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The Beginnings of Judicial Review

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This volume bears witness to an encouraging growth of interest in the history of public law.[1] Decades ago I was asked to teach legal history at the Inns of Court School of Law, and Lord Justice Scarman (as he then was) complained that my draft syllabus did not include the prerogative writs. My first reaction was to reply, 'Of course not, that isn't what we do'. The legal history courses which I had studied and taught, inherited from generations before me, concentrated on land law, contract and tort. However, after a few moments' thought, I saw how right Sir Leslie was. Here was a fundamental piece of the common law which legal historians had treated as somehow off limits. And it was not only lawyer-historians who were narrowly focused. In 1991 I took part in a conference on the 'history of freedom in the West'. It was, no doubt, progressive of political historians to think of inviting a lawyer. The obvious English topics to deal with seemed to me to be the ending of villeinage and the rise of habeas corpus; but I had the sense that this was regarded as a weird aberration by an interloper. No one else at the conference thought it relevant to consider how personal liberty was protected in real life: how, where or when people could escape from being locked up or enslaved. Constitutional historians, likewise, steered clear of practical law. They used the terminology 'constitutional history' rather than the history of constitutional *law*, and they focused on the growth of Parliament and governmental institutions rather than on legal debates, judicial decisions and real people. Even Maitland's lectures on constitutional history, published posthumously in 1908,[2] had nothing to say about the judicial

[1] I was invited to speak on the same topic at two different conferences in the same week, and with the agreement of the organisers gave a similar lecture at both. A slightly extended version of the lecture presented in Dublin will appear in J. Varuhas (ed.), *The Making (and Re-Making) of Public Law* (in press).

[2] F. W. Maitland, *Lectures on Constitutional History: A Course of Lectures* (H. A. L. Fisher ed., Cambridge, 1908).

origins of the prerogative writs. Maitland was immersed in the year books of Edward II and what went before; but his kind of research was not bestowed on the early modern period until much later.[3]

The year books were not the place to start anyway, because there is little or nothing in them about personal liberty. According to Sir John Dodderidge, speaking in the House of Commons in 1610, only private law was to be found in the law reports, whereas public law had to be sought in records – meaning principally the formal records of Parliament, Chancery and Exchequer. The law reports, he said, were 'nothing else for the most part but the reports of private suits'.[4] That had in fact begun to change in the time of Elizabeth I, as we shall see, though it is not much evident from the printed books. Most reporters were students or barristers educated in a tradition which omitted public law from the curriculum, and they put down their pens when such cases began to come before the courts. There was therefore a self-perpetuating convention of exclusion, not unlike that which has prevailed among English legal historians since Maitland's day. But the subject was of practical importance to judges and law officers, and it is chiefly from their long-unpublished notebooks that we are able to trace the beginnings. There were some significant public law cases in Dyer's reports, but they were cut out by the editors of 1585 and not printed until 1993.[5] Coke's notebooks, likewise, contained a good deal of public law which he did not feel able to publish. Some found its way into print in the 1650s, but the rest is only just going to press.[6] The dearth of readily accessible information explains why historians' books of constitutional sources – beginning with Bishop Stubbs's influential *Select Charters*[7] and continued

[3] The important pioneering work of Stanley de Smith (see n. 47, below) and Edith Henderson (see n. 39, below) made no use of manuscript law reports.

[4] E. R. Foster (ed.), *Proceedings in the Parliament of 1610*, 2 vols. (New Haven, CT, 1966), vol. II, 205. It is notable that Sir Matthew Hale's *The Prerogatives of the King* (D. E. C. Yale ed., 92 Selden Society (hereafter SS), London, 1976), which was the first major treatise on English constitutional law (c. 1660), made extensive use of records but none at all of unpublished case law.

[5] J. H. Baker (ed.), *Reports from the Lost Notebooks of Sir James Dyer* (110–11 SS, London, 1994–95).

[6] J. Baker (ed.), *Reports from the Notebooks of Edward Coke* (136–40 SS, London, 2022–23). These five volumes cover the period 1572–1600. Three further volumes (141–3 SS, London, 2025) will complete the edition, with reports from 1601 to 1616.

[7] W. Stubbs (ed.), *Select Charters and Other Illustrations of English Constitutional History . . . to the Reign of Edward I* (Oxford, 1870). This was a standard text for a century and was reprinted as recently as 2012.

forward in time by others – were filled with bare documents, such as statutes, rather than arguments and judgments.[8]

The story of public law in the year-book period has yet to be told. The author of *Bracton* used the term 'public law', but it was a learned term borrowed ultimately from Ulpian and did not creep into the year books. He had some useful things to say about the king being under the law, but that did not mean the king could be sued or prosecuted in his own courts.[9] Lawyers knew about chapter 29 of Magna Carta (1225) and the restraints which it seemed to place on the king's power, but it mentioned no remedies and it left open the question of what absolute prerogatives were allowed to the king by the *lex terrae*. To a fifteenth-century lawyer, Magna Carta was chiefly about wardship and dower, and other matters of private law, mixed with a lot of spent and obsolete material. The potentiality of chapter 29 was missed by the lecturers in the inns of court, who were content to explain it with breath-taking literalism as being mainly about trial by peers in Parliament and not charging fees for writs of right or *justicies*. Selling justice, on this interpretation, was forbidden only in the case of manorial and county courts. The great charter of liberties would only acquire – or retrieve – its importance in constitutional law when it was revived in the 1570s and invested with a new potency.[10]

