

## ‘MAGNA CARTA IN THE TWENTIETH AND TWENTY FIRST CENTURIES’

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### INTRODUCTION

The Great Charter is often portrayed as the source of English liberties: a medieval document which projected its beneficent light forward over eight centuries and which, while representing the triumph of barons over monarch, brought to birth principles which had equal resonance for an age of representative governance and universal suffrage.

Such portrayal is naturally and explicably depicted in brighter colours in this its 800<sup>th</sup> anniversary with celebrations, exhibitions, conferences, a new and scholarly book co-authored by none other than the recently retired Lord Chief Justice, the aptly named Lord Judge,<sup>1</sup> and a no less scholarly but more sardonic one by the historian and Television pundit David Starkey<sup>2</sup> and last but not least, these lectures under the auspices of the University of Buckingham.

I am particularly happy to be invited to give the first of these lectures since it enables me to discharge my obligation as a Visiting Professor which, I regret, that I have hitherto honoured only in the way of the Oxford don who, when asked during a mid-twentieth century inquiry into the governance of the University about his teaching duties, replied “I have to give an annual lecture – but not, you understand, every year”.

### THE SUMPTION THESIS

In his iridescent address to the Friends of the British Library “Magna Carta then and now”,<sup>3</sup> Lord Sumption, probably the most gifted lawyer,

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\* Blackstone Chambers. Visiting Professor of Law Visiting Professorial Lecture delivered at the University of Buckingham 29<sup>th</sup> April 2015 to mark the 800<sup>th</sup> Anniversary of the signing of Magna Carta.

<sup>1</sup> Anthony Arlidge and Igor Judge, *Magna Carta Uncovered* (Hart 2015).

<sup>2</sup> David Starkey, *Magna Carta: The True Story Behind the Charter* (Hodder and Stoughton 2015).

<sup>3</sup> Lord Sumption, ‘Magna Carta then and now’ (Address to Friends of the British Library 9 March 2015).

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and certainly the most gifted historian in the Supreme Court, exercised an erudite iconoclasm to deride the claims of those who saw the charter as the foundation stone of democratic government and the parent of the rule of law as “high minded tosh”.

Following in the august footsteps of Professor (and later Sir) John Holt whose study was published on the 750<sup>th</sup> anniversary of the Charters sealing,<sup>4</sup> he made the irrefutable point that, like any legal instrument, the Magna Carta had to be understood in its historical context. The baronage who compelled King John to submit to their demands at Runnymede were doing no more than seeking to enforce on him “conventions which were profoundly traditional and obligations which he and his predecessors had acknowledged for more than a century”.<sup>5</sup> They were concerned more about matters which touched on their finances and standing than about infant constitutional principle.

It was lawyers of later epochs who, as Lord Sumption demonstrated, put a halo around Magna Carta; Sir Edward Coke who defended the Courts against royal interference and was, as a result of his pains, dismissed from the high office of Chief Justice of the Kings Bench by James I, used the years of his enforced retirement to seek ideological revenge on the Stuart monarchy and declared “Magna Carta is such a fellow that he will have no sovereign”.<sup>6</sup> (Though the charter in Latin is female, Coke’s epigram reflects a gender bias current then and indeed for several subsequent centuries).

Maitland, the doyen of English legal historians, at the turn of the last century described Magna Carta as “the nearest approach to an unrepealable fundamental statute that England ever had”,<sup>7</sup> though many of its provisions had already been repealed, and, as I shall explain later, only a handful have survived a still later legislative cull.

### A CASE-CENTRIC APPROACH

Given the plurality of ways in which others, like Lord Sumption himself, far more eminent and knowledgeable than I, have expatiated on the larger themes whether as believers or belittlers, I thought I would select a smaller and distinct topic: paint a miniature rather than a fresco and consider whether and, if so, how it has continued to impact directly on

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<sup>4</sup> J C Holt, *Magna Carta* (CUP 1965).

<sup>5</sup> Sumption (n 3).

<sup>6</sup> During the parliamentary debates on the Petition of Right.

<sup>7</sup> Frederick Pollock and Frederic Maitland, *History of English law* (Vol I i. i 73).

the domestic jurisprudence of this country since the start of the twentieth century.

I say domestic because paradoxically Magna Carta has been more influential in the courts of the USA than in the courts of the (previously) mother country. Lord Sumption states “In 1991 it was calculated that Magna Carta had been cited in more than 900 decisions of state and federal courts to date” adding sardonically “generally in support of propositions that would not have been recognised by the barons at Runnymede”<sup>8</sup> though I suspect that even the qualification “generally” is itself over generous.

By contrast, by his calculation Magna Carta has been cited in no more than 170 judgments of the Superior Courts in England since 1900. My search engine Westlaw actually bought up 171 cases, which makes somewhat modest the assertion in Halsbury’s Statutes that it has been “more than once referred to in the law reports”.<sup>9</sup> I can honourably claim to have considered all 171 of them,<sup>10</sup> but once I probed beneath the surface of these statistics it appeared that some such references were to commentaries **on** the cases rather than dicta **in** them,<sup>11</sup> and several others were to the same case but at different level of the judicial hierarchy, and some even to the same case at the same level.<sup>12</sup>

Yet other references were simply to a case name: there is an otherwise unmemorable personal injury case called *Walton v Magna Carta Polo*;<sup>13</sup> to a Magna Carta lecture delivered by Lord Falconer,<sup>14</sup> the former Lord Chancellor, to legal metaphor: the Companies Act 1862 was described by Sir Francis Palmer as “the Magna Carta of Co-operative enterprise.”<sup>15</sup> A judgment of Lord Mansfield that the Crown could not levy taxes in the island of Grenada after its capture from the French was described as “the

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<sup>8</sup> Sumption (n 3).

<sup>9</sup> *Halsbury’s Statutes* (4th edn, 2013) 81.

<sup>10</sup> With the invaluable assistance of Elaine Wintle our Chambers information officer.

<sup>11</sup> For example Roger Smith Magistrate, *Magna Carta A Living Will*. 2014 70(6) p 28-29.

<sup>12</sup> *R (Mohammed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65, [2011] QB 218.

<sup>13</sup> [2000] CLY 1694.

<sup>14</sup> *R (on the application of Al Rawi) v Secretary of State for Foreign and Commonwealth Affairs* [2008] QB 289.

<sup>15</sup> *Re Lehman Brothers International (Europe) (in administration)* [2015] EWCA Civ 485.

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Magna Carta of the Colonies”;<sup>16</sup> its constituent Act was described as “the Magna Carta of the Manchester Ship Canal Co”,<sup>17</sup> to Parliamentary statements themselves not always accurate,<sup>18</sup> and allusions in cases in the European Court of Human Rights where the Magna Carta was mentioned by way of embellishment of the narrative or analysis<sup>19</sup> but, for obvious reasons, not critical to the result since that Court’s jurisdiction is founded in and bounded by the European Convention on Human Rights.

Finally there are gratuitous judicial mentions of academic articles dealing with aspects of Magna Carta.<sup>20</sup> In a case on whether the west beach at Newhaven could be registered as a village green under the Commons Act 2006 Lord Carnwath, in discussing public rights of recreation over the foreshore made use of an article in the Yale Law Journal in which “The author traced the history of the law from its Roman roots through Magna Carta to the more modern law in England and America”.<sup>21</sup> In *R v B*<sup>22</sup> the Court had to consider whether in a trial of several defendants for sexual abuse of children it was open to the Judge to try together those who were fit to plead and those who were not. The decision turned on the meaning and effect of section 11(4) of the Juries Act 1974 but Thomas LJ wrapped himself in scholarly garb by referring to an article by Professor Oldham on Anglo-American Special Juries.<sup>23</sup>

The lesson is, put not your trust in search engines: they can accumulate but they cannot differentiate. There was much chaff and little wheat but I shall nonetheless do my best to bake it into something nutritious for your consumption. Oddly the graph of references in the cases, reported and unreported, has curved upwards in the last few years

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<sup>16</sup> *Woolwich Equitable Building Society v IRC* [1993] AC 70 (HL) 116 (Lord Goff). The case was *Campbell v Hall* (1774) 1 Cowp 204.

<sup>17</sup> *The Calgarth* (1927) 93 (CA).

<sup>18</sup> *R (Nikonovs) v Governor of Brixton Prison* [2005] EWHC 2405, [2006] 1 WLR 1518 where the issue was whether the Extradition Act 2003 had overridden habeas corpus and Scott Baker LJ at (19) quoted Baroness Scotland saying in the House of Lords debate ‘Habeas corpus as we know and love it which was given birth to by Magna Carta remains’. Magna Carta was not the parent of habeas corpus. See further below some conflicting dicta on the point.

<sup>19</sup> For example Case 3455/05 *A v United Kingdom* [2009] ECHR, Case 7397/01 *Kyprianou v Cyprus* [2005] ECHR 873, Case 34044/96 *Streletz v Germany* [2001] ECHR.

<sup>20</sup> See below.

<sup>21</sup> *R (on the application of Newhaven Port and Properties Ltd) v East Sussex CC* [2015] UKSC 7, [2015] 2 WLR 601, 124.

<sup>22</sup> [2008] EWCA Crim 1997, [2009] 1 WLR 1545.

<sup>23</sup> *Ibid* [23].

but, I suspect, through coincidence rather than in anticipation of this anniversary.

## A STATUTE SURVIVING AND SPEAKING

Magna Carta still features in Halsbury's Statutes in the volume on Constitutional Law<sup>24</sup> although pride of place in terms of antiquity is taken by the Statute of Westminster 1275, if only because the version of Magna Carta in that classic and comprehensive summary of English law is that confirmed in 1297 by Edward I.

The four clauses which survive from the nine still standing on the statute book in Professor Holt's time<sup>25</sup> include two which are little known, those which protect the privileges of the Church,<sup>26</sup> and those which protect the privileges of the City of London,<sup>27</sup> the church and the city being in 1215 in the barons camp. The remaining two have far greater resonance:

Clause 39 which provides:

"No freeman shall be taken or imprisoned or disseised or outlawed or exiled or any in way ruined, nor will we go or send against him, except by the lawful judgment of his peers or by the law of the land."

And Clause 40 which provides:

"To no-one will we sell, to no-one will we deny or delay right or justice."<sup>28</sup>

I say four, although in Halsbury, which as I said uses the 1297 update, not the 1215 text, amalgamates clauses 39 and 40 into a single clause 29, provoking the same mild irritation in the reader as do the references in the post Lisbon version of the Treaty of European Union in which key articles have been renumbered but, and it is some consolation, then carry the

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<sup>24</sup> *Halsbury's Statutes* (n 9) vol 10, para 53 although in *Swaffer v Mulcahy* [1934] 1 KB 608 (KB) it was noted 'Neither Magna Carta nor the Statute of Westminster the First was on the statute roll.'

<sup>25</sup> Holt (n 4) 1.

<sup>26</sup> Magna Carta 1215 (9 Hen 3), clause 1.

<sup>27</sup> *Ibid*, clause 13.

<sup>28</sup> Both were originally Clause 29.

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legend “ex Article”: an aid to understanding not conceived of by the thirteenth century draftsman.

Judges in their judgments have tendered to meander between the two versions, but I will be faithful to the earlier text.

The first two, guarantees to church and city, survived, according to Professor Holt, “because they were harmless confirmations of rights and privileges conveyed by other instruments”<sup>29</sup> and have required almost<sup>30</sup> no modern judicial exegesis, though one may wonder whether in a multi faith Britain the Church’s special rights will remain unchallenged.

The third and fourth are the jewels in the crown of Magna Carta and the source of most of the recent judicial dicta. I shall return to that case law shortly, but make this prefatory comment that the introductory reference to **freemen** (but not villeins) as beneficiaries of the right in Clause 39 confirms that it was not intended by the barons to be enjoyed by hoi polloi or the plebs, the toxic word used, according at any rate to Mr Justice Mitting, by former Cabinet Minister Andrew Mitchell to the Downing Street policeman.

