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Comparative Study on Writ Jurisdiction in India and the UK

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ABSTRACT

A quick remedy against infringement of rights and injustice can be achieved through writs. Writs are an imperative part of the justice delivery system as they allow the aggrieved to approach higher authorities directly (in case their fundamental rights have been violated). In India, the power to exercise writ jurisdiction lies with the various High Courts (under articles 226) and the Supreme Court (under article 32) as per the Indian Constitution. The concept of writs originated in the UK. This paper aims to examine the state of writ jurisdiction in India and the UK, from its origin to the present-day scenario and also seeks to analyse in what ways India has been influenced by the UK in this aspect. It also seeks to understand the development of this concept in both countries.

This paper shall be divided into four parts. The first part of the paper shall deal with the introduction of the concepts. The second part will deal with the origin and evolution of writs and writ jurisdiction. The third part of the paper will deal with how India has been influenced by the UK in this aspect. The fourth and final part of this paper will deal with the present-day scenario of writ jurisdiction in both the countries and concluding remarks of the research scholar.

I. INTRODUCTION

Prerogative writs (as they are known in England since their inception) are a type of tool that is used to provide remedies to aggrieved persons and somehow relate to or look similar to a system of public law. The word "prerogative" is defined in the dictionary as "an exclusive right, privilege, right etc, exercised by virtue of rank, office or like". This gives us an understanding as to why writs were called "prerogative writs" in England; it is because, they could only be issued and the power relating to them was solely restricted to or vested in the Crown (King or Queen). These remedies were used by the Crown to dispense justice to the citizenry of the nation and initially, were only used for governmental issues/matters. This means they were issued by the Crown for the purposes limited to government officers, their duties and their actions. It was available only to the Crown and not to the subjects (citizens) at large. It was only with later developments that the scope of this remedy was widened and it was made available to all

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subjects for varied types of purposes in getting justice. From being made available to citizens to seek justice, the authority to grant or issue these writs was also delegated to some subordinates of the Crown.

The reason why these remedies were made available to all litigants irrespective of their work, social status and/or ranking in the society or the government, is that the Crown wanted to ensure there is an accountable and lawful governance in the state. there were no doubt, other forms and ways through which people could approach the Crown or courts for seeking justice but, these were more effective in the sense that they (initially) were the direct command of the Crown which was also final or supreme in nature. Not only this, but also the fact that even government officers and offices could be easily held accountable under these remedies, was a big factor in contributing towards their success.

There were six prerogative writs when they were first invented, namely – *Procedendo, Habeas Corpus, Certiorari, Prohibition, Mandamus* and *Quo-warranto.* Let us understand them in detail.

Procedendo also known as *Procedendo ad judicium* is a writ that existed for a short period of time and does not exist anymore in usage. It was mainly used to direct a subordinate court to perform certain functions or to refrain from performing certain functions. This usually happened when a court did not proceed with passing of a judgement which it ought to have passed; in such a situation, a higher or appellate court would direct the subordinate court to proceed with the passing of that judgement, without particularly mentioning or specifying what or how it should be done. In case a judge failed to obey these order(s), they would be punished and could even be made liable for contempt. Most cases wherein this remedy or writ was used was in case of neglect on part of judges.

Habeas Corpus is one of the most important writs, not just as an original prerogative writ in the UK, but also around the world wherever adopted, including India. Habeas Corpus literally translates to "having the body". It is derived from a larger phrase/term in Latin known as *habes corpus ad subjiciendu*. It means that the court demands the body of the person to be brought in front of it (bringing a detainee in front of the court). This writ is extremely instrumental in getting freedom for persons who have been unlawfully or illegally detained or imprisoned. It is important because it ensures that any prisoner who is detained without sufficient and lawful cause and/or evidence, is released at once. It is one of the most handy and impactful writs because it related directly to the right to freedom of movement of a person. This order or command is given by the court so as to be able to ascertain whether the detainment of the person

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has been in accordance with law or not. It acts as a remedy against wrongful confinement. The order containing the direction for the bringing forward or to the court of the detained person acts as a summons. This remedy can either be sought by the prisoner or detainee themselves or by another person on behalf of the prisoner or detainee, in case they are unable to do so for themselves. This petition (in India, may be filed before the High Courts as well as the Supreme Court).

