



Strathmore University
Law School

**HABEAS CORPUS AS AN EFFECTIVE REMEDY TO ENFORCED DISAPPEARANCE
WITH RESPECT TO THE MARIAM & HEMED CASES**

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By

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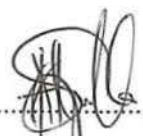
Declaration

I, WAKIO CINDY YVETTE, do hereby declare that this research is my original work and that to the best of my knowledge and belief; it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: 

Date: th 28 MAY 2018

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:  30 May 2018

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Abstract

Confinement of persons, by secretly hurrying them to a gaol, where their sufferings are unknown should be a thing of the past, given the status of habeas corpus as a non-limitable right under Article 25 of the Constitution of Kenya. It is however worrying that judgments such as *Masoud Salim Hemed & another v Director of Public Prosecution & 3 others*, Judgment of 8 August 2014, in the High Court of Kenya at Mombasa seem not to reflect the level of constitutionalism expected of this constitutional provision.

The aim of this paper is to show that habeas corpus can be refashioned to be the appropriate remedy for enforced disappearances. It undertakes to do this by answering three questions; what was the intended purpose of the change in the Constitution, what in the history of common law informs the current interpretation of habeas corpus and what can we learn from the Inter-American system's treatment of habeas corpus that can be used to improve our own system.

The paper makes use of constitutionalism as its theoretical framework; it deduces this to be the intention behind Article 25 of the Constitution. This theme is also explored within the history as well as the interpretation of habeas corpus by the Inter-American Court. Finally the paper compares *Mariam Mohamed and another v commissioner of police and another*, Judgment of 21 November 2007, High Court at Nairobi, a pre-2010 case with *Hemed* within the background of these findings and gives recommendations.

List of Abbreviations

CoE	Committee of Experts
CKRC	Constitution of Kenya Review Commission
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
IACmHR	Inter-American Commission on Human Rights
ICAiHR	Inter- American Court of Human Rights
KNCHR	Kenya National Commission on Human Rights
NCC	National Constitutional Conference
UK	United Kingdom
US	United States

List of Cases

International

- 1) *Bamaca Velasquez v Guatemala*, ICAtHR Judgment of 25 November 2000
- 2) *Cesti Hurtado v Peru*, Judgment of 29 September 1999.
- 3) *Coard v United States*, IACmHR Case no 10.951(1999).
- 4) *Fairén Garbí and Solís Corrales v Honduras*, ICAtHR Judgment of 15 March 1989.
- 5) *Godínez Cruz against Honduras*, ICAtHR Judgement of 17 August 1990.
- 6) IACHR, *Advisory opinion on Judicial guarantees in states of emergency*, 6 October 1987.
- 7) IACHR, *Advisory opinion on habeas corpus in emergency situations*, 30 January 1987, 27 ILM 512.
- 8) *Kurt v Turkey*, ECtHR Judgment of 25 May 1988.
- 9) *Nativí and Martínez v Honduras*, IACmHR Case no 7864 (1987).
- 10) *Rafael Ferrer-Mazorra et al. v United States*, IACmHR Case 9903(2001).
- 11) *Serrano Cruz sisters v El Salvador*, IACtHR Judgement of 1 March 2005, (Merits, Reparations and Costs).
- 12) *Timurtaş v Turkey*, ECHR Judgment of 13 June 2000.
- 13) *Varnava and Others v Turkey*, ECtHR Judgment of 18 September 2009.
- 14) *Velásquez-Rodríguez v Honduras*, ICAtHR Judgment of 29 July 1988.

National

- 1) *Boumediene v Bush*, United States Supreme Court, Judgment of 12 June 2008.
- 2) *Masoud Salim Hemed & another v Director of Public Prosecution & 3 others*, Judgment on 8 August 2014, High Court of Kenya at Mombasa.
- 3) *Mariam Mohamed and another v commissioner of police and another*, Judgment of 21 November 2007, High Court at Nairobi.
- 4) *Re Thomas Darnel*, 59 KB 1627.
- 5) *Timothy Njoya & others v the Hon. Attorney General & others*, Miscellaneous Civil Application No 82 of 2004 in the High Court at Nairobi

List of Legal Instruments

International

- 1) *American Convention on Human Rights, "Pact of San Jose"*, 22 November 1969, O.A.S.T.S. No. 36.
- 2) *American Declaration of the Rights and Duties of Man*, 2 May 1948.
- 3) *Draft Inter-American Convention against Racism and All Forms of Discrimination and Intolerance*
- 4) *Extrajudicial, Summary or arbitrary executions*, UN A/RES/69/182 (30 January 2015).
- 5) UNGA, *Commemorating 300th anniversary of act giving writ of habeas corpus statutory force*, UN A/Resolution 34/178 (1979).

National

- 1) *Constitution of Kenya (2010)*.
- 2) *Constitution of Kenya (Repealed)*.
- 3) *Constitution of Kenya Review Act (2008)*
- 4) *Criminal Procedure Code (Kenya)*.
- 5) *Detainee Treatment Act of 2005 (US)*
- 6) *Habeas Corpus Act, United Kingdom (1679)*.
- 7) *Philippines Constitution*
- 8) *United States Constitution*

Chapter 1

Habeas corpus and enforced disappearance

1.1. Background

The Kenya National Commission on Human Rights (KNCHR), in a 2015 report titled: “The error of fighting terror with terror,” documented 25 extrajudicial killings and 81 disappearances by various Kenyan state agencies.¹

The report elaborated on how Kenyan law enforcement officials had carried out enforced disappearances and extrajudicial executions, in violation of international and regional human rights obligations as well as constitutional guarantees to the right to life and freedom from torture.² They had particularly directed these actions disproportionately at refugees and Kenyan citizens of Somali origin, due to suspicions that these individuals may have been involved with the Somali terrorist group, Al-Shabaab.³

A typical case of enforced disappearance takes place when members of an armed group or police come to a place and arrest one or several persons present in that place. The explanation given is that the persons being arrested will be returned soon.⁴ At a subsequent stage the family members of that individual start inquiring about their whereabouts with no success, and it is at this point that the families decide to go to court and seek a writ of habeas corpus.⁵ The family’s petition for a writ of habeas corpus is however, only entertained by the courts to the extent that the police or armed forces in question do not deny physical possession of the persons thought to have been forcibly disappeared. If these authorities state that they do not have the person, the individual may be taken to be a missing person believed to be dead. This was the case in *Hemed*,⁶ where the Court ordered that an inquest into the person’s death. In *Hemed*, a writ of habeas corpus was filed by both the subject’s family as well as a public interest litigator to have him produced in court by the police; with whom he was last seen. While the Court found reasonable grounds for

¹ Kenya National Commission on Human Rights (KNCHR), *The error of fighting terror with terror*, September 2015, 6.

² KNCHR, *The error of fighting terror with terror*, 6.

³ KNCHR, *The error of fighting terror with terror*, 6; Human Rights Watch, *World report 2015: Kenya*, 2015, 9.

⁴ Florath T, ‘Effective remedies for enforced disappearances - The suitability of habeas corpus’ Research project, Irish Centre for Human Rights, April 2013.

⁵ *Masoud Salim Hemed & another v Director of Public Prosecution & 3 others*, Judgment on 8 August 2014, High Court of Kenya at Mombasa, para 3.

⁶ *Hemed case*.

believing, as contended by the petitioners, that the subject may have been killed, it hesitated to make an order on that finding requiring further investigation to disclose whether in fact the subject escaped from custody or what became of him upon arrest. The Court therefore returned a verdict that the subject of the habeas corpus proceedings, Mr. Hemed Salim, was a missing person believed to be dead within the meaning of section 386 of the *Criminal Procedure Code*. Accordingly, the Court found that the respondent custody of the subject at the time of the ruling had not been proved; stating that the respondent had lost custody of the subject after the arrest and that the case needed to be investigated further to determine the correct factual position. However the Kenya law requires a body in order for an inquest to be carried out.⁷ The order of habeas corpus was therefore held in abeyance until a time when it would be established that the respondents had custody or had regained custody of the subject. This case relied on the holding in *Mariam case* in which the writ of habeas corpus was refused for three main reasons; the physical absence of the subject matter within the custody of the respondent, the impracticability of implementing the writ of habeas corpus and the aversion that the constitutional rights claimed to have been violated by the respondents would need a different forum to be dealt with.⁸

The applicants' in this case averred that the respondent had facilitated the removal of the subject (victim) from the jurisdiction.⁹ The respondent claimed that they were not aware of this and that the Court in this instance had no jurisdiction over persons not present in the country.¹⁰ And that being an application for habeas corpus a proper application needed to be made before the relevant court of constitutional jurisdiction and competence, since violations of constitutional rights were being alleged.¹¹

These cases may be contrasted with *Serrano*¹² which although dismissed for similar reasons to those in *Hemed*,¹³ the Inter-American Court believed it could still be an effective remedy.

Although habeas corpus was used in common law to ensure physical presence of a defendant or witness in front of a court, it has developed over time to oblige a person in charge of a detainee

⁷ Section 386, *Criminal Procedure Code* (Kenya).

⁸ *Mariam Mohamed and another v commissioner of police and another*, Judgment of 21 November 2007 in the High Court at Nairobi. ,1,3,5.

