THE UNIVERSITY OF ZAMBIA

SCHOOL OF LAW

I recommend that the Obligatory Essay

Prepared under my supervision by

RICHARD DUMISANI NGULUBE

entitled

THE EFFECTIVENESS OF THE WRIT OF HABEAS CORPUS AD
SUBJICIENDUM IN SECURING THE PERSONAL LIBERTY OF
DETAINED PERSONS IN ZAMBIA

be accepted for examination. I have checked it carefully and I am
satisfied that it fulfills the requirements relating to format as laid
down in the regulations governing Obligatory Essays.

9th May 2000

Date

MR. LEONARD KALINDE

Supervisor
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DEDICATION

I dedicate this piece of work to the following people.

First and foremost, Mateyo Mkanda who died in March, 2000 at the age of only 13. Mateyo, you were a good and amazing boy to hang around with. Only God knows what you could have become had you lived to a ripe age.

Secondly, Uncle Harry Masaninga who died in April 2000. Uncle I still remember all the advise and encouragement you gave me and up to now I can’t believe that you are gone. May God receive you with both hands. You will always be in mind.

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My studies at the University of Zambia for Bachelor of Laws Degree would not have been possible without the support and encouragement from the following members of my family.

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In conclusion I would like to record my appreciation to my Supervisor, Mr. Leonard Kalinde for his patience and indulgence. May God bless you in your endeavours.
PREFACE

Since independence, Zambia as a country has witnessed widespread arrests and detentions of its citizens. The situation in the country becomes grave when a state of emergency is in force. Consequently, detentions have become an ongoing feature of Zambia's constitutional landscape. As expected, this has had far reaching consequences on the right to personal Liberty. Interestingly, most of the victims have been the so-called political detainees, that is, persons charged with political offences such as treason.

The majority of detentions have been challenged in court, some successfully and others unsuccessfully. These events and the legal proceedings to which they give rise have compelled me to embark on a research that would focus on an effective and speedy means that detainees can employ to counter unlawful arrests and detentions. The writ of habeas corpus ad subjiciendum, being the highest remedy in law for securing personal liberty was the obvious choice. The essay therefore seeks to investigate the effectiveness of the writ of habeas corpus in securing the personal liberty of detainees in Zambia.

This essay significantly attempts to relate the theoretical to the practical aspect by analysing factual cases. I hope you will find it as enjoyable as I did when writing it.
INTRODUCTION

The quest for the protection of personal liberty cannot be over emphasised as its curtailment inevitably leads to the end of almost all other constitutionally guaranteed rights and freedoms.

This essay seeks to investigate the effectiveness of the writ of habeas corpus ad subjiciendum in protecting the personal liberty of detained persons in Zambia. It is the contention of this essay that the writ of habeas corpus is the highest remedy in law for the protection of personal liberty, which Blackstone aptly described as "the most celebrated writ in the English Law."\(^1\)

What then is scope of the writ of habeas corpus and does it issue to a treason accused who is challenging the sufficiency of the evidence on which the charge is premised? It is the purpose of this essay to inquire into and to state in broad outline the answers to these questions. Woven through this essay, will be found the answer as to why a detainee whose initial arrest and detention is unlawful but is currently held on a valid legal order is not entitled to be discharged on habeas corpus. Further, the answer will be found as to the question why the privilege of the writ of habeas corpus can not be suspended in Zambia during a state of emergency as it is done in other Jurisdictions such as England and the United States of America.

\(^1\) Blackstone, Commentaries, 129.
CHAPTER 1

HABEAS CORPUS AD SUBJICIENDUM

AN HISTORICAL OVERVIEW

INTRODUCTION

This chapter represents an attempt to trace the historical development of the writ of habeas Corpus in England. One is very often sent to the early reports to explain the Law on any given point and inevitably, bits of legal history are found to be considerably useful. The purpose of this chapter is merely to trace the broad lines of development through the medieval period to the Seventeenth Century when the writ took its modern form.

In the discussion which follows, emphasis has been placed on the use of habeas Corpus to combat executive committals in the Sixteenth and Seventeenth Centuries. It will be appreciated much later in the course of the essay that the lessons of this period continue to have great constitutional significance to the present day.

1.1 THE ORIGINS OF THE GREAT WRIT

The origin of the writ of habeas corpus is one that appears to be characterised by a certain degree of uncertainty. In tracing its origins, legal scholars such as Edward Jenkins suggested that the writ of habeas corpus was originally intended
not to get people out of prison, but to put them in it. Other legal scholars have perpetuated the myth that the writ of habeas corpus originated and developed primarily to protect the English subject from illegal imprisonment. However, the popular view held by the majority of legal scholars is that the writ originally developed as a means to secure the appearance of unwilling defendant before a court. It is on this premise, that the origins of the writ is traced to the era when the Normans arrived in England in 1066 and found no Central Court System. The absence of a Central administration was discordant with the notion that Justice flowed from the king. To implement this notion, William the conqueror introduced the Curia regis (Kings Council) and the royal missi (itinerant justices).

For Williams centralisation of the court system to be effective, uniform procedures, including a standard form of precept to compel a defendant's appearance, were necessary.

It is for this reason that by the early part of the thirteenth century, the words 'habeas corpus' were a familiar formula in the language of Civil procedure. The words simply represented a command, issued as a means or interlocutory process to have the defendant to an action brought physically before the court.

The primary step in Civil procedure was a writ of summons. If the defendant

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failed to answer it, the sheriff was directed to put him on bail and sureties so that
he should appear before the justice on a specified day. If the defendant
defaulted on the third process, the sheriff was thus made responsible for the
production of the defendant’s body before the court. This was done through the
‘writ of habeas corpus ad respondendum’ meaning ‘have the body to
answer’.

The writ of habeas corpus ad respondendum was firmly established by
1230. There is also some indication that habeas corpus was also employed in
criminal matters from an early date. In the case of Baldwin Tyrel, the writ was
directed to the sheriff to produce tyrel before the court to answer the charge of
‘denouncing’ the king’s death, levied against him by Ranulf of Deugnsby and
Gilbert of Girmunville.

Subsequently, there developed the ‘Capias ita habeas Corpus; meaning ‘arrest
and in this way have the body’.

This writ instructed the sheriff to have the body
of the defendant before the Justices and also provided the sheriff with directions
on how to accomplish the task, that is, by arresting him.

This was often issued
were distraint could hardly compel the appearance of a reluctant and
propertyless defendant. Perhaps, it was on this basis that Jenkins concluded
that, ‘whatever may have been its ultimate use, the writ of habeas corpus was
originally intended not to get people out of prison, but to put them in it’.

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7 W.F. Duker, Supra note 2, p.17.
8 Ibid p.18.
9 Ibid p.19.
10 Edward Jenks, Supra note 2, p.64, 65.
it'. However, it has been argued that the arrest effected under the capias was not originally intended to put defendants in prison, but it merely required the sheriff to bring him into court because the law considers that justice can not be done between the parties in the absence of either of them.\(^\text{11}\)

During the fourteenth century, the purpose of the writ of habeas corpus remained unchanged. However, in the year of Edward III for the year 1340, one discovers a very early example of the combined use of the writ of habeas corpus and the writ of certiorari. The case concerned a recognisance on the statute of merchants made to the plaintiff by three persons.\(^\text{12}\) The plaintiff sued for a certification, and the sheriff was directed to arrest the three. Although the sheriff had to return that two of the defendants could not be found, one was arrested and imprisoned. The imprisoned defendant petitioned for a writ of certiorari to bring the matter into chancery, alleging that the plaintiff had executed a release to him. In response to the petition, a writ of habeas corpus was issued by chancery, directed to the sheriff, commanding him to have the body of the defendant brought before the justices on a certain day, "If he [the defendant] be detained for that reason and no other". After submitting his plea, the defendant was released to sureties to await trial. It can be seen from the foregoing, that the purpose of the writ issued in this case was similar to that of the habeas corpus

\(^{10}\) Edward Jenks, Supra note 2, p.64, 65.

\(^{11}\) J.C. Fox, 'Imprisonment' 39 Law Q. Rev 465, 54.

ad respondendum in that it commanded the sheriff "to have the body "of the defendant. But there were two critical differences; first, the proceeding was instituted on the petition of the prisoner and secondly, it was implicit in the court's action that it intended to examine the cause of the imprisonment. The court thus, assumed a right to inquire in to the nature of an incarceration, and the inference is inescapable that it intended, on the basis of its findings, to do what it deemed just.

By the middle of the fourteenth century, the use of habeas corpus in response to petitions on behalf of prisoners that they might be presented before the court was sufficiently common to have become a distinct form of habeas corpus. This was called habeas corpus cum causa, or simply, corpus cum causa.\textsuperscript{13} The writ ordered the sheriff to have the body of the prisoner brought before the court along with the cause of his arrest and detention. This is the writ which subsequently became known as Habeas corpus ad subjiciendum.\textsuperscript{14} Its significance is that it presupposed a detention. Although the writ of habeas corpus demanding the presence of a prisoner had issued to sheriffs as early as the thirteenth century, whether the defendant was incarcerated had been irrelevant before the origin of the cum causa form of habeas corpus. The use of the new writ of corpus cum causa is illustrated by cases that emerged in the fourteenth century. The writ for exampe, was directed to the mayor of London

\textsuperscript{13} COHEN "MODERN WRIT", 18 Can. B. Rev. 10, 13.
\textsuperscript{14} R.J. Sharpe, Supra 2 p.2.
ordering him to send one Peter Gracyan of Lombard, then imprisoned at Newgate, before the council at Westminster together with "the cause of his taking and detaining". The writ was returned stating Peter had been imprisoned in August, 1382 in a plea of account between himself and Luke Bragadyn, Merchant of Venice, for default on a debt, and that he was therefore detained, 'in accordance with the custom of the City and Law of Merchant'.

From the mid-fourteenth century until mid-sixteenth century, the same judicial writ of corpus cum causa was employed in cases that arose from the jurisdictional conflicts between the superior courts in their attempt to protect their jurisdiction and local courts. For example, the equity powers of the chancellor were used in 1397, when the writ of corpus cum causa was directed from chancery to the mayor and alderman of London requiring them to bring the body of John Walpole, who was being held prisoner for speaking dangerous words. Although to a lesser extent than chancery, the courts of common law also begun to use the corpus cum causa to extend their jurisdiction to bringing the body of the petitioner, as well as the record of the case before them. In 1406, the barons of the exchequer issued a writ of corpus cum causa to the sheriff of London directing him to have the body of one John Rede brought before them. The sheriff's return stated that the Said Rede had been arrested and committed to prison for certain causes before the mayor. The barons then issued a writ of

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15 Y.B. Trim. 24 Edw. 3, L.27, p1.3 (1351).
certiorari ordering the mayor to certify the cause of John Rede's taking, arrest and commitment.\textsuperscript{17} Subsequently, legislation was passed to enhance the right of Lower court magistrates to refuse to recognise corpus cum causa and certiorari. The aim was to correct the abuse of judicial machinery by defendants whose action for removal would result in the intolerable delay of justice, at the great expenses of the plaintiffs.\textsuperscript{18} The writ was in turn used by superior Common Law Courts to counter the encroaching jurisdiction of the privy council and equity. The first indications of the Common Law Courts attempt to question the authority of the privy council appeared in cases holding that in the absence of cause shown, a person held at the command of individual council members would be released. For example in Helyards case,\textsuperscript{19} a return stating only that the prisoner was committed 'by order of Francis Malsingham' principal military Secretary of his majesty's household, but showing no cause, was held insufficient by common pleas.

1.2 THE USE OF HABEAS CORPUS TO TEST THE VALIDITY OF EXECUTIVE COMMITTALS

Perhaps, the most significant development in the Law of habeas corpus came with its use to test the validity of executive committals. By the time of Elizabeth's

\begin{footnotesize}
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\item \textsuperscript{17} (1406) Calendar (1381 - 1412), P.275.
\item \textsuperscript{18} R.J, Sharpe, Supra note 1 p.5.
\item \textsuperscript{19} 74 Eng. Rep. 482 - 83.
\end{itemize}
\end{footnotesize}
reign, it was becoming clear that the claim to a power to commit for reasons of state could be tested on habeas corpus. Thus, there were numerous instances of prisoners of state being discharged or bailed on habeas corpus\textsuperscript{20} and by 1592, the practice was sufficiently troublesome to the privy council which performed both judicial and executive functions, to warrant a request that the judges state the principles upon which such prisoners were to be delivered. The judges resolved as follows:-

If any person be committed by her majesties Commandment from her person, or by order from the council - board, or if any one or two of her council commit one for high treason such persons so in the case before committed may not be delivered by any of her courts without due tryal by the law, and judgment of acquittal, had.

