



## Comparative Aspects Of *Habeas Corpus*

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**Abstract:** This paper discusses the institute of habeas corpus, its origin and development. In this paper will also be presented certain comparative solutions, in particular with regard to European Countries, to determine that this institute is today one of the greatest achievement accepted universally by liberal constitutional democratic states. There is no doubt that this institute has its historical roots such as in France after the 1789 revolution. However, its development is reflected as quit slow compared to its fast presence in the post-revolutionary France. The paper provides also a clear picture of the judicial practice on the European level, national and the reaction of the ECtHR. Part of the discussion in this paper will also be the philosophical ideas which has given birth to the institute of habeas corpus and the fight which has been done by humanity in order to gain and protect it through constitutional guarantees of personal freedom.

**Keywords:** habeas corpus; personal freedom; constitutional guarantees; ECtHR and ECHR; Constitution of the Republic of Kosovo.

### 1. Introduction

Since the war and especially after the declaration of independence on 17 February 2008, Kosovo has been followed with major problems in respect of the rule of law. The transition period in which many countries, stemming from the dissolution of the former Yugoslavia, has passed was characterized by numerous and quite complex problems. Such problems that have characterized this period relate especially to the respect for human rights and freedoms.

Fundamental human rights and freedoms are most often violated in the pre-trial proceedings, but also in the proceedings during the main trial, respectively with the arrest of a person without a court order. This time includes the length of the detention

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until the taking of a formal decision, the written ruling on the detention: the observance of twenty-four hours after the defendant's arrest until his presence before the pre-trial judge as well as the observance of the forty-eight hour deadline holding a hearing session by the pre-trial judge for the issuance of the ruling. This time limit momentum and procedural momentum which constitutes the essence of the habeas corpus order as in our national legislation and from the comparative aspect is dealt with in three parts of this paper.

In the first part is addressed, the history, respectively the historical development of the habeas corpus order in the Anglo-Saxon system and the continental system and the differences between these systems.

The second part of the paper addresses this order in relation to several international conventions. This is done to see its place and importance in the constitutional and legal system of Kosovo, respectively in the Constitution and the Code of Criminal Procedure in Kosovo. The comparative aspect is discussed in the third part of the paper, with a particular focus on the French and German constitutional and judicial solutions.

At the end of the paper, conclusions are drawn of the habeas corpus order institute, for the great importance of respecting this order regarding one of the most important principles such as the principle of legal certainty.

Also, through ECHR case, readers will see the place and position of this institute in the European system in general because today almost all the countries of the old continent directly apply the provisions of the European Convention on Human Rights (ECHR), including Kosovo.

## **2. Purpose**

The purpose of this paper is to analyze the habeas corpus order, comparing it with some rights, respectively, with similar institutes in some European Union countries. The paper argues that the habeas corpus institute aims to protect the dignity and constitutional and legal right of the individual against the other party in the proceedings - the state prosecutor. This is due to the fact that today, where the mixed criminal procedure system prevails, these institutes constitute the main node where the guaranty is attached to the preservation of the dignity and the rights of the defendant in criminal proceedings.

Deprivation of liberty arbitrarily is possible and has, in many cases, been the case in more democratic countries. Without this guarantee it could hardly be achieved any legal and constitutional protection of the arbitrary limitation of the defendant's freedom in criminal proceedings.

### **3. The Source of the Habeas Corpus Order**

The habeas corpus order is a procedural right that allows the detention to be challenged as illegal. As such, it is foreseen in the ECHR (Article 5, right to liberty and security, paragraph 3), and as well a constitutional category (Article 29, paragraph 2 of the Constitution of the Republic of Kosovo).

The defendant is considered a central subject in the criminal procedure for which criminal proceedings are initiated and conducted, when there is suspicion that he has committed a criminal offense. As a fundamental subject, the defendant enjoys several rights, privileges and advantages as well as a number of criminal-procedural guarantees.