For Magna Carta to play any role in modern jurisprudence at all, it has to be classified as an always speaking statute, a phrase popularised by Lord Steyn to indicate that statute should be given its current, not simply its historic meaning,<sup>31</sup> an approach which would be disliked by a

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<sup>29</sup> Ditto.

<sup>30</sup> In my lecture I said ‘no’ without the qualification. But on the very same day the Court of Appeal handed down its judgment in *Sharpe v Bishop of Worcester* [2015] EWCA Civ 399 about whether a parish rector was an employee or worker so as to qualify for rights under modern employment legislation. Lady Justice Arden at [110] surmised that the article embraced ‘freedom of thought and conscience for individual incumbents free from interference by parishioners or the church hierarchy’ but went no further since no reliance had been placed on it by the rectors’ counsel.

<sup>31</sup> See for example *R v Ireland* [1998] AC 147 (HL) 158 (Lord Steyn).

Bearing in mind that statutes are usually intended to operate for many years it would be most inconvenient if courts could never rely in difficult cases on the current meaning of statutes. Recognising the problem Lord Thring, the great Victorian draftsman of the second half of the last century, exhorted draftsmen to draft so that ‘an act of parliament should be deemed to be always speaking.’ Thring, *Practical Legislation*, (London 1902) 83. In cases where the problem arises it is a matter of interpretation whether a court must search for the historical or original meaning of a statute or whether it is free to apply the current meaning of the statute to present day conditions. Statutes dealing with a particular grievance or problem may sometimes require to be historically interpreted; but the drafting technique of Lord Thring and his successors have brought about the

transatlantic originalist like Justice Scalia of the United States Supreme Court to whom the US Constitution means what it meant when drafted, no more, if no less.

## OBSOLETE PROVISIONS

Whatever approach to interpretation is used, many of the rights guaranteed or obligations imposed in Magna Carta have no scope for application in the todays world. We know no more of scutage;<sup>32</sup> there are multiple and more ingenious modern ways to tax us. Novel dissesin, mort d'ancestor, darrein presentment and the writ of praecipe<sup>33 34</sup> have vanished from our legal lexicon. We have scant concern with mortmain,<sup>35</sup> or subinfeudation.<sup>36</sup> No one peer, commoner or cleric is at risk of amercement.<sup>37</sup> The fate of the relations and followers of Gerard d'Athee<sup>38</sup> is not at the apex of the political agenda.

Developing and elaborate legislation for consumer protection has made obsolete the Charter's insistence on uniform measures of wine, ale, corn and cloth throughout the Kingdom;<sup>39</sup> While justices, constables, sheriffs and bailiffs (or their analogous contemporary officials) are still expected ,as Clause 45 enjoins, to "know the law of the land and mean to observe it well"<sup>40</sup> there are rules and regulations, training and discipline rather than mere general exhortation to the monarch to ensure the continuation of such happy state of affairs.

Nor is this obsolete character a cause for unalloyed alarm. Some of the Charters articles are the antithesis of emancipatory. At least two are anti-Semitic,<sup>41</sup> in particular setting limits to Jewish activities as moneylenders;

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situation that statutes will generally be found to be of the 'always speaking' variety.

<sup>32</sup> Magna Carta (n 26), clause 12.

<sup>33</sup> Ibid, clause 18.

<sup>34</sup> Ibid, clause 34.

<sup>35</sup> See discussion in *Attorney General v Parsons* [1956] AC 421 (HL) and *Morelle v Wakeling* [1955] 2 QB 379 (QB).

<sup>36</sup> The subject of *Re Holliday* [1922] 2 Ch 698 (Ch).

<sup>37</sup> Magna Carta (n 26), clauses 20-22.

<sup>38</sup> Ibid, clause 50.

<sup>39</sup> Ibid, clause 35.

<sup>40</sup> Ibid, clause 45.

<sup>41</sup> Magna Carta (n 26), clauses 10 and 11: a point made in a letter to *The Times* of 4<sup>th</sup> April 2015 by Zaki Cooper Trustee of the Council of Christians and Jews.

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and the provision in Clause 45 “no one shall be taken or imprisoned upon the appeal of a **woman** for the death of anyone except her husband”,<sup>42</sup> fall short of the highest feminist ideals, even, I stress, taking account of the qualification at the end of the sentence.

### ANCIENT RIGHTS

Those articles that have perished more slowly en route to today are certainly redolent with the flavour of their times. The first case in the twentieth century, and the only one which predates, to the best of my researches, the First World War, in which Magna Carta was referred to is *Williams v Thomas*.<sup>43</sup> It involved the claims of a widow of an intestate who had himself died in 1885 to an assignment of dower and an account of rent and profits from 1905. On that date, the land from which she had hitherto received since her late husband’s death a third of the rents from the co heiresses, the defendants to the suit, suddenly became available for highly profitable development similar to the familiar contemporary situation when a farmer receives planning permission to build a housing estate on his fields. The Master of the Rolls considered the position of the doweress both in law and in equity, and observed: “At law the doweress was entitled under Magna Carta to have an assignment of dower by metes and bounds within forty days after her husband’s death.”<sup>44</sup> Equity provided no sufficient relaxation of such strict time limits and the widow’s claim was held barred on account of laches or delay.

Some of the cases touch on the collision not of private against private but of private against ancient public rights. Mr Loose, lessee of the Lords of the Manor of Mecham and Snettisham argued that pursuant to his lease he had a right which trumped the public’s right to fish in tidal waters. Relying on the presumption of a lost medieval grant from the Crown, which had to be a date prior to 1189, given that amongst other matters, as Lord Justice Moore-Bick recollected “Magna Carta prohibited the creation of new private fisheries”<sup>45</sup> so curtailing what would otherwise have been the Crown’s prerogative power to exclude the public right.

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<sup>42</sup> Ibid, clause 54.

<sup>43</sup> [1909] 1 Ch 713 (Ch).

<sup>44</sup> Ibid 720 (Cozens-Hardy MR) referring to Clause 7 of the Magna Carta (repealed). See also the mention in *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 (HL).

<sup>45</sup> *Loose v Lynn Shellfish Ltd* [2014] EWCA Civ 846, [2015] 2 WLR 643 [124]. See also *Loose v Castleton* [1981] 41 P&CR 19 (CA).

The same starting point featured in the thoroughly modern context of the Government's fisheries policy and its compatibility with the laws of the European Union and European Convention on Human Rights where the Judge recorded "Interveners submissions began with the proposition that fish are a public resource, recognised as such as long ago as Magna Carta."<sup>46</sup>

An analogous right was the public right of navigation in tidal waters which formed the backcloth to a dispute between Mr Moore and the British Waterways Board<sup>47</sup> where Hildyard J commented "The claimant provided an impressive historical review of the genesis of these rights back past the Magna Carta which confirmed such rights".<sup>48</sup> Unfortunately this erudition did not save the day for Mr Moore because the issue was whether the spot where he wished to berth his craft was or was not in tidal waters and the finding of fact on that critical point was against him.

Mr Roberts was another enthusiast for ancient rights. On acquiring the title to the manor and suburbs of St David's, he claimed as successor in title to the eponymous Bishops to be entitled to rights in the foreshore granted to them by the Crown. In holding that his only right in the foreshore was as to wreck, that is to say to salvage any beached ships, Lewison J observed, again, that "the creation of a several fishery was prohibited by Magna Carta".<sup>49</sup>

An avid collector of titles as well as a serial litigant, the same Mr Roberts, on becoming Lord Marcher of Trellech claimed part of the fee simple in the banks of the Severn estuary. The Crown relied by way of defence on adverse possession. Mummery LJ agreed that, among other legal materials cited, Magna Carta provided "no man shall be disseised of

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<sup>46</sup> *United Kingdom Association of Fish Producers Organisations v Secretary of State for the Environment, Food and Rural Affairs* [2013] EWHC 1959, [2013] All ER (D) 181 (Jul) (Cranston J). See further on fishing rights *Isle of Anglesey CC v Welsh Ministers* [2009] EWCA Civ 94, [2010] QB 163, 35 (Carnwath LJ) where the challenge was to an order giving exclusive rights of oyster and mussel fishing. *Anderson v Alnwick DC* [1993] 1 WLR 156 (CA), *Nicholls v Ely Beet Sugar Factory* no 1 [1931] 2 Ch 84 (Ch).

<sup>47</sup> *Moore v British Waterways Board* [2012] EWHC 182, [2012] 1 WLR 3289.

<sup>48</sup> *Ibid* [27]. See also *A-G ex Yorkshire Derwent Trust v Brotherton* [1990] Ch 136 (Ch).

<sup>49</sup> *Crown Estates Commissioners v Roberts* [2008] EWHC 1302, [2008] 4 All ER 828. See too *Alfred F Beckett Ltd v Lyons* [1967] Ch 449 (CA): "The only public rights in the foreshore which have been recognised by the law since Magna Carta are those of navigation, fishing and possibly some rights ancillary thereto..." *Irish Society v Harold* [1912] AC 287.

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his freehold...but by the law of the land” but reasoned that “this could not limit the ability of the Crown to rely on statutes of limitation which were not then but are now part of the law of the land”.<sup>50</sup>

Such cases and the clauses on which they were based are essentially of antiquarian interest, so I pass from the periphery to the core of the Charter, and those clauses inherently capable of adaption.

Clauses 39 and 40 indeed deal with issues of potential contemporary and general relevance.

### DENIAL OF JUSTICE

Magna Carta guarantees the provision of justice to all the Kings subjects: whether it entitled foreigners to sue in the Kings courts was considered but left open in a case where Irish rebels claimed return of money seized from them,<sup>51</sup> but, to whomever it is owed, the right to justice in Clause 39 is not unqualified.

In *R v Bracknell ex p Griffiths*<sup>52</sup> Lord Simon said<sup>53</sup> “although Magna Carta provided that to no man should justice be delayed or denied, it is not unparalleled for the legislature to constitute such lets or hindrances”. Hence, by way of material example, the statutory requirement for mental patients to obtain the leave of the court to bring proceedings<sup>54</sup> or the restraints on vexatious litigants.

And statute is not the only source of such qualification. In *Rost v Edwards*<sup>55</sup> an MP sought to bring proceedings for libel against the newspaper which alleged that he had improperly disclosed confidential information obtained in his capacity as a member of the Commons select committee on energy and that, as a result, he had lost his post as well as his good name. He wished to adduce in support of his claim evidence about matters internal to Parliament such as the requirements of the MPs’ register of interests. The question was whether this was prevented as involving the questioning of proceedings in Parliament prohibited by the Bill of Rights 1689. Mr Justice Poplewell ruled in Mr Rost’s favour

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<sup>50</sup> *Roberts v Swangrove Estates Ltd* [2007] EWHC 513, [2008] Ch 439 [45].

<sup>51</sup> *Johstone v Pedlar* [1921] 2 AC 262 (HL). Lord Sumner said that ‘an historical inquiry would be of great interest but I doubt if all the necessary material is yet available’, 291.

<sup>52</sup> [1976] AC 314 (HL).

<sup>53</sup> *Ibid*, 329.

<sup>54</sup> *Applied Winch v Jones* [1986] QB 296 (CA) 302 (Donaldson MR).

<sup>55</sup> [1990] 2 QB 460 (QB).

stating, with reference to Magna Carta “It is important to recognise that there is a no less important principle that the citizens of this country should have free and unrestrained access to the courts of the land” but adding, “subject to the rules of Court”.<sup>56</sup> I would add subject too to such substantive rules as those of parliamentary privilege which, on the facts of that case, the learned judge had found not to stretch as far as the newspaper would have wished.

Other principles can collide with and override the right not to be denied justice.

