

Magna Carta: Did she die in vain?

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My title comes from a famous clip from 'Hancock's Half Hour', first broadcast on 16 October 1959, where Tony Hancock mimics the role of Henry Fonda in 'Twelve Angry Men', trying to persuade a jury to his point of view. 'Does Magna Carta mean nothing to you?', he asks. 'Did she die in vain?' But he seems to have had just as many misconceptions about Magna Carta as the authors of *1066 and All That*, and probably most of the rest of us, at least until we began to research it for the purpose of this 800th anniversary. For he went on: 'that brave Hungarian peasant girl who forced King John to sign the pledge at Runnymede and close the boozers at half past ten'. If that were indeed what the King had agreed to, she would certainly have died in vain, now that the boozers can stay open much later but many are closing because alcohol is so cheaply available in retail outlets that people do not feel the need to go out to drink.

This lecture series has certainly helped us to understand more about what Magna Carta really meant. Lord Judge opened the series with a rattling good yarn about how it came about, how it was annulled, how it was reissued by King John's successor, and several times later, how it survived and was revived in later centuries on both sides of the Atlantic.¹ Lord Neuberger compared it to the near- contemporary idea of the Holy Grail, because it later achieved similar mythical status.² Sir John Baker will be exploring the Templar connection between 1215 and 1628.³ What I want to do is to explore its contemporary relevance. Judicial decorum dictates that

¹ Lord Judge, 'Magna Carta, Luck or Judgment?' Middle Temple, 19 February 2015.

² Lord Neuberger, 'Magna Carta and the Holy Grail', Lincoln's Inn, 12 May 2015.

³ Sir John Baker, 'Magna Carta and the Templars 1215 – 1628', Inner Temple, 23 November 2015.

I should do so without entering into party political controversy. But perhaps I can approach that delicate task through three other anniversaries which are celebrated this year.

Although some historians tend to be dismissive of the importance of Magna Carta, we lawyers can trace at least three great ideas back to the original, the Magna Carta of 1215.

The first and greatest idea stems from chapters 39 and 40 of the original Charter, combined as chapter 29 in the 1216 and all later versions. It seems appropriate to quote from the 1297 Charter,⁴ in the wording which still appears on the statute book today:

‘No free man⁵ shall be taken or imprisoned, or be disseised of his freehold or liberties or free customs, or be outlawed or exiled or in any other wise destroyed; nor will we not pass upon him, nor condemn him,⁶ but by the lawful judgment of his peers or by the law of the land. We will sell to no man, we will not deny or defer to any man right or justice.’

As Lord Bingham has said, those words still ‘have the power to make the blood race’.⁷ They embody the individual’s right to life, liberty and property, not to be arbitrarily infringed by the rulers, but only in accordance with the law.

The second great idea came from chapter 12:⁸

⁴ 25 Edw 1, ch 9.

⁵ Professor John Hudson, St Andrews University, points out that the Latin ‘homo’ could include a woman as well as a man and that this chapter would certainly have been perceived to protect female as well as male landholders.

⁶ *Statutes of the Realm* note a variant, ‘deal with him’.

⁷ T Bingham, *Lives of the Law* (Oxford, 2010), p 4.

⁸ The translation is that by H Summerson et al, used in the beautiful modern exemplification of Magna Carta which is now in the exhibition space at the Supreme Court of the United Kingdom.

‘No scutage or aid is to be imposed in Our Kingdom except by the Common Counsel of Our Kingdom unless for the ransoming of Our person and knighting of Our first-born son and for marrying once Our first-born daughter and for these only a reasonable aid is to be taken.’

This was followed up by chapter 14, another of my favourites:

‘And in order to have the Common Counsel of the kingdom for the levying of an aid . . . or for the levying of scutage We are to cause the Archbishops Bishops Abbots Earls and Greater Barons to be summoned individually by Our letters and moreover We are to have a general summons made through Our Sheriffs and Bailiffs of all who hold in chief of Us for a fixed day at least forty days thence and at a fixed place . . .’

My own blood raced shortly after the last Parliament was dissolved, when I received just such a summons, giving me exactly 40 days’ notice of ‘a certain Parliament to be holden at Our City of Westminster’.

