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ABOUT US

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

"EXPLORING THE SIGNIFICANCE AND ROLE OF WRITS IN UPHOLDING CONSTITUTIONAL RIGHTS AND JUSTICE: A COMPARATIVE STUDY"

AUTHORED BY - DR. NEWAL CHAUDHARY¹

Abstract:

Writ is a legal order issued by a court or other judicial or quasi-judicial body that commands or prohibits specific actions. Writs have a long history in legal systems and are often used to protect individuals from unlawful actions by the state or other individuals. This article explores the significance and role of writs in upholding constitutional rights and justice through a comparative study of different legal systems. The article delves into the origins of writs, their evolution, and their relevance in contemporary legal systems. The article aim is to prove that writs play a crucial role in upholding constitutional rights and justice in many legal systems worldwide. The article investigates the historical evolution of writs, their types, and their application in different legal systems, including common law, civil law, and Islamic law. The article analyzes how writs provide a means for individuals to challenge the actions of the state, protect their fundamental rights, and ensure access to justice. The article also examines the challenges facing the use of writs in upholding constitutional rights and justice, including the potential abuse of power, the limitations of legal systems, and the need for reform. Finally, the article concludes insights into how the use of writs can be improved to ensure effective protection of constitutional rights and justice in different legal systems especially focused on Nepalese legal system.

Key Words: *Writs, Constitutional Rights, Justice, Comparative Study, Habeas Corpus, Mandamus, Prohibition, Certiorari, Legal Systems.*

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1. Introduction:

Writs, these succinct yet potent legal instruments, have been indispensable tools within the realm of jurisprudence for centuries. They are the directives that ensure justice does not remain a distant ideal but an attainable reality for individuals within societies governed by the rule of law. Rooted in tradition and continuously evolving in response to changing legal landscapes, writs have consistently played a pivotal role in safeguarding constitutional rights and upholding justice. In an era where constitutional rights are hailed as the bedrock of democratic societies, the role of writs in ensuring their protection cannot be overstated. Writs serve as a safeguard against arbitrary exercise of power, a mechanism for holding authorities accountable, and a shield to protect the most fundamental of human liberties. The term "writ" denotes a formal, legally binding document compelling an individual or entity to either execute or abstain from a precise action or undertaking. Typically authored by judges, courts, or other entities vested with administrative or judicial authority, writs hold a prominent place in the framework of common law. They are frequently issued subsequent to the rendering of a judgment, empowering parties involved in a legal dispute to effectuate the judgment's directives². In the realm of common law, a "writ" constitutes a formally written directive issued by an authoritative body vested with administrative or judicial powers. In contemporary contexts, this authoritative body typically takes the form of a court. During earlier periods, countries like the United Kingdom, Canada, and Australia adhered to a practice known as the "Writ of Election." This term refers to a written order originating from the Governor General, acting on behalf of the King, or State Governors, which directed local officials to organize general elections, ensuring the democratic representation of constituents in House of Representatives or state-level elections³. In Nepal, writs derive their authority from the Constitution and are utilized to safeguard fundamental rights, ensure the proper functioning of government bodies, and maintain the rule of law. Writs can take many forms including summonses, writs of execution, and writs of habeas corpus, warrants, and orders⁴. In the Context of Nepal Writs may be issued by the Supreme Court under Article 133 (2) (2), the High Courts under Article 133 (3) (2) and the District Court under Article 151 (1). Such as Habeas Corpus, Mandamus, Prohibition, Certiorari, Quo Warranto,

² Will Kenton, "Writ: Definition in Law, Types, and Examples", Investopedia, <https://www.investopedia.com/terms/w/writ.asp> (Accessed: Sept 15 2023)

³ A ARUN, "Law of Writs In Indian Constitution", LegalServiceindia, <https://www.legalserviceindia.com/legal/article-541-law-of-writs-in-indian-constitution.html> (Accessed: Sept 15 2023)

⁴ Kenton, *supra* note 2

serves a unique purpose⁵. Writs, in the context Nepalese's Legal System serves as a powerful legal remedies that play a crucial role in upholding constitutional rights and ensuring justice as they serve as instruments through which individuals can seek relief and protection from any violation or infringement of their fundamental rights. The availability of different types of writs allows courts to address a wide range of issues and grant appropriate remedies. Each type of writ has its distinct purpose and scope, providing a comprehensive framework for safeguarding the rule of law. The fundamental rights guaranteed under the Constitutions of Nepal from **Article 16-46**, are of paramount importance and form the bedrock of a just and equitable society. However, these rights may sometimes be violated by individuals, state agencies, or other entities. It is in such instances that writs come into play, empowering individuals to approach the courts and seek appropriate legal recourse. Fundamental rights are not absolute rights. They have reasonable restrictions, which means they are subject to the conditions of state security, public morality and decency and friendly relations with foreign countries⁶.