In *De Crittenden v Bayliss (deceased)*<sup>57</sup> the claimant had been cheated out of his share of partnership monies by the late Mr Bayliss. He brought a claim in debt, and then, only later, sought to trace the money owed to him into property purchased by Mr Bayliss with it. Unfortunately it was by then too late

Sir Christopher Staughton said:

“37...There is a Latin maxim — Interest res publicae ut sit finis litium — it is in the interest of the state that there be an end of lawsuits. That is in my opinion a sound principle, but it is not the whole story. The state has an obligation to provide the apparatus of civil litigation so that citizens may make use of it”. That can be found in Magna Carta. Nulli vendemus, nulli negabimus, aut differemus — to no one will we sell or deny or delay right and justice. Our task is to hold the balance between those principles.”

“38... It is regrettable but unavoidable that we have to decide this appeal against Mr de Crittenden. It may well be that pure justice would require us to entertain the further claims that he wishes to put forward; but, a litigant is obliged to bring forward the whole of his claim at one time. That is not always an absolute rule, but here the effect of embarking on Mr De Crittenden’s further claim would require an extensive inquiry which would be difficult or even impossible now to conduct.”<sup>58</sup>

Indeed, paradoxically, the principle that justice should not be denied can be trumped by the principle that justice should not be delayed. In

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<sup>56</sup> Ibid 724.

<sup>57</sup> [2005] EWCA Civ 1425.

<sup>58</sup> Ibid.

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*Allen v MacAlpine*<sup>59</sup> where Lord Denning MR developed the concept that cases could be struck out on grounds of want of prosecution even if brought within the statutory limitation period, he summarily dismissed an argument that this involved a denial of justice contrary to Magna Carta with the succinct sentence, “the delay of justice is the denial of justice”.<sup>60</sup>

Rules as to rights of audience can also limit indirectly the means of access, to which itself, individuals have a prima facie entitlement.<sup>61</sup> Dr Pelling a maths lecturer had a lucrative side line occupation as a professional and paid McKenzie friend in family law disputes.<sup>62</sup>

The issue which confronted the Court was whether Dr Pelling was entitled to act in custody proceeding which were held not in public but in chambers. Dr Pelling argued, noted Otton J, that “there was now a right to a McKenzie friend in proceedings in Chambers and for the friend so to act once appointed by the litigant. (He) developed this line of argument by reference to Magna Carta with an appropriate citation”.<sup>63</sup>

Otton J nonetheless held that the requirement for Dr Pelling to obtain leave of the court before so acting “cannot be said to be in violation of rights enshrined in Magna Carta”,<sup>64</sup> a proposition he thought so obvious that he did not take time to explain it. The Court of Appeal upheld his decision, without reference to Magna Carta, but confirmed that the discretion which the judge hearing the custody dispute undoubtedly enjoyed should be exercised by reference to the “interests of the litigant in person” not those of Dr Pelling<sup>65</sup> which, I suspect rightly, they may have thought were in the forefront of Dr Pelling’s concerns.

Magna Carta enjoins the state not to deny access; but it does not necessarily require it to provide access. Mr Wynne, a prisoner, submitted that the State was obliged to provide him with funds to cover his expenses of travelling to Court, even where, as was the case, his seemingly perverse claim was against the state<sup>66</sup> for failure to give him Category A status so

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<sup>59</sup> [1968] 2 QB 229 (CA).

<sup>60</sup> Ibid 245, applied in *Barratt Manchester Ltd v Bolton MBC* [1998] 1 WLR 1003 (CA) 1010.

<sup>61</sup> *R v Bow County Court ex p Pelling* [1999] 1 WLR 1807 (CA).

<sup>62</sup> McKenzie friends are persons, who though not legally qualified, are permitted by the Courts to assist litigants in person.

<sup>63</sup> *ex p Pelling* (n 61) 1814.

<sup>64</sup> Ibid 1815.

<sup>65</sup> Ibid 1827.

<sup>66</sup> *R v Secretary of State for the Home Department ex p Wynne* [1993] 1 WLR 115 (HL).

that he could be incarcerated in a high security prison. I represented the Secretary of State. James Munby, now President of the Family Division, representing the prisoner, had three strings to his bow the third of which was Magna Carta. The Court of Appeal held that Mr Wynne was entitled to come to court, but should pay for the privilege. The House of Lords found the issue to be moot, because the prisoner was required to apply for such funding and had not done so, and although Wynne's was a test case declined to overrule the Court of Appeal, or for that matter to uphold it.<sup>67</sup>

## DEFERMENT OF JUSTICE

While delays of the kind described so vividly in Charles Dickens classic "Bleak House" are no longer, in the age of the overriding objective of the Civil Procedure rules and the conversion of judge from referee into case manager, tolerable, or indeed tolerated, delays in dispute resolution can still regrettably occur in Her Majesty's Courts.

In *Grahame Henry Bond v Dunster Properties Limited*<sup>68</sup> Lady Justice Arden started her judgment in this way under the heading:

"Everyone is entitled to a hearing...within a reasonable time".

1. The thrust of the appeal is against the Judge's findings of fact. A major cause of complaint is that the Judge did not hand down judgment until some **22 months** after the conclusion of the hearing and that as one result his findings of fact are against the weight of the evidence. This extraordinary delay clearly called for an apology and, if any existed, an explanation of the mitigating circumstances. However, so far as we are aware, there was none. Litigation is stressful for the parties, sometimes because they are members of the same family and sometimes because the transactions are commercial in nature and their outcome has implications for other transactions that the parties or others need to carry out. Life has to go on before, during and after litigation. In some cases, a delay in producing a judgment may prevent the parties from reaping any benefit from the litigation at all. Unfortunately, this case involves both the elements of close family relations and of commercial transactions. Irrespective of the respective merits of the appeal, this court has no reservation in

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<sup>67</sup> See on the same subject an earlier case *Becker v the Home Office* [1972] 2 QB 407 (CA) where Magna Carta was relied on without effect (412G).

<sup>68</sup> [2011] EWHC Civ 455.

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expressing its sympathies for the parties as a result of the length of time they had to wait for this judgment. We would include others involved in the litigation such as the witnesses and the professional advisers. Delays of this order are lamentable and unacceptable....

3. The opening cross-heading of this judgment is a quotation from article 6 of the European Convention on Human Rights, which has been given protection under domestic law by the Human Rights Act 1998. A “hearing” includes the delivery of judgment. The right is not a new one or one which is alien to the common law. Clause 40 of Magna Carta provides: “To no one will we ... delay... justice”.

Of course the unfortunate judge, the object of this criticism, was a mere tyro in the art of delay compared with Lord Eldon, the long serving Lord Chancellor of the nineteenth centuries, the delays of some of whose judgments were measured in years, not months or weeks.

It is not only claimants who are entitled to a hearing and judgment without undue delay. In *R (Casey) v Restormel BC*,<sup>69</sup> a case about a pregnant teenager living in a car whom the local authority had refused to house on the ground that she was intentionally homeless Munby J delivered a thunderous peroration.

“27. When this matter was before me on 3 October 2007 I expressed myself in strong terms on the subject of the delay, actual or threatened, to which the defendant had been subjected by the court.

28. The delay, I said, was simply indefensible. I referred to Magna Carta, expressing the view that the potential delay here amounted to a denial of justice in the sense in which that phrase is used in Magna Carta...The opportunity for subsequent reflection gives me no reason to moderate my views.”

Which he then expressed over ten trenchant paragraphs ending:

“33. Hard pressed local and other public authorities should not be prejudiced, income tax, corporation tax and council tax payers and rate-payers should not be financially disadvantaged, and other more deserving claimants seeking recourse to over-stretched public resources should not be prejudiced, because of delays in the

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<sup>69</sup> [2007] EWHC 2554 (Admin).

Royal Courts of Justice. It is fashionable nowadays in some circles to decry as no longer relevant anything more than twenty or thirty years old. But there are some principles that ring down the centuries. Magna Carta may be only eight years short of its eight hundredth anniversary, but its message in this respect is timeless. And that message needs to be heeded, not least, it might be thought, in the Administrative Court.<sup>70</sup>

In two cases in the sphere of criminal law the issue was the procedures to be deployed when an application was made for an extension of custody limits.<sup>71</sup> In the former Sir John Thomas President said “the time limit placed on trying those in custody is a vital feature of our system of justice which distinguishes it from many of other countries...Not only does it provide a sure means of compliance with a principle of the common law as old as Magna Carta that justice delayed is justice denied but it has the collateral benefit that money is not squandered by the unnecessary detention of persons in prison awaiting trial at significant costs to the taxpayer”: a happy blend of principle and pragmatism.

The same emphasis on expeditious justice is found in a whole variety of contexts:

- Binyan Mohammed, a British citizen once detained in Guantanamo Bay as a suspected terrorist sought disclosure of the United States documents held by the Foreign Office which he asserted would show that his confessions had been extracted by torture. Sir John Thomas P., summarising the Courts conclusions, said “To deny him at this time would be to deny him the opportunity of timely justice in respect of the charges against him, a principle dating back at least to the time of Magna Carta and which is now a basic part of our common law and of democratic values.”<sup>72</sup>

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<sup>70</sup> And, it appears by a non-judicial body such as ACAS who were told to ‘get on with it’ in *Engineers and Managers Association v ACAS* [1979] 1 WLR 1113 (CA).

<sup>71</sup> *R (on the application of McCauley) v Coventry Crown Court* [2012] EWHC 680 (Admin), [2012] 1 WLR 2766. *Campbell Brown v Central Criminal Court* [2015] EWHC 202 (Admin).

<sup>72</sup> *R (on the application of Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2008] EWHC 2048 (Admin), [2009] 1 WLR 2579 [147].

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- In a complex commercial case where the Bank of St Petersburg sought to wrest control of a Marine Group from its then owner Mr Arkhangelsky<sup>73</sup> and to rely upon a Russian judgment, which the English Courts refused to recognise, an issue arose as to whether Mr Arkhangelsky, who wished to counter claim against the Bank for conspiracy, deceit, duress and intimidation, could dispense with service on the Bank in the commercial court in order to avoid being time barred. Lord Justice Longmore noted that a Mr Stroilov, described by him as “an associate of the Arkhangelskys...with a **certain** knowledge of legal matters who subsequently acted as the Arkhangelsky’s Mackenzie friend”<sup>74</sup>... (the reference to a certain knowledge being a feline judicial euphemism for an uncertain and imperfect knowledge) “had before the first instance Judge” as it was again somewhat ironically put, “**helpfully** referred the Judge to Magna Carta” though it is unclear what help that judge had derived from the reference, and certainly neither his<sup>75</sup> nor the Court of Appeal’s own judgment turned on it.

But justice does not have to be delivered instantaneously; in *Calvey v Secretary of State for Home Department*,<sup>76</sup> Jackson J was dealing with the aftermath of a decision of the House of Lords<sup>77</sup> that the power of the Secretary of State to elongate a prison sentence beyond that stipulated by the trial Judge was a breach of an accused persons right to have his sentence determined by the judiciary, not the executive. Until new provisions to achieve that end were brought in force, Ms Calvey remained in prison. The Judge referred to the argument of his barrister,<sup>78</sup> “Mr Newman submits that in the present case there is a deferring of justice or right to the claimant contrary to chapter 29 of Magna Carta. There will then be long delays before her case can be considered, and by the time her case is considered she will be very close to the end of the 15 year tariff

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<sup>73</sup> *Bank St Petersburg v Arkhangelsky* [2014] EWCA Civ 593, [2014] 1 WLR 4360.

<sup>74</sup> *Ibid* [3] (Longmore LJ).

<sup>75</sup> [2013] EWHC 2068 (Comm).

<sup>76</sup> [2003] EWHC 3450 (Admin).

<sup>77</sup> *R (on the application of Anderson) v Secretary of State for the Home Department* [2002] UKHL 46, [2003] 1 AC 837.

