**ADMINISTRATIVE LAW BAR ASSOCIATION - ANNUAL LECTURE**

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**"HABEAS CORPUS - A NEW CHAPTER"**

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Just over a hundred years ago, on 3 December 1892, a young woman called Daisy Hopkins was convicted by the Vice-Chancellor of Cambridge University and sentenced to fourteen days in the Spinning-House, the University's house of correction. The offence charged against her was that of "walking with a member of the University" - that was the form of words invariably then used in the Vice-Chancellor's Court as a genteel shorthand for Daisy's true offence. What in fact she was guilty of was prostitution with an undergraduate. She brought proceedings by certiorari and habeas corpus and just eight days later came before the Divisional Court. That consisted of the Lord Chief Justice (Lord Coleridge) and Smith J. The University was represented by the Attorney General, a second silk and a junior; Miss Hopkins also had a silk. These were serious matters. Her challenge succeeded; the proceedings against her were quashed and she was set free. As the Lord Chief Justice perspicaciously observed:

"Nobody would suppose that a person simply walking with a member of the University, who might be that member's mother, or sister, or wife, or friend, was guilty of an offence against the law which would justify the Vice Chancellor in imprisoning him or her".

Even though everyone recognised that in reality Daisy Hopkins was being tried for what Lord Coleridge called "the far graver charge of her being a person of immoral character and for having been guilty of immoral conduct", that could not sustain the conviction. That charge had never been made.

Those were great days for habeas corpus. Contrast the position now. The present Lord Chief Justice, Lord Bingham, giving judgement a year ago in a group of cases involving challenges to a number of custody time limit extensions - *ex parte MacDonald* - said, in respect of one of them:

"We dismiss these applications. The concurrent application for habeas corpus was wholly unnecessary and served only to increase costs unnecessarily. It should not have been made."

That by no means unique modern example illustrates the Court's present tendency to discourage the use of this particular process. In short, habeas corpus is no longer what it used to be and the time has come when its future ought to be re-examined. A particular opportunity now arises. As you will know, Sir Jeffery Bowman is currently conducting a Review into the workings of the Crown Office List. Its central objective is to rationalise and improve our procedures in preparation for the avalanche of human rights work which threatens to engulf us. Being on the Review I was asked to contribute a short paper on habeas corpus. Needing also to find a topic for this lecture, I thought to kill two birds with one stone.

When I undertook this task, I had expected to conclude that now at last new life should be breathed into this historic writ so that, thus revitalised, it would help us to meet some of the challenges ahead. Habeas Corpus is after all one of the great brand names of British justice. It has long been a part of the romance and rhetoric of our law. The late Professor de Smith called it "the most renowned contribution of the English common law to the protection of human liberty"; Halsbury's Laws describes it as being "of the highest constitutional importance." All of us learned in our juristic cradles of the writ's golden age when it served as a bulwark against executive oppression and arbitrary detention.

And here we are, within a year of giving effect to the European Convention on Human Rights and with Article 5(4) no doubt well to the forefront of our minds:

"Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

Surely, I had thought, habeas corpus should now be restored to its former glory to enable us to satisfy our obligations under Article 5.

That, however, is not the conclusion I have arrived at. Rather I have come to regard habeas corpus in its present form as a defective process, unnecessarily and unsuccessfully competing with judicial review. No one, I think, would defend the law of habeas corpus as it operates today. To its present deficiencies I shall return. Rather, however, than modernise it as a process and seek to recreate for it an independent life outside the court's supervisory jurisdiction, I believe that the time has come to transform it from a writ into an order and to provide that it be sought as an order within the umbrella of judicial review. That is the burden of my thesis, a thesis first advanced by Andrew Le Sueur in Public Law in 1992 but rejected by the Law Commission in their October 1994 Report on Administrative Law. I am not, let me hasten to say, advocating the total extinction of habeas corpus from the face of the law. No Bateman cartoon could do justice to such a suggestion.