2. Historical Evolution of Writs:

The development of writs involved both statutory changes and judicial interpretations, shaping the scope and applicability of different types of writs. The origin of writs pertains to their initial creation and purpose, dating back to medieval times and the granting of formal written orders by the King's courts. It signifies the historical beginnings of writs as instruments for the exercise of royal authority and the administration of justice. The origin of writs can be traced back to medieval England, where they were formal written orders issued by the King's courts to direct certain actions or remedies. Originally, writs were used as a means for the “**King to exercise control over his subjects and dispense justice**”. Over time, the use of writs expanded, and they became an essential part of the common law legal system. English law courts adopted a standardized system of "writs" to commence court actions. This system was designed to speed up the legal process by allocating each type of complaint to a specific category with standard procedures. To initiate a lawsuit, the plaintiff would simply apply to the court for the relevant writ, which would be sent to the defendant ordering them to appear in court. This system was developed in part to create a

⁵ “Writs and its types”, JLRJS, <https://jlrjs.com/writs-and-its-types/>, (Accessed: Sept 15 2023)

⁶ “Fundamental Rights - Articles 12-35 (Part III of Indian Constitution)”, Byjus, <https://byjus.com/free-ias-prep/fundamental-rights/>, (Accessed: Sept 15 2023).

"Court of Common Pleas" to deal with common types of complaints by subjects of the crown. For example, a writ could be issued if someone's property had been damaged. The previous system of justice at the Royal Court of Chancery was tailored to each individual case, which was very time-consuming. In other words, writs were a way to streamline the legal process and make it more efficient. Instead of having to create a new case from scratch each time someone wanted to sue someone else, the courts could simply use a pre-existing writ that was tailored to the specific type of complaint. This saved time and made it easier for people to access the justice system⁷. The writ was a new type of document developed by the Anglo-Saxon monarchy. It was a short administrative order that was authenticated with a seal. Writs were written in the vernacular, meaning the language of the people, and they were used to make land grants or to give instructions to local courts. At first, writs were only used by the king's chancellor to deal with complaints from vassals against their landowners. If the sheriff had tried to resolve the issue and failed, the chancellor would issue a writ to the landowner ordering them to take action. After the Norman Conquest, William the Conqueror adapted the writ system. It shifted from Anglo-Saxon to Latin and extended to cover a wider range of royal commands. Henry II later allowed individuals to buy writs for justice, significantly increasing their use. Writs came in two forms: open letters patent and restricted letters close. Essentially, writs were an innovative way for the Anglo-Saxon monarchy to assert authority in the people's language, serving various purposes like land grants and court instructions. Adopted by the Normans and expanded by Henry II, they became essential to the common law system. Writs streamlined court actions by allowing complainants to request specific orders for wrongdoers to appear in royal courts, expediting the legal process. This replaced the time-consuming, tailored approach previously used in the royal court of Chancery. The writ system aimed at efficiency. Writs were personally delivered commands to wrongdoers, directing their appearance at a specific court and time, or specifying other required actions. For local court cases or when a visiting justice of Eyre was present, no writ was necessary; informal complaints sufficed. However, for cases seeking royal and superior justice in the King's courts, a writ, a royal command, was essential. Initially, for common law, recourse to the King's courts was unusual, and something for which a plaintiff would have to pay. For most Royal Courts, the writ would usually have been purchased from the Chancery, although the court of the Exchequer, being, in

⁷ V.S.R. Avadhani & V. Soubhagya Valli, "*Lesson on Common Law, Equity, & Constitutional Remedies*" 615 (1st ed. 2021).

