CHARLES II AND ENGLAND'S GUANTANAMO BAY

(A talk delivered to the Property Law Association
at their Oxford conference on Friday, 25th March 2011)

In his book "The Rule of Law" the late and great Lord Bingham sets out 12 events in world legal history relevant to that topic that he says everyone should know. This talk is about four of them – three statutes, all of which are still on the statute book, and one legal procedure still in use, which between them provide the basis for western liberal democracy, the defining feature of which seems to me to be not the right to vote – for what use is a vote if it can be ignored[1] – but the right not to be oppressed, not to be "disappeared", not to be imprisoned or executed without charge or trial, not to be tortured and to have no recourse against the power of the State to do to you what it will, in the knowledge of which it can demand of you what it likes. In this year of the Arab spring, it is a good time to be reminded of the origins of those freedoms which we take for granted but for which others are having to fight.

Let us start at the beginning:

> "*Nullus liber homo capiatur, vel imprisonetur, aut disseisiatur, aut utlagetur, aut exuletur, aut aliquot modo destruatur, nec super eum ibimus, nee super eum mittemus, nisi per legale judicium parium suorum vel per legem terrae.*
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> *Nulli vendemus, nulli negabimus aut differemus rectum aut justiciam.*"[2]

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[1] E.g. Zimbabwe.

[2] No free man shall be arrested or imprisoned or disseised or outlawed or exiled or in any other way harmed. Nor will we proceed against him, or send others to do so, except according to the lawful sentence of his peers or according to the law of the land.
To no one will we sell, to no one will we refuse or delay, right or justice.

Those are Chapters 39 and 40 of Magna Carta 1215. In 1215 Magna Carta was not a statute but a treaty designed to prevent civil war – which it failed to do; it was immediately declared a nullity by the Pope on the grounds that it had been signed under duress - but, following the death of King John, it was re-issued several times, most notably in 1225[3] and re-enacted during the reigns of subsequent Monarchs.

The above provision, now Chapter 29 of the 1225 re-issue, is still on the statute book, together with two other sections.[4] It is the oldest statutory provision still in force and is the nearest our law has to a sacred text. It is even more revered in America. Between 1940 and 1960 the United States Supreme Court cited it in more than 60 cases and has done so again recently in the case of *Boumedienne v Bush* [2008], where it was held by a majority that the Guantanamo Bay detainees had a constitutional right to the writ of Habeas Corpus and that legislation purporting to remove that right was unconstitutional.

Since the original Charter was the product of negotiation, it embodied compromises and fudges and was plainly, as we say, open to interpretation. I suspect that King John was not particularly bothered by Chapters 39 and 40. When they spoke of "*iudicium parium*", they were not speaking of jury trial, which was in its infancy. When they spoke of "*lex terrae*", they did not mean due process. The King would probably regard whatever he did as "*per legem terrae*", since he was the source of law. Such a view is not unknown

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[3] Several of the original chapters or sections in the 1215 text were omitted in the 1225 re-issue with the result that Chapters 39 and 40 became Chapter 29.

[4] Which declared the independence of the Church and preserved the liberties of the City of London, without saying what they were.

in modern times: as Richard Nixon said to David Frost: "*If the President does it, it is not illegal*". It is also worth noticing that "*iudicium parium*" and "*per legem terrae*" were strictly alternatives.

It was only subsequently, mainly as a result of six statutes passed during the reign of Edward III, that "*iudicium parium*" came to mean trial by jury, "*lex terrae*" came to mean due process and "*nullus liber homo*" came to apply to everybody. Magna Carta was certainly not forgotten but it was almost certainly often overlooked and was relatively toothless.

At the beginning of the reign of James I, however, Magna Carta came to the fore, under the aegis of three great Chief Justices: Popham CJ, Flemynge CJ and Coke CJ. The reason, as so often in the law, was procedural.

There existed a number of writs which were essentially Royal commands to attend Court or bring something or somebody to Court; we used to call them subpoenas – now witness summonses. There were also writs which required a prisoner to be brought to Court for trial or to be transferred from one jail to another. These all contained the words "*habeas corpus*". But the Stuart Justices began to make much freer use of a certain type of Habeas Corpus writ called "*Habeas corpus ad subjiciendum*".[5] For its modern form, taken from the Civil Procedure forms[6], see Appendix 1. The modern form of writ is almost identical to that in Coke's Institutes, save that the latter was in latin.

