

MAGNA CARTA, HISTORY AND POLITICS

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These days the process of reflecting on major events in the past turns to a large extent on the celebration of anniversaries. In the last few years we have had the anniversaries of the abolition of slavery, the publication of Darwin's, *Origins of Species*, of the King James Bible. Next year, we will be hearing a lot about the outbreak of the First World War in 1914. The anniversary with which I am concerned today is that of the making of Magna Carta eight hundred years ago in June 1215. In 2010 an Anniversary Committee was established, under the chairmanship of Sir Robert Worcester, and we are already at work planning a series of lectures, exhibitions, broadcasts, pageants and other events to mark the occasion, these spread across the country and culminating, we hope, in a visit to Runnymede by HM the Queen, who has graciously agreed to be our Patron.

What I want to do this evening is to explore briefly two main questions - two questions which are related to each other. The first is: why celebrate Magna Carta? Why is the Charter's historical importance? And the second is, what is the relevance of Magna Carta today? What, if any, is its contemporary meaning?

The first question is one, I think, which we can answer very quickly. Magna Carta is worth celebrating because it established one fundamental principle above all: freedom under the law. It is no exaggeration to say that it is because of Magna Carta that we live in a free country today. The crucial clause of the Charter is clause 39: no free man shall be arrested, imprisoned or disseised except by lawful judgement of his peers or by the law of the land. Alongside this sits the almost equally important clause 40: to no one shall we sell, delay or deny right or justice. Between them, these two clauses established the principle of due legal process in England, ensuring that every free man – a phrase to be glossed as early as the fourteenth century as embracing every male person, regardless of his legal condition – would be assured a free trial.

Yet in a much larger sense Magna Carta is of supreme importance. We need to see the Charter as much more than the sum of its 63 individual clauses. It broke new ground in

contemporary political thought in placing royal government under the law. In medieval Europe there was much debate about the relationship between the king and the law. One view, that of the monarchical apologists, was that the king was above the law. It was maintained that the king derived his authority to rule from God and that he was answerable only to God; he created and enforced the law, but he was not bound by it, nor could his subjects hold him to account if he broke it. That was one view, the view that monarchy was essentially sacral in character. The other view was a very different one, namely that the king was under the law in the sense that he was under natural law, under God's law: he not only declared and enforced the law, he was actually bound by it himself. These debates were fiercely argued about in the Middle Ages, and their outcome was different in different parts of Europe. In England, however, by the thirteenth century there could be little doubt about what the position was: in the wake of Magna Carta, the king was most definitely under the law, like everyone else. Moreover, he was under man-made law. The king enforced the law, and he was bound by it himself. As the author of the legal treatise known as *Bracton* was to put it in the 1230s or shortly afterwards, 'the king is below God and below the law'.

So, for those two reasons, Magna Carta occupies a position of supreme importance in English history. It is no exaggeration to say that it is because of Magna Carta that we have due process of law in this country today; and it is because of Magna Carta that we live in a limited, constitutional monarchy. There can be no doubt about that.

When we move on to my second question, however - what is the relevance of Magna Carta today? – the position is much less clear, because it is hard to see what a document drafted in the thirteenth century still has to say to us. So many of its clauses sound arcane and obscure, redolent of the feudal society in which they had their roots: clause 2, for example, reliefs shall be fixed at £100 for a barony and 100s for a knight's fee; cl. 6, heirs shall be married without disparagement; cl. 11, if anyone dies indebted to the Jews, his wife shall have her dower and pay nothing of the debt ... and so on. My favourite is perhaps cl. 33: all fish weirs shall be cleared from the Thames and the Medway and throughout England, except along the coast. In Magna Carta the local and the national, the petty and the substantive, the personal and the impersonal, all sit awkwardly together. Actually, clause 33 was to be of enormous significance in the history of navigation in this country, because it established the principle of free passage along England's rivers, so laying the foundations for transport development in the Industrial Revolution. So it is worth reminding ourselves perhaps that some of these

obscure-sounding clauses are actually of considerably greater importance than may at first appear. But even allowing for that, when we look at the number of clauses regulating feudal society and all the clauses addressing such arcane matters as the forests, we are bound to ask: what is the relevance of this document to us today in the twenty first century? Is its interest largely historical? Or does it have something of value to contribute to present-day political discourse?

The question gains force when we recall how little of the Charter actually remains on the statute book. Just four of its clauses still retain the force of law: clause 39 (no free man shall be imprisoned . . .), clause 1 guaranteeing the freedom of the Church, clause 13 guaranteeing the liberties of the City of London, and clause 37 stating that any law contravening the terms of the Charter should be held invalid. All the other clauses, one by one, were repealed in the course of the great late-nineteenth, early-twentieth century programme of legislative tidying-up which swept so many of our old and obsolescent laws from the statute book.