<sup>78</sup> *Calvey* (n 77) [30].

which has been set. If at the end of the day it turns out that the tariff ought to be very much shorter, for example that recommended by the trial judge, then she will have served substantially too long in prison, and that is contrary to Magna Carta”, and continued:<sup>79</sup>

“31. I am not persuaded by this submission for a number of reasons... although any delay in enacting legislation to correct incompatibilities between existing legislation and the Convention is unfortunate. ‘Defer’ in chapter 29 of Magna Carta must be construed as meaning ‘defer for an unreasonable period’. In my judgment, there is nothing unreasonable about the time which is elapsing between the decision of the House of Lords in *Anderson* and the likely date when the Criminal Justice Bill of 2003 will pass into law.”

And there are delays and delays. It was optimistic, to put it at its lowest, for the prospective developers of Coin Street to complain that the Inspector had adjourned the start of the planning enquiry for a mere three months;<sup>80</sup> for two persons convicted of handling stolen goods to seek to set aside their convictions because their trial had taken place more than the specified period of eight weeks from committal, especially since they had pleaded guilty.<sup>81</sup> Magna Carta, though relied on, availed none of this diverse cohort of litigants.

This precept of Magna Carta can be a sword as well as a shield. One husband was not permitted to seek to appeal a finding of cruelty against him 21 months out of time;<sup>82</sup> another, the subject of a maintenance order for constructive desertion was held not to be entitled to full particulars of the case against him, as might have been the case in a trial in the High Court<sup>83</sup> because as Simon P said “Magna Carta itself linked delay of justice with denial of justice”<sup>84</sup> and to require such formality would be inconsistent with the exercise by magistrates of a summary jurisdiction.

The principle – no delay in justice – has been deployed in the administrative as well as in the judicial sphere.

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<sup>79</sup> *Ibid* [31].

<sup>80</sup> *Grevcote Estates v Radmor* (CA, 1 January 1981).

<sup>81</sup> *R v Spring Hill Prison Governor ex p Sohi* [1988] 1 WLR 596 (DC) Objectionable delays are remediable by abuse of process applications. *R v Bow Street Magistrates Court ex p Choudhury* (1990) 91 Crim App rep (CA).

<sup>82</sup> *Edwards v Edwards* [1968] 1 WLR 149 (DC).

<sup>83</sup> *Frith v Frith* [1962] 1 WLR 1436 (DC).

<sup>84</sup> *Ibid* 1438.

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In *R v Secretary of State for the Home Department Ex p Phansopkar*<sup>85</sup> two women, one from India one from Bangladesh were denied entry at Heathrow when they sought to join their British husbands. Both were entitled to enter as long as they had a certificate of patriality under section 3(9) of the Immigration Act 1971 and both were entitled to such certificate. But the queues at overseas offices for persons seeking entry, composed both of those who sought such certificate, and those who sought other forms of entry clearance created delays of up to 14 months before either woman could have received their the open sesame to England's green and pleasant land; hence their attempt to short circuit the process.. The Court of Appeal quashed the refusal of entry. All the members referred to Magna Carta.<sup>86</sup> Lord Denning said that the women's rights cannot be taken away by arbitrarily refusing her a certificate or by delaying to issue it to her without good cause,<sup>87</sup> and that bureaucratic delays were not such a cause. Scarman LJ looked not only back to Magna Carta but forward to Article 8 of the European Convention of Human Rights which protects the right of family life,<sup>88</sup> although, of course, at that time it had not been incorporated into domestic law as it later was by the Human Rights Act 1998.<sup>89</sup>

### SALE OF JUSTICE

It is not unexpected that complaints of sale of justice are all but undetectable in recent times. Whatever criticisms may be made of the English judiciary in that timeframe, the charge of corruption is not one. The solitary example which I have unearthed concerns the attempt by Magistrates in Wandsworth to impose, as a prerequisite for granting a licence for increased facilities for drinking, a condition that the licence holder should surrender his other licences.<sup>90</sup> Mr Justice Darling referred to the inhibition in the Charter on the sale of justice. He explained in reliance on a learned historical analysis by Professor McKechnie, the expert on the

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<sup>85</sup> [1976] QB 606 (CA).

<sup>86</sup> *Ibid* 621 (Lord Denning MR), 624 (Lawton LJ), 626 (Scarman LJ).

<sup>87</sup> *Ibid* 621.

<sup>88</sup> *Ibid* 626.

<sup>89</sup> See also *R v Chief immigration Officer Heathrow Airport ex p Bibi* [1976] 1 WLR 979 (CA), *R (on the application of FH) v Secretary of State for the Home Department* [2007] EWHC 1571, *R v Secretary of State for the Home Department ex p Mersin* [2001] INLR 511 (QB).

<sup>90</sup> *R v Wandsworth Licensing Justices ex p Whitbread & Co Ltd* [1921] 3 KB 487 (KB).

charter de ses jours. “The suitor put his money down not to influence the judgment but to obtain a hearing. It was not that justice was sold. It was that the suitor was entitled to the justice of the Kings Courts... only as a matter of grace”. He then mused, “In the present case it seems to me that there was something in the nature of an attempt to return to the procedures of less civilised times”.<sup>91</sup> I am bound to comment that I cannot follow the Judge’s train of thought, but he was, as Judge, celebrated as much for his eccentricities as for his erudition. He wore a silk hat whilst riding to Court on a horse accompanied by a liveried groom.<sup>92</sup>

## **TRIAL BY PEERS**

Trial by one’s peers is certainly guaranteed by Clause 39 but again it cannot stand against later and contradictory legislation.

In *R (Misick) v The Secretary of State for Foreign and Commonwealth Affairs*, the Claimant a former, and controversial, Premier of the Turks and Caicos Islands (“the Territory”), sought permission by way of judicial review to challenge the legality of the Turks and Caicos Islands Constitution (Interim Amendment) Order 2009, whose effect when brought into force would be to suspend temporarily parts of the Turks and Caicos Islands’ Constitution, by, among other things, removing the right to jury trial.

Lord Justice Carnwath said;

“22. In this case, the right to a jury trial has been traced back to Magna Carta and long-settled practice thereafter”

but concluded...

“42. There are no arguments which offer a realistic prospect of the Claimant’s case succeeding at a full hearing; The Court will not enter into discussion of the merits of the particular measures. In the end, the challenge comes down to one of statutory construction or rationality, and on that basis it is bound in my view to fail.”

Another example in a wholly different sphere, that of libel, the case of *Cook v Telegraph Media Group Limited*<sup>93</sup> confirms the point. The salient facts were these: On 17 September 2006 an assistant of Mr Cook, then an

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<sup>91</sup> Ibid 497.

<sup>92</sup> D W Smith, *The Life of Charles Darling* (Cassell & Co London 1938).

<sup>93</sup> [2011] EWHC 763 (QB).

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MP, made a £5 offertory donation at a Battle of Britain church service in Stockton. Mr Cook quite properly reimbursed his assistant. He then improperly, and certainly unwisely, included the £5 in his own claim for reimbursement of his expenses as an MP. It was predictably rejected. However, the very fact that he had made it became an issue in 2009 when the Daily Telegraph published its series of articles on MPs' expenses which attracted very wide publicity. Mr Cook boldly brought a suit for libel against the newspaper for their critical comments on his behaviour. The issue before Mr Justice Tugendhat was whether there should be trial by jury or trial by judge alone.

The Judge delved into history...

“101. Blackstone discussed separately the merits of trial by jury in civil actions in which the state was not a party. Book III at p 379ff. It reads:

“The impartial administration of justice ... is the great end of civil society. But if that be entirely intrusted to the magistracy, a select body of men, and those generally selected by the prince or such as enjoy the highest office in the state, their decisions, in spite of their own natural integrity, will have frequently an involuntary bias towards those of their own rank and dignity: it is not to be expected from human nature, that *the few* should always be attentive to the interests and good of *the many*... the most powerful individual in the state will be cautious of committing any flagrant invasion of another's right, when he knows that the fact of his oppression must be examined and decided by twelve indifferent [i.e. impartial] men not appointed till the hour of the trial.”

Despite these resonant comments, the Judge recognised the clear trend in modern case law, fortified by legislation,<sup>94</sup> which made the traditional practice that a citizen's reputation should presumptively be in the hands of twelve not one obsolete, and ended:

“115. This multiplicity of opportunities to argue the same point<sup>95</sup> is one of the major reasons why the costs of libel actions have become so disproportionate as to risk condemnation as an interference with freedom of expression and the right of access to

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<sup>94</sup> See now the Defamation Act 2013.

<sup>95</sup> On what the allegedly defamatory words meant.

the court (see *MGN v UK* [2008] ECHR 1255 ). In these circumstances the effect of the Human Rights Act 1998 is to require judges and Parliament to continue to develop the law to make it Convention compliant. Trial with a jury makes such development more difficult.

116. Taking all these considerations into account, I see no reason to exercise my discretion in this case to order this action to be tried with a jury, and every reason to order trial by judge alone.”

In that case the Judge had also, if maybe superfluously in a civil case, cited Blackstone on Criminal trials:

“98. As to criminal cases, Blackstone’s Commentaries on the Laws of England Book IV (1769) p342–3 includes the following: ‘The trial by jury ... is also that trial by the peers of every Englishman, which, as the grand bulwark of his liberties, is secured to him by [Magna Carta]... in times of difficulty and danger, more is to be apprehended from the violence and partiality of judges appointed by the crown, in suits between the king and the subject than, than in disputes between one individual and another.’”

Yet even in that sphere the trend is clear. More cases are delegated to the magistracy; and the notion that complex commercial crimes would be better tried by specially composed courts with a degree of financial expertise, and the concern that juris verdicts are unreasoned is the subject of continued policy debate. Magna Carta will be prayed in aid by those who object to such trend but prayers cannot stand out against a Parliamentary majority.<sup>96</sup> Lord Devlin once described the jury was “the lamp that shows that freedom lives”;<sup>97</sup> but it is a lamp whose light is being progressively dimmed.

But when juries are provided, of what must they consist? Who are the peers to which clause 39 refers? In *R v Danso & Hodge*<sup>98</sup> Mr Hodge convicted of a series of serious offences of violence made, as the Court of Appeal’s judgment recited a whole series of complaints to the effect that it was wrong for him to be tried by 12 whites, who included, he complained,

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<sup>96</sup> ‘No doubt the next target will be the jury’ Lord Hutchinson of Lullington QC Thomas Grant, *Jeremy Hutchinson’s Case Histories*. (John Murray 2015) 371.

<sup>97</sup> Patrick Devlin, *Trial by Jury* (Stevens & Sons Ltd 1956) 164, cited in *R v Mirza* [2004] UKHL 2, [2004] 1 AC 1118.

<sup>98</sup> [2005] EWCA Crim 620.

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seven women. He had submitted that is not a trial, amongst other things, by his peers in accordance with, amongst other things, Magna Carta, or with requirements of fairness.<sup>99</sup> This argument, along with others, in which in scattergun style, he blamed indifferently judge, police, prosecution and his former legal advisers for undermining his defence and failing in their respective duties, was summarily dismissed. The law on juries, then and now, is race and gender blind.

### UNLAWFUL DETENTION

Magna Carta provides no guarantee of life, but it does protect liberty which stands between life and the pursuit of happiness as the objectives in the Declaration of Independence.

In the famous Belmarsh case where legislation allowing for the detention without trial of foreign, but not British, nationals suspected of involvement in terrorism was held unjustifiably discriminatory<sup>100</sup> Lord Bingham said “in arguing the fundamental importance of the right to personal freedom the appellants were able to draw on the long libertarian tradition of English law dating back to Clause 39 of the Magna Carta, given effect in the ancient remedy of habeas corpus, declared in the Petition of Right 1628, upheld in a series of landmark decisions down the centuries and embodied in the substance and procedures of the law to our own day.”<sup>101</sup>

Scarcely less eloquent were the words of Lord Phillips, his successor as senior law lord, in a mental health case<sup>102</sup> “the common law respects and protects the personal freedom of the individual which may not be curtailed save for a reason and in the circumstances reflected in the law of the land. This principle is reflected in but does not depend on Article 5(1) of the European Convention on Human Rights. It can be traced back to chapter 29 of Magna Carta 1297 and before that to chapter 30 of Magna Carta 1215.”<sup>103</sup>

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<sup>99</sup> Ibid [52].

