INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed Journal Multi Disciplinary
Peer Reviewed

www.ijlra.com

ISSN: 2582-6433

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ISSN: 2582-6433

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ISSN: 2582-6433

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ISSN: 2582-6433

HABEAS CORPUS UNDER SIEGE

AUTHORED BY - VENIKA SHARMA

ABSTRACT

As defined by English authorities, Martial law or the law of war has been known to be a vestige of history with scarce application in the contemporary legal landscape. It has serious ramifications on exercising principles of natural justice and the rule of law. This practice of arbitrary power, because of necessity during war-like situations, has all but surfaced in areas declared "disturbed" to hold "enemy combatants" sparking international discussion. This state of affairs significantly impacts the legal safeguards in place to protect human rights fundamental to individuals globally, but most of all, the writ of habeas corpus. This research paper intends to delve deeper into the pandora's box of martial law, its manifestations in contemporary constitutional democracies, and its echoes on the writ of habeas corpus.

The object of the writ of habeas corpus is to enquire about the reasonableness, procedure in place, and legality of imprisonment to act as a check over the policing authority as a safeguard for individuals that find themselves at the lowest rung of the social ladder, in essence, the indicted. It is a common consensus that in times of rebellion, the state is bottlenecked with its duty to protect its citizens from potential harm but is also, prone to act ultra vires to constitutional norms. This research deals with the balance between civil liberties and the potential security needs of the State.

Keywords: Habeas Corpus, Martial Law, Guantanamo Bay.

INTRODUCTION

The writ of habeas corpus finds its origins in the Magna Carta itself, guaranteeing that "*no freeman shall be taken or imprisoned except by lawful judgement of his peers or by the law of the land*"[1] and that "*to no one will we sell, to no one will we refuse or delay, right or justice*"[2] In the contemporary legal landscape, the writ is the spirit of all fundamental guaranties, principles of natural justice and the rule of law.

[1] Edw. II,"*Magna Carta*" c. 39. (1229)
[2] Edw. II,"*Magna Carta*" c. 40. (1215)

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Essentially, there are two principles that regulate all constitutional governments: the establishment of justice and comity among public authorities. A constitution should establish and sustain a just government. The first virtue of a constitution is not to protect the rights of the constitution makers, or of the people they represent, or of their posterity. It is to enable those people to act justly as a society. The fact that a good constitution protects their rights is an instance of its more general and fundamental value.

Comity among public authorities: No institution of government has a general, paramount responsibility for just government. In sustaining just government under a constitution, the authorities of the state must act with comity toward each other. Each branch of government must respect the other branches' share of the state's responsibility for just government.[3] Therefore, there exists a deceptively small question of law that has led a remarkable series of international debate as to suspension of the writ.

The suspension of the writ of habeas corpus is a prerogative for governments in times of rebellion and threats to national security. Such tyranny and arbitrariness in executive power forms a black hole in the legal system at times when martial law is imposed. It is an improper exercise of power on part of the State in disallowing the writ that makes up for the heart and soul of constitutions across the globe.

Martial law has been a legal conundrum ever since its development in the seventeenth century as its proclamation combines two facets of law that are antithetical in their very nature. To use Robert Cove's terminology, assertions of legal authority are at the same time 'juris generative' i.e constituting legal meaning, and 'juris pathic' – they kill off alternative fields.[4] In case of Martial law, the meaning that is murdered by its application is the rule of law and the principle of natural justice which in jurisprudential understanding is the murder of law itself. In such a situation, the State officials are granted the authority to act arbitrarily without facing any legal consequences, the protectors of law are granted the privilege of becoming perpetrators of the law. The state - that is, the officials who act in its name - is legally authorized to act without any legal controls. Of course, those who regard martial law or something like it as inevitable in times of severe political stress want to justify it as only a temporary killing off of law - a

[3] Timothy Endicott, "*Habeas Corpus and Guantánamo Bay: A View From Abroad*", 54 Am. J. Juris. 1 (2009).
[4] Michael Ryan & Austin Sarat, *Narrative, Violence, and the Law: The Essays of Robert Cover*, Ann Arbor: University of Michigan Press, (1998)

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suspension. They also say that the acts done under martial law are both lawful - done according to law - and in the long-term interests of legal order.[5] This socio-legal conundrum has consequential political implications as can be seen in *Boumedine v Bush*[6].

