Foreword

SCOTLAND'S MAGNA CARTA: THE CLAIM OF RIGHT AND THE COMMON LAW

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As the anniversary year of Magna Carta draws to a close, it would be supererogatory for a Scots lawyer to add to all that has been written about it by the President and Justices of the Supreme Court (concurring in part, dissenting in part). Scotland is, after all, the only part of the Common Law world where Magna Carta is not, and never has been, part of the law - albeit Alan of Galloway, Constable of Scotland, was one of King John's purported 'advisers'. Nevertheless, Scotland is firmly part of the Common Law world (though we like to say – without too much contemporary justification – that we are also part of the Civil Law world). We share the same Supreme Court and we share the same attachment to the ideal of the rule of law reflected in Magna Carta.

Our Magna Carta, if we have one, is the Claim of Right of 1689, contemporary with, but significantly different from, the English Bill of Rights.[1] The Claim of Right deserves attention for at least two reasons: first, that it enunciates more clearly than Magna Carta or the Bill of Rights the constitutional principle that the monarch is bound by the law; second, that it enunciates some basic principles of due process that are in danger of being forgotten today.

The Bill of Rights – adopted in February 1689 as the Declaration of Right and enacted by the English Parliament in December as the Bill of Rights Act – proceeded on the basis that King James II, by fleeing the country, had abdicated the throne. The throne was therefore vacant. This made it possible for the Parliament to offer the Crown jointly to William of Orange and his wife Mary, daughter of James II. The Declaration of Right stated the conditions (including basic liberties) on which the offer was made and accepted.

It is often said that, with the deposition of James II, 'we got rid of the Stuarts'. On the contrary, Mary II, an extremely popular monarch whose

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[1] The Declaration of Arbroath of 1320, the icon of Scottish identity, was a different sort of document.

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death inspired Purcell to write some of his finest music, was undoubtedly a Stuart and conducted business with firmness while William was away on campaigns, including arresting her uncle (Clarendon) for plotting to restore her father. William III was himself a grandson of Charles I, and if any of Queen Anne's ten children (from 17 pregnancies) had survived, it might have been unnecessary to import a King from Hanover, himself the son of a Stuart mother. In short, the objection was not to the Stuarts as such, but specifically to King James.

The constitutional problem for the Scots in relation to King James, as James VII of Scotland, was that he had not been physically present in that Kingdom and could not be said to have fled from or abandoned it. So his removal, and the substitution of William and Mary, had to proceed on a constitutional basis other than that of constructive abdication adopted by the Bill of Rights. The solution is set out in the Claim of Right – an Act of the Estates (the Parliament) of Scotland, which is still on the Statute Book as the Claim of Right Act 1689.

It is widely believed that the Claim of Right reflects the philosophy of George Buchanan, tutor of the young Mary Queen of Scots and later of her son, James VI and I. A far more attractive and interesting character than his gloomy portraits would suggest, Buchanan was 'by universal consent, the greatest Latin writer, whether in prose or in verse, in sixteenth century Europe.'[2] Montaigne was another of his pupils and he was friendly with, and greatly admired by, most of the great scholars of the period. Some of his verse, assuming that its Latinate indelicacies were understood, would not be recited in polite drawing rooms.

In his book, *De Jure Regni apud Scotos*, which was considered so dangerous that it was burned by the University of Oxford in 1683, Buchanan set out his doctrine that the source of all political power is the people and that the monarch is bound by those conditions under which he was entrusted with supreme power.[3] History might have been different if King James VI and I had paid more attention to what he had been taught.

The Claim of Right falls essentially into four parts.[4] There is first a brief but important Preamble. The second part then sets out the complaints against James and concludes that, on those grounds, he has forfeited the right to the Crown so that 'the throne is become vacant'. The third part, picking up on those complaints, declares that a number of executive actions are 'contrary to law' and insists, somewhat ungrammatically, upon these as 'their undoubted right and liberties'. The fourth part expresses confidence

[2] Hugh Trevor-Roper, *The Invention of Scotland* (Yale UP 2008) ch 2.
[3] George Buchanan, *De Jure Regni apud Scotos* (1579).
[4] I have adapted the spelling of the quotations from the text.

that King William, now King of England, will preserve the rights so asserted and resolves to offer the Crown of Scotland to William and Mary.

