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RUNNYMEDE TRUST CONFERENCE

WHAT MAGNA CARTA AND THE RACE RELATIONS ACT MEAN TO US TODAY

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1. I am honoured to have been invited to address you today. The Runnymede Trust is the leading organisation in this country dedicated to the promotion of racial equality. When it was founded in 1968 by Jim Rose and Anthony Lester it took its name from the meadow by the Thames where the first Magna Carta was sealed in 1215. I am particularly pleased that, among the understandable and widespread commemorations of the 800th anniversary of Magna Carta, the opportunity has not been lost also to remember that this is the 50th Anniversary of the first Race Relations Act in this country.
2. At first sight it is not obvious that there is any link between the two. It is well-known that Magna Carta was sealed as part of a power struggle between King John and the Barons. They would hardly have been interested in creating an equal society. Furthermore, many of the references in Magna Carta itself are based on distinctions between people depending on their status: the reference to “all free men” clearly excluded those who were villeins. The institution of

serfdom was very much alive at that time. And there were provisions in the 1215 version of Magna Carta which on their face discriminated against Jews.

3. Lord Sumption, who is not only a Justice of the Supreme Court but a distinguished historian, has described the sentiments which often surround Magna Carta as “high minded tosh.”¹ Although it is undoubtedly correct to question whether many of the modern readings of Magna Carta have any basis in historical fact, it is also important to recall that the mythology surrounding such documents can itself have continuing impact on a society. As another historian, Professor Linda Colley, has observed, there is a “cult and mode of memory” which rests on bad history and which includes Magna Carta as the most important text in stories of liberty.² The fact is that the phrase Magna Carta still has resonance for ordinary people in this country and they want to know, as Tony Hancock famously asked in 1957: “did she die in vain?”
4. And this is true not only in this country but around the world. Surely this is why, when Eleanor Roosevelt unveiled the Universal Declaration of Human Rights in 1948, she said that it might well become an international Magna Carta for all humanity everywhere.
5. As Article 1 of the Universal Declaration proudly proclaims, all human beings are born free and equal in dignity and rights. Last year I gave a lecture on the development of human rights thought from Magna Carta to the Universal

¹ Lord Sumption, ‘Magna Carta then and now’, Address to the Friends of the British Library, 9 March 2015, p.4.

² Linda Colley, Acts of Union and Disunion (2014, Profile Books), pp.35-36.

Declaration.³ I suggested then that we have come a long way since the explicit inequality which was embedded in the original Magna Carta but that nevertheless the lineage of modern human rights thought can be traced back to then.

6. The respected scholar of human rights Francesca Klug has recently put the point as follows:

“Whilst it would therefore be wildly historically inaccurate to bestow universal intentions on the multiple authors of the Charter, the principles established in the few clauses that remain on the statute book were nevertheless loosely enough phrased to allow for increasingly generous interpretations in the centuries that followed. Today a phrase such as ‘to no one will we deny justice’ has come to be understood as the very foundation of our modern, inclusive justice system.”⁴

7. Nevertheless, it is important to be realistic about the limitations of Magna Carta, even making due allowance for its mythical status. To quote Francesca Klug again:

“This is no doubt in part because its legal remedies have been superseded by a range of statutes and case law that address modern concerns for equality and justice which a medieval document could not be expected to even conceive of. The disputes between a King and his English Barons on a field outside Windsor 800 years ago seem very remote from the struggles of a modern, diverse democracy (currently) composed of four nations and citizens who stem from all parts of the world. The Magna Carta would seem to have nothing to offer if you are disproportionately more likely to be stopped and searched by the police because of the colour of your skin or religious affiliation.”⁵

³ Rabinder Singh, ‘The Development of Human Rights Thought from Magna Carta to the Universal Declaration’ in Robin Griffith-Jones and Mark Hill, Magna Carta, Religion and the Rule of Law (2015, CUP).

⁴ Francesca Klug, A Magna Carta for all Humanity (2015, Routledge), p.7.

⁵ *Ibid.*, p.9.

