FIVE KNIGHTS FOR FREEDOM

(A talk delivered at the conference of the Property Bar Association on 12th November 2007)

The genesis of this talk is two speeches by Lord Hoffmann in the House of Lords in the cases involving the Belmarsh detainees[1].

Following 9/11 the UK Government concluded that there was a public emergency threatening the life of the nation which justified it in derogating from the right to personal liberty guaranteed by Article 5 of the Convention on Human Rights. By section 23 of the Anti-Terrorism etc Act 2001 the Government provided for the detention of non-nationals if the Home Secretary believed that their presence in the UK was a threat to national security but there was some reason why they could not be deported. Nine people were detained in Belmarsh Prison. They appealed to the Special Immigration Appeals Commission ("SIAC"). SIAC quashed the derogation order and declared that section 23 was incompatible with the Convention in that it discriminated against the prisoners on grounds of nationality. The Court of Appeal allowed the Secretary of State's appeal. The House of Lords (Lord Hoffmann dissenting on this point) held that there *was* a public emergency but agreed with SIAC on the discrimination point. In a speech that went rather further than those of the other Law Lords, Lord Hoffmann said:

> "*This is one of the most important cases which the House had had to decide in recent years. It calls into question the very existence of an ancient liberty of which this country has until now been very proud: freedom from arbitrary arrest and*

[1] A v Secretary of State for the Home Department [2005] 2 WLR 87; A v Secretary of State for the Home Department (No.2) [2005] 3 WLR 1249.

> *detention. The power which the Home Secretary seeks to uphold is a power to detain people indefinitely without charge or trial. Nothing could be more antithetical to the instincts and traditions of the people of the United Kingdom. … Freedom from arbitrary arrest and detention is a quintessentially British liberty, enjoyed by the inhabitants of this country when most of the population of Europe could be thrown into prison at the whim of their rulers. It was incorporated into the European Convention in order to entrench the same liberty in countries which had recently been under Nazi occupation.…… I think that the appeal ought to be allowed. Others of Your Lordships who are also in favour of allowing the appeal would do so, not because there is no emergency threatening the life of the nation, but on the ground that a power of detention confined to foreigners is irrational and discriminatory. I would prefer not to express a view on this point. I said that the power of detention is at present confined to foreigners and I would not like to give the impression that all that was necessary was to extend the power to United Kingdom citizens as well. In my opinion, such a power in any form is not compatible with our constitution.* ***The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these."***

Strong stuff indeed. Is it possible that part of Lord Hoffmann's purpose was to take the heat off his brethren? After all the others were quashing the derogation order on the ground that the people in question were *foreign* would-be terrorists, not true born British terrorists, a point the merit of which was likely to be lost on the great British public, unless sold to them on the basis of high principle, the abrogation of which could readily confine each and every one of us to prison without charge. If so, he succeeded. His speech was the one the Press reported.

"*Such a power in any form is not compatible with our constitution*", said Lord Hoffmann. We do not have a constitution. To what was he referring?

A year later the same events gave rise to another question. The detainees were appealing to SIAC against their detention. SIAC reviewed the evidence and dismissed their appeals. In one case it was alleged that the Secretary of State had relied on evidence of a person obtained through his torture in a foreign state. The Commission held that such evidence would be admissible. The Court of Appeal upheld SIAC two-to-one (Neuberger LJ dissenting). A seven Judge House of Lords unanimously allowed the appeals and held evidence obtained by torture inadmissible, although there was some disagreement as to what burden of proof applied to show that evidence had been so obtained. Lord Hoffmann began his speech with this ringing paragraph:

> "*My Lords, on 23rd August 1628 George Villiers, Duke of Buckingham and Lord High Admiral of England, was stabbed to death by John Felton, a naval officer, in a house in Portsmouth. The 35 year old Duke had been the favourite of King James I and was the intimate friend of the new King Charles I, who asked the Judges whether Felton could be put to the rack to discover his accomplices. All the Judges met in Sergeants Inn. Many years later Blackstone recorded their historic decision: "The Judges, having consulted, declared unanimously, to their own honour and the honour of the English law, that no such proceeding was allowable by the laws of England".*"[2]