As a procedural right, habeas corpus has been the pillar of the laws of Western countries since the Magna Carta Libertatum (Great Charter of Freedoms) of 1215. From this it can be seen that the source of habeas corpus was England, which then this institute has imported it into its colonies throughout the world. Sir William Blackstone describes this order as “the glory of English law”. Through this order, citizens had the right to seek revision of the deprivation of liberty and was a fundamental defense against the abuse of government. This content and the message it carries to this day are the same. This is no surprise because the birth of this institute in England has been part of the struggle for constitutionalism that has developed in this country throughout the Middle Ages. The Enlightened Revolution of 1688, which sanctioned the supremacy of Parliament, successfully closed this English struggle for constitutionalism.

There are some constraints to the habeas corpus. Although this legal remedy is a procedural remedy and serves as a guarantee against any prohibition that is not permitted by the law, however, no other rights can be protected with it, for example the right to a fair trial. This implies that, otherwise, if the deprivation of liberty without trial is foreseen by law, habeas corpus can not be used as a legal remedy. However, the habeas corpus order has long been considered as an effective defense of the freedom of the subject and by law this right can not be denied, namely because it constitutes a procedural right guaranteed by the constitution.

There are some forms of habeas corpus institute, which in essence represent separate institutes of this type:

- Habeas Corpus ad deliberandum et recipiendum: an order to bring an accused from a court to the court of the committed crime, for the purpose of the trial (extradition);
- Habeas Corpus ad prosequendum: an order to return a prisoner in order for him/her to be judged;
- Habeas Coprus ad testificandum: an order to return a prisoner in order for him/her to testify.

Most of the continental jurisdictions have a similar legal remedy of deprivation of liberty in an illegal manner. But, there is a substantial difference to that of habeas corpus. In the continental system, this right can not be avoided under any circumstance, while the habeas corpus in the Anglo-Saxon system can be limited in cases of rebellion or invasion. In America, during the Second World War, there are four cases where habeas corpus has been limited. In America, a debate is currently underway, especially after the September 11, 2001 terrorist attacks, about balancing national and individual security interests. However, Congress has not legally suspended habeas corpus by law (Cf. Case *Boumediene v. Bush*, 553 U.S. 723 (2008)).

#### **4. Habeas Corpus Order**

The habeas corpus order is enshrined also in the international treaties, such as the Universal Declaration of Human Rights in Article 3 which foresee that “Everyone has the right to life, liberty and security of person.”, and as well as the European Convention on Human Rights (ECHR), which goes further and ensures that detainees enjoys the right to challenge the detention. Article 5, paragraph 1 c of the ECHR determines that “Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; (European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, article 5)”.

Personal freedom is a fundamental condition that any person should enjoy and the deprivation of personal freedom affects other rights such as the right to family and the right to privacy, the right to free movement, and so on. Furthermore, a person deprived of liberty is placed in a marginal position and, with deprivation of liberty, there is a risk of torture, etc. From this it is clear that any deprivation of liberty should be an exception and not a rule, deprivation should be objectively justified and should not last longer than is necessary (European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, article 5).

In the case of *Brogan and others v. United Kingdom*, the European Court of Human Rights ruled that the delay of four days and six hours constitute a violation of the habeas corpus institute, i.e. violation of personal freedom. The Court at the same time accepted the discretion which state bodies have when deciding on personal freedoms of the individuals, however this discretion has its limits and has to be exercised as soon as possible so that the individuals freedom is not violated (European Court of Human Rights, Case *Brogan and Others v. United Kingdom*, 29 November 1988).<sup>1</sup>

The violation of the freedom, i.e. of every segment of the habeas institute, can not be justified by any circumstance that causes the state body to fail to act quickly and efficiently in cases of deprivation of liberty of the person. Such was the case in *Case Koster v. the Netherlands*, where the European Court of Human Rights made it clear that military maneuvers cannot be a reason for violating the personal freedom and to keep in prison beyond the sentence (European Court of Human Rights, Case *Koster v. The Netherlands*, 28 November 1991).