essence, another government department, was able to issue its own writs. Over time, opposition to the creation of new writs by the Chancery increased. The nobility saw the creation of new writs as an erosion of their influence. In 1258, the King was forced to accept the Provisions of Oxford, which among other things, prohibited the creation of new forms of writ without the sanction of the King's council. New writs were created after that time only by the express sanction of Parliament and the forms of writ remained essentially static, each writ defining a particular form of action. It was the role and expertise of a solicitor to select on his client's behalf the appropriate writ for the proposed legal action. These were purchased from the court by payment of a fee. A barrister would then be hired by the solicitor to speak for his client in court. In other words, writs were a new and efficient way to start a lawsuit in the royal courts. They were purchased from the Chancery, and there was a writ for each type of case. The writ system was reformed in 1258 to prevent the creation of new writs without the sanction of Parliament. The abolition of the Forms of Action in 1832 and 1833 led to a simplification of the English legal system. Writs, which were previously used to start a lawsuit, were no longer needed in such large numbers. A single, uniform writ was introduced, and in 1852, the need to state the name of the form of action was abolished. In 1875, the form of writ was altered to conform more to the subpoena used in the Chancery. A writ was a summons from the Crown to the parties to the action, with the substance of the action set out on its back, together with a 'prayer' requesting a remedy from the court (for example, damages). In 1980, the need for writs to be written in the name of the Crown was ended. From that time, a writ simply required the parties to appear. Writs applied to claims that were to be heard in one of the courts that eventually formed part of the High Court of Justice. The procedure in a county court, which was established by statute, was to issue a 'summons'. In 1999, the Woolf Reforms unified most of the procedure of the Supreme Court and the county courts in civil matters. These reforms brought in the Civil Procedure Rules. Under these, almost all civil actions, other than those connected with insolvency, are now commenced by the completion of a 'Claim Form' as opposed to the obtaining of a 'Writ', 'Originating Application', or 'Summons'. In other words, writs were used to start a lawsuit in the English legal system until 1999. When the Woolf Reforms were introduced, they were replaced with a simpler and more unified procedure. Claim Forms are now used to start almost all civil actions in England⁸.

⁸ V.S.R. Avadhani & V. Soubhagya Valli, *supra* note 7

3. Types of Writ:

a) Writ of Habeas Corpus:

This Writ is very important for the personal liberty of the citizens because if this Writ is not provided by the Constitution **a person can be unlawfully restrained or detained by any authority and it will be a clear violation of the personal liberty of the citizens.** Even though the purpose this Writ is to prevent a person from being detained but it will be applicable only when the detention or restraint is unlawful. Earl of Birkenhead, a British lawyer and politician, described the Writ of Habeas Corpus as "**a writ antecedent to statute and throwing its root deep into the genius of our common law**" in his speech in the O' Biren case. This means that the Writ of Habeas Corpus is older than any law that has been passed by Parliament and that it is a fundamental part of English law⁹. The Writ of Habeas Corpus is issued by the Courts in those cases where a person is illegally detained. Habeas Corpus means '**to have the body**' and it is one of the most effective remedies available to a person detained. By this Writ, the Court commands the person or authority who has detained or restrained another person to present such person before the Court. The Court requires the detaining person to provide the grounds on which the person has been detained and if he fails to provide a valid ground, the person who has been detained will be released by the Court immediately. Illustration: A is wrongfully detained by B, a police officer. A writes to the High Court regarding the same. The High Court summons B with A and asks the grounds for detaining A. If B fails to provide a valid ground or justification for A's detention, A will be free to go. If the Court finds the grounds for detaining to be justified then this Writ cannot be issued. Also, if the Court orders the detention of a person then it does not amount to unlawful detention and this Writ cannot be issued. This Writ can be applied not only by the person who is detained but it can also be done by some other person on behalf of the detained person. In the cases of Habeas Corpus, the Courts have recognized the existing socio-economic conditions in the country and the fact that still, many people are illiterate and poor. Thus, the Courts do not reject the application made by the petitioner on the grounds that he has failed to show the proper ground on which he has challenged the detention. Such a writ can be issued in the following example cases:

- i. When the person is detained and not produced before the magistrate within 24 hours
- ii. When the person is arrested without any violation of the law.