There is, it is important to note, nothing new in the notion of transforming prerogative writs into orders: s.7 of the Administration of Justice (Miscellaneous Proceedings) Act 1938 did precisely that with regard to the writs of *certiorari, mandamus* and *prohibition*. Nor, of course, is there anything new in being required to seek prerogative orders within the framework of an application for judicial review: that was what the landmark rule reforms of 1977 achieved: a uniform, flexible and comprehensive procedural code for the exercise of the court's review jurisdiction. Habeas corpus, however, has hitherto withstood the winds of legal change. Law reformers down the years have assiduously left it alone. And that perhaps is understandable. No feature of our constitution has commanded greater reverence or been surrounded by greater mystique. Furthermore, until modern times, habeas corpus has continued on occasion to prove a useful tool of justice. As recently as 1991, one recalls, it was used creatively in a case called *Muboyayi* to prevent the Home Secretary from deporting a refused asylum-seeker until his challenge to that refusal decision could be heard: the mere issue of the writ transferred the applicant's custody from the Secretary of State to the court. But very soon the use of habeas corpus even for that limited purpose became unnecessary: in 1994, in the great case of *Re M* , the House of Lords held that the Crown can be enjoined like any other party, so that an interlocutory injunction can now be used to guard against the premature removal of asylum-seekers. That clearly is the more obvious and direct remedy.

In short, I can think of no circumstances today in which relief obtainable by habeas corpus would not also be available by judicial review. I believe therefore that the time has come when instead of having, as presently we do, two distinct procedures available to challenge the legality of detention - one resonant with history but old-fashioned and narrowly circumscribed, the other modern, flexible and all-embracing, there should be but one. Judicial review should prevail and habeas corpus should cease to operate as an independent process and become instead simply an order for release available within the review jurisdiction. That the liberty of the person under the law is a prized and fundamental freedom, no one doubts. But there are other fundamental rights and freedoms too and it can hardly be thought that each of them should be safeguarded by a different procedure. It is not even as if every wrongful detention is challengeable by habeas corpus; far from it, as I shall shortly explain. Nor is it the case that wrongful detention is always the gravest violation of human rights that comes before the courts or, indeed, the one calling for the most urgent correction. That too I shall demonstrate. If the writ of habeas corpus had never existed, it is inconceivable that today we should find it necessary to invent it. I am, of course, well aware of

the particular features of the habeas corpus procedure which are thought to give it advantages over judicial review. I shall come later to these to consider both how real they are, and also, where they are real, whether they are justifiable and should be preserved.

First, however, it is worth glancing at the history of the writ if only to destroy the myth that from time immemorial (or at any rate, as many suppose, since Magna Carta) habeas corpus has been the central foundation of all our liberties. It is not so. First a couple of jury points. The writ had its origins not in securing freedom from detention at all, but rather in ensuring a person's attendance before a court of law so that justice (whether civil or criminal) might be administered in his presence. Later on, hardly its finest flowering, the writ became a weapon in the armoury of the common-law courts in their jurisdictional war with the courts of equity. Injunctions would be granted in chancery to prevent litigants from suing at common law or to restrain them from enforcing common-law judgements which violated equitable principle. The King's Bench would then release by habeas corpus whoever was committed for having breached these injunctions. Thus was the battle fought.

Only gradually did the writ emerge as a means of testing the legality of detention. A turning point came with the Habeas Corpus Act 1679 which, in language today almost incomprehensible, although the Act is still in force, sought to strengthen the procedure's safeguards. It provided that writs should be available at any time of the year (remarkably it provides that a judge who unduly refuses the writ in vacation is liable for up to £500 punitive damages, a sum it has not been found necessary to increase down the centuries!), that the jailer must obey the writ immediately, that the judge must come to a speedy determination upon it and that, if released, the prisoner should not then immediately be reincarcerated. "The Act of 1679", observed Professor Sharpe in his monograph on the law of habeas corpus (2nd Edition 1989) - the only such work on the topic and invaluable to anyone concerned to explore this somewhat arcane branch of jurisprudence - "marks the point at which the writ took its modern form." By 1794 Blackstone, in his Commentaries, was describing it as a high prerogative writ. As he put it:

"The King is at all times entitled to have an account, why the liberty of any of his subjects is restrained, wherever that restraint may be inflicted."

And that, of course, is what the writ does: it commands the jailer to bring the applicant before the court on the day and at the time specified "together with the day and cause of his being taken and detained ... [so that the court] may then and there examine and determine whether such cause is legal."