Since actions could not be brought against the king for acting unconstitutionally, any legal protection had to work differently. The key to this was the principle – seldom spelt out explicitly – that the king could do no wrong. It is an idea which often causes mystification and misunderstanding. I remember an external examination candidate in the 1960s writing: 'The queen can do no wrong. That is why she has ministers, to do the wrong for her.' I suppose the candidate was grasping at an underlying truth. Of course, kings were better placed to do wrong de facto than anyone else; but the principle meant that kings were incapable de jure of

[8] A selection of the legal sources, some of which have not been printed before, has been published in translation in J. Baker (ed.), *Sources of English Legal History: Public Law to 1750* (Oxford, 2024) (hereafter *SPL*).

[9] *On the Laws and Customs of England*, 4 vols. (S. E. Thorne ed., Cambridge, MA, 1968), vol. II, 25–6, 33. The possibility of suing the king was accepted in *Corbet's Case* (1307) Year Books 35 Edw. I (Rolls Series), 467, at 469 (and see the editor's note at xv). But during the fourteenth century it became orthodox learning that one could only sue *to* the king, by petition of right.

[10] See J. Baker, *The Reinvention of Magna Carta 1216–1616* (Cambridge, 2017). For the readings see J. Baker (ed.), *Selected Readings and Commentaries on Magna Carta 1400–1604* (132 SS, London, 2015).

authorising wrong, and therefore a commission, patent or executive decision which harmed a subject contrary to law was simply void. That gave the courts a limited power of judicial review. In a famous case of 1368, the chief justices sitting at Chelmsford expressed indignation at a Chancery commission authorising an arrest without due process of law, and complained about it to the king's council.[11] In 1406 the King's Bench struck down a royal charter authorising the chancellor's court of Oxford University to proceed according to the civil law, since it infringed the right of every subject to be governed by the common law.[12] And in 1461 the Common Pleas rejected a writ of protection whereby a party on royal service at the Roman Curia was placed outside the reach of the law for three years – the legal limit for a protection being one year. As Moyle J observed, the king was bound by law to do right to all his subjects, and he was unable to do that if someone was granted exemption from legal proceedings for a lengthy period.[13] That was another way of saying that the king could do no wrong. If something wrong was done or attempted in his name, it would be quashed.

A supporting principle of some importance was that the king could not acquire or part with property except by matter of record. The courts could therefore, by reviewing the relevant record, strike down grants of things to which the crown was not entitled. The courts could even grant relief, by petition of right, in respect of property in the king's hands. No doubt property claims in general should be considered outside the scope of public law, even when the king was a party. But when property included jurisdictional and administrative franchises, the boundary seems less sharp, especially since such franchises could be taken away (by *quo warranto*) for misuse, disuse or abuse: another kind of judicial review.

These, in outline, were the roots from which public law grew; but they were a far cry from judicial review as we know it today. The administrative functions of central and local government, in so far as they were off the record, were largely beyond reach. If on the record, it was mainly in the labyrinthine Exchequer, not in the two common-law benches.

[11] *Sir John atte Lee's Case* (1368) Lib. Ass. 42 Edw. III, pl. 5; Baker, *SPL*, 67. For the context see Baker, *Magna Carta*, 58–60.

[12] *Pedyngton v. Otteworth* (1406) 88 SS 166; Baker, *SPL*, 412. This was known to Coke: Baker, *Magna Carta*, 385. The same principle later prevented Oxford University claiming a jurisdiction in equity: *Perrot v. Mathew* (1588) *Coke's Notebooks*, 137 SS 372; Baker, *SPL*, 382.

[13] *Abbot of Glastonbury v. Lax* (1461) YB Hil. 39 Hen. VI, fo. 38, pl. 3; Baker, *SPL*, 83.

In the last resort, the coercive power of government was enforced by imprisonment. But imprisonment by the king or his ministers was hardly ever questioned before the sixteenth century, and we do not even know how common it was. Decisions by the king and his council were mysteries of state, beyond the jurisdiction of the courts. They would be classified by Tudor jurists as absolute prerogatives.

Even so, the absolute prerogatives were never as extensive as is often supposed. When Coke listed them around 1600, he could only find nine, most of which are still with us today.[14] Coke's list was admittedly incomplete, because it omitted the power to imprison people without showing any reason, to which we shall return. It also omitted torture, about which Coke was ambivalent until the judges declared it to be unlawful in 1628.[15] But there was not the vast range of unlimited prerogative which is sometimes imagined. The essential feature of the absolute prerogatives was that the manner of their exercise was outside the jurisdiction of the courts. However, it was the prerogative of the common law judges to define and confine them. Coke was fond of the expression found in Plowden's *Commentaries* that the common law 'admeasured' the king's prerogative: in other words, it set and controlled the boundaries.[16]

How far this admeasurement could be achieved depended on remedies, and there were not many relevant remedies to be found in the old register of writs. Although it had been enacted in 1267 that actions for damages could be founded on Magna Carta, this did not bear much fruit.[17] The earliest known example of an action on Magna Carta was in 1501, when there began a number of challenges to the coercive jurisdiction of the new Court of Requests: not exactly actions against the central government, but nevertheless challenges to the prerogative power with

[14] *Coke's Notebooks*,138 SS 589; Baker, *SPL*, 11–13.

