THE LAW OF HABEAS CORPUS

SECOND EDITION

R. J. SHARPE

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Note to Second Edition

I have attempted to canvas all recent developments in relation to the law of habeas corpus while maintaining the structure and organization of the first edition. The most significant changes occur in chapter 3, dealing with the review of questions of fact; chapter 4, considering the review of executive powers; chapter 5, discussing the role of habeas corpus in the criminal law, and chapter 6, examining the review of commitments for compulsory treatment.

In recent years, habeas corpus has been frequently used in immigration cases. While a series of disappointing decisions drastically curtailed the powers of review on habeas corpus, the decision of the House of Lords in *Khawaja* v. *Secretary of State for the Home Department* [1984] A.C. 74 fully and properly restores the remedy as an important guarantee of personal liberty. This positive approach has been paralleled on various aspects of the writ by a number of decisions in Canada where habeas corpus is now firmly entrenched in the Charter of Rights and Freedoms. Having assessed these recent developments, I restate with increased assurance my conclusion from the first edition, namely, that habeas corpus is a versatile and flexible remedy, properly seen as a fundamental constitutional guarantee and a cornerstone of the rule of law.

Preface

This book is an attempt to present a comprehensive and critical account of the law of habeas corpus. It may be divided into three parts. The first, one chapter in length, provides an historical introduction, briefly tracing the development of the writ from its origins to the seventeenth century when it took its modern form. The next five chapters all deal with various aspects of the nature of review which is available on habeas corpus. They aim to rationalize and to explain the various historical, constitutional, and sometimes accidental factors which define the possibilities for review. The final four chapters deal with certain rather more technical and procedural considerations peculiar to habeas corpus. In the pages that follow, I conclude that habeas corpus is a versatile and flexible remedy. The writ still has significant day-to-day uses, and is properly seen as a fundamental constitutional guarantee and a cornerstone of the rule of law.

While the book focuses on the law of England, there are extensive references to Australian, Canadian and New Zealand authorities. Only a few American authorities are discussed. The American use of the writ as a post-conviction remedy contrasts markedly with the English practice. Consequently, the principles of review and even the more technical aspects of the writ in the United States are moulded by quite different considerations than those operating in England and the Commonwealth.

The book is a somewhat revised version of my thesis submitted for the D.Phil. degree at Oxford University in 1973. I wish to express my thanks to Professor H. W. R. Wade, Q.C. who suggested habeas corpus as my thesis topic and who acted as my supervisor for one term. I am especially grateful to Dr. Ian Brownlie, my supervisor for the balance of my time at Oxford, who provided me with the guidance and encouragement I needed to see the project through. I am also indebted to David A. Lawson, a fellow doctoral student, who read various drafts of the thesis and gave me many valuable suggestions. I am grateful for the assistance given by the Carswell-Sweet & Maxwell Scholarship and by the Canada Council during my time at Oxford.

ROBERT J. SHARPE
Toronto
March, 1976

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Historical Aspects of Habeas Corpus

1. INTRODUCTION

This chapter represents an attempt briefly to trace the historical development of the writ of habeas corpus.[1] Dealing with any aspect of habeas corpus almost inevitably involves the history of the writ. One is very often sent to the early reports to explain the law on any given point and consequently, bits of legal history are found throughout the book. The purpose of this first chapter is merely to trace the broad lines of development through the medieval period to the seventeenth century when the writ took its modern form.

In the discussion which follows, emphasis has been placed on the use of habeas corpus to combat executive committals in the sixteenth and seventeenth centuries. The lessons of this period continue to have great constitutional significance to the present day. It was then that the writ took its modern form, and then that it gained its place as a fundamental part of the British constitution.

2. MEDIEVAL PERIOD

(a) *Origins of the Writ*

By the early part of the thirteenth century, the words 'habeas corpus' were a familiar formula in the language of civil procedure,[2] and it is

[1] There are several accounts of the early history of habeas corpus. Hereafter, they are cited by author: Cohen, 'Some Considerations on the Origins of Habeas Corpus' (1938) 16 Can. Bar Rev. 93; Cohen, 'Habeas Corpus Cum Causa—The Emergence of the Modern Writ' (1940) 18 Can. Bar Rev. 10, 172; Fox, 'The Process of Imprisonment at Common Law' (1923) 39 L.Q.R. 46; 6, 9 Holdsworth, *A History of English Law* (7th ed. 1956), 108–25; Jenks, 'The Story of Habeas Corpus' vol. ii, *Select Essays in Anglo–American Legal History*, 531 (reprinted from (1902) 18 L.Q.R. 64); Relf, *The Petition of Right* (1917); Walker, *The Constitutional and Legal Development of Habeas Corpus as the Writ of Liberty* (1960); Duker, 'The English Origins of the Writ of Habeas Corpus: A Peculiar Path to Fame' (1978) 53 N.Y.U.L.R. 983; Duker, *A Constitutional History of Habeas Corpus* (1980).