⁹ *Mariam case*, 3.

¹⁰ *Mariam case*, 3.

¹¹ *Mariam case*, 3.

¹² *Serrano Cruz sisters v El Salvador*, IACtHR Judgement of 1 March 2005, (Merits, Reparations and Costs) para 86.

¹³ *Hemed case*.

to present the person physically in court.¹⁴ It has become an important legal challenge for arbitrary detention or confinement.¹⁵

The interesting thing is that in Kenya, pre-2010 Constitution, habeas corpus was simply a procedural tool available to the courts. There was no express provision for it is a right in the law. A reading of the reports and documents that led to the 2010 Constitution also highlight that there was no recorded discussion about habeas corpus and whether or not to include it in the final Constitution. The question then remains, why it was included in the final draft.

1.2. Statement of problem

Habeas corpus is the solution often sought in cases of enforced disappearance. The writ of habeas corpus however deemed in Kenyan law to require physical possession of the person claimed to have been forcibly disappeared for it to stand before a court of law. Physical possession of forcibly disappeared persons is however not possible, a fact that international courts seem to have taken into consideration. This requirement under Kenyan national law therefore needs to be modified if habeas corpus is to become an effective remedy for enforced disappearance, and serve its elevated purpose as an 'unlimitable' constitutional guarantee.

1.3 Justification/significance of the study

The Constitution of Kenya 2010 places habeas corpus as a non-limitable right.¹⁶ It was expected that this change would be reflected in judicial decisions pertaining to habeas corpus. However, in judicial decisions as recent as 2014 habeas corpus is still being treated in a similar manner to those in 2007.¹⁷ The significance of this study is therefore to bridge the gap between the constitutional provision and court judgments. And therefore, to understand why the courts are not reflecting this change and what needs to be done to implement this change. The usefulness of this finding is to help guide the courts to bring Article 25 to life.

1.4 Statement of Objectives

In this study the objectives are to determine:

- a) The reason behind the constitutional inclusion of habeas corpus as a non-limitable right.

¹⁴ *Habeas Corpus Act*, United Kingdom (1679).

¹⁵ *Serrano Cruz sisters v El Salvador*, para 83.

¹⁶ Article 25, *Constitution of Kenya* (2010).

¹⁷ *Hemed case*; *Mariam case*.

- b) What needs to be modified in habeas corpus to make it an effective remedy to enforced disappearance

1.5 Hypothesis

Article 25 of the Constitution was meant to change the status of habeas corpus in Kenya. Certain other aspects of Kenyan law may need a few modifications if habeas corpus, as enshrined in constitutional Article 25 is to become an effective remedy for enforced disappearance.

1.6 Research Questions

- a) What was the intended purpose of the change in the Constitution?
- b) What is the history in common law that informs the current interpretation of habeas corpus?
- c) What can we learn from the Inter-American system's treatment of habeas corpus that can be used to improve our own system?

1.7 Literature Review

The Philippines' Supreme Court adjudged that habeas corpus may not be used as a means of obtaining evidence on the whereabouts of a person, or as a means of finding out who has specifically abducted or caused the disappearance of a certain person.¹⁸ This decision has been quoted by Honourable Muriithi. He elaborated that within the concept of habeas corpus, the court would be unable to make orders for the production of the subject, because such an order would be in vain.¹⁹ It is a fundamental principle applicable in the judicial settlement of disputes that a court of law is not to make an order in vain. He stated that if the respondents say that they have never had custody over the person who is the subject of the writ, the petition must be dismissed, in the absence of definite evidence to the contrary.²⁰

This comment seemed to agree with an earlier high court decision by Justice Ojwang in which he held that, custody is crucial in a habeas corpus case, and even where physical custody is lost by a voluntary act of the respondents, the right to habeas corpus will be affected.²¹

The Inter- American Court however does not share this view. It holds that habeas corpus can be an effective remedy for discovering the whereabouts of a persons or clarifying whether a

¹⁸ *Alejano v Cabuay* 468 SCRA 188, 200, Judgement of 25 August 2005.

¹⁹ *Mariam case*.

²⁰ *Mariam case*.

²¹ *Hemed case*, para 34.

situation that harms personal liberty has occurred.²² This would be the case even if the person in favor of whom it is filed is no longer in the State's custody, or has been handed over into the custody of an individual or even if considerable time has passed since a person disappeared.²³ The Court then dismissed the Constitutional Chamber of El Salvador's view that annulled the effectiveness of the remedy, because it did not integrate the obligation to take measures to establish the whereabouts of disappeared persons into the habeas corpus procedure.²⁴ It further stated that it was admissible to modify the jurisprudential principles of the constitutional chamber in relation to habeas corpus

So, those serious alleged acts of harm to the right to liberty such as forced disappearance and others might not be excluded from the remedy of habeas corpus.²⁵

Habeas corpus could have been effective to determine the whereabouts of the alleged victims or to make significant progress in the *Serrano case*.²⁶ However the relevant procedural actions were not carried out diligently, given the extensive powers of the executing officer and the obligation of the State authorities to provide the executing officer with any information she requested was not complied with.²⁷

What comes out is that a writ of habeas corpus is ineffective because of three main reasons;²⁸

- State of emergency
- Applicant not providing sufficient information of the whereabouts of the victim
- The courts accepting denial of detention by the police or group without further investigations

1.8 Assumptions

This study will make an assumption that the forcibly enforced individual is alive.

1.9 Research Design and Methodology

This research will make use of the descriptive design to explain the changing circumstances from 2006 to 2016. This is in order to show increase in enforced disappearance as a result of the fight

²² *Serrano case*, para 79.

²³ *Serrano case*, para 79.

²⁴ *Serrano case*, para 81.

²⁵ *Serrano case*, para 81.

²⁶ *Serrano case*, para 86.

²⁷ *Serrano case*, para 86.

²⁸ Florath, 'Effective remedies for enforced disappearances', April 2013.

against terror. This will also be necessary to compare events pre-and post-2010 Kenyan constitution. The descriptive design will also aid in showing the transformation of habeas corpus since its inception as a common-law concept.

Further a case study will be done of two judicial decisions, *Hemed and Mariam*.²⁹ To show that the focus of this research will mainly be on the Kenyan citizens of Somali origin and there has been no change in judicial decisions despite the new provisions of the Constitution.

1.10 Limitations

There will be a challenge in finding data in support of this research. This is because majority of the people working in the judicial system, the legal practitioners as well as the police, would rather keep silent when it comes to habeas corpus.

1.11 Conclusion

This paper will begin by assessing why the status of habeas corpus has not changed despite the constitutional upgrade and despite the need for this change to be reflected in judicial decisions. First it gives the background against which the problem arises, it then outlines the problem by stating the objectives, the questions to be answered and the hunch of the author.

The study then moves on to deal with constitutionalism. Moving from the repealed Constitution, through the different draft constitutions as well as the harmonised Constitution. All the while looking through the Committee of experts report, as well as the Constitution of Kenya review commission report. From these readings deducing the intended purpose of article 25 of the Constitution and linking it to the theoretical framework of constitutionalism.

The paper also dedicates a chapter to look into the history of habeas corpus in common law and what in its history informs its current interpretation. It explores the start of habeas corpus as a tool of settling jurisdictional conflicts and its development into a legal challenge for unlawful imprisonment. It also discusses the emerging trends of habeas corpus in light of terrorism and national security concerns.

The paper does an analysis of the Inter-American Court system to see what can be learnt from it and incorporate into our system. Bringing together the conclusions arrived at in chapter one and two of the paper.

²⁹ *Hemed case; Mariam case.*

Having established that the intent is the promotion of constitutionalism, this paper concludes by giving the way forward after arriving at the conclusion that *Hemed* case erred by relying on outdated law given in the *Mariam* case.

Chapter 2

Constitutionalism

2.1 Introduction

This study seeks to rely on the theory of constitutionalism as advanced by Nwabueze³⁰ and Okoth Ogendo to unpack the purpose of Article 25.³¹

A government is an important institution recognised universally as necessary in a democratic society, if the state is to fully realise the potential of its people and grow.³² A democratic government being one that is, of the people by the people for the people.³³ The necessity of a government however also brings with it a problem, inherent arbitrariness that is custom of the power that comes with the office and its functions.³⁴ As put by Lord Atkins, power tends to corrupt and absolute power tends to corrupt absolutely.³⁵

Constitutionalism could be understood as an evaluation of the extent to which the form, substance and legitimacy of constitutional principles are embodied in the constitutional practice, therefore becomes a necessity.³⁶ Or as an elevation of the concept of the rule of law to a position where it ensures that fundamental freedoms and rights are safeguarded at both procedural and substantive levels.³⁷ This paper will particularly focus on how it recognizes the necessity of a government but insists upon limitations being placed upon its powers.³⁸ That at the core and the substantive element of constitutionalism is to limit government power through constitutional guarantees of individual rights that are enforceable through an independent judiciary.³⁹ This creates a system of pre-determined rules, which allows an individual to have predictability in

³⁰ Nwabueze B, *Constitutionalism in the emergent states*, Hurst & Company, London, 1977; Ogendo O, *Constitutions without constitutionalism: Reflections of an African paradox*, American Council of Learned Societies, New York, 1988.