⁹ V.S.R. Avadhani & V. Soubhagya Valli, *supra* note 7 at 683

- iii. When a person is arrested under a law which is unconstitutional
- iv. When detention is done to harm the person or is malafide.

b). Writ of Mandamus:

Mandamus is another important Writ which is provided for by the Nepalese Constitution. In the Writ of Mandamus, the superior courts order the Inferior Courts to do an act or to abstain from doing an act. This order can also be given to an Inferior Tribunal, Board, Corporation or any other type of administrative authority. In Nepal, the Supreme Court is the apex court, therefore it has the power to issue the Writ of Mandamus even against the High Court even though the High Courts have also been provided with the power to issue such Writs under Article 133(3) (2). So, a High Court can issue this Writ under Article 144 (2) (1), only to the Inferior Courts such as the trial court of a district. This Writ is useful for enforcing the duty which is required to be done by law or by the office which a person holds. For e.g. the Judge of the Court has a duty to follow the principles of natural justice and if the Judge fails to do so, a Writ can be issued by the Superior Court to observe the fulfillment of this duty. One of the most important points about the **“Writ of Mandamus is that it cannot be issued against a private person and therefore only the State or the people who hold any office which falls in the category of a public office can be compelled to do or to abstain from doing an act”** . Illustration: A is a public servant who has a duty towards B which he has to fulfil according to the law but he doesn't fulfil the duty. B is aggrieved by this non-performance and therefore approaches the High Court for demanding the fulfillment of the duty by A. Here the High Court on being satisfied that the case of B is bona fide and there is a duty which should be fulfilled, will issue the Writ of Mandamus and A will be bound to fulfil the duty he has avoided until now. But if A was a businessman who had some duty towards B but he fails to perform it. In such a case A cannot approach the Court for Mandamus because this Writ cannot be issued against a private person.

Mandamus cannot be issued against the following:

- i. A private individual or private body.
- ii. If the duty in question is discretionary and not mandatory.
- iii. against president or governors of the state
- iv. against a working chief justice
- v. To enforce some kind of private contract.

c). Writ of Certiorari:

Certiorari is a different type of writ when compared with other Writs. This Writ is corrective in nature which means the purpose of this Writ is to correct an error which is apparent on the records. Certiorari is a Writ which is issued by a superior court to an inferior court. This can be issued when the superior court wants to decide a matter in the case itself or if there is an excess of jurisdiction by the inferior court. This Writ can also be issued when there is a fundamental error in the procedure followed by the inferior court or if there is a violation of the principles of natural justice. If the superior court finds out that there has been a violation of natural justice or a fundamental error on the procedure adopted, it can quash the order of that inferior court. Illustration: There is a case in the District Court and the court has no jurisdiction to decide such cases. Still, the District Court Judge tries the case and gives his decision and an application is made by A (the aggrieved party by such decision) to the High Court. Hereby the power of issuing Writs, the High Court will issue a Writ of Certiorari on the order of the District Court, as a result, the order of the District Court will be quashed.

The Writ of Certiorari can be issued on the following grounds:

- i. When there is an error of jurisdiction.
- ii. When the court has not given the proper time for both parties to be heard or has violated principles of natural justice.
- iii. This writ is supervisory in nature, and thus the High court cannot review the findings of the lower courts.
- iv. If the error is evident.

There are several conditions necessary for the issue of a writ of certiorari.

- i. There should be court, tribunal or an officer having the legal authority to determine the question with a duty to act judicially.
- ii. Such a court, tribunal or officer must have passed an order acting without jurisdiction or in excess of the judicial authority vested by law in such court, tribunal or officer.
- iii. The order could also be against the principles of natural justice or the order could contain an error of judgment in appreciating the facts of the case.

The Writ of Certiorari lies against those bodies which are judicial or quasi-judicial in nature. Thus, when anybody or a person is performing a judicial act, their acts can be subjected to the Writ of Certiorari. It also means that the scope of the application of this Writ is limited to only the judicial bodies or the bodies which perform judicial functions and it will not extend to the Central, State or Local Governments because their functions are administrative in nature and not judicial.

d). Writ of Prohibition:

This Writ is not issued often and is an extraordinary remedy which a Superior Court and high court can issue to an inferior court or tribunal for stopping them from deciding a case because these courts do not have the jurisdiction. If the court or tribunals does not have jurisdiction and it still decides the case, it will be an invalid judgement because for an act to be legal it should have the sanction of law. For e.g., if a District Court is hearing an appeal against the judgement of the High Court, such an act is bound to be prohibited because the District Court does not have the power to hear such an appeal. So, a Writ of Prohibition will be issued against such an act of District Court.