[15] *R. v. Felton* (1628), *Howell's Complete Collection of State Trials*, vol. III (London, 1809) (hereafter 3 St. Tr.), 371. This was the first case in which the judges were formally asked to pronounce on it. For Coke's contemporary approval see 3 Co. Inst. 48. But see Baker, *Magna Carta*, 170–2.

[16] *Willyon v. Lord Berkeley* (1561) Plowd. 227 at 236; Baker, *SPL*, 9 at 10; 3 Co. Inst. 84. It was quoted four times in Coke's commonplace books before 1600: *Coke's Notebooks*, 136 SS cxli n. 9. Cf. *Case of Proclamations* (1610) 12 Co. Rep. 74 at 76 ('The king hath no prerogative but that which the law of the land allows him'); Baker, *SPL*, 186 (slightly different translation from the French).

[17] Statute of Marlborough 1267 (52 Hen. III), c. 5; Baker, *SPL*, 53. Although actions could not be brought against the king, they could in principle be brought against officials acting in the king's name.

respect to the erection of new jurisdictions outside the common law. Few of these actions resulted in judgment, and the formula devised in 1501 was not a vehicle for later development.[18] An attempted revival in 1595, also aimed against the Requests, was stamped on by the Privy Council.[19] It was not a promising route to follow. In any case, as with the action of trespass for false imprisonment, such actions lay only for damages after the event; and it was not always obvious who to name as defendants. It was hardly politic in Tudor times to sue officers of state and ministers of the government, and it did not happen.

The difficulties were brought home in 1532 when a serjeant at law was committed to prison by order of Henry VIII without a criminal charge. He was soon released, but he complained to the Privy Council, and all the judges were summoned to give their advice. The question was evidently embarrassing, even though no remedy was being sought. They pointed out that it was against Magna Carta for the king to treat his subjects contrary to law. But they also pointed to a statute of 1275 which provided that a person committed by the king was not bailable: so that was *lex terrae*. They concluded that, if the king sent someone to prison, his discretion was not to be disputed. The case was reported by one of the judges, Sir John Spelman, but was not printed until 1976.[20]

A new chapter in public law began thirty years later with the development of the prerogative writs. The first was habeas corpus, followed by mandamus and certiorari. Unlike ordinary original writs, they were returnable immediately in the court which issued them, and they were not brought against defendants. They could therefore be used to challenge coercive measures by the government or by the new prerogative jurisdictions, tacitly applying the old idea that the king could do no wrong. As far as we know, they were not called 'prerogative writs' until the early seventeenth century. But it was a cleverly chosen name, contrived to reinforce the delicate principle which underlay them. In practice, the writs were often used to challenge exercises of prerogative jurisdiction or authority. Yet they were represented as defending a higher prerogative, that of keeping all ministers, institutions and jurisdictions within the law. It was the practical mechanism whereby the king, through

[18] Baker, *Magna Carta*, 97–9, 456–62. The 1501 case is translated in Baker, *SPL*, 273.
[19] *Parsons v. Locke* (1595), Baker, *SPL*, 275; Baker, *Magna Carta*, 277–8, 484–7.
[20] *Serjeant Browne's Case* (1532) *Spelman's Reports*, 93 SS 183 (misdated 1540); Baker, *SPL*, 418; Baker, *Magna Carta*, 100–1. The statute was Westminster I (3 Edw. I), c. 15; Baker, *SPL*, 627.

his own court, discharged the duty of his coronation oath to uphold the law.[21] Prerogative writs were brought on behalf of the king, not against him. They came to fulfil the prerogative, not to destroy it. Even Stuart kings could accept the underlying principle.[22]

The main prototype was the medieval writ of prohibition, which was designed to keep ecclesiastical courts within their bounds. In the context of jurisdictional disputes with the Church, seen as a competing authority, it made sense for the writ to recite that excesses of jurisdiction were 'against the king's crown and dignity'. It was also used against admiralty courts, which were likewise seen as competitors. Another prototype was *quo warranto*, initiated by the Attorney General to challenge encroachments on royal authority by those claiming franchises. But those writs were brought against defendants and were therefore not available to challenge the government directly. The furthest reach, perhaps, was of the kind discovered by Coke as Attorney General, when he used *quo warranto* to strike down exorbitant patents of monopoly – treating them, in effect, as franchises. However, the vehicle for most of the new development in the second half of the sixteenth century was the writ of habeas corpus.[23]

It is difficult to attribute the innovation to a single cause. No doubt Elizabeth I's relative tolerance helped create a receptive atmosphere, as did the sympathetic legal mindset of her enlightened chief minister William Cecil, Lord Burghley, who was educated in the common law. We know from Coke's private notes that the queen explicitly instructed her law officers, on appointment, not to stretch her prerogative beyond its legal bounds.[24] It is difficult to imagine her father doing the like. But the story of habeas corpus unfolded in Westminster Hall, not in the corridors of power. The beginnings, in the 1560s, are revealed in the long-unpublished notes of the three chiefs at the beginning of the reign: Sir Robert Catlyn, Chief Justice of the King's Bench, Sir James Dyer, Chief Justice of the Common Pleas, and Sir Edward Saunders, Chief Baron of the Exchequer. It may not be a coincidence that they were all alumni of the Middle Temple, where William Fleetwood played a role in

