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BOOK REVIEW

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By Paul D. Halliday

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HABEAS CORPUS. FROM ENGLAND TO EMPIRE

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In the days when every Australian law student studied legal history, one of the famous cases we were taught was about James Somerset. Taken from Africa, probably in his early teens, Somerset, in 1749, was by the laws of Virginia, made a chattel of his master, Charles Steuart. Twenty years later, Steuart took Somerset to England where he continued to serve as a slave for two years until, in October 1771, he fled his bondage. Steuart had Somerset seized and put on board a ship bound for Jamaica, there to be sold in the slave markets. Abolitionists rushed to the King's Bench in London, where they obtained a writ of *Habeas corpus*. This required the ship's captain to bring Somerset to court with a justification for his detention. Fortunately, the presiding judge was Lord Mansfield who declared that slavery did not exist in England. He uttered the famous order: "Let the black go free". The law of England was too pure and no slave could live in it. *Habeas corpus* was the remedy.

Somerset's story was at once an example of the jurisprudence of one of the great judges of English history, William Murray, First Earl of Mansfield. But it also carried the not too subtle point of the superiority of

English law over all others: including even that of the Americans who had to fight a bloody civil war a century later to be rid of slavery. The case also showed that, in our system of law, all human beings had basic rights. The common and statute law would, where necessary, uphold those rights against oppression, from whatever source.

Somerset's case, and many others, are now told in this engaging book which the author, an associate professor of history at the University of Virginia, has written. He has drawn on a detailed study of *Habeas corpus* cases in the King's Bench in London between 1500 and 1800. The book is a monument to his thorough-going investigation of original documents, most of them still kept in the British National Archives at Kew.

The author traces the origins of *Habeas corpus*, often called the Great Writ of Liberty, dating back before 1500 to the *Magna Carta* that the Barons and the Church in England extracted from the hapless King John in 1215. That charter granted a number of "liberties". Tucked into the middle was a clause, numbered 39, whose language was more vague than most. It promised that "no free man shall be arrested or imprisoned ... except by the lawful judgment of his peers or by the law of the land". Later, the same clause became re-numbered as 29 when the charter was re-issued in 1225, taking its place as the first published English statute.

It was one thing for the King to make promises. It was another to turn them into an actionable remedy to give prisoners and others in detention relief from unlawful restraint. Over many years, the King's Bench (called the Queen's Bench in a female reign or the Upper Bench during the

Commonwealth) developed the remedy to give teeth to King John's promise. It did so, drawing upon the jurisdiction which, its judges claimed, was based on the Royal prerogative.

Halliday points out, in the closing chapters, that the story of the Great Writ did not finish in 1800. It has continued into the present age. The last section of the book called "Writ Imperial", tells the tale of the spread of the influence of *Habeas corpus* to the far reaches of the British Empire as it expanded rapidly to every corner of the earth. Its extension to the Americas, beginning with Bermuda and then the plantations that formed the United States in 1776, gave rise to numerous tricky problems when writs were claimed in London for ships carrying alleged rebels, captured by the Royal Navy during the revolt. It was one thing to uphold liberties in England itself. But would the writ be issued to protect the rights of British subjects beyond the seas? Or would there be adjustments and derogations, taking into account the "special circumstances" of rebellions against, and settlements for, the Crown, in whose name the writ issued?

These problems did not diminish with the years. They grew in number and difficulty as the outposts of Empire stretched to war-like and sometimes rebellious people, in respect of whom Imperial governors did not appreciate the supervision of colonial judges. Some of the most difficult cases that presented after 1800 included claims brought by French settlers in the newly acquired Quebec; Indians alleged to have been involved in the Great Mutiny of 1857; Maori who sought relief in New Zealand in the 1860s and 1880s; Boers who challenged the British at the Cape in the 1880s; right up the Mau Mau, detained in Kenya in the

1950s in huge numbers, in one of the last imperial gasps designed to stave off the demise of British rule.