³¹ Article 25, *Constitution of Kenya* (2010).

³² Nwabueze, *Constitutionalism in the emergent states*, 1.

³³ Nwabueze, *Constitutionalism in the emergent states*, 1.

³⁴ Nwabueze, *Constitutionalism in the emergent states*, 4.

³⁵ Osogo A and Mbondenyei K, *The new Constitutional law of Kenya: Principles, government and human rights*, Claripress, Nairobi, 2012.

³⁶ Lumumba P and Franceschi L, *The Constitution of Kenya, 2010, An introductory commentary*, Strathmore University Press, Nairobi, 2014, 4.

³⁷ Lumumba and Franceschi, *The Constitution of Kenya, 2010*, 4.

³⁸ Nwabueze, *Constitutionalism in the emergent states*, 1.

³⁹ Nwabueze, *Constitutionalism in the emergent states*, 5.

state-citizen relationships and to know the extent of permissible government interference in his/her life and activities.

Constitutions are often linked with this idea of constitutionalism because they create the sense of regulation referred to above.⁴⁰ It is even thought that constitutionalism is better entrenched in a constitution if it excludes the notion of parliamentary sovereignty and requires a lot more than a majority to change a constitutional provision, perhaps even going to the extent of making some articles unalterable.⁴¹

Okoth Ogendo notes a paradox in that many states recognise the importance of a constitution but fail to uphold the constitutionalism part of it.⁴² This awakens us to the possibility of an elaborate constitution with no constitutionalism. He mentions a few factors such as decrease of parliamentary sovereignty and increase in public participation as being key in acquiring constitutionalism.⁴³ In the last 27 years between 1990 and 2017, approximately 48 new constitutions have been made in Africa, and countries that have not been able to draft new constitutions, like Tanzania, have made extensive changes to their old ones.⁴⁴ Yet the worry Okoth Ogendo had still persists, with constitutions simply promising a new era of the rule of law while still being routinely ignored in practice.⁴⁵

2.1.1 Kenya's Paradox

The Constitution of Kenya 2010 erects habeas corpus as non-limitable right, which is in itself a misnomer. Having not ratified the convention on enforced disappearance or put in place any law to address enforced disappearance; this is seen as a big step towards addressing systemic arrests. This would perhaps be equated to the unalterable provisions of a constitution suggested by Nwabueze.⁴⁶ The courts adjudication of this right has however not changed post 2010.⁴⁷ Such judgments as *Hemed* in 2014, seem not reflect the level of constitutionalism that is expected of this constitutional provision. It is therefore worrying that Okoth Ogendo's paradox of states

⁴⁰ Nwabueze, *Constitutionalism in the emergent states*, 6.

⁴¹ Nwabueze, *Constitutionalism in the emergent states*, 11.

⁴² Ogendo, 'Constitutions without constitutionalism', 223.

⁴³ Ogendo, 'Constitutions without constitutionalism', 223.

⁴⁴ 'Wachira Maina: Everywhere you look in Africa democracy is under serious trial' *Daily Nation*, 2 March 2018.

⁴⁵ 'Wachira Maina: Everywhere you look in Africa democracy is under serious trial'.

⁴⁶ Article 25, *Constitution of Kenya*.

⁴⁷ Compare judgment in *Hemed case* and *Mariam case*.

committed to the idea of a constitution, while rejecting constitutionalism might be existent in our country.⁴⁸

This study will therefore look at Kenya's constitutional journey from the repealed Constitution, picking out key constitutional elements that stood out in each period, assessing their impact on Kenya's constitutionalism and consequently drawing the purpose of Article 25. This section intends to show that despite lack of express discussion or definition of habeas corpus in the preparatory works, considerations made in the reports paved way for constitutionalism. The discussions aimed at curing arbitrary arrests, which is at the core of both habeas corpus and enforced disappearance. The setting of constitutionalism through these discussions is therefore a reflection of the expected purpose of article 25 of the Kenyan Constitution.

2.2 Kenya's Constitutional Development

2.2.1 The Repealed Constitution

The repealed Constitution did not make any express provisions for habeas corpus. Article 72, provided that a detained person was to be brought to court within reasonable time. The threshold of what was reasonable time was given as either twenty four hours after arrest or within fourteen days for capital offences.⁴⁹ The burden of proof was then placed on the arresting authority to show that the person was brought to court within reasonable time.⁵⁰ Although this provision did not speak directly to habeas corpus, it opened up the path to protection of personal liberty rights, which as we shall see in chapter three was and still is at the heart of habeas corpus.

2.2.2 Bomas Draft 2003-2005: Parliamentary sovereignty and habeas corpus

The 2003 to 2005 period was dominated by calls for the speedy enactment of a new constitution. This was the platform on which the political parties campaigned, promising a new constitution that would cater for the needs of the people while limiting the excesses of government.⁵¹ This desire for a limited government was an indication of the longing for constitutionalism. Although

⁴⁸ Ogendo. *Constitutions without constitutionalism*, 223.

⁴⁹ Article 72 (3), *Constitution of Kenya* (Repealed).

⁵⁰ Article 72 (3), *Constitution of Kenya* (Repealed).

⁵¹ A coalition of parties under the umbrella of the National Alliance Rainbow Coalition (NARC) Party was formed to contest the 2002 elections against the then ruling party, Kenya African National Union (KANU). In its campaign, NARC had promised to deliver a new constitution for Kenya within one hundred days, if the party were to be elected to power. On being elected, NARC came up with the National Constitutional Conference (NCC) to deliver a new Constitution. The Conference went ahead and produced a draft Constitution which came to be known as The Bomas Draft.

a constitution was eventually delivered, the constitutionality of the procedure used by parliament to bring about such constitution was questioned.⁵²

The High Court ruling on this matter is what is particularly important to this chapter. It held that the National Constitutional Conference (NCC), which was responsible for the final draft of the constitution was not a constituent assembly and that a referendum was, required to adopt the constitution.⁵³ A reasoning that reverts back to Okoth Ogendo's notion of decreased parliamentary sovereignty and increased public participation. This notion of rejection of parliamentary sovereignty is not novel to Kenya and we shall see in chapter 3 that it had to be fought out within the Privy Council as well in order to allow for habeas corpus to thrive.

At this in point in 2004, habeas corpus had still not been mentioned in the draft constitution. The ruling created fertile ground upon which habeas corpus would be grown. It respected the notion, that democracy is an organisation of the process of collective discussion about the right standards on which to organize public life.⁵⁴ And that a Kenyan constitution needed to be seen as having been tailored to the needs of the Kenyans informed through their participation, something that the Bomas draft failed to do.

2.2.3 The 2005 Referendum on a Proposed New Constitution in 2005 ('Wako Draft')

The failure to get a new constitution in 2004 however meant that, the Bill of Rights still remained deficient in that;⁵⁵ rights could be easily limited or suspended, there was no recognition of the principle of gender equity, there was no protection of economic and social rights, which are essential for the basic needs of a large section of the people and there were no adequate mechanisms for enforcing of rights. The rules for amending the Constitution were also neither sufficient to protect important institutions or procedures nor able to recognise some provisions of the constitution as more fundamental than others, and therefore give them greater protection.⁵⁶ Yet the core and substantive element of constitutionalism is the limitation of government through

⁵² *Timothy Njoya & others v the Hon. Attorney General & others*, Miscellaneous Civil Application No 82 of 2004 in the High Court at Nairobi.

⁵³ *Timothy Njoya case*.

⁵⁴ Ogendo, *Constitutions without constitutionalism*, 237.

⁵⁵ Constitution of Kenya Review Commission (CKRC), *Final report of the Constitution of Kenya Review Commission*, 10 February 2005, 34.

⁵⁶ *Final report of the Constitution of Kenya Review Commission*, 34.

constitutional guarantees of individual civil liberties.⁵⁷ Although habeas corpus had still not been expressly mentioned, this state of affairs was an indication of the changes that needed to take place to ensure effective protection of rights. In particular the right to liberty and life which are at the core of habeas corpus. The sense of regulation associated with constitutions was still lacking.

The people in 2005 put the Commission (CKRC) to task; to ensure that nobody was above the law.⁵⁸ They wanted all citizens without exception to be equal before the law, and hoped that a new Constitution would guarantee justice and rule of law for all Kenyans. They feared that unless State power was exercised in accordance with the law, good governance would be compromised.⁵⁹ This was mostly because the rule of law as an element of constitutionalism depended a lot on how and by what procedure it was interpreted and enforced.⁶⁰

A distinction therefore needed to be made between entrenched and non-entrenched provisions of the Constitution, with a stringent mechanism being set up for amending the former entrenched provisions which would include supremacy of the Constitution, the Bill of Rights, land, the Judiciary, security, finance, the system of government.⁶¹

2.2.4 The last Phase (2007-2008)

The 2007 General Elections were heavily contested. The final results were delayed and then announced amidst public tension. This saw violence erupt in different parts of the country.⁶²

As these events took place, the Judiciary was yet to evolve a predictable philosophy to guide in the interpretation of the Bill of Rights, and the realisation of rights remained a mere coincidence rather than a guarantee.⁶³ Yet the rule of law as an element of constitutionalism depended a lot on how and by what procedure it was interpreted and enforced.⁶⁴ A general limitation clause in the constitution would allow limitations on rights in carefully defined circumstances. However,

⁵⁷ Nwabueze, *Constitutionalism in the emergent states*, 5.

