

HABEAS CORPUS: EXPANDING HORIZONS OF LIBERTY

AUTHOR – PRIYA AGGARWAL* & DR. ASHISH KUMAR SINGHAL**

* LLM SCHOLAR AT THE ICAI UNIVERSITY DEHRADUN

** ASSOCIATE PROFESSOR AT THE ICAI UNIVERSITY DEHRADUN

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Abstract

Life Without Liberty is Like a Body Without Spirit

Khalil Gibran

Habeas corpus, often hailed as the "great writ of liberty," serves as a crucial safeguard against unlawful detention and state overreach. This study examines the evolution, scope, and application of the writ of habeas corpus in both India and the United Kingdom while tracing its historical origins and its role in protecting individual liberty. Through a comparative analysis, it explores the procedural and conceptual differences in what way the writ has been interpreted and enforced in both jurisdictions. The study also reviews landmark and recent judicial pronouncements that helps to explain the judiciary's role in shaping the writ's application. Additionally, it discusses the expanding horizons of habeas corpus in addressing modern legal challenges and analysing its constitutional significance and judicial evolution, this study underscores the continuing relevance of habeas corpus as a fundamental safeguard of personal liberty in contemporary legal systems.

Keywords: Habeas corpus, Liberty, UK, India, Writ

Introduction

The power of the Supreme Court and the High Court to issue "directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari"⁵⁹⁴ provided under Articles 32 and 226 of the Constitution of India respectively forms a vital part of Indian Constitutional and Administrative law. The power to invoke these remedies is exercised through the procedure of the "writ petition" considered highly

characteristic feature of public law litigation in India.

Writ is one of the most powerful and effective tools of the judiciary for ensuring justice and safeguarding the rights of individuals that is guaranteed under Indian Constitution. It can be defined as a formal order issued by the superior court to the public authorities or inferior courts to commanding or directing them to do something or refrain from doing something. A writ of Habeas Corpus is one of the most vital and oldest writs which served as a guard by judiciary to protect from illegal detention.

Development of Writ of Habeas Corpus in England and India

In United Kingdom, prerogative remedies are extraordinary remedies in public law that used to ensure the legality and fairness of administrative actions while controlling them. These remedies originated in England that were

⁵⁹⁴ 32. Remedies for enforcement of rights conferred by this Part

(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed. (2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warrant and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part. (3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2). (4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.

developed as a mechanism to control administrative excesses and ensure justice in case of infringement of legal rights of an individual by the action of the same. The term "prerogative" refers to the 'privilege' and fact that these writs were initially issued at the discretion of the monarch or sovereign in common law systems that emerged as discretionary orders issued by the King to ensure justice and accountability.

Specifically, the writ of habeas corpus evolved from the historical document Magna Carta which was signed by King John in June 1215 in England.⁵⁹⁵ Also referred to as the Great Charter, this document was the first to affirm the fundamental principle that neither the government nor the sovereign is above the law. Clause 39 of the Magna Carta⁵⁹⁶ enshrines the doctrine that no individual shall be subjected to arrest or imprisonment except through the lawful adjudication of a competent authority in a fair trial. It laid the foundation of protection against illegal detention for the first time in the world. In India, the concept of writs emerged from the establishment of Supreme Courts at Calcutta under the Regulating Act, 1773⁵⁹⁷ subsequently, the Supreme Courts at Madras and Bombay were established by King George – III in 1800 and 1823 respectively. However, these Supreme Courts also the Sadar Adalats in Presidency towns were abolished by the India High Courts Act 1861 and this Act created High Courts for various provinces⁵⁹⁸ which had given the unambiguously power to issue writ of habeas corpus under Section 491 of The Code of Criminal Procedure, 1898⁵⁹⁹. Further, the

approach of habeas corpus was incorporated under Articles 32 and 226 of the Constitution of India. Article 32 is itself a fundamental right which entitled directly approach Supreme Court in case of violation of fundamental rights and Article 226 empowers individuals to file petition in High Court for the enforcement of fundamental rights as well as other constitutional and legal rights. Liberty of individual from illegal detention can be availed by the application writ of habeas corpus in any of the abovementioned remedy.

Expanded Role of Habeas Corpus in Contemporary Legal Systems

Habeas Corpus, a Latin term meaning "to have the body," is a fundamental legal writ for safeguarding individual liberty against unlawful detention. In formal legal texts, it is referred to in full as habeas corpus ad subjiciendum, or less commonly, ad subjiciendum et recipiendum. It is often termed the "Great Writ," and recognized as one of the most speedy and effective remedies available under the law.⁶⁰⁰ Under common law, the legality of any form of detention can be challenged through an application for a writ of habeas corpus. Originally habeas corpus was a prerogative writ that issued by the King to ensure that his officials carried out their duties lawfully. Its primary significance lies in offering a timely judicial remedy which enable courts to promptly assess and determine an individual's claim to freedom from unlawful detention.⁶⁰¹ Thus the writ of habeas corpus is essentially a procedural writ and deals with the machinery of justice, not the substantive law. The purpose of the writ is to secure release of a person who is

⁵⁹⁵ Neil Douglas McFeeley, 'The Historical Development of Habeas Corpus' [1976] 30 SW LJ 585.