The Writ can be issued only when:

- i. The inferior court or tribunal has overstepped its jurisdiction
- ii. The court or tribunal is acting against the provisions of law
- iii. In cases where the court is partly acting within its jurisdiction and partly outside it, the Writ will be issued against the act which is partly outside its jurisdiction.
- iv. The fact that the applicant has a right to appeal against the order of the inferior court will not be a bar to issue this Writ.
- v. This Writ can be issued only when the proceedings are pending in the inferior court and not when an order has already been passed by that court. Thus, this Writ is a preemptive remedy which is exercised by the superior court to prevent the inferior court from acting outside its jurisdiction.
- vi. The Writ of Prohibition can be issued only against a judicial or a quasi-judicial body and it cannot be issued against any administrative body.

Difference between Prohibition and Certiorari:

There is a fundamental distinction between writs of prohibition and certiorari. They are issued at

different stages of proceedings.

- i. The writ of prohibition is available during the pendency of proceedings i.e. when an inferior court takes up a hearing for a matter over which it has no jurisdiction, the person against whom hearing is taken can move the superior court for writ of prohibition on which order would be issued forbidding the inferior court from continuing the proceedings.
- ii. The writ of certiorari can be resorted to only after the order or decision has been announced i.e. if the court hears the matter and gives the decision, the party would need to move to superior court to quash the decision/order on the ground of want of jurisdiction.

Difference between Mandamus and Prohibition:

- i. While Mandamus directs activity, Prohibition directs inactivity.
- ii. While Mandamus can be issued against any public official, public body, corporation, inferior court, tribunal or government; prohibition can be issued only against judicial and quasi-judicial authorities and not against administrative authorities, legislative bodies.

e). Writ of Quo-Warranto:

The Writ of Quo Warranto is issued by the courts against a private person when he assumes an office on which he has no right. Quo Warranto literally means ‘**by what authority**’ and it is an effective measure to prevent people from taking over public offices. Illustration: A who is a private citizen and has no qualifications for the post of sub-inspector assumes such office. Here a Writ of Quo Warranto can be issued against A to call into question his authority on which he has taken the control of the office of sub-inspector. The power to issue this Writ is discretionary on the courts and therefore nobody can demand that the court is bound to issue this writ.

Conditions for issue of Quo-Warranto¹⁰

- i. The office which has been wrongfully assumed by the private person is a public office.
- ii. The office was created by the Constitution or by any other statute.
- iii. The nature of the duties which arises from this office is public.
- iv. The term of the office must be of a permanent nature and it should not be terminable at any person or authority’s pleasure.

¹⁰ Adarsh Singh Thakur, “*Writs under the Indian Constitution*”, Ipleaders , <https://blog.ipleaders.in/writs-under-the-constitution/>, (Accessed: Sept 19 2023)

- v. The person against whom the Writ is sought to be issued is in actual possession of the office and is using such office.
- vi. This Writ can also be issued in those cases where a person was entitled to hold the office earlier but after getting disqualified he is still in possession of the office.
- vii. In cases where the office is of private nature, this Writ cannot be issued by the Court. This view was held by the court in the case of **Niranjan Kumar Goenka v (An Indian Case). The University of Bihar, Muzzfarpur**, in which the court observed that the Writ of Quo Warranto cannot be issued against a person who is not holding a public office¹¹.

Summarize¹²:

Type of Writ	Meaning of the word	Purpose of issue
Habeas Corpus	You may have the body	To release a person who has been detained unlawfully whether in prison or in private custody.
Mandamus	We Command	To secure the performance of public duties by the lower court, tribunal or public authority.
Certiorari	To be certified	To quash the order already passed by an inferior court, tribunal or quasi-judicial authority.
Prohibition	To stop	To prohibit an inferior court from continuing the proceedings in a particular case where it has no jurisdiction to try.
Quo Warranto	What is your authority?	To restrain a person from holding a public office which he is not entitled

¹¹ Yashh Bethal, “Analysis of writ jurisdiction of supreme court of India” , JLRJS, <https://jlrjs.com/wp-content/uploads/2022/04/10.-Yash-Bethal.pdf> , (Accessed: Sept 20 2023)

¹² Hemant, “Writs and Their Types”, thefactfactor, https://thefactfactor.com/facts/law/legal_concepts/legal_terms/writs/180/, (Accessed: Sept 20 2023)