⁵⁸ *Final report of the Constitution of Kenya Review Commission*, 66.

⁵⁹ *Final report of the Constitution of Kenya Review Commission*, 66.

⁶⁰ Nwabueze, *Constitutionalism in the emergent states*, 9.

⁶¹ *Final report of the Constitution of Kenya Review Commission*, 72.

⁶² An agreement was eventually brokered by Kofi Annan and signed by the principle parties on 28th February 2008. The agreement laid the foundation for the formulation and implementation of constitutional and institutional reforms that would guarantee the political stability of Kenya in the long term.

⁶³ Osogo J A. 'The State of Constitutionalism in Kenya-2007'. I Kioko(ed), *Constitutionalism in East Africa*, Fountain Publishers, Kampala, 2012, 61.

⁶⁴ Nwabueze, *Constitutionalism in the Emergent States*, 14.

the Committee (CoE) was of the view that some rights should not be limited under any circumstances whatsoever.⁶⁵ For this reason it included a non-derogation clause in the draft prohibiting any limitation whatsoever on certain rights.⁶⁶ This idea of a general limitation clause and non-derogation of some rights, in my opinion, hinted at the idea that came to be Article 24 and 25 of the Constitution of Kenya, 2010.

2.3 Conclusion

This far into the constitutional journey, there was still no express mention of habeas corpus. The process however revealed the desire for a limited government, proper governance and more predictability in state-citizen relations. More accountability was desired, bring to an end arbitrariness of state officials and elevate respect for the rule of law.⁶⁷ It was therefore expected that a new constitution would enable Kenyans to achieve governance under a democratic system of government that guaranteed good governance, respect for the constitution itself, rule of law, and human rights.⁶⁸

⁶⁵ The Committee of Experts on Constitutional Review, *The Preliminary report of the Committee of Experts on Constitutional Review*, 17th November 2009, 13.

⁶⁶ *The Preliminary report of the Committee of Experts on Constitutional Review*, 34.

⁶⁷ *Final report of the Constitution of Kenya Review Commission*, 72; Osogo. 'State of Constitutionalism in Kenya-2007'. 63; *The Preliminary report of the Committee of Experts on Constitutional Review*, 33.

⁶⁸ Section 4, *Constitution of Kenya Review Act* (2008).

Chapter 3

The development of habeas corpus; curbing executive power

3.1. Introduction

Chapter 2 established that although not expressly stated in the preparatory works, the developments made prior to the 2010 Constitution were made in an effort to create a constitution with constitutionalism. This was done in response to arbitrariness of the executive. This chapter will now show how habeas corpus has morphed over the years into a tool of constitutionalism to curb executive power.

3.2. History of habeas corpus in common law

The writ of habeas corpus is believed to have its origins in the Medieval English courts.⁶⁹ It is thought that Article 39 of the Magna Carta (1215), which provided that '*no Freeman shall be taken, or imposed ...but by lawful judgment of his Peers, or by the Law of the Land*' is a hint of the writ of habeas corpus.⁷⁰ Whether this is true or not is debatable, however, what is certain is that the prohibition of unlawful detention and imprisonment has not always been at the heart of the writ.⁷¹

The courts that issued the writ of habeas corpus were at first mainly concerned with their own jurisdictional interests over the detained person.⁷² The two English common law courts; King's Bench and common pleas, later joined by the King's Chancery, had jurisdictional competition with the inferior courts.⁷³ The writ, which was issued in the King's name, provided a means for a person to be brought from the jurisdiction of a lower court to that of a higher court such as the Chancery.⁷⁴ This was mainly to enforce the privilege of certain classes such as the clergy and the

⁶⁹ Landman J. 'You should have the body: Understanding Habeas corpus' 72 *Social Education Journal*, 2 (2008), 99.

⁷⁰ Landman. 'You should have the body.99; The Robins collection. 'commonlawcivillawtraditions' *UC Berkley law school*, (2010),3; Wert J. 'With a little help from a friend: Habeas corpus and Magna Carta after Runnymede' 43 *Political Science and Politics*, 3 (July 2010),475-478.

⁷¹ Wert. 'With a little help from a friend. 476.

⁷² Landman. 'You should have the body. 99.

⁷³ Landman. 'You should have the body. 99.

⁷⁴ Landman. 'You should have the body, 99.

nobles.⁷⁵The writ however managed to permeate these interests and developed into a legal challenge to unlawful detention.

Habeas corpus, historically has not been a substantive 'right' that someone possesses so much as it has been an evolving set of procedures through which the right to be free from illegal detention may be vindicated.⁷⁶ What we have come to know as habeas corpus is therefore derived from a series of 'writs of habeas corpus' that were used in the English courts in the medieval period.⁷⁷

The early forms of the writ of habeas corpus were mainly demands to produce a person before the court. They did not have a demand to explain the reason behind a person's detention.⁷⁸ It was not until the fourteenth century that the English courts fashioned a writ whose purpose was to question the reason for a person's detention. With the new writ, *habeas corpus cum causa*, the courts established a procedure that began to resemble the modern writ. The writ required not only asked for production of the body of the person being detained, but also the reason for his detention.⁷⁹

The writ of *habeas corpus cum causa* provided the courts with a powerful tool for controlling the authority of the state to arbitrarily detain persons with no just cause.⁸⁰ Nonetheless, this power still remained largely dormant, and for nearly a century and a half it was exercised by the various English courts to do no more than remove cases from one court to another in a protracted battle over their respective jurisdictions.⁸¹ Still, the courts' reliance on *cum causa* as a procedural tool for protecting their prerogatives as against other courts made habeas corpus a familiar tool. While their battles might seem trivial now, by the late sixteenth century the courts' resistance to encroachment on their jurisdiction extended to executive agencies as well.⁸² In particular, the courts used the habeas writ to protect their jurisdiction from infringement by the Privy Council,

⁷⁵ Wert. 'With a little help from a friend', 475.

⁷⁶ Marc F. 'Back to basics: Habeas corpus procedures and long-term executive detention' 86 *Denver University Law Review*. (2009), 966.

⁷⁷ Marc. 'Back to basics', 966.

⁷⁸ Marc. 'Back to basics', 967.

⁷⁹ Marc. 'Back to basics', 967.

⁸⁰ Marc. 'Back to basics', 967.

⁸¹ Marc. 'Back to basics', 967.

⁸² Marc. 'Back to basics', 968.

whose detention practices were deemed increasingly unlawful by the courts.⁸³ The Privy Council was evolving just as much as the writ.

By 1588, the writ *cum causa* had given rise to the writ *ad subjiciendum*, developed by the King's Bench, chiefly to protect subjects against unconstitutional imprisonment by privy councilors and officers of the state.⁸⁴ This form of the writ could be said to be the direct descendant of what we now know as 'habeas corpus'.⁸⁵ In his Commentaries, Blackstone described the *ad subjiciendum* as 'the great and efficacious writ, in all manner of illegal confinement,' and explained that it was directed to the person detaining another, commanding him to produce the body of the prisoner with the day and reason of his detention.⁸⁶

Around 1590, it therefore appeared that the common law courts had firmly established that habeas corpus was a tool that could be used against the executive in case of unexplained detentions.⁸⁷ Indeed, in 1592, the judges of the King's Bench, Common Pleas and the Exchequer Court assembled to discuss their dissatisfaction with the detention abuses of the Privy Council.⁸⁸ At this assembly, they issued a resolution affirming that their practice was to order the release of person(s) who were detained by the monarch's councilors in cases where a return to a writ of habeas corpus showed no legal justification for the detention.⁸⁹ The judges however had a concern, that as a practical matter, this custom was not completely effective as there were still cases of reincarceration in secret prisons of the men who had been ordered released.⁹⁰ This is an indication of the antiquity of the practice of Enforced Disappearance.

3.2.1. Darnel's Case and the Petition of Right

The power of the state to detain persons without giving a reason for the legal cause of the detention was politically controversial, causing two unsuccessful attempts by the English Parliament to rectify the situation and eventually leading to a constitutional crisis during the

⁸³ Marc, 'Back to basics', 968.

⁸⁴ Marc, 'Back to basics', 968.

⁸⁵ Marc, 'Back to basics', 968.

⁸⁶ Blackstone W, *Commentaries on the Laws of England*, Clarendon Press, Oxford, 1765-1769.

⁸⁷ Marc, 'Back to basics', 968.

⁸⁸ Marc, 'Back to basics', 969.

⁸⁹ Marc, 'Back to basics', 969.

⁹⁰ Marc, 'Back to basics', 969.

reign of Charles I.⁹¹ The spark for the controversy was Darnel's *Case in 1627, also known as the Five Knights' Case*.⁹² The return made by the Executive in this case stated that the men were being detained *per speciale mandatum domini regis*, meaning by a special order of the King.⁹³ The Attorney General noted in defense of the executive that the Magna Carta did not define what qualified to be law of the land and that the King could detain his subjects without giving a reason to the courts.⁹⁴ Relying on the Resolution of 1592 and recent cases, the court accepted the Attorney General's argument, ruling that the general return by the Executive was sufficient and that the prisoners could not be bailed.⁹⁵ Proof that more than the courts word was needed to protect the writ of habeas corpus.