Nevertheless the judges may award the Queens writs bringing the bodies of such persons before them, and if upon return thereof the causes of their commitment be certified to the judges as it ought to be, then the judges in the cases before ought not to deliver him, but to remand the prisoner to the place from whence he came.

Which cannot conveniently be done unless notice of the cause in generality or else especially be given to the keeper or Gaoler that shall have custody of such prisoner."\textsuperscript{21}

The resolution thus specifically sanctioned commitments by special order of the Queen or the entire privy council or by members thereof in cases of high treason. The judges, however, asserted power to issue the writ of habeas corpus in all cases and demanded that a specific return to the writ be made in all but the special instances stated, in which a general return would suffice. The assumption underlying the resolution was that legal charges would be brought

\textsuperscript{20} Peter (1586) 3 Leon. 194.
\textsuperscript{21} 123 Eng. rep. 482 - 83.
against the prisoners and it was perhaps, for this reason that the judges said that they should not be released on habeas corpus without trial.\textsuperscript{22}

The rules of the resolution and supporting case law were strictly interpreted and adhered to by the courts of common law throughout the early seventeenth century. Therefore, in 1627, when the case of the \textit{Five Knights (Darnels Case)}\textsuperscript{23} was presented before the kings bench, a return stating that the prisoner was held "by the special command of his majesty" would seem not to have been valid. The defendants had been imprisoned for refusing to submit to the king's forced loan. When they applied for the writ, the warden then returned that they had been committed "by Special Command of his majesty". Counsel for the defendants avered that the writ expressed no cause and as such the defendants should be bailed. However, the court refused to bail the prisoners.

A number of factors are said to have influenced the outcome of the above case. First, the court seem to have been giving effect to the resolution of 1592 that the cause could be stated in general. Second, the institutional principle at that time was that all justice flowed from the king, the court merely dispensed justice and lastly political pressures and intimidation may have tipped the scale in king Charles favour.\textsuperscript{24}

\textsuperscript{22} R.J, Sharpe, Supra note 2. p.8.
\textsuperscript{23} 3 State trials 1 (1627).
\textsuperscript{24} W.F, DUKER, Supra note 2 p.47.
The above underscores the point that the writ was not effective when called upon to inquire into the legality of imprisonment made by order of the crown or its council and without cause or for political reasons. The judges were unable or unwilling to extend the application for the writ, or perchance to enforce it when the crown ruled otherwise. This inability was made worse by a sentiment in parliament that the devising of new writs was a legislative and not a judicial matter.\textsuperscript{25}

Subsequently, parliament undertook to remedy the situation. To this effect, it passed the petition of right in 1628, which abolished the king's power to imprison by special command without showing cause. Thus, clause eight, the operative part, simply provided "that no freeman in any such manner as is before mentioned be imprisoned or detained". There is some doubt about the formal legal nature of the petition of right. The proponents of the petition insisted that they were merely seeking to enforce the ancient Laws of England. Although the petition of right was frequently flouted,\textsuperscript{26} the reports from this period do yield cases of habeas corpus being used with effect even in the case of committal by the king or council. For example, there was the Chambers case,\textsuperscript{27} which came before the Kings bench. Chambers, a London merchant, refused to submit to

\textsuperscript{25} Ibid 48.
\textsuperscript{26} Ibid 45.
\textsuperscript{27} 79 Eng. Rep 717 (K.B. 1629).
the payment of tonnage and poundage. For his contempt he was summoned to appear before the privy council. Chambers petitioned for and was granted a writ of habeas corpus out of the kings bench. The return to the writ stated only that he was committed to prison by the lords of the council 'for insolent behaviour and words spoken at the council table. The court held the return insufficient and let chambers to bail. Chambers was however, afterwards charged in the star chambers where he was fined. In default, he was committed to the fleet, from which he was again brought before the kings bench upon a writ of habeas corpus. Despite this, the chambers case affirmed that the writ of habeas corpus had assumed a new role. The questioning of the validity of commitments, previously an incidental effect of the writ, now became a major object.

The chambers case, however pointed up to a potential obstacle in the path of the subject's liberty. The court of star chamber could still be employed by the executive branch to execute its will.\(^{28}\) To remove this obstacle, the legislature enacted the Habeas Corpus Act 1640. This Act abolished the star chamber and specifically provided that anyone imprisoned by order of the king or Council should have habeas corpus and be brought before the court without delay with the cause of imprisonment shown. The judges were required to pronounce upon the legality of detention within three days time and bail, discharge or remand the

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\(^{28}\) W.F, Duker, Supra note 2 p.47.
prisoner accordingly. A judge who failed to act in compliance with the statute was made subject to heavy fines and liable in damages to the party aggrieved.

The Habeas Corpus Act of 1640 was however not completely effective as made evident by the following defects. First, the courts were not willing to question committals by Parliament. For example, in 1679, Parliament resolved to impeach Danby of high treason and other high crimes and misdemeanours. Danby was then confined on a general charge of treason untried. After three years of confinement, Danby sought a writ of habeas corpus in the Kings Bench in order to be bailed. The judges agreed with many of Danby's arguments but could offer him only compassion for he had been:

"Imprisoned by a higher hand... where they had no power to intermeddle." 29

The second defect, was that the writ of habeas corpus could not be issued when the court was out of term. For example, Francis Jenkes was committed by the lords of the council for attempting "in a most seditious and mutinous manner' to stir those listening to his speech to go to the lord-mayor and urge him to call a new parliament. 30 When he applied for the writ, lord C.J. Ramsford refused to entertain the writ because it was out of term. Another defect was that the Act allowed the judges almost absolute discretion in the setting of bail. 31 This flaw was however mended in 1688 by the Bill of Rights.

29 H Cobbett, Debates, pp. 1067 - 69.
31 31 Car. 21, C. 2, sect. 3 (1679).
While the Bill of Rights was being debated, Mr. Hapmden brought the following message to Parliament:

"I am commanded by the King to acquaint the House, that several persons about the town, in Cabals, conspire against the Government for the interest of King James: some the King has caused to be apprehended and secured, and thinks he may see cause to do so by others. If these should be set at liberty, it is apprehended we shall be wanting to our own safety, the Government and people. The King is not willing to do anything but what he may be warranted by law; therefore, if these persons deliver themselves by Habeas Corpus, there may arise a difficulty. Excessive Bail you have complained of. If men hope to carry their great design on, they will not be unwilling to forfeit their Bail. The King asks your advise... I forgot to tell you, some are committed on suspicion of Treason only".32

In effect, the monarch was requesting the suspension of the Habeas Corpus Act. The principle underlying the division of those for and against acceding to his request was simply that those who favoured suspension saw those who threatened the government as the greater evil, those opposed to the suspension feared more the precedent that would be established and suggested, as an alternative to suspension, that greater security be taken to ensure the appearance of those let to bail.33 Those who found the existing laws somehow incompatible with a state of emergency carried the day. A three-month suspension was thus imposed.

Efforts were subsequently made in Parliament to remedy the aforementioned defects by legislation and after several abortive bills, the Habeas Corpus Act of 1679 was finally passed. This Act made the writ of Habeas Corpus ad

33  Ibid pp. 131 - 32.
Subjiciendum, the most effective weapon yet devised for the protection of the liberty of the subject, by providing both for speedy judicial inquiry into the justice of any imprisonment on a criminal charge and for a speedy trial of prisoners remanded to await trial.\textsuperscript{34}

Although the Habeas Corpus Act of 1679 did not solve all the difficulties which were known to exist, the Act accomplished reforms in two broad areas. First, it went some way to ensure that prisoners entitled to relief would not be thwarted by procedural inadequacy. The Act tried to ensure the availability of the writ at any time of the year\textsuperscript{35} from any courts or judges at Westminster, that the gaoler would obey the writ immediately,\textsuperscript{36} that the judges would come to a speedy determination,\textsuperscript{37} and that if released, the prisoner would not be thrown back into prison\textsuperscript{38}. There was also another provision which required the gaoler to provide the prisoner with a copy of the warrant so that the grounds for detention would be known to permit an assessment of whether the writ should be applied for in the first place.\textsuperscript{39} Second, it contained provisions which were designed to ensure that even prisoners not entitled to immediate release would be brought to trial with as little delay as possible.\textsuperscript{40} The Habeas Corpus Act of 1679 marks the

\textsuperscript{34} Section 2 of the Habeas Corpus Act, 1679.
\textsuperscript{35} Ibid section 9.
\textsuperscript{36} Ibid Section 1.
\textsuperscript{37} Ibid Section 2.
\textsuperscript{38} Ibid Section 5.
\textsuperscript{39} Ibid section 4.
\textsuperscript{40} Ibid Section 6, 17, 18.
point at which the writ took its place as the highest remedy in law for the protection of individual liberty.
CHAPTER 2

THE ROLE OF THE JUDICIARY IN PROTECTING THE PERSONAL LIBERTY OF DETAINEES

2.1 THE BILL OF RIGHTS AND PERSONAL LIBERTY

Zambia attained independence from Britain in 1964 and inherited a constitution with a justiciable bill of rights tailored on the universal declaration of human rights and the European Convention of Human Rights.\textsuperscript{41} Part three of the constitution provides the machinery for the protection of fundamental rights and freedoms of the individual. It is important to note that part three of the constitution possesses an indispensable character as the only part of the constitution which the legislature cannot easily amend. Any amendments to part three of the constitution can only be effected through a referendum.\textsuperscript{42} Therefore, the provisions of part three have a reasonable guarantee of remaining on the statute book without being tampered with by overzealous politicians.

Article 13 of the constitution specifically relates to the protection of the right to personal liberty. It clearly circumscribes instances in which the right to personal liberty may be encroached upon. Further, it stipulates conditions that must be


\textsuperscript{42} Article 79 (3) of the Constitution, Chapter 1 of the Laws of Zambia.
satisfied to constitute a legally valid detention from the time an individual is
arrested and taken to court. For purposes of brevity and relevance, the
provisions of article 13 can be summarised as follows:-

(i) That no person should be imprisoned unless it is upon reasonable
    suspicion of his having committed or being about to commit a criminal
    offence under a law in force in Zambia.

(ii) Where a person is imprisoned upon reasonable suspicion of his having
    committed a criminal offence, he must be brought before a court without
    due delay.

(iii) When brought before a court, he must tried within a reasonable time.

(iv) If he is tried within a reasonable time, he shall released either
    unconditionally or upon reasonable conditions.

The courts have interpreted these provisions as serving a double purpose.
First, to promote speedy trial and secondly, to induce the individual’s release,
free from any conditions or upon reasonable conditions.43

The need to protect and preserve personal liberty in any civilised society appears
to stem from the recognition that not only do freedom of thought, speech and
religion suffer a diminished meaning for the individual illegally detained, but

43 A. Harding and J. Hatchard, Supra note 1. p.288.
denial of the right to physical security may, and usually does entail the
destruction of all rights in succession or simultaneously and to the extinction of
life itself. 44 Thus, Blackstone observed:

"Of great importance to the public is the preservation of this personal
liberty, for once it were left in the power of any, the highest magistrate to
imprison arbitrary whenever he or his officers thought proper, as in France
it is daily practiced by the crown, there would soon be an end of all other
rights and immunities. Some have thought that unjust attack, even upon
life or property, at the arbitrary will of the magistrate, are less dangerous
to the Commonwealth than such as are made upon the personal liberty of
the subject..." 45

The above proposition underscores the point that arbitrary encroachment on the
right to personal liberty renders the other rights and freedoms almost
meaningless. This is evident from the fact that when an individual is confined, he
cannot easily and readily exercise some of the rights and freedoms guaranteed
by the constitution. Among the rights and freedoms which are adversely affected
include the freedom of movement, expression, association and assembly. It is
instructive to note here, that although the detainee's right to life is not directly
interfered with, the conditions that obtain in most prisons puts it in jeopardy. For
example, in the aftermath of the 1997 failed coup, there was evidence that two of
the detainees Rajan Mahtani and Dean Mung'omba had contracted tuberculosis
while in remand prison. 46

46 The inter African Network fro Human Rights and Development (Afronet) Zambia Human Rights
Reports, 1998, pp. 11 - 12.
Whilst the constitution provides for derogations from the right to personal liberty in clearly enunciated circumstances, the law also attempts to define the time limit within which a person who is arrested is expected to be brought before the court. Under the ordinary law, when a person is arrested with a warrant, he must be taken to court without unnecessary delay.\textsuperscript{47} As regards offences which do not require a warrant, a person must be taken to court within twenty four hours. Additionally, when a state of public emergency is in force, article 26 of the constitution provides the following important safeguards to ensure that personal liberty is protected and preserved. First, a detainee is entitled to be furnished, as soon as is reasonably practicable and in any case not more than fourteen days after the commencement of his detention or restriction, specifying in detail the grounds upon which he is restricted or detained. Secondly, within fourteen days of the commencement of his restriction or detention, a notification must be published in the Gazette giving particulars of the place of detention and the provision of the law under which the restriction or detention is authorised. Thirdly, the detention or restriction must be reviewed by an independent and impartial tribunal.Fourthly, detainees must be given reasonable facilities to consult a legal representative of their own choice. Fifthly, at the hearing of their cases by a tribunal, detainees are permitted to appear in person or by a legal representative of their own choice.  