Before I pass from this lightning history of habeas corpus, there are two broad points to be made. First, the writ of habeas corpus has never been an all-purpose remedy for securing the freedom of those claiming to have been wrongly detained. As Lawton LJ observed in 1987 in *Linnett v Coles* :

"A writ of habeas corpus is probably the most cherished sacred cow in the British constitution; but the law has never allowed it to graze in all legal pastures."

One of the pastures not grazed by habeas corpus is contempt of court, the pasture at issue in *Linnett v Coles* itself. There it was held that the only proper remedy, even for a manifestly unlawful committal for contempt - a committal "until further order", in breach of the express statutory requirement in s.14 of the Contempt of Court Act 1981 that any committal should be "for a fixed term" - lay in the wide appeal power conferred by the Administration of Justice Act 1960. Also, of course, ungrazed by habeas corpus is the whole field of criminal convictions. These have always been outside the reach of habeas corpus even though until 1907 there was no appeal against them, merely a discretionary and little used power under the Crown Cases Act 1848 for the trial judge to state a case for the Court of Crown Cases Reserved. One must, in short,

recognise that habeas corpus has never been an all-encompassing panacea against every form of wrongful detention.

Secondly, it should be noted that historically habeas corpus allowed only the most limited review. So it was that in many cases, the scope of review came to be extended by a linked application for *certiorari - certiorari-in-aid* of habeas corpus as it was known. Daisy Hopkins was just such a case. By bringing up the whole record, the court could be satisfied that there was real substance in the complaint and not merely some technical procedural flaw.

The real point to be made is that strictly speaking the only form of review available on habeas corpus is as to the soundness of the reason given for detention. As Lord Mansfield observed in *Sommersett's Case* : "The only question before us is whether the cause on the return is sufficient." True, as the law developed, there were cases where the court was prepared to go behind the return and to review some prior determination upon which it rested. But that was because the courts chose to act just as if *certiorari-in-aid* had in fact been used.

The essential point I make is that it is no heresy to contemplate, as I do, subsuming habeas corpus within the wider scope of judicial review. That rather would be to re-unite it with *certiorari* as so often in the past it was, or at any rate was assumed to be, united.

So much for the earlier history of the writ. Let me now consider its operation in more recent times. Professor de Smith in the 1980 edition of his work on Judicial Review of Administrative Action, wrote:

"Insuperable difficulties would frustrate any attempt to present a coherent and concise account of the scope for judicial review in habeas corpus proceedings, for the case-law is riddled with contradictions."

The 1995 edition of de Smith, now edited by Professor Jowell and the Master of the Rolls, retains the reference to the case-law being riddled with contradictions but notes that recently:

"The Court of Appeal has sought to limit the scope of habeas corpus by re-asserting a distinction between two types of challenge. In the first type, where it is alleged that the detention is and always was unlawful because made without jurisdiction (e.g. the existence of a precedent fact is challenged), habeas corpus is appropriate. In the second type of case, where the challenge is to the underlying administrative decision (e.g. the decision to refuse leave to enter the United Kingdom) on the ground that it is voidable because of a non-jurisdictional error, this may be raised only by way of an order 53 application."

The two Court of Appeal decisions making that critical distinction were *ex parte Cheblak* and *ex parte Muboyayi* , both decided in 1991 and both in courts presided over by Lord Donaldson MR. In *Cheblak* he said this:

"... the two forms of relief ... are essentially different. A writ of habeas corpus will issue where someone is detained without any authority or purported authority or the purported authority is beyond the powers of the person authorising the detention and so is unlawful. The remedy of judicial review is available where the decision or action sought to be impugned is within the powers of the person taking it, but due to a procedural error, a misappreciation of law, a failure to take account of relevant matters, a taking account of irrelevant matters or the fundamental unreasonableness of the decision or action, it should never have been taken. In such a case the decision or action is lawful, unless and until it is set aside by a court of competent jurisdiction."

*Muboyayi* was argued a month later at substantially greater length and, although the court applied its earlier decision in *Cheblak*, it is perfectly evident from the judgements that it did so less

because it was convinced that such a conclusion was necessarily forced upon it by earlier authority than because as a matter of policy it thought this the better way forward. As Lord Donaldson said:

"In any event [i.e. even if habeas corpus had previously extended to allow a challenge on the same basis as a judicial review application], the evolution of the new and extended system of judicial review under RSC Order 53 with its in-built safeguards would, I think, justify us in confining the ambit of the writ of habeas corpus to the way in which I held it was confined in my judgement in *Cheblak's* case."