[2] There seems to be some doubt about the authenticity of Blackstone's account. See the speech of Lord Bingham at [11]. It is also odd that Coke makes no reference to Felton's Case in his Institutes Part III Ch 2 pp34 -36, where he wrote "There is no law to warrant torture in this land". The answer may be that 3 Inst was written before 1628 (which it was) but it was not published until 1641 and it would have been a simple matter for Coke to have added reference to the most recent and conclusive authority on the point while he was working on 4 Inst. See also Jardine, "The Use of Torture in the Criminal Law" (1836)

But hold on. Was not torture routinely practised in Elizabethan and Stuart England? Was it not par for the course when investigating Catholic conspiracies? Yes it was, but it was practised by warrant of the King and his Council and its product was admissible in the Court of Star Chamber[3], but it was not countenanced by the common law – although common lawyers such as Coke when Attorney-General and Chief Justice were perfectly happy to witness the process when investigating allegations of treason. So if the King wanted Fenton tortured to reveal his accomplices, why did he not just get on with it? The answer to this question and to the question what Lord Hoffmann was referring to as "*our constitution*" lies in the earlier events of 1627 and 1628.

Let me start a few years earlier. In 1624 King James' favourite, the Duke of Buckingham, conceived the idea that if Prince Charles was to marry the Spanish Infanta he had better go and woo her in person. The Prince and the Duke rode across Europe to Madrid incognito wearing false beards and, when they got there, managed to offend the Spanish nobility so greatly that they observed that they would rather drop the Infanta headlong into a well than hand her over to Buckingham. The Prince's suit failed. On such incidents does history turn. Buckingham and Charles returned to England in a rage and encouraged the King to intervene against Spain in the Thirty Years War, something that all his reign he had wisely resisted. The people of England, who hated both the Duke and the Spanish, were delighted at the failure of the mission and the change of policy. Parliament was summoned and voted a subsidy for a fleet. The country was now unknowingly set on the course which would lead to civil war. James died in March 1625 and passed the poisoned chalice to his son.

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[3] See Lord Bingham's speech at [12].

The subsidy was not enough. In 1625 Charles summoned his first Parliament. They voted subsidies worth about £130,000, though the King needed nearly £1m for the war, but declined to make the traditional lifetime grant of Tonnage and Poundage, the right to collect the customs dues. In Parliament a very articulate opposition was forming centred around Sir Edward Coke, now a sprightly 73, Sir Robert Phelips, Sir John Eliot and John Selden. Eliot displeased the King mightily by comparing the Duke of Buckingham to Sejanus, thereby implying that the King was like the Emperor Tiberius. Things were getting messy and Charles dissolved Parliament, only to have to summon another in 1626. This time he had a cunning plan – he tried to disqualify several of the opposition (including Coke and Eliot) as MPs by making them Sheriffs of their counties, the Sheriff's oath requiring them to remain in their counties during their term of office.

In the meantime an expedition led by the Duke of Buckingham against Cadiz had turned into a total fiasco with large losses. The Commons voted to commit the Duke to custody pending his impeachment on charges (inter alia) of selling honours. They refused the King supply and he dissolved Parliament.

The King was now in a real pickle. He had an expensive war on his hands – for which Parliament had originally voted – but no money. So he resorted to non-Parliamentary taxation. On 7th October 1626 he issued a proclamation requiring a Forced Loan and every device at the service of the State was used 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. To confirm the legality of it all, the King asked the Judges for a ruling. They refused. The King summoned the Lord Chief Justice, Sir Randall Crewe, and sought his co-operation. When he refused, he was sacked and his place given to Sir Nicholas Hyde, Counsel previously retained by the Duke of Buckingham.

The Judges' refusal merely emphasised the dubious legality of the loan and encouraged refuseniks. Although by mid-1627 some £240,000 had been collected, some peers and many gentry refused to pay. Over 100 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, a novel method of challenging an act of Council and Monarch, since the writ of habeas corpus was in those days little more than a witness summons. This was not, however, a case of high politics, secret diplomacy or conspiracy against the safety of the realm such as might be thought to justify arrest and detention in the national interest.[4] The Knights' imprisonment was simply an attempt to force them to lend money to the Government (which they would never get back) and their object was to make the Government say so, so that the legality of the exaction could be made the subject of examination.