\textsuperscript{47} Section 108 of the Criminal Procedure Code Act, Chapter 88 of the Laws of Zambia.
It is evident from the above that, while the constitution spells out the circumstances in which derogations are permissible from the right to personal liberty, it also provides important conditions and safeguards that must satisfied to ensure that the detaining authorities do not assume carte blanche powers to detain arbitrary and wantonly.

2.2 THE JUDICIARY AND PERSONAL LIBERTY

Personal liberty and individual freedoms grows and expands, but slowly fighting the frontal assaults and rear guard actions of the vested interests of the authorities.\textsuperscript{48} While article 13 of the constitution is quite clear on the question of personal liberty, it is observed more in breach than in conformity. This is evident by the number of suspects detained in police custody for weeks or months without appearing in court. It is against this background that the Law Association of Zambia through its chairperson of the human Rights Committee wrote a letter to the Inspector General of Police to complain about detentions of persons in police cells for several days pending investigations without charges and without bringing them to Court of Law.\textsuperscript{49}

The violation of personal liberty becomes more pronounced when the president declares a State of Emergency under which the states acquires additional

\textsuperscript{48} L. Kutner Supra note 3 p.47.
\textsuperscript{49} Afronet, Supra note 3. p.11.
powers to combat some grave danger. In this respect, Lord Arkinson in _R _v
_Halliday, ex Parte Zadig_ observed;

> "However, precious the personal liberty of the subject may be, there is
something for which it may well be, to some extent, sacrificed by legal
enactment, namely national success in the war or escape from national
plunder or enslavement." 50

The state of emergency has been frequently invoked to the extent that it has
become an on going feature of the country’s constitutional landscape. It was
and still is the most contentious features of the first, second and third republics.
Since attaining independence in 1964, the State of emergency was finally lifted
after the movement for Multi Party Democracy (MMD) government came into
power in 1991. However since then, three States of emergency have been
declared. The first one was declared in 1993 and this was followed by the
detention of the United National Independence Party (UNIP) leaders in
connection with the zero option plan. The second one was declared in 1996
which resulted in the detention of UNIP leaders in connection with a clandestine
movement called the ‘Black mamba’. The third and more recent was declared in
1997, which saw a group of soldiers and politicians detained in the aftermath of a
failed coup.

Despite the wording of article 13 of the constitution, there is always a conflict
between personal liberty and the state violating it either deliberately or
accidentally in its endeavour to enforce laws. It must be stressed that the

50 (1971) A.C.269 at 271.
constitution is not an adequate protection of civil liberties. Constitutional guarantees are in any case, a mere guide to statements of law to which adherence can be assured only when there are institutionalised means for compelling the government to respect it. In this respect, the role of the judiciary in protecting the personal liberty of detained persons cannot be doubted. Thus, Bhaqwati J. in *Icchu Devi Choraria v Union of India*, observed:

"The court has always regarded personal liberty as the most precious possession of mankind and refused to tolerate illegal detention, regardless of the social cost involved in the release of a possible renegade. This is an area where the court has been most strict and scrupulous in ensuring observance with requirement of law and even where a requirement of the law is breached in the slightest measure, the court has not hesitated to strike down the order of detention."

The above proposition vindicates that in fact, the judiciary must always act as a sentinel and sanctuary of liberty where any person whose personal liberty has been violated can resort to for redress as promptly as possible. In this light article 28 of the constitution allows any person who alleges that his fundamental rights and freedoms are being or are likely to be infringed to apply to the High Court for redress. If the applicant is successful, the court may grant several kinds of relief, depending on the facts of each case.

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51 (1980) 4 SCC at 538.
CHAPTER 3

THE SCOPE OF JUDICIAL INQUIRY IN HABEAS CORPUS
PROCEEDINGS

INTRODUCTION

The purpose of this chapter is to provide a comprehensive view of the scope of judicial review which is available on habeas corpus. This chapter is divided into four parts.

The first part defines habeas corpus and its form of review. The second deals broadly with questions of law. This examines the concepts of jurisdictional review and patent error as a basis for review on habeas corpus. It also deals with the concept of 'reasonable Suspicion' as provided by Article 13 of the Constitution of Zambia. This attempts to determine whether non-compliance with the 'reasonable suspicion' requirement in the arrest and detention of suspects may warrant the issuance of the writ of habeas corpus. This part also attempts to answer the question as to whether the writ of habeas corpus is available to a person charged with treason.

The third part discusses problems relating to the determination of issues of fact. At the core of the supposed difficult in dealing with questions of fact on habeas corpus is the common law rule against controverting the facts in the return. The
fourth discusses the use of habeas corpus in a state of emergency where the liberty of the subject is restrained on account of an order by the executive branch of government. However, due to the voluminous nature of this part, it will be accorded its own separate chapter.

3.1 DEFINITION OF HABEAS CORPUS AND THE FORM OF REVIEW

The meaning of habeas corpus can better be understood if considered from the perspective of the administrative law doctrine of judicial review. Judicial review broadly refers to the jurisdiction of courts to keep public authorities within the legal limits of official power.52 This doctrine rests on the premise that no government official in either the executive or legislative branch may take action against any Citizen Civil or Criminal except pursuant to a specific law.

The traditional guiding principle of review in English law, is the concept of ultra vires. This means that the recipient of a statutory power can do only those things that are authorised by the statute to be done. If the court finds an act not to be so authorised, it will declare the act to be void and of no legal effect.

The successful applicant in judicial review proceedings is entitled to number of remedies. One such remedy is the writ of Habeas Corpus ad Subjiciendum. For

a detailed meaning of the term, resort may be had to Halsbury's law of England, 3rd edition which reads;

"The writ of habeas corpus ad subjiciendum, which is commonly known as the writ of habeas corpus, is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from unlawful or unjustifiable detention, whether in prison or private custody. It is a prerogative writ by which the Queen has a right to inquire into the causes for which any of her subjects are deprived of their liberty. By it, the High court and the Judges of that court, at the instance of a subject aggrieved, command the production of that subject and inquire into the cause of his imprisonment. If there is no legal justification for the detention, the party is ordered to be released".\(^{53}\)

It is evident from the above proposition, that the function of the writ of habeas corpus is essentially two fold. First, it can be used to demand the production of the subject so detained, and secondly, it provides for a speedy inquiry into the cause of a detention. This therefore suggests that the writ of habeas corpus is only available to a person who is in actual detention.

The law of habeas corpus in Zambia is governed by the Habeas Corpus Act of 1679 which is applicable by virtue of section 2(c) of the English law (extent of application Act), chapter 4 of the Laws of Zambia.

The form of review available on habeas corpus may briefly be described as follows: The writ is directed to the gaoler or person having custody or control of the applicant. It requires that person to return to the court, on the day specified, the body of the applicant and the cause of his detention. If the return discloses

a lawful cause, the prisoner is remanded, if the cause is insufficient or unlawful, the prisoner is released. The matter directly at issue is simply the reason given by the party who is exercising restraint over the applicant. The modern practice is to have the application determined on affidavits filed by both the applicant and the detaining authority.

3.2 CONSIDERATION OF QUESTIONS OF LAW

3.2.1 JURISDICTIONAL REVIEW

The first branch of review on habeas corpus considered as a question of law is based on the concept of jurisdictional review. Here, the basis of review is that the impugned proceedings were taken without jurisdiction. For a concise meaning of the term 'Jurisdiction', resort may be had to that given by Ngulube C.J. in Godfrey Miyanda v The High Court:

"The term jurisdiction should first be understood. In one sense, it is the authority which a court has to decide matters that are litigated before it; in another sense, it is the authority which a court has to take cognizance of matters presented in a formal way for its decision. The limits of authority of each of the courts in Zambia are stated in the appropriate legislation."

It is evident therefore, that were the court did not have the authority to entertain the proceedings in question, this offers a basis for review on habeas corpus.

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54 R.J, Sharpe, Supra note 2 p. 23.
55 Ibid, p.23.
56 Ibid, p.25.
57 (1985) ZR 62.
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\textsuperscript{54} R.J, Sharpe, Supra note 2 p. 23.
\textsuperscript{55} Ibid, p.23.
\textsuperscript{56} Ibid, p.25.
\textsuperscript{57} (1985) ZR 62.
It has been seen in the first chapter, that the concept of jurisdictional review emerged during the struggle between the Common Law courts and the other jurisdictions for control. However, the concept of review based on want of jurisdiction emerged with special strength in the magisterial law of the nineteenth century. Magisterial law was essentially the law that governed magistrate courts. Habeas corpus in magisterial law was primary used to review warrants of commitment. The guiding principle of magisterial law was that it had to appear from the face of the record that the court had acted within the statutory limits. In Re Peerless, Coleridge J, explained the basis for review of a warrant of commitment;

"The question is whether the warrant, which the gaoler has returned, be a legal one. Of the conviction we know nothing, except through the warrant. By a legal warrant I mean a warrant which the face of it shows a right to detain: and that cannot exist unless there be Jurisdiction in the magistrate. To deny that this appear on the face of the proceedings, is to call into question one of the most important rules of the Criminal Law."

The above proposition means that in magisterial law, it was a strict requirement for the warrant of commitment to show not only a right to detain but also the jurisdiction of the magistrate to deal with the proceedings in question. The jurisdiction had to be made manifest on the record, since there was no presumption in favour of the validity of the instruments issued by the magistrates.

58 Supra, p.4.
60 Re Peerless (1841) 1 Q.B. 143 at 154.
In the nineteenth century, it was possible by Superior courts to review convictions on habeas corpus on the basis of jurisdiction. The basis for this review was however taken away by the summary Jurisdiction Act of 1848. Nonetheless, the principles that were that were enunciated are still valid today and the concept of jurisdictional review is no longer restricted to warrant of commitment. The jurisdictional issue indirectly arose in *Chief Inyambo Yeta and Others v. Attorney-General.*\(^6\) In this case, Chitengi, J. In dismissing the application for habeas corpus, held that since the appellants were detained on a charge of treason on warrants of commitment on remand regularly issued by the principal resident magistrate who had jurisdiction to issue such a warrant, the writ could not issue. It is submitted that this ruling may be interpreted as saying that the court may have issued the writ of habeas corpus, if the magistrate did not have the jurisdiction to issue the warrants of commitment on remand. The significant aspect of this ruling is that it does in a way show that want of jurisdiction can be the basis for issuing the writ.

