



THE REMEDY OF HABEAS CORPUS IN MALAYSIA: A  
COMPARATIVE APPRAISAL

BY

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## ABSTRACT

The writ of habeas corpus has long been established as a potent weapon in the armoury of the Courts to break the walls of unlawful detention. This writ, which in its original use, was to bring the body of person for the purpose of detention, has undergone a complete reversal, whereby its use now is the antithetical opposite: to secure the release of a person unlawfully detained. This study undertaken herein is to set out the historical underpinning of this celebrated writ followed with the applications in Malaysia with comparative analysis of the position obtainable in selected commonwealth jurisdictions. It seeks to show, from decided cases, that the Malaysian Courts, when confronted with the application for the writ, eschewed the developments taking place elsewhere and preferred instead to hold on tenaciously to the authorities which were developed centuries ago. Jurisprudentially, the approach is one of complete positivism despite constant prodding for the Court to embrace a more humanistic and naturalist posturing. This study also showed that, on a fundamental level, the posture taken by the Courts stems from a failure to understand the scope and extent of the provisions of the Malaysian Constitution, especially Article 5 and Article 8. As a result, in place of an expansionist and liberating interpretation, a literal, and cloistered approach was adopted, thus fettering the Court's own powers and jurisdictions. In the area of executive detentions, this has led to the erosion of the fundamental rights of the detenus. In addition, the absence of clear procedures that first, sets out the manner in which the application is to be made and second, procedural as well as ambiguity on the standards and burden of proof have led to uncertainty of the process of applying for the writ. This study then suggests reforms, which now assume greater significance in view of the current trend of detentions in the new spectre of terrorism, that are sorely needed. Drawing from the experiences of other jurisdictions, this study found that it is important that reforms must take two forms: first, amendments to the substantive law; and second, reform of the procedural law. Thus, suggested amendments to the Criminal Procedure Code have been drafted. Similarly new procedural rules in the form of Order 54 have accordingly been drafted. The net result or outcome that is sought to be achieved by these amendments is to shift from the rigid and subjective approach to a liberating, expansionist and objective approach in determining the legality of detention. If these amendments are carried out it will then ensure that the protection of fundamental and civil liberties is put on a higher pedestal and that every detention is unlawful, unless proved otherwise beyond reasonable doubt.

الإحضرار أمام المحكمة منذ فترة طويلة أنشئت كسلاح قوي في ترسانة المحاكم لكسر جدران الاعتقال غير القانوني. هذا أمر، والذي كان في الاستخدام الأصلي لجعل الجسم من شخص لغرض احتجاز، قد خضعت لانقلاب كامل، حيث استخدامه الآن هو عكس متناقضة: لتأمين الإفراج عن الشخص المحتجز دون وجه حق. هذه الدراسة التي أجريت هنا هو أن تحدد الأساس التاريخي لهذا الاحتفال أمر اتباعها مع التطبيقات في ماليزيا مع تحليل مقارن للموقف يمكن الحصول عليها في ولايات قضائية الكومنولث المحددة. وهو يسعى إلى إظهار، من الحالات قررت أن المحاكم الماليزية، عندما واجه مع التطبيق للأمر، تحاشي التطورات التي تجري في مكان آخر ويفضل بدلا من ذلك أن تمسك بعناد إلى السلطات التي وضعت منذ قرون. فإن هذا النهج هو واحد من الوضعية كاملة على الرغم من الحث المستمر للمحكمة لاحتضان أكثر إنسانية والمواقف الطبيعية. وأظهرت هذه الدراسة أيضا أنه، على المستوى الأساسي، والموقف الذي اتخذته المحاكم نابع من عدم فهم نطاق ومدى أحكام الدستور الماليزي، وخاصة المادة 5 والمادة 8. ونتيجة لذلك، بدلا من توسعيا وتحرير التفسير، حربي، والمنعزل اقترب اعتمد، مما يقضي الصلاحيات والاختصاصات الخاصة للمحكمة. وفي مجال الاعتقالات التنفيذية، وقد أدى هذا إلى تآكل الحقوق الأساسية للسجين. وبالإضافة إلى ذلك، فإن غياب إجراءات واضحة أن الأول، يحدد الطريقة التي كان التطبيق إلى أن يتم والثانية، الإجرائية، فضلا عن غموض في المعايير وعبء الإثبات أدت إلى عدم التيقن من عملية التقدم للحصول على أمر. ثم تقترح هذه الدراسة الإصلاحات، التي تفترض الآن أهمية أكبر في ضوء الاتجاه الحالي لعمليات الاحتجاز في شبح جديد من الإرهاب، أن هناك حاجة ماسة. مستفيدة من تجارب ولايات قضائية أخرى، وجدت هذه الدراسة أنه من المهم أن الإصلاحات يجب أن يأخذ شكلين: الأول، إدخال تعديلات على القانون الموضوعي، وثانيا، إصلاح القانون الإجرائي. وبالتالي، اقترح صيغت التعديلات التي أدخلت على قانون الإجراءات الجنائية. وبناء عليه، تمت صياغة القواعد الإجرائية وبالمثل جديدة في شكل ترتيب 54. النتيجة الصافية أو النتيجة التي يسعى إلى تحقيقها من خلال هذه التعديلات هو التحول من نهج جامدة وشخصي إلى نهج تحرير، التوسعية وموضوعية في تحديد شرعية الاحتجاز. وإذا ما نفذت هذه التعديلات من أنها سوف ثم ضمان حماية الحريات الأساسية والمدنية وضعت على قاعدة التمثال العالي وأن كل اعتقال غير قانوني، ما لم يثبت خلاف ذلك دون أي شك معقول.