[2] There are examples from 1214; *Select Pleas of the Crown* (Selden Soc., vol. 1), 67; and 1220: VIII *Curia Regis Rolls* 308.

likely that the phrase first appeared much earlier. The words simply represented a command, issued as a means or interlocutory process, to have the defendant to an action brought physically before the court.[3] The idea of producing the body with the cause of the detention was not present. In fact, there usually had been no detention at all,[4] and the purpose of the process was to order an officer to bring in the defendant, and not at all to subject the cause of a detention to the court's scrutiny. It has even been said that the early use of habeas corpus was to put people in gaol rather than to get them out,[5] but this seems to have been a mistaken impression. Habeas corpus was used not to arrest and imprison, but to ensure the physical presence of a person in court on a certain day.[6]

There is some indication that 'habeas corpus' was also used to signify a command to the sheriff to bring a person accused of crime before the court.[7] Again, this seems to have been merely one way to have the party physically brought in to face the charges where other methods had failed.[8]

The words 'habeas corpus' at this early stage were not connected with the idea of liberty, and the process involved an element of the

[3] The law required that short of outlawry the defendant had to be actually present in court before a final determination in a personal action could be made: II Pollock & Maitland, 591–4. Habeas corpus was one of the methods described by Bracton in his discussion of the normal process of compulsion available to bring the defendant before the court: ibid. 593, citing Bracton, *De Legibus et Consuetudinibus Angliae*, fols. 439–41. For a thirteenth-century example, see *Select Cases in the Exchequer of Pleas* (Selden Soc., vol. 48), xlvi, xxxiii, lvii. The focus in this chapter is on the cum causa form of the writ which came to be known as habeas corpus ad subjiciendum. Other forms of habeas corpus also developed (ad respondendum, ad satisfaciendum, ad prosequendum, ad testificandum, ad deliberandum, ad faciendum et recipiendum), but these are not significant in modern times, although cf. the attempt to use habeas corpus ad respondendum in *R.* v. *Governor of Brixton Prison, ex p. Walsh* [1985] A.C. 154. For discussion of these forms of the writ see 3 Blackstone, *Commentaries on the Laws of England*, at 129–30.

[4] II Pollock & Maitland, *The History of English Law* (2nd ed. 1952), 593. For an example of its use in this context where the prisoner was in custody, see (1388) Y.B. 2 Rich. II (*Ames Foundation*) 244.

[5] Jenks.

[6] Fox pointed out, correctly it would seem, that Jenks was wrong in thinking that habeas corpus served the same function as capias. Habeas corpus was used only in suits where force was not alleged; capias was used in others at the same stage of the proceedings. Jenks was apparently unaware of this, and when he failed to find examples of habeas corpus during the fourteenth century, but continued to find capias, he concluded that the two were interchangeable.

[7] *Tyrell* (1214) *Select Pleas of the Crown* (Selden Soc., vol. 1), 67; (1328) *Select Cases in the Court of King's Bench, Edw. III*, vol. v (Selden Soc., vol. 76), 24–5.

[8] Cohen, 16 Can. Bar Rev., 109–10.

concept of due process of law only in so far as it mirrored the refusal of the courts to decide a matter without having the defendant present.[9]

The earliest traces of habeas corpus, then, appear to be its use as an interlocutory process rather than an originating proceeding, really little more than an expression which appears from time to time in other proceedings. It was undoubtedly a significant indication of the authority and respect gained by the King's judges that a person could be brought in to justice on their command, but for the association of these words with liberty, further development was required.

(b) *Other Medieval Remedies*[10]

There were three medieval writs which were more closely associated with the idea of liberty than these early forms of habeas corpus: *de homine replegiando*,[11] mainprize,[12] and *de odio et atia*.[13] The first two writs issued out of Chancery and were used to secure release on bail or mainprize pending trial for those prisoners so entitled. The last mentioned writ was available only in certain circumstances to obtain pre-trial release for a prisoner charged with homicide. These writs were all in desuetude by the seventeenth century,[14] and habeas corpus developed quite independently of them.

These medieval writs really differed in a fundamental way from habeas corpus. They were not remedies of general application but special procedures for special situations. While they enabled prisoners

[9] Walker, 16.

[10] Useful accounts of these remedies are: 9 Holdsworth, 105–8; II Pollock & Maitland, op. cit. 585–9, I Stephen, *A History of the Criminal Law of England* (1883), 239–42; 3 Bl. *Comm.*, 128–9; II Hale *P.C.*, 141–3, 147; Cohen, 16 Can. Bar Rev., 95–102. There were also writs relating to the liberty of villains. The writ of *de nativo habendo* allowed a lord to assert his right of possession. The villain could forestall proceedings by suing out a writ of *de libertate probanda*, preventing his arrest until the Eyre of the Justices: Fitzherbert, *N.B.*, 77–9.

[11] For example of the writ, see Fitzherbert, *N.B.*, 66–8.

[12] For examples, see ibid. 249–51.

[13] For examples, see (1209) *Pleas Before the King of Justices*, vol. iv (Selden Soc., vol. 84), 212–13; *Fleta* (Selden Soc., vol. 72), 67.

[14] *De homine replegiando* was used as late as 1736; *Trebelock* 1 Atk. 633. In 1758, Wilmot J. suggested that it was still available as an alternative remedy in the case of a false return to habeas corpus: *Opinion* Wilm. 123. With infrequent exception, however, it was out of use after the medieval period: 9 Holdsworth, 106.