8. This brings me on to the Race Relations Act. At common law it was not unlawful to discriminate against a person on racial grounds, for example their colour. In the Britain of the 1960s it was commonplace for employers, estate agents and landlords to discriminate against people on such grounds. Some progress had been made by the common law, for example the decision of Birkett J in Constantine v Imperial Hotels Ltd.⁶ The famous West Indian cricketer Sir Learie Constantine had been discriminated against by a hotel, whose white customers objected to his staying there. In that case the Court was able to find in his favour by relying on the common law duty of innkeepers to serve anyone who came to stay at a hotel unless it was for just cause. Nevertheless, it was not racial discrimination as such which was the legal basis of the cause of action in that case. There was no duty at common law not to discriminate against a person on racial grounds when it came to such aspects of life as employment, education and housing.
9. It was against that background, and also in the international context of the civil rights movement, in the USA in particular, that the Race Relations Act was born in 1965. Just the year before the US Congress had passed the Civil Rights Act. However, the Race Relations Act in this country was a weaker piece of legislation and certainly much weaker than what was to follow.
10. The 1965 Act was limited in its scope; limited as to who could take action under it; and limited in respect of the remedies which could be granted by the courts.

⁶ [1944] KB 693.

11. The Race Relations Act 1965 prohibited discrimination on the grounds of colour, race, or ethnic or national origins. At that time it did not cover nationality. Subsequent case law confirmed that “national origins” did not include the concept of nationality.⁷
12. Furthermore, the 1965 Act did not cover areas which would now be familiar to us, such as housing or employment. Although the Act applied to “places of public resort”, including hotels and restaurants, it did not apply to private boarding houses. It did not even apply to shops. The prohibited acts of discrimination included refusing to serve a person, and unreasonable delay in serving them or overcharging them.
13. A body known as the Race Relations Board was set up to monitor the work of local conciliation committees. In cases where discrimination continued the matter was to be referred to the Law Officers, who could apply for an injunction from the court. It was made clear that no criminal liability was created under the Act.
14. The background against which the 1965 Act was passed included the Bristol Bus Boycott. In 1955 the Transport and General Workers Union (TGWU) in Bristol had voted against having black and Asian workers at the Bristol Omnibus Company, which then operated a colour bar until 1963. The bar only came to an end as result of the Bristol Bus Boycott. One of the organisers

⁷ Ealing LBC v Race Relations Board [1972] AC 342.

of the boycott, Paul Stephenson, is reported to have said on its 50th anniversary:

“Fifty years has taught me that racism never dies – it simply slumbers.”⁸

In 2013 the modern successor to the TGWU (Unite) issued an apology for what had happened earlier.

15. Later the Race Relations Act was strengthened in 1968 and substantially extended in 1976. By now nationality was included as a prohibited ground of discrimination. The scope of the Act included employment, education and goods and services. That Act extended the concept of discrimination to include indirect discrimination and not only direct discrimination. It created individual rights and a range of remedies, which could be enforced either in the County Court or in what is now called the Employment Tribunal.
16. The Race Relations Act 1976 was perhaps one of the strongest pieces of legislation of its kind in the world and certainly in Europe. It long predated legislation against racial discrimination in EU law, which did not come until the early part of this century.
17. However, the Act still did not cover discrimination by public authorities in the exercise of their public functions. Following the report by Sir William MacPherson into the investigation by the Metropolitan Police of the murder of Stephen Lawrence, Parliament enacted the Race Relations (Amendment) Act 2000. One of the main legislative responses to the Stephen Lawrence

⁸ *Bristol Post*, 14 January 2014.

Inquiry Report was to create a strengthened public sector equality duty, then in section 71 of the 1976 Act. The amended Act also now prohibited racial discrimination by public authorities in the performance of their public functions.

18. At around the same time the Human Rights Act 1998 came into full force, in October 2000. This gives effect in domestic law to the main rights in the European Convention on Human Rights, including the right to equal treatment in the enjoyment of other Convention rights, which is set out in Article 14. By this route we now have a system of law in which even primary legislation can be tested against the standards of the Convention and, in appropriate cases, a declaration of incompatibility can be issued by the higher courts. This is what happened in the so-called “Belmarsh” case, when the House of Lords held that Part 4 of the Anti-terrorism, Crime and Security Act 2001 was incompatible with the Convention rights.⁹ This was in part because it discriminated on the ground of nationality, since the power given to the Secretary of State to authorise the detention of suspected international terrorists applied only to those who were foreign nationals.

19. As the Runnymede Trust knows better perhaps than any organisation in this country, it is one thing for the law to prohibit racial discrimination. It is another for society to achieve equality. The social and economic data are well known.

⁹ A v Secretary of State for the Home Department [2005] 2 AC 68.