3.1 Other Kinds of Writ:

Apart from the above commonly known writs, there are other classes of Writs. They are:

i. Writ of attachment:

A writ of attachment is a powerful legal tool that can be used to collect debts. It allows the creditor to take control of the debtor's assets before the case is over, which can help to ensure that the debt is paid. However, it is important to note that writs of attachment are only granted in certain circumstances, and the debtor has certain rights that must be protected. Example: A creditor might obtain a writ of attachment against a debtor's bank account if they believe that the debtor is trying to withdraw their money to avoid paying the debt. The writ would allow the creditor to freeze the account and prevent the debtor from accessing the money. If the creditor wins the case, they can use the money to pay off the debt.

ii. Writ of audita querela:

A writ of audita querela (Latin for "the complaint having been heard") is a common law writ that allows a defendant to challenge a judgment that has been entered against them, even if the judgment is no longer subject to appeal. The writ is typically used in cases where the defendant has discovered new evidence or developed a new legal defense after the judgment was entered. To obtain a writ of audita querela, the defendant must file a motion with the court that entered the original judgment. The motion must explain why the defendant was unable to raise the new evidence or legal defense during the original proceedings, and why the court should set aside the judgment. If the court grants the writ, it will hold a hearing to consider the defendant's new evidence or legal defense. If the court finds that the defendant has a valid claim, it will set aside the judgment and order a new trial. Writs of audita querela are rarely granted, but they can be a valuable tool for defendants who have been unfairly harmed by a judgment. Some examples of situations where a writ of audita querela may be granted include:

- a. The judgment was entered based on fraudulent evidence.
- b. The defendant was prevented from raising a valid defense by coercion or duress.
- c. The defendant discovered new evidence that proves their innocence after the judgment was entered.
- d. The defendant became insane after the judgment was entered and was unable to defend themselves.

iii. Writ of Capias:

A writ of capias is the same thing as a capias or bench warrant. This is an order from a sitting judge to police to arrest an individual who failed to obey a court order¹³. writ of capias is a court order that commands a law enforcement officer to arrest a person and bring them before the court. Writs of capias can be issued in both civil and criminal cases. In civil cases, writs of capias are typically issued when a defendant has failed to appear in court or has disobeyed a court order. For example, a court may issue a writ of capias against a defendant who has failed to pay child support or has violated a restraining order. In criminal cases, writs of capias are issued to arrest defendants who have been charged with a crime. For example, a court may issue a writ of capias against a defendant who has been indicted by a grand jury or who has failed to appear for a court hearing. Once a writ of capias has been issued, the law enforcement officer who is served with the writ is obligated to arrest the person named in the writ. The person who has been arrested will then be brought before the court to answer the charges against them. Writs of capias are a powerful tool that the court can use to ensure that defendants appear in court and comply with court orders. However, it is important to note that writs of capias should not be used lightly. Defendants have certain rights that must be protected, even when they have been accused of a crime or have failed to comply with a court order. Here are some examples of situations where a writ of capias may be issued:

- a) A defendant fails to appear in court for a scheduled hearing.
- b) A defendant fails to pay child support or alimony.
- c) A defendant violates a restraining order.
- d) A defendant is indicted by a grand jury.
- e) A defendant fails to appear for a court hearing on a criminal charge.

iv. Writ of Error:

A writ of error is a legal document that allows a party to challenge a judgment that has been entered against them in a lower court. It is a type of appellate review, which is a process by which a higher court reviews the decision of a lower court. To obtain a writ of error, the party who wants to challenge the judgment must file a notice of appeal with the appellate court. The notice of appeal must identify the judgment that is being appealed and the errors that the party believes were made

¹³ Jack Woerner, "What is a Capias Warrant?", Study, <https://study.com/learn/lesson/capias-warrant.html> (Accessed: Sept 20 2023)

by the lower court. Once the notice of appeal has been filed, the appellate court will review the record of the case from the lower court. The appellate court will then issue a decision, which may uphold or overturn the judgment of the lower court. Writs of error are typically used to challenge judgments that have been entered in civil cases. However, they can also be used to challenge judgments that have been entered in criminal cases. Here are some examples of situations where a writ of error may be used:

- A party believes that the lower court made a mistake of law in applying the law to the facts of the case.
- A party believes that the lower court made a mistake of fact in finding or not finding certain facts.
- A party believes that the lower court's decision was unfair or unjust.

