

Erskine May, Vol. III, Chapter XI, pp. 10-24

Habeas Corpus and Impressment

The writ of Habeas Corpus is unquestionably the first security of civil liberty. It brings to light the cause of every imprisonment, approves its lawfulness, or liberates the prisoner. It exacts obedience from the highest courts: Parliament itself submits to its authority.(1) No right is more justly valued. It protects the subject from [11] unfounded suspicions, from the aggressions of power, and from abuses in the administration of justice. Yet this protective law, which gives every man security and confidence, in times of tranquillity, has been suspended, again and again, in periods of public danger or apprehension. Rarely, however, has this been suffered without jealousy, hesitation, and remonstrance; and whenever the perils of the state have been held sufficient to warrant this sacrifice of personal liberty, no minister or magistrate has been suffered to tamper with the law, at his discretion. Parliament alone, convinced of the exigency of each occasion, has suspended, for a time, the rights of individuals, in the interests of the state.

Early Suspensions of Habeas Corpus

The first years after the Revolution were full of danger. A dethroned king, aided by foreign enemies, and a powerful body of English adherents, was threatening the new settlement of the crown with war and treason. Hence the liberties of Englishmen, so recently assured, were several times made to yield to the exigencies of the state. Again, on occasions of no less peril,—the rebellion of 1716, the Jacobite conspiracy of 1722, and the invasion of the realm by the Pretender in 1745,—the Habeas Corpus Act was suspended.(2) Henceforth, for nearly half a century, the law remained inviolate. During the [12] American war, indeed, it had been necessary to empower the king to secure persons suspected of high treason, committed in North America, or on the high seas, or of the crime of piracy:(3) but it was not until 1794 that the civil liberties of Englishmen, at home, were again to be suspended. The dangers and alarms of that dark period have already been recounted.(4) Ministers, believing the state to be threatened by traitorous conspiracies, once more sought power to counteract treason by powers beyond the law.

Suspension During the Revolutionary War

Relying upon the report of a secret committee, Mr. Pitt moved for a bill to empower His Majesty to secure and detain persons suspected of conspiring against his person and government. He justified this measure on the ground, that whatever the temporary danger of placing such power in the hands of the government, it was far less than the danger with which the constitution and society were threatened. If ministers abused the power entrusted to them, they would be responsible for its abuse. It was vigorously opposed by Mr. Fox, Mr. Grey, Mr. Sheridan, and a small body of adherents. They denied the disaffection imputed to the people, ridiculed the revelations of the committee, and declared that no such dangers threatened the state as would justify the surrender of the chief safeguard of personal freedom. This measure would give ministers absolute power over every individual in the kingdom. It would [13] empower them to arrest, on suspicion, any man whose opinions were obnoxious to them,—the advocates of reform,—even the members of the parliamentary opposition. Who would be safe, when conspiracies were everywhere suspected, and constitutional objects and language believed to be the mere cloak of sedition? Let every man charged with treason be brought to justice; in the words of Sheridan, 'where there was guilt, let the broad axe fall;' but why

surrender the liberties of the innocent?

Yet thirty-nine members only could be found to oppose the introduction of the bill. Ministers, representing its immediate urgency, endeavoured to pass it at once through all its stages. The opposition, unable to resist its progress by numbers, endeavoured to arrest its passing for a time, in order to appeal to the judgment of the country: but all their efforts were vain. With free institutions, the people were now governed according to the principles of despotism. The will of their rulers was supreme, and not to be questioned. After eleven divisions, the bill was pressed forward as far as the report, on the same night; and the galleries being closed, the arguments urged against it were merely addressed to a determined and taciturn majority. On the following day, the bill was read a third time and sent up to the Lords, by whom, after some sharp debates, it was speedily passed.

The strongest opponents of the measure, while denying its present necessity, admitted that when [14] danger is imminent, the liberty of the subject must be sacrificed to the paramount interests of the state. Ringleaders must be seized, outrages anticipated, plots disconcerted, and the dark haunts of conspiracy filled with distrust and terror. And terrible indeed was the power now entrusted to the executive. Though termed a suspension of the Habeas Corpus Act, it was, in truth, a suspension of Magna Charta,(5) and of the cardinal principles of the common law. Every man had hitherto been free from imprisonment until charged with crime, by information upon oath; and entitled to a speedy trial and the judgment of his peers. But any subject could now be arrested on suspicion of treasonable practices, without specific charge or proof of guilt: his accusers were unknown; and in vain might he demand public accusation and trial. Spies and treacherous accomplices, however circumstantial in their narratives to secretaries of state and law officers, shrank from the witness-box; and their victims rotted in gaol. Whatever the judgment, temper, and good faith of the executive, such a power was arbitrary, and could scarcely fail to be abused.(6) Whatever the dangers by which it was justified,—never did the subject so much need the protection of the laws, as when government and society were filled with suspicion and alarm.