[21] Hale, *Prerogatives of the King*, 14–15.
[22] Baker, *Magna Carta*, 310–11, 485, 512–13.
[23] The important study by P. D. Halliday, *Habeas Corpus from England to Empire* (Cambridge, MA, 2010) makes full use of the records but begins the story later, with an important case of 1605 (see n. 32, below).
[24] *Coke's Notebooks*, 138 SS 474, 573; 3 Co. Inst. 79; 2 Bulst. 44. See also Baker, *Magna Carta*, 149.

reawakening Magna Carta from centuries of slumber, where Edmund Plowden wrote of admeasuring the prerogative, and where (a few years later) Robert Snagge and James Morice would give lectures reintroducing Magna Carta and constitutional monarchy into legal discourse.[25]

Both Dyer and Saunders made detailed notes of a case in 1560 which set the judges thinking seriously about habeas corpus.[26] Mary I had unlawfully granted an office in the Common Pleas, while the chief justiceship was vacant, to a young courtier who lacked the requisite technical knowledge. Dyer CJ rejected the grantee and nominated a qualified attorney instead. The earl of Bedford and Lord Dudley then used improper influence at court to procure a special commission to determine the title to the office, which was a freehold, with power to commit Dyer's nominee if he refused to answer. He did refuse to answer and was committed for contempt. This was a newly invented, ad hoc, power of imprisonment. But what could be done? The chief justice considered using a general habeas corpus, which he thought could be issued under the inherent jurisdiction of the court, and a writ was actually prepared but not sealed. However, it was decided to rely instead on the prisoner's status as an attorney and release him on a writ of privilege, a long-established special form of habeas corpus. He was immediately rearrested by the commissioners and remained in prison for over five weeks before a settlement was reached. The judges were deeply affronted by this 'check to the law' (as Dyer called it), and Dyer began collecting precedents of general writs of habeas corpus from the King's Bench rolls, showing how judges earlier in the century had discharged or bailed prisoners committed by statesmen such as Wolsey and Cromwell. His colleague Catlyn CJ joined in the search. These were not law reports, just records; but the bare record was enough to show what the court could do.

Two important cases of habeas corpus occurred in 1565. The first concerned an imprisonment by the Council in the North at York.[27] The

[25] For Fleetwood see Baker, *Magna Carta*, ch. 6. Robert Snagge gave the first known reading devoted entirely to Magna Carta, c. 29, in 1581: ibid., 251–5. James Morice had prepared the way with an important reading on the prerogative in 1578. For Morice and the 'Puritan' lawyers serving in Parliament, see ibid., 255–61. For Plowden see n. 16, above.

[26] *Scrogges' Case* (1559–60) Dyer 175; 109 SS 34, 54–7; Baker, *SPL*, 224; Baker, *Magna Carta*, 156–7. Scrogges relied explicitly on Magna Carta, c. 29.

[27] *John Lamburne's (*alias *Lambert's) Case* (1565), Baker, *SPL*, 284; Baker, *Magna Carta*, 158–9. The case was noted as a precedent by Coke (ibid., 506) and Christopher Yelverton (British Library [hereafter BL] MS. Hargrave 430, fo. 181).

prisoner's body was not produced in obedience to the writ, because (as appeared from the return) the archbishop had ordered his gaoler to disobey it. The archbishop, as president of the Council in the North, was apparently awaiting instructions from the Privy Council. The King's Bench was greatly affronted by this. Catlyn CJ protested:[28]

> In this court we hold we hold pleas before the queen herself, inasmuch as it is the queen's highest court . . . [and] this court is of such dignity that, in whatever prison someone is, we may command the officer to bring him here. Even if someone is in the Tower by command of the Council, we may send for him here by writ of *corpus cum causa* directed to the constable of the Tower.

The court not only ordered an alias habeas corpus but an attachment against both the archbishop and the gaoler. We know that Lamburne was in fact a criminal who had turned queen's evidence against some robbers.[29] But that was not the point. The King's Bench had no judicial notice of the surrounding facts. It was for the court to decide on the lawfulness of an imprisonment, and without a proper return they could not do so.

The other case in 1565 concerned the ecclesiastical High Commission, which was established in 1559. A gentleman who had been imprisoned for hearing mass (an indictable misdemeanour) was released by the King's Bench on the grounds that the commissioners had no power to imprison, especially without bail. He was promptly rearrested – yet another example of high-handedness which was 'much debated' by the judges, but again (as in 1560) without a satisfactory resolution.[30] Three years later the Common Pleas, using a writ of privilege, released a prisoner of the High Commission who had refused to incriminate himself upon the oath *ex officio* concerning his alleged attendance at mass. Though not reported in print, it was the first clear decision affirming the privilege against self-incrimination.[31] It is noteworthy that both these

[28] R. Crompton, *L'Authoritie et Jurisdiction des Courts* (1594), ff. 78v–79; translated in Baker, *SPL*, 284. He cited the case of the imprisonment by Cardinal Wolsey, identifiable as *Ex parte Apryse* (1518): Baker, *Magna Carta*, 157–8. He had also found precedents from the 1520s: Catlyn's commonplace book, Alnwick Castle MS. 475, fo. 95.

