TITLE: A STUDY OF PREROGATIVE REMEDIES WITH SPECIAL REFERENCE TO THE REMEDY OF HABEAS CORPUS.

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by

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Grateful to Dr. J. B. Ojwang, whose guidance and suggestions I found most useful.

DEDICATION

To my parents for their love.

Table of Cases

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2. Darnel's case 3 St. Tr. 1.
3. Eshughayi Eleko v Officer Administering the Government of Nigeria /1931/ A.C. 662.
4. Greene v Secretary of State for Home Affairs /1942/ 1 Q.B. 358.
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8. King v Electricity Commissioners Ex parte London Electricity Joint Committee, /1978/ 2 All E.R. 202.
9. King v. Dunshealth Ex parte Meredith /1951/ 1 K.B. 127.
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13. Olyumi v Lieutenant.
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15. Permanent Trustee Company of New South Wales v Municipality of Campbell Town 34 A.L.J. 255.
16. R v Excise Commissioners /1924/ 1 K.B. 171.
17. R v Hill Prison Board of Visitor, Ex parte, St. Germain /1978/ 2 All E.R. 198.

18. R v London County Council, Ex parte Corrie /1918/ 1 K.B. 68.

19. R v Metropolitan Police Commissioner Ex parte Black Burn /1968/ 1 All E.R. 473.

20. R v Paddington Valuation Officer Ex parte Peachy Property /1965/ 2 All E.R. 836.

21. R v Stafford Justice Ex Parte Stafford Corporation /1940/2 K.B. 33.

22. Searche's Case 1 Leon 70.

23. Stephen Mwangi Muriithi. The Weekly Review Nairobi, April,& June, 1982.

24. Watt v Kesteven County Council, 1 All E. R. 473.

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A STUDY OF PREROGATIVE REMEDIES WITH SPECIAL REFERENCE TO HABEAS CORPUS.

INTRODUCTION

This paper examines the present Administrative Law prerogative remedies, but with special reference to habeas corpus. The above-mentioned topic will be discussed and set out in four chapters. The first chapter will discuss the historical background and the evaluation of these remedies with a view to examining how these factors have influenced their development, for it is these, more than anything else that have contributed to their present form. Secondly, the remedy of habeas corpus will be looked at with interest and at length because it forms the core of this paper. Reasons would be given as to why it should be so treated in the paper. A concise account on its nature and development will be given too. The third chapter will be an assessment of its application in Kenya. An attempt will be made to present a comprehensive colletion of relevant case law.

Finally, an attempt will be made to point out the defects in the present state of the law relating to this remedy which defects militate against the efficacy of the remedy, and also to indicate whether there is any room for reform. Then a conclusion will be made.

CHAPTER ONE

HISTORICAL ORIGIN OF PREROGATIVE REMEDIES

INTRODUCTORY

Prerogative remedies are perhaps the oldest administrative law remedies. They were regarded as emanating directly from the king himself, in order to vindicate the liberty of one of his subjects. These remedies are mandamus, certiorari, prohibition, and habeas corpus. They developed almost at the same time, therefore, a general characteristics can be listed as follows:

(a) That they could not be had for the asking, that in order for the writs to issue, proper cause had to be shown; hence they are not what were known as "writs of course," in the early period of the common law there were writs which were recognised as "writs of course."[1] That is, those that had acquired a certain form and could be purchased by or on behalf of any applicant from the Royal Chancery. But in the 17th Century, in the reign Charles II, applications for these remedies were made to the King's Bench rather than the Chancery.

(b) The court was given a discretion whether to grant the writs or not. It is because of the discretionary nature of these remedies that they were designated "prerogative."[2] This was brought out in the case of R v Excise Commissioners:

> "An application for a mandamus is an application to the discretion of the court, a mandamus is a prerogative writ and is not right."

However, it should be noted at this point that, although none of the prerogative writs is a "writs of course," not all are discretionary, e.g. in certain instances prohibition issues as of right. And habeas corpus is a writs of right which issues ex debito justitiae[3] where an applicant satisfied the court that his detention is unlawful. We cannot therefore call these writs of grace in the fullest sense.

It is appropriate that a brief account of each of these remedies be given.

(a) Prohibition

An order of prohibition issues out of a superior court (Queen's Bench Division) primarily to prevent an inferior court from exceeding its jurisdiction, or acting contrary to the rules of natural justice; for instance to restrain a judge from hearing a case in which he is personally interested.[4] It will not issue unless something remains to be done which a court can prohibit

e.g. a continuing excess of jurisdiction, as to its score, it is not clear what the "precise limitations of the writ are, but it is certain that it will lie against a body exercising public functions. But it cannot be used to restrain legislative process or those policies which cannot be challenged in a court of Law, because they are purely executive in character. Neverthless, the tendency is to enlarge the scope of the effectiveness of the writs. The courts exercise the power of controlling anybody or persons given a "judicial" power to impose obligations upon others. The case of the King v Electricity Commissioners, ex-parte London Electricity Joint Committee[5] is of particular interest in this connection. The judgment of Atkin, L. J. as he then was deserves a careful study as affording many illustrations of the circumstances in which the courts have granted the writ in the past. It is also made clear that the common requirement of confirmation by a higher authority, even where the approval has to be that of the Houses of Parliament, does not put an order of a local authority outside the category of a judicial proceeding, which can be restrained by means of prohibition. Atkin, L.J. said,

> In the provision that the final decision of the commissioners is not to be operative until it has been approved by the two houses of Parliament. I find nothing inconsistent with the view that in arriving at that decision the commissioners themselves are to act judicially and within the limits prescribed by the Act of Parliament, and

that the courts have power to keep them within those limits.6

(b) Certiorari

Is a discretionary remedy, Lord Widgery said in R v Hill Prison Board of Vistors, Ex parte St. Germain[7]

> "There is not, and one may hope never will be, a precise and detailed definition of the exact sort of order which can be subject to certiorari."

It will not be granted to a plaintiff whose conduct does not deserve it. In the Australian case of Parmanent Trustees Company of New South Wales v Municipality of Campbell Town[8] certiorari was refused to an applicant who sought to have quashed a decision of an inferior court given in proceedings commenced by himself, but in which the decision had been unfavourable to the applicant. Certiorari can also be refused to an applicant who is guilty of unreasobale delay. This was the situation in R v Stafford Justices Exparte Stafford Corporation.[9]

The facts of this case are briefly summarized here under: On an application to divert a public highway under the High Ways Act, 1835, the justices wrongly made their final certificate under the proviso to S.91, stating that the substituted foot path had been completed and put in good condition and repair. On application for an order of certiorari, the aggrieved party was not entitled to this order to quash the certificate ex debito justitiae. The court had a discretion which it could and did exercise to refuse the application. The court

argued that the order of certiorari could not issue as there had been undue delay in bringing the proceedings by the plaintiff. It may also not be granted in respect of disciplinary proceedings in a closed body such as a prison, the Armed Forces of the Crown or, the Fire Service. It will not normally be granted unless, and until the plaintiff has exhausted other remedies reasonably available and equally appropriate, such as statutory right of appeal clearly, where there is such it will normally be in the plaintiff's own interest to pursue such a remedy if it is cheaper and expeditious than certiorari proceedings.