Glidewell LJ agreed, and Taylor LJ added:

"I would reject this attempt to extend the principle laid down in *Khawaja's* case to allow habeas corpus to cover the review of administrative decisions which are properly within the wide scope of judicial review as it has developed in recent years. Leave is required to move for judicial review of such administrative decisions so that, in the interests of good administration, cases cannot be brought and fought so as to frustrate administrative action in hopeless circumstances. While I appreciate that *ex-hypothesi* we are concerned here with cases involving liberty of the subject, I do not consider that applications for habeas corpus, which require no leave, can be admitted to attack such administrative decisions provided that other effective means for challenging the basis of the detention are available."

Now although those two decisions have been much criticised by academics (and, indeed, in the Law Commission Report), they have never been overruled and nor indeed has the Court of Appeal in subsequent decisions expressed doubts about them. Much of the criticism against them is based on dicta of the House of Lords in 1984 in *ex parte Khera* and *Khawaja* but that criticism for my part I find unconvincing. Khera and Khawaja were not, be it noted, habeas corpus cases at all: both applicants had brought their challenges solely by way of judicial review. True it is that in deciding that the executive power there in question - the power to remove illegal entrants - depended on the Secretary of State establishing illegal entry as a precedent fact, Lord Wilberforce and Lord Scarman touched on the reach of habeas corpus. But the real question before the court was how to construe paragraph 9 of schedule 2 to the Immigration Act 1971: the issue was whether, on its proper construction, the Secretary of State's conclusion that someone is an illegal entrant is subject only to Wednesbury challenge or whether the Secretary of State must satisfy the court of its factual correctness? I readily accept that a power is more likely to be held subject to proof of precedent fact if its exercise will result in the deprivation of liberty. Such a holding is in reality a mechanism whereby the court assumes a more intensive review jurisdiction and, unsurprisingly, that is something it will tend to do in detention cases. But it does not always adopt that approach. Take for example the detention and deportation of refused asylum-seekers. The House of Lords in 1987 in *Bugdaycay* (before ever there was any right of appeal in such cases) held that whether someone is a refugee is a question of fact to be left to the authorities; it is not a jurisdictional fact. Once a power to detain is held to depend on precedent fact, then of course anyone subjected to it can properly invoke habeas corpus. But that is not to say that habeas corpus must be regarded as available whenever anyone wants to challenge the underlying basis of his detention.

Nor do I share the Law Commission's view that *Cheblak* and *Muboyayi* must be regarded as inconsistent with the Privy Council's decision in *Armah v Government of Ghana* . That was an extradition case and it is clearly arguable that different considerations apply to extradition. After all, for well over 100 years Parliament has chosen to provide for challenges to extradition committals to be made exclusively by way of habeas corpus.

Perhaps the stronger criticism to be made of the Cheblak/Muboyayi approach is that it seeks to recreate for the purposes of habeas corpus a distinction between jurisdictional and non-

jurisdictional errors of law substantially abolished by the House of Lords thirty years ago in *Anisminic*.

But put that thought and the precedents aside. When one comes to consider the true nature of the challenges in those two Court of Appeal cases and how incidental the detentions there were, the Court was surely entitled to regard judicial review as the only proper remedy available. In *Cheblak* the decision was to deport the applicant for reasons of national security; in *Muboyayi* it was to refuse him leave to enter as an asylum-seeker on the basis that he could properly be returned to France as a safe third country. In both cases, true, the applicants' detention resulted from those administrative decisions, but only in the sense that the applicants were being detained with a view to their removal from the United Kingdom. Detention was purely ancillary to those decisions, a means of implementing them. The Secretary of State had no greater desire for the applicants' continuing detention than did the applicants themselves. His concern was to despatch them abroad as soon as possible; theirs was to be granted admission to this country. Had the applicants in fact been at liberty at the time of challenging the decisions to remove them (as such applicants very often are - when, for example, granted temporary admission), then inevitably their challenges would have proceeded by judicial review alone and habeas corpus applications could never have been contemplated. Is it not somewhat arbitrary and unsatisfactory that, merely because they are detained, a wholly different process of challenge should thereby become available.