The jurisdiction issue also arose in *Fred M'Membe and Bright Mwape v The Speaker of the National Assembly and the Commissioner of Prisons and The Attorney-General.*\(^6\) In this case the applicants were committed to prison by the Speaker for alleged contempt of parliament. Counsel for the applicants argued

\(^6\) 1996/HP/2886 - HP 8 A/29/96 UNREPORTED.
\(^6\) High Court Judgment No. X of 1996 UNREPORTED.
inter alia, that the Zambian parliament had no power to commit any person to prison because neither the National Assembly (Power and privileges) Act Chapter 17 nor the Constitution gave it such powers. In other ways counsel was contending that parliament did not have the jurisdiction to commit a person to prison for contempt. The court found that although, the Zambian Parliament was not a court of law endowed with judicial functions, it had the power to commit for contempt. The applicants were however released on habeas corpus on the ground that there was a breach of natural Justice, as they had not been accorded a hearing. The Interpretation of this ruling was that parliament had the Jurisdiction to commit the applicants for contempt, notwithstanding that it was not a court of law. However, it was the failure by parliament to accord the applicants a hearing that rendered the detention unlawful. It is therefore submitted that if the court had found that parliament had no jurisdiction to commit for contempt, the writ would have issued.

There are many other cases which illustrate the modern operation of jurisdictional review on habeas corpus. The law of immigration provides many examples where it is open to the applicant on habeas corpus to show that he is not a person subject to the statute or that the authorities failed to follow the requisite procedure. The premise is that jurisdiction to detain can only be

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64 R.J, Sharpe Supra note p.32.
exercised if the prescribed conditions that give jurisdiction have been satisfied.

Thus Lamont J. in *Samajina v R* explained in the following language:

"It is established law that jurisdiction on the part of an official will not be presumed, when jurisdiction is condition upon the existence of certain things, their existence must be clearly established before jurisdiction can be exercised."\(^{55}\)

Similarly, in the law of extradition, relief may be granted on the basis of jurisdictional review as in the cases where the offence alleged is not extraditable or political within the meaning of the statute or where the committing magistrate has failed to follow the statutory procedures.\(^{66}\)

3.2.2. REVIEW OF PATENT ERROR

The other form of review considered as a question of law available on habeas corpus is that of patent error. This aspect of review means that the Superior court may examine the record or documents brought before it relating to the inferior court's proceedings and give a remedy where there is a patent error or error on the face of the record.\(^{67}\) The significance of allowing for review based on patent error is that it allows for a remedy without requiring the classification

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\(^{55}\) *Samajina v R* (1932) S.C.R. 640 at 646.

\(^{66}\) R.J, Sharpe Supra note 2 p.32.

\(^{67}\) Ibid, p.34.
the error as going to jurisdiction.\textsuperscript{68} In other ways, the error is seen as being intra-Jurisdictional.

The first branch of the rule relating to patent error, is the idea that the process under which the prisoner is held has to show cause for his imprisonment.\textsuperscript{69} Thus, a document such as a warrant of commitment issued by a magistrate authorising the commitment of the accused, is required to show the cause such as the essence for which the accused is committed to prison for;

"A warrant of commitment must express the cause for which he is committed, namely felony and what kind of felony....it is necessary upon return of the habeas corpus out of the kings' Bench because it is in the nature of a writ of right or a writ or error to determine whether the imprisonment be good or erroneous."\textsuperscript{70} The plain meaning of the above proposition seems to be that, if a warrant of commitment is insufficient in terms of its failure to express the cause for which a person is committed to prison, the accused is entitled to habeas corpus on the basis of there being a patent error on the document. The rationale behind this rule, is that it is only when the cause is expressed on the document allowing for detention, that a Court would be able to form an opinion whether or not the cause is sufficient to justify a person's detention.\textsuperscript{71}

It is seen here, that the Court is able to issue the writ of habeas corpus without necessarily going to Jurisdiction".

The second branch of the rule centres on the technical forms of error which could vitiate a warrant of commitment.\textsuperscript{72} Here, the emphasis is not on the cause

\textsuperscript{68} Ibid, p.35.
\textsuperscript{69} Ibid, p.41.
\textsuperscript{70} 1 Hale P.C. 584.
\textsuperscript{71} Per Kenyon C.J. in R v Bowen (1793) S.T.R 156 at 158.
\textsuperscript{72} R.J Sharpe Supra note 2 p.42.
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72 R.J Sharpe Supra note 2 p.42.
of detention, but technical errors that may appear on the face of the record or document before the Court.

The practice of the Courts is to classify the errors or defects as technical or mere informalities.\textsuperscript{73} The classification is very much a subjective one for the judge. It can not however, be doubted that in considering the intrinsic nature of the error, the Courts are swayed by its gravity.\textsuperscript{74} The question appears to be whether the error in question goes to the root of the detention as to render it illegal. Thus, even where there is an error on the face of the record, the court may still refuse to discharge the applicant by way of habeas corpus. In \textit{R v Secretary of state for the Home Department ex p. Iqbal}, it was observed that;

"Even where the liberty of the subject is involved, the court should strive not be hamstrung by pointless technicalities."\textsuperscript{75}

Furthermore, in \textit{R v Brixton Prison ex. Servini}, Ridley, J. had this to say;

"It is in my opinion undesirable to apply the writ of habeas corpus to a case of this kind - a case where a mere technicality not affecting the merits is the only point raised".\textsuperscript{76}

The above authorities may be taken to mean that courts would be unlikely to order discharge on habeas corpus where the error is merely technical and does not affect the merits of the case.

\textsuperscript{73} Ibid p.55.
\textsuperscript{74} Ibid p.55.
\textsuperscript{75} (1979) 1 ALL ER 675. at 684.
\textsuperscript{76} (1914) 1 K.B 17 at 79.
The question of a defective warrant of commitment arose in Rajan Lekhraj Mahtani v Attorney-General. The facts were that the applicant was arrested and charged of treason. He was held on a warrant issued for committal to the High court for trial and not on the appropriate remand warrant under section 227 of the Criminal Procedure Code. The issue before the court was whether the irregularity in the warrant was fatal to the detention as to render it unlawful. In delivering his ruling, Chitengi, J, said:

"From the applicant's own evidence he is being detained in prison on a charge of treason. So whether the warrant is entitled 'remand warrant' or 'committal warrant for trial by the High court' the error does not go to the root of the matter for it to be fatal to the applicant's detention, the reason given in both the remand warrant and committal warrant for the detention of the applicant is the same, namely, treason charge."  

This case undoubtedly warrants close scrutiny. Clearly, the error on the warrant was its issuance under a wrong section of the Criminal Procedure Code. The question that arises is whether the error was so grave as to vitiate the detention in question. To throw light upon this question, it is important to observe that the court alluded to the following points. First, that the error was committed because the court had ran short of remand forms and instead made an improvisation. Secondly, that the applicant knew the reason why he was detained and the fact that he was committed on a wrong section of the Criminal Procedure Code did not go to go to the root of the detention. The significance of the preceding points, is that it shows that the judge did in fact attempt to measure the gravity of

77 1998/HP/1147 UNREPORTED
78 Ibid pp 7 - 8.
79 Ibid p.7.
the error. As to the latter point, it is also seen that during the period when convictions were subject to reveal on habeas corpus, the courts were reluctant to discharge the detainee on mere technical errors, if the applicant knew the reason for his detention. It was stated in *R v Rogers*, that the commitment need not contain everything the conviction contained and that where the warrant recited that a good convicted had been made, the court would presume that it contained the requisites of validity. The theory was that the warrant was an instrument secondary to the conviction and as such the prisoner could not benefit from a clerical or formal defect. Similarly, it is tenable to argue that since a warrant of commitment on remand, is an instrument secondary to a charge, the detainee cannot be seen to benefit from a mere technical error in the issuance of a warrant of commitment, where the charge itself is technically valid in law. It is also possible that the Judge may have taken into account other factors in measuring the gravity of the error. One such factor is the nature of the offence for which the applicant was charged with. The offence was treason and above all, non-bailable. It was therefore a question of public policy whether a person facing a charge of treason could be released on a technical error on a warrant of commitment. It is therefore submitted that it would have been an affront on Justice for a person charged with a serious offence such as treason to be released on a mere technical error on the warrant of commitment. Perhaps, the only deficiency in the ruling, is that the court did not provide a concise legal basis

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80 (1822) 1 D. & R. 156.  
81 R.J, Sharpe Supra note 2  p.29.
upon which the decision rested. It is suggested that for purposes of case law development, the judge should have first pointed out, that a patent error does in fact provide a basis for review on habeas corpus. As to whether the writ may issue or not largely depends on the gravity of the error. Thereafter, the judge would have proceeded to provide a clear account of the factors taken into account when measuring the gravity of the error. This indeed avoids speculations and assumptions as to the ratio decidendi of the Judgment.

The rule relating to technical errors on a warrant of commitment was applied by the Supreme court in Waluliya v Attorney-General.\(^2\) The court held that provided there is in existence a valid authority for the detention, an irregularity in the document accompanying a detainee to his place of detention is a breach of the provisions of the prison Act, but does not render the detention unlawful. Here, there was no specific application for habeas corpus, but it is submitted that the circumstances are analogous with the Mahtani case and the same reasoning applies.

In sum, what emerges very clearly is that courts are not willing to release a detainee on habeas corpus where the application is on mere technicalities and does not affect the merits of the detention itself, although in certain circumstances, this does provide a vehicle for relief.

3.2.3 THE CONCEPT OF REASONABLE SUSPICION

Article 13 (3) (b) of the Constitution, provides that any person who is arrested or detained upon 'reasonable suspicion' of his having committed or being about to commit a criminal offence should be brought to court without undue delay. On a plain reading of the said provision, it is clear that 'reasonable suspicion' is a condition precedent to any lawful arrest or detention.

The concept of reasonable suspicion presupposes the existence of facts which arouse the mental element of suspicion. The adjective 'reasonable' imports an objective standard and requires facts and circumstances which would lead a third party to form the belief or suspicion in question.\textsuperscript{83} Suspicion in the context of arrest may arise from the police officers' own observation or from information supplied to him from other sources.\textsuperscript{84} However, though this is a subjective requirement, there must be objectively verifiable facts which led him to suspect that the person had committed or was about to commit an offence. The facts to be adduced are not necessary to be justified beyond a reasonable doubt, which is a requirement for conviction, but such that reasonable men would conclude that in all probability the suspect is the perpetrator.\textsuperscript{85}

\textsuperscript{84} Ibid p.7.
\textsuperscript{85} State v Phillips 262 W L.S. 303, 307, ss N.W. 2d, 384.
It is observed that in *Shamwana v Attorney-General*,\(^{86}\) Chaila J, held that the provisions of Article 13 (3) (b) does not apply to persons detained under regulation 33(1) of the preservation of public security regulations. At the same time, in *Chisata v Attorney*,\(^{87}\) where the applicants were detained under regulation 33(1) of the preservation of public Security Regulations, the Supreme court held that on the evidence it was unreasonable to suspect the detainees of the alleged activities, and hence it was not reasonably necessary to detain them. This case shows that the courts have not discarded the need to show 'reasonable suspicion' even where the detention is pursuant to an executive order.

A person detained by the police can apply for habeas corpus from the moment detention begins. A detainee may complain that the arrest was improper as there were no grounds to suggest that he committed an offence. If a case is made out, there can be no doubt that habeas corpus is an appropriate remedy.\(^{88}\)

The efficacy of the writ of habeas corpus in the area of arrests seems to be watered down by the general rule that unless prior illegality vitiates the present cause of detention, it will not matter what has happened to the prisoner so long as the detention is now justified.\(^{89}\) This rule is further augmented in the law of

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\(^{86}\) (1980) ZR 270.

\(^{87}\) (1981) ZR 35.

\(^{88}\) Re Isbell (1929) S 2 C.C.C. 173 (S.C.C.)

