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Does the Universal Declaration of Human Rights Implicitly Guarantee a Right to Habeas Corpus?

by *Brian Farrell**

INTRODUCTION

THE RIGHT TO A JUDICIAL DETERMINATION OF THE LAWFULNESS OF A PERSON'S DETENTION, COMMONLY KNOWN AS THE RIGHT TO HABEAS CORPUS, provides an essential safeguard against unlawful deprivation of personal liberty. From its origins in medieval England, habeas corpus spread to diverse corners of the globe as part of English common law and its influence on other legal systems. Functioning as a check on a government's ability to imprison an individual, habeas corpus has earned an almost mythical status as a bulwark of liberty, and serves as a cornerstone of Anglo-American jurisprudence.

The availability and scope of habeas corpus has assumed a renewed importance in the post-September 11th world. The right has been invoked in response to aggressive state detention practices employed against suspected terrorists and others. In particular, the extent of the right to habeas corpus has been a central issue in the controversy surrounding the United States' detention of "enemy combatants" at the Guantánamo Bay naval facility in Cuba. Thus far, habeas corpus has provided the only meaningful legal mechanism challenging the legal basis for holding these detainees.

The reach of habeas corpus, however, is sometimes limited under domestic law. The U.S. Congress's 2006 attempt to strip courts' jurisdiction to hear Guantánamo detainees' habeas corpus petitions without providing a suitable substitute underscores the importance of habeas corpus guarantees in international human rights instruments.¹ The sixtieth anniversary of the Universal Declaration of Human Rights (UDHR) provides a fitting opportunity to explore the extent to which that instrument guarantees the right to habeas corpus.

DRAFTING THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

In early 1947, less than a year after the first session of the United Nations General Assembly, the newly-created Human Rights Commission (the Commission) met for the first time to begin work on an "International Bill of Human Rights," which would include both a non-binding declaration of human rights and a binding convention. To aid in its work, the Commission requested that the UN Secretariat create an outline of rights for it to consider as it began its task. The right to habeas corpus was one of the forty-eight items included in the Secretariat's outline.²

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Courtesy of UN Photo

President and Chair of the Commission on Human Rights, Eleanor Roosevelt looking at the UDHR.

Having given priority to drafting the non-binding declaration, which could be adopted by resolution of the General Assembly, the Commission's drafting committee began considering which rights were suitable for inclusion. Initially, the committee elected to include the right to habeas corpus in an article guaranteeing liberty of the person. Closely modeled on the habeas corpus language in the American Law Institute's 1945 Statement of Essential Human Rights, the committee's provision stated that "[e]very one placed under arrest or detention shall have the right to immediate judicial determination of the legality of any detention to which he may be subject."³

As the drafting process continued, however, members of the committee suggested incorporating additional rights into the draft declaration. As part of this process, the rights to a speedy trial and to release on bail were tacked on to the end of the habeas corpus provision.⁴ The article that emerged contained three distinct categories of rights: the right to liberty of person, the right to habeas corpus, and fair trial rights applicable to criminal proceedings.

By the time the committee unveiled this wide-ranging article, however, a shift had occurred in the Commission regarding the draft declaration's appropriate content. The expanded habeas

corpus article conflicted with an emerging preference among many members of the Commission to produce a shorter declaration less concerned with specifics. In the words of one representative, “the Declaration should lay down principles and not become involved with details.”⁵ In June 1948, the Commission voted to approve a revised draft of the entire UDHR that contained less detailed articles. The article that contained the right to habeas corpus was rewritten to reflect the general principle that “[n]o one shall be subjected to arbitrary arrest or detention.”⁶

This streamlined version of the draft declaration was forwarded via the Economic and Social Council to the Third Committee of the General Assembly. There, the lack of a habeas corpus provision did not go unnoticed, and the omission caused concern in the minds of many delegates. While the reinstatement of the specific right was rejected as being incompatible with a view of the UDHR as a brief statement of general principles, the absence of any remedial provisions was equally unacceptable.