## **APPROVAL PAGE**

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## DECLARATION

I hereby declare that this thesis is the result of my own investigations, except where otherwise stated. Other sources are acknowledged by footnotes giving explicit references and a bibliography is appended.

Dato' Abd Shukor Bin Ahmad

Signature.....

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**COMPARATIVE APPRAISAL**

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## LIST OF CASES

- Abdul Jaffar Abdul Muthalib v Timbalan Menteri Dalam Negeri Malaysia* [2007] 7 CLJ 174.
- Abdul Razak bin Baharudin & Ors v Ketua Polis Negara & Ors and another appeal* [2006] 1 MLJ 320.
- Alaguthven Selvarajah v Timbalan Menteri Keselamatan Dalam Negeri Malaysia & Ors* [2008] 8 CLJ 733
- Aminah v Superintendent of Prison Pengkalan Chepa, Kelantan* [1968] 1 MLJ 92.
- Andrew s/o Thamboosamy v Superintendent of Pudu Prisons, Kuala Lumpur* [1976] 2 MLJ 156
- Assa Singh v Menteri Besar, Johore* [1969] 2 MLJ 30.
- Athappen a/l Arumugam v Menteri Hal Ehwal Dalam Negeri Malaysia & Ors* [1984] 1 MLJ 67.
- Bandhua Mukti Morcha v Union of India* AIR 1984 SC 802.
- Barnado v Ford* [1892] AC 326.
- Bee Bak Leng v Menteri Dalam Negeri Malaysia & Ors* [2010] 5 CLJ 961.
- B Surinder Singh Kanda v The Government of Federation of Malaya* [1962] 28 MLJ 169.
- Borhan Hj Daud & Ors v Abdul Malek Hussin* [2010] 8 CLJ 656.
- Cheah Chun Huat v Timbalan Menteri Dalam Negeri Malaysia & Ors* unreported Kuala Lumpur High Court R1-24-83-10, Aziah J, decision dated 4<sup>th</sup> March 201.
- Christie v Leachinsky* [1947] AC 573.
- Chong Been Hoon v Timbalan Menteri Keselamatan Dalam Negeri* [2008] 5 MLJ 76
- Chandra Kumar vs. Union of India* (1997) 3 SCC 261.
- Chor Phaik Har v Farlim Properties SdnBhd* [1994] 4 CLJ 285
- Che Ani bin Itam v PP* [1984] 1 MLJ 113
- Chong Yung Yao v Menteri Keselamatan Dalam Negeri Malaysia* [2005] 5 CLJ 461.
- Chng Suan Tze & Ors v Minister of Home Affairs & Ors* [1989] 1 MLJ 69.
- Chua Han Mow v Superintendent, Pudu Prison* [1979] 2 MLJ 70.
- Case of X v United Kingdom, Application no. 7215/75) STRASBOURG 5 November 1981 (1981) ECHR 6*
- Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.
- Cheow Siong Chin v Timbalan Menteri Hal Ehwal Dalam Negeri Malaysia* [1986] 2 MLJ 235.
- Cooper v Cooper* [1936] WN 205.
- Darnell's case* (1627) 3 St. Tr. 1.
- Dwarka Das Bhatia v The State of Jammu and Kashmir* AIR [1957] SC 164.
- Dwarka Nath Tewar v State of Bihar* AIR 1959 SC 249.
- Dalip Bhagwan Singh v PP* [1997] 4 CLJ 645.
- Darma Suria Risman Salleh v Menteri Dalam Negeri Malaysia & Ors* [2010] 1 CLJ 300.
- Durai Raja Suppiah v Timbalan Menteri Keselamatan Dalam Negeri & Ors*, unreported Kuala Lumpur High Court decision 44-207-2007.
- Ex parte Rogers* (1843), 7 Jur. 992.
- Eng Mee Yong & Ors v Letchumanan* [1979] 1 LNS 18.