⁵⁹⁶ No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.

⁵⁹⁷ C K Takwani, *Administrative Law* (5th edn, Eastern Book Company 2012) 366-367.

⁵⁹⁸ 'Supreme Court of India' (Drishti IAS), <https://www.drishtiias.com/printpdf/supreme-court-of-india> accessed [Feb 5, 2025].

⁵⁹⁹ **Power to issue directions of the nature of a habeas corpus**

491.(1) The High Court Division may, whenever it thinks fit, direct:-

(a) that a person within the limits of its appellate criminal jurisdiction be brought up before the Court to be dealt with according to law;
(b) that a person illegally or improperly detained in public or private custody with such limits be set at liberty;

(c) that a prisoner detained in any jail situate within such limits be brought before the Court to be there examined as a witness in any matter pending or to be inquired into in such Court;

(d) that a prisoner detained as aforesaid be brought before a Court-martial or any Commissioners for trial or to be examined touching any matter pending before such Court-martial or Commissioners respectively;

(e) that a prisoner within such limits be removed from one custody to another for the purpose of trial; and

(2) The [Supreme Court] may, from time to time, frame rules to regulate the procedure in cases under this section.

[(3) Nothing in this section applies to persons detained under any law for the time being in force providing for preventive detention.

⁶⁰⁰ Manuj Sharma v State of U.P. and Others [2019] 4 ADJ 840 (DB), [8]-[28].

⁶⁰¹ Surinderjit Singh Mand & Anr v State of Punjab & Anr [2016] AIR SC (Criminal) 1089.

illegally restrained of his liberty.⁶⁰² In United Kingdom, Habeas Corpus Act, 1679, was enacted to prevent abuses of prolonged imprisonment.⁶⁰³ The Act required that a prisoner must be brought before a court without unnecessary delay preventing prolonged detention without trial. It restricted the ability of the monarchy and government officials to detain individuals without lawful justification. Initially, there was no right to appeal in case of refusal of writ as well as against issuance of writ however in the year 1960 the Administration of Justice Act was enacted. Section 15 of the Act⁶⁰⁴ incorporates “Appeal in habeas corpus proceedings.” In *R v Secretary of State for the Home Department, ex parte Khawaja*⁶⁰⁵ The House of Lords held that habeas corpus is available as a remedy for any unlawful detention regardless of the legal status of the detainee including nationality of him. The burden of proof was placed on the government to justify the legality of the detention. The most appealing aspect of Habeas Corpus is that it can be invoked by any individual in court on behalf of a detained person consequently making it a widely accessible public remedy. Unlike other writs, it is not subject to the same restrictions but ensures that it remains readily available for those seeking relief from unlawful detention. The intrinsic objective of habeas corpus was observed in *Sapmawia v. Deputy Commissioner, Aijal*⁶⁰⁶ by Dua, J. as a writ of habeas corpus serves as a prerogative remedy that adapted to examine the validity of

detention by summary procedure and the detaining authority unable to satisfy the court that the denial to personal liberty was not according to the procedure established by law then detained person is entitled for the liberty however this writ is not intended to impede the customary application of criminal law.

The Supreme Court has progressively broadened the application of habeas corpus by allowing it in family-related cases. Traditionally, it was believed that this writ was only applicable in criminal matters but that perspective was incorrect. In *Gautam Kumar Das vs. Nct of Delhi & Ors*,⁶⁰⁷ the Supreme Court allowed the writ of Habeas Corpus by observing that in a child custody matter the welfare of the child is paramount and the writ of Habeas Corpus can be invoked to safeguard these interests. Similarly, the Apex Court viewed that no hard and fast rule can be formulated for the maintainability of a habeas corpus petition in the matters of custody of a minor child is concerned. As to whether the writ court should exercise its extraordinary jurisdiction under [Article 226](#) of the Constitution of India or not will depend on the facts and circumstances of each case.⁶⁰⁸ The maintainability of a writ of habeas corpus requires proving illegal custody. However, in exceptional circumstances where the child's welfare is at risk, the court may set aside this requirement. In such cases, the court's primary focus is the child's well-being rather than the interests of either parent.⁶⁰⁹

The position in United Kingdom can be understood by the recent decision of the UK Supreme Court in *Father v Worcestershire County Council*,⁶¹⁰ the father sought to have his children returned from local authority care through the writ of habeas corpus. The court examined the wider role of habeas corpus in family cases. While the judges dismissed the idea that habeas corpus is outdated in these contexts and pointed out that the Family

⁶⁰² *Kanu Sanyal v District Magistrate, Darjeeling & Ors* [1973] AIR 2684 (SC), [1974] 1 SCR 621.

⁶⁰³ MP Jain and SN Jain, *Principles of Administrative Law* (6th edn, Lexis Nexis 2013).

