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Habeas Corpus - Its Past, Present and Possible World-Wide Future

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HABEAS CORPUS—ITS PAST, PRESENT AND POSSIBLE WORLD-WIDE FUTURE

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The writ of habeas corpus has long been recognized in the Anglo-American legal systems as the appropriate procedure to use to challenge an individual's detention and thus to protect his right to freedom from arbitrary arrest. Justice Sutton outlines the history of the development of the writ of habeas corpus and its usage today in the United States of America. Against this background he poses the present-day need for habeas corpus procedures at the international level.

I. GENERAL HISTORY OF THE WRIT UP TO ITS CONSTITUTIONAL OR STATUTORY ADOPTION IN THE UNITED STATES OF AMERICA

THE WRIT of habeas corpus as used today in the United States of America is a civil remedy commanding that a person restrained be brought before a civil court for a determination of the legality of his detention.[1] Historically, however, under the English common law system, upon which the American system is based, there were a number of different types of habeas corpus writs, each commanding that a person restrained be brought before a court or public official for a specified purpose.[2] For example, the ancient writ of *habeas corpus ad deliberandum et recipiendum,* which ordered a prisoner to be removed to the jurisdiction in which an alleged offense had been committed,[3] is perhaps similar to the present procedures of extradition in use in the various American states. The ancient writ of *habeas corpus ad prosequendum* was used for the same purpose.[4] The old writs of *habeas corpus ad faciendum et recipiendum* and *habeas corpus cum causa* commanded that a prisoner be removed from an inferior court to a superior court.[5] Other early writs included *habeas corpus ad satisfaciendum,* which was used in order to remove a prisoner from an inferior court to a superior court in order to execute on a judgment gained in the inferior court,[6] and the writ of

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[1] R. HURD, A TREATISE ON THE RIGHT OF PERSONAL LIBERTY, AND ON THE WRIT OF HABEAS CORPUS 129 (2d ed. 1876).

[2] *Id.*

[3] BLACK'S LAW DICTIONARY 837 (4th ed. 1951).

[4] 39 C.J.S. *Habeas Corpus* § 1 n.2 (1944).

[5] BLACK'S LAW DICTIONARY 837, 838 (4th ed. 1951).

[6] *Id.* at 837.

habeas corpus ad testificandum which commanded that a witness in custody appear in court for the purpose of giving testimony.[7] The writ of *habeas corpus ad subjiciendum,* the source of our present procedures, commanded that a prisoner be brought before a public official for the purpose of determining the legality of his detention.[8] This article is concerned with the development of this last type of writ.

The principle of habeas corpus, though often thought of as of Anglo-Saxon origin, can be traced in other legal systems as well, having arisen independently to meet a widespread human need for justice and freedom. An example of this was the process of *manifestation* which in Spanish law paralleled the early writ of English habeas corpus.[9] The former, though, was much more effective at the time and was considered unequaled as an instance of judicial firmness and integrity.[10] Still earlier, the Roman edicts of *quem liberum hominem dolo malo retines, exhibeas* and *de libero homine exhibendo* were striking parallels to the early writ of Anglo-Saxon habeas corpus.[11] These edicts allowed freemen who were allegedly restrained improperly to apply to a praetor for an interdict so that they could be liberated.[12] As a prerequisite however, it had to be clearly shown that the prisoner was a freeman, since his status was not open to question in the proceeding.[13]

The first written evidence of the use of the principle of habeas corpus in England appeared during the reign of Henry II, 1154-1189, in the form of a writ called *de odio et atia,* which was used to liberate persons unjustly imprisoned.[14] Other writs which secured personal property and liberty, for example, the writs of *de homine replegiando, de manucaptione capienda* and of *mainprize,*[15] appeared at about the same time. Predictably these gradually became little used because they were of limited application and were too complex.[16]

The first royal recognition of the right embodied in the principle of habeas corpus was the signing of the Magna Charta on June 15, 1215.[17] The development of the law in this field, however,

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[7] 97 C.J.S. *Witnesses* § 30 (1957).