[29] See the archbishop's letter in M. A. E. Green (ed.), *Calendar of State Papers Domestic (Elizabeth): Addenda*, vol. 12 (1870), 554.

[30] *Mytton's Case* (1565) *Dyer's Notebooks*, 109 SS lxxix, 107. Mytton was subsequently indicted at common law, but died in 1568 before trial.

[31] *Thomas Lee's Case* (1568) *Dyer's Notebooks*, 109 SS 143; Baker, *SPL*, 343; copy of the habeas corpus in BL MS. Harley 7648, fo. 267v; Coke's memorandum on c. 29 of Magna

decisions were in favour of Roman Catholics; there were other contemporary decisions in favour of Puritan ministers.

During the same period, the King's Bench discharged or bailed persons imprisoned by the Court of Requests, the Council in the Marches, and even the Chancery. These were prerogative courts, but the remedy was given in the name of a superior prerogative and was supported by the queen's law officers. In a habeas corpus case of 1605, Coke (still Attorney General) explained[32]:

> Even if the king gives authority by his commission to some persons to execute justice, or the law does so by Act of Parliament, nevertheless the examination thereof – as to what may be done by such authority – must remain in the absolute and supreme power of the king, that is, in his Bench, which is the proper seat of justice. And although there are no law reports to be found to prove this, yet he said that he had by search found infinite precedents to prove the continual use of it.

He was referring to the precedents, such as those collected by Dyer and Catlyn, in the rolls of the clerk of the crown. But the great question was, how far habeas corpus could reach towards the centre of government, the Privy Council. In 1577 Dyer CJ conceded that a general or unspecific return could not be reviewed in the case of a committal by the whole Privy Council, because there might be secret reasons which it would not be appropriate to make public.[33] Nevertheless, the King's Bench in 1567 and again in 1578 granted bail to prisoners sent to the Tower by the Privy Council without any cause shown,[34] and in 1587 it declared that those imprisoned by the Council were in all cases entitled to be brought before the court so that the lawfulness of their imprisonment could be examined.[35] Thus, as Catlyn CJ had asserted in 1565, even the Privy Council could not place someone completely beyond the reach of the law. It was, however, an empty remedy, since all the judges

Carta (1604) 132 SS 399; Baker, *Magna Carta*, 506; abridged, Baker, *SPL*, 438. It was frequently cited by Coke as chief justice.

[32] *Honnyng's Case*, arising from *Whetherley v. Whetherley* (1605) BL MS. Lansdowne 1075, ff. 101v–103v, translated in Baker, *Magna Carta*, 512; Baker, *SPL*, 290 at 292. The remark was in response to Francis Bacon's assertion that proceeding in this way would damage the royal prerogative.

[33] *Hynde's Case* (1576–77), Baker, *SPL*, 343; 109 SS lxxx n. 61. Cf. the report in 4 Leon. 21 ('because it may concern the state of the realm, which ought not to be published').

[34] *Robert Constable's Case* (1567) KB 29/201, m. 68; *John Brownyng's Case* (1578) KB 29/213, m. 73d.

[35] *John Howell's Case* (1587) 1 Leon. 70; Baker, *SPL*, 420.

collectively conceded in 1592 (albeit tacitly) that they could not go behind a general return by the queen or the whole Council.[36] Despite a lone protest from Walmsley J in 1601, this remained the position until the Petition of Right 1628.[37] The initial victory, in the Elizabethan period, was the ending of arbitrary imprisonment by individual ministers or courtiers and excesses of jurisdiction by newly created tribunals.

Habeas corpus was, obviously, limited to restraints on bodily liberty. But there were other kinds of liberty which were not adequately protected (if at all) by actions for damages.[38] The two further media of judicial review, mandamus and certiorari, were developed in the seventeenth century to fill some of the gaps.[39] They were originally aimed at local government: mandamus against municipal authorities, certiorari against county magistrates and other commissioners. The first of them, chronologically, was mandamus. Fractious behaviour in urban government was commonplace by 1600 and sometimes resulted in arbitrary abuses of position by those in authority. A freeman might be disenfranchised, which would deprive him of a vote; an alderman, town clerk or recorder might be removed on trumped-up or exaggerated charges of misconduct; an elected mayor might be kept out of office. Mandamus ('we command') is a word which occurred in various earlier writs. But a new version, known initially as a 'writ of restitution', was nurtured in the early 1600s.[40] It worked by ordering the municipal corporation to restore the applicant, whereupon the corporation could make a return justifying its conduct so that the court could review the stated reasons. The earliest reported case in the King's Bench, brought against the mayor of

[36] *Memorial from the Judges* (1592) 1 And. 297; Baker, *SPL*, 143; Baker, *Magna Carta*, 166–9, 496–8. An earlier version, signed in autograph by all the judges on 9 June 1591, is in the Burghley Papers, BL MS. Lansdowne 67(87).