In that same year, 1627, Parliament passed the Petition of Right, which was a declaration of grievances against Charles I that included the complaint that subjects had been imprisoned without any reason being given. The hallmark of this petition was the so called special order of the king that was used as justification for the detentions.⁹⁶ But even after the Petition of Right was passed, Charles I refused to honour it, continuing to offer only general returns and denying that the Petition had the force of law. For the most part, the courts did all they could to avoid confronting the executive on its refusal to abide by the Petition of Right.⁹⁷ A lot more than a declaration was needed to deal with this executive supremacy and the judicial passivity.

3.2.2. The Habeas Corpus Act, 1640

The passivity of the courts eventually led Parliament, when it reconvened, to pass the Habeas Corpus Act of 1640, specifically providing that any person detained by order of the King or his Privy Council must be brought without delay to the court and a reason must be given for the detention.⁹⁸ This first Habeas Corpus Act was however hampered by procedural defects, and was

⁹¹ Marc. 'Back to basics', 969.

⁹² *Re Thomas Darnel*, 59 KB 1627; This case brought into play the need for codification of the writ of habeas corpus. King Charles I had ordered a forced loan from his subjects in order to raise revenue without Parliament's sanction. His agents detained those who refused to make the loans, including five knights. Probably seeking to test the legality of the King's scheme, they sought a writ of habeas corpus, claiming that their detention was illegal.

⁹³ *Darnel's case*.

⁹⁴ Marc. 'Back to basics', 970.

⁹⁵ Marc. 'Back to basics', 970; *Darnel's case*.

⁹⁶ Landman. 'you should have the body'. 99.

⁹⁷ Marc. 'Back to basics', 970.

⁹⁸ Marc. 'Back to basics', 970.

therefore not completely effective.⁹⁹ It was disputed, for example, whether the writ could be awarded while the courts were in vacation, leading to lengthy detentions.¹⁰⁰ There were also a number of abuses, including the movement of prisoners from jail to jail to avoid the writ, or transportation to Scotland or other areas beyond the jurisdiction of the courts. Yet again this was an indication of the antiquity of the practice of enforced disappearance.¹⁰¹ Without a muscular writ it was possible that a prisoner could be taken in secret and his detention would never be known by the public. Blackstone observed, ‘confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten, was a less public, a less striking, and therefore a more dangerous engine of arbitrary government.’¹⁰²

3.2.3. Habeas Corpus Act, 1679

Parliament sought to remedy the procedural defects of the 1640 Act through passage of the Habeas Corpus Act of 1679¹⁰³, a piecemeal statute that was designed to make the writ an effective remedy.¹⁰⁴ Hailed by Blackstone as the ‘second Magna Carta,’ this Act codified the common law writ of habeas corpus *ad subjiciendum* as the law’s primary safeguard against illegal detentions.¹⁰⁵

Although by its terms the Act applied only to criminal matters, the Act’s procedures were utilised in non-criminal detentions that were challenging executive detentions via the common law writ.¹⁰⁶ Towards the end of the seventeenth century, the writ of habeas corpus, either as a common law or statutory writ was indisputably available to all Englishmen to contest the legality of all executive detentions by, primarily, forcing the state to make the person available in court and by obliging the state to articulate a legal basis for the detention.¹⁰⁷ By the colonial American era, habeas corpus had fundamentally realigned the relation of the judiciary towards the

⁹⁹ Marc, ‘Back to basics’, 971.

¹⁰⁰ Marc, ‘Back to basics’, 971.

¹⁰¹ Marc, ‘Back to basics’, 971.

¹⁰² Blackstone, *Commentaries on the Laws of England*, 185.

¹⁰³ *Habeas Corpus Act*, 1679 (United Kingdom).

¹⁰⁴ Marc, ‘Back to basics’, 971.

¹⁰⁵ Blackstone, *Commentaries on the Laws of England*, 134.

¹⁰⁶ *Habeas Corpus Act*, 1679 (United Kingdom).

¹⁰⁷ Marc, ‘Back to basics’, 971.

executive putting it on a more even footing by providing a veto for an administrative action of the government that it believed not to be authorised by law.¹⁰⁸

3.3. History of habeas corpus in the United States

Following its independence from Britain, the new constitution of the United States was the first written constitution containing a guarantee of habeas corpus rights.¹⁰⁹ It enumerated legislative powers and provided that the Privilege of the writ of habeas corpus shall not be suspended, except in cases of rebellion or invasion of public safety.¹¹⁰ Throughout much of US history, habeas corpus continued with the English tradition of being a check on executive power and a mechanism for fostering the separation of powers.

In its most vigorous interpretation in the US, habeas corpus was the shield behind which the right of personal liberty and the right to be free from arbitrary seizure and detention hid.¹¹¹ There have however been many episodes in which personal liberty has been sacrificed on the altar of national security; from President Lincoln's suspension of the writ during the Civil War to President Roosevelt's decision to suspend the writ along the West Coast of the US during World War II.¹¹² The evolution of modern US habeas law has therefore seen re-enactments of many of the same conflicts that for so long animated English habeas corpus history, especially with regard to the intra-court conflicts, as well as issues regarding the proper separation of powers between the branches.¹¹³

More recently, the writ of habeas corpus has been threatened by the indefinite detention of alleged 'enemy combatants' in Guantanamo Bay, Cuba, as part of the Bush Administration's 'War on Terror'.¹¹⁴ In *Boumediene v Bush*,¹¹⁵ the US Supreme Court undertook a survey of the Suspension Clause, stating that given the unique status of Guantanamo Bay and the particular dangers of terrorism in the modern age, courts simply may not have confronted cases with close

¹⁰⁸ Marc, 'Back to basics', 972.

¹⁰⁹ Farrell B. 'Habeas corpus in international law' Unpublished LLM Thesis, Irish Centre for Human Rights, August 2013, 31.

¹¹⁰ Farrell, 'Habeas corpus in international law', 31.

¹¹¹ Shackelford S. 'Habeas Corpus Writ of Liberty, Boumediene and beyond' 57 *Cleveland State Law Review* 10 (2009), 671.

¹¹² Shackelford, 'Habeas Corpus Writ of Liberty', 672.

¹¹³ Shackelford, 'Habeas Corpus Writ of Liberty', 676.

¹¹⁴ Shackelford, 'Habeas Corpus Writ of Liberty', 672.

¹¹⁵ *Boumediene v Bush*, United States Supreme Court, Judgment of 12 June 2008, 2; the Court discussed whether aliens designated as enemy combatants should be able to challenge their detention through the writ of habeas corpus.

parallels to this one.¹¹⁶ Nevertheless, the Court concluded that the writ of habeas corpus may only be suspended in cases of invasion or rebellion.¹¹⁷ According to the Court, it was protecting a time-tested device, the writ and that this protection was intended to maintain the delicate balance of governance between the executive branch and the judiciary.¹¹⁸ As a result, a majority of the Court found that Section 7 of the MCA stripped courts of the ability to review the validity of detention other than by procedures established in the Detainee Treatment Act of 2005. The Court's holding in *Boumediene* essentially was that the President did not have the authority to unilaterally suspend the writ.¹¹⁹

What is interesting in this case is the extent to which concerns over the fundamental issue of the separation of powers animate the Court's holding in *Boumediene* and its interpretation of the writ of habeas corpus. In Justice Kennedy's majority opinion, he argues that to allow the political branches, suggesting that even the legislature could fall within this group, to decide in which areas the United States is sovereign and in so doing also allow them to decide when the Constitution should and should not apply would lead to a striking anomaly in the tripartite system of government, leading to a regime in which Congress and the President, as opposed to the Court, say 'what the law is'.¹²⁰ As such, habeas corpus could be seen as judicial review of legislative actions.¹²¹ This case was a replica of the fight that was seen in England during *Darnell's case*, a fight against the executive's 'special commands' and the fight that Kenya also seemed to be struggling with in its constitutional journey as well as post 2010 case of *Hemed*.

The political wars that have characterized the history of habeas corpus from *Darnell's Case* to *Boumediene* correlate with the rise of the courts as a coequal branch and a check on the executive and legislature. As such, an apolitical check on state overreach. It is a story shared by England and the United States, which through centuries have proven that even when courts and the Congress occasionally side too blatantly with the executive such inequitable treatment has been only temporary.

¹¹⁶ Shackelford, 'Habeas Corpus Writ of Liberty' 673.

¹¹⁷ *Boumediene v Bush*, 2.

¹¹⁸ *Boumediene v Bush*, 3.

¹¹⁹ *Boumediene v Bush*, 35.

¹²⁰ *Boumediene v Bush*, 5.

¹²¹ *Marbury v Madison*.