Sadly, chapters 12 and 14 did not survive into the 1216 and later reissues. They were not denied, but being deemed ‘important but doubtful’, they were ‘deferred until we have fuller counsel, when we will, most fully in these as well as other matters that have to be amended, do what is for the common good and peace and estate of ourselves and our kingdom’.⁹ They never reappeared. The third great idea, which permeates the whole Charter, is that the King and his officials are as much subject to the laws of the land as are his subjects. The rule of law is not one-way traffic:

⁹ 1216 Charter, chapter 40.

not only do the governed have to obey the law, but so do the governors. This was reinforced by my own favourite chapter in the 1215 Charter, chapter 42, also sadly omitted from the later reissues:

‘We will not appoint Justices Constables Sheriffs or Bailiffs except from such as know the law of the Kingdom and are willing to keep it well.’

The closing words of what is now chapter 29 also embody the individual’s right to access to justice, before an incorruptible decision-maker who will judge according to law and not by the size of the bribe, which is the first requirement of any ‘impartial tribunal’.

Further, by chapter 60 of the original Charter:

‘Moreover all the aforesaid customs and liberties which We have granted to be maintained in Our kingdom as far as We are concerned with regard to Our own men all the men of Our Kingdom both Clergy and Laity are also to observe so far as they are concerned with them with regard to their own men.’

The promises made by the king to the barons were to be cascaded down through the feudal ranks.

These are the three great pillars of modern constitutionalism – the liberties of the individual, the consent of the people to taxation and other burdens, and the rule of law - but they all beg the question: what is the law and who makes it? The answer was certainly not clear in 1215 and took many centuries to establish. But where stand those three great ideas today?

As to the first, I do not propose to discuss where we are with the substance of each of the rights enumerated in what became chapter 29, rather to ask where we are with the idea of such rights. And where better to look than another important anniversary which we celebrate this year, the 250th anniversary of the great case of *Entick v Carrington*?¹⁰ Contrary to popular belief, this was not a case about general warrants, but it established some important principles which are with us to this day. And as are we today, it was concerned with the delicate balance between the needs of effective government and the freedom of individuals to oppose such government. Oliver Cromwell had little doubt about which should prevail, allegedly saying that “your magna carta cannot control actions taken for the safety of the Commonwealth”.¹¹ He was not alone. The power of the Secretaries of State, the King’s principal ministers, to issue warrants without any judicial authority to apprehend, detain and question people suspected of treason or even seditious libel was recognised in the case law of the King’s Bench.¹²

The chain of events which culminated in *Entick v Carrington*¹³ began with a series of cases prompted by issue No 45 of *The North Briton*, a weekly news sheet which was highly critical of the King and his government. The anonymous author, John Wilkes MP, countered the plea in the King’s speech to Parliament for ‘that spirit of concord, and that obedience to the laws, which is essential to good order’, with the retort that the ‘spirit of concord’ was not to be expected of people who were being made subject to arbitrary searches and seizures, rather the ‘spirit of liberty’ should rise up in proportion to the grievance they felt – ‘freedom is the English subject’s Prerogative’.

¹⁰ (1765) 2 Wilson KB 275, 95 ER 807; 19 Howell’s State Trials 1029.

¹¹ According to Clarendon, *History of the Rebellion*: see Arlidge and Judge, *op cit*, p 143.

¹² *R v Kendal and Row* (1700) 1 Ld Raym 65, 91 ER 304; *R v Derby* (1711) Fort 140, 92 ER 794; *R v Earbury* (1733) 2 Barn KB 293, 94 ER 509; 2 Barn KB 346, 94 ER 544.

¹³ I am grateful for and heavily reliant on the researches of Tom Hickman, ‘Revisiting *Entick v Carrington*: Seditious Libel and State Security Laws in Eighteenth-Century England’, in A Tomkins and C Scott, *Entick v Carrington – 250 Years of the Rule of Law* (Hart, 2015).