[37] *John Bate's Case* (1601), Baker, *SPL*, 423; first noted in J. Baker, *English Law Under Two Elizabeths: The Late Tudor Legal World and the Present* (Cambridge, 2021), 49–50. Walmsley J had signed the memorials of 1591–92.

[38] E.g. it was not decided until *Ashby v. White* (1702) 2 Ld Raym. 938 (Baker, *SPL*, 143), after much debate and dissension, that an action on the case lay against a returning officer for rejecting a valid vote in a parliamentary election.

[39] The story below is told mainly from the reported cases. The full story lies in the records. The original returns are in the King's Bench *recorda* files (KB 145 to the year 1689, then KB 16) and the proceedings in court may be followed in the controlment rolls (KB 29) and the rule books (KB 21). The pioneering study by E. G. Henderson, *Foundations of English Administrative Law* (Cambridge, MA, 1963), made good use of the controlment rolls but did not use the files, which were not then available, or the manuscript reports.

[40] Baker, *Magna Carta*, 203–6. Here again the roots of the remedy had been discovered by Dyer (in 1574).

Cambridge in 1606, involved an element of habeas corpus as well as restitution, since the complainant bailiff had been imprisoned after an altercation with the mayor[41]; but mandamus rapidly became an independent procedure in regular use, and there were several reported cases (mostly not in print) testing its limits.[42] Although it was a judicial invention, Coke CJ attributed it in 1615 to chapter 29 of Magna Carta – not as a matter of history, of course, but of legal doctrine – and went so far as to assert that[43]:

> To this court of King's Bench belongs authority not only to correct errors in judicial proceedings, but other errors and misdemeanours extra-judicial tending to the breach of peace or oppression of the subjects, or to the raising of faction, controversy, debate or any manner of misgovernment; so that no wrong or injury, either public or private, can be done but that it shall be reformed or punished by the due course of the law.

That sweeping restatement of the rule of law drew an indignant rebuke from Lord Ellesmere LC prior to Coke's downfall the following year[44]:

> In giving excess of authority to the King's Bench, [Coke CJ] doth as much as insinuate that this court is all sufficient in itself to manage the state. For if the King's Bench may reform 'any manner of misgovernment' (as the words are), it seemeth that there is little or no use either of the king's royal care and authority exercised in his person . . . nor of the Council Table, which under the king is the chief watch-tower for all points of misgovernment, nor of the Star Chamber, which hath ever been esteemed the highest court for extinguishment of all riots and public disorders and enormities.

He went on to accuse Coke of claiming for the King's Bench 'a superintendency over the government itself, and to judge wherein any of them

[41] *R. v. Mayor of Cambridge*, ex parte *Tompson* (1606) KB 29/246, m. 125 (translated in Henderson, *Foundations of English Administrative Law*, 163–7); judgment in KB 21/3, fo. 72; reported in BL MS. Lansdowne 1075, fo. 189v; MS. Add 35954, fo. 444v; 1 Rolle Abr. 456; Baker, *SPL*, 392.

[42] Notably *R. v. Burgesses of Stamford*, ex parte *Loveday* (1609) KB 29/249, m. 138d; reported in Cambridge Univ. Lib. MS. Mm. 6.69, ff. 113, 117v; Baker, *SPL*, 392; *R. v. Mayor of Lincoln*, ex parte *Shuttleworth* (1613) KB 29/255, m. 23; Calthorpe's reports, BL MS. Hargrave 385, fo. 115; *R. v. Mayor of Boston*, ex parte *Midlecott* (1615) KB 29/257, m. 103; Calthorpe's reports, fo. 353v.

[43] *R. v. Mayor of Plymouth*, ex parte *Bagg* (1615) 11 Co. Rep. 98; also reported in 1 Rolle Rep. 224; Baker, *SPL*, 393; record in KB 29/259, m. 76; Baker, *Magna Carta*, 396–8.

[44] Lord Ellesmere, 'Observations on Coke's Reports', printed in L. A. Knafla (ed.), *Law and Politics in Jacobean England: The Tracts of Lord Chancellor Ellesmere* (Cambridge, 1977), 297–318, at 307 (here modernised); Baker, *SPL*, 398.

do misgovern'. That was, indeed, exactly what Coke was claiming. And it has been the foundation of English administrative law ever since. It may have seemed preposterous to the lord chancellor in 1616; but leaving the review of misgovernment to the government itself, whether in the person of the king or through the Privy Council or Star Chamber, was hardly satisfactory to an aggrieved subject. In any case, in his exasperation with Coke's sweeping assertions, and in his desire to be rid of him, Ellesmere had exaggerated the potential scope of mandamus. The writ did not lie against the crown, or against a minister of the crown, and therefore was not (until 1968) available to challenge misgovernment at the highest level.[45] Moreover, it was still a writ of restitution, limited to public offices and positions, or freehold offices which existed 'for the common weal'.[46] It did not lie to enforce private contracts of employment or even (at first) the performance of official duties.