The Crown was not going to play ball. The Council arranged that the return of the Warden of the Fleet to the writ said simply that each prisoner was "*detentus in prisona …per speciale mandatum domini regis …*" and stated no other cause. The effect was to switch the issue from the legality of the loan to whether the King had power to commit Englishmen to prison simply

[4] The King almost certainly did regard it as a matter of national interest since the loan was essential to pay for a war being fought in the national interest.

because he wanted to. Was the King's say so what Magna Carta meant by "*lex terrae*"?[5]

Sargeant Bramston, Counsel for Sir John Heveningham, argued that the return was bad because it did not show cause for the imprisonment; it followed that the Court could not examine the legality of the charge and so the prisoner had no remedy and could therefore be held in prison indefinitely.

John Selden, Counsel for Sir Edmund Hampden, argued that "*per legem terrae*" meant "*by due process of law*" and did not encompass the exercise of the Royal prerogative without any cause expressed.

The Attorney General argued for the Crown that the King's act, done as it must be taken to be, for reasons of State, is legal by definition. He relied on precedents, the most recent a decision of the whole King's Bench in 1592, to the effect that the Courts would always remand in custody if the King gave no reason for his command, assuming that "*it is intended to be a matter of State and that it is not right nor timely for it to appear*" – the defence of *arcana imperii*. The proper remedy, he said was a petition to the King, not a writ of habeas corpus.

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[5] Magna Carta Ch 39: This is one of the three chapters of Magna Carta which is still on the statute book and is still in force.

"Nullus liber homo capiatur, vel imprisonetur, aut disseisiatur, aut utlagetur, aut exuletur, aut aliquot modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum vel per legem terrae."

" No freeman shall be taken, or imprisoned, or disseized, or outlawed, or exiled, or in any way harmed--nor will we go upon or send upon him--save by the lawful judgment of his peers or by the law of the land."

Hyde CJ, the King's recently appointed Chief Justice, held that *all* the precedents showed that the Court would not bail a prisoner if no cause for his imprisonment was shown in the return but would presume he was imprisoned "*for matter of state, which we can take no notice of*". The Knights were remanded in custody.

What next followed produces one of those cruxes that scholars love, the resolution of which dictates the view we take of past events and personalities.

When summoned to explain their conduct to Parliament the following year, the Judges insisted that their order had been purely interlocutory and created no precedent. Their intention had only been "*to take advice and make no judgment until next term*". That is not how Hyde's reasoning reads. However, no entry of the judgment had been made on the Court Rolls except the word "*remittitur*" (he is remanded). When the Attorney General discovered this, he drafted what we would call a Minute of Order and submitted it to the Court Clerk. The Clerk refused to enter it without the consent of the Judges and the Judges refused to alter the record. What was going on?

In the next Parliament John Selden argued that this was a deliberate attempt to pervert the Court record and create a binding precedent favourable to the Crown. This view gained some colour when, in the Lords, the ever cack-handed Buckingham, trying to excuse the Attorney General, made things infinitely worse by saying that the Attorney General had acted on the express instructions of the King.

Professor Guy of Bristol University, writing in 1982, built on this incident a picture of King Charles as a devious politician, scheming behind the scenes to establish a legal tyranny[6]. He blamed the attempt to "pervert" the Court record and the King's "duplicity" for the explosive events of the subsequent Parliament.

Professor Kishlansky of Harvard, in an article published in 1999[7], argues against this view of a duplicitous King, the unmasking of whom powered the indignation of Parliament in 1928. He argues:

(i) that the King did not need to manufacture a binding precedent justifying his power to imprison, because there were plenty already;

(ii) the Court's refusal of bail implied that the return was valid;

(iii) the King was only trying to buy time to collect the loan anyway; and

(iv) the Attorney General's Minute of Order was perfectly anodyne – it merely recited that each Knight, having been detained by command of the King without special cause expressed, was remanded in custody.

I am of the Kishlansky persuasion. I do not think the King was a political and legal schemer. Far from it, he was an aesthete and art collector. He hated lawyers and politicians. He was just desperate for cash. In January 1628 he released the five Knights. He had to. He had to call another Parliament and secure supply.