As I have said, the *Cheblak* approach has been followed in subsequent Court of Appeal decisions. I mention just two, both Mental Health Act cases. The applicant in the first case, *Re S-C* , sought habeas corpus to be released from hospital on the ground that her admission for treatment was prohibited by s.11(4) of the 1983 Act, because her father, her nearest relative, had objected to it. At first instance it was held that the detention could nonetheless be justified under s.6(3) of the Act which provides that any application for the admission of a patient which appears to be duly made can be acted upon without further proof that the underlying conditions are satisfied. The Court of Appeal, however, allowed the appeal. It held, surely correctly, that merely because the hospital managers were entitled to act upon an apparently valid application, that did not mean that the detention was therefore lawful. In the result Sir Thomas Bingham MR (as he then was) expressed himself "satisfied that on the present facts an application for habeas corpus is an appropriate and possibly even the appropriate course to pursue."

The applicant in the second case, *MB v The Managers of Warley Hospital* ,decided just last year, applied for both habeas corpus and judicial review. Her complaint was that she been detained for treatment when in fact her condition was merely being assessed or monitored rather than treated. Of the substantive challenge I need say nothing other than that it was rejected. Lord Woolf MR, however, took the opportunity to consider in some detail the differences between habeas corpus and judicial review and to discourage applications for the former. Referring to the veneration paid to habeas corpus because of its historic role in protecting the liberty of the subject, he said: "This is a veneration which is probably no longer justified in view of the ability of judicial review to provide a remedy equally expeditiously whenever the liberty of the subject is threatened." He respectfully disagreed with the suggestion in *Re S-C* that habeas corpus might have been the only appropriate procedure there. Pointing out that the jurisdictional distinction made by Lord Donaldson in *Cheblak* and *Muboyayi* is not always easy to make and "that is another reason why it is preferable usually to proceed by way of judicial review", Lord Woolf concluded with the hope that "in the future it would be possible to make an order of habeas corpus on an application for judicial review." Hobhouse LJ referred to "the need for further consideration and guidance to be given to when applications for the writ [of habeas corpus] or for judicial review are appropriate" and added "whilst it is of the greatest constitutional importance that the availability of the right to apply for the writ should in no way be undermined, it may be thought that the present procedural confusion and overlap is undesirable and requires reconsideration and clarification." It is that confusion and overlap which I am presently concerned to explore.

Let me then turn to the procedural advantages which are thought to attach to habeas corpus and which in the views of some practitioners and academics continue to justify the availability of a special regime to challenge the legality of a person's detention.

**i. No requirement for Leave**

Although there is no requirement for leave as such, the habeas corpus procedure begins with an application for the writ to issue made ex parte to a judge in open court supported by affidavit. As Professor Sharpe says:

"The purpose of the initial ex parte application is to enable the court or judge to determine whether the matter has sufficient merit to warrant a full hearing."

This is essentially the same test as applies when deciding whether to grant permission to move for judicial review. Unless the applicant for a writ of habeas corpus can show some coherent reason for supposing his detention to be unlawful, the jailer will not be called upon to justify it. This supposed distinction between the processes seems to me illusory.

**ii. No time limit for Habeas Corpus**

It is surely inconceivable that the court would operate a time bar against any judicial review applicant whom it thought might be being wrongfully detained.

**iii. In Habeas Corpus there is no discretion to refuse relief if the detention is found unlawful**

Again it is surely inconceivable that the court would exercise its discretion to refuse an applicant his liberty once it had found him unlawfully detained. Think of Article 5(4).

**iv. Accelerated hearing - habeas applications routinely go to the top of the list**

There are a number of points to be made under this head. First is that the Crown Office is always alive and responsive to considerations of urgency. Detention cases get priority listing, whether or not the challenge is by habeas corpus. Second, there are other judicial review challenges which are no less important and urgent than those alleging wrongful detention. Amongst those that I personally have come across recently have been the threatened removal of a new-born baby from her imprisoned mother, a local authority's discontinuance of round-the-clock supervision over a child at risk, and the withdrawal of possibly life-saving treatment from a patient. Third, there is a need to guard against over accelerated hearings of difficult cases. The vexed question of prisoner release dates provides a classic illustration of this: a too urgent hearing in *ex parte Gaffney* in 1982 (and certainly insufficient time for preparation by treasury counsel for the prison governor!) set the law on an erroneous course for fifteen years.