20. In the last quarter of 2014 the unemployment rate for all people aged 16 plus in the UK was 5.6%. For people of black ethnic background it was 13.9%. Although for all ethnic groups the unemployment rate was higher among young people aged 16-24, the youth unemployment rate was 16% for white people; 25% for people of Asian ethnic background; and 32% for people of black ethnic background.¹⁰
21. The 2011 census figures show that, in England and Wales, the percentage of the population describing themselves as Asian or Asian British was 5.87%. The percentage describing themselves as Black or Black British was just 2.81%. Contrast that with the figures for the prison population.
22. The prison population, according to research by the Prison Reform Trust, contains a large proportion of prisoners from a minority ethnic background. 10% of the prison population are black and 6% are Asian. According to the Equality and Human Rights Commission, there is now a greater disproportionality in the number of black people in prison in the UK than in the United States.
23. Then consider police powers to stop and search. According to the Equality and Human Rights Commission, if you are a black person you are at least six times as likely to be stopped and searched by the police in England and Wales as a white person. If you are Asian, you are around twice as likely to be stopped and searched.

¹⁰ Research briefing on unemployment by ethnic background to be found on the UK Parliament website.

24. What about those who exercise the power of the state on behalf of the public? Although there had been members of Parliament from minority ethnic backgrounds historically going back to the 19th century, in the postwar period they only started to become elected to Parliament in 1987, when four MPs were elected. That represented 0.6% of the membership of the House of Commons. That figure has now increased to 42 MPs in the House of Commons elected in May this year, representing 6.6%.
25. When it comes to judicial appointments, the picture is mixed. The proportion of BAME judges at lower levels of the judiciary and amongst fee paid judges, for example Deputy District Judges and Tribunal Members, is much closer to the proportion of BAME communities in the population generally than it is at more senior levels of the judiciary.
26. Does any of this matter? On one level not, because judges put aside their backgrounds and opinions when they come to a case, and decide it on the facts and the law. Yet on another level, according to a report in 2012 by Alan Paterson and Chris Paterson, it does matter, particularly in the perception society has of its judges.¹¹ The authors of that report suggest that “the concept that the institutional legitimacy of the judiciary as a branch of government is in some way linked to a reflection of the society it serves.” They suggest that the judiciary from the High Court and above might loosely be described as the “‘politically significant judiciary’ – the judges involved in the day to day review of government decision-making.”¹² That is a reference to the important role

¹¹ ‘Guarding the guardians? Towards an independent, accountable and diverse senior judiciary’, p.34.

¹² *Ibid.*

played by judicial review of administrative action, although that role is now increasingly played by the Upper Tribunal and not only the High Court. It is also worth noting in this context that the power to make a declaration of incompatibility under section 4 of the Human Rights Act is confined to the High Court and above.

27. Even at the time when I started at the Bar in 1989, it was in theory possible for barristers' chambers and their clerks to discriminate, both in the recruitment of members of chambers and in the allocation of work. This is because the Race Relations Act at that time did not extend to barristers. This was changed by the Courts and Legal Services Act 1990.
28. Changing the law does not make society automatically fair and does not make all parts of life more diverse. That has more to do with structural features of our society, in particular social and economic factors. The prohibition of racial discrimination does not necessarily lead to diversity in all parts of life, for example in certain professions and occupations. Change can appear to be very slow.
29. I would suggest that, to understand the nature of our society today, it can be important to recall what was happening 20 years ago or more. Many of the people appointed to judicial office today, in particular at the more senior levels, were born more than half a century ago. They were at school in the 1960s and 70s, when our education system was completely different from what it is now. For example, hardly anyone today would know what a "direct grant" school was. Yet that is the kind of school I attended 40 years ago.

30. Many of those who are judges now, like me, were appointed to various offices such as Junior Counsel to the Crown when we were in practice. In 1998 the Attorney General introduced the modern system for such appointments, in which there is an annual open competition in which every advocate can make an application.
31. When it comes to judicial appointments themselves the Judicial Appointments Commission was created by the Constitutional Reform Act 2005. It started to run competitions for the High Court bench in 2007. Again all such appointments are made on merit.
32. So I would suggest that what we are doing as a society now will have an impact on shaping the nature and character of our society for decades to come. For example the person who will be Lord Chief Justice of England and Wales in another 50 years time is probably a student now. It is unlikely that we can change things radically overnight. However, what we can do as a society is to take constructive steps now which will have a beneficial effect in years and decades to come in the future.
33. It is well-known that the Race Relations Act was never intended to have exclusively legal effect. Such legislation has a symbolic impact and is designed to educate the public in certain fundamental values of our society. The message was clearly sent out by Parliament that racial discrimination would not be countenanced in this country and that the principle of equality is fundamental to our society.

34. As will become apparent at this conference, the Race Relations Act 1965 was a weak and imperfect piece of legislation. Nevertheless, as is often the case in history, what is important about the 1965 Act is that it was the first step on an important journey. That journey has not yet finished.

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