[8] J. SCOTT & C. ROE, THE LAW OF HABEAS CORPUS 9 (1923).

[9] For an excellent article on the history of habeas corpus in the Spanish concept and its modified current use in Puerto Rico, see Amadeo, *El Habeas Corpus En Puerto Rico,* 17 REVISTA JURIDICA 1 (1947).

[10] R. HURD, *supra* note 1, at 131.

[11] W. CHURCH, A TREATISE ON THE WRIT OF HABEAS CORPUS 2 (2d ed. 1893).

[12] R. HURD, *supra* note 1, at 131.

[13] W. CHURCH, *supra* note 11, at 3.

[14] *Id.* at 4.

[15] 39 C.J.S. *Habeas Corpus* § 1 (1944).

[16] R. HURD, *supra* note 1, at 130.

[17] F. FERRIS, THE LAW OF EXTRAORDINARY LEGAL REMEDIES 22 (1926).

from that time until the time of Henry VI, 1422-1461, remains somewhat obscure.

In any event, during the reign of Henry VI a remedy known as *corpus cum causa* made its frequent appearance. This writ was closer than *de odio et atia* in form and effect to the later writ of habeas corpus and was used primarily for relief from unjust private detention.[18] Apparently it was not until the reign of Henry VII, 1485-1509, that the remedy was used against the crown.[19] By the time of the reign of Charles I, 1625-1649, the process had become an admitted constitutional remedy and was referred to as a writ of habeas corpus.[20] This line of development led to the passage of the English Habeas Corpus Act on May 26, 1679.[21]

Prior to the passage of the Habeas Corpus Act in England, the power to issue the writs had been exercised by the Courts of Chancery, King's Bench and Common Pleas, and by the Exchequer in a case of privilege.[22] The right, once firmly established in English law, was, unfortunately, greatly abused, and the Act, when finally passed, was aimed not at securing this right to the people, but at eliminating the flagrant abuses of the right by the government and by crown lawyers.[23] The Act itself, 31 Car. II, c. 2, passed the House of Commons as early as 1674[24] but did not get approval from the House of Lords until 1679 and then only by dubious means. It is reported that at least one assenting member apparently managed to be counted more than once with the final vote of the 107 member house being 57 in favor of passage and 55 against.[25]

The Act of 1679 authorized all four of the above mentioned courts in term time to grant the writ of habeas corpus and, upon proper application, also authorized its granting in vacation time by the Lord Chancellor, the Lord Keeper, any of His Majesty's Justices, and the Barons of the Exchequer of the degree of the coif.[26] The Act granted jurisdiction only in cases of imprisonment for "criminal or supposed criminal matters."[27] It was later supplemented by the Statute of 56 Geo. III, c. 100, in 1816, which gave similar jurisdiction in other than criminal matters.[28] An Act in 1862 allowed courts in

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[18] W. CHURCH, *supra* note 11, at 4.
[19] R. HURD, *supra* note 1, at 131.
[20] W. CHURCH, *supra* note 11, at 4.
[21] *Id.* at 21.
[22] R. HURD, *supra* note 1, at 132.
[23] W. CHURCH, *supra* note 11, at 25.
[24] *Id.* at 16.
[25] *Id.* at 22.
[26] R. HURD, *supra* note 1, at 133.
[27] *Id., quoting from* 31 Car. II, c. 2.
[28] *Id.* at 133.

the colonies and dominions to process writs in their jurisdictions without interference from the English courts, if they could insure the execution of the writ.[29]