This last chapter also contains the story of how *Habeas corpus* in the 1820s came to be exercised in Australia by Chief Justice Francis Forbes in Sydney and by Mr. Justice Pedder in Hobart. In his first year, Forbes granted *Habeas corpus* for a runaway from HMS Tamar named William King. Statute law ultimately afforded a proper foundation for the detention. However, Forbes asserted his right to enquire into the evidence said to justify the imprisonment. He eventually discharged the writ. In Hobart, in the same year, Pedder went to a prison cell where Thomas Warton was detained, to take his deposition in his challenge to imprisonment. Yet it did not take these judges long to water down their ringing affirmations about *Habeas corpus*, and to recognise, explicitly, the difficulties of providing relief in a colony with a large number of convicts, prone to run away from the sometimes light detention to which they were subject.

Whereas the three centuries of the author's special enquiry coincided with the high point in the development of the Great Writ, the years after 1800 saw the ringing judicial affirmations decline in number and outcomes. Although, in a statistical appendix, Mansfield and his contemporaries are shown to have released nearly 80 percent of those brought to court under the Writ, parliaments, and governments, acting under legislative powers, chipped back at the assertive judges. They protected the right of government to maintain law and order, and especially in the face of alleged dangers from local trouble-makers.

The last section of this book provides a somewhat disconcerting collection of instances where British and colonial lawmakers afforded themselves lawful ways of avoiding *Habeas corpus*. They did this by statutory suspension during war and rebellion; by judicial excuses based on “necessity”; and by an apparent decline in the robust attitude of the presiding judges. All of this was so, as Halliday remarks pointedly, although the dangers faced by governments in the era of judges like Francis Bacon, John Holt and Lord Mansfield were probably much greater and more perilous than those faced by more recent rulers. The ups and downs of the writ’s effectiveness over the years are estimated. The author concludes on a sombre note that many, who have trumpeted the virtue of *Habeas corpus* in solemn speeches, have been the very people who have “comforted themselves as they bound the judge and muffled the prisoners”.

This conclusion has a resonance in our own age in the way in which our legal system has responded to the dangers of terrorism, with huge accretions of legal powers to police and others to detain suspects, not yet convicted, in the name of protecting the public. Many of the stories of British colonialism in the last portion of the book find contemporary reflections in the long-term detentions of terrorism suspects by the United States in Guantanamo Bay. And the ready willingness of other countries to co-operate in the rendition of accused nationals to places of detention and torture by agents of third countries, like Mubarak’s Egypt, trusted to do in their prisons what cannot, or will not, be done at home.

The last section, added as a kind of extended postscript, leaves the reader wondering whether we can ever re-capture the energy and determination of the great releasing judges like Holt and Mansfield.

Although Halliday hints that this might still happen, he also suggests that the very success of the Empire project and the accretion of power to a complex modern state meant that lawful exceptions, derogations and suspensions of the Great Writ would become the norm. They would restore government officials to virtual immunity from effective review of deprivations of liberty. When this happens, the restraints on detention are rejected by hand-wringing judges, complaining that the circumstances are “tragic” and “lamentable”. But holding that there is nothing they can do because of the manacles of the enacted law binding them.

In England (where this story began) and in the United States (where it continues), there are checks on the worst governmental abuses. These are provided respectively by statute and the *European Convention* in the British case and by the *Bill of Rights* in the American Constitution. In Australia, only tradition, fickle parliamentary vigilance or the occasional “persistent judge” defend our liberties. Curiously, when the old prerogative writs were constitutionalised in Australia in 1901, *Habeas corpus* was omitted.

Paul Halliday should now write a popular history book, accessible to informed citizens. It should draw on his extensive research. But he should bring it right up to date. He should abandon the reticence of scholarship and tell those interested what every judge and lawyer knows: that the Great Writ merely gets the person complaining before the court. If the expansive law authorises the detention, the jailer can declare with a smile: ‘Gotcha’.

MICHAEL KIRBY