*Greene v Secretary of State for Home Affairs* [1942] AC 284.  
*Hong Leong Equipment Sdn Bhd v Liew Fook Chuan & Another appeal* [1996] 1 MLJ 492.  
*Hairul Hisham Bin Salim v Dato' Zainal Abidin Bin Zin & Anor* [2003] 5 MLJ 567.  
*Heng Peo v Ketua Pengarah Imigresen* unreported Federal Court 05-24-2007 (W).  
*Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1996] 4 CLJ 687.  
*In Re PE Long @ Jimmy & Ors v Menteri Hal Ehwal Dalam Negeri Malaysia & Ors* [1976] 2 MLJ 133.  
*In Re Greene* (1941) 57 TLR 533.  
*In Re Madhu Limaye* AIR 1969 SC 1014.  
*Jagannath Misra v State of Orissa* AIR 1966 SC 1140.  
*Jagadish Balwantrao v State of Maharastra* AIR 1994 Bom 143.  
*Jecius v Lithuania* [2000] ECHR 34578/97.  
*Joceline Tan Poh Choo v V. Muthusamy* [2007] 6 MLJ 485.  
*Kam Teck Soon v Timbalan Menteri Dalam Negeri, Malaysia & Ors and other appeals* [2003] 1 CLJ 225.  
*Kamal Jit Singh v Minister for Home Affair & Others* [1992] 3 SLR (R) 352.  
*Kandupillai Krishnan v Timbalan Menteri Dalam Negeri Malaysia* [2011] 4 CLJ 312.  
*Madhu Limaye v State of Punjab* AIR 1959 Punj. 506.  
*Karam Singh v Menteri Hal Ehwal Dalam Negeri* [1969] 2 MLJ 129.  
*Keshavananda Bharati v Kerala* AIR 1973 SC 1461.  
*Ketua Pengarah Imigresen Malaysia lwn HengPeo* [2007] 2 CLJ 111.  
*Ketua Polis Negara v Abdul Gahni Haroon & Another application* [2001] 2 MLJ 689.  
*Kamal Jit Singh v Minister for Home Affairs & Ors* [1993] 1 SLR 24.  
*Karpal Singh s/o Ram Singh v Menteri Hal Ehwal Dalam Negeri Malaysia & Anor* [1988] 1 CLJ 197.  
*Ketua Polis Negara v Abdul Ghani Haroon* [2001] 4 MLJ 11.  
*Kumaran Suppiah v Dato' Noh bin Haji Omar & Anor* [2006] 6 MLJ 393.  
*Kerajaan Malaysia & Ors v Nasharuddin Nasir* [2004] 1 CLJ 81.  
*KekotongSdnBhd v DanahartaUrus Sdn Bhd* [2003] 3 CLJ 378.  
*Lee Kew Sang v Timbalan Menteri Dalam Negeri Malaysia & 2 Ors* [2005] 3 CLJ 914.  
*Liversidge v Andersen* [1942] AC 206.  
*Lee Weng Kin v Menteri Hal Ehwal Dalam Negeri, Malaysia* [1991] 2 MLJ 472.  
*Lui Ah Yong v Superintendent of Prisons, Penang* [1977] 2 MLJ 226.  
*London and Clydesdale Estates Ltd. v Aberdeen District Council* [1979] 3 All ER  
*Madhu Limaye v State of Punjab* AIR 1959 Punj. 506.  
*Maljis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor* [1999] 3 CLJ 65.  
*Maneka Ghandi v Union of India* AIR 1978 SC 597  
*Masella v Langlais* [1955] SCR 263  
*May v Warden of Ferndale Institution* [2005] 3 S.C.R. 809  
*Megat Ibrahim v British Resident Perak & Anor* FMSLR 372  
*Menteri Keselamatan Dalam Negeri v Arasa Kumaran* [2006] 4 CLJ 847.  
*Menteri Keselamatan Dalam Negeri, Malaysia & Ors* [2005] 6 CLJ 550.  
*Mersing Omnibus Co. Sdn. Bhd. v Minister of Labour & Manpower and Anor* [1983] 2 CLJ 7; [1983] CLJ (Rep) 266.  
*Metro Pacific Sdn Bhd v Ketua Pengarah Kesatuan Sekerja & Anor* [2002] 8 CLJ 660.