Let's see how it works. It is a command from the Monarch to a jailer issued as a result of a complaint made to the Court that somebody is detained in custody ("as is said" – "ut dicitur") to do two things:

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[5] "Ad subjiciendum" means "to undergo".

- to bring the prisoner to Court in person – "habeas corpus"; and
- to make a return stating the grounds of his detention with sufficient particularity to enable the Court to enquire into the legality of that detention.

It is a prerogative writ. It is issued by the Monarch's Judges as agents of the Monarch performing the Monarch's function – "*to no one will I deny right or justice; no free man shall be imprisoned save in accordance with the law of the land*". This is the King as the fount of justice, looking after his every subject. But suppose the reason for the prisoner's incarceration was the command of the King himself or his Government? Could the prerogative turn in on itself and control the King?

At the start of the 17th Century the notion of judicial independence, let alone the separation of powers, was unknown. The Judges were the Crown's agents. They went out on Assize as the King's eyes and ears and overseers of local administration. Their role was highly political. They held office "*de bene placito*" and could be sacked at the will of the King. They knew it and everyone knew it. Could they stand against the King? Not if they wanted to keep their jobs. But they were lawyers, they had their professional pride and they were bound by custom and precedent. What would they do if their understanding of the law would not produce a result that the King had made clear that he wanted?

The King was all powerful. His role is described by Penny Uglow in her book on Charles II, "A Gambling Man", as follows:

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[6] High Court Forms No. 89: see RSC Order 54.

> *"Kingship was more than an office of state. The King was the heart that pumped blood and gave life to the nation: through his representatives his will flowed through all institutions of state and Church. He created peers and bishops, gave charters to Boroughs, appointed Judges, directed the Army and Navy, made war and declared peace. If he wished, he could confiscate all land, and he could levy taxes on all who walked upon it, on the crops and cattle in fields, the fish in the rivers, the riches in the mines. It was treason to curse him, and to wish, or even imagine, his death. He carried his subjects, as Hobbes said, like Jonah in the belly of the great Leviathan."*

The King ruled through his Councils: the Privy Council, the Council of the Marches and the Council of the North. He exercised jurisdiction through a plethora of different Courts, not just Kings Bench, Common Pleas and Exchequer but the Chancery and the Star Chamber. These Courts competed for power and influence. The battle between Kings Bench and Chancery resulted in the famous Star Chamber Decree of 1616 following the Earl of Oxford's case.[7] That arose as a result of the Chancellor granting an injunction to prevent enforcement of an order of Chief Justice Coke. Another battleground was the use by the Kings Bench of the Prerogative Writs, notably Habeas Corpus and Prohibition.

Let me take just one case.[8] In 1604 the Council of the Marches ordered its jailer, one Frances Hunnynges, to lock up one Witherley "*in little ease*" for disobeying its order in a property dispute. Witherley applied to the Justices of the Kings Bench for a writ of Habeas Corpus. Kings Bench sent the writ –

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[7] See my paper "**The Wicked Doctor and the Offended Earl**". James I's Star Chamber decree is the origin of the rule, now found in s.49 of the Senior Courts Act 1981 that, wherever there is any conflict between the rules of equity and the rules of the common law, the rules of equity shall prevail.

[8] For this example I am indebted to Professor Paul Halliday in his book: "Habeas Corpus – from England to Empire": Chapter 1.

nothing happened. They sent another, called an "alias", with a penal notice. Nothing happened. They sent a third, called a "pluries". Still nothing. They then had Hunnynges arrested and brought to London to answer a charge of contempt. He pleaded that he had acted "*in defence of the Royal Prerogative*".

Sir Edward Coke, the Attorney General, intervened and ran a novel argument: it was the duty of the Court acting on behalf of the Crown to examine the acts even of other emanations of the Crown (such as the Council of the Marches) in order to give effect to Magna Carta. Popham CJ agreed that Hunnynges' defence was not good and ordered him to be imprisoned and fined. So it appeared that the King's Government was subject to the law. Thus did judicial independence of the executive begin to emerge.