<sup>100</sup> *A v Secretary of State for Home Department* [2005] UKHL 56, [2005] 2 AC 68.

<sup>101</sup> Ibid [36].

<sup>102</sup> *R (on the application of Brandenburg) v East London and City Mental Health NHS Trust* [2003] UKHL 58, [2004] 2 AC 280.

<sup>103</sup> Ibid [6].

## INTER ARMA LEGES SILENT?

Especially in times of war, laws and orders designed to protect the community against potential threats have had to be tested against that historic bedrock; and now with legitimate anxieties about the presence of an enemy within, not as before aliens but even British citizens, the same exercise – the balance of private rights against public interests – is required.

### *Mental health*

But it is not only in such extreme situations that the principle is engaged.

In a case which came before the Court of Protection<sup>104</sup> the question was whether a local authority could keep a man in a residential support unit contrary to his wishes and those of his father. Peter Jackson J stated “If a local authority seeks to regulate control compel restrict confine or coerce” a liberal use of a thesaurus, “it must, except in an emergency point to specific statutory authority for what it is doing or obtain the approval of the Court.”<sup>105</sup> He continued “The origin of this basic principle is to be found in an era long before the invention of local authorities as we know them” and quoted predictably chapter 29 of Magna Carta 1297<sup>106</sup> adding “The Court of Appeal has recently said this right to freedom is a fundamental constitutional right (a reference to a dictum of Toulson LJ).<sup>107</sup> It will certainly not lose its importance in the field of adult social care with an ageing population increasing the responsibilities of families and state”

And many cases in this discrete area illustrate the truth of his proposition.

In another the issue was whether a Tribunal rather than the Secretary of State was empowered to order the discharge of a patient from a mental hospital into a care home but from which he could only move among the community under escort, so indisputably restricting his liberty.<sup>108</sup> Arden LJ echoed the sentiments:

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<sup>104</sup> *Hillingdon LBC v Neary* [2011] EWHC 1377 (COP), [2011] 4 All ER 584.

<sup>105</sup> *Ibid* [22].

<sup>106</sup> *Ibid* [23].

<sup>107</sup> In *R (TMM) v Hackney LBC* [2011] EWCA Civ 4, [2011] 1 WLR 2873 [33] (Toulson LJ).

<sup>108</sup> *Secretary of State for Justice v RB* [2011] EWCA Civ 1608, [2012] 1 WLR 2043.

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She said “The right to liberty of person is a fundamental right. It has been so regarded since at least the time of the well-known provisions of Clause 39 of Magna Carta, which in due course found its reflection in Article 9 of the Universal Declaration of Human Rights and Article 5 of the European Convention...”<sup>109</sup> So important was this right that it was nothing to the point, held the Court of Appeal, that the discharge even on those restricting terms was in the best interests of the patient.<sup>110</sup>

A different issue arose in another case where a mental patient refused a social worker permission to consult his nearest relatives on whether he should be admitted for treatment. As a result the social worker determined, without consideration of all the circumstances, that it was “not reasonably practicable to do so” which was the **only** qualification to the duty to consult imposed by the Mental Health Act 1983. Aikens LJ, stressing the importance of compliance with the provisions of that Act continued “If they are not”, as Toulson LJ said in *R (TTM) v Hackney LBC*, since the statute of Magna Carta ch. 29 1297... “a person can obtain redress where her right confirmed by that statute has been infringed even though there is no provision in the 1983 Act; which enables her personally to do so.”

In the case referred to by Aikens LJ (and indeed by Peter Jackson J) , Toulson LJ had instanced the writ of habeas corpus and the writ for trespass as reinforcing the substantive protection of Ch 29<sup>111</sup> which itself is actually silent on remedy for breach.<sup>112</sup> In an earlier case Lord Donaldson MR had cited Magna Carta as confirming that habeas corpus lay against the Crown itself<sup>113</sup> but, more precisely and accurately, habeas corpus was described in the House of Lords as “rendered more actively

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<sup>109</sup> Ibid [8].

<sup>110</sup> The same substantive issue was revisited by the Supreme Court, where the issue was not whether and, if so, when it was lawful to deprive someone of his or her liberty but rather what was meant by deprivation of liberty. However, the various judgments made no reference to Magna Carta focussing on its philosophical descendant Article 5(4) of the European Convention on Human Rights. *Cheshire West and Chester Council v P* [2014] UKSC 19, [2014] AC 896

<sup>111</sup> *R (TTM)* (n 107) [33].

<sup>112</sup> Further mental health detention cases include *Secretary of State for Justice v RB* [2011] EWCA Civ 1608, [2012] 1 WLR 2043, *R (on the application of Epsom & St Helier NHS Trust) v Mental Health Review Tribunal* [2001] EWHC Admin 101, *St George's Healthcare NHS Trust v S* [1999] Fam 26 (CA), and *Re S-C (Mental Patient: Habeas Corpus)* [1996] QB 599 (CA).

<sup>113</sup> *R v Secretary of State for the Home Department Ex p Muboyayib* [1992] QB 244 (CA) 254 G-H.

remedial by the statute of Charles II but founded upon the broad basis of Magna Carta ...the principal bulwark of English liberty.”<sup>114</sup>

*Immigration detention*

Another area of contemporary political and social importance and indeed controversy is immigration.

In *R (on the application of Lumba) v Secretary of State for the Home Department*<sup>115</sup> the Secretary of State, John Reid MP, had an unpublished policy that for all prisoners who were subject to immigration control and liable to deportation on completion of their sentence of imprisonment should be detained pending deportation. This was inconsistent with his published policy which allowed for discretion and hence violated a well established principle of public law

Lord Collins of Mapesbury said “This is a case in which on any view there has been a breach of duty by the executive in the exercise of its power of detention. Fundamental rights are in play”. He then quoted Ch. 39 of Magna Carta 1215 (9 Hen 3) adding that the liberty of the subject as a fundamental constitutional principle hardly needs the great authority of Sir Thomas Bingham MR but it is worth recalling what he said in his book *The Rule of Law 2010* at p.10 about the fundamental provisions of Magna Carta “These are words which should be inscribed on the stationary of the Home Office”,<sup>116</sup> the department which Mr Reid himself famously described on his accession to his high office as unfit for purpose.<sup>117</sup>

At the other end of the chronological spectrum in immigration matters which stretches from entry to expulsion, in a case involving a juvenile asylum seeker<sup>118</sup> the issue was the lawfulness of the decision by the Secretary of State to detain pending removal the claimant, a juvenile citizen of Afghanistan.

Lady Justice Arden opined:

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<sup>114</sup> *Secretary of State for Home Affairs v O'Brien* [1923] AC 603 (HL) 646. To the same effect *Ex p Mwenya* [1960] 1 QB 241 (CA) 292 (Evershed MR) and *Greene v Secretary of State for Home Department* [1942] AC 284 (HL) 302 (Lord Wright).

<sup>115</sup> [2011] UKSC 12 , [2012] 1 AC 245. I represented the Home Department.

<sup>116</sup> *Ibid* [217].

<sup>117</sup> See further *R (on the application of Detention Action) v Secretary of State for the Home Department* [2014] EWCA Civ 1634.

<sup>118</sup> *R (on the application of AA (Afghanistan)) v Secretary of State for the Home Department* [2012] EWCA Civ 1383.

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“...the burden of showing that the detention was lawful falls on the Secretary of State”

and referred in swift succession to Magna Carta, Article 5 of the European Convention on Human Rights, United Nations Convention on the Rights of the Child (“UNCRC”) and other international instruments.

Ultimately no instruments, ancient or modern, saved the claimant from removal.

### *Extradition*

In the field of extradition the same principle is engaged. In the case of *Juana Chaois v Spain*<sup>119</sup> the High Court of Northern Ireland was seized of an application by the Respondent to revoke the Appellant’s bail, and commit him to custody. The issue to be determined was jurisdictional, namely whether the High Court or any other agency was empowered to take the measures requested.

McCloskey J noted that there was no express power to that effect in the Extradition Act 2003. He continued;

[27] The suggestion of an implied statutory power of the kind mooted is contradicted by two further considerations. The first is Article 5/1 ECHR... In short, a power of this kind would lack the essential qualities of accessibility and foreseeability. The second contra indication is the *nature* of the power. Such a power would entail deprivation of the citizen’s liberty. The common law has long recognised liberty as a hallowed right and it possesses a similar ranking in Convention jurisprudence.

There is no justification in logic or in principle for adopting a less robust approach where the detaining agency is the court, rather than the executive.

## CONTEMPT OF COURT

The necessity of finding an express provision justifying detention to override the Magna Carta presumption in favour of liberty is shown in a pair of cases in the sphere of contempt of court, where incarceration is one of the options available to a Court. It has been held that there is no power to remand in custody someone pending a decision as to what is the

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<sup>119</sup> [2010] NIQB 68 (QB Northern Ireland).

appropriate sanction in his case for such contempt.<sup>120</sup> nor someone arrested under a search and find order in connection with alleged child abduction unless and until the contempt by way of breach an earlier court order to return the child was proved.<sup>121</sup>

*Protection of Property*

Chapter 39 protects not only the person, but property against arbitrary seizure.<sup>122</sup> Many of the most famous constitutional cases arise from the executive appetite in wartime to lay its hands on whatever suits its purpose provoking inevitably pleas to that Article.<sup>123</sup> In the case of *De Keyzers Royal Hotel*<sup>124</sup> it was stated “Since Magna Carta the estate of a subject in lands or buildings has been protected against the prerogative of the Crown”, Lord Parmoor suggesting that not only out and out seizure, but also interference with use and occupation fell within the remit of Clause 39<sup>125</sup> although in another case<sup>126</sup> where a company complained about a refusal of permission to build factories and shops on its land Viscount Simonds said dismissively but realistically “Such a diminution of rights can be affected without a cry being raised that Magna Carta is being dethroned or a sacred principle of liberty infringed.”<sup>127</sup> Arbitrary of course means without colour of law. The problem is the wealth of law governing everything from compulsory purchase to enforcement of

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<sup>120</sup> *Delaney v Delaney* [1996] QB 387 (CA).

<sup>121</sup> *Re B (Minors) (Wardship: Power to Detain)* [1994] 2 FLR 479 (CA).

<sup>122</sup> Said to extend to freedom of trade in *Esso Petroleum v Harper's Garage* [1968] AC 269 (HL) 317 E-D (Lord Hodson).

<sup>123</sup> For example *Central Control Board (Liquor Traffic) v Cannon Brewery Co Ltd* [1919] AC 744 (HL) 760 (Lord Parmoor) where Magna Carta was held to disentitled the Central Control Liquor Board to use the prerogative to confiscate private property per *Nissan v A-G* [1970] AC 179 (HL) (expropriation of luxury hotel in Cyprus for use of British peace keeping forces where Counsel for the Plaintiff praying Magna Carta in aid was Quintin Hogg QC, later twice Lord Chancellor. *Burmah Oil v Lord Advocate* [1965] AC 75 (HL) where the House of Lords ordered compensation to be paid to the company whose property had been destroyed to keep it out of the hands of Japanese invaders, only – notoriously- to have the effect of their order set aside by the War Damage Act 1965.

<sup>124</sup> [1920] AC 508 (HL).

<sup>125</sup> *Ibid* 508.

<sup>126</sup> *Belfast Corporation v OD Cars* [1960] AC 490 (HL).

<sup>127</sup> *Ibid* 519.

## MAGNA CARTA IN THE TWENTIETH AND TWENTY FIRST CENTURIES

judgments to revenue raising measures, all overriding property rights. Do not rely on Magna Carta against a Mansion tax or similar future scheme.

### EXILE

Extradition in an age a mutual assistance between states designed to combat crime is commonplace. Exile to which I now turn is exceptional.