\(^{89}\) R.J. Sharpe Supra note 2 p.180.
Criminal procedure in most of the Common law jurisdictions. For example it is a general principle of Common Law that where an accused person has been illegally arrested and brought before a court for trial, the court will not lack jurisdiction over the person on account of the illegal arrest.\footnote{Ibid p.181.} Thus, in \textit{Leachnisky v Christie}, Scott L.J, observed;

"Neither the committing magistrate nor the trial court will lose jurisdiction merely because.... the prisoner has been arrested in circumstances which for any of the reasons I have stated, was unlawful, although the fact may well influence discretion as to bail, but the person so wronged will have his cause of action against the person who arrested him unlawfully, and in action for false imprisonment every harm to the plaintiff caused .... resulting from the original wrong will be a matter for the jury to consider in assessing the quantum of general damages......"\footnote{(1945) 2 ALL ER 395 at 403 - 4.}

This may further be illustrated by the case of \textit{Liswaniso v The People}, where the then Silangwe, CJ, said;

"... It is our considered view that ... evidence illegally obtained, e.g, as a result of an illegal search and seizure or as a result of an inadmissible confession should, if relevant, be admissible on the ground that such evidence is a fact (i.e true) regardless of whether or not it violates a provision of the Constitution (or some other law).\footnote{(1976) 2 R 277}"

Although the \textit{Liswaniso case}, did not come on habeas corpus, it appears that the policy consideration governing the rule as it relates to illegal arrests and illegal searches is the same, being that, it is not in the public interest that persons accused of crimes should go unpunished because of impropriety on the part of the arresting authorities.\footnote{R.J, Sharpe Supra note 2 p.181.} The general rule therefore implies that if the initial
arrest by a police officer is illegal, habeas corpus will not be available to an applicant who, at present is detained under a valid detention order. It suffices here to repeat the words of Jagannadhadas, J, in delivering the judgment of the Supreme court of India in the case of R' Sura - v - State of Banbay, where he said;

"We also agree with the view of the High court that, what has got to be made out is not of bonafides on the part of the police but want of bonafides on the part of the detaining authority".94

When an illegal arrest is challenged, habeas corpus is, and probably has always been, much more a threat than a remedy which is actively used. This is because when habeas corpus proceedings are threatened, the likely effect is to cause the police to proceed according to law, before the hearing of the application before the court and sometimes before the court pronounces its ruling. An example may suffice here. In 1998 when Dr. Kenneth Kaunda and Mr. Kaulongo'mbe were arrested and detained following the failed coup d'etat of 1997, they applied for habeas corpus challenging their arrest and detention. Before the court could deliver its ruling, they were charged with misprision of treason. In justifying the action, the then police Spokesman Beenwell Chimfwembe issued a press statement and said;

"Mr. Kaulong'ombe together with Dr. Kaunda were arrested and charged for mistreason of prison on Wednesday, 11th February 1998 long before the Judgment of habeas corpus."95

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94 (1956) S.C.R. 382 at 387.
95 The Post, March, 14 1998, p.3.
It is contended that the reason why Mr. Kaulong'ombe and Dr. Kaunda were charged with misprision of treason before the ruling was pronounced, was to enable the police to escape the illegality that may have characterised their arrest and detention.

The rule that it is only the present circumstances of the restraint which are relevant has also meant that it is permissible for there to be a substituted warrant even after the writ is issued and served. It is also possible to amend the return to the writ and to supply a new and better cause for the detention as the court commences the hearing.96

Where the writ of habeas corpus has been refused notwithstanding a prior illegality in the arrest and detention of the applicant, other remedies may be resorted to. One such remedy is the recovery of damages in a civil action for false imprisonment. In Banda v Attorney-General97 the appellant who was illegally detained under a police detention order pursuant to regulation 33(b) of the preservation of public Security Regulations, successfully sued the respondent for damages for false imprisonment. Indeed, one may be sceptical of the effectiveness of actions for false imprisonment as a device to keep the authorities within proper legal bounds, but it may often be equally difficult to justify the discharge of persons accused of crime simply to control police powers.

96 ORDER §4, RULE 7(2) SUPREME COURT RULERS, 1995.
Moreover, the writ of habeas corpus is not deterrent in nature but merely remedial.

The general principle that habeas corpus only calls for the justification of the present detention, notwithstanding the non-fulfillment of a condition precedent does not apply to certain classes of cases. We have seen that as long as the detaining authority is able to justify the present detention, the fact that article 13(3) (b) of the Constitution has been violated does not give a ground for issuing the writ of habeas corpus. Where the wording of a statute specifically requires a certain condition precedent to be satisfied, as a basis for the valid exercise of Jurisdiction, relief will be afforded on habeas corpus. This class of cases include Deportation and Extradition cases. In R v Secretary of State for the Home Department ex parte khawaja,98 a deportation case, it was held that;

"Where the power to detain is dependent upon the existence of a precedent fact, and the existence of that precedent fact is challenged by or on behalf of the person detained, a challenge to the detention may be mounted by means of an application for a writ of habeas corpus even if there are alternative procedures available".

This principle was further applied in re Guerin.99 Here, the learned Judge had little difficulty in holding that as non-British nationals were subject to extradition under the treaty, a finding of fact which led directly to the conclusion that the prisoner was not British was open to review. It is seen that the question of nationality was a condition precedent paramount to the existence of a

99 (1888) 60 L.T. 538.
This principle was further applied in *re Guerin*. Here, the learned Judge had little difficulty in holding that as non-British nationals were subject to extradition under the treaty, a finding of fact which led directly to the conclusion that the prisoner was not British was open to review. It is seen that the question of nationality was a condition precedent paramount to the existence of a magistrates Jurisdiction. If the question of nationality is not determined in the first instance, it would be difficult to determine whether a particular person is subject to extradition.

The difference therefore appears to lie in the fact that it is only the determination of the precedent facts that gives the tribunal jurisdiction to determine Deportation and extradition cases. As regards, criminal cases, the court may exercise jurisdiction, notwithstanding that the precedent condition of reasonable suspicion in article 13(3) (b) of the Constitution has been violated. There is every reason, therefore to consider Deportation ad Extradition cases as sui generis (In a class of their own).

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99 (1888) 60 L.T. 538.
3.2.3 HABEAS CORPUS: WHETHER AVAILABLE TO A PERSON CHARGED WITH TREASON

The question as to whether habeas corpus is available to a person charged with treason has been a centre of controversy in a number of cases that have come before the Zambian High Court. For example

In Chief Inyambo Yeta and Others v Attorney-General, Chitengi, J. observed by way of dicta;

"And talking specifically about the charge of treason which the Applicants face, there is authority that in general the writ of habeas corpus will not be granted to persons committed for treason plainly expressed in the warrant of commitment".100

Paragraph 242 of Halsburys Laws of England 4th edition, also reads,

"In general the writ will not be granted to persons committed for treason plainly expressed in the warrant of commitment or to persons convicted or in execution of a legal sentence after conviction on indictment or after conviction by a duly constituted court martial, the proceedings of which have been in due course confirmed by the competent authority or to an alien enemy who is a prisoner of war or to a party to a suit who is in lawful custody to enable him to appear in court for the purpose of arguing his case in person, unless it appears that without attendance, substantial Justice could not be done".

In order to determine whether habeas corpus is available to a person charged with treason, it is necessary to refer back to the historical development of the writ. It has been seen in the first chapter, that following abuses of the petition of right which sought to protect persons from arbitrary executive committals, Parliament passed the Habeas Corpus Act of 1640. It specifically provided that

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100 1996/HP/2886 - HP 8A/29/96 p.17. UNREPORTED.
anyone imprisoned by order of the King or council should have habeas corpus and brought before the court without delay with the cause of imprisonment shown.\textsuperscript{101} Significantly, this Act appears to have embodied all types of crimes including those against the state. It is against this background that Mr. Hampden, brought a message to Parliament for the suspension of the Habeas corpus Act.\textsuperscript{102} This was on the ground that certain persons had conspired against the government and as such had been committed for treason. Following a vote in parliament, the writ was suspended.\textsuperscript{103} Clearly, the intention was to deny the treason accused the benefits of the writ.

The power of Parliament to suspend the writ in times of danger to national security, remained intact even after the enactment of the Habeas Corpus Act of 1679. This power was subsequently altered by the enactment of the 'Habeas Corpus Suspension Acts'.\textsuperscript{104} These Acts were seen as a means of conferring emergency powers on the State. However, there was not so much a suspension of the writ itself but a suspension of one of the rights secured by the writ namely the right to be either tried or released.\textsuperscript{105} It is further seen that the United States of America, being a former Colony of England also imported the Habeas Corpus Act of 1679.\textsuperscript{106} Subsequently, congress was empowered to suspend the writ in

\textsuperscript{101} SUPRA, p7.
\textsuperscript{102} Ibid p.7.
\textsuperscript{103} Ibid p.8.
\textsuperscript{104} R.J. Sharpe Supra note 2 p94.
\textsuperscript{105} Ibid p.94.
\textsuperscript{106} W.F Duker Supra note 2 p.229.
cases of rebellion or invasion when required by public safety. This power is expressly provided for in Article 1, Section 9, clause 2 of the United States Constitution.

As the above shows, both England and the United States of America which at one point applied the Habeas Corpus Act of 1679, had to pass a specific Law to suspend the writ. The intention was to deny the benefits of the writ to those charged with offences that threatened public safety. We have seen that in Zambia, the Habeas Corpus Act of 1679 is still applicable, but there is no provision in the Constitution or any other statute allowing for its suspension. It is therefore contended that the writ is always available even to those charged with offences that threaten national security such as treason.

It is in this regard that, there is a preponderance of authorities to suggest that a prisoner charged with treason can still apply for habeas corpus. In R v Despaped, a prisoner charged with treason applied for habeas corpus to determine the sufficiency of the warrant. In R v Boyle, a prisoner charged with treason applied for habeas on the ground that the individuals authorising the warrant did not have the legislative authority. Therefore the sweeping statement that habeas corpus does not apply to persons charged with treason is not legally supportable.

\[107\] (1798) 9 T.R. 736.
\[108\] (1868) 4 P.R 256 (ont).
It must also be noted from the footnotes in Halsbury that the view that habeas corpus does not apply to a person committed for treason is founded on the provisions of section 2 of the Habeas Corpus Act of 1679 and Section 10(2) of the Criminal Law Act of 1967. The Criminal Law Act of 1967 does not apply to Zambia and no similar provision exists on our Penal Code or Criminal Procedure Code. Section 2 of the Habeas Corpus Act of 1679 reads:

"How writs to be marked - Persons Committed for treason and felony etc, may appeal to the Lord Chancellor etc. Habeas Corpus may be awarded and upon service thereof the officer to bring up the prisoners as before mentioned and thereupon within 2 days Lord Chancellor etc may discharge upon recognizance and certify the writ with the return and recognizance - proviso for process not available".

Nowhere under the above provision does it say once a person has been charged with treason, a habeas corpus writ cannot issue. It is further submitted that this provision relates to procedure and is not a prohibition that once a person is being detained on a charge of treason, a court cannot issue a writ of habeas corpus. To suggest therefore that the above section fetters the courts power to issue the writ once a person has been charged with treason would be erroneous.

It is further observed that in the seventeenth and eighteenth Centuries, it was common in England for parliament to commit persons for treason. In such circumstances, the courts declared lack of jurisdiction to discharge or bail the accused.\textsuperscript{109} There are several reasons why this practice was allowed in

\textsuperscript{109} Supra p.9.
England. First, in England there is no written Constitution. As a result, practice and Convention have recognised this power of Parliament to commit. Secondly, parliament in England discharges Judicial or quasi Judicial functions. This is primarily because the house of lords is also a component of Parliament. On the other hand, in Zambia we have a written Constitution which has expressly provided the function of each branch of government. Thus, the courts in Zambia have the Jurisdiction to review any act done by Parliament because it is inferior to the High court in the field of adjudication. Parliament is only Supreme in the area of legislation. It is against this background that our Parliament does not have the power to commit for treason because this is the function of the courts. Even assuming that it had powers to commit, this act would still be reviewable by the High court.

Having endeavoured to show that the writ to habeas corpus issues to a person charged with treason, it remains to be determined whether it is possible on habeas corpus to 'go behind' the warrant and review the decision to charge the applicant with treason. It must be comprehended at the outset, that there is a distinction between challenging a detention on the ground that the charge is not sufficient in law and challenging a detention on the ground that the charge is not sufficiently supported by evidence. It is the latter which appears to be the borne of contention since the former is settled as earlier seen with warrants of commitment.
At this point, it is perhaps useful to consider what Constitutes a charge.

In *R v D'Eyncourt*, 110 J. said;

"I am of opinion that the word 'charge' must be read in its known legal sense, namely, the Solemn act of calling before a magistrate an accused person and stating, in his hearing, in order that he may defend himself, what is the accusation against him".

It is apparent therefore that the decision to charge reflects a belief that there is sufficient evidence of guilty to warrant expending further resources of Criminal process for the purpose of obtaining a conviction and in so doing, to subject the suspect to the economic and social costs incidental to defending oneself in a Criminal prosecution. 111

For the purposes of providing a check on the charging decision in respect of certain offences, the law has provided for the holding of a preliminary inquiry for serious offences such as treason. 112 The purpose of a preliminary inquiry is to determine whether there is sufficient evidence to warrant a trial by the High court. Thus, a preliminary inquiry is not a trial where the guilty or innocence of the accused is determined, but a test of the sufficiency of the evidence. In essence, this means that the law has provided a specific procedure by which a

110 (1888) 21 QBD 109, D.C. at 119.
112 Section 254 of The Criminal Procedure Code.
person charged with treason may test the sufficiently of the evidence on which he is being held.