It was not, however, until 1627 that the fat really hit the fire. In 1625 Charles I succeeded his father and inherited a war for which he needed money. He summoned his first Parliament. They voted him £130,000 (which was wholly inadequate) but declined to make him the usual lifetime grant of a customs duty called Tonnage and Poundage. The reason was the unpopularity of the King's favourite, the Duke of Buckingham. Charles dissolved Parliament, only to call another the following year, which was equally unco-operative.

The King then resorted to extra Parliamentary fundraising. He issued a proclamation calling for a Forced Loan and used every device at the service of the State to enforce it – compulsory attendance at the Council for the great, forced drafting into the army for the lesser folk and ultimately, and on a wide scale, imprisonment for failure to cough up. To confirm the legality of it all, the King asked the Judges for a ruling. They refused to oblige. The

King summoned the Chief Justice, Sir Randall Crewe, and sought his co-operation. When he refused, he was sacked and his place given to Sir Nicholas Hyde. The Judges' refusal merely emphasised the dubious legality of the loan and encouraged refusenics. Over 100 of these were imprisoned by Royal Command.

Five Knights of the Shires decided to mount a legal challenge. On 3rd November 1627 they applied for writs of Habeas Corpus. Their objective was to get the Government to state in the return to the writ the ground of their detention, viz. refusal to pay the loan, so that the legality of the exaction could be made the subject of examination by the Court. The Crown was not going to play ball. The return simply stated that each prisoner was "*Detentus in prisona ... per speciaie mandatum Domini Regis ...*" and stated no other cause. This switched the issue from the legality of the loan to the much more delicate question as to whether the King had power to commit Englishmen to prison simply because he saw fit. Was this what Magna Carta meant by "*per legem terrae*"?

The Judges were in a political bind. If they released the prisoners, they would displease the King, who would probably sack them for questioning his prerogative. If they did not release the prisoners, they would probably have been impeached in Parliament for not doing their judicial duty. Prudently they adjourned the case to the following term. Shortly after Christmas, the King, having collected enough money, ordered the Knights released, so the case was never finally resolved.

When Parliament met in March 1628, however, they were extremely cross. 27 of the newly elected members had been imprisoned. The resulting constitutional crisis resulted in the King extremely relucantly giving His

Assent to the Petition of Right, which, since it was voted on by both Houses and given the Royal Assent, has the force of statute. It

- confirms an Englishman's right to liberty and security from imprisonment without cause;
- reaffirms Magna Carta;
- prohibits billeting of soldiers and martial law in peace time; and
- prohibits taxation without consent of Parliament.[9]

Charles I was so traumatised by this episode that he did not call another Parliament for 11 years. When he did so, it resulted in civil war.

Now let us jump forward twenty years to the Restoration. We have a new King, Charles II, and a new dawn. The new King had some serious political problems to resolve. The first was to disband Cromwell's standing army, who were not exactly Royal supporters. That was accomplished remarkably efficiently. The second problem was the Regicides – those who had signed the King's father's death warrant. They were tried, convicted of treason and hanged, drawn and quartered.

But what about others known to be dyed in the wool republicans, such as ex-officers in Cromwell's army, committed non-conformists and suspected potential troublemakers who had not, however, committed a crime for which it was possible to secure a conviction. Charles' Lord Chancellor, Sir Edward Hyde, later the Earl of Clarendon[10], came up with a cunning plan: lock them up quietly but out of reach of Habeas Corpus, in foreign parts like Scotland, or the Channel Islands or Tangier (recently acquired as part of the dowry of

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[9] I have told the story of the passing of the Petition of Right in my paper "**Five Knights for Freedom**".

[10] Son of the Sir Nicholas Hyde appointed Chief Justice of the Kings Bench by Charles I.

Catherine of Braganza). It was not that the writ did not run in those parts. The problem was that there was no practical way of compelling a return.

Is this not an oddly familiar tale? A Head of State has in his power captives suspected of having fought on the other side in a recent war; he regards them as a continuing danger; he wants them out of the way but he does not have the evidence necessary to convict them and, if he locks them away "*per speciale mandatum regis*", his Judges will order their release. Solution: find an overseas base outside the reach of the Courts; lock them up and throw away the key. This is precisely what the Bush administration did when they passed the PATRIOT Act and set up a detention centre at Guantanamo Bay.

