Sic semper monopoliis:

Modernising the law of markets and fairs

In a society in which the law is constantly challenged, interrogated, and forced by its citizens to improve, there is still one way in which an area of law may escape reform: by arousing so little excitement that it is simply left alone.

Were it better known, the English law of markets and fairs could not possibly have survived this long unreformed. It is built on ossified rules of law which were barely appropriate as medieval rules of thumb. On the rare occasions it comes before the courts, even judges are not hesitant to admit that they are in unfamiliar territory, and that they find it to be "recondite and confused."[1]

Such an area would be deserving of reformers' attention even if its effects on everyday life were limited. What makes reform essential is that these rules stand guard over a web of monopolies that hangs silently over the country, concentrating in unaccountable if not unknown hands the power to decide where, and whether, a market may take place.

(1) SUMMARY

This essay sets out first to convince of the need for reform, and then to propose a simple measure that would place the system on a rational track.

It begins by stressing the value of a flourishing market system, and then isolating the single point of law from which the present system's irrationality and inefficiency flows, the common-law right of the owner of a market franchise to insist that no rival market take place within 6⅔ miles of his own. It then sets out some of that rule's logical and practical flaws, and proposes in its place that the responsibility for granting permission for a market be transferred into the hands of local authorities, to be exercised – subject to both judicial and electoral review – as part of their ordinary jurisdiction, where it naturally belongs.

[1] *Sevenoaks District Council v Pattullo and Vinson Ltd* [1984] 1 All ER 544 per Slade LJ at 553

(2) MARKETS: THE PRACTICAL CASE

The case for a flourishing and rationally constituted system of markets is not difficult to make. Local farmers' markets, for instance, serve a number of uncontroversial social and economic objectives with no appreciable drawbacks.

They can: provide consumers with an optional alternative to supermarket shopping; strengthen social ties, by making shopping an event for the community to enjoy; develop local economies, by providing nearby farmers with an outlet for produce; give consumers a more affordable way of eating healthily; help the environment, by reducing the need for long-distance transportation of food to the point of sale.

Where an activity can serve the public interest in so many ways, it is vital that any power to suppress or regulate it is exercised exclusively with that public in mind. As will be shown, the present system treats this power as a private possession; without more, its holder is under no obligation to take any public interest into account.

(3) LEGAL FRAMEWORK

In law, a "market" is a franchise which gives its holder the right to hold a concourse of buyers and sellers for the sale of one or more types of commodity.[2] These franchises can be granted by royal charter, letters patent, or statute, and once granted they exist indefinitely; some of those still in operation are over 800 years old.[3]

The real benefit of the franchise is its attendant right to bring a civil action for 'disturbance' against the operator of any nearby market dealing in similar goods. A successful claim gives rise to an award of damages and – more importantly – an injunction to prevent the rival market from continuing to operate.[4]

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[2] *Marquis of Downshire v O'Brien* (1887) 19 L.R.Ir 380
[3] <http://www.staffsmoorlands.gov.uk/site/scripts/services_info.php?serviceID=1408>
[4] Edward Cousins and Robert Anthony, *Pease & Chitty's Law of Markets and Fairs,* 5th ed (London: Butterworths, 1998), 69.

The common law recognises a zone of protection with a radius of 6⅔ miles from the franchise market.[5] The standard reasoning behind this rule is first found in Bracton's *De Legibus*: since a market-goer can walk 20 miles in a day, and requires a third of the day to reach the market, a third to trade, and a third to return home, 6⅔ miles represents the longest distance he can travel to market.[6]

The common law, left to its own devices, has not modernised this rule out of existence; indeed, it has intervened with presumptions of law which strengthen the power. If the rival market takes place on the same day of the week as the franchise market, there is an irrebuttable presumption of loss – meaning that, in practical terms, the franchise-holder need only produce his charter and the rival market will be shut down.[7] If the rival market takes place on another day, the franchise-holder may still obtain an injunction by proving loss, and the burden of proof is low; already in 1879 it was held that because of the speed of "modern" transport it could be effectively presumed that a Monday market would cause loss to a Thursday market-holder.[8]