*Mohd Faizal Haris v Timbalan Menteri Dalam Negeri Malaysia & Ors* [2005] 4 CLJ 613.  
*Mohd Faizal Harris v Timbalan Menteri Dalam Negeri Malaysia & Ors* [2006] 1 MLJ 309.  
*Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & Other Appeals* [2002] 4 MLJ 449.  
*Mokhtar Bin Amin v Mokhtar Bin Omar* [2001] 4 MLJ 329.  
*Munusamy v Subramaniam & Ors* [1969] 2 MLJ 108.  
*Munisvaran Kannan v Menteri Hal Ehwal Dalam Negeri Malaysia & Anor* [2004] 3 CLJ 375.  
*Murugan Palanisamy & Ors v Deputy Minister of Home Affairs* [2000] 1 CLJ 147.  
*Muhammad Jailani bin Kasim v Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors* [2006] 6 MLJ 403.  
*Muniswaran Kannan v Menteri Hal Ehwal Dalam Negeri Malaysia & Anor* [2004] 3 CLJ 375.  
*Nasharuddin Nasir v Menteri Dalam Negeri Malaysia* [2003] 1 CLJ 345.  
*Ng Chai Yang v Timbalan Menteri Dalam Negeri & Ors* [1994] 2 MLJ 336.  
*Nagaraja Ponnusamy v Menteri Dalam Negeri* [2010] 4 CLJ 213.  
*Noor Ashid Sakib v Ketua Polis Negara* [2001] 4 CLJ 737.  
*Nillima Privadarshini v State of Bihar* AIR 1987 SC 2021.  
*Ooi Ah Phua v Officer-in-Charge Criminal Investigation, Kedah/Perlis* [1975] 2 MLJ 198.  
*Patto Perumal v Menteri Hal Ehwal Dalam Negeri Malaysia* [1988] 2 CLJ 224 (Rep).  
*Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 4 CLJ 105.  
*Public Prosecutor v Koh Yoke Koon* [1988] 1 CLJ (Rep) 269.  
*Puvaneswaran Murugiah v Menteri Hal Ehwal Dalam Negeri Malaysia* [1991] 3 CLJ (Rep) 649.  
*Rajeevan Edakalavan v Public Prosecutor* [1998] 1 SLR (R) 10.  
*Ramachandran v The Industrial Court* [1997] 1 CLJ 147.  
*Ravi a/l G Suppiah v Timbalan Menteri Dalam Negeri, Malaysia & Anor* [1995] 2 CLJ 152.  
*Re Hastings* [1959] 1 QB 358.  
*Rupesh Kantilal Savla v State of Gujarat* (2000) 9 SCC 201.  
*Ranjit Singh v State of Pepsu* AIR 1959 SC 843.  
*R v Inland Revenue Commissioners, ex p Rossminster* [1980] AC 952.  
*R. v. Governor of Wandsworth Prison; ex parte Silverman* (1952), 96 Sol. J.853.  
*R v Governor of Parkhurst Prison & Ors ex parte Hague* [1992] 1 AC 58.  
*Re Isbell* [1930] SCR 62.  
*Ram Manohar Lohia & Ors v State of UP & Ors* [1968] Cr LJ 281.  
*Reg v Coleshill Justice, Ex parte Davies* [1971] 1 WLR 1684.  
*Re Onkar Shrian* [1970] 1 MLJ 28.  
*R v Secretary of State for the Home Department; ex parte Mughal* [1973] 1 WLR 1133.  
*Ram Manohar v State of Bihar* AIR [1966] SC 740.  
*R v Secretary of State for the Home Department Ex p. Muboyayii* [1992] 1 QB 244.  
*Regina v Willans* [1858] 3 Ky. 16.  
*R v Secretary of State for the Home Department; ex p. Cheblak* [1991] 1 WLR 890.  
*Rasid Kulop Mohamad v Timbalan Menteri Dalam Negeri & Ors* [2004] 4 CLJ 721.  
*Re Tan Boon Liat* [1977] 2 MLJ 108.