3.4. The Writ of Amparo

Since the next chapter will delve into the Inter-American system interpretation of habeas corpus. It would then be prudent to discuss briefly the writ of amparo which in some way evolved and influenced the current interpretation of habeas corpus. *Amparo* in its early days, around 1857, was a shield from acts or omissions of public authorities that trampled upon constitutional rights.¹²² It was also available as a remedy to protect tenants' rights in the agrarian reform process.¹²³ It eventually progressed into a judicial remedy that included the power of judicial review and the protection of both political and socio-economic rights.¹²⁴

The interesting thing to note about the writ of amparo especially is its development in the Philippines. It moved from non-existence within the law to the Supreme Court passing rules for this writ in 2007.¹²⁵ In 1971, a former Justice Adolfo Azcuna, who was then a delegate to the Constitutional Convention, tried unsuccessfully to have the writ of amparo incorporated into the Philippine Constitution due to Spanish colonisation.¹²⁶ He replicated the same efforts as a member of the 1986 Constitutional Commission.¹²⁷ Although the writ was not constitutionalized, he succeeded in introducing a provision granting the Supreme Court power to promulgate rules concerning the enforcement of rights.¹²⁸ In 2002, he was appointed to the Supreme Court, and long effort three decades before paid off when the Supreme Court adopted in 2007 the Rule on the Writ of Amparo for the protection of the rights to life, liberty, and security. This struggle is quite similar to the Kenyan one where the writ took a while before being codified.¹²⁹ The difference is habeas corpus came to Kenya by way of common law and did not need codification.

Although strikingly similar to the writ of habeas corpus, the writ of amparo in the Philippines emphasised not only the need to protect actual violations of the right to life, liberty, and security but also threats of violation of such rights.

¹²² Daytec C. 'The Writs of Habeas Corpus and Amparo: A comparison of remedies against the menaces of state power', *National union of people's lawyers*, (30 November 2013).

¹²³ Daytec C. 'The Writs of Habeas Corpus and Amparo'.

¹²⁴ Daytec C. 'The Writs of Habeas Corpus and Amparo'.

¹²⁵ Daytec C. 'The Writs of Habeas Corpus and Amparo'.

¹²⁶ Daytec C. 'The Writs of Habeas Corpus and Amparo'.

¹²⁷ Daytec C. 'The Writs of Habeas Corpus and Amparo'.

¹²⁸ Daytec C. 'The Writs of Habeas Corpus and Amparo'.

¹²⁹ Daytec C. 'The Writs of Habeas Corpus and Amparo'.

3.5. Conclusion

Habeas corpus in its history is seen to be taking up different roles, from being a remedy, as judicial review, as being emblematic of separation of powers, as an unwritten power of courts and as an apolitical role. And perhaps the aim of entrenching it in unity is it in cooperate all these different roles into one stand-alone right.

Chapter 4

Analysis of International Human Rights Courts

4.1. Introduction

Chapter 3 followed the evolution of habeas corpus and found that at different points in history it was viewed; as a remedy, as judicial review, as emblematic of separation of powers, as unwritten power of courts and as apolitical role. This chapter looks into the various ways the Inter-American court has used the different versions of habeas corpus to curb the systematic crime of enforced disappearance.

The Inter-American human rights system is constituted by both institutions and instruments. The focus in this chapter will be on the American Convention on Human Rights,¹³⁰ the American Declaration of the Rights and Duties of Man,¹³¹ and their principal interpreters, the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights. The prevalence of systematic human rights violations in the Americas, and the consequent rise of the Court and the Commission to the position of gatekeepers make it a suitable system for analysis.¹³² This is more so because as a region the notion of regional consensus rarely figures, an indication of the difficulty the system faces in reaching its decisions.¹³³ Its approach has received good external reception seeing as the African Court, with jurisdiction over contentious cases and authority to issue advisory opinions, bears strong resemblance to the Inter-American Court.¹³⁴ It is even more interesting that similar to Kenya,¹³⁵ the American Convention's initial draft did not provide a specific right to habeas corpus this is despite speaking to the right to be free from arbitrary arrest.

One of the most important contributions of the Inter-American Court and Commission to the broader human rights regime is their analysis of enforced disappearances and the means of combating them. While the phenomenon of forced disappearances: detentions that are unacknowledged and take place in an undisclosed location and which are often fatal, has not

¹³⁰ *American Convention on Human Rights, "Pact of San Jose"*, 22 November 1969, O.A.S.T.S. No. 36.

¹³¹ *American Declaration of the Rights and Duties of Man*, 2 May 1948.

¹³² Neuman G. 'The external reception of Inter-American human rights law' *Quebec Journal of International Law* (2011), 104.

¹³³ Neuman. 'The external reception of Inter-American human rights law'. 104.

¹³⁴ Krisch N. 'The Establishment of an African Court on Human and Peoples Rights' 58 *Journal of Foreign Public Law and International Law* (1998), 713-732.

¹³⁵ See discussion in chapter 2.

been unique to the Americas. They were especially prevalent in the 1970s and 1980s. Enforced disappearances therefore provided the subject matter of the Inter-American Court's first cases in the 1980s, and many of its cases since.

4.2. Non-derogability of habeas corpus in the Inter-American system

Article 27 of the American Convention contains a list of non-derogable provisions including the rights to life and to humane treatment, along with the judicial guarantees essential for the protection of such rights. In a pair of important early advisory opinions,¹³⁶ the Court explained that this language should be understood as making the right to a judicial remedy for unlawful detention, such as habeas corpus, as elaborated in Article 7(6) of the Convention non-derogable, although that provision is not expressly enumerated on the list.¹³⁷ The Court justified this inclusion partly by its interpretation of the phrase 'judicial guarantees and partly by its elaboration of why habeas corpus was essential for the protection of life and bodily integrity.'¹³⁸

Habeas corpus performs a vital role in ensuring that a person's life and physical integrity are respected, in preventing his disappearance or the keeping of his whereabouts secret and in protecting him against torture or other cruel, inhumane, or degrading punishment or treatment.¹³⁹ This conclusion is buttressed by the realities that have been the experience of some of the peoples in the Americas in recent decades, particularly disappearances, torture and murder committed or tolerated by some governments.¹⁴⁰ This experience has demonstrated over and over again that the right to life and to humane treatment are threatened whenever the right to habeas corpus is partially or wholly suspended.¹⁴¹

¹³⁶ IACHR, *Advisory opinion on Judicial guarantees in states of emergency*, 6 October 1987; IACHR, *Advisory opinion on habeas corpus in emergency situations*, 30 January 1987, 27 ILM 512.

¹³⁷ IACHR, *Advisory opinion on Judicial guarantees in states of emergency*.

¹³⁸ IACHR, *Advisory opinion on Judicial guarantees in states of emergency*.

¹³⁹ IACHR, *Advisory opinion on habeas corpus in emergency situations*.

¹⁴⁰ Farrell, 'Habeas corpus in international law', 143.

¹⁴¹ Farrell, 'Habeas corpus in international law', 228.

4.3. Connection between habeas corpus and enforced disappearance

There are 44 enforced disappearance cases in the IACtHR, 40 of which are ongoing and 4 which are closed.¹⁴² The surge in disappearances corresponded with the formative years of the Inter-American human rights system.¹⁴³ This intersection had implications for many aspects of Inter-American jurisprudence. Among the more significant impacts was that on the right to habeas corpus. On one hand, the widespread use of disappearances underscored the inviolability of the right to habeas corpus, which was already a prominent feature in most of the legal systems in the Americas. And on the other hand was the fight against arbitrary detention at the hands of government, the remedy was viewed as the front line in the struggle against disappearances.¹⁴⁴ This led to an elevation of habeas corpus to the ranks of the most protected rights in the Inter-American system.

The Court and Commission have focused primarily on whether habeas corpus is available at all. In majority of these cases, a violation of the right was found because a disappeared person was not able to exercise their right to habeas corpus. In essence the court's jurisdiction to listen to the matter was being ousted.¹⁴⁵

The Commission however, commented on the underlying purpose of the habeas corpus guarantee in *Ferrer-Mazorra v United States*, stating that it cannot overemphasize the significance of ensuring effective supervisory control over detention as an effective safeguard.¹⁴⁶ This statement was in line with the United Nations General Assembly Resolution, which states that habeas corpus plays a fundamental role in protecting against arbitrary arrest, clarifying the situation of missing persons, and may prevent the use of torture or other cruel, inhuman, or

¹⁴² CEJIL. 'case website' [https://sidh.cejil.org/en/library/?q=\(filters:\(descriptores:\(values:\(%2733575268-5ff3-426b-a738-467d007fc6bf%27\)\),estado:\(values:\(bce629bf-efc1-40dd-9af0-0542422dc3.%2735ae6c24-9f4c-4017-9f01-2bc42ff7ad83%27\)\)\),order:asc.sort:title.types:\(%2758b2f3a35d59f31e1345b48a%27\),userSelectedSorting:\(t\)\)](https://sidh.cejil.org/en/library/?q=(filters:(descriptores:(values:(%2733575268-5ff3-426b-a738-467d007fc6bf%27)),estado:(values:(bce629bf-efc1-40dd-9af0-0542422dc3.%2735ae6c24-9f4c-4017-9f01-2bc42ff7ad83%27))),order:asc.sort:title.types:(%2758b2f3a35d59f31e1345b48a%27),userSelectedSorting:(t))) on 29 March 2018.

¹⁴³ Goldman K. 'History and action: the Inter-American human rights system and the role of the Inter-American Commission on human rights' *American University Washington College of Law* (2009), 867.

¹⁴⁴ Farrell, 'Habeas corpus in international law', 121.

¹⁴⁵ Farrell, 'Habeas corpus in international law', 121.