Admittedly, this system was once itself a desirable and practical innovation. Sales of goods in Anglo-Saxon England required heavy supervision, and the ill-developed state needed to outsource its regulatory role by awarding private individuals a local monopoly.[9]

The common-law rule that emerged to protect those monopolies, however, is a threefold nonsense, and needs reforming. First, even at its birth it was deeply illogical. Second, subsequent developments in the law have made it still more profoundly so. Finally, it is on any practical analysis hopelessly outdated.

(a) Illogical at birth

[5] supra, n.1
[6] Cousins and Anthony, *Markets*, 70.
[7] *Yard v Ford* (1670) 2 Wms Saund 172
[8] *Elwes v Payne* (1879) 12 Ch D 468
[9] Pollock and Maitland, *History of English Law, vol II,* 2nd ed (Cambridge University Press, 1898), 58-60

The first obstacle to reform of such a long-established rule is a natural reluctance to meddle with our ancestors' ancient wisdom. It is helpful, therefore, that even on its own terms the rule's reasoning is plainly wrong.

Firstly, if a market-goer can indeed travel 6⅔ miles to reach a market, then a market established just outside the perimeter will be accessible to many people within the franchise-holder's zone. For market-goers living near the perimeter, a market just beyond it may be the nearest.

Secondly, the rule assumes that all market-goers can cover the same distance. Even a twenty-first century lawyer can appreciate that a trader taking a cartload of apples to market would cover more distance than one transporting a herd of unruly cows.

At no point, therefore, did the rule truly achieve its aim of giving a market-holder legal rights over the area from which his market-goers would be drawn. This insensitivity to the problem it purported to address left it fundamentally unable to adjust.

(b) Increasingly unjustifiable

Developments in the interpretation of distances – notably, the Interpretation Act 1889's rule that distances should be measured in straight lines rather than by the shortest reasonable route – have, when applied to the law of markets, wrenched the 6⅔-mile perimeter still further from any practical justification.[10] Similarly, the natural expansion of what the law considers to be a 'market' – to include, for instance, a weekly car boot sale – has brought within the scope of the rule informal species of activity which it was never designed to suppress.[11]

(c) Impractical and unjust

[10] *Newcastle-upon-Tyne City Council v Noble* (1990) 89 LGR 618.
[11] Ibid.

Finally, the old rule is unsuited to modern conditions and offensive to modern ideas of governance, for a number of reasons.

Because market rights arise from private grants, there can be no central database of the areas subject to their controls. For many franchises, the only record that they were granted at all is in the Patent Rolls, a series of folios in semi-legible Latin held in the National Archives. Moreover, like other incorporeal hereditaments, franchises can arise by prescription or under the doctrine of lost modern grant, two legal fictions which are only marginally more comprehensible to a layperson than the Patent Rolls.[12] The effect is that there is no way of knowing whether a market is unlawful until a franchise-holder appears and exerts his rights. An entrepreneur in 2009 may finish arranging a car-boot sale only to find it is outlawed by the decree of a Plantagenet king.

Equally pressing is the issue of the identity of those exerting the rights, and whether they can be scrutinised.

Many private rights were purchased by local authorities in the nineteenth and twentieth centuries, giving the public a degree of supervision over their use. A number, however, are still in the hands of private individuals; in Market Bosworth, for instance, the establishment of any new market requires the personal approval of a person named Caroline Davies.[13] In other areas, they are controlled by boards of trustees, such as the Melton Mowbray Town Estates or the Old Enfield Charitable Trust.[14] Although unelected, these can have considerable power over the local community or its neighbours; the residents of Muswell Hill, for instance, cannot establish a Saturday farmers' market without permission from the holders of an Enfield charter, and have been unable to obtain it.[15]