The most significant case *R v Secretary of State for the Foreign and Commonwealth Office ex p Bancoult*<sup>128</sup> illuminates both the strength and the weakness of Magna Carta. It concerned what Lord Hoffman described as the “sad story”<sup>129</sup> of the Chagos islanders, inhabitants of an archipelago in the British Indian Overseas Territories. Diego Garcia, the largest island, because of its position, had significant strategic potential and the USA desired it as a military base. Between 1968 and 1971 the majority of the islanders were relocated in Mauritius, not by force, but as a result of the closure of the plantation company which was their sole source of supply of necessities from the outside world.

The interests of the islanders were disparagingly referred to in an inter-office memorandum as “a few Tarzans or Men Fridays”<sup>130</sup> in an era where racial equality, let alone political correctness was unheard of, but whose disclosure by the respondent department was itself a testimony to the transparency both required of and respected by public authorities.<sup>131</sup> In 1971 an Immigration Ordinance stipulated that no-one could enter the territory without a permit, and in 2004 belt was added to braces by a further ordinance expelling the few who remained in situ.<sup>132</sup>

It was common ground in the challenge to the later Ordinance that it raised issues under Article 39. Neither King John nor the barons at Runnymede knew even of the existence of Diego Garcia. It was nonetheless in law British territory from which prima facie citizens could

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<sup>128</sup> [2008] UKHL 61, [2009] 1 AC 453.

<sup>129</sup> Ibid [9].

<sup>130</sup> Quoted in a first instance decision in the same series of cases, *R (on the application of Bancoult) v Secretary of State for the Foreign and Commonwealth Office* [2001] QB 1067 (DC) 1083 E (Laws LJ).

<sup>131</sup> See the approving comments of Laws LJ and Gibbs J at Ibid [63] (Laws LJ), [72] Gibbs J.

<sup>132</sup> This unhappy episode in a last chapter of Britain’s imperial history was further discoloured by allegations that Diego Garcia was used by the USA for extraordinary rendition and the torture of terrorist suspects.

not be expelled.<sup>133</sup> But the right was not an unqualified right; it was expressly made “subject to the law of the land.” The key question which divided the majority and minority was whether the prerogative power, as distinct from legislation, was sufficient to annul the right. For the minority Lord Mance said “A constitution which exiles territories’ inhabitants is a contradiction in terms.”<sup>134</sup> For the majority Lord Hoffman said “In a ceded colony...the Crown has plenary legislative authority. It can make or control the law of the land. The right of abode is a creature of the law. The law gives it and the law may take it away.”<sup>135</sup> The Islanders had to take their claims for a return to their homeland to the European Court of Human Rights where they failed because they had already accepted compensation for resettlement elsewhere.<sup>136</sup>

## PROPORTIONATE PUNISHMENT

The principles of Magna Carta have infiltrated the last phase of the criminal process: the imposition of sanction. In one of the many cases in which the Privy Council had, with undisguised reluctance, to deal with death penalty cases from Caribbean jurisdictions, it had to determine whether a provision of Bahamian law prescribing the death penalty should be construed as mandatory or discretionary; it opted for the more lenient construction. As, Lord Bingham said; “the principle that criminal penalties should be proportionate to the gravity of the offence committed can be traced back to the Magna Carta; Chapter 14 of which prohibited excessive amercements” and, in the words of one commentator, “clearly stipulated as fundamental law a prohibition of excessive punishment.”<sup>137</sup>

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<sup>133</sup> *ex p Bancoult* (n 129) [42] (Lord Hoffman), [85] (Lord Rodger), [124] (Lord Carswell), [151] Lord Mance.

<sup>134</sup> *Ibid* [157].

<sup>135</sup> *Ibid* [45] See to like effect as to approach, if not conclusion: *R (on the application of Bancoult)* (n 131) [34] (Laws LJ).

<sup>136</sup> *The Guardian* (London, 20 December 2012).

<sup>137</sup> *Bowe v the Queen* [2006] UKPC 10, [2006] 1 WLR 1623 [30] (Lord Bingham). See too *R v Morris (Charles)* 1951 1 KB 394 (CA). Nonetheless the fact that the sentence for common law conspiracy to defraud was at the discretion of the Court did not infringe the prohibition *Verrier v DPP* [1967] 2 AC 195 (HL) 208G.

# MAGNA CARTA IN THE TWENTIETH AND TWENTY FIRST CENTURIES

## DOUBLE JEOPARDY

But sometimes weight is imposed on Magna Carta which it does not easily bear. In another case in the same sequence the Privy Council had to decide whether a provision entitling the prosecution to appeal when a trial judge had erroneously dismissed its case was constitutional. The judge had, wrongly in the view of the Privy Council, excluded evidence adduced to show that the death of the victim of an assault was the consequence of the assault itself and not of treatment subsequently administered in hospital on the basis that the expert called was not qualified to tender such an opinion. Counsel for the respondent accused argued: “Before independence and the Republican constitutions of Trinidad and Tobago came into force double jeopardy was a recognised principle of considerable antiquity; Magna Carta 1354 confirmation Chapter 39.”<sup>138</sup> Whether this was so or not, and it seems an optimistic reading of the text, the Privy Council found nothing constitutionally objectionable in such prosecutorial appeal.

## OPEN JUSTICE

Another illustration of the same ambition extravagantly to magnify Magna Carta’s effect can be detected in the case of *Commissioner of the police for the Metropolis v Times Newspapers Ltd.*<sup>139</sup> There the newspaper sought to make use of leaked police documents to defend a libel action brought by a person whose criminal network was said by the Sunday Times to be so vast that Scotland Yard regarded him as too big to take on. The question was whether it could do so. Tugendhat J said “The principle of freedom of expression in all proceedings in court is so highly regarded by the law that it is given effect to by defences of absolute (sometimes qualified) privilege and witness immunity. These principles can be traced back to the origins of the right to a fair trial which had already been recognised before it was included in Magna Carta in 1215.”<sup>140</sup> The conclusion seems farfetched.

But then the same judge had form in this area. In *LNS v Persons Unknown*, the claimant, the initially disguised, the former English football captain and Chelsea centre half John Terry<sup>141</sup> – no role model he – sought

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<sup>138</sup> *Trinidad and Tobago v Boyce* [2006] UKPC 1, [2006] 2 AC 76.

<sup>139</sup> [2011] EWHC 2705 (QB), [2014] EMLR 1.

<sup>140</sup> *Ibid* [72].

<sup>141</sup> [2010] EWHC 119 (QB), [2010] EMLR 16, 400.

an injunction to prevent revelation of the fact that he was sleeping with another team member's wife. In rejecting the claim which he held to be more concerned with protecting the commercial value of the player's commercial reputation rather than his or his paramour's privacy, the Judge said "Open justice is one of the oldest principles of English law, going back to before Magna Carta"<sup>142</sup> but not, as far as I can discern, actually included in it.

## BURDEN OF PROOF

Other principles have been read into Magna Carta by advocates seeking to clothe their submissions with spurious pedigree. One case involved an asylum seeker requiring accommodation<sup>143</sup> to which he would be entitled if he was a minor, but not if he was not. Was it for the claimant to show that he was a minor or the local authority to prove that he was not? The ordinary rule is of course that he who asserts something essential to a claim, or for that matter defence, bears the burden of proving it; but there are some exceptions. Counsel for the Applicant submitted that "the origin of exception "to the presumption of regularity" may have lain, at least instinctively in chapter 39 of Magna Carta 1215(9 Hen 3)... as set out in Sir Thomas Bingham's *The Rule of Law*". Even the qualification, at least instinctively, does not save the observation from the charge of overheated imagination, and Lord Bingham's name as a potential supporter of this thesis was surely taken in vain.

Nor did Magna Carta provide special rules to protect an owner of property threatened with compulsory purchase. A decision to exercise such power could only be challenged on conventional Wednesbury grounds of unreasonableness.<sup>144</sup>

## NATURAL JUSTICE

The same tendency to wishful resort to the Charter was displayed in an extradition case.<sup>145</sup> Lord Donaldson MR stated that it was elementary that a person threatened with extradition was entitled to know the case

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<sup>142</sup> Ibid 106.

<sup>143</sup> *R (On the application of CJ v Cardiff CC)* [2011] EWCA Civ 1590, [2012] 2 All ER 836.

<sup>144</sup> *R v Secretary of State for Transport ex p Rothschild* [1989] 1 All ER 933 (CA), 935C (Slade LJ), *Singh v Department of the Environment* [1989] 24 EG 128.

<sup>145</sup> *Re Nagdhi* [1990] 1 WLR 317 (DC).

## MAGNA CARTA IN THE TWENTIETH AND TWENTY FIRST CENTURIES

against him “without” as he said somewhat archly “having to refer to Magna Carta.”<sup>146</sup> Clearly in his view a reference by Counsel too far.<sup>147</sup>

### TORTURE

I must therefore emphasise that Magna Carta is simply not the source of all that is good in English law, the seed of every plant in the field of justice.

In the case which authoritatively laid down that evidence obtained by torture was inadmissible in our courts<sup>148</sup> Lord Bingham in confirming the common laws long standing aversion to torture noted the fact “that reliance was placed on sources of doubtful validity such as Chapter 39 of Magna Carta 1215... does not weaken the strength of received opinion.”<sup>149</sup>

But not all Judges are so willing to deny the link.

In another case involving Binyan Mohammed, an application to redact passages in a judgment on the ground that their inclusion would damage the relationship of the United States of America and the United Kingdom.<sup>150</sup> Lord Judge referred to Chapter 29 of Magna Carta before concluding “all the said ancient authors are against any pain, or torment to be put or inflicted upon prisoners before attainder, nor after attainder but according to judgement.”<sup>151</sup>

In a later case *J v the Metropolitan Commissioner of Police*<sup>152</sup> the actual issue was again a narrow procedural one; what was the correct forum for claims in tort and for breach of convention rights brought by environmental protesters who had been persuaded into sexual relationships with an undercover police officer masquerading as a green sympathiser. In the course of his judgment Tugendhat J, something, as you will by now have appreciated, of a Magna Carta groupie, said “The right not to be subject to degrading treatment has been recognised by the

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<sup>146</sup> Ibid 322.

<sup>147</sup> Ibid 396 G-H.

<sup>148</sup> *A v Secretary of State for the Home Department* [2005] UKHL 71, [2006] 2 AC 221.

<sup>149</sup> Ibid [11].

<sup>150</sup> *R (on the application of Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 158, [2011] QB 218,

<sup>151</sup> Ibid [16].

<sup>152</sup> *J v the Commissioner of Police of the Metropolis* [2013] EWHC 32 (QB), [2013] 1 WLR 2734.

common law from the earliest time”. According to Blackstone amongst the natural rights recognised by the common law were, in the words of Magna Carta, “a prohibition not only of killing and maiming but also of torturing to which our laws are strangers.”<sup>153</sup>

## FORENSIC FAILURE

Sometimes Magna Carta is deployed as ballast. In the leading case on control orders<sup>154</sup> Counsel submitted that “the right to liberty and freedom from arbitrary detention lies at the heart of the domestic legal system as the pre-eminent freedom guaranteed by the common law since Magna Carta”: a legitimate submission. The same use was made in the famous case of *Liversidge v Anderson* concerned with wartime internment under the notorious 18B<sup>155</sup> which provoked the most celebrated dissent in English legal history by Lord Atkin: “I view with apprehension the attitude of judges who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more executive minded than the executive.”<sup>156</sup>

However Magna Carta can sometimes indeed be not merely an unnecessary and gratuitous add on to an otherwise reputable argument but, as I have already illustrated, the last resort of the forensic failure.

In *Attorney-General's Reference No.1 of 1990* it was argued that that a mere two years deferment in prosecuting a police officer for assault, which had resulted from the explicable need to await the outcome of the trial of the two alleged victims whom he had arrested violated Article 39 so that the prosecution should be stayed. Lord Lane LCJ gave short shrift to this ambitious contention. “Delay” he ruled “means at its lowest wrongful delay such as is not justified by the circumstances of the case.”<sup>157</sup> It is a curious feature of that case that the unsuccessful Counsel, Anthony Arlidge QC was co-author with Lord Judge of “Magna Carta

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<sup>153</sup> Ibid [67].