It is the more remarkable that they did this because the right to Habeas Corpus is actually written into the American constitution, which says:

> "*The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety shall require it.*"

There have only been four suspensions in US history, at least two of which resulted in a later US Government apologising to and compensating those imprisoned as a result. In the absence of rebellion or invasion, however, suspension was impossible. Hence the attempt to evade the jurisdiction of the Federal Courts.

I return to the reign of Charles II. During the 1670s Parliament sought to strengthen the reach of Habeas Corpus so as to defend the citizens against the power of the Executive. A number of times Bills passed in the Commons were rejected in the Lords. Eventually, in the aftermath of the Popish plot, during which Habeas Corpus was employed to secure the release of many

Catholics groundlessly accused of treason, the Habeas Corpus Amendment Act 1679 was passed. There is a (probably apocryphal) story that it was only passed because the teller for the Ayes counted ten lords passing through the lobby when the view of the teller for the Noes was obscured by a particularly fat lord and, indeed, the number of votes cast did exceed the number of lords recorded as having been in the Chamber that day.

There is not time to examine the whole Act but let us look at one remarkable section, section XII[11], which is still on the statute book. It begins by prohibiting sending anyone living within the jurisdiction as a prisoner into foreign parts. Then it declares any such imprisonment to be illegal and gives the prisoner a right of action for false imprisonment against all the people involved in his detention. Thirdly, it provides that in any such action he can recover treble costs and damages of no less than £500, an enormous amount in 1679. Fourthly it disqualifies from holding public office anybody responsible for or having anything to do with an act prohibited by the section. Fifthly, it removes the right of the King to grant a pardon to the perpetrator.

It is fortunate for Mr. Rumsfeld that he is not an Englishman.

Falcon Chambers **Jonathan Gaunt QC**

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[11] Appendix 2.

Elizabeth The Second, by the Grace of God etc.

To the Governor of Our Prison Greeting:

We command you that you have in the Queen's Bench Division of our High Court of Justice at the Royal Courts of Justice, Strand, London, on the day and at the time specified in the notice served with this writ, the body of A.B being taken and detained under your custody as is said, together with the day and cause of his being taken and detained, by whatsoever name he may be called therein, that Our Court may then and there examine and determine whether such cause is legal, and have you there then this writ.

Witness ..... Lord Chancellor of Great Britain
The .... day of 2011

Appendix 2

XII. And, for preventing illegal imprisonments in prisons beyond the seas, be it further enacted by the authorities aforesaid that no subject of this realm that now is, or hereafter shall be an inhabitant or resiant Of this Kingdom of *England*, dominion of *Wales*, or town of *Berwick upon Tweed*, shall or may be sent prisoner into *Scotland*, *Ireland*, *Jersey*, *Guernsey*, *Tangier*, or into forts, garrisons, islands, or places beyond the seas, which are or at any time hereafter shall be within or without the dominions of His Majesty, his heirs, or successors;

and that every such imprisonment is hereby enacted and adjudged to be illegal; and that if any of the said subjects now is or hereafter shall be so imprisoned, every such person and persons so imprisoned, shall and may, for every such imprisonment, maintain, by virtue of this act, an action or actions of false imprisonment, in any of His Majesty's Courts of record, against the person or persons by whom he or she shall be so committed, detained, imprisoned, sent prisoner, or transported, contrary to the true meaning of this act, ...

and the plaintiff in every such action shall have judgment to recover his treble costs, besides damages, which damages so to be given shall not be less than five hundred pounds; .....

and the person or persons who shall knowingly frame, contrive, write, seal or countersign any warrant for such commitment, detainer, or transportation, or shall so commit, detain, imprison, or transport any person or persons contrary to this act, ... being lawfully convicted thereof, shall be disabled from thenceforth to bear any office of trust or profit within the said realm of *England*, dominion of *Wales*, or town of *Berwick upon Tweed*, or any of the islands, territories, or dominions thereunto belonging, ...and be incapable of any pardon from the King, his heirs or successors...