It should also be remembered that the remedy by way of certiorari is not lightly to be excluded by a privative clause in a statute, in view of S. 14 of the Tribunals and Enquires Act, 1971. In R v Paddington Valuation Officer ex parte Peachy Property.[10] In this case the applicants complained that they and their tenants in park west had been badly treated in regard to the rates on their purpose built flats. They said that the first respondent, the valuation officer of Paddington on the one hand had rated the purpose built flats at too high a figure and on the other hand had rated the flats in coverted houses at too low a figure. They said that this was because he had prepared the whole of the valuation list on the wrong

footing. They asked to court to issue an order of certiorari so as to quash the list altogether, and they asked the court too, to issue an order of mandamus, so as to order the first respondent to make a new list. Lord Denning M.R. dismissed the appeal in that the applicants were to be successful in their application for an order of mandamus or certiorari. However, they had to show that the first respondent, the valuation officer of the borough, had gone wrong in Law in such a way as to render the valuation list invalid, because he had taken in to consideration matters which were of direct importance in ascertaining the values to be put on the hereditaments.

(c) Mandamus

This order is different in nature from prohibition and certiorari. It commands any person to whom it is directed to carry out a public duty imposed by Law. The order is therefore not restricted in operation to orders against inferior tribunals and government agencies required to act judiciary or quasi-judiciary. Indeed, it is an instrument of judicial review of the discretionary acts of an inferior agency only in the sense that an order of mandamus can be obtained if an agency has not exercised a discretion vested in it by statute. Moreover, if a discretion has been abused, it can be said that the discretion has not exercised at all, and that therefore

mandamus will lie ordering the agency to exercise its discretion properly. Otherwise, however Mandamus cannot be used as a judicial process to scrutinise or reverse the manner in which a discretion has been exercised by an agency in a particular instance, e.g. an order of Mandamus was granted against a rent tribunal which had wrongly held than it had no jurisdiction to hear and determine an application properly made it", but no order was granted in a case where the tribunal had correctly declined jurisdiction.[12] If an agency refuses to excercise a discretion because it has laid down a policy, will lie to require the agency to hear and determine the application according to Law. This was the decision in R v London County Council ex parte corrie.[13] Mandamus will also lie to enforce nay duty imposed by statute, such as the service of notice, or in a proper case, the issue of a licence.

The duty which it is sought to enforce by order of mandamus must be of a public nature, thus where the duty was imposed on an officer of a University by the unversity's statutes to convene a meeting, this was held to be a domestic matter and one which should be settled by the visitor to the University.[14] Mandamus therefore could not issue. On the other hand, the duty need not have been imposed by statute, and it certainly need not be of a

a judicial nature, e.g. A local authority is under a duty to comply with its own standing orders as to inviting tenders for contracts, and therefore mandamus was granted on the application of a rate payer requiring the council to comply where, however, a duty is imposed by statute expressly made enforceable against a government agency, such as a local authority, by a minister of the crown, it seems that Mandamus will be refused to a private individual. Watt v Kesteven County Council[15] affirmed the above.

Also in R v Metropolitan Police Commissioner Ex parte Black Burn,[16] a former member of Parliament took proceedings for a mandamus requiring the commissioner to reverse a policy decision to the effect that the time of police officer's would not be spent on enforcing the complicated provisions of the Betting, Garming and Lotteries Act, 1963, in London. In the event that followed, the commissioner agreed to change his policy decision and no mandamus was granted, but the case was fully argued, and it was accepted that an order would lie against the commissioner in such a case, as it was the duty of every police officer to enforce the Law. The fact that the applicant for the order had another remedy open to him, but taking private proceedings in the criminal courts, was insufficient answer to the argument that he should follow that remedy first, but the court was not satisfied that he would have had sufficient Locus Standi.

In the course of his judgement, Lord Denning M.R. said:

> "... Mandamus is a very wide remedy which has always been available against public officers to see that they do their public duty. It went in the old days against justices of the peace both in their judicial and in their administration functions. The legal status of a commissioner of police is still that he is justice of the peace, as well as a constable. No doubt the party who applies for mandamus must show that he has sufficient interest to be protected and that there is no other equally convenient remedy, but once this is shown the remedy of mandamus is available, in case of need, even against the commissioner of police of the metropolis."17

However, in 1978, when Mr. Blackburn went again to the court of appeal asking them to require the metropolitan police commissioner to enforce the Law against the sale of pornography, the question of Locus Standi was not raised, although Mandamus was refused on the merits. A successful applicant for mandamus must also be able to show that he has asked the defendant authroity to perform the duty, but the authority has not done it.

Mandamus will not lie against the crown, but it will lie against a corporate body, and if continually disobeyed, it may be enforced against the members governing body of the corporation.

1. De Smith: Judicial review of Administrative Action, London: Stevens, 3rd Edition pages, 227 - 230.

2. /1958/ Cambridge Law Journal 218.

3. J. R. Sharpe: The Law of habeas corpus Clarendon Press, Oxford University Press, 1976.

4. Wade & Phillips: Constitutional Law 6th Edition Longmans, pages 662 - 664.

5. /1924/ I K.B. 171.

6. Ibid.

7. /1978/ 2 All E.R. 198 at 2012.

8. /1960/ 34 A.L.J. 225.

9. /1940/ s K.B. 33.

10. /1965/ 2 All. E. R. 836.

11. /1934/ 1 K.B. 668. The King v Bedwelty Urban Council Exparte Price.

12. /1898/ A.C. 387. Pasmore v Aswaldtwistle Urban District Council.

13. /1918/ 1 K.B. 68.

14. /1951/ 1 K.B. 127. The King v Dunsheath, Exparte Parte Neredith.

15. /1955/1 All E.R. 473.

16. /1968/ 1 All E. R. 763.

17. Supra at page 6.

CHAPTER TWO

HABEAS CORPUS: A CONCISE ACCOUNT ON ITS NATURE AND DEVELOPMENT.

The writ of Habeas Corpus still has significant day-to-day uses, and is properly seen as a fundamental constitutional guarantee, and a corner stone of the rule of Law.[1] Earl Jowith defines it thus: "you have the body,"[2] a writ so called because it is directed to a person who detains another in custody, and commands him to produce or have the body of that person before the court for a specified purpose. This definition is given force by the criminal procedure code section 389,[3] which provides that:

> The high court will direct that any person within the limits of Kenya be brought up before the court to be dealt with according to law.

Further, S. 84 of the constitution, which is the supreme law of the Land provides for its application as forming part of the fundamental human rights.[4]

In 1938, under the administration of justice (miscellaneous provisions) Act of U. K., all the prerogative writs were changed into prerogative 'orders', but with an exception to the writ of Habeas Corpus, because it was too sacred to be tampered with. Nominally sought by the crown, the

remendy is in reality freely available to any prisoner and to any one acting on the prisoner's behalf without regard to nationality. Thus, the writ provides an efficacious means of testing the validity of a prisoner's imprisonment or detention.

The writ of Habeas Corpus took its present form in the 17th century. However, by the early part of the 13th century, the words "habeas corpus" were a familiar formula in the language of civil procedure. By then, it merely represented a command issued as a means of interlocutory process, to have the defendant to an action be brought physically before the court. The idea of producing the body with the cause of his detention was not present. Infact, there usually had been no detention at all, and the purpose of the process was to order an officer to bring in the defendant and not at all to subject the cause of a detention to the court's scrutiny. It has even been said that the early use of habeas corpus was to put people in jail rather than to get them out, but this seems to have a mistaken impression, because today it is used to ensure the physical presence of a person in court on a certain day. The words 'habeas corpus' at this stage were thus not connected with the idea of liberty, and the process involved an element of the concept of due process of law in so far as it reflected the refusal of the courts to decide a matter without having the defendant present. Therefore, the earliest traces of habeas corpus appear to be its use as an

interlocutory process rather than as an originating proceeding. It was undoubtedly a significant indication of the authority and suspect gained by the Kings judges that a man could be brought to justice on their command. But for the association of these words (habeas corpus) with liberty, further development was required.