These international instruments and enshrined principles in the international instruments are applicable also in the legal order of the Republic of Kosovo through Articles 22 and 53 the Constitution of the Republic of Kosovo. Article 22 [Direct Applicability of International Agreements and Instruments] of the Constitution of the Republic of Kosovo foresees as follows:

“Human rights and fundamental freedoms guaranteed by the following international agreements and instruments are guaranteed by this Constitution, are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions:

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<sup>1</sup> Similar also the decisions of the European Court of Human Rights in cases: *Harkmann v. Estonia*, (Application no. 2192/03). Judgment, Strasbourg, 11 July 2006 and *Kandzhov v. Bulgaria*, (Application No. 68294/01), Judgment, Strasbourg, 6 November 2004.

- (1) Universal Declaration of Human Rights;
- (2) European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols;”

Article 53 (Interpretation of Human Rights Provisions) of the Constitution of the Republic of Kosovo determines very clear that every work and every act of the public authority must be based on the jurisprudence of the European Court of Human Rights. The Article provides that:

“Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights.”

Given these two provisions, quite naturally, the Kosovo Constitution in Article 29 sanctions and regulates the nature and physiognomy of the habeas corpus institute. Moreover, it is worth mentioning that, at the time of adoption of the Kosovo Constitution, these provisions were more detailed than those of Kosovo's criminal law with respect to the institute in question. This was clearly stated by the Constitutional Court of the Republic of Kosovo, in the case known as “Bajrush Xhemajli case” (Constitutional Court of the Republic of Kosovo, Case No. KI 78/12, 24 January 2013).

As follows, the habeas corpus, provided for in Article 29 (Right to Liberty and Security) of the Constitution, should be read in the spirit of these international documents and standards set by the ECtHR. This article stipulates that no person of the Republic of Kosovo may be arbitrarily deprived of liberty. It also provides for the universal principle of human rights, which guarantees legal certainty and an elementary right to freedom of movement. Not only that, the Constitution has explicitly regulated all cases of deprivation of liberty of a person. According to this provision, a person may be deprived of his liberty only if his actions are found to be unlawful by a court decision at any stage of the development of the proceedings. The full Article of the Constitution, namely Article 29, provides as follows:

“1. Everyone is guaranteed the right to liberty and security. No one shall be deprived of liberty except in the cases foreseen by law and after a decision of a competent court as follows:

- (1) pursuant to a sentence of imprisonment for committing a criminal act;

(2) for reasonable suspicion of having committed a criminal act, only when deprivation of liberty is reasonably considered necessary to prevent commission of another criminal act, and only for a limited time before trial as provided by law;

(3) for the purpose of educational supervision of a minor or for the purpose of bringing the minor before a competent institution in accordance with a lawful order;

(4) for the purpose of medical supervision of a person who because of disease represents a danger to society;

(5) for illegal entry into the Republic of Kosovo or pursuant to a lawful order of expulsion or extradition.

2. Everyone who is deprived of liberty shall be promptly informed, in a language he/she understands, of the reasons of deprivation. The written notice on the reasons of deprivation shall be provided as soon as possible. Everyone who is deprived of liberty without a court order shall be brought within forty-eight (48) hours before a judge who decides on her/his detention or release not later than forty-eight (48) hours from the moment the detained person is brought before the court. Everyone who is arrested shall be entitled to trial within a reasonable time and to release pending trial, unless the judge concludes that the person is a danger to the community or presents a substantial risk of fleeing before trial.

3. Everyone who is deprived of liberty shall be promptly informed of his/her right not to make any statements, right to defense counsel of her/his choosing, and the right to promptly communicate with a person of his/her choosing.

4. Everyone who is deprived of liberty by arrest or detention enjoys the right to use legal remedies to challenge the lawfulness of the arrest or detention. The case shall be speedily decided by a court and release shall be ordered if the arrest or detention is determined to be unlawful.

5. Everyone who has been detained or arrested in contradiction with the provisions of this article has a right to compensation in a manner provided by law.

6. An individual who is sentenced has the right to challenge the conditions of detention in a manner provided by law.”

As it is seen, the provisions of this article also define the rights of the person deprived of liberty, such as: the right to silence, the right to the defense counsel, the right to information, the right to legal remedies, the right of compensation to be applied when a person was detained and illegally arrested, etc.

