Mr John Hurst – written evidence (CIC0342)

House of Lords Constitution Committee
Inquiry into the Constitutional Implications of COVID-19

The use of emergency powers during the Covid-19 pandemic.

1. I submit that the questions that are put in the document reveals a fundamental misapprehension of the powers that the Executive and Parliament have in the event of an emergency.

2. I submit that as a mater of law "State necessity" is forbidden by our Constitution because it would suspend the laws which protect the subjects from arbitrary acts by the Executive. What has taken place is therefore a treasonous enterprise to suspend the Constitution.

3. I draw Your Lordships attention to this passage, the ratio decidendi of the Supreme Court Miller Judgement in 2017:

4. " 44. In the early 17th century Case of Proclamations (1610) 12 Co Rep 74, Sir Edward Coke CJ said that "the King by his proclamation or other ways cannot change any part of the common law, or statute law, or the customs of the realm". Although this statement may have been controversial at the time, it had become firmly established by the end of that century. In England and Wales, the Bill of Rights 1688 confirmed that "the pretended power of suspending of laws or the execution of laws by regall authority without consent of Parlyament is illegall" and that "the pretended power of dispensing with laws or the execution of laws by regall authoritie as it hath beene assumed and exercised of late is illegall". In Scotland, the Claim of Right 1689 was to the same effect, providing that "all Proclamationes asserting ane absolute power to Cass [ie to quash] annull and Dissable lawes … are Contrair to Law". And article 18 of the Acts of Union of 1706 and 1707 provided that (with certain irrelevant exceptions) "all … laws" in Scotland should "remain in the same force as before … but alterable by the Parliament of Great Britain".

5. The Crown's administrative powers are now exercised by the executive, ie by ministers who are answerable to the UK Parliament. However, consistently with the principles established in the 17th century, the exercise of those powers must be compatible with legislation and the common law. Otherwise, ministers would be changing (or infringing) the law, which, as just explained, they cannot do. A classic Page 16 statement of the position was given by Lord Parker of Waddington in The Zamora [1916] 2 AC 77, 90: "The idea that the King in Council, or indeed any branch of the Executive, has power to prescribe or alter the law to be administered by Courts of law in this country is out of harmony with the principles of our Constitution. It is true that, under a number of modern statutes, various branches of the Executive have power to make rules having the force of statutes, but all such rules derive their validity from the statute which creates the power, and not from the executive body by which they are made. No one would contend that the prerogative involves any power to prescribe or alter the law administered in Courts of Common Law or Equity."

6. "46. It is true that ministers can make laws by issuing regulations and the like, often known as secondary or delegated legislation, but (save in limited areas where a prerogative power survives domestically, as exemplified by the cases mentioned in paras 52 and 53 below) they can do so only if authorised by statute. So, if the regulations are not so authorised, they will be invalid, even if they have been approved by resolutions of both Houses under the provisions of the relevant enabling Act - for a recent example see R (The Public Law Project) v Lord Chancellor [2016] AC 1531...".

7. https://www.supremecourt.uk/cases/docs/uksc-2016-0196-judgment.pdf

8. These, I submit, are the principles of our Constitution in Magna Carta that are being infringed by the present claim of state necessity, the subjects are being "destroyed" without any due process of law and conviction and their rights not to be subject to arbitrary restrictions are being denied:

9. " 39. No freeman shall be taken or [and] imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or [and] by the law of the land.3

10. To no one will we sell, to no one will we refuse or delay, right or justice...".

11. https://oll.libertyfund.org/titles/mckechnie-magna-carta-a-commentary

12. For the avoidance of doubt I include this passage from "Magna Carta by William Sharp McKechnie (1914) on the significance of the second instance of the word "And" , ("vel" in the Latin) in Article 39. Many translations use merely the word "or" which falsely implies that there is an alternative to Judgement by ones peers:

13. " 4): The meaning of "vel."

14. The peculiar use of the word "*vel"* introduced an unfortunate element of ambiguity. No proceedings were to take place "without lawful judgment of peers *or* by the law of the land"—"or" thus occurring where "and" might naturally be expected. Authorities on medieval Latin are agreed, however, that "*vel"* is sometimes equivalent to *et.*3 Comparison with the [382] terms of chapter 52 and with those of the corresponding Article of the Barons places the matter almost beyond doubt. The 25th of the Articles of the Barons had provided that all men disseised by Henry or Richard should "have right without delay by judgment of their peers in the king's court," giving no hint of any possible alternative to *judicium parium.* Chapter 52 of the Charter, in supplementing the present chapter, describes the evils complained of in both chapters as acts of disseisin or outlawry by the King "*sine legale judicio parium suorum,"* leaving no room for ambiguity...".