¹⁴⁶ *Rafael Ferrer-Mazorra et al. v United States*, IACmHR Case 9903(2001), para 232.

degrading treatment.¹⁴⁷ The remedy does so by providing an assurance that the detainee is not exclusively at the mercy of the detaining authority.¹⁴⁸

In *Coard v United States*, the Commission discussed the availability of the right to habeas corpus during the 1983 United States military operations in Grenada.¹⁴⁹ It observed that the requirement that detention not be left to the sole discretion of the state agents responsible for carrying it out is so fundamental that it cannot be overlooked in any context. The Commission concluded by stating that habeas corpus is not subject to abrogation and is also available during war.

The legality of a person's detention should be decided by a court. The Commission in *Coard*, indicated that requirement could be met by a judicial authority or a quasi-judicial board which has the power to order production of the person detained and the power to release the person if the detention is unlawful.¹⁵⁰ In *Ferrer-Mazorra*,¹⁵¹ the Commission added that the decision maker must meet currently prevailing standards of impartiality and it noted that the United Nations Human Rights Committee had found delays of even 48 hours to be questionable.

A primary obligation of the state is to ensure that a detained person has access to the remedy of habeas corpus. The right to habeas corpus is denied to persons unable to invoke the right due to the circumstances under which their liberty is deprived. For this reason, it is clear that a forced disappearance in which the government denies having custody of a person violates Article 7(6).

4.4. The Inter-American Court and Inter-American Commission on habeas corpus

The leading case of enforced disappearance considered by the Inter-American Court is that of *Velasquez Rodriguez v Honduras*,¹⁵² the well-known 1988 judgment contains a far-reaching pronouncement of the principle of state responsibility for enforced disappearance in the absence of full direct evidence. In order to establish state responsibility, the Court in this case relied on circumstantial and presumptive evidence.¹⁵³ It found this to be especially important in cases of alleged enforced disappearance, because of the nature of this type of repression. Enforced

¹⁴⁷ UNGA, *Commemorating 300th anniversary of act giving writ of habeas corpus statutory force*, UN A/Resolution 34/178 (1979).

¹⁴⁸ Farrell, 'Habeas corpus in international law', 125.

¹⁴⁹ *Coard v United States*, IACmHR Case no 10.951(1999), para 55.

¹⁵⁰ *Coard et al v United States*, para 58.

¹⁵¹ *Rafael Ferrer-Mazorra et al v United States*, para 213.

¹⁵² *Velasquez-Rodriguez v Honduras*, ICAtHR Judgment of 29 July 1988.

¹⁵³ *Velasquez-Rodriguez v Honduras*, para 131.

disappearances are invariably concurrent with efforts to suppress all information about the kidnapping or the fate and whereabouts of the victim. This was informed by the systematic practice of disappearances in Honduras in the early 1980s and tied the obligation of states parties under article 1 (1) of the American Convention to ensure human rights are protected.

The Convention placed an obligation on states to prevent, investigate and punish any violation of the rights recognised in the Convention. Even if it had not been fully proven that Mr. Velásquez had been kidnapped and killed by State agents, this case established the duty to investigate.¹⁵⁴ This view of the law was affirmed in the case of *Godinez Cruz against Honduras*¹⁵⁵.

This jurisprudence was reaffirmed and further developed by the Court in the case of *Efrain Bamaca Velasquez v Guatemala*.¹⁵⁶ The Court ruled that in the circumstances of the instant case, the right to truth is subsumed in the right of the victim or his next of kin to obtain clarification of the facts relating to the violations and the corresponding responsibilities from the competent State organs, through the investigation and prosecution.

4.5. External reception of the system's jurisprudence

The Court's first judgment, *Velásquez-Rodríguez*,¹⁵⁷ accepted the Commission's argument that 'the policy of disappearances, supported or tolerated by the Government, is designed to conceal and destroy evidence of disappearances', and that therefore the standards of proof needed to be arranged in a manner that could reach the truth despite such obstacles.¹⁵⁸

The Inter-American court may be said to have taken a flexible approach to standards of proof contrasted with the more demanding approach of the European Court, which has called for proof beyond reasonable doubt of human rights violations, even if not in the strict criminal law sense. This willingness to give states the benefit of the doubt led to difficulties when the European Court had occasion to confront claims of forced disappearance in Turkey in the 1990s. The European Court first considered the Inter-American Court's case law in *Kurt v Turkey*,¹⁵⁹ but continued to place a high evidentiary burden on victims, it concluded that although a person last

¹⁵⁴ *Velásquez-Rodríguez v Honduras*, para 182.

¹⁵⁵ *Godinez Cruz against Honduras*, ICAtHR Judgement of 17 August 1990.

¹⁵⁶ *Bamaca Velasquez v Guatemala*, ICAtHR Judgment of 25 November 2000.

¹⁵⁷ *Velásquez-Rodríguez v Honduras*, para 124.

¹⁵⁸ *Velásquez-Rodríguez v Honduras*, para 128.

¹⁵⁹ *Kurt v Turkey*, ECtHR Judgment of 25 May 1988, para 67-70,101-102.

seen in the custody of security forces four years earlier had suffered a grave violation of the right to liberty, he had not been shown to have suffered loss of life or inhuman treatment.

As disappearance cases accumulated, the European Court became more receptive to shifting burdens and making presumptions based on circumstances. This was seen two years after the *Kurt case*, in *Timurtaş v Turkey*.¹⁶⁰ This case distinguished the *Kurt case* on various points and held that a suspected PKK member last seen six years earlier must be presumed dead following an unacknowledged detention by the law enforcement when evidence to contrary is absent from the state. The European Court did not simply follow the Inter-American Court's lead in this area, but rather was converted to a similar approach as its own experience confirmed the Inter-American Court's analysis. Nonetheless, it appears likely that the rapid evolution in the European practice was facilitated by knowledge of the Inter-American situation.

The European Court subsequently invoked the practice of the Inter-American Court (as well as the HRC) with regard to forced disappearances in the 2009 Grand Chamber decision *Varnava and Others v Turkey*.¹⁶¹ The Inter-American cases lent support to the derivation of a continuing procedural obligation to investigate disappearances that had begun before the respondent state recognized the Court's jurisdiction.

4.6. Unique features of habeas corpus before the Court

The habeas corpus remedy made available must be real, and not just be provided for by the law. It is not enough for the remedy to exist formally; it is necessary that it also be effective. The Court has stated that a remedy that proves illusory due to the general situation in the country or even the particular circumstances of any given case cannot be considered effective.

The Court has suggested that lawfulness also requires compliance with Article 7 of the American Convention. In the *Cesti Hurtado Case*¹⁶² the Court stated that the judicial authority considering a habeas corpus petition should have determined whether the detention was arbitrary, as proscribed by Article 7(3) of the Convention. According to the Court, the factors to be considered in making this decision included the competence of the authority issuing an arrest

¹⁶⁰ *Timurtaş v Turkey*, ECHR Judgment of 13 June 2000, para 85.

¹⁶¹ *Varnava and Others v Turkey*, ECtHR Judgment of 18 September 2009, Para 93-98,138,147.

¹⁶² *Cesti Hurtado v Peru*, ICAtHR Judgment of 29 September 1999, Para 130.

warrant and the regularity of the proceedings under which the order would be issued.¹⁶³ In considering the regularity of proceedings, it appears that Article 7(6) requires conformity with both substantive and procedural law, much like its international and European counterparts. This is informed by the Article 7(2) requirement that detention occur only for the reasons and under the conditions previously established in domestic law.

In *Nativí and Martínez v Honduras*¹⁶⁴ the Inter-American Commission observed that five days represented a 'very long delay' for a habeas corpus decision given the serious nature of an alleged disappearance.

Finally, a court must have the means to carry out its judgments. In the *Fairén Garbí and Solís Corrales Case*¹⁶⁵ the Inter-American Court observed that a court must have power to compel the authorities to adhere to its decision. The fact that military authorities would be unlikely to comply with the orders of an ordinary judge indicated that the remedy would have little meaningful effect in that case.

4.7. Conclusion

The notion that an enforced disappearance places the subject (victim) outside the law is the biggest issue that the Inter-American court has to deal with. It however asserts that habeas corpus is an effective remedy as it gives the state an obligation to investigate. And it gives the victim or his his next of kin to obtain clarification on what happened. These are however matters to be dealt with only when the court is given an opportunity to assess the events that led to the enforced disappearance, whether or not the person is within the custody of the state.

¹⁶³ Farrell, 'Habeas corpus in international law'.139.

¹⁶⁴ *Nativí and Martínez v Honduras*, IACmHR Case no 7864 (1987).

¹⁶⁵ *Fairén Garbí and Solís Corrales v Honduras*, ICAtHR Judgment of 15 March 1989, 91.

Chapter 5

Conclusion and Recommendations

5.1. Introduction

Chapter 4 looked into the various ways the Inter-American court has used habeas corpus as a tool to curb the systematic crime of enforced disappearance. This concluding chapter will begin by analyzing circumstances in *Mariam* and *Hemed* case after which it will provide recommendations based on the discoveries made from chapter 2-4.