The courts have been made very accessible and easy to approach under this writ as there is no strict format of pleadings (as in other cases regularly done) that needs to be adhered to while filing a petition of this writ – it was held in the case of *Icchu Devi v. Union of India*[2] that even something as informal such as a postcard or letter written by the detainee would be sufficient enough for the courts to issue this writ and take look into the case as to whether the detention has been done in accordance with the law of the land or not; the court also mentioned in the same case that the onus of proof here, lies on the detaining authority. *A.D.M Jabalpur Case*[3] also known as the *Habeas Corpus Case*, saw the court holding that in case where there is a suspension or ending of Article 21 as a result of the President's order under Article 359 (which empowers the President of India to suspend the right to enforce fundamental rights guaranteed by part III of the Indian Constitution – which may extend to a part of the India or the whole territory), the detained person loses their *locus standi* to approach the courts under this writ and the High Courts and Supreme Court lose their discretion to entertain such a writ by such a person.

It was after the 44th Amendment Act of 1978, that it was decided that under no situation even under an emergency, shall the rights as conferred upon the citizens by virtue of Articles 20 and 21 shall be suspended under Article 359 (1).

This writ is not maintainable under Article 32, against a private person who has unlawfully confined or detained the petitioner. The condition for issuance of this writ is that there must be a *prima facie* case of the detention being unlawful or illegal. It was held in the *Lallubhai Case*[4] that the principle of *res judicata* does not apply to a case or petition under the writ of *habeas corpus.* In any case a situation has occurred that the High Court has rejected or dismissed a plea of this nature, then the petitioner may go further to approach the Supreme Court under article 32 for the same.[5]

[2] Icchu Devi v. Union of India, AIR 1980 SC 1983.
[3] A.D.M Jabalpur v. Shivakant Shukla, AIR 1976 SC 1207.
[4] Lallubhai Jogibhai v. Union of India, AIR 1981 SC 728.
[5] Ghujam Sarwas v. Union of India, AIR 1967 SC 1335.

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Certiorari is a writ that is generally used to quash or set aside any order of any authority that exists in the system of the government. It is one that operates or works or can be invoked only *after* the damage through some action has been done. This means that this writ can be brought to the court when an arbitrary or inefficient order has been already passed by lower courts or tribunals or other authorities. We can say that *certiorari* is a sort of a corrective remedy. This writ lies against any courts which expel judicial or quasi-judicial functions in their working. It can be issued only by a higher court to its subordinate court and not the other way round. It is very well understood by the simple definition itself that the aim of this writ is to keep a check on the working of such bodies as mentioned above.[6] It can also be exercised by the courts when a subordinate court does not dispense its functions timely or with due speed. However, it is important to note that this writ cannot be made applicable to an act or ordinance which on the ground being stated as it being void or in any manner, unconstitutional; this was held in the case of *Prabodh v. State of U.P.*[7]

Prohibition as in contrast to *certiorari*, is a writ that is issued against any subordinate court, tribunal or authority to so as to stop them from doing something/anything. Why *prohibition* is in contrast to *certiorari* is because the former acts as a prevention or precautionary measure in the form of an order, while the latter acts as a curative measure or remedy (also in the form of an order). One of the most common reasons as to why a superior court may issue this writ is because it might believe that the lower court is acting beyond its jurisdictional capacity. Another reason as to why this writ may be issued could be the non-following of proper procedure by lower courts. The court issuing this writ, however, must ensure that it gives out proper reasoning and mentions the grounds based on which this writ has been issued against the respective court/tribunal/authority. Despite many similarities, the main way in which the writ of *prohibition* is different from those of *certiorari* and *mandamus* is that the former does not require the authorities to have acted for it to issue this writ. The *Kirloskar*[8] held that irrespective of the case, no writ of *prohibition* shall be issued so as to direct an authority to act against or contradictory to the provisions of any law.

