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LIBERTIES, CUSTOMS AND THE FREE FLOW OF TRADE

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800 YEARS OF MAGNA CARTA – THE COMMERCIAL RULE OF LAW IN THE 21ST CENTURY

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Magna Carta – Liberties, Customs and the Free Flow of Trade

It is a real pleasure to have been asked to give the keynote address at this 4th annual British Irish Commercial Law Forum. Given its theme – Magna Carta – I am particularly delighted to have been invited to do so this year. I am, as you may know, chairman of the Magna Carta Trust; a position held by all Masters of the Rolls since the Trust was established in 1956. You can imagine that my term of office as chairman has been rather busier than that of my illustrious predecessors.[1]

One of the aims of the Trust is to '*perpetuate the principles of Magna Carta*'[2] Magna Carta is a curious hotch-potch of a document. Many of its provisions cannot by any stretch of the imagination be described as principles. They include detailed measures of an intensely practical

[1] I wish to thank John Sorabji for all his help in preparing this lecture. The title is inspired by A. E Dick Howard's excellent reference guide to Magna Carta, '*Magna Carta – Text and Commentary* (University of Virginia Press) (1998) at 19.

[2] See <http://magnacarta800th.com/magna-carta-today/the-magna-carta-trust/>

nature which reflect the economic and social conditions of the early 13th century. Some of them concern were aimed at resolving grievances that King John's barons had at the time; grievances that were not only directed at him but were a reaction to Angevin rule.

For example, the Charter required him to remove a number of his more troublesome supporters from office. Chapter 50 provided: "We will entirely remove from our bailiwicks the relations of Gerard de Atheyes, so that for the future they will have no bailiwick in England; we will also remove Engelard de Cygony, Andrew, Peters and Gyon, from the Chan-cery; Gyon de Cygony, Geoffrey de Martyn and his brothers; Philip Mark and his brothers and his nephew, Geoffrey, and their whole retinue". Quite a putsch.

But it is undeniable that Magna Carta does contain a numbers of chapters which we would recognise as setting out important principles which have real relevance today. They are the reason why it has been grandiloquently been claimed that Magna Carta is the inspiration for democracy; and why thousands of people from all over the World are planning to congregate in a field at Runnymede on 15th June to commemorate the 800th anniversary of the sealing of the Charter. I have in mind in particular the famous chapter 40 "To none will we sell, to none will we deny, or delay, the right of justice". Words of captivating brevity. And chapter 20: "A freeman shall not be amerced for a small fault but after the manner of the fault; and for a great crime according to the heinousmess of it" (an early assertion of the principle of proportionality). I also have in mind other provisions concerning access to justice and due process of law and the right to fair trial as well as the requirement that justice should be dispensed from a fixed place[3], that it should be local[4]; and that judges should know the law,

[3] Magna Carta 1215 chapter 17.
[4] Magna Carta 1215 chapter 19.

which often meant local law[5] – an early instance of subsidiarity, perhaps. And that only judges should sit in judgment[6]. The Charter was not, however, the source of trial by jury or the great writ of habeas corpus.

Its opening provision guaranteed the rights and liberties of the English Church[7], although it did not specify what they were. Plenty of room for manoeuvre there, and work for lawyers. And it provided a series of significant guarantees concerning trade and commerce. While it was neither the first nor the last instrument to do so, it established uniform weights and measures.[8] England at the time was developing economically. Successful trade depends, to a large extent, on traders understanding and being in agreement as to what they are selling and buying. It would be a recipe for chaos if a seller took a length to mean 45 inches when the purchaser understood it to mean 37 inches.[9] A thriving mercantile economy, much of which involved trading in a variety of types of cloth, needed a uniform approach.

So Magna Carta standardised the basis of trade. It sought to secure the free flow of trade. It required the removal of all fishweirs from rivers across England[10]. Bad for fisherman, but good for traders. Fishweirs led to rivers silting up. Consequently they became less and less navigable. They clogged up important trade arteries. Their removal was needed to increase free trade.