[15] Notwithstanding the failure of the state prosecutions, and the discredit cast upon the evidence of a traitorous conspiracy, on which the Suspension Act had been expressly founded, ministers declined to surrender the invidious power with which they had been entrusted. Strenuous resistance was offered by the opposition to the continuance of the act: but it was renewed again and again, so long as the public apprehensions continued. From 1798 to 1800, the increased malignity and violence of English democrats, and their complicity with Irish treason, repelled further objections to this exceptional law.(7)

At length, at the end of 1801, the act being no longer defensible on grounds of public danger, was suffered to expire, after a continuous operation of eight years.(8) But before its operation had ceased, a bill was introduced to indemnify all persons who since the 1st of February, 1793, had acted in the apprehension of persons suspected of high treason. A measure designed to protect the ministers and their agents from responsibility, on account of acts extending over a period of eight years, was not suffered to pass without strenuous opposition. When extraordinary powers had first been sought, it was said that [16] ministers would be responsible for their proper exercise; and now every act of authority, every neglect or abuse, was to be buried in oblivion. It was stated in debate that some persons had suffered imprisonment for three years, and one for six, without being brought to trial; and Lord Thurlow could 'not resist the impulse to deem men innocent until tried and convicted.' The measure was defended, however, on the ground that persons accused of abuses would be unable to defend themselves, without disclosing secrets dangerous to the lives of individuals, and to the state. Unless the bill were passed, those channels of information would be stopped, on which government relied for guarding the public peace. When all the accustomed forms of law had been departed from, the justification of the executive would indeed have been difficult: but evil times had passed, and a veil was drawn over them. If dangerous powers had

been misused, they were covered by an amnesty. It were better to withhold such powers, than to scrutinise their exercise too curiously; and were any further argument needed against the suspension of the law, it would be found in the reasons urged for indemnity.

Post-War Suspension

For several years, the ordinary law of arrest was free from further invasion. But on the first appearance of popular discontents and combinations, the government resorted to the same ready expedient for strengthening the hands of the executive, at the expense of public liberty. The suspension of the Habeas Corpus Act [17] formed part of Lord Sidmouth's repressive measures in 1817,(9) when it was far less defensible than in 1794. At the first period, the French Revolution was still raging: its consequences no man could foresee; and a deadly war had broken out with the revolutionary government of France. Here, at least, there may have been grounds for extraordinary precautions. But in 1817, France was again settled under the Bourbons: the revolution had worn itself out: Europe was again at peace; and the state was threatened with no danger but domestic discontent and turbulence.

Again did ministers, having received powers to apprehend and detain in custody persons suspected of treasonable practices,—and, having imprisoned many men without bringing them to trial,—seek indemnity for all concerned in the exercise of these powers, and in the suppression of tumultuous assemblies. Magistrates had seized papers and arms, and interfered with meetings, under circumstances not warranted even by the exceptional powers entrusted to them: but having acted in good faith for the repression of tumults and sedition, they claimed protection. This bill was not passed without a spirited resistance. The executive had not been idle in the exercise of its extraordinary powers. Ninety-six persons had been arrested on suspicion. Of these, forty-four were taken by warrant of the secretary of state; four by warrant of the privy council: the remainder on the [18] warrants of magistrates. Not one of those arrested on the warrant of the secretary of state had been brought to trial. The four arrested on the warrant of the privy council were tried and acquitted.(10) Prisoners had been moved from prison to prison in chains; and after long, painful, and even solitary imprisonment, discharged on their recognisances, without trial.(11)

Numerous petitions were presented, complaining of cruelties and hardships; and though falsehood and exaggeration characterised many of their statements, the justice of inquiry was insisted on, before a general indemnity was agreed to. 'They were called upon,' said Mr. Lambton, 'to throw an impenetrable veil over all the acts of tyranny and oppression that had been committed under the Suspension Act. They were required to stifle the voice of just complaint,—to disregard the numerous petitions that had been presented, arraigning the conduct of ministers, detailing acts of cruelty unparalleled in the annals of the Bastile, and demanding full and open investigation.' But on behalf of government, it appeared that in no instance had warrants of detention been issued, except on information upon oath; and the attorney-general declared that none of the prisoners had been [19] deprived of liberty for a single hour, on the evidence of informers alone, which was never acted on, unless corroborated by other undoubted testimony.