Mandamus is a writ issued by a higher court to command a subordinate court or authority, tribunal, public authority, corporation or any other person, directing them to compulsorily or mandatorily perform a certain act (as per the directions of the order of the court). This command or direction to do something must be a public duty of that body towards which it is directed.

[6] Bharat Bank v. Employees of Bharat Bank (1950) SCR 459.
[7] Prabodh v. State of U.P., AIR 1985 SC 167.
[8] Union of India v. Kirloskar Pneumatic Co. Ltd. (1966) 4 SCC 453.

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However, it must be noted that any corporation or body which does not owe any *public duty* towards anyone, cannot be made to follow a writ of *mandamus.* It is issued to secure the performance of a public duty, in the performance which the applicant has a substantial legal interest.[9] There are exceptions to whom this writ can be issues and they are the President of India and Governors of States of India.

Quo-warranto can be issued by a High Court whenever it feels that an appointment in an office is done without following due procedure and/or not according to the standards of the statutory rules, as held in *Rajesh Awasthi's Case*[10]. The term "*quo-warranto"* literally translates to simple English as "by what authority" meaning thereby, this writ enables the courts to ask a person holding an office, as to by what virtue or authority he holds his office/position. If proper proof and valid reasons have been given as to how they are accommodated in their office, then no action would lie against them, but if it is discovered that they have usurped this position and unlawfully or illegally have been holding their position, then orders for them to vacate their office may be issued. There are two conditions which must be taken into account while issuing this writ and they are as follows:

1. The office in question must be a public office.
2. It must be held by the person without legal authority.

All these writs though originated in UK, have travelled a great deal of changes and evolution as and when they were adopted in India. We shall study this aspect of it in the next part of our study.

II. ORIGIN AND EVOLUTION OF WRITS

The origin of writs can be traced back to the Anglo-Saxon period in the then England, now known as the United Kingdom. It has been considered as one of the greatest contributions of the British towards law and legal remedies in particular. It is believed that writs in a very premature form existed even quite some time before the Anglo-Saxon period as well, however, it was post the Anglo-Saxon period that they became formalised and clearly explained with reference to their usage. From Sweden, Norway and Denmark to France, Germany and India, the concept of writs was widely accepted by many, many countries.

Of course, as the writ travelled to different parts of the world, it differed in minute ways, in its form and application, however, its foundation remained the same and purpose as well. this

[9] Wade & Phillips, Constitutional Law, p. 644.
[10] Rajesh Awasthi v. Nand Lal Jaiswal, 2012 (10) Scale 527 :2012 (7) Supreme 752.

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difference was mostly seen in the number of writs adopted and the procedures related to them. It is quite natural that these differences existed, the reason being, the difference in the various aspects of countries, right from their legal framework to judicial structure and their population to type of government. With the underlying object of the writs being the same, there were some changes that had to be accommodated as per the need of the hour and the situation in the state at that given point of time.

Originally, these writs were handwritten and sealed. Seals played a very important role back in the day. Wax was used to seal these documents that carried orders of the Crown and/or competent authority.

The Anglo-Saxon form of political organisation as well as governance was a highly decentralised one, meaning that the powers were deeply delegated through the layers of government and offices. There were courts and tribunals back then but they had a number of flaws. One of these was that the local tribunals were very slow in their operations and the second one was that trials were only trials by ordeals or trials by compurgation. These were both obsolete and more than that, quite baseless, and to an extent even mortifying ways to conduct trials. Another issue was that the feudal courts and communal courts didn't have a properly marked line of distinction in their operation and jurisdiction. This led to a lot of instability. The powerful and rich supressed the courts and justice therefore, was not much of a just nature.