Preliminary inquiry proceedings are however, rarely conducted by magistrate courts in Zambia, thereby denying the treason accused the opportunity to test the evidence on which the charge is premised. Thus, in Chief Inyambo Yeta and others v Attorney-General, Chitengi, J, meticulously observed:

"Magistrates appear to be under the erroneous impression that the powers of the Director of public prosecutions under section 254 of the Criminal Procedure Code to issue a certificate for summary trial is in derogation of their powers under section 222 of the Criminal Procedure Code to conduct a preliminary inquiry and commit the accused to the High Court for trial, if there is sufficient evidence or discharge the accused person if there is no sufficient evidence".

On the strength of the above proposition, it is submitted that magistrate have a legal duty to commence preliminary inquiry proceedings immediately a person is charged with treason and brought before the court. The fact that the Director of Public Prosecutions is dilly dallying in issuing a certificate for summary trial should not frustrate the holding of a preliminary inquiry.

The question to be determined at this juncture is whether a detained person can have recourse to the writ of habeas corpus to test the sufficiency of the evidence on which he is charged, when in fact, the law has expressly provided the procedure for doing so. It has been argued that since habeas corpus is not a

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113 R.J, Sharpe Supra note 2 p.59.
discretionary remedy, the existence of an alternative remedy does not afford
grounds for refusing relief on habeas corpus.\textsuperscript{114} Whether the other, perhaps
more direct remedy could still be used or whether the applicant has foregone the
right to use it, its existence should not preclude or affect the right to apply for
habeas corpus. This principle has however, not been universally followed as in
cases were the writ has been refused because an appeal was thought to be
appropriate.\textsuperscript{115}

Having the above in mind, it is submitted that the decision as to whether a
person charged with treason could apply for habeas corpus to test the
sufficiency of the evidence on which the charge is premised, should be
determined according to the experiences of each jurisdiction. For example in
Zambia, it is seen that most detainees who are charged with treason spend a
considerable period in detention on very spurious and preposterous charges.
This explains why the state has resorted to the use of the \textit{nolle prosequi} to
escape the shame of subjecting a treason accused to trial, when in fact there is
no evidence to support such a charge. Among those who have been discharged
from detention on \textit{nolle prosequi} include the former president, Dr. Kenneth
Kaunda and his head of security, Moyce Kaulung'ombe who were both charged
with misprision of treason.\textsuperscript{116} The other is a businessman Rajan Mahtan who
was charged with treason. Others such as the former president of Zambia

\textsuperscript{114} Ibid, p.59.
\textsuperscript{115} Ibid, p.59.
Democratic Congress, Dean Mung'omba and Princess Nakatindi, the Chairperson for Women's affairs in the movement for Mullet-Party Democracy were released on Constitutional bail after spending more than seven months in detention. Furthermore, it is also seen that magistrates are not willing to commence preliminary inquiry proceedings, neither is the Director of Public prosecution willing to issue a certificate for summary trial. The foregoing clearly shows that in most cases, the detaining authorities do not gather sufficient evidence before making the decision as to whether to charge a person with treason.

Against this background, it is submitted that the High court should have the liberty to entertain an application for habeas corpus whose aim is to determine whether there is sufficient evidence to support the charge of treason. The High court should not be constrained by unnecessary technical rules when the personal liberty of a person is at stake. This however, should only be permissible were the Magistrate court has not commenced preliminary inquiry proceedings and were the Director of Public Prosecutions has not issued a certificate for summary trial. In other ways, when a person has appeared before the Magistrate court charged with treason, he should be able to apply for the writ of habeas corpus to test the sufficiency of evidence upon which the charge is based. Such an application should operate as a bar to any subsequent preliminary inquiry proceedings on the ground of resjudicata so as to prevent the possible relitigation of the same facts. This, it is hoped would not only compell
Magistrate courts to commence preliminary inquiry proceedings as early as possible, but also enable the detainee to test the legality of his detention speedly.

3.3 CONSIDERATION OF QUESTIONS OF FACT

At the core in dealing with questions of fact on habeas corpus, is the Common law rule against controverting the facts in the return. The Common law rule as stated by Wilmot J, was as follows:

"The court says [to the gaoler]. Tell the reason why you confine him. The court will determine whether it is a good or bad reason, but not whether it is a true or a false one. The Judges are not competent to this inquiry, it is not their province, but the province of a Jury, to determine it: 'ad question Juris, non fact; Judices respondent'. The writ is not framed or adapted to litigating facts: It is a summary short way of taking the opinion of the court upon a matter of law where the facts are disclosed and admitted ...[1] F the facts are controverted, they must go to a jury; and when the return to a habeas corpus is made and filed, there is an end to the whole proceeding, and the parties have 'no day' in court, and therefore it is impossible that a proceeding, by way of trial, should be grafted upon it."\textsuperscript{117}

In simplistic, the above rule means that when a detainee makes an application for habeas corpus and the return is made thereto, the proceedings come to an end, if the return is good in law. It is not permissible for the applicant to controvert facts in the return, the reason being that, it is not competent for the court to determine the truth or falsity of the facts therein. The determination of questions of facts was considered to the province of the Jury.

\textsuperscript{117} R.J. Sharpe Supra note 2 p.65.
It has however been argued that while Wilmot, J, was correct in his assertion that there was a Common law rule against controverting the facts, the real reason for refusing to decide matters of fact was not the absence of the Jury. Instead the Common Law rule may be regarded as an assertion that habeas corpus was not to take the place of trial by Jury for the ultimate determination of guilty or innocence.\textsuperscript{118}

The rule as put forward by Wilmot, J, has been unquestionably adopted by the Zambian courts. For example in \textit{Chisata and Lombe v Attorney General}, the Supreme court said:

"We are not determining the truth or falsity of the grounds as such but their reasonableness".\textsuperscript{119}

Even by Wilmot's time, however, there seem to be situations in which the courts were willing to consider questions of fact on habeas corpus. For example, in \textit{Goldswam},\textsuperscript{120} the court declared that they could not wilfully shut their eyes against such facts as appeared on the affidavits, but which were not noticed in the return.

Due to dissatisfaction with the rule against controverting the truth of the return, there was pressure in England for reform which resulted in the enactment of the

\textsuperscript{118} Ibid, p.65.
\textsuperscript{119} (1981) ZR p.35.
\textsuperscript{120} (1778) 2.W.M. B 1. 1207 at 1211.
Habeas Corpus Act of 1816. The Act abolished the rule in all cases where the applicant was confined other than for some Criminal or supposed criminal matter and except persons imprisoned for debt or by process in any civil suit.\textsuperscript{121} The reason why these provisions of the Act were not extended to Criminal cases was probably the fear that it would lead to trying people on affidavits.\textsuperscript{122} It must be mentioned however, that the Habeas Corpus Act of 1816 does not apply to Zambia. The Zambian situation is purely governed by the Common Law rule. In \textit{Chisata and Lombe v Attorney-General},\textsuperscript{123} the state alleged that the appellants convened meetings in which they preached the use of violence to achieve political motives. The state gave specific dates on which meetings were held. The Appellants application for the issue of writs of habeas corpus were rejected by the High court. On appeal to the Supreme court the appellants by affidavits put up pleas of \textit{alibi} and gave detailed accounts of their movements on the alleged dates. The State did not file any affidavits in reply. The Supreme court held that the Appellants by their uncontadicted evidence of \textit{alibi} showed that it was not reasonable to suspect them of the alleged activities and hence that it was not reasonably necessary to detain them. The Appellants were then discharged on habeas corpus. This decision undoubtedly has given fresh impetus in this area. It is therefore submitted, that were a person applies for

\textsuperscript{121} Section 1, Habeas Corpus Act (1816).
\textsuperscript{122} R.J. Sharpe Supra note 2 p.69.
\textsuperscript{123} (1981) ZR p.3.
habeas corpus and raises issues of identity or alibi, there is no reason why the
court should not proceed to determine that fact.

There are certain questions of fact which are said to be jurisdictional and
therefore open to review by the Superior courts, not necessarily because of the
effect of the Habeas Corpus Act of 1816, but because of their nature. Such
questions are sometimes called 'Preliminary' or 'Collateral' or questions of
'precedent fact'.\textsuperscript{124} They are preliminary in the sense that they are logically prior
to a determination of the main issue and such further issues are collateral to the
issue that the tribunal is asked to decide ultimately. The decision of the court
determines the Jurisdictional bounds of the tribunal. The type of cases that fall
under this class include deportation and extradition cases.

This principle was clearly enunciated by Wills, J, in the case of Re Guerin.\textsuperscript{125} In
this case, the Judge had little difficult in holding that as only non-British nationals
were subject to extradition under the treaty, a finding of fact which led directly to
the conclusion that the prisoner was not British, was open to review:

"With respect to the power of this court to review the finding of the
Magistrate upon the question of nationality, which is a question for the
Magistrate in the first instance, it is a well established principle that where
a matter of fact which is cardinal to the existence of a Magistrate's
Jurisdiction is collateral to the subject of inquiry, the decision of the
Magistrate is not final and the court has a right to inquire into the
sufficiency of the evidence upon which the Magistrate acted, as being a
matter on which his Jurisdiction to hear the case at all is based."

\textsuperscript{124} R.J, Sharpe Supra note 2 p.72.
\textsuperscript{125} (1888) 60 L.T. 538.
The other example is the decision of the house of lords in *Khawaja v Secretary of State for the Home Department*,\(^{126}\) dealing with the detention of an individual admitted to the United Kingdom, but subsequently detained as an illegal entrant on the ground that he had gained entry by fraud or deception. The house of lords held that the power to detain could only be validly exercised if the prisoner was an fact in illegal entrant, and hence the court was called upon to review the facts to determine whether the precedent fact had been established. Other classes of cases are those under the extradition Act where the court admits evidence tending to show that the offence was of a political nature or evidence that the offence was not extraditable in some other respect.\(^{127}\)

What emerges from the above discussion, is that Deportation and extradition cases are considered to fall in a class of their own. This is because it is inherent in their very nature, that the precedent fact that gives the court Jurisdiction be determined. Without the determination of the precedent fact, the court would possibly not find it easier to determine the issue in question.

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\(^{127}\) R.J. Sharpe Supra note 2 p.73.
CHAPTER 4

THE USE OF HABEAS CORPUS IN A STATE OF EMERGENCY

INTRODUCTION

The purpose of this chapter is to examine the use of habeas corpus where the liberty of the subject is restrained on account of an order made by the executive branch of government in a state of emergency. Central to this is the use of habeas corpus as check on the power of preventive detention. Another issue for consideration is the extent to which the writ of habeas corpus has been used to ensure compliance with the constitutional Safeguards as provided by article 26 of the constitution. While this will inevitably involve the examination of Zambian cases, comparative material, particularly from the Common Law jurisdiction will be deployed at suitable points to illuminate possible deficiencies in judicial decisions involving habeas corpus applications in Zambia.

The issue in this chapter is simply the extent to which the courts should control the exercise of discretionary powers. Broad discretionary powers may be conferred which affect even such basic rights as personal liberty, but the judges can control the exercise of executive discretion when they wish to do so by defining the Lawful limits of the power granted, and by making certain that the official has acted within those limits.
4.1 THE USE OF HABEAS CORPUS TO TEST PREVENTIVE DETENTIONS

There comes a time in the life of almost every nation when a situation arises which threatens its security. Consequently, the Constitutional and legal order permits the government to assume emergency powers to enable it deal with exceptional circumstances threatening the well being of the nation, with which normal powers cannot Cope.\textsuperscript{128} The political rationale underlying resort to emergency powers was summed up by Abraham Lincoln;

"Every man thinks he has a right to live and every government thinks it has a right to live. Every man when driven to the wall by a murderous assailant will override all Laws to protect himself, and this is called the great right of self-defence, so every government when driven to the wall by a rebellion will trample down a constitution before it will allow itself to be destroyed. This may not be constitutional Law, but is fact."\textsuperscript{129}

In Zambia, the power to declare a state of emergency is contained in Articles 30 and 31 of the constitution. Under Article 30(1) of the Constitution, the President is empowered in Consultation with Cabinet, to declare a state of public emergency. This is known as a state of full emergency. Similarly, the president may under Article 31 (1) declare a semi or threatened emergency. When there is a full emergency, the Emergency Powers Act is activated\textsuperscript{130} and in the case of a semi-emergency, the preservation of Public Security Act is activated.\textsuperscript{131} Both

\textsuperscript{129} Ibid p.2.
\textsuperscript{130} Section 3 (1) of the emergency Powers Act, Chapter 108.
\textsuperscript{131} Section 3 (1) of the Preservation of Public Security Act Chapter 108.
Acts empower the president to make regulations in the preservation of public security and for any other matters incidental thereto whenever a state of emergency is in force.