15. Magna Carta, and the Declaration of Rights, are constitutional statutes which ratified peace treaties and re-stated the common law as an exercise of the Royal Prerogative. Here is what Halsbury's Laws of England in its chapter on constitutional law has to say on this subject:

16. " 368. Relations of prerogative to common law and statute.
17. The prerogative is thus derived from and limited by the common law, and the monarch can claim no prerogatives except such as the law allows. In particular no prerogative may be recognised that is contrary to Magna Carta or any other statute, or that interferes with the liberties of the subject.

18. The courts have jurisdiction, therefore, to inquire into the existence or extent of any alleged prerogative, it being a maxim of the common law that the King ought to be under no man, but under God and the law, because the law makes the King. If any prerogative is disputed, the courts must decide the question whether or not it exists in the same way as they decide any other question of law. If a prerogative is clearly established, they must take the same judicial notice of it as they take of any other rule of law...".

19. The case of Nichols v. Nichols, 1576, stated "Prerogative is created for the benefit of the people and cannot be exercised to their prejudice".

20. This principle, that the Courts must adjudicate on and respect prerogative like any other form of law, is the reason why all Crown Officers must know the law. If an official does not know the law how can he be certain that he is complying with it and justify his actions in a Court of law?

21. Appointing persons who are insufficiently educated in the constitutional rights of the people cannot be beneficial to the people.

22. I am mindful that it is an overt act of the treason to destroy the constitution of the country, that all persons who incite, aid or abet treason are themselves guilty of treason as principals and may be indicted accordingly, that in a case of treason a person who gives assistance after the commission of a crime does become thereby a party to the crime and that the common law offence of compounding (misprision) of treason is specifically retained by section 5(5) of the Criminal Law Act 1967.

23. I draw the House's attention to this passage from McKechnie:

24. " CHAPTER FORTY–FIVE.

25. We will appoint as justices, constables, sheriffs, or bailiffs only such as know the law of the realm and mean to observe it well….

26. The commentary from McKechnie is as follows:

27. "The object of this plainly worded clause was to prevent the appointment of unsuitable men to responsible posts under the Crown. The list of officers is a comprehensive one—justices, sheriffs, constables and bailiffs—embracing all royal ministers and agents, both of the central and of the local government, from the chief justiciar down to the humblest serjeant.3 This clause was directed in particular against John's foreign favourites such as the Poitevin Bishop of Winchester, Peter des Roches, who had wielded the authority of chief justiciar in 1214 when the King was abroad,4 or such as Engelard de Cigogné, stigmatized by name in a later part of Magna Carta.5 Such men had no interests at stake in England, and little love for its customs and free traditions. In future John must choose a different type of servants, avoiding all such unscrupulous men, whether Englishmen or foreigners, as were ready to break the law in their master's interests or their own. But what class were to fill their places?

28. Bishop Stubbs credits the framers of the Charter [432] with an intention to secure the appointment of men well versed in legal science: "on this principle the steward of a court–leet must be a learned steward."1 The clause of Magna Carta, however, refers to royal nominees, not to the officers appointed by mesne lords to preside over their feudal courts. The barons appointed their own stewards and bailiffs, and had no wish to hamper their own freedom of choice; but only that of the King. Further, the barons did not desire that John should employ men steeped in legal lore, but plain Englishmen with a rough–and–ready knowledge of insular usage, who would avoid arbitrary acts condemned by the law. The barons at Runnymede desired precisely what the council of St. Albans had desired on 4th August, 1213, when it issued formal writs to sheriffs and foresters to observe the laws of Henry I. and abstain from unjust exactions;2 and these laws of Henry were but the laws of Edward Confessor (or, in reality, of Canute) slightly amended.

29. The attitude of John's barons was the same as that of Henry's barons, when the latter declared, in 1234, in emphatic terms, that they did not wish the laws of England to be changed.3 They were far from desiring to be governed by ministers deeply versed in the science and literature of jurisprudence, since these would necessarily have been churchmen and civilians...".

30. Magna Carta: A Commentary on the Great Charter of King John, with an Historical Introduction. by William Sharp McKechnie (Glasgow: Maclehose, 1914).

31. Then there is the matter of compensation:

32. 'No citizen is to be deprived of his land by any public authority against his will, unless it is expressly authorised by Parliament and the public interest decisively so demands; and then on condition that proper compensation is paid'; citing *A-G v De Keyser's Royal Hotel Ltd* [1920] AC 508, HL

33. Finally, I remind all concerned in promoting the present treasonous enterprise that there is no general defence open to members of the armed forces or the police of obedience to superior orders: *R v Clegg* [1995] 1 AC 482, [1995] 1 All ER 334, HL.

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