Free movement of goods is not however sufficient for a thriving economy. There has also to be free movement of merchants. Thus chapter 41 provided "All merchants shall have safe and secure conduct, to go out of, and to come into England, and to stay there, and to pass as well by land as by water, for buying and selling by the ancient and allowed customs without any

[5] J. C. Holt ibid. 63.
[6] Magna Carta 1215 chapters 24 and 45.
[7] Magna Carta 1215, chapter 1.
[8] Magna Carta 1215, chapter 35.
[9] I. Judge & A. Arlidge, *Magna Carta Uncovered*, (2014) (Hart) at 88.
[10] Magna Carta 1215, chapter 33.

evil tolls; except in time of war, or when they are of any nation at war with us". What better evocation of the idea of free trade? An early embodiment of the ideals which informed what is now known as the European Union.

Encouraging the free movement of goods and tradesmen is one thing. But trade and investment do not simply depend on an ability to trade. If they are to flourish, it is imperative that property rights of traders and investors are protected by the law. The parties to the Charter well understood this. A trader or investor has little incentive to engage in trade or to invest if they are at risk of arbitrary dispossession of their property interests. Such dispossession was not uncommon. King John routinely stripped his subjects of their property in order to fund his military adventures.[11] An object of the Charter was to put a stop to this. It provided at chapter 39 that "no freeman shall be taken or imprisoned, or disseised, or outlawed, or banished, or any ways destroyed, nor will we pass upon him, nor will we send upon him, unless by the lawful judgment of his peers, or by the laws of the land".[12] This was an early foreshadowing of Locke's theory of government and the 14th amendment of the US Constitution.

So the Charter made provisions to ease trade and secure property rights. It also affirmed that the City of London and all other '*cities, boroughs, towns and ports shall have their liberties and free customs*.'[13] Commercial centres needed to be supported. The exact nature and extent of the liberties and free customs was not defined. It is right to note, however, that more than seventy charters had been issued to individual towns and cities. Magna Carta was declaratory of their continuing effect, as well as of the right of the City of London to be both self-governing and to continue to appoint its Lord Mayor.

[11] J. C. Holt, ibid. at 192.
[12] Magna Carta 1215, chapter 39, and also see chapter 9 on debtor-creditor relations.
[13] Magna Carta 1215, chapter 13. And see chapters 33, 35 and 41 – 42.

The importance of Magna Carta today

So much for the Charter itself. What is its relevance for commerce and the rule of law today? Here I pause to note a warning that was given in a stimulating recent analysis of Magna Carta by Lord Sumption.

In a recent lecture in which he stripped away a number of what might be called the myths in which the Charter has become enveloped, Lord Sumption concluded with this warning:

> '*We are frighteningly ignorant of the past, in large measure because we no longer look to it as a source of inspiration. We are all revolutionaries now, controlling our own fate. So when we commemorate Magna Carta, perhaps the first question that we should ask ourselves is this: do we really need the force of myth to sustain our belief in democracy? Do we need to derive our belief in democracy and the rule of law from a group of muscular conservative millionaires from the north of England, who thought in French, knew no Latin or English, and died more than three quarters of a millennium ago? I rather hope not.*'[14]

Not for him Sir Anthony Eden's view that the road to 1215 '*marked the road to individual freedom, to Parliamentary democracy and to the supremacy of the law.*'[15]

It may be that nobody directly bases their belief in democracy or the rule of law on the document that was sealed at Runnymede 800 years ago. But it cannot be denied that the Charter does set out a number of principles which, however rudimentary the form in which they were expressed, are now taken for granted as being central to a modern liberal democracy. It is right that, from a historical point of view, we should locate the Charter in the social and economic conditions of the 13th century and acknowledge that it reflects the values

[14] J. Sumption, *Magna Carta – Then and Now*, (British Library lecture) (9 March 2015) at 18 <https://www.supremecourt.uk/docs/speech-150309.pdf>.
[15] The Rt Hon Sir Anthony Eden MP, Prime Minister, letter to the Magna Carta Trust (October 1956) <http://magnacarta800th.com/magna-carta-today/the-magna-carta-trust/>.

and mores of that time. But it is an inescapable fact that the Charter principles to which I have referred have been influential in the development of modern democratic systems. This is not the place to trace the checkered history of these principles. Suffice it to say that the Charter endured for no more than ten weeks, before the Pope annulled it at John's request. It was brought back to life by William Marshall on John's death. Thereafter, it languished until, as Lord Sumption explains in a little detail, it was resurrected with enthusiasm by Edward Coke in the 17th century.