In the 15th and 16th centureis in the U.K., there developed jurisdictional conflicts between the Central Courts of the Crown and the Local Courts. These conflicts mark the transition of the writ of habeas corpus to form a device to secure the physical presence of a party so that he could undergo some other process, to an equivocal demand for the reason for the applicant's detention so tha the court could judge the sufficiency of that reason. The modern "ad subjiciendum[5] form of the writ" to submit the cause to scrutiny was emerging. Habeas corpus, in this struggle for control between the central court of the crown and the local courts proved to be a useful device. There is little doubt that its use in this contest fostered the concept of the writ requiring cause to be shown for the imprisonment. It was directed by the central courts against the local inferior jurisdictions and helped to channel the litigation, and remove the sting from efforts of the local courts to enforce their orders. At this level, habeas corpus

was used by both, the courts of common law and by the chancery in their efforts to centralize the administration of justice. In its initial stage, habeas corpus was used with either certiorari or privilege and some times with Audita querela[6] to remove causes from inferior courts. By the mid 15th century, the issue of habeas corpus together with privilege was a well established way to remove a cause from an inferior court where the defendant could show some special connection with one of the central courts which entitled him to have his case tried there. To protect its own jurisdiction and to rob the inferior court of litigation, the superior court had the defendant brought up and discharged. There can be little doubt, however, that habeas corpus in its cum causa form[7] was being used for this purpose independently of privilege or certiorari and 1433 the Staple Act made reference to its use.

But, perhaps, the most significant development in the law of habeas corpus came with its use to test the validity of executive commutals. By the time of Elizabeth I, it was becoming clear that the claim to a power to commit for reasons of state could be tested on habeas corpus, e.g. there are cases as early as 1567 in which habeas corpus was used by persons detained by order of the privy council to obtain their release on

on bail. In 1587, in Searche's Case,[8] and Howel's Case,[9] it was shown to be a remedy fit to challenge the authority of the crown. In the latter case, it was held that a commitment by the hand of one privy councillor was insufficient where no cause was shown although the court added by way of dictum that such a committal by the whole council would be upheld. There are numerous other instances of prisoners of state being discharged or bailed on habeas corpus, and by 1592, the practice was sufficiently troublesome to the council to warrant a request that the judges state the principles upon which such prisoners were to be delivered. The judges therefore resolved as follows:

> We think if any person be committed by her majesty's commandment from her person or by order from the council board, or if anyone or two of her council commit one for high treason such persons so in the case before commited may not be delivered by any of her courts without due trial by the law, and judgment of acquittal, had nevertheless, the judges may award the quee's writs to bring bodies of such persons before them, and if upon return thereof the causes of their commitment be certified to the judges in the cases before ought not to deliver him, but to remand the prisoner to the place whence he came, which cannot conveniently be done unless notice of the cause in generality or else especially be given to the keeper or goaler that shall have custody of the prisoner.

It gradually became clear that the power to commit prisoners of state was being abused, the issue came to a head on an application for habeas corpus in Darnel's Case,[10] usually known as the five knights' case.

This case was a case of major constitutional importance and one which illustrates the extent of the development of habeas corpus by the early 17th century. It involved the clash between the Stuart claims of the prerogative and the common law and was in the words of one of the judges" the greatest cause that I ever knew in this court" per Doderidge J. The facts of this case may be stated briefly as follows: Charles I had resorted to a forced loan in an effort to raise revenue without Parliamentary sanction, and his agents had detained a number of subjects who refused to contribute of these detained five sought their freedom by way of habeas corpus. It is very likely that they intended to test the legality of the whole scheme of the forced loan, but the returns to the writ of habeas corpus simply stated that they were detained "per speciale mandatum domini regis." This case turned quite simply or whether that statement or lack of statement of the cause for committal entitled the court to bail the prisoners. The central issue which reappeared at each stage of the argument was whether the court had to take it on good faith that there was substantive legal justification for the imprisonment, or whether the failure to disclose the grounds for the detention itself entitled the prisoners to be bailed until they were brought to trial, i.e. did the king possess, a power which superseded the common law

adjudicatory process, or was he always subject to a supervisory judicial power to inquire whether his actions complied with the law?

Counsel for the prisoners placed great reliance on magna carter and statutes from the time of Edward III which were said to confirm it and define the concept of due process of law. How, it was asked, could the imprisonment be justified in the face of Chapter 29 of the great charter which stated that no freeman shall be taken or imprisoned or defer to any man either justice or right. However, the Attorney-General's answer to this defence was that the magna carter didn't define "Legem terrae, and to rely on that phrase was mere question begging. One thing is clear from the above decision, that the sovereign had long exercised a power of arbitrary committal where there was thought to be a threat to the safety of the realm. Thus like struggle has always been to shun any threat against the political powers of the crown, detentions without trial have been one way and perhaps most practised to curb such threats. Kenya without any doubt is not an exception to this as we shall see in a later chapter of the text.

Another feature in the nature and development of habeas corpus is that in the late 17th and 19th centuries it had become an important aspect of day-to-day criminal procedure. It was the accepted method by which a person

committed by the local justices could appeal to the general power of the King's Bench to grant bail and it generally provided a method of review over pre-trial proceedings. It was, and still is thought to provide a measure of protection against arrest and detention not authroized by the ordinary criminal process. To this, Lord Coke C.J. demonstrated the fervour of the common lawyers' desire when he said:

> "By the law of God none ought to be imprisoned but with the cause expressed in the return of his imprisonment, as appeareth in the acts of the apostles." 11

But although the foregoing information has shown the merits and the purposes for which the writ of habeas corpus was intended, it is important to note at this juncture, that there are certain aspects of habeas corpus that could be criticised. Perhaps, the most neglected aspect of the writ of habeas corpus has been its use as a device to secure the right of accused persons detained pending their trial to be either tried quickly or released. One of the most important provisions of the celebrated Habeas Corpus Act 1679, 5.6, [12] (though now repealed) gave a prisoner the right to be either indicated within one term after his commitment, or bailed and to either tried within two terms or sessions, or discharged. From the 17th century to the present times, judges have considered this section to be the very hub of the design of the

Habeas Corpus Act 1679. Lord Holt's words in 1694: "... the design of the Act was to prevent a man lying under an accusation of treason," were echoed by Abbot C.J. In 1825, when he said:

> "The object of the Habeas Corpus Act was to provide against delays in bringing persons to trial, who were commited for criminal matters."13

An by Paker, C. J. in 1859 in the case of Re Hastings (No.2)[14] Drcey pointed out,[15] the section gave habeas corpus an important dual purpose, that is, to secure persons detained in prison without bail and to bring them before the law courts for a speedy trial, so that an accused person was able to test the validity of the warrant and charges upon which he was held as soon as he was in carcerated. In view of the importance of the principles laid down by the Act (1679), it is surprising to find so little discussion of the section in the modern cases, and it is further disappointing to find that the section has recently been repealed by the courts' Act 1971. Although the reasoning behind this repeal and especially its 5.6 was that it had become difficult to apply it, because of its archaic language, the majority of the common lawyers are of the view that the principle it established, namely the guarantee of a remedy to ensure speedy trial should have been continued.