Lord Halifax, Secretary of State, issued a general warrant, authorising the King's Messengers to search for the unnamed authors, printers and publishers of *The North Briton* and to seize them and their papers. Wilkes and a number of printers and apprentices were rounded up under the warrant, eventually achieved their release and brought actions for false imprisonment and trespass. Wilkes, of course, was a prominent politician but the others were ordinary folk who had never brought such actions before. The juries found for the plaintiffs and awarded them large sums in damages. In none of these cases was the issue of the legality of such warrants clearly raised and decided, although both Chief Justice Pratt, of the Court of Common Pleas, and Lord Mansfield, Chief Justice of the Court of King's Bench, expressed the view that they were not. Indeed, Pratt CJ, in declining to interfere with the jury's awards, observed that the jury had been struck by the Secretary of State 'exercising arbitrary power, violating Magna Carta, and attempting to destroy the liberty of the kingdom'.¹⁴ The result was that it became unsafe to rely on general warrants and no more were issued.

Matters did come to head with *Entick v Carrington*. Halifax had issued a specific warrant, authorising Carrington and three other King's messengers to search for the plaintiff, to seize and apprehend him, and bring him together with his books and papers, before the Secretary of State to be examined concerning his authorship of *The Monitor*, another weekly news-sheet, which was said to contain 'gross and scandalous reflections and invectives upon His Majesty's government and upon both Houses of Parliament'. The jury found that the messengers had broken and entered the plaintiff's house, had stayed there for four hours, all the time disturbing him in his possession thereof, had searched several rooms, and in one bureau or writing desk, and several drawers, had read over and examined several of his papers, and seized and taken away some of his books and papers. They had also seized and taken away the plaintiff, who had then been

¹⁴ *Addenda to the cases concerning Mr Wilkes*, 19 Howell's State Trials 1381, at 1405.

released on bail, and was released from his recognisances a few months later. This was all part of the government strategy. They did not generally plan to prosecute for sedition, merely to harass and disrupt publication. Cleverly, Entick's claim was not for false imprisonment, but for trespass to land and goods. The jury returned a special verdict, setting out the facts and asking whether the search and seizure in pursuance of the warrant were lawful; if not, they awarded £300 in damages. This time, the issue of the legality could not be avoided. Lord Camden, as Pratt CJ had become, presiding over the full Court of Common Pleas, was determined to decide it. The court found for the plaintiff.

As to the claim that such warrants had been in use, at least since the Glorious Revolution,

‘[T]he usage of these warrants since the Revolution, if it began then, is too modern to be law; the common law did not begin with the Revolution; the ancient constitution which had been almost overthrown and destroyed was then repaired and revived; the Revolution added a new buttress to the ancient venerable edifice.’

As to the lack of challenge hitherto:

‘It must have been the guilt or poverty of those upon whom such warrants have been executed, that deterred or hindered them from contending against the power of a Secretary of State and the Solicitor of the Treasury, or such warrants could never have passed for lawful till this time.’

The court had to accept that there were binding precedents recognising the power of the Secretary of State to issue warrants of arrest and committal, not only for high treason, but also for seditious libel. Departing from them would be more damaging to the law than following

them, even though the court disapproved of them as contrary to history. But it refused to go further and allow for searches and seizures. The evidence given in all the earlier cases which Pratt CJ had tried had shown how these could be used in an arbitrary and speculative manner:

‘If this is law it would be found in our books, but no such law ever existed in this country; our law holds the property of every man so sacred that no man can set his foot upon his neighbour’s close without his leave; . . . if there was [such a law] it would destroy all the comforts of society; for papers are often the dearest property a man can have.’

Once again, the appeal is to history, to the venerable edifice of the common law. Not only that, although the action was for interference with property, the real gravamen was seen as the interference with privacy. This is a clear foretaste, not only of article 4 of the American Bill of Rights, but also of the ‘right to respect for his private and family life, his home and his correspondence’, now protected by article 8 of the European Convention.

The court also held that where torts had been committed, there was no defence of state necessity. There could be limits placed on liberty, for it must not become licentiousness, but if Parliament wanted to permit the seizure of seditious libels before they were published, it would have to legislate to do so. Furthermore, if Parliament wanted to authorise state officials to commit torts, it would have to do so in clear terms. This too is a clear forerunner of what we now call the principle of legality – that if Parliament wishes to legislate to interfere with fundamental rights, it must make itself crystal clear, so that Parliamentarians understand what they are voting for and are prepared to take the political risk in doing so.¹⁵

¹⁵ *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 539.