<sup>154</sup> *Secretary of State for the Home Department v JJ* [2007] UKHL 45, [2008] 1 AC 385.

<sup>155</sup> 1942 AC 206 (HL). ‘The appellants counsel truly say that the liberty of the subject is involved. They refer in emphatic terms of Magna Carta...’

<sup>156</sup> Ibid 244.

<sup>157</sup> *A-G's Reference (No 1 of 1990)* [1992] QB 630 (CA) 640G-H.

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Uncovered” and the junior member of the Court which rejected his argument was Judge J himself.<sup>158</sup>

But Mr Arlidge’s efforts were surely trumped by those of Mr Randle-Joliffe, who sought to quash orders for possession in favour of the City of London made against the protesters of the Occupy Movement: ideological opponents of capitalism of the philosophical school of Russell Brand, who had pitched their tent in the environs of St Pauls Cathedral.<sup>159</sup> Lord Neuberger MR referred politely to his “esoteric arguments” which he then enumerated:

“First he challenged the judgement on the ground that it did not apply to him as a Magna Carta heir. But that is a concept unknown to the law. He also says that his Magna Carta rights would be breached by execution of the orders but only chapters 1, 9 and 29 of Magna Carta 1297 version survive. Chapter 29 with its requirement that the state proceeds according to law and its prohibition on the selling or delaying of justice is seen by many as the historical foundation of the rule of law in England but has no bearing on the arguments in this case.”

Somewhat ironically, Lord Neuberger added, “the two other clauses concern the rights of the Church and of the City of London and cannot help the Defendants.” One might add *au contraire*...

The latitude characteristically in our courts extended to litigants in person was stretched to breaking point in the first instance decision in the same case<sup>160</sup> where the same Randle Joliffe referred to “the fairness founded in Magna Carta” and his fellow dissenter Mr Ashman invoked Magna Carta as allowing persons in “situations of...overwhelming urgency...to respond by breaking the law”, a charter on this exotic analysis not then for rule law but for lawlessness.

Still less persuasive, were that possible, was the argument of a private investigator who, in blatant and deliberate breach of a reporting restriction order, continued to assert that a husband involved in acrimonious divorce proceedings whom she was tracking was a rapist and paedophile and then sought to resist committal for contempt relying on “her inalienable right under common law and the inviolable right to exercise lawful rebellion

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<sup>158</sup> In *Tan Soon Gin (George) v Cameroon* [1992] 2 AC 205 (PC) 222 a similar submission was avoided: ‘No such argument has been advanced in the present case and we need say no more about it.’

<sup>159</sup> *City of London Corp v Samede* [2012] EWCA Civ 160, [2012] 2 All ER 1039

<sup>160</sup> [2012] EWHC 34 (QB).

under Chapter 61 of Magna Carta”. The President of the Family Division commented intelligibly on these submissions: “Once again I do not understand these in the context of committal summons.”<sup>161</sup>

Nor indeed do I. The clause Chapter 61 is, described in Arlidge and Judge as “the security clause” enabling the provisions of the Charter<sup>162</sup> to be “guaranteed by the barons choosing 25 of their number with powers of distrain and distress against the Crown, if the King does not observe its terms.”<sup>163</sup> While the authors imaginatively describe the clause as establishing “representative action and majority voting”,<sup>164</sup> the private investigator’s attempt to deploy it as a justification for her violation of a court order trespasses beyond the boundaries of imagination and into the realm of illusion, not least of course because it had been long repealed.

Litigants in person are clearly particularly prone to rely on Magna Carta, or their misunderstanding of it, where all else fails. Mr Rockliff brought proceedings before a tax tribunal<sup>165</sup> complaining that the taxation of his police pension as his sole income and not the joint income of himself and his wife discriminated against him as a married man, indeed against the institution of marriage itself. The Chairman recorded<sup>166</sup> at 22:

The taxpayer also submitted at all three hearings a great deal of non-statutory material, in support of his argument ranging from Magna Carta to statements by Ministers in Parliament and contemporary articles speeches and radio interviews. It is interesting and informative, and doubtless material to the policy decisions of the legislature, but it does not constitute legal authority which the tribunal is entitled to take into account or is bound by, and I will not refer to it further. I repeatedly explained this to the taxpayer, who replied that he wished this material to be “on the record”; it is accordingly retained in the tribunal’s files.

Where, no doubt, if you are interested, it can still be located.

Nor did Mr Davidson fare any better before the VAT and Duties tribunal suggesting that the Revenue and Customs Commissioners had no

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<sup>161</sup> *Doncaster MBC v Watson* [2011] 3 FCR 422 (F) [37].

<sup>162</sup> Arlidge and Judge (n 1) 77.

<sup>163</sup> *Ibid* 6-7.

<sup>164</sup> *Ibid* 78.

<sup>165</sup> *Rockliff v Revenue and Customs Commissioners* [2009] UKFTT 162 (TC).

<sup>166</sup> *Ibid* [22].

## MAGNA CARTA IN THE TWENTIETH AND TWENTY FIRST CENTURIES

right to seize and to refuse to return his illegally imported tobacco without trial and judgment of a court of law as the Charter allegedly required.<sup>167</sup>

Magna Carta has been wheeled out without success in cases for compensation for unfair dismissal<sup>168</sup> to invalidate the compulsory introduction of metric in place of imperial weights<sup>169</sup> to prevent on his own appeal one solicitor from being struck off the roll for fraud<sup>170</sup> or another solicitor from suffering the same fate on the application of a businessman who complained that the solicitor's clients, not the solicitor himself, had given false evidence against him:<sup>171</sup> an application which, had it won the day, would have added fresh terrors to the practice of law.

Magna Carta proved no basis for a challenge to the congestion charge<sup>172</sup> or to regulations altering the criteria for blue badges for disability parking<sup>173</sup> or, on a matter of greater moment, the diminution of national sovereignty involved in the Treaty of Nice and the European Communities Amendment Act.<sup>174</sup>

The striking out of claims for negligence against two major pharmaceutical companies for damage allegedly caused by their anti-depressant pills<sup>175</sup> on the basis that individual plaintiffs at the highest would recover little and the costs of defending the claims would be disproportionate, did not involve a denial of justice; nor did the non-disclosure to a plaintiff in a family dispute of medical evidence which was relied on to justify the official solicitor taking over his threadbare case.<sup>176</sup>

The Court of Appeal declined to decide whether Magna Carta could be relied on as the source of an award of exemplary or punitive damages for wrongful arrest by police officers but displayed no enthusiasm for the

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<sup>167</sup> *Davidson v Revenue and Customs Commissioners* (VAT and Duties Tribunal, 25 July 2008).

<sup>168</sup> *Pearson v Halesowen College* [2004] All ER (D) 389 (Mar) (EAT).

<sup>169</sup> *Thorburn v Sunderland City Council* [2002] EWHC 195 Admin, [2003] QB 151.

<sup>170</sup> *Re Solicitor no 11 of 2001* [2001] EWCA Civ 1538.

<sup>171</sup> *Tassell v President of the Law Society* [2001] EWHC Admin 611.

<sup>172</sup> *R (on the application of George) v the Mayor of London* [2003] EWHC 1257 (Admin).

<sup>173</sup> *Seaton v Secretary of State for Transport* [2015] EWHC 146 (Admin).

<sup>174</sup> *McWhirter v Secretary of State for Foreign and Commonwealth Affairs* [2003] EWCA Civ 384.

<sup>175</sup> *AB v John Wyeth & Brother Ltd (No 5)* [1997] PIQR P385 (CA).

<sup>176</sup> *Cobbett v Cobbett* (CA, 24 March 1993).

proposition;<sup>177</sup> nor did it save a drug trafficker in Singapore from execution.<sup>178</sup>

The House of Lords dismissed claims made for compensation by someone mistakenly certified, in the language of the early twentieth century, as a lunatic.<sup>179</sup> He addressed the House himself. Viscount Haldane, while noting that the Appellant was “obviously of an excitable disposition” said that the question was whether the **defendant** had reasonably thought him to be of unsound mind. Among the items of evidence considered adverse to the appellant was that a medical officer had thought him “to have exaggerated ideas of his own importance”, that he refused to “eat animal food or drink milk”<sup>180</sup> that he “would not do any work but lay in bed till the middle of the day”<sup>181</sup> “worried his mother with questions for hours at a time”<sup>182</sup> and had “pulled down curtains at his father’s house.”<sup>183</sup> There but for the grace of God may some of us go...

Even witnesses can pray Magna Carta in aid though to no greater benefit. In *R v Usman Ali*<sup>184</sup> Mr Khan, victim of an unsuccessful murderous attack, provided the key testimony against those charged as his assailants. Under strenuous cross-examination in which he displayed a penchant for not answering the question but for making statements, for which the Judge properly chided him, he commented “Magna Carta no man shall be denied justice”, adding ominously “if they (presumably the accused) come back on the street you are going to have the biggest war on your hands.”

## MAGNA CARTA’S INFLUENCE

So to the question posed by Adam Tomkins in an article in Public Law “would a court go so far as to invalidate an executive decision solely on the basis that it violated clause 29 of Magna Carta or is Magna Carta now something which is, as a matter of law, capable of carrying only

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<sup>177</sup> *Holden v Chief Constable of Lancashire* [1987] QB 380 (CA) 387H-385A. See counsels argument at 382C-D.

<sup>178</sup> Counsels submission in *Ong Ah Chua v Public Prosecutor* [1981] AC 648 (PC) 653C.

<sup>179</sup> *Everett v Griffiths (No 1)* [1921] 1 AC 631 (HL).

<sup>180</sup> *Ibid* 645.

<sup>181</sup> *Ibid* 647.

<sup>182</sup> *Ibid*.

<sup>183</sup> *Ibid* 648.

<sup>184</sup> [2006] EWCA Crim 161, [2006] Crim LR 776.

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symbolic or rhetorical weight?”<sup>185</sup> I would be compelled to answer it is the latter rather than the former.

My tour d’horizon of the last 115 years, my chosen time frame shows, I must conclude, that, Magna Carta has never been necessary to a judicial decision and that whether it has been sufficient is an all but meaningless question. Lord Bingham in his magisterial statement in the Belmarsh case about the ancestry of the right to liberty in English law started but did not end with Magna Carta. It is hard to imagine that, even without Magna Carta, the same right would not have taken root in later centuries. Indeed the overwhelming majority of the cases exemplify what Magna Carta cannot do rather than what it can, and many constitutional principles of the first water, such as the fact that only primary legislation entitles the state raises taxes, have been decided without reference to it even when it was argued.<sup>186</sup>

There are obvious reasons for this decline in influence.

First Magna Carta has been progressively repealed with, as I said at the outset, only 4 out of 63 clauses still extant.

Secondly even those clauses which have survived cannot stand against later inconsistent legislation; this lecture is littered with examples of which the Chagos case is only the most prominent. As Darling J said “Magna Carta has not remained untouched, and like every other law of England is not condemned to that immunity from development and improvement which was attributed to the laws of the Medes and the Persians.”<sup>187</sup> Or as Lord Atkinson said, concurring in a judgment, that the internment of a naturalized British subject of German birth was validated by DORA in World War 1, DORA “was itself part of the law of the land; if it were otherwise then every statute and every intra vires rule or by law having the force of law creating a new offence for which imprisonment could be inflicted would amount, pro tanto to a repeal of Magna Carta.”<sup>188</sup>

Thirdly the value of its key provisions, Clauses 39 and 40, have been enhanced and updated in later and more focussed legislation.<sup>189</sup>

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<sup>185</sup> ‘Magna Carta, Crown and colonies’ [2001] PL 571.

<sup>186</sup> See *Bowles v Bank of England* [1913] 1 Ch 57 (Ch) 61-2.