Eventually, the Third Committee voted to add a broad remedial provision proposed by Mexico and based on the Latin American concept of *amparo*. This new language, added as Article 8, guaranteed that “[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the constitution or law.”⁷ This provision was forwarded to the full General Assembly for inclusion in the UDHR, approved 10 December 1948.

THE RELATIONSHIP BETWEEN *AMPARO* AND HABEAS CORPUS

Although the final version of the UDHR did not contain an explicit reference to habeas corpus, one reading of the document is that the addition of *amparo* in Article 8 in effect implicitly restored the right. The remedies of *amparo* and habeas corpus are closely related. While habeas corpus developed in English law exclusively as a means of challenging an unlawful detention, *amparo* developed more recently across Latin America as a broad mechanism available to remedy the violation of any fundamental rights, including those of personal liberty. Influenced by the Spanish remedy of *manifestación de las personas*, the United States concept of judicial review, and Anglo-American habeas corpus, *amparo* originated in nineteenth-century Mexico and spread in various forms across Central and South America.

As *amparo* spread, national judicial systems throughout Latin America adopted procedures for determining the legality of a person’s detention under models that incorporated elements of both habeas corpus and *amparo*. In Mexico, and later in Chile, a remedy known as *amparo de la libertad* evolved as one of several specific versions of the writ of *amparo*. In Venezuela, Honduras, and Nicaragua, no such specialized version existed, and challenges to detention occurred under the general remedy of *amparo*. On the other hand, the writ of habeas corpus was adopted as the exclusive means of determining the lawfulness of detention in Argentina, Peru, Guatemala, El Salvador, Costa Rica, Panama, Bolivia, Paraguay, and Brazil, while the general remedy of *amparo* remained available to vindicate all other constitutional rights.⁸

In essence, habeas corpus and *amparo* coexisted in many of these countries, with habeas corpus used as the specific remedy for unlawful detention and *amparo* available for all other violations of fundamental rights. In countries where habeas corpus

did not exist as a separate remedy, its function was incorporated into general or specific versions of *amparo*.

In its final version, Article 8 of the UDHR includes a broadly stated remedy, equivalent to the general remedy of *amparo*. Given the absence of a separate habeas corpus provision, the general remedy of *amparo* can be understood to include the right to a determination of the legality of a person’s detention, so long as national law contains a prohibition against arbitrary and unlawful detention.

DOES ARTICLE 8 PROVIDE AN ADEQUATE REMEDY FOR UNLAWFUL DETENTION?

While the Article 8 *amparo* provision in the UDHR allows for a general judicial remedy for violations of national constitutions or laws, does this truly fill the void left by removing a specific habeas corpus provision? Habeas corpus has evolved into a highly specialized and distinct right with particular connota-

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tions. The Commission was aware of this, as habeas corpus was the only remedy of a specific nature included in the Secretariat’s outline of possible rights for inclusion in the UDHR. Its removal was a conscious decision by the Commission, as was the Third Committee’s decision not to restore a specific habeas corpus article.

These factors might suggest that Article 8 was not intended to include the right to habeas corpus. In addition, Article 8 only provides a remedy for violations of national law. The Commission’s draft habeas corpus provision, on the other hand, might have been interpreted to require that a remedy be made available for violations of personal liberty as defined by the UDHR itself, and not only those that violated national law. In this way, the article would have provided wider protection in

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situations where national law permitted detention that might be considered unlawful or arbitrary by international standards.

At the same time, the Commission's draft habeas corpus provision lacked any reference to one of the basic elements of habeas corpus in the Anglo-American tradition: the authority of the court to order a person's release if detention is determined

specific rights, but as a statement of general principles. The subsequent removal of the specific right to habeas corpus must be viewed through the same lens. The removal of the right was therefore not a rejection of the concept of habeas corpus, but part of conscious decision by the drafters to make the UDHR a less detailed and more idealized affirmation of human rights.

Even in this environment, however, the omission of habeas corpus did not go unnoticed, and was the impetus for the addition of the broader *amparo* provision in the Third Committee. It is significant that the addition of this provision was spearheaded by representatives from Latin American countries who would have understood the concept of *amparo* to implicitly include the right to habeas corpus in the absence of a separate, specific statement of that right. Certainly, the text of Article 8 is broad enough to guarantee a remedy for violation of the right to liberty. In this context, Article 8 should be read as encompassing the right to habeas corpus.

