

10th ATTORNEY-GENERAL'S CONFERENCE

HABEAS CORPUS IN FIJI – POSSIBLE REFORMS IN PRACTICE & PROCEDURE

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Introduction

For centuries the writ of habeas corpus evolved to protect human liberty. Whenever there was an attack on personal liberty, the writ of habeas corpus became an enforcement vehicle of the right to personal liberty by providing for a prerogative process for securing the liberty of the subject and by affording an effective means of immediate release from unlawful or unjustifiable detention. The writ is recognized as the most renowned contribution of the English common law to the protection of human liberty. Most jurisdictions have codified this process in legislation and have extended the scope of review to extradition proceedings, deportation, illegal immigration proceedings, and in proceedings under the mental health statute.

This paper discusses the historical development of the writ of habeas corpus, the fundamental rights the writ intends to protect, the ratification of those rights in the Constitution, the procedure for the writ, the scope of review in habeas corpus and the relationship with judicial review, and possible reforms. In this paper I have excluded any discussion of the writ in deportation and immigration proceedings because there are cases on this aspect of the writ before the courts.

Historical Development

A conventional use of habeas corpus has been to seek the release of persons held in actual, physical custody in prison or jail. Yet English courts have long recognized the writ as a proper remedy even though the restraint is something less than close physical confinement. The King's Bench, as early as 1722, held that habeas corpus

was appropriate to question whether a woman alleged to be the applicant's wife was being constrained by her guardians to stay away from her husband against her will (*Rex v Clarkson*, 1 Str.444, 93 Eng.Rep.625 (K.B. 1722). The test adopted was simply whether she was "at her liberty to go where she pleased". So also, habeas corpus was used in 1763 to require the production in court of an indentured 18-year-old girl who had been assigned by her master to another man "for bad purposes" (*Rex v Delaval*, 3 Burr. 1434, 97 Eng.Rep.913 (K.B. 1763). Although the report indicates no restraint on the girl other than the covenants of the indenture, the King's Bench ordered that she "be discharged from all restraint, and be at liberty to go where she will." And more than a century ago, an English court permitted a parent to use habeas corpus to obtain his children from the other parent, even though the children were "not under imprisonment, restraint, or duress of any kind" (*Earl of Westmeath v Countess of Westmeath*, as set out in a report's footnote in *Lyons v Blenkin*, 1 Jac. 245,264,37 Eng. Rep.842 (Ch. 1821); accord, *Ex parte M'Clellan*, 1 Dwn.81 (K.B. 1831). These examples show clearly that English courts have not treated the Habeas Corpus Act of 1679 -- the forerunner of all habeas corpus acts -- as permitting relief only to those in jail or like physical confinement.

Similarly, in the United States, the use of habeas corpus has not been restricted to situations in which the applicant is in actual, physical custody. Habeas corpus has been consistently regarded by U.S courts as the appropriate procedural vehicle for questioning the legality of an induction or enlistment into the military service. In U.S, habeas corpus has been widely used by parents disputing over which is the fit and proper person to have custody of their child.

In the Marshall Islands, in a case in which I represented the Chief Justice of the High Court, a writ of habeas corpus was issued to quash a directive of the Attorney General to the Immigration Department to place the Chief Justice on travel banned before criminal charges were filed against the Chief Justice. The presiding judge held that the test was whether the applicant enjoyed the same freedom of movement as any other member of the public and the judge found the Chief Justice's freedom of

movement was unlawfully restricted by the directive of the Attorney General and therefore the writ was issued.

History, usage, and precedent can leave no doubt that, besides physical imprisonment, there are other restraints on a person's liberty, restraints not shared by the public generally, which have been to support the issuance of habeas corpus.