In the Criminal Procedure Code of the Republic of Kosovo (CPC), the main principles set out in the Constitution of the Republic of Kosovo are also incorporated in the CPC. We are talking about the current code, issued after the entry into force of the Constitution of the Republic of Kosovo (Criminal Procedure Code of Kosovo, 2012) CPC, in its provisions foresee the cases when a person can be deprived of his liberty.

Although the habeas corpus procedure is the source of the Anglo-Saxon system, the justice system in Kosovo has also adopted as a legal guarantee for the protection of human rights and freedoms. In the provisions of the Constitution, but also the provisions of the CPC are foreseen from the moment when the person is detained or arrested, within the legal deadline, to be sent to the pre-trial judge who decides on his release or for detention. This legal deadline should not exceed forty eight (48) hours. Not only that, there are other provisions in the CPC which further specify this institute and make it compatible with the constitutional provisions which, as mentioned above, are extraordinarily detailed.

In Article 164, paragraphs 5, 6 and 7 of CPC, some forms of deprivation of liberty and the *habeas corpus* order are foreseen. These determined forms in this Article provides the following:

“5. Detention under the present Article may not exceed forty-eight (48) hours from the time of arrest. On the expiry of that period the police shall release the detainee, unless a pre-trial judge has ordered detention on remand.

6. As soon as possible after the arrest and no later than six (6) hours from the time of the arrest, the state prosecutor shall issue to the arrested person a written decision on detention which shall include the first and last name of the arrested person, the place, date, and exact time of the arrest, the criminal offence of which he or she is suspected, and the legal basis for the arrest.

7. Within twenty four (24) hours of the arrest, the state prosecutor shall file with the pretrial judge a request for detention on remand.

10. As soon as possible, but no later than within forty-eight (48) hours of arrest, the pretrial judge shall hold a hearing to determine whether the defendant shall be held in detention on remand.

11. As soon as possible, but no later than forty-eight (48) hours after the hearing under Paragraph 10 of this Article, the pretrial judge shall issue a decision



determining whether the defendant shall be held in detention on remand (Criminal Procedure Code of Kosovo, 2012, article 164, paragraph 5, 6 and 7)”

As noted, CPC also regulates some deprivation issues such as: temporary arrest, police detention and detention. While a police detention over six (6) hours and detention on remand constitutes a restriction of liberty on the basis of a court decision, temporary arrest and detention for up to six (6) hours represent the actual limitation of liberty (Sahiti & Murati, 2013, p. 199).

For a temporary arrest and for a police arrest of up to six (6) hours, the authorized person is not obliged to take a formal ruling on the limitation of liberty, and if the time limit of six (6) hours is exceeded, liberty must have a formal ruling, ie the difference between the temporary arrest and the police detention lies in the fact that the arrest is only the moment of deprivation of liberty, while the police prohibition is the time limiting the deprivation of liberty. However, these forms of deprivation of liberty need to be distinguished from police authorizations to detain persons located in the crime scene for the purpose of collecting relevant information on criminal proceedings in cases where the collection of information from these persons will later be impossible or would drag the criminal procedure (Sahiti & Murati, 2013, p. 199).

Similar to our criminal procedure, this procedural remedy is also regulated in Macedonia's criminal proceedings. Article 6, paragraph 4, of the Law on Criminal Procedure of Macedonia stipulates that “... a person deprived of liberty must be immediately and at the latest within 24 hours from the moment of deprivation of liberty to be brought before the court, which without delay will decide on the legality of the deprivation of liberty” (Criminal Procedure Law of Macedonia, *Official Gazette of the Republic of Macedonia* No. 15/97, 44/02, 74/04, 15/05, 83/2008, 67/2009 and No. 51/2011).