Indemnity was granted for the past: but the discussions which it provoked, disclosed, more forcibly than ever, the hazard of permitting the even course of the law to be interrupted. They were not without their warning. Even Lord Sidmouth was afterwards satisfied with the rigorous provisions of the Six Acts; and, while stifling public discussion, did not venture to propose another forfeiture of personal liberty. And happily, since his time, ministers, animated by a higher spirit of statesmanship, have known how to maintain the authority of the law, in England, without the aid of abnormal powers.

Ireland

In Ireland, a less settled state of society, agrarian outrages,—feuds envenomed by many deeds of blood,—and dangerous conspiracies, have too often called for sacrifices of liberty. Before the Union, a bloody rebellion demanded this security; and since that period, the Habeas Corpus Act was suspended on no less than six occasions prior to 1860.(12) The last Suspension Act, in 1848, was rendered necessary by an imminent rebellion, openly organised and threatened: when the people were arming, and their leaders inciting [20] them to massacre and plunder. Other measures in restraint of crime and outrage have also pressed upon the constitutional liberties of the Irish people. But let us hope that the rapid advancement of that country in wealth and industry, in enlightenment and social improvement, may henceforth entitle its spirited and generous people to the enjoyment of the same confidence as their English brethren.

Impressment

But perhaps the greatest anomaly in our laws,—the most signal exception to personal freedom,—is to be found in the custom of impressment, for the land and sea service. There is nothing incompatible with freedom, in a conscription or forced levy of men, for the defence of the country. It may be submitted to, in the freest republic, like the payment of taxes. The services of every subject may be required, in such form as the state determines. But impressment is the arbitrary and capricious seizure of individuals, from among the general body of citizens. It differs from conscription, as a particular confiscation differs from a general tax.

The impressment of soldiers for the wars was formerly exercised as part of the royal prerogative: but among the services rendered to liberty by the Long Parliament, in its earlier councils, this custom was condemned, 'except in case of necessity of the sudden coming in of strange enemies into the kingdom, or except' in the case of persons 'otherwise bound by the tenure of their lands or possessions.'(13) The prerogative was discontinued: but during the exigencies of war, the temptation of [21] impressment was too strong to be resisted by Parliament. The class on whom it fell, however, found little sympathy from society. They were rogues and vagabonds, who were held to be better employed in defence of their country, than in plunder and mendicancy. During the American war, impressment was permitted in the case of all idle and disorderly persons, not following any lawful trade, or having some substance sufficient for their maintenance.(14) Such men were seized upon, without compunction, and hurried to the war. It was a dangerous license, repugnant to the free spirit of our laws; and, in later times, the state has trusted to bounties and the recruiting sergeant, and not to impressment,—for strengthening its land forces.

But for manning the navy in time of war, the impressment of seamen has been recognised by the common law, and by many statutes.(15) The hardships and cruelties of the system were notorious. No violation of natural liberty could be more gross. Free men were forced into a painful and dangerous service, not only against their will, but often by fraud and violence. Entrapped in taverns, or torn from their homes by armed press-gangs, in the dead of night, they were hurried on board ship, to die of wounds or pestilence. Impressment was restricted by law to seamen, who [22] being most needed for the fleet, chiefly suffered from the violence of the press-gangs. They were taken on the coast, or seized on board merchant-ships, like criminals: ships at sea were rifled of their crews, and left without sufficient hands to take them safely into port. Nay, we even find soldiers employed to assist the press-gangs: villages invested by a regular force; sentries standing with fixed bayonets; and churches surrounded, during divine service, to seize seamen for the fleet.

The lawless press-gangs were no respecters of persons. In vain did apprentices and landsmen claim exemption. They were skulking sailors in disguise, or would make good seamen, at the

first scent of salt-water; and were carried off to the sea-ports. Press-gangs were the terror of citizens and apprentices in London, of labourers in villages, and of artisans in the remotest inland towns. Their approach was dreaded like the invasion of a foreign enemy. To escape their swoop, men forsook their trades and families and fled,—or armed themselves for resistance. Their deeds have been recounted in history, in fiction, and in song. Outrages were of course deplored: but the navy was the pride of England, and everyone agreed that it must be recruited. In vain were other means suggested for manning the fleet,—higher wages, limited service, and increased pensions. Such schemes were doubtful expedients: the navy could not be hazarded: press-gangs must still go forth and execute their [23] rough commission, or England would be lost. And so impressment prospered.(16)