Hale said that mainprize 'hath still its use': II Hale *P.C.*, 142, but it too was essentially a medieval remedy. It was refused in *Jenke's Case* (1676) 6 St. Tr. 1190 on the grounds, *inter alia*, that it was not applicable in cases of committal by the Council.

Hale called *de odio et atia* 'a writ much out of use': II Hale *P.C.*, 147, although Coke had argued that it was still extant: 2 *Inst.*, 43, 55, 315.

to obtain release on bail or mainprize, the court did not call for an explanation of the cause of imprisonment so that its legality could be determined as in the case of habeas corpus. The prisoner was simply given a temporary release until the time came for trial. Later on, this could also happen on habeas corpus, where the prisoner was bailed, but the significant aspect of habeas corpus was to be that it brought the matter of the imprisonment fully before the court and provided the possibility for a fundamental and final determination. Most important of all, these medieval writs were not available where the imprisonment was by virtue of the Crown's order, and could not, therefore, be used by the lawyers of the seventeenth century in their contests with the Stuarts,[15] contests which were to establish habeas corpus firmly in the English constitution.

3. HABEAS CORPUS AND THE JURISDICTIONAL CONFLICTS

The cases which arose from the jurisdictional conflicts of the fifteenth and sixteenth centuries mark the transition of the writ of habeas corpus from a device to secure the physical presence of a party to undergo some other process, to an unequivocal demand for the reason for the applicant's detention so that the court could judge the sufficiency of that reason. The modern 'ad subjiciendum' form of the writ, 'to submit' the cause to scrutiny, was emerging.

(a) *Centralization and the Local Courts*

Habeas corpus proved to be a useful device in the struggle for control between the central courts of the crown and the local courts. There can be little doubt that its use in this contest fostered the concept of the writ requiring cause to be shown for the imprisonment. It was directed by the central courts against the local inferior jurisdictions and helped to channel the litigation, and the fees, towards a central administration. As it was important to be able to exert physical control over the parties in civil litigation, and as the ultimate sanction possessed by a court was attachment or committal, habeas corpus could be used to upset the course of litigation, and remove the sting from the efforts of the local courts to enforce their orders. At this

[15] See 3 St. Tr. 95.

level, habeas corpus was used by both the courts of common law[16] and by the Chancery[17] in their efforts to centralize the administration of justice.

Initially habeas corpus was used with either certiorari or privilege and sometimes with *audita querela*[18] to remove causes from inferior courts. By the middle of the fifteenth century, the issue of habeas corpus, together with privilege, was a well established way to remove a cause from an inferior court where the defendant could show some special connection with one of the central courts conferring a right to have the case tried there.[19] To protect its own jurisdiction and to rob the inferior court of litigation, the superior court had the defendant brought up and discharged. Perhaps somewhat closer to testing the legality of an imprisonment is the use of habeas corpus with certiorari, again a practice well established by the early 1400s.[20] Here, it was available as a means of discharge from inferior process where it could be shown that the cause was one over which the local court lacked competence. The procedure was a recognized method of chicanery,[21] and the habeas corpus was clearly subsidiary. It does, however, mark an important stage in the development of the idea that habeas corpus should be associated with the concept of testing the legality of cause: here, the idea of testing the capacity of the tribunal which had ordered the detention of the defendant.

There can be little doubt, however, that habeas corpus in its cum causa form was being used for this purpose independently of privilege or certiorari by the mid-fifteenth century, and in 1433 there is a statute[22] referring to the use.[23] Emerging in these cases was the

[16] Fitzherbert, *Abridg.* (1577), sub tit. 'Corpus Cum Causa'; *Spencer's Case* (1615) 1 Role 316; *Webb* (1616) 3 Bulst. 214.

[17] *Select Cases in Chancery* (Selden Soc., vol. 10), 8–9, 104–5, 121, all fourteenth-century examples. See also Spence, *Equitable Jurisdiction of the Court of Chancery* (1846), vol. i, 331, 687.

[18] *Quartermaynes* (1456) *Select Cases in the Exchequer Chamber* (Selden Soc., vol. 51), 162.

[19] See, e.g., *De Vine* (1456) O. Bridg. 288; Fitzherbert, *Abridg.* (1577), sub tit. 'Corpus Cum Causa'.

[20] An act in 1414 (2 Hen. V, St. 1, c.2) mentioned habeas corpus and certiorari in this context: cited by Cohen, 18 Can. Bar Rev., 14.

[21] Jenks, 538–9; Cohen, 18 Can. Bar Rev., 15–16 gives references to legislation from 1554 to 1614 to curb the practice.

[22] Hen. VI, c.10; cited by Cohen, 18 Can. Bar Rev., 15.

[23] For examples, see Fitzherbert, *Abridg.* (1577), sub tit. 'Corpus Cum Causa'; *Select Cases in the Exchequer Chamber*, vol. 2 (Selden Soc., vol. 64), 75, 76, 82. Habeas corpus continued to be used for this purpose well into the nineteenth century: *infra*, p. 161.