Therefore, a need to do an intervention was felt by the Crown and the courts. The early on stages of this intervention were done through wrong means, probably even violent sometimes, although it was much-needed. Slowly they started seeping in to the systems, and initially only into the executive and administrative areas and not the judiciary directly. The way in which this intervention was done, was through a tool called the *writ*. The writ became a written document which was the order of the Crown, and had supreme authority of command. It was written, had the royal seal and was addressed to whosoever caused mischief or violence or engaged in anything unlawful in nature. Although this was a smooth move to be able to open up doors for a better redressal system, it was also very easily misused and abused in its working, again, sometimes by the rich and powerful, and other times, by the government officials, who were driven by selfish motives or greed.

This further evolved into the writ containing summons for the addressee and demanding their presence before the King or the Crown itself, where he would listen to the facts of the case, both the sides, witnesses if any, and other relevant material would be checked, followed by the Crown giving their decision. And this pronouncement was deemed to be final. It is at this stage

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of evolution that the writs became an extraordinary instrument of justice disposal.

Slowly and steadily, with the evolution of law, society and governance systems, writs came to be used often and became one of the most important instruments of remedies. They then developed or evolved into distinct writs, (namely, *procedendo*, *habeas corpus*, *certiorari*, *prohibition*, *mandamus* and *quo-warranto*) each of which were used specifically for the purpose that they were created. This shows us that over time and with constant usage, the changing nature of the factors affecting the writs and writ jurisdiction, came to be compartmentalised into separate, proper distinct forms as we know them of today.

Writ jurisdiction, as we have already seen earlier, was only and exclusively available to the Crown (King or Queen) of the State in England, however, with evolution in judicial systems, it was realised that there is a dire need to delegate the power and jurisdiction to deal with, entertain and decide upon matters relating to writs to lower or subordinate authorities (who still had a few authorities under them as well). This need was felt seeing the growing population and the variety in the issues faced by people, which called for a larger number of forums or authorities to be able to hear writ petitions and cases. In the later and recent stages, the writ jurisdiction was also allowed to be accessed by the King's bench and not just the Crown, because in effect, the King's bench itself rendered this duty of deciding writ cases in the UK.

At present, the power to exercise writ jurisdiction in UK, lies with the superior courts; Chancery Division of Courts, that fall under the High Courts of the United Kingdom.

Many acts (in England) were also brought into existence which changed a lot of facets of writs and writ jurisdiction in the UK, right from the names of certain writs to their jurisdiction.

III. How UK influenced India (with respect to writs and writ jurisdiction)

The Indian subcontinent in its all mighty and powerful judiciary has on every important feature – it allows the Supreme Court and High Courts to exercise writ jurisdiction and to issue "*directions, orders or writs, in the nature of habeas corpus, mandamus, prohibition, certiorari and quo-warranto"* as per Article 226 of the Constitution of India (for High Courts) and as per Article 32 of the Constitution of India (for the Supreme Court of India).

These writs as we have read earlier, took birth in England as "prerogative" writs and were only at the discretion of the Crown. Since the British had annexed and occupied India, while ruling over it and subsequently leaving it, they also left a lot of laws and systems or fashions of judiciary in India, some of which still exist in their original form, as it is; these writs too, can

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be understood as a part and parcel of the remnants of the colonial era in India.

However, it must be understood and noted that it was not merely the imposition and intervention of British rule and their laws that was the reason as to why India has these writs and writ jurisdiction today. A very crucial and strong reason, which has almost always been kept hidden or at least, shadowed, is that the Drafting Committee (of the Constitution of India) was very keen on ensuring that the Fundamental or Basic Rights of the people of India are always very strongly protected. To do so, they realised they needed a proper mechanism that addressed these issues and a special manner or instrument which would be used to approach the doors of justice, in case of violation of any fundamental rights. It was this ideology and aim of the drafters of the Indian Constitution that made them include the concept of writs and give special powers to the Supreme Court and High Courts of India, to have writ jurisdiction in case, the fundamental rights of any Indian have been violated in any which way.