An example is the very first case to be heard in the Supreme Court of the United Kingdom, *Abmed v Her Majesty's Treasury*,¹⁶ where we held that the very generally worded power in the United Nations Act 1946, to make Orders in Council in order to comply with our obligations under the United Nations Charter, did not entitle the government to over-ride fundamental rights and thus to make provision for freezing the assets of suspected terrorists without due process of law.

Entick v Carrington, as it seems to me, provides the link between the first great idea in Magna Carta and the present day. There is the appeal to the 'ancient constitution', the common law which would be found in the 'books' if it existed. There is the recognition that governmental power must not only be exercised in accordance with the law, but that the object of the law is to avoid the arbitrary and capricious use of power, and that there must be proper judicial safeguards for that purpose. All of these principles are with us to this day. They are enshrined in the European Convention on Human Rights and explain why so many of its guarantees are as much concerned with process as they are with outcomes.¹⁷ But we should not forget that these principles are also enshrined in the common law.

That brings me to the second great idea which we can trace back to Magna Carta. In what became chapter 29 the King promised not to violate the rights of free men except by the lawful judgment of his peers or the law of the land. But what was the law of the land? At that stage, it could only have been ancient custom and practice, which developed into the common law, and perhaps the decrees of the King. It is interesting to compare the two great medieval treatises on *The Laws and Customs of England*. Glanvill, writing in about 1190, before Magna Carta, included

¹⁶ [2010] UKSC 2 and 5, [2010] 2 AC 534.

¹⁷ An example is *HL v United Kingdom* (2005) 40 EHRR 32, concerning the need for procedural safeguards for mentally incapacitated people effectively detained in hospital.

the statement that ‘what please the Prince has force of law’; but Bracton, writing in about 1230, left this out, saying that ‘whatever has been rightly decided and approved with counsel and consent of the magnates and general agreement of the community, with the authority of the king or prince first added hereto, has the force of law’. As he explained, ‘the King ought not to be subject to man, but subject to God and the Law’.

In the original Magna Carta, the King had also promised not to levy taxes without consent, save in a very limited number of customary circumstances. The body which was there contemplated as giving that consent was the Great Council of the realm, summoned in accordance with Chapter 14, a clear forerunner of today’s House of Lords. The earliest use of the word ‘Parliament’ to refer to the Great Council was in 1236. But another anniversary which we are celebrating this year is the 750th anniversary of Simon de Montfort’s second Parliament in 1265. Parliament is holding a Festival of Freedoms to commemorate what is often thought of as the first real Parliament. The practice of summoning two ‘knights of the shires’ from each county in England had already begun. De Montfort added to this by summoning two burgesses from the boroughs. This became the invariable practice from 1327. Thus the House of Commons took the shape which it retained until the great Reform Act of 1832 took the first faltering steps towards universal suffrage, a process which was only completed in 1928, when we became a real democracy.

No doubt many Kings would have done without Parliament if they could. But the reality was that they needed Parliament’s consent if they were to be able to raise the taxes they needed to wage their wars. Not only that, by the mid 15th century, Sir John Fortescue, Chief Justice of the King’s Bench, in his treatise *In Praise of the Laws of England*, could say that ‘The King of England cannot alter nor change the laws of his realm at his pleasure. . . . he can neither change Lawes

without the consent of his subjects, nor yet charge them with strange impositions against their wils’.

Of course, it took the upheavals of the 17th century, culminating in the Glorious Revolution of 1688, for it to be finally established that ‘levying money for or to the use of the Crown by pretence of prerogative without grant of Parliament . . . is illegal’.¹⁸ Just as it takes clear words to empower the executive to interfere with fundamental rights, it takes clear words to empower the executive to levy charges. As every Law student knows, a power to regulate the sale of milk by issuing licences to buy it does not include a power to charge the purchaser 2d a gallon for the privilege.¹⁹

Indeed, levying taxes and authorising the government to spend the proceeds is the one area of control of the economy over which Parliament does have some oversight. As Tony Prosser has shown, there are many other ways in which the economy is regulated these days, through the money supply, interest rates, various regulatory bodies, government procurement, and so on, over which Parliament has little or no control.²⁰ Indeed, it may be that in today’s world, Parliamentary control of taxation and expenditure is less than wholly effective. But at least the principle first established in Magna Carta is maintained.