It is the State's effort to mitigate the risks of internal terrorist movements and rebellion to disintegrate the nation by granting special powers to the military personnel to assess and enforce necessary extreme measures. With respect to the detention of suspected Al-Qaeda members in Guantanamo Bay prison by the US military, the administration claimed the authority to detain them there as the President chose, for times and in conditions of his choosing, with no advice or recourse except what his officials chose to grant. Guantanamo Bay was chosen for the avoidance of habeas corpus. As the laws of the land established that detention of aliens in a foreign country is beyond the jurisdiction of the courts and a petition cannot be brought forth for the same in *Johnson v Eisentrager*[7].The Supreme Court held six - three in *Eisentrager* that no United States court had jurisdiction, because habeas corpus was not available to aliens held outside the sovereign territory of the United States. Aliens have long been given access to court when they are in the United States. But Justice Jackson, for the majority, insisted that *"the privilege of litigation has been extended to aliens, whether friendly or enemy, only because permitting their presence in the country implied protection.*"[8] Half a century after *Eisentrager*, lawyers brought habeas corpus petitions on behalf of the Guantanamo detainees. And in *Rasul v. Bush*,[9] six of nine justices decided that the federal courts did have jurisdiction to hear the petition. The majority did not overturn Eisentrager, and did not reach the constitutional question (whether the United States Constitution requires that the writ be available to control detention of aliens by order of the President in Guantanamo Bay). Five of the justices decided the case on the precarious basis of the federal statute conferring habeas corpus jurisdiction on the federal courts. The congress finally formulated an amendment in the Detainee Treatment Act that "*no court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defence at Guantanamo Bay, Cuba."*[10]
Such situations leave jurisprudential principles in peril and present a question of law as well as

[5] Bruce Ackerman, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism*, New Haven, CT: Yale University Press, (2006)
[6]553 U.S. 723 (2007)
[7] 339 U.S. 763 (1950)
[8] Ibid 777-78
[9] 542 U.S. 466, 124 S.Ct. 2686 (2004)
[10] Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2680, 2739 (2005).

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human rights. The present paper intends to discuss this question and analyse the legal loopholes that have been used to enact such extreme measures, and whether the balance of justice indeed requires meddling with civil liberties to ensure security.

UNDERSTANDING HABEAS CORPUS: DEFINITION AND IMPORTANCE

Habeas Corpus, essentially, protects the detainees against unlawful and indefinite imprisonment. It finds its origins in the Latin language meaning "*duly produce the body*". Habeas Corpus has been in practice since the Elizabethan days, as a method of resistance to the royal tribunals to question imprisonment orders of The Chancery, The Court of Requests, The Admiralty, and The High Commission.

Under the English common law system, there were different types of habeas corpus writs, issuing summons that a restrained person be brought before the court for a specific purpose.[11] 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.[12] The old writs of *habeas corpus ad faciendum et recipiendum* and *habeas corpus curn causa* commanded that a prisoner be removed from an inferior court to a superior court[13]. *Habeas corpus ad testificandum* commanded that a witness in custody appear in court for the purpose of giving testimony[14]. 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.[15]

Ever since its inception, England has more than once had to check the tendency of judges to serve the ruling power by unreasonably delaying or denying the writ of habeas corpus. As stated by the Earl of Halsbury:

"The Habeas Corpus Act, 1640, gives to any person restrained of his liberty or suffering imprisonment by command of the Queen or her Privy Council the right, upon demand or motion made in open court, to the immediate issue of the writ of habeas corpus to be directed to the gaoler or other person in whose custody he may be. The person to whom the writ is directed

[11] R. Hurd, *A Treatise On The Right Of Personal Liberty, And On The Writ Of Habeas Corpus*, 2d Ed. (1876)
[12] BLACK'S LAW DICTIONARY 837, 838,4th Ed. (1951).
[13] Ibid 837
[14] C.J.S. *Witnesses* (1957)
[15] J. Scott & C. Roe, *The Law Of Habeas Corpus* (1923).