4. Significance of Writs in Upholding Constitutional Rights and Justice:

The writ system holds great significance in protecting civil liberties and ensuring justice is served in a constitutional democracy. The significance of writs in upholding constitutional rights and justice are:

- i. **Protecting Fundamental Rights:** Writs like habeas corpus provide an effective remedy against illegal detention or imprisonment, thereby upholding the fundamental right to personal liberty under Article 17. For instance, a person can immediately move the High Court or Supreme Court or District court of Nepal seeking a habeas corpus writ if they are detained without trial or without any lawful justification. The court can swiftly order the authorities to produce the detainee, examine the legality of detention, and secure the person's liberty.
- ii. **Limiting Government Power:** Writs such as certiorari, prohibition and quo warranto place important checks on arbitrary administrative actions. Certiorari enables judicial review of executive orders to examine if the authorities have exceeded their jurisdiction or violated principles of natural justice. For example, certiorari can quash a detention order passed by an executive authority without following due process. Prohibition restricts bodies from taking actions that overstep the bounds of their constitutional powers and jurisdiction.

- iii. **Facilitating Access to Justice:** The writ system provides an accessible and efficient mechanism for the common person to assert their fundamental rights against the State. Procedural requirements for filing writ petitions are simple compared to regular suits. The courts also have the discretion to waive technicalities to deliver speedy justice. This facilitates access to justice, especially for the poor and disadvantaged sections.
- iv. **Maintaining Separation of Powers:** The writs of prohibition and certiorari prevent the executive from encroaching on the domain of the judiciary and legislature respectively. This maintains the system of separation of powers between the three organs of government. For instance, prohibition can prevent a government department from establishing tribunals and assuming judicial powers.
- v. **Promoting Equity and Justice:** Writs are flexible remedies that aim to promote justice and fairness. For instance, certiorari can correct errors or irregularities in judicial orders by lower courts which result in miscarriage of justice. The courts can mold relief through writs based on the principles of equity, good conscience and reasonableness.

5. Limitations and challenges of writs in upholding constitutional rights and justice:

The limitations and challenges of Writs in upholding constitutional rights and justice are:

- i. **Standing requirements:** Stringent standing requirements to file writ petitions often prevent violations of rights from being challenged. For instance, only an 'aggrieved party' can file a writ petition. This bars public-spirited persons and organizations from approaching the court even when a public injury has occurred.
- ii. **Expensive procedures:** Despite simplified procedures, writ proceedings involve considerable expense in terms of court fees and lawyer charges. This bars effective access to writ remedies for the poor.
- iii. **Delay in disposal:** There are huge pendencies of writ petitions in courts due to lack of judges and infrastructure. This leads to inordinate delays in securing remedies, diminishing their efficacy. For instance, habeas corpus petitions often remain pending for months.
- iv. **Judicial discretion:** Excessive discretion with judges regarding entertaining writs leads to inconsistent application of remedies. Courts can refuse to admit petitions or delay hearings, depriving timely relief.

- v. **Limited scope:** The scope of judicial review under writs like certiorari and prohibition is limited. Courts cannot examine the correctness of administrative decisions, but only their procedural propriety. This allows arbitrary exercise of power.
- vi. **Statutory exclusions:** Legislatures often exclude certain matters from the purview of writ jurisdiction. For instance, military matters and tax laws are beyond judicial review under writs. This enables unchecked use of state power.

6. Case Studies on the Use of Writs in Upholding Constitutional Rights and Justice:

A. United States:

I. Rasul v. Bush (2004): A seminal case that demonstrated the role of writs in enforcing civil liberties in the United States was the Guantanamo Bay detainees case - Rasul v. Bush. After 9/11 several foreign nationals were captured by the US government and detained at the Guantanamo Bay prison without trial as "enemy combatants". They sought the writ of habeas corpus to challenge the legality of their detention. The US Supreme Court ruled that the habeas corpus rights under the Constitution apply to all persons detained by the US government, including foreign nationals at Guantanamo Bay. It upheld the detainees' right to challenge their detention and directed lower courts to hear the habeas petitions. This expanded the scope of constitutional protections through the writ of habeas corpus. It checked arbitrary executive power to indefinitely detain terror suspects without trial. The case affirmed the judiciary's role in safeguarding rule of law even during emergencies.