John Adams, the second President of the United States, said that '*Democracy never lasts long. It soon wastes, exhausts and murders itself.*'[16] He believed that in democracies, as in other forms of government, individuals were prey to the same flaws of, as he put it, '*fraud, violence and cruelty*.' The strength of any democracy lies in the robustness of its institutions of governance and in public confidence in them. Weaken either and democracy is weakened.

One of the great strengths of the UK and states which enjoy similar democratic systems has been their commitment to systems of justice. It is no good having wonderful laws if the state does not provide a fair and effective system of justice to enable individuals to vindicate their rights by reference to those laws. Everyone should have equal access to justice. And I do not simply mean formal equality of access in the sense that 'The doors of the Ritz are open to all.' I mean, of course, practical and effective equality. This includes that the courts, legal advice and representation are available to all those who require it. This an essential aspect of democratic participation in society. It is because it is the means by which the law (these days largely the creation of elected Parliaments) is given life. It is also the means by which aggrieved citizens can hold public authorities to account by judicial review in the courts.

[16] J. Adams, *Letter to John Taylor of Carolina*, in G. W. Covey (ed), *The Political Writings of John Adams* (Washington) (2000) at 406.

Free and fair elections are, rightly, understood to be the central mechanism by which democracy is nurtured and sustained. Equal and effective access to the justice system is another, and equally important, mechanism. At the present time the justice systems in many democratic societies are under strain. Budgetary constraints are having a serious effect. Governments are strapped for cash and have to make hard political choices. These tend to be driven by their assessment of what the electorate regards as important. Sadly for those to whom the maintaining of high standards of justice is of paramount importance, expenditure on justice systems is not seen as a high priority by those in power. In a number of jurisdictions there has been a marked shift away from state-funded legal aid for civil and family justice. This has been particularly controversial in England and Wales. This shift has, to a certain degree, been mirrored by a liberalisation in other funding methods, such as the introduction of various forms of contingency fee funding and the growth of third party funding.

The merits of the public and private funding civil justice are issues for another day. However, if we are to continue to maintain access to the courts, our funding methods must be effective and affordable. If they are not, and individuals and small and medium-sized enterprises are unable to gain access to our courts, we will surrender our commitment to equality before the law and we will diminish our democracies, and their ability to develop their economies. A small or medium-sized business that is unable to enforce its debts, or to keep its trading partners to their bargains through litigation or the threat of litigation is one that will not long thrive or even survive. Diminution of funding is a modern analogue to the barriers to trade that Magna Carta sought to blow away.

Necessarily linked to litigation funding is the cost of litigation. By this I mean to refer to both court fees and lawyers' costs. If either is too high, they inhibit access to the justice system. The

individual litigant who wishes to have recourse to the courts in order to vindicate his private law rights or to hold a public authority to account by judicial review proceedings may not be able to do so. This is potentially very serious. Judicial review is a valuable means of holding public authorities to account. To curtail the ability of a citizen to seek judicial review of a decision is no doubt good for the decision-maker. For public authorities, judicial review is it best an irritant and at worst a road block to the journey it wishes to make. But the denial of judicial review is bad for the rule of law. If citizens cannot afford to have their disputes resolved by the courts, that too is bad for the rule of law. The spectre of self-help and disorder is not fanciful.

From a commercial perspective, if litigation costs are high and a dispute cannot be settled consensually, businesses must divert resources from commercially beneficial activity, such as investing in new products and developing new markets, to litigation. This is may be welcome to the legal profession; but it is of little benefit to the overall economy. Excessive litigation costs silt up the arteries of trade and access to justice as effectively as the fishweirs that were removed by Magna Carta were a barrier to river traffic in the 13th century.