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must, at the return to the writ, produce in open court the body or the party so committed or restrained, and must then certify the true cause of his detainer or imprisonment; within three days after such return the court must proceed to examine and determine whether the cause of such commitment appearing upon the return is just and legal or not, and must deliver, bail, or remand the prisoner accordingly, under penalty of treble damages for feitable to the party aggrieved".[16]

Habeas Corpus is an absolute rule in a sense that, a person detained can make an application to each and every court, and each court is bound to hear that application independently, and in case, any court has declared that the person is detained wrongfully, the decision is not appealable. Lord Dunedin in *Secretary of State for Home Affairs v O' Brian*[17] stated that "Habeas corpus is a cardinal principle of the laws of England, ever jealous for personal liberty, that when once a person has been entitled to liberty by a competent court, there shall be no further question."[18]

1. Suspension of Habeas Corpus by President Lincoln in United States of America

According to Article 1 Section 9 of the US Constitution, "*The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it*."[19] This provision in the US Constitution permitted the suspension of the writ of habeas corpus during specific cases of rebellion and/or rebellion. This constitutional provision became the foundational basis of President Lincoln's suspension of the writ. 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.[20]

On May 25, 1861, federal troops arrested a planter, John Merryman on suspicion that he was involved in a conspiracy as part of an armed secessionist group. Merryman was detained at Fort McHenry without a warrant. Merryman's attorney petitioned the U.S. Circuit Court for Maryland, which Justice Taney oversaw, for his client's release. It was in this case,[21] that

[16] Viscount Simonds, *The Laws of England*, Vol 11, Edn. 3 (1955)
[17] [1923] A.C. 603
[18] Ibid 620
[19] U.S. Const. art. I, § 9
[20] 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).
[21] 17 F Cas. 144 (1861)

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Justice Taney argued that the suspension of habeas corpus was devoted only to the Legislative Department and not the Executive Department. Henceforth, the President was not authorised to suspend the writ of habeas corpus or arrest a citizen except in aid of the judiciary.

President Lincoln, however, amidst draft resistance in 1863, issued a proclamation suspending habeas corpus, seeking to position himself under both constitutional and statutory authority. According to President Lincoln, the constitution allowed for suspension during rebellion for public safety and the decision as to what constitutes a threat to public safety rests with the President, as the commander-in-chief. 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*[22], 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".[23]
In this landmark judgement, the question was whether the military commission had jurisdiction to try him upon any charges whatsoever, as he was a citizen of the United States and that the right to trial by a jury was guaranteed to him by the Constitution of the United States. During the late wicked Rebellion, the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question. Then, considerations of safety were mingled with the exercise of power, and feelings and interests prevailed which are happily terminated.[24] Finally, the conviction of Milligan was held to be illegal and in this context Justice Chase remarked that, "*The Constitution of the United States is a law for the rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances."*[25]
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 funda mental fairness currently held assertable by means of the writ are:

[22] 71 U.S.,2, 4 Wall, (1866).
[23] Ibid 130-31
[24] James A. Dueholm, *Lincoln's Suspension of the Writ of Habeas Corpus: An Historical and Constitutional Analysis*, Journal of the Abraham Lincoln Association, Summer (2008)
[25] 71 U.S.,2, 4 Wall, (1866).

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(1) Denial of the right to counsel at trial;[26]

(2) Admitting as evidence a confession involuntarily obtained;[27]

(3) Admitting evidence obtained as a result of an illegal search and seizure;[28]

(4) Denial of the right to counsel at critical points in the proceedings;[29]

(5) Denial of counsel during interrogation by the police;[30]

(6) Pre-trial publicity prejudicial to the defendant;[31]

(7) Denial of the right against self-incrimination;[32]

(8) Denial of the right to counsel for prosecution of appeal.[33]