*Re Tan Sri Raja Khalid bin Raja Harun* [1987] CLJ 1014 (Rep); [1987] 2 CLJ 470.  
*Rupesh v State of Gujarat* (2000) 9 SCC 201.  
*S Ravi a/l G Suppiah v Timbalan Menteri Dalam Negeri, Malaysia & Anor* [1988] 1 MLJ 468.  
*Sadanandan v. State of Kerala and Anor* AIR 1966 SC 1925.  
*Sajad Hussain Wani v Ketua Pengarah Imigresen & Satu Lagi* [2008] 2 CLJ 403.  
*Sasinthiran Balakrishnan v Ketua Polis Negara & Ors* [2012] 1 CLJ 534.  
*Sejahratul Dursina v Kerajaan Malaysia & Ors* [2006] 1 CLJ 593.  
*Seloga Jaya Sdn. Bhd. v Pembinaan Keng Ting (Sabah) Sdn. Bhd.* [1994] 2 CLJ 716.  
*Shamm Bin Sulong v Minister for Home Affairs & Anor* [1996] 2 SLR (R)  
*Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2002] 2 CLJ 697.  
*SK Tangakaliswaran v Menteri Dalam Negeri* [2009] 6 CLJ 705.  
*SMD Kiran Pasha v Government of Andhra Pradesh* (1990) 1 SCC 328.  
*Sugumar Balakrishnan v Pengarah Imigresen Sabah Negeri Sabah & Anor* [1998] 3 CLJ 85.  
*Sunil Batra v Delhi Administration* AIR 1980 SC 1535.  
*Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers Union* [1995] 2 CLJ 748 CA.  
*Tarapada De v State of Bengal* AIR 1951 SC 174.  
*Tan Ah Lek v Penguasa Pusat Pemulihan Akhlak Simpang Renggam & Satu Lagi* [2008] 10 CLJ 617.  
*Theresa Lim Chin Chin & Ors v Inspector General of Police* [1988] 1 MLJ 293.  
*Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771.  
*Tan Lay Beng v Menteri Hal Ehwal Dalam Negeri Malaysia* [2004] 8 CLJ 674.  
*Tan Boon Aun v Timbalan Menteri Dalam Negeri*  
*Tee Yam v Timbalan Menteri Keselamatan Dalam Negeri Malaysia & Yang lain* [2006] 4 CLJ 752.  
*Timbalan Menteri Keselamatan Dalam Negeri Malaysia & Ors v Arasa Kumaran* [2006] 4 CLJ 847.  
*TW v Malta* [1999] ECHR 25644/94.  
*Uthayakumar Ponnusamy v Menteri Keselamatan Dalam Negeri Malaysia* [2009] 1 CLJ 546.  
*Vimal Kishore Mehrotra v State of Uttar Pradesh* AIR 1956 All 56;  
*Yap Cheah Neo v Ong Cheah Neo & Ors* (1872) 1 Ky. 326.  
*Yap Chin Hock v Minister of Home Affairs & Anor* [1989] 2 CLJ 673 (Rep).  
*Yap Peng Sang v Menteri Kemeterian Sumber Manusia Malaysia* [1998] 5 CLJ 804.  
*Yeap Hock Seng @ Ah Seng v Minister for Home Affairs, Malaysia* [1975] 2 MLJ 279.  
*Yit Hon Kit v Minister of Home Affairs, Malaysia & Anor* [1988] 2 MLJ 638.  
*Zahir Ahmad v Ganga Prasad & Ors* AIR 1963 All 4.

## LIST OF STATUTES

American Bill of Rights 1791.  
American Declaration of Independence 1776.  
Anti Terrorism and Crime Act 2001 (UK).  
Anti Terrorism Act 2011 Canada.  
Anti Terrorism Act (No. 2) 2005 - Commonwealth of Australia.  
Banishment Enactment 1910.  
Banishment (Repealed) Act 2011.  
Criminal Procedure Code 1900.  
Criminal Procedure Code 1910.  
Criminal Procedure Code 1922.  
Criminal Procedure Code (Cap 68).  
Criminal Law (Temporary Provisions) Ordinance 1955.  
Courts Ordinance 1873, Ordinance V of 1873.  
Courts Ordinance 1878, Ordinance III of 1878.  
Courts Ordinance 1907, Ordinance XXX of 1907.  
Courts Ordinance 1926, Ordinance 101 of 1926.  
Courts Ordinance 1934 , Ordinance 17 of 1934.  
Courts Ordinance 1936.  
Courts Enactment 1919.  
Courts of Judicature Act 1964.  
Constitution of the Republic of Singapore (Amendment) Act 1989.  
International Covenant on Civil and Political Rights 1966.  
Dangerous Drugs (Special Preventive Measures) Act 1985.  
Dangerous Drugs (Special Preventive Measures) (Advisory Board Procedure) Rules 1987).  
Emergency (Public Order and Prevention of Crime) Ordinance 1969.  
European Convention on Human Rights 1950.  
Enactment No. 25 (Courts) for the State of Kedah.  
English Supreme Court Rules 1965.  
English Habeas Corpus Acts 1640, 1679 and 1816.  
F.M.S. Criminal Procedure Code.  
Federal Constitution.  
French Declaration of the Rights of Man 1791.  
First Charter of Justice 1807.  
Federated Malay States Banishment Enactment 1909.  
Habeas Corpus Act 1641.  
Habeas Corpus Act 1679.  
Habeas Corpus Act 1816.  
Internal Security Act 1960.  
Internal Security (Amendment) Act 1989 (No. 2 of 1989).  
Judicial Committee Act 1966.  
Kelantan Enactment No. 31 of 1938 .  
New Zealand Habeas Corpus Act 2001.  
Perak Order in Council of 1893.