The last of the prerogative writs, certiorari, is briefly noticed in manuscript law reports in the 1640s, though it only rose to importance in the Restoration period. The formula had long been used for removing indictments and other records into the King's Bench from lower courts of record,[47] and Coke found a year-book case in which something similar was used to review a decision by justices of the forest.[48] Like prohibition, it lay only to control courts; but there were several courts in the seventeenth century which exercised governmental functions. In the first half of that century it began to be used to review fines imposed by commissioners of sewers or convictions by justices of the peace exercising summary jurisdiction.[49] On the surface, it operated formally in the same way as in the past: the writ merely ordered that the record be sent up to the King's Bench, and the bare record was all that the return contained. But when the return contained a judgment or order, it operated as an informal counterpart to the writ of error as a way of obtaining a judicial review. More or less

[45] The position was changed by *Padfield v. Ministry of Agriculture* [1968] AC 997.

[46] *Cock's Case* (1658) 2 Sid. 112; Baker, *SPL*, 398.

[47] For earlier uses see S. A. De Smith, 'The Judicial Writs' (1951) 11 *Cambridge Law Journal* 40, 45–8. For its use in Chancery see W. J. Jones, *The Elizabethan Court of Chancery* (Oxford, 1969), 187–9.

[48] *Case of the Forest of Pickering* (1347) YB Mich. 21 Edw. III, fo. 48, pl. 70; 4 Co. Inst. 294. It was not called certiorari: Coke called it a *venire facias recordum*.

[49] See K. Costello, 'The Writ of Certiorari and Review of Summary Criminal Convictions 1600–1848' (2012) 128 *Law Quarterly Review* 443–65. It was presumably this use of the writ which occasioned complaints in 1621 that it was issued too frequently, resulting in judges' rules to regulate it: J. F. Larkin and P. L. Hughes (eds.), *Stuart Royal Proclamations* (Oxford, 1973), vol. I, 513, no. 217.

invisible before the 1640s, it became a standard procedure during the later seventeenth century for challenging orders made by quarter sessions – in effect, the county local government – such as the assessment of rates, the settlement of paupers, and affiliation orders.[50]

The development may have been connected with the abandonment of oversight of local government by the assize judges in the middle of the seventeenth century, though that cannot be the full explanation.[51] The first reported debate about the extension of the remedy occurred in 1642, when certiorari was used successfully to remove and quash an order made by commissioners of sewers. Although it was resisted as a new departure, once again the principle which prevailed was that no inferior authority was beyond the scope of judicial review by the King's Bench.[52] Bramston CJ remarked that he did not think the writ would be much used,[53] though in that prediction he was much deceived. The procedure rapidly gained a foothold because it suited all parties not to challenge it.[54] It relieved complainants from having to wait for an unlawful order to be enforced against them so that they could bring a civil action for damages or a replevin,[55] and it settled the status of the order itself rather than just the issue between particular parties. Yet these were purely public law remedies, in that they lay only in respect of public authorities or courts.[56]

[50] See K. Costello, 'The King's Bench and the Poor Law 1630–1800' (2014) 35 *Journal of Legal History* 3–26.

[51] See J. Baker, 'Equity and Public Law in England' in J. Baker, *Collected Papers on English Legal History* (Cambridge, 2013), vol. II, at 956–60. The Star Chamber also exercised some control over local government before its abolition in 1640, but it was chiefly concerned with criminal misconduct.

[52] *Comyns v. Masham* (1642) March N.R. 196 (Baker, *SPL*, 408); Harvard Law School MS. 113, 170–5; KB 29/291, m. 39 (writ and return); KB 21/13, fo. 14 (decree affirmed); followed in *Re Newton and Tydd St Giles* (1648) Style 178, 184, 191; KB 29/297, m. 33 (writ); KB 21/13, ff. 120v–127v (rules). The 1642 case is discussed in Henderson, *Foundations of English Administrative Law*, 101–6; and for earlier but unreported precedents see ibid., 93–101. I am grateful to Dr Paul Warchuk of St John's College, Cambridge, author of a recent PhD dissertation on the history of certiorari (1600–1800), for a helpful discussion of the subject.

[53] From the citation of *Comyns v. Masham* in *Re Newton*, as reported in Barnard's reports, BL MS. Add 25222, fo. 166 (reversing).

[54] This was emphasised in *Comyns v. Masham* (n. 52, above), Baker, *SPL*, 409.

[55] E.g. *Wythers v. Rookes* (1598) *Coke's Notebooks*, 139 SS 844, 5 Co. Rep. 99 (replevin); Baker, *SPL*, 405; *Keighley's Case* (1609) 10 Co. Rep. 139 (action on the case); *Hetly v. Carryer* (1614) 2 Bulst. 197 (replevin). These were all brought in respect of distraints to enforce the orders of commissioners of sewers.