2. Habeas Corpus in India

Habeas Corpus is a legal instrument that acts as a safeguard for the right to freedom and personal liberty. In India, the scope of the writ of Habeas Corpus is discussed in Article 32 and Article 226 of the Indian Constitution. Article 32 illustrates the 'Remedies for enforcement of right conferred by this part'[34] and the power of courts to issue writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari and Article 226 illustrates the power of High Courts to issue certain writs.[35] Clause (1) of this Article states that "*Notwithstanding anything in Article 32 every High Court shall have powers, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibitions, quo warranto, and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose*."[36]

Habeas Corpus, in essence, acts as a writ of enquiry to the legitimacy and legality of an individual's detention. It acts as a protector of individuals against the authorities in case, they act arbitrarily and take an innocent person into custody. It allows executive, judicial, or other governmental restraints on personal liberty to be subjected to judicial scrutiny.

[26] Gideon v. Wainwright, 372 U.S. 335 (1963).
[27] Jackson v. Denno, 378 U.S. 368 (1964); Fay v. Noia, 372 U.S. 391 (1963).
[28] Mapp v. Ohio, 367 U.S. 643 (1961).
[29] White v. Maryland, 373 U.S. 59 (1963); Hamilton v. Alabama, 368 U.S. 52 (1961).
[30] Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964).
[31] Sheppard v. Maxwell, 384 U.S. 333 (1966); Rideau v. Louisiana, 373 U.S. 723 (1963).
[32] Malloy v. Hogan, 378 U.S. 1 (1964)
[33] Douglas v. California, 372 U.S. 353 (1963).
[34] Indian Const. art. 32. (1951)
[35] Ibid (2)
[36] Indian Const. art. 226. (1951)

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ADM Jabalpur v Shiv Kant Shukla[37] pioneered the evolution of the concept of habeas corpus in India. It was held in this case, by the Supreme Court, that during the emergency period, the writ of Habeas Corpus shall not be maintainable. The rationale of this judgement is indeed not followed the due principle of Justice, Equity and Good Conscience as when any person is wrongfully detained or arrested then there seems to be the violation of Article 21 of the Indian Constitution[38] which is Right to Personal Liberty, which is totally ignored in this case and therefore, this judgement referred to be as the '*Darkest Judgement*' ever been pronounced by any Hon'ble Courts in India.

In the case namely *Sunil Batra v. Delhi Administration*[39], the Hon'ble Court has given the standardized judgement and interpreted Habeas Corpus in a very wide and comprehensive manner. The Hon'ble Court held in its judgement, that whenever a person is wrongfully detained, then not just the Personal Liberty gets suspended of him but also, the manner in which they have been detained by the Police Authorities which further violates their basic human rights respectively.

In the case namely, *A.K. Gopalan v. The State of Madras*,[40] the Hon'ble Court has illustrated and gave certain directives, they are as follows:

i. The aggrieved person is having the right to approach to either Hon'ble Supreme Court or Hon'ble High Courts in case of Unlawful Detention done by the Police Authorities.
ii. The Hon'ble Courts has a clear mandate to preserve, protect and nurture the Fundamental Right of the person by securing their Right to Personal Liberty under Article 21 of the Indian Constitution.
iii. The Hon'ble Court has checked the true validity of Preventive Detention Law under Article 22 of the Indian Constitution[41], as this law is not related to the wrongful detention but the preventive detention to prevent the successive crimes or offences done by an offender, but still the Hon'ble Court checks the validity and other nuances of this law, so, that no sort of violations pertaining to the fundamental rights of the citizens gets affected.

[37] 1976 SC 1207
[38] Indian Const. art. 21. (1951)
[39] 1980 AIR 1579.
[40] AIR 1950 SC 27
[41] Indian Const. art. 22. (1951)

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In *Rudul Sah v State of Bihar,*[42] The Supreme Court held that Rudul Sah's continued detention for over 14 years following his acquittal was unlawful and a blatant violation of his fundamental right to liberty. The Court ruled that Rudul Sah was entitled to ancillary reliefs, including rehabilitation, reimbursement of medical expenses, and compensation for his illegal incarceration. Consequently, the State of Bihar was held liable to compensate Rudul Sah for infringing upon his fundamental rights.