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[6] J A Guy: "The origins of the Petition of Right Reconsidered",Historical Journal 25 (1982)pp289-312

[7] Mark Kishlansky: "Tyranny Denied", Historical Journal 42 (1999) pp53-83

When Parliament met in March, every loan refusenik who stood was returned. Twenty-seven MPs had been imprisoned on the King's command. They were cross as wasps. Not only had they and their friends been imprisoned or threatened or drafted into the army or hauled up to London to attend Council but Buckingham had recently conducted another disastrous expedition against the Island of Rhé and troops had been forcibly billeted on householders. The big issue, however, was imprisonment without cause expressed.

In Parliament Coke and Selden and others spoke out in defence of an Englishman's right to his property and his liberty. Coke, however, was caught out badly. In one of those forensic coups that we advocates can only dream about, the Solicitor General was able to refer to two cases: in the first in 1592 Coke, while himself Solicitor General, had advised Council that a person committed by the Privy Council was not bailable; in the second in 1616 Chief Justice Coke had decided that in such a case the cause of imprisonment was to be taken to be "*arcana regni*" and need not be disclosed. Coke was thrown into confusion. He returned to the House two days later to say that his previous advice and decision were mistaken and could not stand against a number of statutes which he had unfortunately overlooked.

The Commons then drew up four resolutions to the effect that no freeman was to be imprisoned without cause shown, even at the King's command; and that taxation except by consent of Parliament was unlawful. It was then necessary to get the Lords on board. Coke and Selden were sent to sell the need for some instrument declaratory of the law to the Lords in the light of the threat to everybody's liberty posed by the five Knights' case. While they

waited for the Lords' reply, the Commons debated and resolved to give the King five subsidies but decided not to pass the Bill except for a quid pro quo. The House resolved "*that grievances and supply go hand in hand*".

What they got back from the Lords was a watered down version larded with reference to "*His Majesty's Royal prerogative, intrinsical to his sovereignty*". The Commons rejected it as useless. As Coke put it, "*Reason of State lames Magna Carta*".

It was now the end of April and the King had not got his money. He came to Parliament and addressed it through the Lord Chancellor. He accepted that Magna Carta and the other statutes were all in force; he would respect the freedom and property of his subjects; they could trust his word; would they now please proceed to his business? But the Commons stood firm. During the debate a message came from the King: "*Would they clearly state whether they would rest upon his Royal word and promise?*" That was a heart-stopper. The Commons could not say "*No*" but they could hardly assent. Messages passed back and forth. Coke came up with a wonderful line:

> "*Not that I distrust the King; but that I cannot take his trust but in a Parliamentary way*".

In this painful debate, the constitutional settlement between Government and people was being hammered out.

Coke then proposed the idea of a petition of right[8] which would be voted on by both Houses and given the Royal Assent and thus have the authority of law, even if it contained no sanctions for breach. It was to:

- confirm an Englishman's right to liberty and security from imprisonment without cause;
- reaffirm Magna Carta;
- prohibit billeting of soldiers and martial law in peacetime; and
- prohibit taxation without consent of Parliament.

Again it had to be sold to the Lords. Again the King refused to give up the power of discretionary imprisonment. Again the Lords tried to insert weasel words to sugar the pill for the King: "*… with due regard to leave entire that sovereign power which etc …*". Again Coke and the Commons' lawyers said "*No*", Coke with his famous aphorism:

"*Magna Carta is such a fellow that he will have no sovereign.*"

For the time, those words were incredibly brave – only the sovereign had no sovereign.

The Lords capitulated. On 2nd June the King came to Parliament to assent to the petition. It was read. All waited for the traditional words of assent:

"*Soit droit fait comme il est desire*".

But they did not come. Instead the Lord Chancellor delivered an agreeable but ambiguous formula which ended with the ominous word "*prerogative*".

Next day the Commons sat again. They received a message from the King: they must proceed to business; they had one week. The Commons were in

[8] To be contrasted with a petition of grace. By the former the petitioner sought relief as of right based on existing law: by the latter he sought a favour or indulgence to which he had no pre-existing entitlement.

despair. Sir John Eliot rose to speak and was about to cast all the blame for the Royal intransigence on the Duke of Buckingham, when the Speaker rose and told the House that he was under command from the King "*to interrupt any that should go about to lay any aspersion on the Ministers of State*". Eliot sat down and the House fell silent. The silence was broken by Sir Nathanial Rich with the famous line:

"*We must speak now or forever hold our peace.*"