Indeed, once it is accepted that in certain circumstances detention pending trial is justified, then habeas corpus protection is defective, unless there is some limit on the time a person may be held without trial, justification for pre-trial detention is plainly conditional upon having the prisoner brought to trial as quickly as possible. The principle of ensuring that every detention is justified in law would be violated if accused persons were held for unlimited periods of time without trial and without a remedy. The right to be either tried according to law or released is really the right that habeas corpus is supposed to secure.

Having looked into the nature and development of habeas corpus, it is appropriate that the second part of this chapter is considered generally, after reading the foregoing, perhaps what a reasonable man would ask himself is why all that on habeas corpus? This question is what is going to be answered in this final part of this discussion in this chapter. The first consideration the author gives to habeas corpus is that, as an administrative law remedy, it also forms part of the fundamental human rights. That are deeply entrenched in our constitution, chapter five, 5.77(1) provides that:

> if any person is charged with a criminal effence, then unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

This provision, therefore, is to the effect that if it is contravened, then one can apply for an order of habeas corpus for a speedy trial, for justice delayed is justice denied. Thus the remedy is viewed as a fundamental constitutional guarantee to protect individuals against injustice occasioned by delay before trial.

It is also felt that, this is one area where no adequate study has been done, yet it is so vital an area of our law. Therefore, it needs this attention. It is for this reason that the writer feels obliged to explore into this area of our law. For instance, we have occasionally witnessed situations where people have been kept in custody for so many days, and their relatives just sit back and wait. In most cases they are not aware of their constitutional rights, and this is why they would not request for the production of such persons who have been so delayed in custody to be produced before the court for a haster trial by way of habeas corpus. This paper intends to bring fourth relevancy information in respect of that question.

But some times one feels that the blame for this kind of ignorance among our people should be pinned on the colonial administration itself. This is felt to be so, because the colonialists wanted to keep the African as ignorant of his rights as possible, so as not to face any challenges in their

of exploiting him (the African). Therefore it is not a wonder that the African finds himself so unaware of certain fundamental rights as the one in question.

FOOTNOTES

1. J. R. Sharpe: The Law of habeas corpus.
2. Earl Jowitt: The English Law Dictionary Oxford University Press.
3. Laws of Kenya Chapter 75.
4. Chapter five of the constitution.
5. To bring up the body of a person imprisoned or criminal charge or detention.
6. The defendant's complaint has been heard, now replaced by a stay of execution.
7. Producing the body with the cause of detention.
8. Ileon, 70.
9. Ileon, 70.
10. 3 st. tr. 1.
11. Codd v Turback /1615/ 3 Bulst. 109.
12. Habeas Corpus Act /31 car. 2, C2./.
13. Ex parte Beaching /1825/ 6D & R209.
14. /1859/ 1Q.B 358 at 369. The purpose of the Act to avoid delays in trial is also discussed in R v M'Cartie /1859/ II Ir. C. L. Reports 188.
15. Report of the Departmental Committee on Legal aid in criminal proceedings 1966.

16. R v Campbell /1959/ 2 All E. R. 559 - 60.

"It may be that in the conditions of today, it is difficult, if not impossible, to comply with the requirements of the statute. That may be an argument of validity and force for amending or reconstructing the law of habeas corpus, but today I must construe the the fact of 1679, as it (per Justice Laski, Liverpool Crown Court). But however, Lord Goddard, C. Y. in R v Oliver /1957/ 42 Cr. App. R. 27, where he referred to the section of the Act as being still effective e.g. some part of the common wealth like Canada still do apply the section (5.6 of the Habeas Corpus Act 1679).

CHAPTER THREE

THE LAW OF HABEAS CORPUS AS IT APPLIES IN KENYA

Most of the legal systems in Africa were imposed in the colonial era through general reception statutes.[1] In trying to state the origin or evolution of Kenyan Law, it is inevitable that one has to look at the reception of the law from England and the phases it underwent before it was permanently included in our law. Speaking of the Europeans at this particular period Allott said:-

> "... each power first introduced its own legal system or some variant of it as the fundamental and general law of its territories."2

It is during this period that we get the main outlines of our legal system as we know it today. The laws so established by the European powers took the form of Legislation orders-in-council or other prerogative instruments and local legislation made by the government or the legislative council of the territory. Our concern in this chapter is the writ of habeas corpus, which is an administrative law remedy. By the same process outlined above, administrative law was also received in this country from Britain. The right in question is one which supposedly occupies a special place in English Law, which is the basis of our law; this is the right of personal liberty. S.84 of our

constitution, which is the supreme law of the land, gives effect to this right, in the form of a guarantee of a fundamental right.[3]

Generally speaking, it is in time of war or emergency that the executive assumes power to restrict personal freedom. For this reason, the war time cases are of continuing significance to the law of habeas corpus. The questions to be asked are, to what extent are the courts willing to guard that jealously guarded right from encroachment by the executive? and secondly, what are the special considerations which come into play in time of crisis and how do these considerations affect the work of the courts? In the 17th century, in Darnel's case,[4] (which is a land mark case of the law relating to habeas corpus) one of the most important legal issues which arose during the great constitutional struggle of the century was the question of the supposed prerogative power of the crown to detain the subject without presenting a criminal charge. In the case above, the crown courts returned that the prisoners were detained "per speciale mandatum Regis." No justification other than the King's special command was given for their arrest and improsonment. The King's Bench, despite strong arguments to the contrary sided with the king and held this to be a proper return. Many parliamentarians were strongly opposed to such an extraodinary prerogative power as the courts were willing to allow. This matter and others regarding the king's

claims of prerogative powers were debated in Parliament, and the result was the petition of right. Among other things, the petition of right abolished the power of detention which had been confirmed in Darnel's case. The king and council were thereby deprived not only of the power to enforce the collection of money behind the back of the Parliament, but also of the power to lock up without laying a criminal charge, those who were considered to be dangerous to the security of the state. This information has been included here so as to give a comparative picture, in relation to what Kenya's experience is in matters touching on detentions. But before I come on to this, one or two things about emergency detentions in the United States and the United Kingdom could be considered e.g. Great Britain exercised powers of preventive detentions in the first and second World Wars.[5] The United States of America applied this type of control to a minority racial group during the second World War, and the Emergency Detention ACt of 1950, gives clear indication that these powers will be even more extensively employed in the event of a future war.[6] This Act permits the president, in event of invasion, or a declaration of war by congress, or insurrection within the United States in aid of a foreign enemy, to order the apprehension and detention of any person as to whom there is reasonable cause to believe that he probably will engage in, or conspire to engage in espionage or sabotage. To make this scheme operate effectively, in 1953 detetion facilities in

Arizona, Oklahoma, Florida, California and Pennsylvania were held in readiness to receive the 14,000 persons who had been designated by the Department of Justice for preventive detention in the event of an internal security emergency.

It is on this line of thought that the following study of emergency detention in Britain during the 2nd World War is offered. (the sources from which this study is derived are primarily the House of Common's debates). on this subject of detention came up with Regulation 18B. Under this, the emergency power (Defence) Act of 1939 explicitly delegated to the British Executive power to

> "make provision ... for the detention of persons whose detention appears to the secretary of state to be necessary or expedient in the interest of the public safety or the defence of the realm."7

Parliamentary opposition to the regulation in this form caused a change in the language delegating detention powers to the Home Secretary to permit detentions in these terms:-

> "If the secretary of the state has reasonable cause to believe any person to be of hostile origin, or associations or to have been recently concerned in the acts prejudicial to the public safety or the defence of the realm or in the preparation or instigation of such acts and that by reason thereof, it is necessary to exercise control over him."