The first recorded application for the writ of habeas corpus in the North American colonies was denied in 1689 in Massachusetts. In 1692 the Assembly of Massachusetts passed an act specifically conferring upon the courts the power to grant the writ, but the enactment was disallowed by Lord Bellamont in 1695.[30] A subsequent application in 1706 was also refused, but there was no indication that the request was considered unusual at the time.[31] South Carolina, in the 1690's, also passed an act enabling magistrates and judges to put in force the Statute of 31 Car. II, c. 2.[32] In most other colonies, though no specific action was taken, the people apparently assumed that the right to habeas corpus extended to them as there were instances of application for it in a number of colonies.[33] And, the denial, on application to the British Parliament, of the authority to issue writs of habeas corpus in the Province of Quebec in 1774 became an additional ground for complaint at the first Continental Congress in that year, as the other colonies felt that the right, although severely abused at the time, would be flatly denied them as well.[34]

Though no provision regarding the right to habeas corpus was made in the American Articles of Confederation, the United States Constitution, when adopted in 1787, specifically mentioned the writ of habeas corpus. The reference in the American Constitution assumes the existence of the right to habeas corpus and preserves it although it makes no jurisdictional grants.[35] Actual implementation of the writ came in the Judiciary Act of September 24, 1789, section 14 of which granted jurisdiction to issue the writ to the federal Supreme Court, the federal circuit courts and the federal district courts.[36] All of the American states have recognized the right to habeas corpus, some by constitutional provision and others simply by statutory enactments. Thus, though this was originally a common law writ, it has become largely either constitutional or statutory in the United States.[37]

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[29] *Id.* at 133 n.1, *referring to* Statute of 25 Vict., c. 20.

[30] W. CHURCH, *supra* note 11, at 36.

[31] *Id.* at 35.

[32] *Id.* at 37.

[33] *Id.* at 39.

[34] *Id.*

[35] *Id.* at 40.

[36] R. HURD, *supra* note 1, at 134.

[37] 39 C.J.S. *Habeas Corpus* § 3 (1944).

II. SUBSEQUENT DEVELOPMENT OF THE WRIT IN THE UNITED STATES OF AMERICA

The right to a writ of habeas corpus has not remained intact throughout the history of the United States. The Federal Constitution provides that the privilege may not be suspended "unless when, in Cases of Rebellion or Invasion, the public Safety may require it."[38] On April 27, 1861, President Lincoln authorized General Scott to suspend the writ should it become necessary for the public safety during the Civil War.[39] At that time there was no express authority placing the suspension of the writ among the powers of the President. In 1863, however, such a statute was passed.

The United States Supreme Court nevertheless in 1866, during the time in which the writ was suspended, did issue a writ of habeas corpus in *Ex parte Milligan,* stating:

> The suspension of the privilege of the writ of *habeas corpus* does not suspend the writ itself. The writ issues as a matter of course; and on the return made to it the court decides whether the party applying is denied the right of proceeding any further with it.[40]

The court then went on to say that the suspension of the privilege of the writ ceases when the rebellion or other public emergency ceases, and the prisoner may be released, if in fact his claim has merit, when the suspension terminates.[41]

The writ of habeas corpus today is used in both federal and state courts in the United States for numerous purposes both civil and criminal. All uses involve a determination of the legality of a detention. For example, these run the gauntlet from asserted unconstitutional restraints of various types[42] to attacks on the legal existence of the court itself.[43] Generally the writ is used when it is alleged that due process of law has been denied a petitioner.

In recent years, many United States Supreme Court cases have involved the use of the writ of habeas corpus to attack various procedural defects in criminal trials. Some of the denials of fundamental fairness currently held assertable by means of the writ are:

(1) Denial of the right to counsel at trial;[44]

(2) Admitting as evidence a confession involuntarily obtained;[45]

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[38] U.S. CONST. art. 1, § 9 (2).

[39] Kutner, *World Habeas Corpus for International Man: A Credo for International Due Process of Law,* 36 U. DET. L.J. 235, 253 n.61 (1959).

[40] 71 U.S. (4 Wall.) 2, 130-31 (1866).