B. United Kingdom:

I. Anisminic v Foreign Compensation Commission (1969): A landmark writ case in the UK was Anisminic v Foreign Compensation Commission concerning the writ of certiorari. A statute barred judicial review of decisions of the Foreign Compensation Commission related to compensation claims. When a claim was rejected based on an error of law, the aggrieved party challenged this restriction on certiorari before the House of Lords. Ruling: The Lords held that the judicial review bar was unconstitutional, and courts had the power to issue certiorari to quash any decision where there was an error of law on the face of the record. This upheld the rule of law and supervisory writ jurisdiction over public bodies. The innovative Anisminic principle dramatically expanded

the scope of judicial review in the UK. It reinforced parliamentary sovereignty was subject to fundamental common law rights. The case marked a power shift towards greater judicial protection of rights against executive action.

C. India:

1. **Maneka Gandhi v. Union of India (1978):** This case expanded the ambit of personal liberty under Article 21 of the Constitution and held that the procedure established by law must be fair, just, and reasonable. It laid down the principle that a person should have an opportunity to be heard before any order affecting their rights can be passed.
2. **A.K. Gopalan v. State of Madras (1950):** This case dealt with the interpretation of the scope of Habeas Corpus and held that preventive detention can be challenged under Article 32 when it violates the fundamental right to personal liberty.
3. **State of Punjab v. Rita Kumari (1989):** The Supreme Court held that the writ of Mandamus can be issued against private individuals or entities in exceptional circumstances to secure the performance of public duties or obligations.

E. Nepal:

1. **Lakshmi v. Government of Nepal¹⁴:** This case was relating to writ of mandamus, the court ordered the government to pass a new abortion law that would create a national fund to help pay for abortion costs, protect women's privacy, and make abortion services more accessible to all women. The court also ordered the government to educate health care providers and the public about safe abortion services.
2. **Sunil Babu Pant Case¹⁵:** Representatives of the LGBTI community filed a case against the Government of Nepal for excluding gender and sexual minorities. They claimed that gender minorities lacked access to public benefits because they could not obtain citizenship cards on the basis of non-binary gender identity. The Supreme Court of Nepal ruled that sexual orientation and gender identity are protected by the Constitution and that the

¹⁴ “*Lakshmi v. Government of Nepal (Supreme Court of Nepal)*”, Center for Reproductive rights, <https://reproductiverights.org/case/lakshmi-dhikta-v-government-of-nepal-amici-supreme-court-of-nepal/>, (Accessed: Sept 20 2023)

¹⁵ “*Sunil Babu Pant and Others/ v. Nepal Government and Others, Supreme Court of Nepal (21 December 2007)*”, icj, <https://www.icj.org/sogicasebook/sunil-babu-pant-and-others-v-nepal-government-and-others-supreme-court-of-nepal-21-december-2007/>, (Accessed: Sept 20 2023)

government is responsible for creating an environment where people of all sexual orientations and gender identities can enjoy their rights without discrimination. The Court also ordered the government to form a committee to study issues related to same-sex marriage.

8. Conclusion

In conclusion, the extraordinary writ jurisdiction of courts plays an indispensable role in upholding constitutional rights, enforcing fundamental freedoms, and dispensing justice in accordance with the rule of law. As illustrated through various case studies across different countries, writs such as habeas corpus, mandamus, prohibition, certiorari and quo warranto allow citizens to directly approach apex courts to remedy violations of their civil liberties and check abuses of power by state authorities. However, writ remedies are not a complete panacea for all violations of rights and have their limitations. Technical procedures, delays in disposal, limited scope of judicial review, administrative resistance, and lack of awareness are some challenges that constrain their efficacy. Notwithstanding these limitations, writs remain a crucial bulwark for the enforcement of constitutionalism and for holding governments accountable to the constitution. Going forward, strengthening the writ jurisdiction framework requires continuous reform - simplifying procedures, expanding standing criteria, improving infrastructure to expedite disposal, greater compliance monitoring, extensive legal awareness campaigns, filling judicial vacancies, and adequate budgetary support. Writ powers must also be exercised judiciously and in a balanced manner by the judiciary. With the right systemic improvements and responsible exercise, the writ jurisdiction can be leveraged further to deepen human rights protection and enhance access to constitutional justice.