The primary complaint against James, set out in the Preamble, was that he had 'invaded the fundamental Constitution of the Kingdom and altered it from a legal limited monarchy to an arbitrary despotic power […] and did exercise that power to the subversion of the Protestant religion and to the violation of the laws and liberties of the Kingdom'. There then follows a list of particular wrongs committed, all of which are said to be 'utterly and directly contrary to the known laws statutes and freedoms of this realm'. This leads to the conclusion that King James has forfeited the right to the Crown and that the throne is consequently vacant.

The Claim then narrates that William Prince of Orange 'now King of England', having delivered the Kingdoms from Popery and arbitrary power, had invited the Scottish Estates to take steps to establish 'that their religion, laws and liberties might not be again in danger of being subverted'. So the Estates 'being now assembled in a full and free representative of this Nation … do in the first place, as their ancestors in like cases have usually done for the vindicating and asserting their ancient rights and liberties, Declare [there follows the list of executive actions that are contrary to law].' This leads to the resolution to invite William and Mary to assume the Crown of Scotland.

There are a number of provisions of the Claim of Right that one would not wish to reassert today. The verbose enumeration of the evils of Popery, and insistence upon the rights and prerogatives of the Protestant religion, compares unfavourably with the simplicity of Article 8 of the Articles of Capitulation by which the Dutch surrendered New Amsterdam in 1664: 'The Dutch here shall enjoy the liberty of their consciences in Divine Worship and church discipline'.[5] Likewise, the statement in the Claim of Right that 'using torture without evidence or in ordinary crimes is contrary to law' is, to say the least, surprising. But torture did not become illegal in all circumstances until the passing, after the Union, of the Treason Act 1708. And it is as well that it is no longer necessary to protect husbands against being fined 'for their wives withdrawing from the church'.

The Claim of Right, like Magna Carta and the Bill of Rights, has to be read in its historical context, but some of its provisions have a contemporary resonance, particularly in the context of the Supreme Court's repeated reminders that legal protection of fundamental rights did not begin with the Human Rights Act.[6] Dicey and Rait, in their *Thoughts on the Union between*

[5] James, Duke of York and Lord High Admiral, was popular in those days: the city was renamed New York in his honour.

[6] See e.g. *R (Osborn) v Parole Board* [2013] UKSC 61, [2014] AC 1115 [54]-[63] (Lord Reed).

England and Scotland, interpreted the Claim of Right as being 'in effect a demand for every power belonging to the Parliament of England […] far exceeding any power which [the Parliament of Scotland] actually possessed and exercised before the Revolution of 1689'.[7] Whatever the motives, the words used are surely capable of a more generous interpretation.

The justification for declaring that James has forfeited the right to the Crown relies on the antithesis between 'a legal limited monarchy' and 'an arbitrary despotic power […] exercised to the violation of the laws and liberties of the Kingdom'. 'A legal limited monarchy' is a more explicit description of the constitutional position than is to be found in Magna Carta or the Bill of Rights. The monarch is bound by the law and his/her powers are limited by the law – an idea that might with profit be drawn to the attention of those of the Queen's Ministers who seek to limit access to judicial review of executive action.

The almost metaphysical conception of law as standing 'beyond and above' (found today in the Treaty on European Union[8]) had been stated by Lord President Stair, the first and greatest of the Scottish institutional writers:

> No man can be a knowing lawyer in any nation, who hath not well pondered and digested in his mind the common law of the world, from whence the interpretation, extensions, and limitations of all statutes and customs must be brought. […] Law is the dictate of reason.[9]

It follows that that which is lawful cannot be arbitrary or irrational – a principle already present in the *Wednesbury* criteria and developed in more detail from EU administrative law (derived from German law) insisting on the objective justification and proportionality of executive action.[10] For recent examples of how this idea is being given effect, see in particular the Judgments of the Supreme Court in *R* v *Gul*[11] and *Beghal v DPP*[12] which illustrate the evils of over-broad discretionary powers, as well as the importance of not relying on answers given under compulsion.

The reference in the Claim of Right to the Estates as 'a full and free representative of the Nation', whether or not it reflects the constitutional phi-

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7 Albert Dicey and Robert Rait, *Thoughts on the Union between England and Scotland* (Macmillan 1920 (reprinted by Greenwood Press 1971)) 63.