The Glorious Revolution also finally established that the King could not suspend or dispense with the law, and that only the King in Parliament could make new laws. That does, of course, mean that Parliament can take away our rights, or limit our freedoms, as the court acknowledged in *Entick v Carrington*. A striking example is the Security Service Act 1996, which gave the Security

¹⁸ Bill of Rights 1689, article 4.

¹⁹ *Attorney General v Wilts United Dairies Ltd* (1922) 38 TLR 781.

²⁰ Tony Prosser, *The Economic Constitution* (2014).

Service the new function of supporting the police in the prevention and detection of crime.²¹

The Secretary of State was thus empowered to grant warrants, on the application of the Security Service, authorising them to enter private property, to interfere with it, and to bug it, in pursuit of this new function, all without judicial control. Hence the Security Service, acting in a policing role, has greater powers than the police do. This was in the days when Law Lords were Members of the House of Lords and entitled to take part in its Parliamentary business. Lord Browne-Wilkinson was scathing:

‘What has never happened in police matters hitherto, since *Entick v Carrington*, is proposed in this Bill almost by accident; that is to say, an executive warrant enabling entry into English property; the burgling and bugging of it, under executive warrant, which is the very thing which has been fought by the law and all interested in liberty, for many hundreds of years.’²²

That is why, in most other countries in the world, there is a superior law, a Constitution or a Bill or Charter of Rights, which limits the powers of the legislature to pass laws which infringe such fundamental rights. Indeed, at the Commonwealth Magistrates and Judges conference recently, after I had explained that the Human Rights Act did not allow the courts to strike down Acts of Parliament which were incompatible with fundamental rights, a delegate clearly could not understand how Parliament could be permitted to pass an Act which was unconstitutional. But that has always been the position and I doubt very much whether most of us, brought up on the doctrine that ‘Parliament can make or unmake any law’, would want it any different.

²¹ See M Hunt and P Duffy, ‘Goodbye *Entick v Carrington*: the Security Service Act 1996’ [1997] EHRLR 11.
²² 573 *Hansard (HL)* col 1043, 27 June 1996.

However, we are beginning to recognise that not all Acts of Parliament are equal. Some of them may have a special constitutional status, which means that they cannot be impliedly repealed or amended by a later Act of Parliament. Once again, clear words would be needed to bring about such a constitutional change. Thus, in the ‘Metric Martyrs’ case, section 1 of the Weights and Measures Act 1985, an ordinary Act of Parliament, which permitted the continued use of imperial weights and measures, could not be taken to have impliedly repealed section 2(2) of the European Communities Act 1972, which recognised the supremacy of community law by empowering the use of subordinate legislation to comply with a European Directive requiring the primary use of metric measures.²³ Among the ‘constitutional’ statutes listed was Magna Carta.²⁴ On the other hand, the European Communities Act could not be taken to have authorised the courts to disobey article 9 of the Bill of Rights, that ‘freedom of speech and debate or proceedings in Parliament ought not to be impeached or called in question in any court or place out of Parliament’, so as to permit the court to investigate whether the Parliamentary scrutiny to be given to the bills authorising HS2 was sufficient to comply with the Environmental Impact Directive.²⁵ In both of those cases, Magna Carta was, of course, listed among the examples of such constitutional statutes. The reverse, however, is not so far the case: there is no such thing as an unconstitutional statute.

The sovereignty of Parliament should, of course, place a heavy burden on Parliament to legislate with great care when fundamental rights are at stake. In this country, we can place some reliance on what Dominic Grieve²⁶ has called

²³ *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] QB 151.

²⁴ It is difficult to extract a right to use imperial measures from chapter 35, now repealed, which merely provides that the same weights and measures shall be used throughout the Kingdom.

²⁵ *R (Buckinghamshire County Council) v Secretary of State for Transport* [2014] UKSC 3, [2014] 1 WLR 324.

²⁶ ‘Why Human Rights should matter to Conservatives’, lecture at University College London, 3 December 2014.