<sup>187</sup> *Chester v Bateson* [1920] 1 KB 829 (KB) 832 (a case where under DORA not only was property requisitioned but the owner prevented from challenging its requisition in the Courts: see further *ibid* 839 (Avory J)).

<sup>188</sup> *R v Halliday* [1917] AC. 260 (HL) 272. The exercise of the prerogative to deport an enemy alien was held consistent with Magna Carta in *Netz v Ede* [1946] Ch 224 (Ch) 234 (Wynn Parry J).

<sup>189</sup> See for example *Re C’s Application for Judicial Review* [2012] NIQB 62 (QB Northern Ireland) ‘It has been said from the time of Magna Carta that justice

Fourthly, a point I could not have made on the seven hundredth or even the 750<sup>th</sup> anniversary, we look today to analogous articles of the European Convention on Human Rights, not least Article 5(4) of the ECHR: the prohibition on arbitrary detention and Article 6: the right to a fair trial, which have made reliance on Magna Carta redundant.<sup>190</sup>

In *Oxfordshire CC v DP*,<sup>191</sup> a case about how far the Court could go at an interim stage in proceedings in making findings of fact as to the father's responsibility for injury to his child. Macfarlane J said:

Magna Carta is not habitually quoted in support of legal argument in the Family Division, it is however of interest to be reminded of the terms of its Chapter 29 and to measure them up against the more modern and well known provisions of ECHR, Art 8. There is in my view very little difference between the requirements laid down in these two instruments, despite the passage of over 700 years between the two. That this is so is really of no surprise. Both are fundamental statements of core human rights. For the purposes of the "lawfulness" argument raised in this case, I fully accept that any process upon which this court embarks to find facts in these proceedings must be "by lawful judgment" and "by the law of the land" (per 1215) or "in accordance with the law" (per 1950).<sup>192</sup>

## CONTEMPORARY ISSUES

Current debate about the future of our legal system in the age of austerity focusses on the restrictions on judicial review, the reduction in legal aid and the increase in court fees. The first two could be classified as instances of the denial of justice; the latter as its sale. Yet though all three have been the subject of actual or proposed legal challenges, Magna Carta was not placed in the forefront of the argument.

The first, restriction of judicial review, was considered in a claim brought by several well-known campaigning law firms to regulations for the introduction of a "no permission, no fee" arrangement for making a

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delayed is justice denied. This has perhaps received new vigour from cases under Article 6.'

<sup>190</sup> Although Magna Carta's role as the inspiration of such instruments is itself important.

<sup>191</sup> [2005] EWHC 1593 (Fam), [2005] 2 FLR 1031.

<sup>192</sup> *Ibid* [11].

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legally aided application for judicial review.<sup>193</sup> The issue was whether section 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, an awkwardly double jointed statute, more familiar known, in the modern taste for acronyms as LASPO could be read as, contemplating that where substantial legal services under the scheme established by it are properly provided they will nonetheless have to be provided without payment. The claimants complained of its chilling effect on access to the High Court inasmuch as lawyers might be deterred from taking on clients with meritorious but not straightforward claims because of the threat of no remuneration. The Lord Chancellor retorted that the providers of legal services should bear the risk of determining whether cases to be advanced by those clients qualified for legal aid on a proper interpretation of the relevant criteria. The Divisional Court upheld the challenge insofar as the scope of the impugned regulation “extends beyond the circumstances which can be seen as rationally connected to the purpose given for its introduction.”<sup>194</sup> So the outcome turned on construction of a twenty first not of a thirteen century statute

The second, the restriction of legal aid has prompted the judiciary on several occasions to suggest<sup>195</sup> that it is a false economy leading to additional expense for the Courts. In a recent divorce case an unrepresented husband sought an order for disclosure of documents against the police, a non-party, a procedural issue described by Lord Justice Aikens as “technical and unusual”.

In the course of his ruling he added:

Yet again the Courts have been without any legal assistance and had had to spend time researching the law for itself, then attempting to apply it to the relevant facts in order to arrive at the correct legal answer. To do the latter exercise meant that the Court itself had to trawl through a large amount of documents in the file. All that involved an expensive use of judicial time which was in short supply already. Money might have been saved from the legal aid funds but an equal amount of expense, if not more, had been incurred in terms of the costs of judges and courts time. The result was that there had been in fact no economy at all. Worse, that way

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<sup>193</sup> *R (on the application of Ben Hoare Bell Solicitors and others) v Lord Chancellor* [2015] EWHC 523 (Admin), [2015] All ER (D) 19 (Mar).

<sup>194</sup> *Ibid* [72].

<sup>195</sup> See cases cited in Michael J B Beloff QC, ‘Virtuous Values - the Advocates Contribution to the Rule of Law (McDermott Lecture Queens University Belfast 2014).

of dealing with the cases ran the risk that a correct result would not be reached because the court had not the legal assistance of counsel that it should have had and the court had no other legal assistance available to it.<sup>196</sup>

But he entirely, maybe prudently, refrained from seeking to engage Magna Carta in a judgment whose intended audience was clearly the Ministry of Justice.

The third, higher court fees, had a more promising prologue. At the three day legal summit in London celebrating the sealing of Magna Carta, with an acute eye for public relations, legal bodies including the Law Society and the Bar Council issued a pre action protocol letter putting the Lord Chancellor on notice of yet another judicial review. In that letter, a required first step for the issue of legal proceedings, the Law Society said that the proposals were tantamount to “selling justice” and so contrary to the principles of Magna Carta. The President of that body expatiated on that proposition in a public statement saying “The policy on enhanced court fees amount to a flat tax on those seeking justice” they “will price the public out of the Courts and keep small business saddled with debts they are due but unable to recover. State provision for people to redress wrongs through the Courts is the hallmark of a civilized society”. To which the Ministry of Justice responded by saying that it is not litigants but that a segment of our community so much beloved of politicians<sup>197</sup> “the hard working taxpayers” who had up to now had to pick up some of the bill.

This clash of ideologies will not, however fall to be resolved in the Courts after all. Judicial review is of course a discretionary remedy. But in this instance discretion proved the better part of valour. Despite the indicative precedent of *R v Lord Chancellor ex p Witham*<sup>198</sup> where an order repealing provisions which gave poor litigants exemption from a reduction in court fees was held unconstitutional as a denial of access to the Court, and apparently on the advice of leading Counsel, the Law Society announced on 8<sup>th</sup> April 2015 “that it did not intend to pursue the litigation route.”<sup>199</sup> This did not, however mean their spokesman said, “that we are giving up. Far from it, our relentless lobbying has led the Labour and the Liberal Democrats stating that they will review the court

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<sup>196</sup> *Lindner v Rawlins* [2015] EWCA Civ 61, *The Times*, 7 April 2015.

<sup>197</sup> Frances Gibb, *The Times* (March 2015).

<sup>198</sup> [1998] QB 575 (QB).

<sup>199</sup> *Law Society Gazette* (8 April 2015).

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fee increase if they are part of a new government.” “If” may be the operative word.<sup>200</sup>

So I would not seek to dispute the proposition that Magna Carta's significance is as mythic document rather than as a legal text. Nonetheless the text is not trivial. A submission made by David, (now) Lord Pannick QC, in the Chagos islands litigation that it was “not an act of parliament<sup>201</sup> but some unspecified category of subordinate law”,<sup>202</sup> was withdrawn by him after, if not merely as a result of, an expression of judicial dismay by Laws LJ.

Indeed rather than being classified as less than law, there is high authority that it is a category of superior law. In litigation in the Supreme Court over the paving legislation for HS2<sup>203</sup> Lord Neuberger and Mance jointly stated “The United Kingdom has no written constitution but we have a number of constitutional instruments. They include Magna Carta.”<sup>204</sup> Theirs is merely one of many statements to the same effect, some of which I have already quoted.<sup>205</sup>

I stress, however, that one should not be beguiled by such encomia into classifying Magna Carta as a constitution in the sense that we usually ascribe to that concept: that is to say, a superior legal norm against which even legislation, enacted by a democratic legislature, fails to be tested and, if found wanting, to be invalidated, of which the Constitution of the USA is the best known, but by no means the only example.

It does not even enjoy the level of potency of the Human Rights Act which entitles the judges, where legislation offends against its provisions, to make a declaration of incompatibility,<sup>206</sup> requiring in fact if not in form the enactment of amending legislation to ensure such compliance. At its highest it supplies presumptions that liberty or property is not to be

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<sup>200</sup> And so indeed it proved to be. Both parties have been since the General Election in opposition.

<sup>201</sup> *R (on the application of Bancoult)* (n 131) 1073 F-G.

<sup>202</sup> *Ibid* [32] (Laws LJ) for the interpretation of his submissions. See too *A-G's Ref (No 1 of 1990)* (n 158) where Lord Lane himself described it as a statute.

<sup>203</sup> *R (on the application of Buckinghamshire CC) v Secretary of State for Transport* [2014] UKSC 3, [2014] 1 WLR 324, 207.

<sup>204</sup> *Ibid* [207].

<sup>205</sup> See too *In Re S-C* (n 113) 534 (Bingham MR):

‘As we are all well aware, no adult citizen of the United Kingdom is liable to be confined in any institution against his will, save by the authority of law. This is a fundamental constitutional principle, traceable back to chapter 29 of Magna Carta 1297...’

<sup>206</sup> Human Rights Act 1998, s 4.

interfered with other than by clear colour of law<sup>207</sup> and is immune itself to implied repeal by later legislation.<sup>208</sup>

### MAGNA CARTA - MYTH?

So myth it chiefly is, but I stress too that myth can sometimes be as potent as reality in shaping history. Lord Sumption puts the proposition pithily “Some legislation has a symbolic significance quite distinct from any principles it actually articulates.”

It is often the interpretation given to words rather than their literal meaning which can be decisive in shaping human action; in our times the diverse treatment of the Koran perfectly illustrates the point.

As Laws LJ said in the Chagos islander’s case “Magna Carta is in truth the first genuine declaration in the long history of our constitutional jurisprudence of the principle of the rule of law that describes the enduring significance of Magna Carta today.”<sup>209</sup>

If it has survived Cromwell’s vulgar pun – he called it Magna Farta – it can surely survive Dr Starkey’s observation that it contained “a lot of guff.”<sup>210</sup> Magna Carta was as important for what it was as for what it said. The barons may not have been fully fledged democrats, but they did corral the King.

We should not mourn that it has survived only in an abbreviated form and with diminishing impact on the development of our jurisprudence. We should marvel that, eight centuries on, it has survived at all. Let me leave the penultimate word with Lord Judge and Mr Arlidge:

The perception of what the charter stood for became as important as the actual language of the original clauses. In this country we now take for granted that laws should not be handed down by government diktat and that the community should be involved in its creation; that those in authority are subject to the rule of law

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<sup>207</sup> See *Jaroo v A-G of Trinidad and Tobago* [2002] UKPC 5, [2002] 1 A.C. 871 [24] on its inspiration for the phrase ‘due process of law’.

<sup>208</sup> *Thorburn* (n 170) [62] (Laws LJ).

<sup>209</sup> *R (on the application of Bancoult)* (n 131) [36].

<sup>210</sup> Made at White and Cases celebration at the British Library to mark the Anglo-American firms sponsorship of the US loans of its Declaration of Independence and Bill of Rights. See Edward Fennell, ‘Law Diary’ *The Times* (2015) <<http://www.thetimes.co.uk/tto/law/article4365364.ece>> accessed 21 August 2015.

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and that the rights of the citizen should be protected by the efficient administration of justice.<sup>211</sup>

Or as I would put it in a single sentence: it is because of Magna Carta that we can truthfully say that in our society the immortal principle is that “no one – the king or lawmaker is above the law”,<sup>212</sup> that we are governed by laws and not by men.

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<sup>211</sup> Arlidge and Judge (n 1) 2-3

<sup>212</sup> Halsbury’s Laws (5th edn, 2010) vol 88A, para 1