Perak Order in Council No. 5 of 1894.  
Perak Banishment Extension Order No. 3 of 1896.  
Perak Enactment No. 10 of 1899.  
Perak Enactment No. 8 of 1900.  
Prevention of Terrorism Act 2005 (UK).  
Public Order and Prevention of Crime (Procedure) Rules, 1972.  
Restricted Residence Act 1933.  
Restricted Residence (Repealed) Act 2011.  
Security Offences (Special Measures Act) 2012.  
Terrorism Suppression Act 2002, New Zealand.



## **LIST OF PRACTICE DIRECTIONS**

Practice Direction No. 3 of 1991.

Practice Direction No. 7 of 1992.

## LIST OF ABBREVIATIONS

AC	Appeal Cases.
AIR	All Indian Reports.
All ER	All England Law Reports.
Can. B. Rev.	Canadian Bar Review.
CLJ	Malaysian Current Law Journal.
CPC	Criminal Procedure Code.
Cr. LJ	Criminal Law Journal.
DDSPMA	Dangerous Drugs (Special Preventive Measures) Act.
ECHR	European Court of Human Rights.
FMSLR	Federated Malay States Law Report.
<i>Golden Gate U.L. Rev</i>	Golden Gate University Law Review.
ibid	(ibidem): in the same place.
id.	(idem): the same as previously mentioned.
ICLQ	International Comparative Law Quarterly Review.
ISA	Internal Security Act.
JMCL	Journal of Malaysian and Comparative Law.
KB	Kings Bench Report.
Ky.	Kyshee Reports.
LQR	Law Quarterly Review.
LR	Law Review.
MLJ	Malayan Law Journal.
N.Y.L. Sch. J. Hum. Rts.	New York Law School Journal of Human Rights.
POPO	Emergency (Prevention of Crime) Ordinance.
PL	Journal of Public Law.
QB	Queens Bench Report.
SCC	Supreme Court Cases (India)
SCR	Supreme Court Reports (Canada).
SLR	Singapore Law Reports.
Sol. J	Solicitors Journal.
U.N.	United Nations.
w.e.f.	With Effect From.
WLR	Weekly Law Reports.
WN	Weekly Notes.

# CHAPTER 1

## INTRODUCTION

### 1.1 INTRODUCTION

The remedy of habeas corpus *ad subjiciendum* has a long history at common law.<sup>1</sup> It has been characterised as the most celebrated prerogative writ,<sup>2</sup> the most renowned contribution of the English law to the protection of human liberty<sup>3</sup> and a bulwark against the arbitrary infringement of the liberty of the subject.<sup>4</sup> Its purpose is to set free the person who is being subjected to a detention on the basis that the detention is unlawful. It is a writ which requires a person detained by the authorities be brought before a court of law so that the legality of the detention may be examined. It becomes the duty of the Court then to examine the lawfulness of the detention when the writ is

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<sup>1</sup> Sir William Blackstone, who wrote his famous *Commentaries on the Laws of England* in the 18th Century, recorded the first use of habeas corpus in 1305. But other writs with the same effect were used in the 12th Century, so it appears to have preceded Magna Carta in 1215. The writ however has a modest origin: it was used in mense process – see SA de Smith, *Judicial Review of Administrative Action*, 3<sup>rd</sup> Edition, (London: Butterworths, 1973) p. 520. For an account of the historical origin of the remedy see AV Dicey, *An Introduction to the Study of the Law of the Constitution*, 10<sup>th</sup> Ed., (London: Macmillan Press, 1982); *Halsbury's Laws of England*, 4<sup>th</sup> Edition, 2001 Reissue, Volume 1(1); W. Duker, *A Constitutional History of Habeas Corpus*, (New York: Praeger, 1980); See also Maxwell Cohen, Habeas Corpus Cum Causa - The Emergence of the Modern Writ-I, *18 Can. B. Rev.* 10, 16 (1940). S.A. De Smith, The Prerogative Writs, *11 Cambridge L.J.* 40 (1951); Robert J. Sharpe, A Constitutional History of Habeas Corpus, *1982 Public Law* 154; Erwin Chemerinsky, The Individual Liberties Within the Body of the Constitution: A Symposium: Thinking about Habeas Corpus *37 Case W. Res.* 748 (1987); J.H. Baker, *An Introduction to English Legal History* 537-38 (3rd ed. 1990); Alan Clarke, Habeas Corpus: The Historical Debate, *14 N.Y.L. Sch. J. Hum. Rts.* 375; Rona Epstein Habeas Corpus, an update *New Law Journal*, Vol 146 No 6767 p. 1626 (1996); Tom Bingham, Personal Freedom And The Dilemma Of Democracies *52 ICLQ* 841 (2003); Steven M. Wise, The Entitlement of Chimpanzees to the Common Law Writs of Habeas Corpus and De Homine Replegiando, (2007) *37 Golden Gate U.L. Rev.* 219; For the Australia and New Zealand's perspective see David Clark, Legal History: The Icon of Liberty: The Status and Role of Magna Carta in Australian and New Zealand Law *24 Melbourne U. L.R.* 866 (2000); Halliday, Paul D, *Habeas Corpus- From England to Empire*, (Belknap Press of Harvard University Press: Cambridge Massachusetts, 2010).