## **5. Habeas Corpus order in France**

Revolutionary France, in its first document, the “Declaration of Human and Citizen Rights” (1789), sanctioned as a fundamental human right the right to protection against unlawful deprivation. This was due to the fact that unlawful deprivation at the time of the regimes had been a routine, which was enforced by law enforcement authorities for no reason and under any circumstance that was perceived to be in conflict with the current interests of the French monarchy. Lafayette’s drafting of this text has been made in collaboration with Thomas Jefferson. Lafayette engaged

not only for habeas corpus, but also for lay-judging, religious tolerance, popular representation, slave emancipation, freedom of the press, and other liberal rights and freedoms which constituted the pillar of French revolutionaries at the beginning of the Revolution (Declaration of Rights, June 1789).

The Declaration provides that “no individual can be indicted, arrested, or deprived of liberty unless the law provides otherwise and in accordance with the foreseen procedure”. Furthermore, the Declaration stipulates that “no one can be arbitrarily detained” and that “the judicial authority, which is the guardian of individual freedom, ensures compliance with this principle in accordance with the law”. However, there are the permissible circumstances in which people may be deprived of their liberty and procedural safeguards in the case of detention. Such an exemption today is a standard, but as such, it should be specified by law and under a procedure that provides procedural guarantees for the dignity of the person. That is so in the context of France. It is also seen from the fact that the Declaration makes it clear in particular when it says that "a person who is deprived of his freedom by arrest or detention measures has the right to undertake procedures by which the lawfulness of the detention should quickly be decided by a court that is likely to issue an order on his release if the deprivation is illegal."

Based on this French experience, René Cassin and the French team during the drafting of the ECHR have vigorously supported the introduction of provisions on habeas corpus. This institute, as noted earlier, is strongly predicted today in the ECHR.

Such a guarantee exists to date even in the Constitution and in the Criminal Procedure Code of France.

## **6. Habeas Corpus order in Germany**

Also Germany has constitutional guarantees against illegal detention, similar to the habeas corpus institute.

Germany's Basic Law of 1949 provides that deprivation of liberty can only be imposed on the basis of the law, including procedural rules. Every arrested individual must be brought before a judge at the end of the day following the day of the arrest, so that the suspect is heard at the hearing and the judge decides on detention. The

Basic Law also says that there must be legal remedies to challenge the deprivation of liberty (Basic Law of Germany, 2014, article 104)<sup>1</sup>

In Italy (Italian Constitution, 1948, article 13) and Spain (Spanish Constitution, 1948, article 17), there are also institutes and other rights similar to the habeas corpus order. Not only that, all the constitutions of liberal democracies contain similar provisions, mainly under the personal freedom section, to regulate and guarantee the way of deprivation of liberty and the conditions under which such a thing can happen. The introduction of constitutional guarantees on the individual's personal freedom and the judicial control of any deprivation of personal liberty constitutes an achievement of the second half of the twentieth century. Such a thing has been impossible to reach today's scale before the second half of this century because of the extremely low culture of Europeans in the sphere of individual freedoms and rights.

What can be seen from the analysis of the constitutional texts is that after the Second World War the nations of the countries that have gone through dictatorships give more space to the constitutional arrangement of the habeas corpus institute. This is not the case with constitutional texts in the United States and France in 1789.

## 7. Conclusions

The main purpose of Article 5 of the ECHR and Article 29 of the Constitution of the Republic of Kosovo consists in preventing arbitrary and unjustified deprivation of liberty of any person located in Kosovo's jurisdiction.

The right to freedom and security is a value of democratic society. For this reason habeas corpus is considered an institute and a constitutional principle that enables the protection of the rights of person from the executive/judicial bodies in cases when, supposedly, a person is arrested and detained but who have no (or do not keep) any record of time, date and place of arrest, general data description, and reasoning for detention. This is considered a serious violation of human rights and freedoms, which rights are defined by international and national acts. That this is so, at the European level, it has been ascertained in cases by the ECtHR such as *El-Masri v. Macedonia* (European Court of Human Rights, Case El-Masri v. The Former

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By federal laws, constitutional guarantees against the unlawful deprivation of liberty are enforced mainly through the Criminal Procedure Code as well as other laws, as well as through laws and other acts of member states of the Federation.

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