[41] Kutner & Carl, *An International Writ of Habeas Corpus: Protection of Personal Liberty in a World of Diverse Systems of Public Order,* 22 U. PITT. L. REV. 469, 507 n.251 (1961).

[42] *Ex parte* Novotny, 88 F.2d 72 (7th Cir. 1937); United States v. Baird, 85 F. 633 (D.C.N.J. 1897); *Ex parte* Martinez, 56 Cal. App. 2d 473, 132 P.2d 901 (1942).

[43] *Ex parte* Pitts, 35 Fla. 149, 17 So. 76 (1895).

[44] Gideon v. Wainwright, 372 U.S. 335 (1963).

[45] Jackson v. Denno, 378 U.S. 368 (1964); Fay v. Noia, 372 U.S. 391 (1963).

(3) Admitting evidence obtained as a result of an illegal search and seizure;[46]

(4) Denial of the right to counsel at critical points in the proceedings;[47]

(5) Denial of counsel during interrogation by the police;[48]

(6) Pre-trial publicity prejudicial to the defendant;[49]

(7) Denial of the right against self-incrimination;[50]

(8) Denial of the right to counsel for prosecution of appeal.[51]

Both historically and currently it is apparent, as mentioned earlier, that the need for and development of the writ of habeas corpus arose because of mankind's innate sense of justice and the need of organized governmental structures to recognize human rights, dignity and freedom. The process developed basically to insure due process of law in a civilized society. The latter implies, of course, a public hearing or public trial with a recognized form of judgment,[52] thus securing an individual and his property from the arbitrary exercise of the powers of government, unrestrained by established principles of law, and assuring to him fundamental rights and distributive justice.

III. The Movement Toward a World Habeas Corpus

The movement toward international recognition of the remedy of habeas corpus to protect fundamental human rights has gained considerable momentum in the past few decades. It has been said that this development is based primarily upon divine law, an international theory of due process, and certain individual rights inherent in natural law.[53] Whatever its origin, and admittedly it has an excellent historical pedigree, in 1928 the Permanent Court of International Justice held that rights could be secured to individuals through treaties. Based upon that ruling, a number of treaties have come into effect which do just that. One example is the Hungarian Peace Treaty of 1947.[54]

Apparently formal protection, on an international scale, of what today are called "human rights" was first provided for in the United

[46] Mapp v. Ohio, 367 U.S. 643 (1961).

[47] White v. Maryland, 373 U.S. 59 (1963); Hamilton v. Alabama, 368 U.S. 52 (1961).

[48] Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964).

[49] Sheppard v. Maxwell, 384 U.S. 333 (1966); Rideau v. Louisiana, 373 U.S. 723 (1963).

[50] Malloy v. Hogan, 378 U.S. 1 (1964).

[51] Douglas v. California, 372 U.S. 353 (1963).

[52] In this connection see La Plata River & Cherry Creek Ditch Co. v. Hinderlider, 95 Colo. 128, 25 P.2d 187 (1933).

[53] Kutner, *supra* note 39, at 242.

[54] Kutner & Carl, *supra* note 41, at 536.

Nations Charter. Article 55 pledges signatory nations to a universal respect for human rights and fundamental freedoms.[55] Article 56, in turn, pledges members to take positive action in observance of the purposes and aims of Article 55.[56] Many of these principles, however, are still in the process of being debated since there does not seem to be universal agreement by member nations on how to implement the Charter provisions as expressed in the Universal Declaration of Human Rights and Fundamental Freedoms.[57] This declaration was proposed by the Commission of Human Rights and adopted by the General Assembly on December 10, 1948.[58]

As far as habeas corpus is concerned, Article 9 of the Universal Declaration contains a provision to the effect that "[n]o one shall be subject to arbitrary arrest, detention or exile."[59] Neither this declaration, however, which does not have the effect of a treaty,[60] nor the United Nations Charter contain any provision for implementation of the right to be free from arbitrary arrest.

