

**Conferring the Powers Under  
Section 491 (1) (a) & (b) of the  
Code of Criminal Procedure 1898  
on the Court of Session**

Report No. 34

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## **Introduction**

Article 9 of the Constitution guarantees the security of person. It prohibits the deprivation of the right to personal liberty save in accordance with law. This guarantee is further re-enforced by Article 4, which states that every person shall enjoy the protection of law and be dealt with in accordance with law. This provision indeed establishes the principle of rule of law and due process procedure. The constitutional safeguards in the shape of Fundamental Rights are enforced through the superior courts viz. the Supreme Court (under Article 184(3)) and the High Courts (under Article 199(1)©). The comparable provisions in the Indian Constitution are Articles 32 and 226 thereof. Notwithstanding the abrogation of successive constitutions in Pakistan, such safeguards were retained in every newly enacted constitution.

The power of issuing the 5 prerogative writs namely habeas corpus, prohibition, mandamus, quo warranto and certiorari was not available to the judiciary before independence. Such power was conferred on the High Courts in 1953 through the addition of Section 223-A to the Government of India Act 1935. Later on, through Article 170 of the 1956 Constitution and Article 98 of the 1962 Constitution, such power was retained by the High Courts. The Constitution of 1973 followed the same pattern, as

Article 199 conferred writ jurisdictions on the High Courts. Article 184 (3) further conferred the said power on the Supreme Court.

It may be stated that in the pre-partition period, the power of issuing habeas corpus writs was conferred upon the High Courts through Section 491 of the Code of Criminal Procedure 1898. This Section empowered the High Courts to issue writs in cases of illegal or unlawful detention in a public or private custody. It enabled the High Courts to cause detainees to be produced before it, so as to satisfy that they are dealt with in accordance with law and are not being held unlawfully. Thus, till independence, Section 491 was the sole enabling provision for issuing the habeas corpus writs.

It may be noted that besides Section 491, power is also conferred upon the magistrates to deal with cases of the illegal or unlawful detention and grant appropriate remedy.

Section 100 reads:

100. Search for persons wrongfully confined.—If any Magistrate of the first class or Sub-divisional Magistrate has reason to believe that any person is confined under such circumstances that the confinement amounts to an offence, he may issue a search-warrant, and the person to whom such warrant is directed may search for the person so confined; and such search shall be made in accordance therewith, and the person, if found, shall be immediately taken before a Magistrate, who shall make such order as in the circumstances of the case seems proper.

Compared to Section 100, Section 491 confers relatively wide powers on the High Courts. Section 491 reads:

491. Power to issue directions of the nature of a habeas corpus.---(1) Any High Court may, whenever it thinks fit, direct:-

- (a) that a person within the limits of its appellate criminal jurisdiction be brought up before the Court to be dealt with according to law;
- (b) that a person illegally or improperly detained in public or private custody within such limits be set at liberty;
- © that prisoner detained in any jail situate within such limits be brought before Court to be there examined as a witness in any matter pending or to be inquired into in such Court;
- (d) that a prisoner detained as aforesaid be brought before a Court-martial or any Commissioners for trial or to be examined touching any matter pending before such Court-martial or Commissioners respectively;
- (e) that a prisoner within such limits be removed from one custody to another for the purpose of trial; and
- (f) that the body of a defendant within such limits be brought in on the Sheriff's return of cepi corpus to a writ of attachment.

(2) The High Court may, from time to time, frame rules to regulate the procedure in cases under this section.

- (3) Nothing in this section applies to persons detained under any law providing for preventive detention.

It is clear thus that the High Courts have been conferred upon the power of issuing habeas corpus writs through two provisions viz. by Section 491 of the Cr. P. C. and Article 199 (1) © of the Constitution. In essence, the constitutional provision did not add anything substantial to the safeguard available under Section 491 of the Code; however, it served an important purpose: the provision being constitutional, is superior and may not be easily tampered with through legislative or executive action.

It may be clarified that, in the aftermath of constitutional safeguards though Articles 32 and 226 of the Indian Constitution; Section 491 was omitted from their newly enacted Code of Criminal Procedure 1973. The Indian precedent, however, may not be followed in Pakistan for the reason that the scope and extent of writ jurisdiction of the Indian High Courts (under Article 226) is wider compared to the jurisdiction of the High Courts (under Article 199) in Pakistan. Indeed, Article 226 empowers the Indian High Courts to issue the 5 prerogative writs “in the nature of” habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of fundamental rights and “for any other purpose”. As per the Supreme Court of India, the use of expression “nature” indicates that the scope of the prerogative writs is wider in India compared to the scope of such prerogative writs in England.<sup>1</sup> Another important difference lies in the fact that the prerogative writs may be issued not just for the enforcement of

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<sup>1</sup>. AIR 1986 SC 847; AIR 1984 SC 802; AIR 1975 SC 226

Fundamental Rights but also for “any other purpose”.<sup>2</sup> It is therefore desirable that in Pakistan, Section 491 is retained.

A perusal of case law suggests that in view of Article 199, the provision of Section 491 is sparingly used for issuing directions of the nature of habeas corpus. As per statistics from reported cases, in two years period i.e. 1996 - 97, some 70 cases were decided in 1997 and 66 in 1996. Among such cases, a large number i.e. 90% relates to cases of custody of children. Another 5% of the cases relate to the alleged detention of ‘sui juris’ (e.g. detention of married woman by parents and/or husband). Indeed only 5% cases relate to illegal/improper detention by the police. For the same period (as per record of reported cases), the High Courts disposed of a total of 16 writ petitions under Article 199 of the Constitution including 11 in 1997 and 5 in 1996.