‘an entirely distinctive national narrative, embodying the Common Law; its confirmation through Magna Carta and its numerous reissues in the Middle Ages, the outcome of the conflict of authority between King and Parliament in the 17th century, in the Petition of Right, the abolition of the Star Chamber and the prohibition of torture; habeas corpus and the Bill of Rights of 1689, Lord Mansfield’s ruling on slavery in Somerset’s case and the Commentaries of William Blackstone.’

He goes on to suggest that

‘This national narrative has been so powerful that it has acted as an almost mythic restraint on successive British governments trying to curb freedoms when tempted to do so by threats to public order or national security . . . ’

This brings me to the third great idea which we can trace back before Magna Carta, the idea which we now call the rule of law. In fact, as Lord Bingham has shown,²⁷ that embraces several ideas. But its essence lies in two principles. The first is that everyone is subject to the law, the governors as well as the governed. Then, the King and his officers had to act within the limits of what the law allowed. Now, the government and all other public bodies have to act within the limits of what the law allows. It is the job of the higher courts to ensure that they do.

For most of the time, this means that the court is acting as the servant of Parliament. Most public bodies, being creatures of statute, derive their powers from Acts of Parliament or subordinate legislation. The role of the court is, not to exercise those powers for them, but to

²⁷ T Bingham, *The Rule of Law*, 2011, Penguin Books.

ensure that they are exercised in accordance with the law, not outside the limits of what their powers allow, in a fair and proper manner and not without reason. Sometimes, of course, the executive's power derives from other sources, most notably the royal prerogative. But since Magna Carta there have been limits to the royal prerogative and it is now the role of the higher courts to ensure that government stays within those limits.

In this connection, I cannot resist mentioning the case of the Chagos islanders, because it is a case in which Magna Carta itself might have made a difference.²⁸ When, in the 1960s, the British decided to lease Diego Garcia, the largest island in the Chagos archipelago, to the United States as a military base, it was also decided to remove all the islanders. This was done with a 'callous disregard' for the islanders' interests.²⁹ A new colony was created and its Commissioner given power to make laws for the 'peace, order and good government' of the colony. This was done under the royal prerogative to legislate for the colonies by Order in Council without Parliamentary approval. The Commissioner used his power to ban anyone from entering or remaining on the islands without permission. Years later, in 2001, Mr Bancoult successfully challenged the Commissioner's Order as outside his legislative powers.³⁰ At first, the government accepted this.

But in 2004, for reasons that are still obscure and controversial, they changed their minds and decided to reinstate the ban. This time they did it, not by giving legislative power to the Commissioner, but by enacting a new Constitution by Order in Council which itself prohibited entry except in accordance with a new Immigration Order. Mr Bancoult brought a second set of proceedings to quash the new Orders. He succeeded in the High Court and Court of Appeal, but failed in the House of Lords, by a majority of three to two.

²⁸ R (*Bancoult*) v *Secretary of State for Foreign and Commonwealth Affairs* (No 2) [2008] UKHL 61, [2009] 1 AC 453.

²⁹ Lord Hoffmann at para 10.

³⁰ R (*Bancoult*) v *Secretary of State for Foreign and Commonwealth Affairs* [2001] QB 1067.

Among the many arguments deployed on behalf of the islanders was one based on chapter 29 of Magna Carta: ‘No freeman shall be . . . exiled . . . but by the lawful judgment of his peers or by the law of the land’. It was accepted that Parliament might pass a law exiling a person from his homeland, but it was argued that an Order in Council in the exercise of the royal prerogative could not do so. Three of the Law Lords disposed of this argument by holding that the Orders were ‘the law of the land’ for the purpose of chapter 29. Two of the Law Lords held that there had never been a prerogative power to exile a population from its homeland. Magna Carta, and the later development of its principles by Blackstone and Lord Mansfield, lay at the heart of their reasoning.

But there is another aspect to the rule of law, which can also be derived from Magna Carta’s most famous guarantee: ‘we will sell to no man, we will not deny or defer to any man right or justice’. In modern terms, everyone has the right to access to justice: access to justice to defend themselves against the accusation that they have committed a criminal offence or should be subjected to some other form of penalty; access to justice to defend themselves against a civil claim; access to justice to assert a civil claim or to vindicate a right. It is a core function of the modern state to provide such access. Indeed, it has been argued that access to justice is even more important than access to other public services:³¹

‘Just as the modern State tries to protect the poorer classes against the common dangers of life, such as unemployment, disease, old age, social oppression, etc, so it should protect them when legal difficulties arise. Indeed the case for such protection is stronger than the case for any other form of protection. The State is

³¹ EJ Cohn, ‘Legal Aid for the Poor: A Study in Comparative Law and Legal Reform’ (1943) 59 *Law Quarterly Review* 250, at 253.

not responsible for the outbreak of epidemics, for old age or economic crises.