8 Treaty on European Union, art 19 (1): 'The Court of Justice […] shall ensure that in the interpretation of the Treaties *the law* is observed'.

9 Stair, *The Institutions of the Law of Scotland* (1681) Book I, Title 1.

10 See e.g. *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

11 *R v Gul* [2013] UKSC 64, [2014] AC 1260.

12 *Beghal v DPP* [2015] UKSC 49, [2015] 1 WLR 4546.

losophy of George Buchanan, cannot surely be interpreted as a demand for 'sovereign' Parliamentary power, still less the power of the Parliamentary majority for the time being. It is, rather, an assertion that ultimate power rests with the 'Nation', of which Parliament is but the representative – an idea that is taken to its logical conclusion in the opinion of the German Constitutional Court on the Lisbon Treaty.[13] The claim to represent 'what the people want' is often exploited in the corridors of the Parliaments at Westminster and Holyrood under the guise of representing the Nation. Dicey was perspicacious in his prediction in 1915 that:

> The result of a state of things which is not fully recognised inside or outside Parliament is that the Cabinet, under a leader who has fully studied the arts of modern parliamentary warfare, can defy, on matters of the highest importance, the possible or certain will of the nation[14]

Passing from the general to the particular, we should note four types of executive action that are said by the Claim of Right to be 'contrary to law' and do not figure in the English Bill of Rights.

First, 'imprisoning persons without expressing the reason thereof and delaying putting them to trial is contrary to law'. Here one thinks of the inhabitants of Guantanamo and perhaps also some of those held in Belmarsh. The Virginia Declaration of Rights of 1776 was even more explicit in asserting that an accused person 'has a right to demand the cause and nature of his accusation [and] to be confronted with his accusers and witnesses'. We are entitled to be satisfied that provisions for detention without charge or trial, and for 'secret' trials, and more particularly the way they are used case by case, are objectively necessary for a legitimate public purpose and that their exercise is proportionate.[15]

Second, 'sending letters to the courts of Justice ordaining the Judges to stop or desist from determining causes, or ordaining them how to proceed in causes depending before them is contrary to law'. Of course, all judicial decisions are legitimately open to comment and criticism. But more than one Home Secretary has sought to tell the judiciary how to apply (or how not to apply) the Human Rights Act. And there is an increasing tendency to invoke the doctrine of Parliamentary sovereignty, which properly applies

[13] Judgment concerning the Lisbon Treaty (2009) BVerfG, 2 BvE 2/08 [279] and elsewhere.

[14] AV Dicey, *The Law of the Constitution* (8th edn, Macmillan 1915) 50-51, reprinted in *The Oxford Edition of Dicey*, vol 1 (JWF Allison ed, Oxford UP 2013) 481.

[15] See e.g. *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68; *VB v Westminster Magistrates Court* [2014] UKSC 59, [2015] AC 1195.

only to duly enacted legislation, to justify Ministers and other politicians in criticising, or even abusing, judges for disregarding their view of the law and how it is to be interpreted and applied.

Third – another assertion of the importance of judicial independence – 'changing the nature of the Judges' gifts *ad vitam aut culpam* into commissions *durante bene placito* is contrary to law'. The Latin phrases assert the distinction between appointment of judges for life (now, until statutory retirement age) or removal for misconduct, and appointment for only so long as the executive is well pleased with what they do. Protection of the judiciary against discretionary interference by the executive with the financial and other conditions of appointment and tenure remains an important element in the constitutional separation of powers.

Fourth, the Claim of Right declares that two judicial decisions of the Lords of Session were contrary to law. One of these had held that '[p]ersons refusing to discover [disclose] what are their private thoughts and judgments in relation to points of treason or other men's actions are guilty of treason'. As the Investigatory Powers Bill passes through Parliament, we may legitimately demand, relying on the Claim of Right, that Big Brother will not be one of the reapers in the harvesting of data, and that our private thoughts and judgments as to other men's actions will remain immune from intrusion or inquiry. Section 19 of the Terrorism Act 2000 has already breached that dyke.

In conclusion, the Claim of Right is entitled to stand alongside Magna Carta and the Bill of Rights as a formal assertion of the principle of lawful limited monarchy and of the fundamental rights of due process and judicial protection against arbitrary executive action. Fervent as have been the expressions of admiration of Magna Carta, we may rightly demand respect for these other, more explicit, expressions of the Common Law tradition.