The most widely used power during a state of emergency is the power of preventive detention. This refers to detention without trial as opposed to punitive detention which can be made after a trial in a Court of Law, in which the person to be detained is proved to have committed an offence punishable under Law.\(^{132}\)

The object of preventive detention is therefore to enable the executive or its agents to detain an individual without recourse to the judicial process.

The power of preventive detention is contained in Section 3 (1) of the Preservation of Public Security Act and Regulation 33(1) of the preservation of Public Security Regulations. Section 3 empowers the president to promulgate regulations providing for the detention of persons, while regulation 33(1) reads as follows

"When the president is satisfied that for the purpose of preserving public security it is necessary to exercise control over any person, the president may make an order against such person directing that such person shall be arrested, whether in or outside the prescribed area and be detained".

It is instructive to note here that preventive detention does not necessarily imply that a person will be detained ad infinitum (indefinitely). This is because

Regulation 33 (1) of the preservation of Public Security Regulations empower the president to establish a tribunal if he considers it necessary or expedient to review the case of a detained person.

It is clear from the wording of regulation 33(1) that the inclusion of the word 'satisfied' was intended to grant the president a subjective standard in determining whether a particular person should be detained or not. This does not however, suggest that the power conferred on the president is not justiciable as to preclude the testing of the merits of the decision to detain on habeas corpus. Thus, in *Chisata v Attorney-General*, the then Supreme Court Judge, Cullinan said after citing a passage from *Kapwepwe and Kaenga* case that:

"The question of detention is one purely for the subjective satisfaction of the president", Judge Cullinan then went on to say this:

"I accept that the detaining authority is not prima facie obliged as such to support any suspicion: its order is valid on the face of it. To that extent I agree that the detaining authority's satisfaction is not subject to review. I hesitate to think however, that the learned Judge, by the use of the term 'subjective satisfaction' meant that the detaining authority's satisfaction was absolute and was not subject to the test of reasonableness when challenged on prima facie grounds".

The above proposition may be interpreted to mean that it is possible on habeas corpus to test the merits of the decision of the president to detain. Since the presidential detention order is prima facie valid on the face of it, the applicant

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needs to cast doubt upon the propriety of the detention. Thus, in Shamwana v Attorney-General, the Supreme court noted:

"A presidential detention order, is therefore, on the face of it, a valid order and a detainee must establish a prima facie case as to its alleged invalidity."

However, doubt is not casted where the applicant merely asserts that he has no idea why he is detained. The grounds for challenging a presidential detention order will be adequately explored in the subsequent section. It must be mentioned, though, that in fact, it possible to challenge a presidential detention order on the ground of malafides, even before the grounds of detention are furnished as provided by Article 26(1) (a) of the Constitution. Here, the detainee would be asserting that the president did not act in good faith when he issued the detention order. If the detainee succeeds in proving malafides, he is entitled to be released on habeas corpus. The burden to prove the same, which is certainly very great to be discharged, will be entirely on the detainee.

During the existence of a state of emergency, regulation 33 (6) as amended by the preservation of Public Security (Amendment) (No.2) Regulation of 1993, empowers any police officer of or above the rank of superintendent to detain any person who he has reason to believe he is a danger to public security. Such a person can only be detained for a period not exceeding seven (7) days.

136 R.J. Sharpe Supra note 2, 102.
Therefore, the power to detain under regulation 33(1) and 33(6) of the preservation of Public Security Regulation is not one and the same thing. For, example, the periods of permissible detention are different. However, the legal and constitutional principles that apply to detentions under both regulation 33(1) and regulation 33(6) are the same.

4.2 THE USE OF HABEAS CORPUS TO ENSURE COMPLIANCE WITH THE CONSTITUTIONAL SAFEGUARDS

Clearly, both regulation 33(1) and 33(6) of the preservation of Public Security Regulation confer wide discretionary power of detention on the president and the Police. As far as these powers are concerned, their abuse is likely to lead to the violation of personal liberty. It is important to bear in mind that a person who is detained has not committed any crime and thus punishment is not the aim of detention laws. Accordingly, a detained person must be treated with humanity and with respect for the inherent dignity of the human person. It is against this backdrop that Article 26 of the Constitution has provided important safeguards for detainees. The use of habeas corpus in ensuring that the detaining authority comply with the constitutional Safeguards can therefore not be doubted. These constitutional Safeguards will now be discussed in detail.
4.2.1 FURNISHING GROUNDS OF DETENTION

It has been seen that one of the most important legal issues which arose during the great struggle of the 17th Century, was the question of the supposed prerogative power of the Crown to detain the subject without presenting a Criminal charge. In Rarnel's case,\(^{138}\) in 1627, the return to a writ of habeas corpus stated that the prisoners were detained 'per special mandatum regis', meaning the king's special command. No justification other than the king's special command was given for their arrest and imprisonment. Despite strong arguments to the contrary, the court sided with the king and held this to be a proper return. Subsequently, the petition of Right abolished the power of detention which had been confirmed in Rarnel's case. The king and the council were thereby deprived of their power to lock up without providing proper grounds for the detention of those considered to be dangerous to the security of the state. Article 26 (1) (a) of the Constitution is essentially a reminiscent of this general rule that the executive show grounds for the detention of a person within 14 days after the commencement of the detention.

As regards the purpose of the grounds of detention, the then Silungwe C.J, in Attorney-General v Musakanya,\(^ {139}\) had this to say:

"taking the above quotation as a whole, it is clear that the fundamental object intended to be secured by para (a) of clause (1) is to provide

\(^{138}\) 3 st Tr. 1.
\(^{139}\) Supreme court of Zambia, case No. 17 of 1981 Unreported.
machinery for enabling a detained or restricted person to know as soon as possible, but not later than 14 days, the reasons for his detention or restriction”.

From the above, it is evident, that grounds are not charges but reasons for the detention of a person. That being so, they are not expected to be particularised in the same way as criminal charges. In this respect Kania. C.J. in *State of Bombay v Atma Ram Vaidya*,\(^ {140}\) said;

“By their very nature the grounds are conclusions of fact and not a complete detailed recital of all the facts”.

Therefore, the grounds of detention are not expected to supply each and every detail relating to the detention, but merely to enable the detainee known the reason for his detention.

The requirement that the grounds be furnished within 14 days is mandatory and failure of compliance renders the detention void ab initio. In the Landmark case of *Chipango v Attorney General*,\(^ {141}\) the grounds for detention were not served on the applicant within the stipulated 14 days. The applicants applied for habeas corpus. The issue before the court was whether the requirement in issue was mandatory or merely directory. It was held that the requirement was a mandatory and a fundamental right and its contravention rendered the continued detention unconstitutional and therefore unlawful.

\(^{141}\) (1971)ZR1.
The interpretation of Article 26(a) was similarly applied in the English case of *R v Home Secretary ex p Budd*.¹⁴² In this case, an internee's release was ordered on habeas corpus because failure to comply with the requirement in the regulation that he be given a document stating the grounds of his detained rendered that detention unlawful.

The above authorities also confirm that it is no longer permissible for the detaining authority to merely produce a detention order as the sole justification for the detention. In *R v Governor of Brixton prison ex p Sarno*,¹⁴³ Low J, stated:

"I do not agree that if the executive were to come into this court and simply say a person is in our custody and therefore the writ of habeas corpus does not apply because the custody is at the moment technically legal, the court would have no power to consider the matter and, if necessary deal with the application for the writ. In my judgment that answer from the crown in reply to an application for the writ would not be sufficient if this court were satisfied that what really in contemplation was the exercise of an abuse of power. The arm of the Law in this country would have grown very short, and the power of this court very feeble, if were subject to such restriction in the exercise fo its power to protect the liberty of the subject as that proposition involves".

Further in *Kapwepwe and Kaenga v Attorney General*,¹⁴⁴ the Supreme court observed:

"if for instance the grounds were a recitation of the relevant legislation... it is clearly impossible for the detained person to do more than deny that he has ever engaged or would engage in such activities. Such a representation would obviously have no chance whatever of success".

¹⁴² (1942) 2 K.B. 14.
¹⁴³ (1916) K.B742 at 752.
¹⁴⁴ (1972) ZR 248.
Having the above in mind, it is noted that in the Habeas corpus proceedings involving Dr. Kenneth Kaunda following his detention on 31st December, 1997, the respondent’s sole authority for detaining the applicant was a police detention order. The detention order was tendered before the court by way of a return through one Harrison Bulongo Chizuka, acting superintendant and officer in charge at Mukobeko maximum prison in Kabwe. However, before the court could deliver its ruling, the applicant was charged with misprision of treason. It is submitted that had the court made a ruling, the return would have been found erroneous in Law, as it did not enable the applicant know the reason for his detention.

As earlier seen, the maximum period for furnishing the grounds for detention is 14 days. This entails that the detaining authorities are not obliged to furnish the grounds of detention before the expiration of 14 days. While the object of the writ of habeas corpus is to provide a speed inquiry in to the legality of a detention, this aspect cannot override a constitutional provision which represents the Supreme Law of the Land. In Shamwana v Attorney General, the Supreme court observed by way of dicta;

"it is common ground in this case that habeas corpus proceedings were set in motion prior to the expiration of the statutory maximum period of 14 days within which grounds for detention were to be furnished to the detained person in terms of Article 27(1) (b) ....However, the stipulated period had not expired in this case”.

146 (1980) ZR 261.
4.2.1.1 BASIS FOR CHALLENGING THE GROUNDS OF DETENTION

The ground which are supplied by the detaining authorities can be challenged in a number of ways. First, if the grounds are not specified in detail as stipulated by Article 26(1) (a) the detention may be rendered unlawful on habeas corpus. This is because if the grounds are not in detail, the detainee would not be in a position to know the reason for his detention. In Kapvenwe and Kaenga,\(^{147}\) the Supreme court stated that the fundamental objects of requiring detained person to be furnished with detailed grounds were that the detainee should within the stipulated period be aware of the reasons as to why he is detained, and that the detainee should at the earliest opportunity make a meaningful representation to the detaining authority or the Detainees Review Tribunal. This test was also followed in Herbert v Phillips,\(^{148}\) where Lewis, C.J. observed;

"Must, in detailing the grounds for detention, furnish sufficient information to enable the detainee to know what is being alleged against him to bring his mind to bear on it".

In Rao v Attorney General,\(^{149}\) the allegation against the applicant was that over a period of 11 years, he had been involved in the illegal trafficking into, and smuggling out of, Zambia of large quantities of emeralds. The applicant argued that the grounds for detention were vague and that the applicant could not, therefore, be expected to make meaningful representation to the detaining

\(^{147}\) (1972) ZR 248.


\(^{149}\) Supreme Court of Zambia Judgment No. 30 of 1987 (Unreported).
authority. The majority of the court held that it was not enough for the detaining authority simply to make such allegations. The continued detention was thus declared invalid for vagueness.

The above authorities clearly indicate that the courts of law are always ready to declare a detention invalid on the ground of vagueness if challenged on habeas corpus.

Secondly, the grounds may be challenged on the ground that they disclose facts that suggest, that the detaining authority acted ultra vires. For example, it is clear from regulation 33(1) of the preservation of Public Security Regulations, that the power of preventive detention is conferred on the president for the sole purpose of preventing a person from endangering public security. It follows that if the president makes a detention order for the purpose other than that contemplated by regulation 33(1) the detention is unlawful. Thus in Eleutheriadis v Attorney General,150 the then CJ, Royle, had occasion to observe at page 11:

"I wish to make it clear from the outset that I do not question in any way the discretion of the detaining authority. The court cannot query the discretion of the detaining authority if it is exercised within the power conferred. The question here is one of vires".