So constant were the draughts of seamen for the American war, that in 1779 the customary exemptions from impressment were withdrawn. Men following callings under the protection of various statutes were suddenly kidnapped, by the authority of Parliament, and sent to the fleet; and this invasion of their rights was effected in the ruffianly spirit of the press-gang. A bill proposed late at night, in a thin house, and without notice,—avowedly in order to surprise its victims,—was made retrospective in its operation. Even before it was proposed to Parliament, orders had been given for a vigorous impressment, without any regard to the existing law. Every illegal act was to be made lawful; and men who had been seized in violation of statutes, were deprived of the protection of a writ of habeas corpus. Early in the next exhausting war, the state, unable to spare its rogues and vagabonds for the army, allowed them to be impressed, with smugglers and others of doubtful means and industry, for the service of the fleet. The select body of electors were exempt: but all other men out of work were lawful prize. [24] Their service was without limit: they might be slaves for life.

Throughout the war, these sacrifices of liberty were exacted for the public safety. But the when the land was once more blessed with peace, it was asked if they would be endured again. The evils of impressment were repeatedly discussed in Parliament, and schemes of voluntary enlistment proposed by Mr. Hume and others. Ministers and Parliament were no less alive to the dangerous principles on which recruiting for the navy had hitherto been conducted; and devised new expedients more consistent with the national defences of a free country. Higher wages, larger bounties, shorter periods of service, and a reserve volunteer force,—such have been the means by which the navy has been strengthened and popularised. During the Russian war great fleets were manned for the Baltic and the Mediterranean by volunteers. Impressment,—not yet formally renounced by law,—has been condemned by the general sentiment of the country;(17) and we may hope that modern statesmanship has, at length, provided for the efficiency of the fleet, by measures consistent with the liberty of the subject.

Footnotes.

1. May's Law and Usage of Parliament, p. 75 (6th Ed.).
2. Parl. Hist., viii. 27-89; xiii. 671. In 1745 it was stated by the solicitor-general that the act had been suspended nine times since the Revolution; and in 1794 Mr. Secretary Dundas made a similar statement.—Parl. Hist., xxx. 539.
3. In 1777, act 17 Geo.III.c.9.
4. Supra, Vol. II. p. 302.
5. 'Nullus liber homo capiatur aut imprisonetur, nisi per legale judicium parium suorum.' . . . 'Nulli negabimus, nulli differemus justiciam.'
6. Blackstone says: 'It has happened in England during temporary suspensions of the statute, that persons apprehended upon suspicion have suffered a long imprisonment, merely because they were forgotten.'—Comm., iii. (Kerr), 146.
7. In 1798 there were only seven votes against its renewal. In 1800 it was opposed by twelve in the Commons, and by three in the Lords. It was then stated that twenty-nine persons had been imprisoned, some for more than two years, without being brought to

trial.—Parl. Hist., xxxiv. 1484.

8. The act 41 Geo. III. c. 26, expired six weeks after the commencement of the next session, which commenced on the 29th of Oct., in the same year.
9. Supra, Vol. II. p. 343.
10. Lords' Report on the state of the country. In ten other cases the parties had escaped. Hans. Deb., 1st Ser., xxxvii. 573; Sir M.W. Ridley, March 9th, 1818; Ibid., 901.
11. Petitions of Benbow, Drummond. Bagguley, Leach, Scholes, Ogden, and others—Hans. Deb., 1st Ser., xxxvii. 438, 441, 453, 461, 519.
12. It was suspended in 1800, at the very time of the Union; from 1802 till 1805; from 1807 till 1810. in 1814; and from 1822 till 1824; subsequently to 1860, it was suspended in 1866; and this suspension was twice continued until March 1869. Again, in 1871, it was suspended in Westmeath, and parts of adjacent counties.
13. 16 Charles I. c. 28.
14. 19 Geo. III. c. 10; Parl. Hist. xx. 114.
15. Sir M. Foster's Rep., 154; Stat. 2 Rich. II. c. 4; 2 and 3 Phil. and Mary, c. 16, etc.; 5 and 6 Will. IV. c. 24; Barrington on the Statutes, 334: Blackstone, i. 425 (Kerr); Stephen's Comm., ii. 576; Parl. Hist. vi. 518.
16. See debate on Mr. Luttrell's motion, March 11th, 1777; Parl. Hist., xix. 81. On the 22nd Nov., 1770, Lord Chatham said: 'I am myself clearly convinced, and I believe every man who knows anything of the English navy will acknowledge, that, without impressing, it is impossible to equip a respectable fleet within the time in which such armaments are usually wanted.'—Parl. Hist., xvi. 1101.
17. The able Commission on manning the navy, in 1859, reported 'the evidence of the witnesses, with scarcely an exception, shows that the system of naval impressment, as practised in former wars, could not now be successfully enforced.'—p. xi.

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