Catherine Drinker Bower in her splendid book on Coke, "The Lion and the Throne", describes the scene that followed:

> "*Pym rose, tried to speak and wept outright; Coke followed with a like dramatic result. "Overcome with passion, and seeing the desolation likely to ensure, Sir Edward Coke was forced to sit down when he began to speak, through the abundance of tears. Yea, the Speaker in his speech could not refrain from weeping and shedding of tears, beside a great many whose great griefs made them dumb and silent. Yet some bore up in that storm and encouraged others". "That black and doleful Thursday", a newswriter called it. "Such a spectacle of passions, as the like had seldom been seen in such an assembly, some weeping, some expostulating, some prophesying the fatal ruin of our kingdom; some playing the divines in confessing their own and country's sins, which drew those judgments upon it; some finding, as it were, fault with those who that wept. I have been told by a Parliament man that there were about a hundred weeping eyes.*"
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> *It was an extraordinary scene. These men who wept outright before their fellows were not the timid spirits of Parliament but members whose courage already had been tested, some of whom had suffered imprisonment for the cause. They wept from helplessness, frustration, a temporary loss of hope. By the King's message it would seem he stood against his subjects altogether and could not be separated from that man of evil who was at the root of all the kingdom's wrongs."*

Sir Edward Coke now rose to make his last speech in Parliament. He bravely and in defiance of the King's command named the Duke of Buckingham as the cause of all the country's miseries, calling him the grievance of grievances. The Lords were consulted and they dispatched a joint deputation to ask His Majesty for a "*clear and satisfactory answer*" to their Petition of Right. The next day the speaker brought a message that the King wished again to meet with Parliament "*that all Christendom might take notice of a sweet parting between him and his people*". Two days later, the King came again to Parliament. The petition was read again and this time the Clerk to the House read the magic words of Royal Assent.

> "*As the words were pronounced, a great shout rang, and was repeated again and again. News spread to the street – "broke out", wrote a Privy Councillor, "into ringing of bells and bonfires miraculously". From steeple to steeple the joyous sound was echoed. The City heard, three miles away, and as the June dusk began to fall there were bonfires "at every door, such as were never seen but upon His Majesty's return from Spain".*"

So the Petition of Right became law. It is the link between Magna Carta and Article 5 of the European Convention, which says much the same as the Latin text but at much greater length. It is England's gift to the free world.

And yet. And yet we hear again the justification of "*arcana imperii*". As it happens, the five Knights were in prison for about 90 days. Our present Government wants to be able to hold terrorist suspects without charge for longer than the 28 days already (exceptionally) permitted by statute. When our Home Secretary was asked in Parliament how many days would be enough, she evaded the question. When she was asked why her party was whipped to vote for 90 days (resulting in Mr Blair's only Commons defeat),

she was unable to answer. When asked in how many cases to date it would have been useful to have been able to hold persons for more than 28 days, she was unable to identify any. But she says such a case may arise. No adequate explanation has been advanced as to why the extra time might be needed or what use would be made of it or what would be done to the detainees during it, but the Prime Minister seems to want the power to detain for 56 days, the only rationale for which appears to be that it is more than 28 and less than 90.

Let us go back to 1628. So scarred was he by the experience of his third Parliament, its readiness to bargain with the Government and its palpable distrust of his intentions, that the King did not call another Parliament for 11 years. He ruled by means of increasingly desperate fiscal devices to raise revenue without Parliamentary approval, thus stoking up a terrible anger in the populace. When he called his fourth Parliament in 1640, the situation rapidly deteriorated into civil war.

To repeat Lord Hoffmann:

> "*The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these.*"

Oh – and why did the King ask the Judges whether Felton could be tortured? Because Felton was a hero. After he had plunged his knife into Buckingham in Portsmouth, he was cheered as he was brought back to London in chains to be hanged at Tyburn; he was the David who had slain Goliath; he was celebrated in ballads, poems and the drinking of healths. Buckingham had been hated for his arrogance, his incompetence and as the King's proxy – a

King was never wrong or unjust; he was always badly advised. If the hero of the hour had been tortured "*per speciale mandatum regis*" a matter of months after the trauma of the Petition of Right and the events of the 1628 Parliament, even King Charles could foresee a PR disaster. So he tried to pass the buck to the Judges. They did not fall for it.

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