The power conferred upon High Courts under Section 491 is an important safeguard against the abuse of authority or illegal/improper exercise of power by a public functionary or private person. Furthermore, it helps in the efficacious and expeditious disposal of pending cases as prisoners or detainees or defendants may be caused to be produced before the court. The remedy, though efficacious and expeditious, is somewhat costly and also involves considerable hassle and inconvenience, especially to people in rural areas, as the complainant has to travel long distances to file petitions in the High Court. To that extent the remedy, at times, is neither inexpensive nor effective and expeditious.

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<sup>2</sup>. AIR 1953 SC 210; AIR 1950 SC 163

The Constitution of Pakistan obliges the State to “ensure inexpensive and expeditious justice”.<sup>3</sup> So is the policy of the incumbent as well as previous governments. It is, therefore, proposed that the power of issuing directions of the nature of habeas corpus may also be conferred upon the Court of Session. This measure will relieve the High Courts of some of the workload. It would also be convenient and beneficial for the general public in as much as justice would be made available to them at the district level, thereby saving them from undue hassle, travel expenses and heavy fee being charged by High Court lawyers. The Secretariat of the Commission accordingly moved a draft amendment for the consideration of the Commission.

### **Commission’s Deliberations**

The Commission examined the draft proposal in its meeting on 25 - 26 September 1999. The Commission noted that through this measure the workload of High Courts can be reduced and quick and inexpensive remedy made available at the local (District) level. Such a measure may also be an appropriate response to the problem of detained/abducted women being brought from far-flung areas to High Court and at times placed/detained in prison/Darul-Aman. It was however pointed out that the proposed measure might prove counter-productive, due to the already heavy workload of District & Session Judge. It was further pointed out that in considering the said proposal, certain other relevant sections of the Cr. P. C. viz. Section 100 and 552, may also be examined, to see if the stated objective may be achieved through appropriate amendments in these sections. After thorough discussions on the subject, the Commission resolved to obtain the views/comments of High Courts on the subject. The

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<sup>3</sup>. Article 37 (d)

Secretariat of the Commission had earlier forwarded its draft to the High Courts for opinion. The Chief Justice of Peshawar High Court sent his concurrence to the proposal and further suggested that besides the District and Sessions Judges, the same power may also be made available to the Additional District and Session Judges and the courts at the sub-Divisional level.

The Commission in its meeting held on 9 September 2000, again considered the draft Bill and after due deliberations approved it in principle. The Commission further resolved that the Bill should be published for eliciting public opinion.

Accordingly, on 6 – 7 October 2000, the media was briefed as to the salient features of the proposed amendment along with other drafts. The draft was also made available on the Commission's Website. Furthermore, copies were forwarded to the relevant public/private institutions and individuals for eliciting their reaction to and comments on the subject. Copies were also circulated to the members of the Pakistan Law Commission, the Attorney General for Pakistan and 4 Advocates General, Secretaries of the Law Department and Home Department of provincial Governments, some serving and retired judges of the superior judiciary as well as subordinate courts, President and members of the Pakistan Bar Council, Presidents of Provincial Bar Councils/Associations and lawyers.

A 60-day time period was given for submission of comments/suggestions. The response from the general public was fairly enthusiastic. Many sent written submissions

suggesting further improvement to the draft. Some visited the Secretariat and made personal presentations on the subject. Others responded through the Internet. All in all, 85 written responses were received on various drafts of the Commission from various agencies/individuals including government departments, NGOs, Pakistan Bar Council, provincial bar councils/associations, serving and retired judges, law professors, prominent lawyers and the general public. In the light of the comments/suggestions received, the drafts were revised and submitted to the members of the Commission for perusal/approval. The draft was approved with consensus by the Commission (Commission's composition at the time given at Annex IV).

Meanwhile, on expiry of tenure of non-official members, the Government reconstituted the Commission and the draft was again placed before the reconstituted Commission in its meeting on 17 March 2001. After due deliberations, the Commission unanimously approved the following draft Bill:

## **The Code of Criminal Procedure (Amendment) Ordinance 2001**

Whereas the National Assembly and the Senate stand suspended in pursuance of the Proclamation of the fourteenth day of October 1999, and the Provisional Constitution Order No.1, as amended;

And whereas the President is satisfied that circumstances exist which render it necessary to take immediate action;

Now, therefore, in pursuance of Proclamation of the fourteenth day of October 1999, and Provisional Constitution Order as well as Order No. 9 of 1999, and in exercise of all powers enabling him in that behalf, the President of the Islamic Republic of Pakistan is pleased to make and promulgate the following Ordinance.

**1. Commencement.**- (1) This Ordinance may be called the Code of Criminal Procedure (Amendment) Ordinance, 2001.

(2) It shall come into force at once.

**2. Amendment of section 491, Act V of 1898.**- In the Code of Criminal Procedure, 1898 (Act V of 1898) in section 491, after sub-section (3), the following new sub-section shall be added, namely:-

“(4) The Sessions Judge may also exercise the power conferred under clauses (a) and (b) of sub-section (1), if the case falls within his territorial jurisdiction.

(5) An Additional Sessions Judge shall have and may exercise all the powers of a Sessions Judge under sub-section (4) in respect of any case which

may be transferred to him under any general or special order of the Sessions Judge.

- (6) A person aggrieved by an order or direction of the Sessions Judge or an Additional Sessions Judge may refer an appeal to High Court.”