[56] This was also at first true de facto of habeas corpus. No examples have been found of habeas corpus against private individuals before the time of Charles II, but it was then

There was one remaining obstacle to treating the King's Bench as judicially supreme. The power of the Privy Council to imprison people without giving reasons was usually defended with reference to treasonous plots, and it was certainly one of the proper functions of the Council to authorise and make preparations for state trials. Even Coke, both as law officer and as lord chief justice, accepted that such pre-trial proceedings were beyond review.[57] But imprisonment could potentially be used in connection with politically controversial ends, such as the enforcement of monopolies[58] and extra-parliamentary taxation. The most hotly contested aspect of this in the early modern period was prerogative taxation by means of impositions. In *Customer Smyth's Case* (1598), concerning an imposition on alum, and in *Bate's Case* (1606), concerning an imposition on currants, the Court of Exchequer held that the king had an absolute prerogative power to lay impositions on imported merchandise.[59] Fleming CB wryly observed in *Bate's Case* that the only losers were wealthy epicures who had to pay a little more for their currants; but the constitutional principle at stake was widely considered to be fundamental. The decision caused a major stir and was frequently debated in the Commons, where it was the subject of lengthy historical and legal discourses. Coke and Popham CJJ were of the view that import duties could be imposed for the public good – for instance, in order to achieve parity with duties imposed by foreign governments – but that there was no general prerogative power of taxation.[60] That came to be tested with the even more controversial forced loan of 1626, which caused a furore in Parliament but was not ruled upon decisively,[61] and with the ship-money levy imposed in 1636, which was upheld by only a bare majority of the

used (e.g.) to liberate children from would-be guardians: Baker, *SPL*, 446–7. For an unsuccessful attempt to use it for an abused wife see *R. v. Lord Leigh* (1675) ibid., 445–6. For an inconclusive attempt to use the analogous writ *de homine replegiando* for a slave see *Sir Thomas Grantham's Case* (1687) ibid., 453.

[57] *Ruswell's (*alias *Rosewell's) Case* (1615) 118 SS 453; *Saltonstall's Case* (1615) 1 Rolle Rep. 219; Baker, *Magna Carta*, 401, n. 342. For the first case see also Baker, *SPL*, 260.

[58] *Leathersellers' Company v. Darcy* (1598) Baker, *Magna Carta*, 168, 196.

[59] *Att.-Gen. v. Smyth* (1598) *Coke's Notebooks*, 139 SS 873; Baker, *SPL*, 469; *Att.-Gen. v. Bate* (1606) Lane 22; extracts in Baker, *SPL*, 471. The imposition on alum was effected by letters under the privy signet. That on currants was effected by letters patent addressed to the lord treasurer.

[60] *Case of Impositions* (1606) 12 Co. Rep. 33; Baker, *SPL*, 478.

[61] Its enforcement by imprisonment was contested in *The Five Knights' Case* (1627) 3 St. Tr. 1 (extracts in Baker, *SPL*, 426), but the returns to the writs of habeas corpus deliberately did not disclose the reason for the imprisonment, and therefore the only issue was whether the king could commit people to prison without giving reasons.

judiciary in 1638.[62] By that time the judicial robustness of Coke's day had waned, and public confidence in the judges was reaching a low point. Coke had been dismissed in 1616, and his successor Sir Randall Crewe was removed in 1626 for opposing the loan. These were heroic moments, but they fostered a sense that the judges who managed to remain in office might no longer be as independent as in the past.

The control of local government by means of mandamus and certiorari was to become a major part of King's Bench business by 1700. However, after the failure of the King's Bench judges effectively to oppose the forced loan, the protection of the subject from unconstitutional taxation and arbitrary imprisonment passed for a time to the High Court of Parliament, where the advocacy of the lawyer members – some of whom had represented the loan refusers in 1627 – stood a better chance of success. Coke was among them. Having himself been imprisoned without cause shown, in 1621 and again in 1622, he now recanted his former opinion about imprisonment by the king or the Privy Council.[63] In 1628 he was the chief promoter of the Petition of Right, which (with the king's grudging assent) guaranteed that 'that no man hereafter be compelled to make or yield any gift, loan, benevolence, tax, or such like charge without common consent by Act of Parliament' or be imprisoned without cause shown. That did not avail the defendant in the ship-money case, but in 1640 Parliament reversed the judgment in that case and guaranteed the availability of habeas corpus in all cases of committal by the king or the Privy Council.[64]

The role of the House of Commons in establishing such basic principles of public law is well known and beyond the scope of the present discussion. It is enough to observe that it was a very different body from its successor today. It was not tied by party politics to do the government's bidding. Its members came (in Selden's words) 'bound by the trust reposed in them by their country that sent them' to defend their freedoms.[65] Most importantly, the House was full of barristers, always chaired by a prominent lawyer, and frequently resounded with legal arguments of the highest quality, replete with legal and historical

[62] *R. v. Hampden* (1638) 3 St. Tr. 1127 (Exchequer Chamber); extracts in Baker, *SPL*, 482. Five judges supported Hampden, who had declined to pay a tax of £1 for the construction of warships, but seven voted for the crown.

[63] He excused his former opinion on the grounds that 1615 was 'an ill time': 3 St. Tr. 81–2 (1628).

[64] Ship Money Act 1640 (16 Car. I), cc. 10, 14.

[65] Debate on the liberty of the subject (1628) 3 St. Tr. 145.

citations. Legal history had become both a vocational subject and a force in politics. The lawyers in the Commons thought they were defending an ancient inheritance represented by Magna Carta. They did their utmost to ensure that the king (and Parliament itself) stayed within the rule of law. It is perhaps unsurprising that kings saw Parliament as troublesome, and sought to manage without it. As it turned out, that was a serious miscalculation. Constitutional monarchy had already been firmly implanted in the legal and political mind by the decisions of the courts in Westminster Hall, and by their inspired notion that the king's prerogatives in executive action could legitimately be controlled by the king's higher prerogative in judicature.