The guarantee of due process vouchsafed by Magna Carta was predicated on the barons' complaint about John's resort to arbitrary justice. They wanted justice before the court of barons – their peers – which had been enjoyed before John decided to use the law as a means of increasing his finances. The barons have been portrayed as heroes. But that has not always the case. As Jeremy Bentham noted in his discussion about the laws which prohibited champerty and maintenance, '*a man [could] buy a weak claim, in hopes that power might convert it*

into a strong one, and that the sword of a baron, stalking into court with a rabble of retainers at his heels, might strike terror into the eyes of a judge upon the bench.'[17]

The days of barons or anybody else stalking into court, sword in hand, are long gone. But Bentham's colourful image illustrates brilliantly what we now call "inequality of arms". These days, inequality is usually demonstrated by a lack of availability of equal resources to opposing parties. It is often manifested by an imbalance between defendants and prosecuting authorities in the criminal law context; and between claimants and public authorities in the public law context. In the case of private law disputes, there can be a serious imbalance between the resources available to an individual of modest means and those available to a wealthy individual or a large corporation. The rule of law requires that a justice system is open to all; and that all who come before the courts are treated equally. Justice should not be at the beck and call of the highest bidder, contrary to King John's view.

I recognise that the provision of an effective justice system is expensive. In England and Wales, as in many liberal democratic systems, the courts are under huge pressure to cut costs and improve efficiency. I accept that, in our system at least, there is scope for improvement without sacrificing access to justice. Lawyers are said to be conservative and resistant to change. There may be some force in that assessment. But in my country at least, the judges are co-operating in the reforms that are in train. There have been major changes in the processes of criminal, civil and family justice. These are reforms which would have been unthinkable when I entered the legal profession in the late 1960s. And there is much more to come. Perhaps the most fundamental change that now needs to be made is to modernise our IT systems. We have not yet realised the benefits that the IT revolution can bring to our system of justice, a revolution, which if carried through effectively, will increase the speed and

[17] Bentham (1843) Vol. 3, *A Defence of Usury*, Letter XII at 19.

efficiency of litigation and reduce costs. I hope, for example, that before long all documents will be filed and managed electronically; and that the majority of procedural applications will be dealt with electronically. The days when court buildings are bursting with paper files on the floor or stored on long shelves or in large cupboards are, I hope, numbered.

We are also exploring the possibility of a scheme for on-line dispute resolution. This is an exciting project which I am confident will get off the ground before long. We shall have to work out the details of how it will operate and, in particular, to what kinds of case it will apply. I can also see no practical reason why, assuming the court has jurisdiction, it should not be possible for hearings to take place across continents via the Internet, bringing litigants from one continent into the same court as litigants from another continent. Changes are taking place at great speed. The main impetus is the need to improve efficiency and reduce cost. In principle, that is a good thing. We need, however, to be vigilant to ensure that this rush to change, increased efficiency and saving of cost does not undermine access to justice. There is no reason in principle why it should have that effect. But we need to take care to protect an ideal that owes not a little to Magna Carta and which is fundamental to the rule of law. It hardly needs to be said that the rule of law is one of the hallmarks of our cherished democratic societies.

It took hundreds of years to move from Runnymede to liberal democracy and to secure firmly the commitment to the rule of law. If we are to maintain that commitment, we need to recognise that it cannot be taken for granted. We must be vigilant to ensure that we maintain an effective, accessible system of justice. It is essential to the promotion of confident economic activity that parties are able to make bargains in the knowledge that their disputes will be resolved in a court of law by independent judges in accordance with the law of the land and that the judgments that they obtain from the courts will be enforced by the state. Without

such a system, there is chaos and trade becomes difficult, if not impossible. Our system is not perfect. Indeed, the recent cuts in resources which have been introduced in England and Wales (and other jurisdictions too) as a result of the economic downturn have put our system under enormous strain. The political reality, however, is that there are fewer votes in Justice than, for example, in Health and Housing. But we still enjoy a system which is the envy of most countries in the world. It is precious and we should value it. We should certainly do all we can to protect it.

Thank you.