**v. Certain appeal provisions are different**

In civil cases there are two distinctions between habeas corpus appeals and judicial review appeals, both of which I accept are in favour of the applicant. In habeas corpus an applicant can appeal to the Court of Appeal as of right, whereas for judicial review he needs leave. Secondly, if habeas corpus has been granted at first instance, then any appeal by the respondent is moot; whatever its outcome, it cannot affect the applicant's right to liberty; it serves only to clarify the law for the future.

And there is a distinction in criminal cases too, there being no requirement in habeas corpus to certify a point of law of general public importance.

Until recently, I may note, there used to be a further distinction between the two procedures: only the Divisional Court, and not merely a single judge, could finally refuse habeas corpus on a criminal application, and this was true equally in vacation as during term-time. It was indeed the one situation in which a Divisional Court had to be assembled in vacation. Under the Access to Justice Act, however, that has now changed. The Crown Office has a new power to allow criminal causes or matters including habeas corpus applications to be heard by a single judge rather than, as at present required, by the Divisional Court.

What then are the anomalies of the habeas corpus writ process today? There are, I suggest, several. First is what seems to me the essential anomaly in having two quite discrete and alternative processes available to those detained. Second, the particular cases for which habeas corpus is available are limited and illogical. As I have sought to show, whole areas of the law have long been recognised to be beyond the reach of the writ and now, since *Cheblak* and *Muboyayi*, the writ in any event goes only to challenge jurisdictional error in the old-fashioned narrow sense. Extradition surely is a third anomaly. A hundred and thirty years ago, in the infancy of what is now judicial review, habeas corpus was the logical way to test the legality of an extradition committal. Were Parliament according a new statutory right of challenge today, it would surely be by way of judicial review. Finally this: the remedy of habeas corpus is available only to those wrongfully detained. Take a prisoner, lawfully detained but contesting his release date - a fertile source of litigation over recent years. The intended date of release is notified to the prisoner shortly after sentence. If his challenge is brought, as sensibly it would be, before the date when he claims to be due for release, then it can only be by way of judicial review. If, however, it is after that date, then he can go by habeas corpus. What possible justification can there be for that?

These anomalies apart, consider the archaic form of the writ and the scant relationship it bears to the process actually followed by the courts today. As already explained, the application for the writ is generally made ex parte to a judge in open court. Ordinarily, if a *prima facie* case is made out, the judge then adjourns the hearing for notice to be given to the respondent. The subsequent inter partes hearing - ostensibly a hearing as to whether the writ should issue - in practice is likely to conclude the matter. If the applicant succeeds at that first inter partes hearing, then the court generally orders discharge (often doing so by stating incongruously that habeas corpus must go) and the writ never in fact issues at all. What I am advocating represents the reality of the position today: an initial ex parte application, followed, assuming a prima facie case is shown, by an inter partes hearing which, if the applicant succeeds, leads to an order of habeas corpus freeing him from detention.

I would summarise my conclusions as follows:

1. The supposed procedural advantages of habeas corpus over judicial review are, save as to certain appeal rights, for the most part illusory rather than real. As to those appeal rights, the differences are not to my mind justified. Why should the Court of Appeal not decide on a permission application that the point is hopeless and not worthy of a substantive hearing? Why should a respondent's appeal in a civil case (perhaps involving the detention of a dangerous mental patient) be only moot? And why in habeas corpus, but not for example in the case of criminal convictions, should the House of Lords entertain appeals that raise no point of general importance?
2. Because of the perceived advantages of habeas corpus and perhaps too because of the resonance of the writ's very name, challenges are still frequently brought by habeas corpus. But because the distinction between jurisdictional and non-jurisdictional error of law is not always easy to make, or because the challenge is made in an area of the law where the remedy has not traditionally run, habeas corpus may well prove to be the

wrong procedure, and indeed applicants often hedge their bets by pursuing both remedies simultaneously. To choose the wrong route or to duplicate the challenge by following both routes is wasteful of time and money and productive of much arid debate. That essentially was what prompted the strictures of the Lord Chief Justice in the Manchester Crown Court challenges and the preference for judicial review expressed by the Master of the Rolls in the *Warley Hospital* case.