Scope of Review

The scope of review on habeas corpus is restrictive. The predominant inquiry is a legal one, that is, whether the applicant's detention is unlawful. According to English authorities, a writ of habeas corpus will not issue if ordinary legal remedies are applicable or adequate (*R v Cowle* [1759] 2 Burr 834, *Crowley's Case* [1818] 2 Swan 1, *Greene v Secretary for State for Home Affairs* [1941] 1 ALL ER 388). If a detainee can question his or her detention by invoking some other available procedure, then a writ will not issue. But if there were no means of questioning the detention, a writ will follow. The alternate remedy rule is similar to the judicial review and constitutional redress rules of alternative remedies.

Procedure

In Fiji habeas corpus is available in the Magistrates' Court and the High Court. Section 16(1) (d) of the Magistrates' Court confers the jurisdiction to the Magistrates to issue the writ. The procedure is unique to Fiji because in other jurisdictions habeas corpus is only available in the superior court. There may be practical reasons for having the procedure available in the Magistrates' Court because public have access to a Magistrates' Court in all urban centers, certain rural communities and in islands whereas the High Court is only located in the three divisions, namely, Central, Western and Northern. Arguably public have easy access to Magistrates' Court than a High Court and therefore it may be desirable to retain this procedure in the Magistrates' Court.

Although the Magistrates' Court has jurisdiction to issue a writ of habeas corpus, the procedure is rarely used. Most applications are made in the High Court under Order 54 of the High Court Rules. Past records show that most applications were made during the time of political crisis in this country when the right is challenged by the actions of the executive and that most applications were made in the Central Division of the High Court.

When an application for the writ of habeas corpus is made to the High Court, the application is filed in the Civil Registry and is subject to the High Court Rules and the Administration of Justice Act, before a judge is assigned to hear the application. The Administration of Justice Act allows for subsequent application once the initial application was refused, based on fresh evidence rule (*Re Cao Juan Wen* [2002] HBM 0075/02S). Once the writ is filed, it is given priority over all other court business so that the purpose of the writ is not defeated.

The rule that applications have to be made to the Court meaning as an institution is subject of two exceptions. The first exception is that a writ of habeas corpus may directly be made to a judge when no judge is sitting in court. This exception seems to capture a situation when there is urgency for the writ to issue outside the business hours of the Court. The second exception is when the application is made on behalf of a minor.

Another rule for the applications for habeas corpus is that they are not be made *ex-parte* unless supported by an affidavit by the detainee showing that it is made at his instance and setting out the nature of the restraint. According to case law, *ex-parte* applications should be made in very exceptional circumstances such as if the matter is clear and the injustice is glaring (*Re Stockdale* (1861) 1 QSCR 110 (FC)).

When an application is made *ex-parte* by a judge not sitting in court, the judge may direct that an originating summons for the writ be issued, or where the application is made to Court, adjourn the application so that notice may be given which must be 8 clear days before the hearing of the application, or even order release of the detainee.

O.54, r.3 creates disclosure obligations in respect of affidavits being relied on by the parties subject to demand and on payment of the proper charges. If a writ is issued, the Court or judge must give a returnable date. The normal rules for service and return of service apply when the writ is issued. When the detainee is brought before the Court or judge, the procedure at hearing is that the detainee's counsel is heard first, then counsel for the State, and then one counsel for the person restrained in reply. The rules prescribe a particular form for the writ.

These procedures predate the 1997 Constitution that guarantees the right to personal liberty (s.23) and the freedom of movement (s.34). However these rights are not absolute and are subject of limitations.

Constitutional Limitations

The constitutional limitations on the right to personal liberty and the freedom of movement are similar in nature. The main limitations on personal liberty are justified by legal obligations created by the courts, for instance, to execute a sentence after conviction of an offence or punishment in contempt proceedings. Personal liberty of a minor could be restricted for the purposes of education or welfare, by a court order. Law enforcement agencies or private citizens could restrict a person's liberty on the ground of reasonable suspicion of having committed an offence. Personal liberty could be restricted on medical grounds such as preventing the spread of a contagious disease.

What is striking about the Constitution is that it does not expressly restrict personal liberty under a state of emergency. But, the Constitution provides for a procedure to challenge a detention under a state of emergency. Arguably, the Constitution impliedly restricts personal liberty under a state of emergency. The procedure is as follows.