Following this, appeals were directed to British jurists seeking a review of the necessity for detaining individuals held under this regulation. (18B). However, these evoked negative response, which echoed the words of Lord Atkinson, concurring in the leading first World War detention case the King v Halliday[8] when he said

> "It seems obvious that no tribunal for investigating the question whether circumstances of suspicion exist warranting some restraint can be imagined less appropriate than a court of law."

Ultimately the House of Lords found that Regulation 18B entrusted to the Home Secretary a discretion sufficiently broad in nature to preclude judicial review on other than procedural grounds. Liversidge v Anderson[9] and Green v. Secretary of State for Home affairs,[10] were also decided on the same footing. The House of Lords precluded virtually any review of the Home Secretary's discretion to interim. The order would be bad only if the Home Secretary lacked a reasonable belief in the relevant matters, and according to the House of Lord's the Home Secretary could judge for himself what was reasonable; therefore, their lordships held, there was no reason to require the Home Secretary to support what he had done by affidavit. This African case Olyumi v. Lieutenant.[11] Where the plaintiff is the sons of the reigning Bale objected to a rule made by a native authority and approved by the governor changing the customary law of succession so that not only sons but grand sons of the Bale could be elected to the succession.

The statute gave the governor power to alter and modify any native law if such modification is expedient and not repugnant to justice, equity or good conscience. The court dismissed the action saying that.

> The legislation by its nature presumes that the lieutenant - governor will act in good faith ... (he) must satisfy himself that the modification is expedient.

The operation of Regulation 18B, was not only limited to Britain, it also applied to her colonies in Africa and elsewhere. The best authority for this is the Nigerian case of Eshugbayi Eleko V Officer Administering the government of Nigeria.[12] The case, other than illustrating the above mentioned proposition, is also the best example of effective review by way of habeas corpus of executive action. This was a decision of the privy council in 1931 on appeal from Nigeria. The governor of the colony was empowered to order the depertation and detention of certain individuals in certain specified circumstances. Regulation 18B allowed the minister to act where he had "reasonable cause to believe" that the requisite circumstances were present. The deposed chief's removal ordinance allowed the governor to make an order with respect to a deposed native Chief where native law and custom required the deposed chief to leave the area over which he exercised

jurisdiction, if the governor was of the view that this was necessary for the re-establishment of peace, order, and good government. As in the war time cases, the applicant in the Nigerian case alleged that none of the circumstances were present. The governor's reply was that his decision on these points was not open to question, but was to be respected as if it were the order of a superior court, and that habeas corpus could not be invoked to allow for a judicial investigation of the facts. This was the same argument which was to be made in Liversidge and Greene eleven years later, but in the Nigerian case, the privy council held that the valid exercise of the power was contingent on the objective existence of the facts contemplated by the ordinance, and once the applicant alleged that these conditions did not exist, it was for the court to see for itself that they did.

But what is the procedure for applying for an order of habeas corpus? In the United Kingdom which is the origin of our law, an application for a writ of habeas corpus ad subjiciendum must be made to a Divisional Court of the Queen's Bench Division, or if no such court is sitting at the time, to a single judge of any Division of the High Court. In vacation, or at any other time when no judge is sitting in court, it may be made to a judge out of court (e.g. at his home).

Applications for habeas corpus have priority over all other business. An application will normally be made exparte, but it must be supported by an affidavit by the person restrained, unless he is unable to make an affidavit, in which case the affidavit may be made by another person on his behalf and must explain the special circumstances. If prima facie grounds are shown the court or judge may order that the writ shall issue forthwith to produce the prisoner, the writ must state before whom and when it is to be returnable. The return to the writ made by the person having custody the prisoner, must specify the cause of detention. If the application is allowed, the prisoner is immediately discharged. An application for habeas corpus in respect of detention in a criminal cause or matter may be granted by a single judge, but if he is to refuse it, he is not entitled to do so but must instead direct that the application be heard by a Divisional Court of the Queen's Bench Division. This same practice obtains in Kenya as well. But the applications this time are made to the High Court not to the Queen's Bench as in U.K. which is the only one with jurisdiction to handle such matters. S.389 of the Criminal Procedure Code[13] provides that the High Court may whenever it thinks fit direct.

> that any person within the limits of Kenya be brought up before the court to be dealt with according to law, and that any person illegally or improperly detained in public or private custody within such limits be set at liberty.

It is against this background that we are going to view the law,relating to habeas corpus in Kenya. Kenya's latest experience on this, is relected in several cases before and after the abortive coup d'etal of August 1, 1982. It should however, be noted that the fact that the writer of the text has picked on cases before and after the abortive coup, does by no means suggest that these are the only cases of detention that the country has had. It is pretty obvious why the period before and after the August one has been picked on here. In my previous chapter, discussing the nature and development of habeas corpus, it has been mentioned that habeas corpus as a remedy has so much to do with war time cases, and with states of emergency. Therefore, it is no wonder that events before and after August 1st 1982, feature so prominently here.

On becoming the president of the nation on the 20th November, 1978, Mr. Daniel arap Moi made one important pledge that he would not use detention except as a last resort. It seems the growth of radicalism and extremism on the political left especially involving the member of Parliament for Nakuru North, Mr. Koigi wa Wamwere, member of Parliament for Kitutu East, Mr. Abuya Abuya and in the Main Campus of the University of Nairobi strained Moi's patience to breaking point, forcing him to back track on this pledge he had made some years back. The point to be

clear about, here is that detentions have become a policy to most leaders in the world especially when their leadership is at stake. Therefore, detentions can best be seen as a means of protecting power by those who wield it when there is a power struggle. In such a circumstances the excuse given for these illegal detentions is the need to protect 'public' interest. The courts have little or no say at all, nor are they willing to interfere in such cases. The reason being that those judges who are direct appointees of the president would lose favour with him and might even be detained themselves. B Kiwanuka's case[14] Uganda's former Chief Justice would suffice to illustrate this point. He was detained by former Dictator Idi Amin, because he questioned his authority when he granted a habeas corpus application against the president's wish. And in Matovu's case[15] the courts reluctance not to interfere with detention matters is clearly shown. The circimstances under which this case arose can be summerised as follows. In 1962, Uganda became a sovereign state under a written constitution. On February 22nd, 1966, Milton Obote who was then the prime Mininster unilaterally abrogated the constitution, favourably rejected the president from his official resident from his official residence and got a new constitution promulgated by the National Assembly. Clearly this was a revolution which was not much resisted since the president absconded from the country.

The applicant one Micheal Matovu who was subsequently under the new constitution brought an application to challenge the validity of his detention. Unfortunatly the court, presided over by the Nigerian Chief Justice Udo Udoma Suo matu, raised the question of the validity of the 1966, constitution. The Altorney-General on behalf of the government quite rightly challenged the competence of the court to go into this question. However, in a subsequent judgment the learned Chief Justice said:-

> "In our view since it is the duty of the judges of this court to do right to all manner of people. In accordance with the constitution of the sovereign state of Uganda as by law established, it must follow as the night follows the day, that it is an essential part of the duty of the judges of this court to satisfy themselves that the constitution of Uganda is established according to law and that it is legally valid."

