaimed by article 2 of the 1789 Declaration of the Rights of Man, which has been incorporated into the present Constitution.[1] Article 7 of such Declaration also provides that "No individual may be accused, arrested, or detained except where the law so prescribes, and in accordance with the procedure it has laid down."[2] The Constitution further states that "No one may be arbitrarily detained. The judicial authority, guardian of individual liberty, ensures the observance of this principle under the condition specified by law."[3]

France is also a signatory of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Its article 5 provides that everyone has the right to liberty and sets forth permissible circumstances under which people may be deprived of their liberty and procedural safeguards in case of detention. In particular, it states that "anyone deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."[4]

II. Procedural Safeguards

The Code of Criminal Procedure contains several provisions implementing the constitutional guarantees set forth above. It provides, for example, that "any person arrested by virtue of a warrant who has been held for more than twenty-four hours without having been interrogated shall be considered as arbitrarily detained. Any judge or civil servant who has

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[1] 1958 CONST., CODE CONSTITUTIONNEL 10 (Litec 2005).

[2] *Id*. at 48.

[3] *Id*. art. 66, at 576.

[4] European Convention for the Protection of Human Rights and Fundamental Freedoms, CODE DE PROCEDURE PENALE [C. PR. PÉN.] 2083 (Dalloz 2009).

ordered or knowingly tolerated arbitrary detention shall be punished with the penalties stated in articles 432-4 to 432-6 of the Penal Code."[5] These articles of the Penal Code deal with infringements on individual liberty by persons exercising governmental authority or who are entrusted with a public service mission. They set forth very harsh penalties. Article 432-4, for example, reads as follows:

> A person exercising governmental authority or entrusted with a public service mission who, in the performance or on the occasion of performing his or her duties or mission, arbitrarily orders or performs an act prejudicial to individual liberty is punishable by seven years imprisonment and a fine of €100,000.
>
> When the prejudicial act is a confinement or retention for a period longer than seven days, the penalty is increased to thirty years imprisonment and a fine of € 450,000.[6]

Furthermore**,** as a general rule, police services cannot detain a suspect more than twenty-four hours. The public prosecutor may extend this period for another twenty-four hours.[7] Other extensions must be authorized by a specialized judge, the judge of liberties and detention, or by an investigating judge. Warrants are required for arrests. When placed on provisional detention during a formal judicial investigation, in addition to appealing the detention orders to the Investigating Chamber, a suspect or his attorney may file a petition for his release at any time during such investigation. The competent judge or court must rule within eight days from the date of the filing of the appeal.[8]

Finally, judgments rendered by the Investigating Chamber (including detention orders) and judgments rendered by the courts of final instance in criminal matters may be quashed, in the event of a violation of the law, upon a request filed before the *Cour de Cassation*, France's supreme court for judicial matters.[9]

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[5] C. PR. PÉN. art. 126.

[6] CODE PENAL [C. PEN.] art. 432-4 (Dalloz 2009).

[7] C. PR. PÉN. art. 77.

[8] *Id*. art.148.

[9] *Id*. art. 567.

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GERMANY

HABEAS CORPUS RIGHTS

Executive Summary

Germany has constitutional guarantees against an improper detention and these require a judicial warrant for an arrest and insist on procedural remedies to challenge a detention. These constitutional guarantees have been implemented in statutory law in a manner that can be considered as equivalent to writs of habeas corpus.

I. Constitutional Parameters

Article 104, paragraph 1 of the German Constitution[1] provides that deprivations of liberty may be imposed only on the basis of a specific enabling statute that also must include procedural rules. Article 104, paragraph 2 requires that any arrested individual be brought before a judge by the end of the day following the day of the arrest. For those detained as criminal suspects, article 104, paragraph 3 specifically requires that the judge must grant a hearing to the suspect in order to rule on the detention.