⁶⁰⁴ **Appeal in habeas corpus proceedings.**

(1) Subject to the provisions of this section, an appeal shall lie, in any proceedings upon application for habeas corpus, whether civil or criminal, against an order for the release of the person restrained as well as against the refusal of such an order.

(3) In relation to a decision of [the High Court] on a criminal application for habeas corpus, section one of this Act shall have effect as if so much of subsection (2) as restricts the grant of leave to appeal were omitted.

(4) Except as provided by section five of this Act in the case of an appeal against an order of [the High Court] on a criminal application, an appeal brought by virtue of this section shall not affect the right of the person restrained to be discharged in pursuance of the order under appeal and (unless an order under subsection (1) of that section is in force at the determination of the appeal) to remain at large regardless of the decision on appeal.]

⁶⁰⁵ [1984] AC 74

⁶⁰⁶ [1971] 1 SCR 690.

⁶⁰⁷ [2024] SCC OnLine SC 2059.

⁶⁰⁸ *Nirmala v Kulwant Singh* [2024] SC India.

⁶⁰⁹ *V Charitha v The State of Andhra Pradesh* [2024] Andhra Pradesh HC (Amravati).

⁶¹⁰ [2025] UKSC 1.

Procedure Rules specifically allow its use in matters involving children means providing alternative remedy, the court stressed that application of habeas corpus is still very restricted and cannot be used to override the detailed statutory framework set out in the Children Act 1989. It is evident that one of the basic principles of habeas corpus which is followed in both the UK and India is that writ of habeas corpus is only available when the ordinary remedy under statute is either not available or become ineffective.⁶¹¹

Article 21 of the Indian Constitution guarantees the fundamental right to life and personal liberty which states that “No person shall be deprived of his life or personal liberty except according to procedure established by law.” [Article 21](#) is the sole repository of rights to life and personal liberty against a State. Any claim to a writ of habeas corpus is enforcement of Article 21.⁶¹² Justice H.R Khanna expressed dissenting opinion that Article 21 is not the sole repository but in its absence rule of law is the basic pillar of constitution which guaranteed state cannot claim unrestricted power over one’s personal liberty even during the time of national emergency while in UK, Lady Hale explains that common law has historically safeguarded individual freedom through habeas corpus and the tort of false imprisonment. Similarly, Article 5 of the European Convention on Human Rights (ECHR) upholds the right to liberty and personal security that incorporates that no one can be deprived of their liberty except in specific circumstances and following a legal procedure.⁶¹³

The question of whether the principle of res judicata applies to habeas corpus petitions has been a subject of judicial interpretation. In India, the situation is nuanced. The Supreme Court has not expressly ruled that res judicata applies to habeas corpus petitions. However, in Ghulam

Sarwar v Union of India (1967) AIR 1335 (SC), the Court observed that a *habeas corpus* petition dismissed on merits may bar a subsequent petition on the same grounds. At the same time, if there is a change in circumstances, new legal grounds, or procedural irregularities, a fresh habeas corpus petition may still be entertained. In England, as established in *Re Hastings* (No. 2) (1958), it has been held that once an applicant for habeas corpus in a criminal case has been heard by a Divisional Court of the Queen’s Bench Division, they cannot seek another hearing before a different Divisional Court within the same Division. This is because a decision by one such court is considered equivalent to a decision by all judges of that Division, just as rulings of old common law courts sitting in bank were treated as decisions of all their judges. In England, an order on a habeas corpus petition is technically not considered a judgment, which sets such petitions apart from others. In this context, reference has been made to the fact that in England, multiple habeas corpus petitions can be filed successively, and the rejection of one does not prevent the filing of another for the same reason. However, in our view, there is no direct comparison between habeas corpus petitions and those filed under Article 226 or Article 32 of the Indian Constitution. Historically, habeas corpus has been considered a distinct category of writ.⁶¹⁴

Conclusion

The writ of habeas corpus has historically played a fundamental role in safeguarding individual liberty against unlawful detention in both the United Kingdom and India. Its evolution from a prerogative remedy in England to a constitutional safeguard in India manifests its expanding horizons in protecting human rights. As it was rooted in the Magna Carta and later formalised through legislative frameworks such as the Habeas Corpus Act, 1679, the writ has played a crucial role in preventing arbitrary detention by state authorities.

⁶¹¹ Tejaswini Gaud v Shekhar Jagdish Prasad Tewari [2019] SC India.

⁶¹² Additional District Magistrate v Shivkant Shukla [1976] AIR 1207, 1976 SCR 172.

⁶¹³ D (A Child) [2019] UKSC 42.

⁶¹⁴ Daryao and Others v State of Uttar Pradesh and Others [1961] AIR 1457 (SC).

Despite its historical roots, habeas corpus remains a dynamic and evolving legal instrument. It continues to be a powerful safeguard against arbitrary detention as ensures that state actions comply with principles of natural justice and due process. Whether applied in cases of national security, immigration detention, or civil rights violations, it serves as a crucial check on executive power. As legal interpretations continue to evolve, habeas corpus upholds the fundamental principle that personal liberty must be protected from unjust deprivation.