<sup>2</sup> *Yeap Hock Seng @ Ah Seng v Minster for Home Affairs, Malaysia* [1975] 2 MLJ 279.

<sup>3</sup> de Smith, above.

<sup>4</sup> MP Jain, *Administrative Law of Malaysia and Singapore*, 3<sup>rd</sup> Ed, (Kuala Lumpur: Malayan Law Journal, 1997) p. 631

applied for. The Court has long regarded the remedy of habeas corpus as a remedy given by the Court in exercising its power to check administrative actions.

It must be emphasised that the remedy of habeas corpus is not entirely without basis in so far as the international instrument is concerned. It is axiomatic that laws exist not in vacuum but as a result of the desirability to better regulate the rights, relationship and boundaries in relations. In this respect the desire to set an orderly relations in relation to rights of persons have been felt very early in human civilization. The idea of rights was debated and continues to be debated by jurist over time from the Natural Law Schools, the Positivists, the Sociologist and even Marxist. The jurists attempted to explain the existences of rights and the pursuit of that right. The necessary off-shoot from that discussion is the idea of human rights which suggest that that there are essential human rights that a person or group of person must enjoy. The idea for the protections of human rights is reflected in various international instruments, three of which requires special mention:-

- a. Universal Declaration of Human Rights 1948;<sup>5</sup>
- b. International Covenant on Civil and Political Rights;<sup>6</sup> and
- c. International Covenant on Economic, Social and Cultural Rights.<sup>7</sup>

These three instruments are later known as International Bill of Rights.

Later development showed that internationally, the idea for the protection of human rights has not lost, but gained, momentum. Various other conventions were

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<sup>5</sup> Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948. Available at <<http://www.un.org/Overview/rights.html>> (accessed on 27<sup>th</sup> October 2009).

<sup>6</sup> G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.

<sup>7</sup> Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 *entry into force* 3 January 1976, in accordance with article 27.

passed by the United Nations and ratified by the nations around the world such as the Torture Convention.<sup>8</sup>

Quite apart from the international instruments, regional instruments are also in place to further protect the individual's rights. The most comprehensive and important development is that which is taking place in the European Union. The European Convention of Human Rights and Fundamental Freedom was signed in 1950 and entered into force in 1953.<sup>9</sup> This Convention was the first comprehensive treaty in the world with regards to human rights. It was first to establish an International Court for determination of human rights matters. Of the Articles of the Convention, Article 5 is of particular relevance. It provides:-

1. Everyone has the right to liberty and security of person.  
No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
  - (a) the lawful detention of a person after conviction by a competent court;
  - (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
  - (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority of reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
  - (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
  - (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants;
  - (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

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<sup>8</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984 *entry into force* 26 June 1987, in accordance with article 27 (1)

<sup>9</sup> Available at <<http://www.hri.org/docs/ECHR50.html>> (accessed on 7<sup>th</sup> December 2009).

The opening words of the Article are reminiscent of the Article 5 of the Malaysian Federal Constitution. The European Court has held that Article 5 preserves the remedy of habeas corpus and extended the scope of the Court's jurisdiction to inquire into areas where the domestic court may not be able to cover in a domestic application of habeas corpus.<sup>10</sup>

It is clear therefore that there has been a steady and sustained march in the protection of individual liberty internationally and in certain regional associations. Not only that the idea of human rights has now assumed another dimension where a new category of liberty is established known as "civil liberties" and in this respect "habeas corpus" is treated as a major remedy in the protection of civil liberties.

In the Malaysian context, the Malaysian Courts have long recognised that it has the power to issue the remedy of habeas corpus<sup>11</sup> and in many cases have so issued the writ in many instances including preventive detention, banishment,<sup>12</sup> extradition,<sup>13</sup> and restricted residence.<sup>14</sup>

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<sup>10</sup> Case of *X v United Kingdom*, Application no. 7215/75) STRASBOURG 5 November 1981

<sup>11</sup> See the case of *Munusamy v Subramaniam & Ors* [1969] 2 MLJ 108 where Abdul Hamid J traced the origins of power of the High Court to issue a writ of *habeas corpus* and come to the conclusion that such power is traceable to Article 5 of the Federal Constitution and section 365 of the Criminal Procedure Code. The Court observed:-

The only written law relating to directions of the nature of *habeas corpus* can be found under Part XXXVI of the F.M.S. Criminal Procedure Code. Section 365 of the Criminal Procedure Code provides powers to the court of a judge to direct that any person who is alleged to be illegally or improperly detained in public or private custody within the limits of the Federation is to be set at liberty. Under Chapter XXXVI provisions governing applications, affidavits, warrants, service of warrants and appeals were also made. Whatever may have been the position before the Courts of Judicature Act 1964 came into effect, it seems to me that by reason of section 25 of the Act the additional powers of the High Court as set out in the First Schedule must be exercised only in accordance with any written law relating to the same, and Chapter XXXVI of the Criminal Procedure Code, being provision relating to directions in the nature of *habeas corpus*, would apply.