Restrictions on the power of the authorities to arrest and detain individuals also emanate from article 2 paragraph 2 of the Constitution which guarantees liberty and requires a statutory authorization for any deprivation of liberty. In addition, several other articles of the Constitution have a bearing on the issue. The most important of these are article 19, which generally requires a statutory basis for any infringements of the fundamental rights guaranteed by the Constitution while also guaranteeing judicial review; article 20, paragraph 3, which guarantees the rule of law; and article 3 which guarantees equality.

In particular, a constitutional obligation to grant remedies for improper detention is required by article 19, paragraph 4 of the Constitution which provides as follows:

> Should any person's right be violated by public authority, he may have recourse to the courts. If no other jurisdiction has been established, recourse shall be to the ordinary courts.

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[1] Grundgesetz für die Bundesrepublik Deutschland, May 23, 1949, BUNDESGESETZBLATT [BGBl. official law gazette of the Federal Republic of Germany] 1.

II. Statutory provisions

In federal law, the constitutional guarantees against improper detention are implemented primarily in the Code of Criminal Procedure[2] and in an Act on Court Proceedings for Deprivations of Liberty (hereinafter: Deprivations of Liberty Act).[3] The Act is applicable on a subsidiary basis to all detentions imposed by federal law, if the specific enabling provisions are not sufficient.[4] In the states, these constitutional guarantees are implemented in the laws governing the police.

The Code of Criminal Procedure applies to all criminal proceedings and it requires that a detained person be brought before the judge on the day of detention as a rule, but at the latest on the day following detention.[5] In addition, this Code provides that a detained person may at any time submit a complaint challenging the detention, by claiming either that the detention was unlawful to begin with or that it is no longer required on the basis of law.[6]

The Act on Deprivations of Liberty also requires a judicial hearing within the constitutionally prescribed time limit of the day following the day of arrest.[7] In addition, this Act provides appeals possibilities for decisions on detention[8] and allows the detained person to challenge the detention at any time.[9]

An example for an implementation of the constitutional safeguards against detentions in a law of the states is contained in the Act on Public Security and Order of the State of Lower Saxony.[10] This Act allows police detentions for a maximum of four days to protect public safety in general, and for a maximum of ten days to prevent a serious criminal offense. Detainees must be brought before a judge by the day following the detention and they have appeals possibilities against a detention decision.

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[2] Strafprozessordnung [StPO], repromulgated Apr. 7, 1987, BGBl I at 1074, as amended.

[3] Gesetz über das gerichtliche Verfahren bei Freiheitsentziehungen [FreihEntZG], Jun. 29, 1956, BGBl I at 599.

[4] FreihEntZG § 1.

[5] StPO, § 115.

[6] StPO § 117.

[7] FreihEntZG § 5.

[8] FreihEntZG § 7.

[9] FreihEntZG, §§ 10 and 12.

[10] Niedersächsisches Gesetz über die öffentliche Sicherheit und Ordnung, repromulgated January 19, 2005, NIEDERSÄCHSISCHES GESETZ- UND VERORDNUNGSBLATT 9, § 18-21.

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HABEAS CORPUS RIGHTS

ITALY

Italy's Constitution states in Article 13 that "No form of detention, inspection or personal search is admissible, nor any other restrictions on personal freedom except by order from a judicial authority which states the reasons, and only in cases and manners provided for by law."[1] Exceptions are made in the same article for "cases of necessity and urgency," but even then judicial authorities must validate the action within forty-eight hours.

As a safeguard against unjustified detentions, "liberty tribunals" (panels of judges) review cases and rule whether continued detention is warranted.[2] The Constitution and the law provide for restitution in cases of unjust detention.[3]

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[1] Constitution of the Italian Republic, 1948, as amended to 2003, *The Italian Republic: Constitution*, 9 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Oceana Publications, Dec. 2006).

[2] U.S. Dept. of State, Country Reports on Human Rights Practices, Italy, 2006, *available at* http://www.state.gov/g/drl/rls/hrrpt/2006/78819.htm (last visited Jan. 13, 2009).