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[12] Cousins and Anthony, *Markets*, 15-19.
[13] Minutes of Market Bosworth Parish Council Meeting, 05/02/2008 <http://marketbosworth.leicestershireparishcouncils.org/uploads/1747b99926e383d004257809.doc>
[14] <http://www.meltonmowbraytownestate.co.uk/street-markets/history>; <http://www.toect.org.uk/history-page.html>
[15] <http://www.lynnefeatherstone.org/2004/04/saturday-market-council-refuse-to-assist-in-repeal-of-ancient-charter.htm>

Even where a charter is in the hands of a local authority, the mixture of public and private law creates its own problems. The 6⅔-mile common-law zone of control exists independently of a council's jurisdictional boundaries, so a council may find it has the power to interfere in its neighbour's governance.[16] Leicester City Council, for instance, has the power to deny consent to markets in neighbouring Blaby, a town otherwise represented by Blaby District Council.[17]

The interests of transparency, accountability and competitive trade clearly require that the system be reformed.

(4) EXISTING CONTROLS

It would nevertheless be unwise to jump straight to a legislative attack on laws of such ancient pedigree without first considering all other means of controlling their excesses. All, however, have proven inadequate.

(a) Public law

Where a market is operated by a local authority, the authority is required by s.6 Human Rights Act 1998 to act in a way which gives effect to human rights. An authority may also, in some circumstances, be subject to judicial review: for instance, where the market is statutory or, as in *R v Barnsley MBC ex parte Hook*[18], where the local authority unfairly revoked a stallholder's licence in breach of his common-law right to trade.[19]

However, HRA lacks any broad economic rights which would limit the exercise of a monopoly over other markets. Similarly, the specific circumstances which gave rise to reviewability in *Hook* do not appear to extend beyond safeguarding the interests of traders within an established market.

[16] *Birmingham City Council v Anvil Fairs* [1989] 1 WLR 312
[17] HC Deb 8 October 2008 c379
[18] [1976] 1 WLR 1052
[19] Barry Hough, "Public law regulation of markets and fairs", P.L. 2005, Aut, 586-607

More fundamentally, it is likely – particularly in the light of recent case law on functional public authorities under s6 HRA – that privately-operated markets would escape regulation altogether. Even if they did not, the cost of launching an uncertain legal challenge to find out is prohibitive, and none has yet been brought.[20]

(b) Competition law

The other potential line of attack – competition law – has been still less fruitful. In *Leeds CC v Watkins,*[21] it was argued that a franchise-holder was exercising its power anti-competitively, contrary to the Competition Act 1998 and Articles 81 and 82 of the EC Treaty. The argument failed because of the difficulty, endemic in competition cases, of gathering sufficient evidence; this was not the first time it had happened.[22]

Even if such a challenge were to succeed, it would only constrain one market-holder's abuses; it would do nothing to remedy the uncertainty inherent in the present, irrational network of rights.

An Act of Parliament is therefore the only option.

(5) COUNTERARGUMENTS

A franchise-holder would no doubt argue in response that restrictions on rival markets are necessary for any market to survive; too many markets would dilute demand and cause them all to disappear.

There are two responses to this. Firstly, a new system can and should still include a means of limiting the number of markets, for reasons outlined below. The point is that any such mechanism should be exercised accountably and reviewably by a public authority with a clearly-defined area of competence.

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[20] *YL v Birmingham CC* [2007] UKHL 27
[21] [2003] EWHC 598 (Ch)
[22] Birmingham CC v In Shops plc [1992] NPC 71

More fundamentally, the franchise-holder's reasoning – like the system it seeks to defend – tackles a medieval problem, not a modern one. With the advent of supermarkets, markets are no longer each other's biggest competitors. A visit to a market is now not a necessity but an option to be weighed up; a consumer might choose a supermarket one mile away over a market six miles away and yet, if given the opportunity of a market one mile away, choose the market. Now that markets are one option among many, demand for them is best served by making them more, not less, convenient; the powers that the common law's presumptions provide to franchise-holders have lost their commercial purpose, and ought to be modernised.