It is interesting to note that in one of the earliest law reports, the Kyshe's Report, there is a special section dealing with the habeas corpus cases – see Kyshe Report Volume II. All in all there were 11 cases reported in the said volume.

<sup>12</sup> See the cases of *Lui Ah Yong v Superintendent of Prisons, Penang* [1977] 2 MLJ 226; *cf Andrew v Superintendent of Pudu Prisons, Kuala Lumpur* [1976] 2 MLJ 156; *Re Meenal* [1980] 2 MLJ 299.

<sup>13</sup> *Chua Han Mow v Superintendent, Pudu Prison* [1979] 2 MLJ 70.

<sup>14</sup> *Lee Weng Kin v Menteri Hal Ehwal Dalam Negeri* [1991] 2 MLJ 472.

## 1.2 STATEMENT OF PROBLEM AND RESEARCH QUESTIONS

Whilst the courts in Malaysia has in numerous occasions repeatedly asserted the significance of the writ of habeas corpus, the question in reality is whether “the writ is praised in theory far more often than it is employed in practice”.<sup>15</sup> It is therefore pertinent to study the foundational basis for the issuance of the writ of habeas corpus by the Malaysian courts. This would therefore necessitate an inquiry into relevant laws that confers jurisdiction to the High Court to issue the writ of habeas corpus. In this respect an examination will have to be carried out to determine whether the remedy of habeas corpus, being of common law vintage, must necessarily be bound by the technical rules developed at common law or whether the remedy can be connected to any provisions in the Malaysian Constitution.

Of particular interest also is the attitude of the courts when confronted with an application for the writ of habeas corpus applied for by an applicant (or a detenu) who is being detained under the order of detention by the executive arm of the government.

The jurisdictional basis, the approach taken by the Malaysian Court and the state of the law relating to the writ of habeas corpus needs to be put under proper analysis as there were numerous criticism that the Malaysian courts, based on decided cases, in contradistinction with other common law jurisdictions, such as India, Australia and New Zealand, have shown great reluctance in declaring detentions ordered by the executive to be illegal.<sup>16</sup> Put it differently, many a time the applications

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<sup>15</sup> To borrow a phrase from Dershowitz, *The Best Defense*, (New York: Doubleday, 1982) p. 110 when the author was commenting on the usability of the writ as writ of error in the American jurisprudence.

<sup>16</sup> MP Jain, *The Courts and The Constitution*, Paper Presented during the Conference on The Malaysian Constitution After 30 Years – 22<sup>nd</sup> -23<sup>rd</sup> August 1987, University of Malaya at 21; Cyrus Das, *Trends in Constitutional Litigation: Malaysia and India – No Longer Shared Experience*, LR (2005) pp 270-281. See also Rawlings, H.F., *Habeas Corpus and Preventive Detention in Singapore and Malaysia*, (1983) 25 *Malaya Law Review* 3241; Gan Ching Chuan, *Judicial Review of Preventive Detention in Malaysia* [1994] 1 *MLJ* cxiii.

of writ of habeas corpus against executive detention orders were met with little success. It is therefore important to examine why this is so.

Based on the foregoing it is also pertinent to study the approaches of the courts and state of the law relating to habeas corpus in Malaysia in comparative appraisal with other selected commonwealth jurisdictions such as India, Australia and New Zealand to determine whether the Malaysian courts have fallen far behind in terms of the development of the remedy and if so, to point a way forward to improve the position towards a better position.

Based on the foregoing the following would constitute the research questions:-

- a. what is the source of the Malaysian courts power to issue the writ of habeas corpus?
- b. whether the Malaysian courts can draw its jurisdiction from the common law alone or whether the provisions of the Federal Constitution can be referred to as a basis of the source of power?;
- c. whether the Malaysian courts fully appreciate the scope and extent of its powers when dealing with an application for a writ of habeas corpus?;
- d. whether the Malaysian courts ought to be bound by the decisions of the English courts in relation to the issue of writ of habeas corpus or whether it could mould the relief?;
- e. whether the state of the laws (including procedure) pertaining to the writ of habeas corpus in Malaysia is satisfactory and if no, whether reform is necessary?