But the State is responsible for the law.'

Those words were written in the context of access to lawyers but access to justice is even more fundamental than that.

In a speech to the Commonwealth Magistrates and Judges' Association, the Lord Chief Justice has recently commented that government and Parliament may not fully understand how important access to justice is to the maintenance of the rule of law. It is therefore the role of leadership judges to engage with them both, and with the public, to try and explain. So here is my simple attempt to do so.

The importance of affording a fair trial to persons accused of crime is not always obvious. All too often, our trial processes seem to the great British public to result in the acquittal of the guilty. We do, of course, have an obligation to make such processes fair to the alleged victims as well as to the alleged perpetrators. But, as it seems to me, a large part of the importance of a fair criminal process is to reassure the law-abiding: if we obey the law, we shall not be punished. If there is a risk of arbitrary and unjust punishment, what incentive is there to obey the law? In this connection, therefore, it is important to scrutinise any incentive to persons accused of crime to admit their guilt to police officers, or to plead guilty in court, in order to ensure that they do not place improper or unfair pressure on the innocent. An example is the recently introduced criminal court charge, levied on those who are convicted after having pleaded not guilty. I make no comment on whether this is, or is not, improper or unfair. My point is only that such pressures to plead guilty have always been rightly treated with suspicion in our common law world.

The importance of ensuring that people who have civil claims can also have access to justice to enforce or vindicate them is also not always obvious. Sometimes we in the justice system have only ourselves to blame. In my own world of family law, we have been so keen to encourage separating parents or spouses to settle things between themselves, that we may have neglected those who cannot, or cannot reasonably be expected to, do so. It is all very well to promote family mediation (as President of National Family Mediation I am naturally a supporter). Fighting in court is financially and emotionally exhausting and unlikely to promote the constructive relationships which are vital to successful parenting in future. But mediation can only work fairly and properly if it is backed up by the knowledge on both sides that a fair and just system of adjudication will be available if it fails. Otherwise the bully will always win.

Where the family justice system led, the civil justice system soon followed. Fighting in court is to be avoided if at all possible. Alternative dispute resolution processes are to be encouraged. Once again, however, these can only work fairly and properly if they are backed up by the knowledge on both sides that a system of adjudication will be available if they fail. Not only that, people and businesses need to know, on the one hand, that they will be able to enforce their debts and their civil claims if they have to do so, and, on the other hand, that if they fail to meet their obligations, there is likely to be a remedy against them. It is that knowledge which keeps the world of business and commerce going. It is that knowledge which makes every-day economic and social relations possible. Once again, therefore, steps which look as if they may impede such access have to be scrutinised with care.

For example, we can argue about whether or not it should be unlawful to sack a woman just because she is pregnant. But for as long as we have such a law, she has to have a realistic possibility of bringing a claim if the law is broken. It cannot be right effectively to subvert such a law by making it practically impossible to assert the rights which it gives her. Once again, I make

no comment on whether the levels at which court and tribunal fees are now set is an unfair deterrent to those who quite properly seek access to justice to vindicate their claims. The point is that, if Magna Carta is to mean anything today, right or justice must not be unfairly denied to anyone.

I cannot resist adding that, as well as being the 800th anniversary of Magna Carta, the 250th anniversary of *Entick v Carrington*, and the 750th anniversary of the de Montfort Parliament, this is also the 15th anniversary of the coming into force of the Human Rights Act, which has reinforced the great ideas of Magna Carta in many ways, and we all hope and expect that those great ideas will be at the forefront of any proposals for reform. So, I ask again, did that brave Hungarian peasant girl die in vain? I think not. The pledges which she made King John ‘sign’³² remain the basic principles of our Constitution today. But we all have to be alert to maintain those principles in the face of the very different risks and complexities of the modern world.

³² Although of course he did not sign anything – he sealed it.