What is startling in this proposition is that by the time this case came up, the 1966, Uganda constitution was already in operation, and by virtue of Article 127 (1) of the constitution all the judges were deemed to have been re-appointed under it. The judges accepted this situation, thus acquiescing in the validity of that constitution and hence could not have gone back to examine questions concerning that validity. Apparently they were carried away by their oaths of office - "to do right to all manner of people in accordance with the constitution as by law established." Thus losing sight of the fact that they had no competence

to consider the question of the validity or otherwise of the constitution under which they were infact performing their judicial functions. Whether or not a revolutionary government become a lawful government is surely a political question; and in the context of the case in hand, it is perhaps necessary to ask what Robert Martin has said namely, that:-

> The whole doctrine of 'political question' is sufficiently vague and that it would have been a simple matter to conclude that the validity of the 1966 Uganda constitution was in law a political question and thus beyond the court's competence."16

This then explains why in detention matters the powers of the executive override those of the judiciary, because the matters involved are purely political, and therefore, beyond the jurisdicitions and competence of the courts. This then is the reason why most if not all the habeas corpus applications are dismissed as we are likely to see in the course of this chapter. As it were, this one area where the courts have really failed in their task of executing justice. This point will, however, be pursued further in our next chapter that discusses defects in the law relating to habeas corpus in Kenya.

Shortly before and after August one, 1982, Kenyans witnessed a wave of change in the working system of the judiciary. The executive had simly taken over from the judiciary, and the judiciary had to obey without a question, for these were political matters in which

they lacked competence. Under such circumstances so many people were put in detention and without trial. Among these, the former Deputy Director of Intelligence, Mr. Mwangi Stephen Muriithi, followed by that of the former member of Parliament for Kitutu East Mr. George Moseti Anyona on May 31st, 1982; and again in October 1981, but on different charges. Events ocassioning Anyona's detention on May 31st, 1982, were a call for formation of a socialist party in opposition to the ruling party KANU.[17] Following this event Mrs. Esther Anyona saw Mr.Anyona's lawyer Mr. Hohn Khaminwa to discuss filing a habeas corpus application in the event of Mr. Anyona not being released overnight. By Monday morning Anyona was still in custody and Mr. Khaminwa proceeded with drawing up the grounds for habeas corpus application on behalf of Mrs. Anyona. In his submission, Mr. Khaminwa noted that Anyona had been in custody for more than 24 hours, after which the detention becomes illegal. To this, the Deputy Public Procecutor (DPP) Sharad Rao stated that he was not aware of any rule that said holding a person for more than 24 hours automatically made his custody illegal. He went on to say that all that the penal code and the constitution require is that the person should be produced in court as soon as reasonably practicable. Rao then disclosed that he had been instructed to inform the court that the subject (Anyona) "is held under a detention Order under the

preservation of Public Security Act[18] and Public Security Detained & Restricted Persons Regulations." Rao had with him the original of the detention order dated May 31st, and signed by the Minister of the State responsible for internal security and defence, the late Mr. J. S. Gichuru, which he said had been served on Anyona on May 31st at 7.P.M. The defence lawyer opposed the dismissal of the suit and said the court would have to satisfy itself that the detention order presented by the state does qualify as a detention order, hence onus of proof is on the state. Justice Sachdeva, however, dismissed the application. In October, 1981, Mr. Anyona again was picked up allegedly for being found in possession of leaflests urging a boycott of the Kenyatta Day celebrations. Mr. Khaminwa filed a habeas corpus application which this time resulted in Anyona being released on bail for health reasons. Subsequently the case was dismissed when the state withdrew the charges against him. Under the same circumstances Mr. Stephen Mwangi Muriithi,[19] Deputy Director of intelligence was sacked from this post to General Manager of the Uplands Bacon. Khaminwa, appearing for him, argued, in effect that the President had no power to retire civil servants from office. The application for habeas corpus was rejected. Muriithi not satisfied planned to file an appeal to overturn the High Court's ruling. Nothing was heard about him or this planned

petition until his life through Khaminwa, filed a habeas corpus application to secure the release of her husband who had been picked up by the Criminal Investigation Department (C.I.D.) on may 22nd, 1982. On the 28th May, the Principal State Counsel, Mr. Bernard Chunga, produced documents indicating that Mr. Muriithi had been detained. What exactly does this mean? The best explanation one would give about habeas corpus in detention matters is that the executive determines whose application should be granted or dismissed, and further, it is not a far fetched conclusion for one to arrive at that the judiciary has simply become a mere rubber stamp of the executive for it goes by the dictates of the executive. This has been shown beyond any reasonable doubt by the cases we have just considered above, and more so by other cases not necessarily from Kenya. For instance Mr. Matovu's case in Uganda etc.

Therefore, these cases have revealed more than anything else, that the cases which involve emergency powers indicate a reluctance on the part of the courts to use the remedy of habeas corpus to its full potential. Just like it was in Halliday, or Greene, and Liversidge,[20] In each case, accepted principles of constitutional and administrative law were available and applicable, yet the judges acted on policy grounds. What the court said in Eshugbayi Eleko's[21] case is worthy of mention. This case effectively established that habeas corpus can be

an effective remedy to control the exercise of discretionary powers, but that the policy considerations may often make the courts reluctant to act on the other hand, it is submitted that the cases which involve emergency powers indicate a reluctance on the part of the courts to use the remedy of habeas corpus to its full potential. Where executive action interferes with personal liberty, the courts should be prepared to scrutinize its legality carefully and check its exercise unless parliament has clearly granted the power. The use of habeas corpus in Eshugbayi Eloko's case thus demonstrates that the techniques for judicial interference are readily available if the courts want to use them. We could therefore say that it is the failure of the judiciary that has resulted in this abuse of the remedy of habeas corpus because they have allowed themselves to be pushed around by the Executive. But while we can afford to criticize the judiciary for this short-coming on their part we should bear in mind the close connection that there is between the executive and the judiciary; especially in appointments to office. Section 61 of the constitution provides for the appointment of the Chief Justice by the President who is the Chief Executive, and he also appoints the High Court Judges but with the help of the Judicial Service Commission. This way we can, in a way see why the judiciary should act the way it does. But we still maintain that strict separation of

powers and full autonomy of the judiciary should be adhered to if the judiciary were to be effective in its work.

One final point to make here is that, following Muriithi's and Anyona's detentions, John Khaminwa, their lawyer was also picked and detained. He was perhaps detained because he was defending the detained. The question to ask is whether this was sufficient ground for his detention. But the fact of the matter is that he was not ready to compromise with the interests of the ruling class which interest it has been established it is the one they talk about when they (executive) talk of "public interest" if anything, it was John Khaminwa who was serving the public interest in the true meaning of the word. He was defending his clients in matters of law which he did so effectively.

To conclude this chapter, we have seen that all the detention cases that have been mentioned in here seem to fall under a particular pattern. That, usually these cases arise when the political power of the ruling class is threatened, and secondly that it is enough that the state has reasonable cause or suspects that some one is a threat to public security to warrant such a person a detention without trial. Therefore concrete evidence is nothing to go by in such matters because most if not all are never taken to courts. This position

is not taken by Kenya alone, Britain too, under the Emergency Detention Act. of 1950, and under Regulations 18B of 1939 empowered the Home Secretary to detain anybody if he was of the belief that such persons were a threat to the security of the realm, and so many people were detained under such provisions like we have seen.