The Supreme Court in *Kanu Sanyal v. District Magistrate, Darjeeling,*[43] has held that habeas corpus was essentially a procedural writ dealing with machinery of justice. The object underlying the writ was to secure the release of a person who is illegally deprived of his liberty. The writ of habeas corpus is a command addressed to the person who is alleged to have another in unlawful custody, requiring him to produce the body of such person before the court. On production of the person before the court, the circumstances in which the custody of the person concerned has been detained can be inquired into by the court and upon due inquiry into the alleged unlawful restraint pass appropriate direction as may be deemed just and proper. The High Court in such proceedings conducts an inquiry for immediate determination of the right of the person's freedom and his release when the detention is found to be unlawful.

Abovementioned cases have been instrumental in the development of the writ of habeas corpus in India. However, challenges persist, including delays in the adjudication of habeas corpus petitions, instances of executive overreach, and inadequacies in legal representation for marginalized communities. Addressing these challenges requires concerted efforts from all stakeholders, including the judiciary, the executive, civil society, and legal professionals. Moving forward, it is imperative to strengthen procedural safeguards, enhance public awareness, and fortify accountability mechanisms to ensure the effective realization of habeas corpus rights. By upholding the principles of justice, fairness, and the rule of law, the Indian judiciary can continue to serve as a beacon of hope for safeguarding individual liberties and upholding constitutional values.[44]

[42] (1983) 4 SCC 141
[43] (1973) 2 SCC 674
[44] Manish Singh Chouhan & Dr Razit Sharma, *A Critical Study of the Writ of Habeas Corpus from Indian Scenario,* International Journal of Research Publication and Reviews, Vol 5, no 5 (2024)

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MARTIAL LAW

Military jurisdiction is of four kinds, viz:

i. Military law, which is the legal system that regulates the government of the military establishment. Military law is a branch of the municipal law, and in the United States derives its existence from special constitutional grants of power.

ii. The law of hostile occupation, or military government, as it is sometimes called; that is, military power exercised by a belligerent over the inhabitants and property of an enemy's territory, occupied by him. This belongs to the law of war, and, therefore, to the law of nations.

iii. Martial law applied to the army; that is, military power extended in time of war, insurrection, or rebellion over persons in the military service, as to obligations arising out of such emergency, and not falling within the domain of military law, nor otherwise regulated by law. It is an application of the doctrine of necessity, founded on the right of national self-preservation.

iv. Martial law at home, or as a domestic fact; by which is meant military power exercised in time of war, insurrection, or rebellion in parts of the country retaining allegiance, and over persons and things not ordinarily subject to it.

Martial Law, fundamentally works on the doctrine of necessity as applied to the right of national self-preservation; neither expressed nor included in any written law, but depending for its jurisdiction upon a question of fact- the fact of necessity.[45] But the conflicting nature of martial law presents a conundrum for socio-legal thinkers worldwide over the need presented in a specific circumstance and the overlap of principles of natural justice and personal liberty of individuals.

A.V. Dicey, claims that the common law does not know martial law, by which he meant an executive prerogative to act as it sees fit in times of emergency. '"Martial law,"' he writes, in the proper sense of that term, in which it means the suspension of ordinary law and the temporary government of a country or parts of it by military tribunals, is unknown to the law of England.'[46] However, Dicey also recognizes that in times of emergency there might be legitimate recourse by officials to illegality, that is, to actions that cannot be justified by the

[45] Lieber, G. Norman. *"What Is the Justification of Martial Law?"* The North American Review 163, no. 480 (1896)
[46] A. V. Dicey, *The Law Of the Constitution, and the Challenge of Popular Politics* (1885–1915)

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defence of necessity. It is this category of morally justified but illegal acts that an act of indemnity, properly so called, is meant to cover. The fact that such a statute, one that retrospectively grants criminal and civil immunity to officials for their acts, amounts to the 'legalisation of illegality' is for him proof of his claim that the English Constitution does not know martial law.[47] One practical consequence of Dicey's position is that any trial of an individual who is not subject to martial law in the sense of the law that governs the military, that is, anyone who is not a member of the military forces, must be conducted by the ordinary civil courts. So, trial of civilians by military tribunals during times of stress is constitutionally precluded, and the idea that such individuals could be tried on capital offences by such tribunals at a time when they posed no immediate threat is an even greater constitutional abomination. For example, the system of military tribunals set up by the us Congress[48] in response to the Supreme Court's decision in Hamdan v. Rumsfeld[49] would, on Dicey's view, be just as unconstitutional in England if enacted by Parliament as was the attempt to set up such a system by executive order, which the Supreme Court declared invalid in that case.