A detainee under a state of emergency must, as soon as practicable or within 7 days from the date of detention, be provided in the language that the detainee understands written reasons for the detention.

A notice of the detention must be published in the Gazette within 14 dates from the date of detention by stating the law under which the detention is authorized.

After one month and during intervals before six months, the detention must be reviewed by an independent and impartial tribunal established by the Judicial Service Commission and presided over by a legal practitioner.

During the detention, the detainee should be allowed to have access to his or her spouse, partner or next of kin, a religious counselor or social worker, and legal counsel of choice.

At the tribunal hearing, the detainee has a right to legal representation.

As for the relief, the tribunal may make recommendations to the appropriate authority as to the continued detention.

The question is whether this constitutional procedure is intended to suspend the *locus standi* of a detainee under a state of emergency to apply for a writ of habeas corpus. There is strong argument that it does, because the Constitution provides for an alternative remedy for a detainee under a state of emergency, and a writ of habeas corpus will not issue if there are alternative remedies available to challenge the detention. This procedure needs to be clarified by legislative reform to the issuance of writ of habeas corpus under a state of emergency.

Possible Reforms

A good starting point for any reform to the existing practice and procedure is to bring the practice and procedure in uniformity with the constitutional importance of the

remedy intended by the writ of habeas corpus. Any alteration of existing procedure should be scrutinized carefully.

One potential area for reform is subsuming habeas corpus in the judicial review procedure where it could operate as a separate form of relief. Of course there are advantages and disadvantages for this course. The advantages are that it would no longer be necessary to commence two separate forms of proceedings where the challenge to a person's detention was based on both an alleged jurisdictional and non-jurisdictional error. Secondly, the type of application made would no longer have to depend on that often difficult distinction. Thirdly, a simple procedure would mean that in all cases where the liberty of the person is at stake, the court should act with expedition – whether the application for review is made under Order 53 or Order 54 and whether or not the unlawfulness involves an error of precedent fact.

The disadvantages arise from the fact that habeas corpus is used very infrequently, which suggests that any inconvenience created by the different procedures is likely to be marginal because the writ's efficacy over its long history stems from its capacity to operate in a very short time and to secure the production of the detainee as of right. The discretionary nature of judicial review procedure which includes leave requirement would not be suitable for habeas corpus and could be seen as eroding ancient and vital constitutional liberties. All these factors should be considered for any reform.

Another area for reform that may be considered is in relation to *ex-parte* applications for the writ of habeas corpus. *Ex-parte* applications are generally heard in chambers. Such applications are in conflict with the principle of open justice recognized by the Constitution. Public confidence in the judiciary is gained by open justice. A closed door decision by judicial officers erodes that confidence and leaves a cloud of suspicion in public's mind. An ordinary member of the public should feel confident that justice is accessible in an open manner. As the rules stand now, the circumstances under which *ex-parte* applications for writ of habeas corpus could be made are too broad and any future reform may consider this. The only prerequisite according to the

rules is that the application must be supported by an affidavit setting out the nature of restraint.

Finally, reforms in terms of legislation should be considered to identify the scope of review for the writ of habeas corpus along the constitutional limitations placed on the right to personal liberty and freedom of movement that I have identified earlier in my paper and the alternative remedy procedure provided by the Constitution in a case of emergency needs to be clarified.

Conclusion

Personal liberty and freedom of movement are said to be among the fundamental rights guaranteed by the Bill of Rights. However, liberty and movement are confined and controlled by law. The safeguard of liberty is in the good sense of the people and in the system of representative and responsible Government which has evolved. Fundamental rights are basis aspects of rights selected from what may previously have been natural or common law rights. These basic aspects of rights are elevated to a new level of importance by the Constitution. This also means that the safeguards that previously existed to enforce the basic rights are also elevated to a new level of importance by the Constitution and any reform of the existing practice and procedure for the writ of habeas corpus must conform to the provisions of the Constitution.