(6) REFORM

(a) The proposal

The reasons for handing responsibility for the regulation of an area's markets to that area's local authority should, by now, be clear. It would put what is effectively a regulatory power in the hands of democratically accountable and judicially reviewable officials. It would standardise the legal position of markets across the country, ending the present doubt-ridden patchwork. It would also give local communities full control over their own affairs, and encourage those interested in markets to get more involved in local governance.

Many local authorities already have powers under s50 Food Act 1984 to establish markets within their area, provided no established market rights are disturbed. They also, in their role as planning authorities, have experience of making decisions about the social utility of economic activity.

It is important to retain some kind of control, but also to recognise that markets may vary greatly in size and function. The need for licensing in respect of the largest commercial enterprises must not be permitted to swamp the smallest gatherings in bureaucracy. As a result, this proposal gives the local authority the *power* to license a market, and the *discretion* to close unlicensed markets or to permit them. This would avoid the economic

injuriousness of mass licensing while still allowing socially undesirable markets – such as those which become traffic hazards, or havens for stolen goods – to be controlled.

Out of practicality, local authorities must have the power to levy charges on markets. A requirement that those charges be reasonable, however, would not only place controls on their activity, but would also help encourage courts and lawyers to treat the exercise of market functions as judicially reviewable. In short, this proposal would deliver the whole framework into the public's hands.

In summary, this essay proposes legislation on the following lines:

> *(1) The right of the owner of a market franchise to bring a action for disturbance against the operator of a rival market is abolished.*
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> *(2) A local authority may –*
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> > *(a) issue a licence to any person to operate a market on a given day or days on any site within the local authority's area;*
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> > *(b) demand in respect of any market within its area, licensed or otherwise, such reasonable charges as it may from time to time determine;*
> >
> > *(c) on application to a county court, obtain an injunction requiring any person to cease operating an unlicensed market.*
>
> (3) *A licence issued under subsection (2)(a) above shall not be taken as interfering with the rights of any person over his land without that person's consent.*

The possibility of granting existing franchise-holders an automatic licence under the new system has been considered, but is not recommended. In most cases where the public interest is engaged, such as with a particular historic market, a local authority will no doubt relicense it – but ultimately the power to revoke a license must be preserved.

(b) Previous attempts

We must finally consider why reform has failed in the past in order to understand how it may now succeed.

In 1994, the Deregulation and Contracting Out Bill contained three clauses which would have abolished the right of local authorities to bring actions against rival markets. After backbench disapproval, the clauses were deleted.[23]

The present reform would not fail in this way, for two reasons.

Firstly, the 1994 reform fundamentally misapprehended the real issue. It attacked only local authorities and left private monopolies untouched, thereby surrendering the political advantage that would have come with taking a clearly pro-democratic, pro-competitive position against all ancient monopolies.

Secondly, it would have left markets unregulated. Local authorities campaigned extensively against it by raising fears of fly-by-night traders, sprawling public hazards, and a rise in rates to compensate for lost income.[24] The present reform recognises the value of local authority involvement, which would allow priority to be given to socially useful markets, mismanagement to be punished by revocation, and fees to be levied under a statutory requirement of reasonableness.

(7) FINAL REMARKS

It is possible that any legislation abolishing private monopoly rights would, as an interference with "property", run into compatibility issues with Article 1 of the First Protocol of the European Convention. That Article, however, permits a state "to enforce such laws as it deems necessary to control the use of property in accordance with the general interest."

It is to be hoped that the reader will consider how great is the 'general interest' in reforming this irrational, stifling network of privileges – and that legislation will be put forward which will

[23] Barry Hough, "Controls on the Development of Markets in Public and Private Law", 10 Denning L.J. 107 (1995)
[24] Ibid.

slice through the invisible knot of unreformed market franchises, freeing the Gordian ox-cart to carry its goods wherever the public wants them to go.

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