FOOTNOTES

1. Taylor: A treatise on the law of evidence. 17th Edition Vol. 1, page 79.
2. /1872/ 12 Cox. 177.
3. Chapter 5 of the constitution of Kenya.
4. 3. st. tr. 1.
5. Cornelius P. Colter: Constitutionalizing Emergency Powers, Vol. 5 (1953), Starnford University Law Review, page 382.
6. Cornelius P. Colter: Emergency Detention in War time the British Experience. Starnford Law Review, Vol. 64, page 1019, 1950.
7. S. 6 Defence of the Realm Act, 1914.
8. /1917/ A.C. 260 at 269.
9. /1942/ A. C. 206.
10. /1942/ A.C. 284.
11. /1954/ 1928 I.A.C. 459
12. /1931/ A.C. 662.

13. Cap 75 Laws of Kenya.

14. The Weekly Review Nairobi. 1975

15. /1966/ E.A. 514.

16. /1968/ I E.A.L. Rev. 66.

17. Kenya African National Union,

18. Chaptert 57 of the Laws of Kenya.

19. The Weekly Review, Nairobi, April to June, 1982.

20. Supra at page 4.

21. Supra at page 5.

CHAPTER FOUR

DEFECTS IN THE PRESENT LAW OF HABEAS CORPUS, AND PROSPECTS FOR REFORM

This chapter intends to discuss the defects in writ of habeas corpus and the reforms that could be introduced. This will be done by generally discussing the other prerogative remedies with the object of seeing what changes if any they have undergone. We shall discuss the defects in the writ of habeas corpus against this background- and if habeas corpus is by any way treated differently in the process of reforming the prerogative remedies. We shall proceed to answer the question why this should be so.

Judges and leading scholars in the common law world have registered their concern over the inadequacies of the present remedies of judicial review. The general defects of the present prerogative orders seem to stem from their being classified "prerogative" i.e. they were conceived as emanating from the king through the agency of the court of the King's Bench and, therefore could not issue as of right. We can identify three general defects peculiar to the prerogative orders.

1. They are discretionary and being discretionary, they may be refused an applicant even though he may have proved his case on the merits.

2. These remedies cannot be combined with an award of other relief; i.e. certiorari cannot be granted together with an injunction or declaration or award of damages.

3. Thirdly, the procedure for applying for them is more complicated than that of equitable remedies. As a general observation, it can be said that these common features of the remedies then militate against the citizen in his endeavour to realize his rights. All these are discretionary and the court may exercise its discretion to deny them to the citizen. The citizen has the burden of proving sufficient interest that will entitle him to relief failing which he will be without remedy. The defects of these remedies are both procedural and substantive and the citizen, in order to be awarded relief, must observe both the rules pertaining to procedure and the rules of law.

It is for these defects that reform of these writs was sought. Although these technicalities and inadequacies of the administrative law remedies have been recognized for a long time, it is only in this decade that postive attempts have been taken to reform them. Whatever these attempts have been, we shall confine ourselves to the technical subject of Administrative Law Remedial Reform. Moreover this analysis has been restricted to the Common Law Jurisdictions of Canada, Australia, New Zealand, and Britain. The shortage of literature on this subject

does not allow for a deeper analysis. It is important to note at this juncture that whatever reforms were introduced, these did not affect the writ of habeas corpus. We shall examine in the course of this chapter why this was so. Here under a number of these countries that have attempted these reforms.

Britain;

In 1969, the United Kingdom Law Commission was appointed under S.3(1)(e) of the Law Commissions Act, 1965, and its task was "to review the existing remedies of judicial control of administrative Acts and omissions with a view to evolving a similar and more effective procedure" Thus it was not concerned with the scope of these remedies.[1] The tentative proposals of the commission are contained in the working paper No. 40 of 1971.[2] The commission indicated that the "complexities and deficiencies of the various remedies" suggest that it might be desirable to provide a single form of procedure for reviewing acts and omissions of the administration. The commission came up with two proposals, a major proposal and an alternative approach. The major proposal is that there should be a single remedy and procedure for the judicial review of administrative action and orders.[3] The commission was of the view that this new remedy should be called "the application for review," and under it all

forms of relief available under the present orders, both prerogative and equitable, would be available. Under this new remedy the High Court would be empowered to grant any relief presently available for the judicial control of Administrative Action. Any difference would be a difference in terminology otherwise the effect of the new orders would be the same as those of the present. An applicant for a particular remedy would be granted an alternative order notwithstanding the fact that he had applied for a different or a wrong one. The commission also was of the view that it might be necessary to spell out the grounds for review under the remedy, but in order to counter the effect this will have in restricting the future development of the Law, it should be stated that the courts need not be too restrictive in their interpretation of the grounds and in particular they willneed to be encouraged to develop principles of judicial review. The commission extensively examined the various implications of the new remedy as to the time limits, the question of Locus standi, exclusion of judicial review, and the effects of the new remedy on statutory remedies. The law commission also recommended an alternative approach to reform. Under this approach the prerogative orders of certiorari, prohibition and mandamus would be retained but the procedure for applying them be assimilated to that of ordinary civil proceedings begun by a writ or originating summons.

Lastly mention should be made of the 1971 Report by"Justice.'[4] This report concerns itself with aspects of Administrative Process Impinging directly on individual interests and the law relating to judicial review. There are two main proposals of the report:

1. An administrative division of the High Court and,
2. A statutory code of "principles of good administration which principles are stipulated in the report.

The report states that besides the existing grounds of judicial review an applicant should be able to get relief on the basis of a breach of the "principles of good administration." The report also referred to the creation of a British Conseil d'etat, and a statute on constitutional bill of Rights, but it dismissed these as unsuitable to British circumstances.

Australia, Canada, Nova Scotia, and New Zealand have also tried to reform the prerogative remedies of Administrative Law. We will not go into the detail of the reforms carried out in these countries since our major concern is the reform on the writ of habeas corpus. It is therefore, assumed that the foregoing will suffice to give the background against which recommendations could be made on the writ of habeas corpus.

So far, the reforms that took place in Britain, Australia, Canada, Nova Scotia and New Zealand on the prerogative remedies did not affect the writ of habeas corpus. This arouses our curiousity, as to why not, and as such, should also form an important aspect of our discussion. Right through the history of habeas corpus as one of the prerogative writs, one notices a peculiar characteristic in this remedy that is distinct from all other prerogative orders. One of the most outstanding of these features is to be found in the fact that it has retained the name "writ" even when the other prerogative writs changed to orders. This was done under the Administration of Justice (miscellaneous provisions) Act of 1938 s.7 in U. K. It was due to its sacred nature that it could not be tampered with. In Kenya this designation of the old prerogative writs as orders has been provided in s.8 of the Law Reform Act.[5]

The sacred nature of the writ of habeas corpus is not enough that it should be left intact with not a change affecting it like the other prerogative remedies. There must be more to it than just this, and this is what we proceed to investigate. De Smith[6] said this about this writ, that the prerogative writ of habeas corpus ad subjiciendum is the most renowned contribution of the English Common Law to the protection of human liberty. This is true that habeas corpus is one of the remedies

which has really served its purpose as a constitutional guarantee of a fundamental right. This, for sure, is one of the reasons underlying the fact that habeas corpus has not been reformed for it has worked fairly well- and efficiency was its virtue; like when Dicey Dicey declared that the habeas corpus Acts were "for practical purposes worth a hundred constitutional articles guaranteeing individual liberty," he spoke for the mass of English constitutional lawyers in support of it.