This means therefore that the president as a recipient of a statutory power just like any other detaining authority, can do only those things that are authorised by

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150 (1975) ZR 69.
the statute to be done. If the court finds an act not be so authorised, the
detention may on habeas corpus, be declared null and void.

Thirdly, the grounds of detention may be impugned on the basis of their
reasonableness.\textsuperscript{151} Thus, before making a detention order the detaining
authority must be satisfied on the facts and on reasonable grounds that it is
necessary for the preservation of public security to exercise control over that
person. Here, the question is not whether the Judge agree with the detaining
authority, but simply whether it was reasonable in the circumstances of the case
to resort to preventive detention. Thus, in \textit{James Chanda Kasamanda v
Attorney General}\textsuperscript{152}, the Supreme court observed:

"It must always be borne in mind that when a person is detained under
regulation 33(1) of the preservation Public Security Regulations, mere
formation and communication of written grounds to him ...is not enough.
There must be a basis, that is there must be material, or the gist therefore,
that will be invariably be put forth by way of evidence when the detention
is challenged in court. The existence of such material at the time the
detention order is made is imperative because it is from the material that
grounds of grounds of detention are or should be formulated. If it were
not so, individual liberty would be in jeopardy at the hands of an
overzealous agent of the state who might be tempted to frame plausible
but baseless or hollow allegations against an innocent person under the
guise of preservation of public security".

The above proposition underscores the point that a detaining authority is under
obligation to state the facts and material on which the grounds are framed. It is
upon the stated facts and material, that a detainee would be able to impugn the

\textsuperscript{151} A. Harding and J. Hatchard, \textit{Preventive Detention and Security Law}, Martinus Nijhoff Publishers
\textsuperscript{152} Supreme Court Judgment (1981) Unreported.
reasonableness of the decision to detain him. It must be mentioned that the burden to cast doubt on the reasonableness of the decision to detain is on the detainee himself and as such he is expected to adduce evidence. In the case of Frederick Jacob Titus Chiluba v Attorney General, it was held that:

"Once the applicant has adduced evidence to show that the grounds for his detention were not true or lawful, then it is for the detaining authority to adduce sufficient evidence to negative the applicants challenge, thereby enabling the court to be satisfied if not beyond reasonable doubt at least on a balance of probabilities on the basis for an irresistible inference that there were reasonable grounds to suspect the applicant of the alleged activities in order to justify his lawful detention".

The question of reasonableness was in issue in Chisata v Attorney General. In this case, the appellants were detained under regulation 33(1) of the preservation of public Security Regulations. The state alleged that the appellants convened meetings in which they preached the use of violence to achieve political motives. The state also gave specific dates on which meetings were held. Applications for the issue of habeas corpus were rejected by the High court. On appeal to the Supreme court the appellants by affidavits put up pleas of alibi and gave detailed accounts of their movements on the alleged dates. The state did not file any affidavits in reply. It was held that the appellants by their uncontradicted evidence of alibi showed that it was not reasonable to suspect them of the alleged activities and hence it was not reasonably necessary to detain them. The court further went on to say that it was not concerned with the truth or falsity of the grounds of detention but merely with whether or not

153 (1981) ZR.
there was reasonable cause to suspect the appellants. The appellants were thus discharged on habeas corpus.

The Chisata case may be interpreted to mean that while the court may subject the detaining authority's satisfaction to the test of reasonableness, it does not have jurisdiction to inquire into the truth or otherwise of the grounds of detention. As earlier noted, the reason for not inquiring into the truth of the grounds of detention in respect of a person accused of criminal activities, is to avoid trying people on affidavits.\textsuperscript{155}

It is however, observed that in \textit{R v Board of Control and others ex p Rutty},\textsuperscript{156} Lord Goddard, C.J, stated as follows:

"That this court has power to examine into the truth of the facts set forth in the return to a writ of habeas corpus and to examine them by means of affidavit evidence is clear from section 3 and 4 of the Habeas corpus Act, 1816..."

It must be mentioned that the Habeas corpus Act of 1816, does not apply to Zambia. What applies to Zambia is the Habeas Corpus Act of 1879 which does not contain any provision relating to the determination of the truth or otherwise of the specific allegations in the grounds of detention. Further, Lord Goddard proposition was not based on a criminal or supposed criminal case but an extradition case. The 1816 Habeas Corpus Act expressly allows an inquiry into

\textsuperscript{155} Ex p. Beeching (1825) 6 D. & R. 209 at 211 - 12.
\textsuperscript{156} (9156) 1 All ER 769.
the truth or falsities of the facts in the return involving extradition cases. The reason for this, is that a person can only be extradited if certain precedent facts that give jurisdiction to extradite have been determined. For example, the court may have to determine whether the offence for which a person is to be extradited for is of a political nature. Here, the courts are reviewing facts essential to the jurisdiction underlying the order for extraditing. This, it is submitted, can only be done if the truth or otherwise of the facts in the return has been determined. This provision however, does not extend to criminal cases.

4.2.2 NOTIFICATION OF DETENTION

Under Article 26 (1) (b) of the Constitution, the detaining authority is required to publish a notice in the Government Gazette giving details of the detention. This must be published within 14 days after the commencement of the detention or restriction. In Chipango v Attorney-General, Magnus J, held that this requirement was mandatory and that failure to observe it rendered further detention unconstitutional and unlawful. In upholding this decision, the court of appeal noted that the object of notification was clearly to ensure that the public was made aware who had been detained and why. The court observed that there were some countries where people disappeared without trace. The court

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157 Re Kołczyki (1955) 1 ALL ER 31.
158 (1971) ZR 1.
therefore considered the provision as an essential safeguard against involuntary
disappearances and incommunicado detentions.

In the case of Moyce Kaulung’ombe v Attorney General,159 the High court found
the detention of the applicant unconstitutional and unlawful. This was on the
ground that the state had breached Article 26(1) (b) of the Constitution which
rendered his detention unlawful. The applicant was thus released on habeas
corpus.

The above authorities are sufficiently indicative that breach of Article 26(1) (b)
entitles the detainee to be released on habeas corpus.

4.2.3 RIGHTS OF REVIEW

By virtue of Article 26(1) (c), every detainee is entitled to have his case reviewed
by an independent and impartial tribunal established by law and presided over
by a person, appointed by the Chief Justice, who is or is qualified to be a Judge
of the High court. The initiative is on the detainee to request review. The
tribunal must advise the detaining authority on the necessity or expediency of
continuing the restriction or detention. Under Article 26(2) of the Constitution,
the detaining authority is obliged to act in accordance with any such advise.
There is no doubt therefore, that if the detaining authority do not act in

159 Reported in the Post, February 13, 1998.
accordance with the advise of the tribunal, the detainee can apply for habeas corpus so as to be discharged. This is because the detaining authority has breached a fundamental Constitutional Safeguard that centres on the issue of detention itself.

4.2.4 PROTECTION OF ILLITERATE OR SEMI-ILLITERATE DETAINEES

Article 26(1) (a) provides that a detainee must be furnished with grounds of detention in a language that he understands. Undoubtedly, this is to enable the detainee to understand the reasons for his detention and also to be able to make a meaningful representation to the tribunal. In Chakota v Attorney-General, the Supreme court held that where a detained person is illiterate, the detaining authority should, at the time of serving a written statement of grounds, make certain that the grounds are fully explained and translated in a language that the detainee understands, and a certificate of such be attested by the officer who explained the grounds to the detainee.

In the case of Attorney-General v Juma, the respondent was detained and served with the grounds of his detention written in the English language, a language he could neither read nor understand. The respondent was granted a writ of habeas corpus by the High court on the ground that the Constitutional provision requiring that the grounds for detention be written in a language that

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the detainee understood was mandatory. On appeal by the Attorney General, the Supreme court held that the Constitutional requirement was merely directory and failure to comply with it was a defect which might be remedied. The court noted that the respondent had not been prejudiced in any way by the mere fact that the grounds were furnished in English. As the defect was capable of being cured and was in fact cured, a failure to comply with the provision in those circumstances did not have the effect of rendering the continuing detention of the respondent null and void.

What has emerged from the preceding discussion is that the Zambian courts have laid down the principle that not every one of the Constitutional Safeguards available to a detained person would, if not observed render the detention invalid. A distinction has thus been made between mandatory provisions and those which are directory. This distinction appears to be made between those which have a direct bearing on the detention itself and those which do not.
CHAPTER 5

CONCLUSION

The object of the research was to investigate the effectiveness of the writ of habeas corpus ad Subjiciendum in securing the personal liberty of detained persons in Zambia. The research has established that the writ of habeas corpus is the most effective weapon in testing the legality of any detention. This is indeed evident from the examination of judicial decisions both from Zambia and other Common Law jurisdictions.

Judicial activism in protecting personal liberty in Zambia has to a large extent been active and commendable. The courts, for example, have bravely questioned the subjective satisfaction of the president in issuing detention orders under regulation 33(1) of the preservation of Public Security Regulations. Where it has been successfully shown that there were no reasonable grounds to justify preventive detention, the courts have not hesitated to discharge the detainee on habeas corpus. This is contrary to other jurisdictions were the courts have categorically refused to question detention powers which are subjective in character\(^{162}\).

\(^{162}\) Uganda case of Re Ibrahim (1970) E.A. 162.
The courts have further ensured that the constitutional safeguards provided by article 26 are observed by the detaining authority. Thus, in instances were the constitutional safeguards have been abrogated, the courts have accordingly discharged the detainees on habeas corpus.

However, there is one area where courts have not performed so well. This is where a detainee who is formally charged with treason is challenging the sufficiency of the evidence on which the charge is premised. It is observed that the Criminal Procedure Code has expressly provided the procedure for testing the sufficiency of the evidence on which the impugned charge is premised. This is by way of a preliminary inquiry. For unknown reasons, Magistrate courts which are empowered by law to conduct preliminary inquiry proceedings have shown unmeasurable amount of reluctance to do so. Similarly, the Director of public Prosecutions who is empowered to issue a certificate for summary trial has displayed the same attitude. Consequently, a detainee is left with no choice but to resort to the writ of habeas corpus for relief. It has been established that in fact, there is no reason why the courts should deny the writ to a detainee who finds himself in such a situation. The fact that there is another procedure provided by law, which procedure is not directly invokable by a detainee himself, is not a sufficient ground for the court to deny the writ. What is important in habeas corpus applications is for the applicant to show proper grounds that the
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detention is unlawful. In other ways, the court ought to issue the writ of habeas corpus *ex debito Justitiae*.

**RECOMMENDATIONS**

(i) In view of unlawful detentions especially against political opponents during a State of emergency, it is proposed that the recommendations of the review tribunal established under regulation 33(7) of the preservation of Public Security Regulations be binding on the detaining authority. Currently, the review tribunal is not effective since the president is the final authority in deciding whether further detention is justifiable. With this, it is hoped that detentions without trial for many years\(^{163}\) would be a thing of the past.

(ii) Police officers who are responsible for unlawful arrests and detentions should be held personally liable in a civil action for false imprisonment. Alternatively, the Police service should formulate regulations aimed at reprimanding police officers who wantonly curtail fundamental rights and freedoms. The current arrangement were the state alone is liable, does not operate as a deterrent to police officers who engage in this vice.

(iii) The executive should make monthly reports to parliament on the number of people detained, place of detention and state of their health.

(iv) The power of Magistrate courts to conduct preliminary inquiry proceedings should be mandatory in respect of persons charged with serious offences such

\(^{163}\) The Case of William Chipango v Attorney General. (1980) (Unreported) : Applicant detained for seven (7) years without trial.
as treason. The proceedings should commence immediately a detainee is charged and brought before the court. The overriding powers of the Director of Public Prosecutions to issue a certificate for summary trial should be abolished. This, it is hoped will significantly ensure that detainees are not subjected to the costs and embarrassment of a trial on preposterous charges.

(v) Considering the number of people who are unlawfully arrested and detained, it is proposed that the legal aid department be well staffed by lawyers who are conversant with the theoretical and practical aspect of the writ of habeas corpus so as to offer free legal services to detainees who do not have the financial resources to retain private lawyers.
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