The vision of an international writ of habeas corpus has been propounded recently by legal theorists. Mr. Luis Kutner, the American leader in this field, has made the following comments in this connection:

> The concept of an international writ of habeas corpus came into existence as a concrete proposal after the reading of *Mein Kampf* in 1930 and a view of the frightening scene of 10,000 arms raised in Roman salute to the raucous voice of a demented, self-proclaimed redeemer of the German national honor. Hitler's blueprint for arbitrary arrest, detention, and human slaughter was made available for all the world to see.[61]

The ideal has caught the imagination of many persons in many lands, particularly in the United States, where numerous authors, lecturers, congressmen, diplomats and legal theorists urged, during the 1950's, that the right to issue writs of habeas corpus should be vested in a

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[55] U.N. CHARTER art. 55 (c). *See generally* H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 33 (1950).

[56] Kutner, *World Habeas Corpus: A Legal Absolute for Survival,* 39 U. DET. L.J. 279, 282 (1962).

[57] See Report of the American Bar Association's Standing Committee on Peace and Law Through United Nations, May 1967, for its comments and recommendations on four of the proposed conventions already submitted to the United States Senate (Genocide, Supplementary Slavery, Abolition of Forced Labor, and Political Rights of Women); and see its comments on other conventions not yet submitted to the Senate for its advice and consent. As far as is known no convention has yet been proposed by an official United Nations Commission on a world-wide habeas corpus system.

[58] Kutner, *A Proposal for a United Nations Writ of Habeas Corpus and an International Court of Human Rights,* 28 TUL. L. REV. 417, 420 (1954).

[59] Kutner, *supra* note 56, at 296. For an example of a petition brought under this provision, see Petition for Writ of World Habeas Corpus for Moise Tshombe filed in the United Nations General Assembly, Economic and Social Council, Human Rights Commission, July 1967.

[60] Kutner, *supra* note 58, at 420.

[61] Kutner, *supra* note 56, at 288.

world court.[62] During those years a resolution was proposed in the United States House of Representatives to the effect that the United States sponsor a treaty proposing that an international court be empowered to issue the writ of habeas corpus upon proper application directed to countries detaining their own nationals. Opposition to such a stand, by the United States Department of State, among others, was based upon the obvious loss of sovereignty by each signatory nation if such a step were to be taken.[63]

Some other nations, nevertheless, have not been as reticent as the United States and have evidently believed the surrender of such a parcel of sovereign power would be worthwhile in the rapidly changing world of today. For example, the European Convention for the Protection of Human Rights and Fundamental Freedoms, which became effective in September 1953, provided for regional implementation of a remedy for arbitrary detention.[64] Also, the European Court of Human Rights came into being in 1959 as a result of the European Convention, and in 1960 that court began handling cases of a nature that would be treated by the type of International Courts of Habeas Corpus proposed by Mr. Kutner.[65] The possible creation of the latter type of court has now become the subject of considerable world-wide discussion. Its advent is believed by many authorities to be the proper beginning of a solution as to how the basic human right of mankind to individual freedom can best be recognized and protected. For that reason the general concept and operation of such a court system will next be discussed.

Kutner conceives of the creation by treaty of International Courts of Habeas Corpus. Such courts would be created in definitive geographical regions, each comprised of a number of signatory nations. Each regional court would be staffed by regional world attorneys-general, appointed to prosecute and resist applications, as well as by amici curiae who would be regionally appointed, to aid in the prosecution of petitions.[66] The court itself would consist of not less than two jurists from each signatory country, each serving a region which does not include his own country. Each region would select its own chief justice from among the member jurists.[67] The court itself would operate on general principles of fundamental fairness, and on natural law rather than legal principles drawn from any one or more member nations.[68] Apparently, inherent in the legal con-

[62] *Id.*

[63] *Id.* at 289.