[3] For detailed discussions of criminal procedure in Italy, see G.L. CERTOMA, THE ITALIAN LEGAL SYSTEM (1985); V. CIRESE & V. BERTUCCI, THE NEW ITALIAN CRIMINAL PROCEDURE FOR FOREIGN JURISTS (1993); & J. LENA & UGO MATTEI, eds., INTRODUCTION TO ITALIAN LAW (2002).

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JAPAN

HABEAS CORPUS RIGHTS

The Constitution of Japan, which was drafted by Americans when Japan was under the Allied Occupation from 1945 to 1952,[1] was strongly influenced by the United States Constitution. Article 34 of the Constitution has a provision, which relates to habeas corpus. Article 34 reads: No person shall … be detained without adequate cause; and upon demand of any person such cause must be immediately shown in open court in his presence and the presence of his counsel.[2] The Habeas Corpus Act was enacted in 1948 during the Occupation. The purpose of the Act is "to enable the people to recover the liberty of a person actually unlawfully deprived of liberty in a prompt and easy manner through a judicial procedure."[3] Further, "[a]ny person whose personal liberty is under restraint without due process of law may apply for relief pursuant to the provisions of this act."[4]

The United Nations Human Rights Committee criticized Japan because the effectiveness of the remedy for challenging the legality of detention is impaired by the Habeas Corpus Rules.[5] The Habeas Corpus Rules, which provide rules to implement the Act, "limits the grounds for obtaining a writ of habeas corpus to (a) the absence of a legal right to place a person in custody, and (b) manifest violation of due process. It also requires exhaustion of all other remedies."[6]

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[1] ALFRED C. OPPLER, LEGAL REFORM IN OCCUPIED JAPAN 43 (1976).

[2] Nihonkoku kenpō [Constitution of Japan] (1946), art. 34.

[3] Jinshin hogo hō [Habeas Corpus Act], Law No. 199 of 1948, art. 1.

[4] *Id*. art. 2, para. 1.

[5] United Nations, Concluding Observations of the Human Rights Committee: Japan, CCPR/C/79/Add.102 (Nov. 19, 1998), *available at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/5a2baa28d433b6ea802566d40041ebbe?Opendocument (last visited Jan. 14, 2009).

[6] *Id*. para. 24; Jinshin hogo kisoku [Habeas Corpus Rule], Supr. Ct. Rule No. 22 of 1948, *as amended*, art. 4.

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PAKISTAN

HABEAS CORPUS

Issuance of a writ is an exercise of an extraordinary jurisdiction of the superior courts in Pakistan. A writ of habeas corpus may be issued by any High Court of a province in Pakistan. Article 99 of the 1973 Constitution of the Islamic Republic of Pakistan, specifically provides for the issuance of a writ of habeas corpus, empowering the courts to exercise this prerogative:

> Article 199. Jurisdiction of High Court.—Subject to the Constitution, a High Court may, if it is satisfied that no other adequate remedy is provided by law,--
> (a) . . .
> (b) on the application of any person, make an order –
> (i) that a person in custody within the territorial jurisdiction of the Court be brought before it so that the Court may satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner; . . .

The hallmark of extraordinary constitutional jurisdiction is to keep various functionaries of State within the ambit of their authority. Once a High Court has assumed jurisdiction to adjudicate the matter before it, justiciability of the issue raised before it is beyond question. The Supreme Court of Pakistan has stated clearly that the use of words "in an unlawful manner" implies that the court may examine, if a statute has allowed such detention, whether it was a colorable exercise of the power of authority.[1] Thus, the court can examine the *mala fides* of the action taken.

In another leading case,[2] the Supreme Court stated that in exercising constitutional jurisdiction relating to a detention, the court was under an unconditional duty to satisfy itself with regard to the lawfulness of authority of detention and the manner of detention. The scope of the inquiry is not in any way fettered by any rules of procedure of the write of habeas corpus. Once the attention of the court is properly drawn to a case of detention, the onus immediately shifts to the detaining authority to show the lawfulness of its authority in detaining the detainee. The duties, therefore, are specifically that of the court and the detaining authority. The applicant may come to the forefront in such situations incidentally.