3. Michael Shrimpton, replying in Public Law in 1993 to Le Sueur's 1992 article, concluded that: "If habeas corpus were abolished [or, as he put it, watered down into Order 53] we may find our hard-won freedoms diminished and ourselves as vassals to an over-mighty executive set loose from the restraint of the law." That seems to me a touch hyperbolic. But it is right to note that something of the same concern was expressed also by the Law Commission:

"11.8 ... the writ's efficacy over its long history stems from its capacity to operate in a very short time and to secure the production of the appellant as of right. This suggests that the discretionary nature of Order 53 procedure would not be suitable for habeas corpus and could be seen as eroding ancient and vital constitutional liberties. It is arguable that within a unified procedure the discretionary nature of judicial review could infect habeas corpus."

That I have to say seems to me an over-fearful and defensive reaction to what I suggest would be really no more than a sensible rationalisation of our law. I suggest that the time has come to acknowledge the great advances made in recent times by judicial review and to recognise that it is in the continued development of this important jurisdiction that the future protection of fundamental rights and freedoms must lie.

It is not even as if habeas corpus has been found to satisfy the requirements of the Human Rights Convention in years past. On the contrary, in the case of *X* , which I myself fought and lost for the UK Government in 1981 and which directly led to the Mental Health Act 1983, the European Court of Human Rights found habeas corpus an inadequate remedy to protect a patient's rights upon his recall to Broadmoor: under the governing legislation then in force the justification for recall was exclusively a matter for the Secretary of State unchallengeable by habeas corpus. And that, of course, was ten years before *Cheblak* and *Muboyayi* narrowed the scope of the remedy still further.

I am not suggesting that we should be complacent about judicial review. Far from it. Further development of the process will almost certainly be necessary if we are to meet the many human rights challenges that lie ahead. As David Pannick QC pointed out in one of his pieces in The Times last month, the European Court of Human Rights in *Smith* - the gays in the military case - found Article 13 breached because of our domestic courts' inability on judicial review to consider the merits of the complaint. The problem is illuminatingly explored in an article by Professors Laurence Lustgarten and Ian Leigh in this month's issue of the Cambridge Law Journal which suggests that an altogether sharper and deeper scrutiny of administrative action is likely to be required in human rights cases than is currently permitted under the Wednesbury principle, and indeed that there will have to be more extensive factual investigation than at present. But this is not the lecture in which to explore those questions, interesting and important though they are. The crucial point I am trying to make that all our present attention should be focused on the need to adapt and develop the principles of judicial review, not distracted by attempts to maintain, or indeed repair, the parallel process of habeas corpus. Of course habeas corpus should remain part of our law, but in a new role, incorporated within the review jurisdiction where it will serve to remind us of our history and to signal those cases where personal liberty is at stake.

I began a hundred years ago with Daisy Hopkins. I end, still further back in history, with Sommersett's case of 1778. You will need no reminding of its facts. Sommersett was a negro slave brought by his master from Virginia to England. Having refused to continue in service, he was captured and confined in irons on a ship lying in the Thames bound for Jamaica. A writ of

habeas corpus was issued directed to the ship's captain requiring him to produce the applicant's body before the Court together with the cause of his detention. The return to the writ stated that slaves were authorised by the laws of Virginia and Jamaica and that Sommersett had been committed to custody to be taken to Jamaica and sold there. Lord Mansfield's historic holding was that slavery is so odious that only positive law could support it, and that in England there was none. He concluded with the famous words "the black must be discharged." I always thought, however, that counsel had the best line:

"The air of England is too pure for a slave to breathe in".

I mention the case not just because no habeas corpus lecture would be complete without it, but also to make three short final points. First this: Sommersett's case took six months to decide; judicial review, I assure you, can do much better! Second, great though the issue there was, that was not a public law case at all. Rather it was a dispute between the slave and his owner, although of course the writ had to be directed towards the ship's captain. I can see no purpose whatever in retaining habeas corpus as a private law remedy. If anyone today is wrongly detained by a private citizen, his remedy surely would be to obtain an immediate injunction. Third and finally this. Tempting though it is to glory nostalgically in our proud past, we should instead have the courage to recognise and build on our present success. Remedies and processes are only ever as good as the judges who administer them. Bring habeas corpus into the evolving process of judicial review and I do not think the judges will fail you.