Another very important aspect of the writ of habeas corpus concerns the issue of Locus standi and capacity. Unlike the other prerogative remedies, the writ of habeas corpus is the only one that does not concern itself with the question of locas standi and capacity. What this means is that, any person restrained may apply for the writ. There are no restrictions based on lack of capacity to sue. The technical reason for this is the prerogative nature of the writ. This was explained in a Canadian case where it was objected that a minor could not bring proceedings:

> "as the writ issues in the king's name, the status of the petitioner is immaterial, and his detention may be inquired into even if legal disabilities would prevent his taking an action for the enforcement of civil rights."7

It has for instance, never been suggested that mentally ill patients lack capacity to have the legality of their detention tested. It is often supposed that alien enemies lack Locus standi for the pruposes of habeas corpus, but, as we have seen in our chapter II of this text on nature and development of the writ, this is a misconception. The courts have, infact, entertained applications from alien enemy prisoners, although it is clear that if the applicant trully does fail within the class, his imprisonment will be justified. There is, then, no restriction of the remedy on the grounds of Locus standi, and any person restrained may apply for the writ.

Also the question when applications may be made should be considered. That if circumstances require, an application for habeas corpus may be made to a judge at any time of the day or night,[8] or on Sunday.[9] In such cases, there has usually been the fear that the prisoner is to be taken outside the jurisdiction.

It should also be noted that habeas corpus matters enjoy precedence over all other business.[10] This is designed to ensure a steady determination of the question, but in this context it should be noted that the rules of court require, in the ordinary

course, atleast eight days notice to parties concerned. This is the U.K.'s position. In Kenya this period is shortened to five days. S.27 of the constitution requires that a statement of the grounds for which one is detained should be given within five days of the detention.

These reasons have won the writ of habeas corpus the status it enjoys as a prerogative writ. It is for these reasons that no one has ever come up with an idea to reform it. Since it does not suffer from the complexities of the other prerogative orders, it has worked well to fulfil the purposes for which it was created, and perhaps ought to remain that way. But may be the only area where some kind of reform could be introduced in the remedy is in the procedure. Common to all the prerogative remedies is the technical nature of the procedure followed to have the particular remedy be granted. Like in the other prerogative remedies a reform to over come this defect is called for. But the extent to which this technicality is felt is one of degree, i.e. the difference is relative e.g. it could be in a country like Kenya this technicality would be more pronounced than it would be in a country like Britain, where the society is more complex and the citizenry is fairly aware of its legal rights. We may consider looking into the technicality of this procedure. This

procedure obtains in both Britain and Kenya alike, with only minor differences as to the names of the courts that have jurisdiction to entertain such matters. In Kenya it is the High Court that has this jurisdiction. S. 389 of the criminal procedure code. (See Chapter three of this thesis). In U.K. (and I refer to U.K. here because she is the basis of our law) an application for a writ of habeas corpus **ad subj**iciendum must be made to a Divisional Court of the Queen's Bench Division, or if no such court is sitting at the time, to a single judge of any Division of the High Court. In vacation, or at any other time when no judge is sitting in court, it may be made to a judge out of court (e.g. at his home). Applications for habeas corpus have priority over all other business. An application will normally be made ex parte, but it must be supported by an affidavit by the person restrained. If prima facie grounds are shown the court or judge may order that the writ shall issue forthwith to produce the prisoner, the writ must state before whom and when it is to be returnable. The return to the writ made by the person having custody of the prisoner, must specify the cause of detention. If the application is allowed, the prisoner is immediately discharged. An application for habeas corpus in respect of detention in a criminal cause may be granted by a single judge, but if he is to

refuse it, he is not entitled to do so but must instead direct that the application be heard by a Divisional Court of the Queen's Bench Division.

For many years it was thought that an unsuccessful applicant for habeas corpus could renew his application before each superior court and judge in turn. Eshugbayi Eleko v Government of Nigeria."[12] it was finally established that by virtue of S.14(2) of the administration of Justice Act 1900, no application for habeas corpus shall be made on the same grounds to the same court or judge, unless fresh evidence must be relevant and admissible. The reason being that as the judicature Act of 1873 had fused all the courts into one High Court, the order of one Divisional Court was the order of the whole court and that the Chancery Division did not constitute a separate entity for this purpose.

To avoid repetition we would not set out the procedure in Kenya, as there is not much difference with that of U.K. And the critique that is going to be given would apply to Kenya and elsewhere especially the Common Law countries. It could safety be said that the procedure is fairly long. May be, it could be made simpler so that everybody may have access to it. As it is today, the technical nature in the procedure of applying for this writ limits the number of

applicants. Thus, while its doors are wide open, as it does not require Locus standi and capacity, the procedure limits the number, in that not all but a few educated will have access to it. This is very crucial especially in Kenya, where the majority of population is illiterate.

In conclusion, it can be said that habeas corpus is a remedy well worth retaining and its services to all, regardless of race or nationality, is evident. But the major problems that courts have faced especially in terms of this writ, is when the executive interferes so that courts cannot make independent decisions. At such times especially during emergency, the executive has the bigger say, and they determine whose application for habeas corpus should be granted or dismissed. This is why hardly any application for habeas corpus are granted. These detainees are usually a threat to the ruling class. This then explains why the executive interferes so much. Chapter three of our text has discussed this at length, so reference could always be made to it for more clarification of the points.

It is not only in Kenya that such a situation prevails, many parts of Africa and the world at large are no less affected. eg. Uganda like we have seen in chapter three, in Matovu's case,[11] and B. Kiwanuka's case. And in Britain the war cases (1st & 2nd World) are of continuous importance to the law relating to

habeas corpus. Like, Liversidge v Anderson[12] and of course, the operation of Regulation 18B of 1939, which gave the Minister for Home Affairs so much power to detain anybody whom he thought was a threat to the realm. As we have also seen in our previous chapter, when the state detains, it is not entitled to give reasons as to why the person is detained. It is enough to say that they have detained that person for reasons of public interest. We feel that the term public interest is not clear, and perhaps could be given a definition. In chapter three, we also discussed the encumbrance caused to the judiciary by the interference by the executive especially in detention matters. Our concern here is that the judiciary cannot execute justice with this kind of interference. Perhaps, the only way the judiciary would be effective in its work, is if it was left alone to pass independent judgments regardless of the nature of the offence.

FOOTNOTES

1. The Law Commission, working paper no. 40, Remedies in Administrative Law, 11th October, 1971, 1.
2. Ibid at page 3.
3. Ibid.
4. Administration under Law. A Report by Justice, 1971.
5. Cap 26 Law of Kenya.
6. S.A. de Smith: erd Edition, Judicial Review of Administrative Action pages 507 - 513. (London, Stevens, & Sons Ltd., 1973).
7. Re A.B. 1905 0 c.c.c. 390 at 391.
8. R v Secretary of State for Home Affairs ex parte Soblem /1952/ 3 All E.R. 373. where Mocatta J. said that he had made an order for the issue of the writ "in the very early hours of the morning".
9. Re N /1967/ 1 All E.R. 161, Stamp J. granted an interim injunction on a Sunday, taking as authority the idea that habeas corpus could be issued at any time.

10. Supreme Court Practice /1973/, 784.
11. /1966/ E.A. 514.
12. /1942/ A.C. 206.