[64] Kutner, *supra* note 58, at 421; Kutner & Carl, *supra* note 41, at 538.

[65] Kutner, *supra* note 56, at 306.

[66] *Id.* at 319.

[67] *Id.* at 322.

[68] Kutner, *supra* note 39, at 243.

cepts to be employed, however, would be those discussed earlier herein relating to due process of law and the right of an individual to be free from arbitrary governmental arrest and restraint.

One can foresee many practical difficulties in trying to establish such a new judicial system in this era of great social, economic and political upheaval. For example, it is essential in the first instance, to gain general recognition of the right of an individual, as opposed to that of the state, to present his case before an international tribunal.[69] If World Habeas Corpus is to succeed it is obvious that the detained or incarcerated individual, or someone on his behalf, must be permitted to file and prosecute the petition.[70] As previously noted, a good start in altering thinking along the necessary lines has been made by the creation of the European Court of Human Rights. Apparently, a second obstacle is the reluctance on the part of some nations, including the United States,[71] to agree to any loss of individual sovereignty which is, to some extent, implicit in adhering to the jurisdiction of any international judicial body. Another serious stumbling block is that there does not appear to be at this time any way to enforce the mandates of such courts.[72] In this connection, it has been suggested that sanctions are unnecessary. Proponents of this belief cite as examples the general success of the few international tribunals which have functioned heretofore, as well as the success of international arbitral boards. They also refer to the European Common Market operations to support the proposition that signatory nations will respect and adhere to the judgments of an international judicial body.[73] This position, while it may be overly optimistic, may be somewhat supported by the fact that there are very

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[69] *See* H. LAUTERPACHT, *supra* note 55, at 51. *See also* Kutner, *supra* note 58, at 423-30.

[70] Procedural machinery must be developed in those states in which there is no guarantee that the right to habeas corpus will be more than a paper right. For a brief discussion of the internal problem involved and the present procedural guarantees available in the Communist states, see Kutner & Carl, *supra* note 41, at 516-35. Sanctions should also be imposed to enforce the guaranteed right. *See* Kutner, *supra* note 56, at 316 n.95.

[71] Kutner, *supra* note 56, at 290. An example of this is the United States Senate's insistence on the Connally Reservation to the United States declaration of adherence to the compulsory jurisdiction of the International Court of Justice in 1946. The Connally Amendment consists of only the six italicized words which appear at the end of the following quotation from the United States declaration of adherence to the jurisdiction of the World Court: "This declaration shall not apply to . . . (b) Disputes with regard to matters which are essentially within the domestic jurisdiction of the United States *as determined by the United States*." Declaration by the President, Aug. 14, 1946, 61 Stat. 1218, T.I.A.S. No. 1598 (emphasis added). The net effect of this amendment is not only to give the United States what amounts to a veto over which cases it will permit to come before that court but also, under the doctrine of reciprocity, a state sued by the United States has the same right of determination. If it is assumed that any Regional World Court joined by the United States of America would have a similar restriction placed on the declaration of adherence, then the "veto" power could be exercised in this context as well.

[72] Kutner, *supra* note 56, at 292.

[73] *Id.* at 295.

few recorded instances of non-compliance with the judgments of the present International Court of Justice.[74]

History teaches us that the progress of the human race has always been one of struggle to achieve a better way of life, more perfect justice and a more peaceful existence. The writ of habeas corpus has been one of the most potent weapons yet devised in man's attempt to follow paths to these fundamental and rightful goals. Mankind will somehow, some way, and hopefully very soon, use this ancient, revered and versatile remedy to serve his need for human freedom on an international basis. Surely, Regional International Courts of Habeas Corpus are within reach. Once created and obeyed, they will permit those who in good faith adhere to the precepts of the United Nations Charter, to see to it that at least in their countries there is protection against arbitrary arrest and unlawful detention. Hopefully, this safeguard can gradually be extended to all men everywhere.

[74] *Id.* at 325.