Dicey has time and again, rejected the idea that doctrine of necessity justifies the imposition of martial law. He claimed that in times of great crisis, the authorities should not be granted with greater power and it presents a popular delusion with respect to the activity of 'public spirited despots would increase tenfold the miseries and the dangers imposed upon the country by an invasion.'[50]

Hence, Dicey's claim about martial law brings to the surface tensions in his general position that undermine his thoughts about the superiority of the judge-made constitution. They also make paradoxical his assertion that 'the constitution being based on the rule of law, the suspension of the constitution, as far as such a thing can be conceived possible, would mean with us nothing less than a revolution.[51]

[47] David Dyzenhaus, *The Puzzle of Martial Law*, The University of Toronto Law Journal, Winter, 2009, Vol. 59, No. 1 (Winter, 2009)
[48] Military Commissions Act of 2006, 28 U.S.C.A. § 2241 (2007)
[49] 548 U.S. 557, 126 S. Ct. 2749 (2006)
[50] Dicey, *Law of The Constitution and the Challenge of Popular Politics*, at 233 (1885–1915)
[51] Ibid at 197

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GUANTANAMO BAY: A CASE STUDY IN LEGAL CONTROVERSIES

The detention of Al Qaeda suspects in Cuba, Guantanamo Bay is the most prominent case of suspension of Habeas Corpus on the basis of a legal loophole in the Constitution to discharge he duty of the State government from military operations. The American Supreme Court in *United States v Klein*[52] held that The Congress may not use jurisdictional regulation to require any court of the country, to decide a case in violation of the constitution.[53] This particular precedent was used to set up a military base in Cube, outside the jurisdiction of the country's courts to detain suspects of the attacks of 9/11 and to retrieve information from them, by any means necessary.

Guantanamo Bay, consequently, was chosen for the avoidance of habeas corpus. Fifty years earlier, the Supreme Court in *Johnson v Eisentrager*[54] had decided that aliens detained abroad cannot bring a petition of habeas corpus to the federal courts. The Supreme Court held 6-3 in Eisentrager that no United States court had jurisdiction, because habeas corpus was not available to aliens held outside the sovereign territory of the United States. Aliens have long been given access to court when they are in the United States. But Justice Jackson, for the majority, insisted that "*the privilege of litigation has been extended to aliens, whether friendly or enemy, only because permitting their presence in the country implied protection*."[55]

But twenty-five years later to the detention in Guantanamo Bay in 2002, six of nine justices decided that federal courts did indeed have the jurisdiction to hear petitions on behalf of the Guantanamo detainees in *Rasul v Bush.*[56] The majority, however, did not overturn Eisentrager, and did not reach the constitutional question of whether the United States Constitution requires that the writ be available to control detention of aliens by order of the President in Guantanamo Bay. This left the decision to the Congress who in December 2005, made certain amendments to the Detainee Treatment Act, that "*no court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba."*[57]

The detainees' lawyers came back to the courts nevertheless, and in Hamdan v. Rumsfeld[58] the

[52] 80 US (13 Wall) 128 (1872)
[53] Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 Georgetown L J 2537, 2538–49 (1998).
[54] 339 U.S. 763 (1950).
[55] Ibid 777-78
[56] 542 U.S. 466, 124 S.Ct. 2686 (2004).
[57] Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2680, 2739 (2005).
[58] 126 S.Ct. 2749 (2006)

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Supreme Court held 5-3 that the Detainee Treatment Act did not repeal the federal courts' jurisdiction in cases that were pending when the Act was passed.[59]

Detainees challenged the Military Commissions Act as an unconstitutional suspension of habeas corpus, and finally the Supreme Court faced the constitutional question. The First Article of the United States Constitution protects the writ: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[60] The Congress was of the view that their acts were legal and valid as Al Qaeda detainees did not fall under the purview of the Geneva Convention and are not entitled to be of Prisoners of War status.[61]

But in *Boumediene v Bush,*[62] Justice Kennedy finally held in favour of the detainees that the detainees were not barred from seeking habeas or invoking the Suspension Clause merely because they had been designated as enemy combatants or held at Guantanamo Bay.