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[1] Government of West Pakistan v. Begum Agha Abdul Karim Shorish Kashmiri, A.P.L.D. 1969 S.C. 14.

[2] Muhammad Azam Malik v. A.C. Karachi, A.P.L.D. 1989 S.C. 266.

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RUSSIAN FEDERATION

HABEAS CORPUS RIGHTS

The right to freedom and personal inviolability is guaranteed by the Russian Constitution. Article 22 of the Constitution states that arrest or detention shall be authorized by a judicial ruling. Without a judicial ruling no person may be subjected to detention for a period of more than forty-eight hours. The legal grounds for taking and holding a criminal suspect or an accused individual in detention are defined by the Code of Criminal Procedure, which entered into force on July 1, 2002.[1]

Detention as a measure of restraint in regard to the person accused or suspected of committing a crime can be selected by a prosecutor, investigator, or a person conducting the inquiry if there is a chance that this individual may obstruct the investigation, hide from the authorities, continue his criminal activities, or threaten witnesses and other participants of the investigation process. Detention is only allowed in cases when the minimum punishment established by a law for a crime an individual is suspected or accused of is no less than two-year imprisonment. In such cases, the official who conducts the inquiry, the prosecutor or an investigator, shall submit a detention request to the judge for judicial approval of the detention order no later than eight hours before the expiration of the detention period. The request shall be resolved by an individual judge during *in camera* hearings within eight hours after receipt of the request. The detainee, prosecutor, and defense attorney, if the latter is retained, shall be present. The detention order can be issued in absentia only if the suspect/accused is reported for an international search. The detainee is allowed to provide explanations to the judge. After hearings, which last about twenty to thirty minutes, the judge decides whether to authorize the detention, to deny the detention request and release the individual, or to extend the detention for the next seventy-two hours in order to let the investigator build the case for the next detention hearings. The judge's ruling can be appealed to the higher court within three days.

During the investigation, the detention cannot exceed two months, and during the court trial it should be no longer than six months. The Code of Criminal Procedure (arts. 109, 255), however, provides for the possibility of extending the detention periodically through a ruling of the court; the total term of detention, however, cannot exceed two years. During the trial, the detention is not allowed for a term longer than six months, but it can be indefinitely extended for a three-month period each time.

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[1] Code of Criminal Procedure of the Russian Federation, adopted by Federal Law No. 174-FZ, ROSSIISKAIA GAZETA [government-owned daily newspaper, official publication] No. 249, Dec. 22, 2001.

Amendments to the Code of Criminal Procedure, adopted in 2008, did not affect the rights or status of individuals during the pretrial detention period.

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UNITED KINGDOM

HABEAS CORPUS RIGHTS

Executive Summary

Habeas corpus ad subjiciendum is an ancient and fundamental principle of English constitutional law. It originated through the common law and has been confirmed and regulated by a number of statutes that date back to the Magna Carta. Habeas corpus is still available in the United Kingdom today. Its importance and use, however, has diminished considerably due to extensive statutory protections that exist to protect a person's liberty.

I. Background

The ultimate purpose of a writ of habeas corpus is to provide a remedy in cases of illegal restraint or confinement by testing the legality of a person's detainment.[1] A petition for issuance of the writ can be filed by the imprisoned person or by other individuals acting on his or her behalf.[2] If the court cannot find any legal justification for the person's detention, an immediate release is ordered.[3] It remains in effect today, with legal treatises noting that habeas corpus has most often been used in immigration cases to test the legality of the detention of immigrants,[4] extradition proceedings, and to challenge detention under mental health legislation.[5] One of these treatises notes that:

> despite its status, the writ's practical importance has diminished as more flexible methods of protecting liberty have been established either by specialized statutory procedures or

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[1] IV ENCYCLOPEDIA OF THE LAWS OF ENGLAND, WITH FORMS AND PRECEDENTS 469 (A. Wood Renton et al. eds., 2nd ed. 1907). Habeas corpus is also provided for in the following statutes: Habeas Corpus Act 1679, 31 Ch. 2, c. 2; H.C. Act 1803, 43 Geo 3, c. 140; H.C. Act 1804, 44 Geo. 3, c. 102; H.C. Act 1816, 56 Geo. 3, c. 100; and the H.C. Act 1862, 25 & 26 Vict. c. 20.