It was not just their aim, but their determination and strong will to protect fundamental rights of the Indian citizens, which are of the utmost importance in the varied types of rights that an Indian may have. It was then taken into account by the members of the Drafting Committee that there is one such mechanism that originated in England, that could serve the purpose they envisioned and therefore, with necessary changes in the system of writ jurisdiction that existed in the UK, it was added to the Indian Constitution.

This decision to insert Article 32 (and Article 226) in the Indian Constitution is what was a stepping stone of success and true sense and spirit of law in the field of justice in India. Dr. B.R. Ambedkar even went ahead to mention that it is this Article 32 that is the heart and soul of the Indian Constitution.

During the time of the World War and its aftermath, the judicial system of UK had gone very haywire and had been rendered rather weak. This meant and showed that there was a diminishing phase even in the writ-related cases. The writ jurisdiction and its importance started to wither away. However, it was soon after this that the same writs and writ jurisdiction started taking rising in India. No doubt, the concept of writs and writ jurisdiction in India is a borrowing from the UK, but it must also be acknowledged that the framers of the Indian Constitution had their own individual and clear view about having such a mechanism and therefore, they deserve the credit too, for what exists in India today, in this context.

IV. PRESENT-DAY SCENARIO AND CONCLUSION

These forms of remedies may have been birthed by England (UK) and even borrowed from there and then used in India, but the way they have been modified and used in India is quite

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different from that in the UK. In India, writ jurisdiction has never seen ups and downs with reference to its exercisability and importance, whereas in Britain, although it started with quite vaguely, came to a stage where it was very strong but then started diluting in concept as well as function, as compared to India.

The way this concept as a legal concept has been evolved in both these countries, one (UK) supposedly being very rich, powerful and developed and the other (India) still developing, is quite shocking; shocking in the way how despite originating in UK, writs and writ jurisdiction have not been able to have a stronghold in the state as of today, but in India, are absolutely effective, widely used and timely updated – India, a colony of UK, now outdoing UK in the very same field, that it originated or gave birth to.

The reasons for this could be that firstly, India because it has taken the somewhat quite developed form of writs and writ jurisdiction from UK, did not have to deal with the vast changes that UK faced since the inception of writs, decades and decades ago. And second, because India is not rigid in the way it lets its laws develop; it allows them space to evolve and ensures timely check on such mechanisms to make sure that systems (of justice delivery) are revised as per the need of the hour.

A third and very important factor that should be taken into account here, are the judges of the courts of India. Judges in India are constantly making efforts to make the Indian judiciary and especially the judicial review system, more effective and efficient, with all their judgements. Their contributions must be noted as well.

India has succeeded in this field because it has not bound itself or its judiciary by any sorts of historical barriers or constraints which could in any manner whatsoever, hamper the growth of law and the effectiveness of writ jurisdiction; and to be able to do this in the short span that it did, despite having taking the concept from UK, and yet, being able to maintain the individuality of the country's diversity, need and setup, is a commendable feat that India has achieved.

However, to make it better and let it grow even more, there could be some changes that if implemented, could change the face of the Indian Judiciary and give it a much wider reach and the citizens, better opportunities of being heard. This change could be with regard to Article 32 being amended to include writ jurisdiction being extended to not just fundamental rights, but also legal rights of the Indian citizens. The High Courts in India already exercise writ jurisdiction over matter which are of non-fundamental rights issues too. Then why the discrepancy between the High Courts and the Supreme Court with regard to this aspect?

In conclusion, the research scholar would like to state that, for sure, writs and writ jurisdiction

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has done well and survived in both these countries, but in India, it is thriving. Very clearly writ jurisdiction in India is at a much better position than what it is in the UK.

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