BIBLIOGRAPHY

- Matthew Happold, *The Detention Of Al-Qaeda Suspects At Guantanamo Bay*: United Kingdom Perspectives, Human Rights Law Review - Volume 4, Number 1 – (2004).
- J. V. Capua, *The Early History Of Martial Law In England From The Fourteenth Century To The Petition Of Right*, The Cambridge Law Journal, Apr., 1977, Vol. 36, No. 1 (Apr., 1977).
- Charles E. Wyzanski, Jr., *The Writ Of Habeas Corpus*, The Annals Of The American Academy Of Political And Social Science, Jan., 1946, Vol. 243, Essential Human Rights (Jan., 1946).
- George M. Dennison, *Martial Law: The Development Of A Theory Of Emergency Powers, 1776-1861*, The American Journal Of Legal History, Jan., 1974, Vol. 18, No. 1 (Jan., 1974).
- James A. Dueholm, *Lincoln's Suspension Of The Writ Of Habeas Corpus: An Historical And Constitutional Analysis*, Journal Of The Abraham Lincoln Association, Summer, 2008, Vol. 29, No. 2 (Summer, 2008).

[59] Ibid., 2764-9.
[60] United States Constitution, Art. I § 9, cl. 2.
[61] Lord Steyn "*Guantanamo Bay: The Legal Black Hole*", 53 International and Comparative Law Quarterly (2004)
[62] 128 S Ct 2229 (2008).

ISSN: 2582-6433

- David Dyzenhaus, *The Puzzle Of Martial Law*, The University Of Toronto Law Journal, Winter, 2009, Vol. 59, No. 1 (Winter, 2009).
- Leonard V.B. Sutton, *Habeas Corpus - Its Past, Present And Possible World-Wide Future*, 44 Denv. L.J. 548 (1967).
- Timothy Endicott, *Habeas Corpus And Guantanamo Bay: A View From Abroad*, Natural Law Lecture 2009.
- Michael Lobban, *Habeas Corpus, Imperial Rendition, And The Rule Of Law, Current Legal Problems*, Vol. 68, (2015).
- Chester L. Hunt, *Philippine Values And Martial Law*, Journal Of Southeast Asian Studies , Mar., 1980, Vol. 11, No. 1 (Mar., 1980).
- Danial Latifi, *Efficacy Of Habeas Corpus Restored*, Journal Of The Indian Law Institute, July-September 1987, Vol. 29, No. 3 (July September 1987).
- G. Norman Lieber, *What Is The Justification Of Martial Law?* The North American Review, Nov., 1896, Vol. 163, No. 480 (Nov., 1896).
- K. Ratnabali, U.C. Jha And Anita Yadav, *Martial Law In India: Historical, Comparative And Constitutional Perspective*, 63 JILI (2021) 360.
- Daniel J. Meltzer, *Habeas Corpus, Suspension, And Guantánamo: The Boumediene Decision*, The Supreme Court Review, Vol. 2008, No. 1 (2008).
- Harold C. Relyea, *National Emergency Powers: A Brief Overview Of Presidential Suspensions Of The Habeas Corpus Privilege And Invocations Of Martial Law*, Residential Studies Quarterly, Fall, 1977, Vol. 7, No. 4 (Fall, 1977).
- Herman Belz, *Emancipation and Equal Rights: Politics and Constitutionalism In The Civil War Era* (1978), W.W. Norton & Co.
- J.A.P. Jones, *King John and Magna Carta* (1971), Harlow: Longman.
- Thomas T. Lewis, *The Bill of Rights*, (2002).
- Begari, Jagannatham, *B.R. Ambedkar and Social Transformation: Revisiting the Philosophy and Reclaiming Social Justice*, New Delhi: Routledge India (2021).