[2] HILAIRE BARNETT, CONSTITUTIONAL AND ADMINISTRATIVE LAW 741 (4th ed. 2002).

[3] *Id.*; IV ENCYCLOPEDIA OF THE LAWS OF ENGLAND, *supra* note 1, at 469.

[4] BARNETT, *supra* note 2, at 742.

[5] ENGLISH PUBLIC LAW ¶ 18.75 (David Feldman ed., 2004). In 2000-2001 the courts dealt with sixty-nine applications for habeas corpus, with fifty-two of these applications relating to immigration and asylum cases. In the Lord Chancellor's Department Consultation Paper, *The Administrative Court: Proposed changes to primary legislation following Sir Jeffery Bowman's Review of the Crown Office List* (July 2001), *available at* http://www.dca.gov.uk/ consult/bowmanrev/bowman.htm (last visited Jan. 14, 2009), the notion of merging judicial review and habeas corpus was rejected.

more generally by way of judicial review. This has led to calls either for its abolition or its merger with judicial review.[6]

II. Use of Habeas Corpus by Individuals Subject to 'Preventive' Anti-Terrorism Laws

The United Kingdom (UK) has faced the issue of how to lawfully detain an individual that they suspect is a terrorist but cannot prosecute for varying reasons through a system of "control orders." These orders, issued under the Prevention of Terrorism Act 2005,[7] do not serve to detain individuals per se, but rather impose obligations upon them that are designed to disrupt and prevent terrorist activity. Such obligations include restrictions on association with specified individuals, restrictions on movement, and curfews.

III. Access to Courts Similar to Habeas Corpus

Judicial review provides access to the courts that is considered to be similar to habeas corpus, to the extent that it has been considered on many occasions that habeas corpus should be merged with judicial review.[8] Individuals that are subject to control orders may apply to the courts for a review of their order if they have applied to the Secretary of State to have the order revoked or modified and the application has been denied, or in cases where the Secretary of State has renewed the order. In the case of an appeal against the renewal of, or a decision to not revoke an order, the court must consider whether the decision of the Secretary of State was flawed in determining that:

- The continuation of the order is necessary to protect members of the public from a risk of terrorism; and/or

- The obligations in the order are necessary to prevent or restrict a person's involvement in terrorism-related activity.[9]

In the case of an appeal against a modification of an obligation imposed by the order, whether on renewal or otherwise, the court must consider whether the decision of the Secretary of State was flawed in determining that: the modification is "necessary for purposes connected with preventing or restricting involvement by the controlled person in terrorism-related activity."[10] In the case of an appeal against a decision by the Secretary of State to not modify an obligation, the court must consider whether the decision of the Secretary of State was flawed in determining that the obligation remains necessary for the purpose of preventing or restricting involvement of the individual in terrorism-related activity. The courts' only powers in this case,

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[6] ENGLISH PUBLIC LAW, *supra* note 5, ¶ 18.75. *See also* The Lord Chancellor's Department Consultation Paper, *supra* note 5.

[7] Prevention of Terrorism Act 2005, c. 2.

[8] *See, e.g.*, The Lord Chancellor's Department Consultation Paper, *supra* note 5.

[9] Prevention of Terrorism Act 2005, c. 2.

[10] *Id.*

as in the preliminary hearings and full hearings, are to either quash the order or one or more of the obligations imposed by the order, direct the Secretary of State to revoke or modify the obligations of the order, or dismiss the appeal.

During the debates on the Prevention of Terrorism Act 2005, the government was accused of attempting to pass laws that would curtail terrorists' rights to habeas corpus. The government has said that the law does not prevent any individual detained from seeking habeas corpus, although that the use of this legal tool is now infrequent due to the statutory protections in many acts and restrictions on the duration of detainment.

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