5.2. The *Mariam* case

Let us begin with the *Mariam case* in which the writ of habeas corpus was refused for three main reasons; the physical absence of the subject matter within the custody of the respondent, the impracticability of implementing the writ of habeas corpus and the aversion that the constitutional rights claimed to have been violated by the respondents would need a different forum to be dealt with.¹⁶⁶

The respondent in this case stated that the basis for issuing of a writ of habeas corpus had been taken away by the physical absence of the subject.¹⁶⁷ And that upon release, the police had no further responsibility to follow-up on the subject.¹⁶⁸ This was despite the applicants' insistence that the respondent had facilitated the removal of the subject (victim) from the jurisdiction.¹⁶⁹ The respondent claimed that they were not aware of this and that the Court in this instance had no jurisdiction over persons not present in the country.¹⁷⁰ And that being an application for habeas corpus a proper application needed to be made before the relevant court of constitutional jurisdiction and competence, since violations of constitutional rights were being alleged.¹⁷¹

Although this case was determined in favour of the respondent, it pushed the boundaries within which the writ of habeas corpus lied as at 2007. The applicants stated that the police needed to uphold Kenya's sovereignty, and therefore endeavour to find out what happened to the

¹⁶⁶ *Mariam case*, 1,3,5.

¹⁶⁷ *Mariam case*, 1.

¹⁶⁸ *Mariam case*, 3.

¹⁶⁹ *Mariam case*, 3.

¹⁷⁰ *Mariam case*, 3.

¹⁷¹ *Mariam case*, 3.

subject.¹⁷² The applicants raised that the vital principle that guided the Court in this instance, would be their fidelity to the Constitution; and that the actions that led to the removal of the subject from the jurisdiction, ought to have been examined by the Court.¹⁷³ The applicants prayed for the Court to declare that the subject had been removed from Kenya unlawfully, and to order those who facilitated the said removal to take place, to bring the subject back.¹⁷⁴

What is particularly important and will tie in with chapter 2 on constitutionalism was the fact that it seemed as though one could remove an individual from the jurisdiction, and then plead even worse, outside jurisdictional reach of Kenyan courts, which could be taken to mean that an individual can abuse the Constitution and then be held unaccountable considering that even where the death of an individual has occurred, there would be accountability for the manner in which the death has occurred.¹⁷⁵ The applicants seemed to be pushing the Court's ruling to address other pertinent issues not limited within the confines of a habeas corpus application. Therefore touching on dimensions of a constitutional claim which, I think, had not had to be dealt with before, within the framework of a habeas corpus application similar to the case of *Boumediene v Bush*.¹⁷⁶ Nevertheless, the Court failed to come to the conclusion that the writ of habeas corpus cannot just be ousted, if anything, it needed to protected being a time-tested device, the writ protection was intended to maintain the delicate balance of governance between the executive branch and the judiciary.

The *Mariam case* could have in statutory law been unable to address these three concerns as habeas corpus was simply a procedure and not an entrenched constitutional right. Also as at 2007, the Judiciary was yet to evolve a predictable philosophy to guide in the interpretation of the Bill of Rights, and the realisation of rights remained a mere coincidence rather than a guarantee.¹⁷⁷ However in the post 2010 dispensation, habeas corpus had been elevated to a right and it was no longer in question whether the court can make a ruling even with the absence of the subject or if it can dive into constitutional principles in a habeas corpus case.

¹⁷² *Mariam case*, 4.

¹⁷³ *Mariam case*, 4.

¹⁷⁴ *Mariam case*, 4.

¹⁷⁵ *Mariam case*, 5.

¹⁷⁶ *Boumediene v Bush*, United States Supreme Court, Judgment of 12 June 2008, 2; the Court discussed whether aliens designated as enemy combatants should be able to challenge their detention through the writ of habeas corpus.

¹⁷⁷ Osogo J A, 'The State of Constitutionalism in Kenya-2007', 61.

5.3. Hemed case

The *Hemed* case, therefore presented the Court with a perfect opportunity to deal with the same issues, although under a different arguably better legal regime. The Court in *Hemed* had three issues for determination; whether it had been established that the subject was or was not in police custody, whether further orders relating to violations of the subject's rights and fundamental freedoms could be made in the habeas corpus proceedings and what orders were to be made in the circumstances of this case.¹⁷⁸

The petitioners were quickly able to establish that the subject was at one point under the custody of the respondents; this is because the respondents admitted to arresting the subject. What was now in question was whether the police had custody of the subject at the time of the habeas proceedings. While the Court found reasonable grounds for believing, as contended by the petitioners, that the subject may have been killed, it hesitated to make an order on that finding requiring further investigation to disclose whether in fact the subject escaped from custody or what became of him upon arrest. The Court therefore returned a verdict that the subject of the habeas corpus proceedings, Mr. Hemed Salim, was a missing person believed to be dead within the meaning of section 386 of the *Criminal Procedure Code*. Accordingly, the Court found that the respondent custody of the subject at the time of the ruling had not been proved; stating that the respondent had lost custody of the subject after the arrest and that the case needed to be investigated further to determine the correct factual position. The order of habeas corpus was then held in abeyance until a time when it would be established that the respondents had custody or had regained custody of the subject.

The Court relying on the position in *Mariam case* held that custody is indispensable in a habeas corpus case; even where physical custody is lost by voluntary act of the respondents the right to habeas corpus would still be affected. And although a court can in the interest of justice amend proceedings in order to give appropriate relief. Judge Muriithi thought that fresh proceedings would be appropriate, on the basis facts upon which the relief was being sought had not been fully established seeing that the matter of the death and cause of death had not been determined. He stated that the inchoate nature of the cause of action, dictated separate proceedings for

¹⁷⁸ *Hemed*, 7.

particularised reliefs under the Bill of Rights other than the habeas corpus proceedings already before the Court. Yet the Court is constitutionally mandated to administer judicial redress and should cherish all opportunity to resolve and remedy through the application of law all disputes which arise between the individuals inter se and between them and the State, in the interests of upholding human rights, rule of law and good governance among other principles and values of governance set out in Article 10 of the Constitution for the promotion of constitutionalism.

Distinguishing the case of illegal detention and enforced disappearance of a person, the Court held that forcible taking and disappearances was the proper subject of criminal investigations and not habeas corpus. Yet in majority of the cases, a violation of the right was found because a disappeared person was not able to exercise their right to habeas corpus. As a result, judicial interpretation of specific terms of the habeas corpus provisions and its implementation is somewhat lacking.¹⁷⁹ Habeas corpus plays a fundamental role in protecting against arbitrary arrest, clarifying the situation of missing persons, and may prevent the use of torture or other cruel, inhuman, or degrading treatment.¹⁸⁰ It ensures that a person's life and physical integrity are respected, in preventing his disappearance or the keeping of his whereabouts secret and in protecting him against torture or other cruel, inhumane, or degrading punishment or treatment.¹⁸¹ The remedy does so by providing an assurance that the detainee is not exclusively at the mercy of the detaining authority.¹⁸² Yet the very institution thought to have caused the disappearance of Hemed was being given the authority to investigate itself through the inquest order.

By relying on old outdated law in *Mariam*, the *Hemed* case failed to make use of the position accorded to habeas corpus by virtue of Article 25, and therefore made bad law.

5.4. Summary of chapters

Chapter 1 introduced the legal problem to be addressed by this paper. That is refashioning habeas corpus as an effective remedy for enforced disappearance. It gives three research questions which form the basis of the other chapters. What is the intended purpose of the change in the constitution?, what is the history in common law that informs the current interpretation of habeas

¹⁷⁹ Farrell, 'Habeas corpus in international law'. 121.

¹⁸⁰ UNGA, *Commemorating 300th anniversary of act giving writ of habeas corpus statutory force*, UN A/Resolution 34/178 (1979).

¹⁸¹ IACHR, *Advisory opinion on habeas corpus in emergency situations*.

¹⁸² Farrell, 'Habeas corpus in international law'. 125.

corpus and what can we learn from the Inter-American system's treatment of habeas corpus and use to improve our system.

Chapter 2 looked into constitutionalism as the possible intent behind habeas corpus elevation to Article 25 of the Constitution. It established that although not expressly stated in the preparatory works to the constitution, the developments made prior to the 2010 Constitution were made in an effort to create a constitution with constitutionalism. This was done in response to the arbitrariness of the executive.

Chapter 3 explored the history of habeas corpus, seeing how it has morphed into a tool of constitutionalism used to curb executive power. Habeas corpus was seen as a remedy, as judicial review, as unwritten power of courts, as emblematic of separation of powers and as apolitical role.

Chapter 4 then looked into the use of habeas corpus by the Inter-American court in curbing the systematic crime of enforced disappearance. It established the duty to investigate that is placed upon the state when cases of enforced disappearance occur and the right of the victim of his next of kin to obtain clarification on what happened.

Chapter 5 finished off by comparing the circumstances in the *Mariam* and *Hemed*, and establishing what differentiated them and why it was wrong for *Hemed* to rely on old outdated law from *Mariam* in arriving at its decisions. Then suggesting recommendations.

5.5. Recommendations

Enforced disappearance presents a difficult situation in which a person who is seemingly outside the law is seeking redress within the law to no avail. And there exists a threat to the legitimacy of judicial institutions as well as Constitutional provisions, if they fail to adhere to the functions for which they set up. This paper therefore recommends that the judiciary to not be afraid and to explore the elastic limit of its new power under Article 25.

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