HABEAS CORPUS IN THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

During the Commission's early sessions, it was decided that its goal of creating an "International Bill of Human Rights" would be best achieved by drafting both a non-binding declaration and a binding convention to be ratified by UN member-states. One result of this decision was the emergence of the view among delegates that the UDHR should reflect broad principles while the convention should provide a detailed list of specific rights. As described above, the removal of an explicit right to habeas corpus from the UDHR was primarily a result of this view. Examining the treatment of the right to habeas corpus in the corresponding binding convention, the International Covenant on Civil and Political Rights (ICCPR), provides additional context for assessing the extent to which Article 8 of the UDHR may implicitly guarantee the right.

From the start, the right to habeas corpus was included among the enumerated provisions of the ICCPR. The earliest drafts actually contained language guaranteeing a "remedy in the nature of 'habeas corpus.'"⁹ This language was amended, however, to provide a more universal description of the right. By 1952, the habeas corpus article was essentially in its final form.

The ICCPR's adoption and ratification would, of course, take many more years. The General Assembly adopted the covenant



Courtesy of UN Photo

Drafting Committee Meeting in Lake Success, New York, 1947.

to be unlawful. As written, the Commission's draft only provided for "judicial determination of the legality" of detention. By omitting this key element, the draft article would have either provided an ineffectual remedy, or it would have had to be read only as a general requirement to make habeas corpus available as opposed to a detailed procedural rule.

The latter reading, of course, is consistent with the drafters' decision to frame the UDHR not as an enumerated list of

in 1966 and it took effect in 1976 upon ratification by the thirty-fifth state-party. ICCPR Article 9(4) contained an unambiguous guarantee to habeas corpus, stating:

Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.¹⁰

Including a specific habeas corpus article in the ICCPR lends weight to the argument that UDHR Article 8 encompasses a right to habeas corpus. Moreover, it vindicates removing the habeas corpus provision from the UDHR by highlighting the provision's shortcomings. Unlike the draft provision considered for the UDHR, Article 9(4) of the ICCPR specifically mandates that courts be empowered to order the release of a person it finds to be unlawfully detained.

CONCLUSION

Analyzing the drafting history of the UDHR and the background of the *amparo* provision, it is evident that Article 8 should be read to guarantee the availability of habeas corpus as a remedy against the violation of the fundamental right to personal liberty. The enumeration of a specific habeas corpus right in the ICCPR affirms the view that the UDHR implicitly guaranteed the right while also providing an express statement of the right in a binding instrument.

The right to habeas corpus has assumed an enhanced importance in recent years due to practices employed in the fight against terrorism. Its existence in the UDHR and other international human rights instruments is significant given both the UDHR's moral and political weight and the influence these instruments have in developing national law. **HRB**

ENDNOTES: Does the Universal Declaration of Human Rights Implicitly Guarantee a Right to Habeas Corpus?

¹ Military Commissions Act of 2006, Pub. L. 109-366, 120 Stat. 2600, 2608-09 (2006) (codified in scattered sections of 10, 28 & 42 U.S. C.).

² U.N. Doc. E/CN.4/AC.1/3 (June 4, 1947).

³ U.N. Doc. E/CN.4/21, annex F at 74, art. 8 (July 1, 1947).

⁴ U.N. Doc. E/CN.4/57 (December 10, 1947).

⁵ U.N. Doc. E/CN.4/SR.54 at 4 (June 10, 1948).

⁶ U.N. Doc. E/800 (June 28, 1948).

⁷ U.N. Doc. A/777 (December 7, 1948).

⁸ See Hector Fix Zamudio, *The Writ of Amparo in Latin America*, 13 LAW. AM. 361 (1981).

⁹ U.N. Doc. E/CN.4/95 at 20, annex B, art. 9(4) (May 21, 1948).

¹⁰ 999 U.N.T.S. 171 art. 9(4) (entered into force March 23, 1976).