Understandably, issues which a group of barons considered important in the thirteenth century held little or no interest to parliamentarians and legislators in the nineteenth and early twentieth. To the utilitarians and the Benthamites, the rationalists and the streamliners, Magna Carta was no more than a quaint relic, a hang-over from the distant feudal past, not a real, living document.

The danger of being overtaken by events was in fact one that had beset Magna Carta right from the very beginning. As a peace treaty and as a statement of what constituted good government, it had originated in a very specific set of historical circumstances. Once these circumstances had passed, and once amity had been restored between king and barons, it was left high and dry, a document without meaning. Indeed, on King John's death in October 1216 it had very nearly died, having been annulled by the pope twelve months before, and was only saved by the circumstances of the minority of John's son, the boy king Henry III. At the beginning of the reign the regency government was beset by enemies on all sides, among them the French, who had been called in by the barons to assist their cause. To neutralise the opposition, in a stroke of genius the regent, William Marshal, earl of Pembroke, took the Charter, shredded it of all its most contentious and time-specific clauses, and reissued it as a rallying point around which all parties could unite. That was in November 1216. The tactic did not work immediately, and the regent had to repeat it. There were further reissues in 1217 and 1225. But the text finally agreed in 1225 was to become

definitive. It acquired the character of a fundamental law. It was then that the Charter was launched on its career as the foundation stone of the constitution.

But a price had to be paid for this achievement. And it was this - that henceforth the Charter's importance was to be largely symbolic. The Charter was to provide a touchstone of good government – aggrieved parties would appeal to it in the courts, and its terms were often cited in litigation. But, a product of one age, it offered no practical solutions to the problems of the next. Accordingly, later baronial oppositions in their struggles with the Crown would build on it, taking it as their starting point, but adding to it their own new sets of demands, their own more radical and elaborate mechanisms for controlling the king. In 1258, much later in Henry III's reign, the barons imposed on the king a document called the Provisions of Oxford. This went very much further than clause 61 in Magna Carta, the security clause establishing the committee of Twenty Five, creating instead a permanent baronial council, so that, in Trehearne's words, 'the king reigned but the council ruled'. The Provisions proved much too radical for the time, however, and were cast aside after the death of their champion, Simon de Montfort, at the battle of Evesham. Half a century later there was to be another big exercise in baronial constitution-making when the Ordinances of 1310-11 were imposed on Edward II. Just as earlier in 1258, the idea was to alight on a set of arrangements which would both reform the body politic and ensure adequate supervision of the king. Yet again, however, the supervisory arrangements, imposed at a moment of royal weakness, did not survive the recovery of royal power. The clear lesson of the first century of Magna Carta was that, if one problem was that the Charter was in constant need of updating, a second was that it was difficult to enforce. If a wayward king refused to abide by the controls imposed on him, there was little or nothing that the barons could do about it. Sovereignty rested with the king; there was no effective legal means of constraining him: he had to be free in his exercise of office. It was thus a mark of the failure of Magna Carta in the long term that, increasingly, baronial oppositions in the Middle Ages resorted to kingly deposition. Edward II, the first king after the Conquest to be deposed, was the last on whom any attempt to impose a Magna Carta-style constitution had been made. From 1327, if a king proved incorrigible, he was not constrained or controlled; he was got rid of.

It is therefore no surprise to find that from the late fourteenth century less and less was heard of Magna Carta in political discourse. Indeed, this iconic document, once spoken of in awe, was hardly ever mentioned at all. Increasingly from the fourteenth century, the hopes of

reformers were placed not in a charter, not in a fundamental law, but in an institution: in parliament. In the long run, it was in and through parliament, in and through the power of the purse strings, that monarchical power was brought under control. And the main stages of the story are well known. In 1407 the principle was established that the Lords could only assent to a grant of taxation independently made by the Commons. In 1660, in the Restoration Parliament, an end was put to the feudal revenues which had supported Charles I in his Personal Rule. In 1679 by the Habeas Corpus Act legislative reinforcement was given to Magna Carta's insistence on due legal process. In 1694 under the Triennial Act parliament was established as a permanent body meeting annually, and to the lower house of which elections were required every three years. The outcome of all this by the early eighteenth century was that parliament had turned itself into a branch of government superior to the Crown, so ending for ever any possibility of absolute monarchy in England. At the conclusion of four centuries of constitutional struggle, a solution to the problem of controlling the executive was found not in a document like Magna Carta but in the assertion of parliamentary sovereignty.

So we are faced with the paradox that the country which had produced the world's first written constitution – Magna Carta - was the one country actually to lack such a constitution. Parliament took to itself to exercise the functions which in other circumstances a constitution might be expected to have performed. The British constitution, insofar as we have such a thing today, consists of the common law and that body of statutes passed over the years in which the workings of the law have been regularised and written down. Magna Carta occupies a dignified position as first of those statutes. But, as we have seen, ever since the fourteenth century it has been of symbolic importance only. Its significance has been as an idea, a lodestar, a source of inspiration. Its precise terms have absolutely no relevance to the concerns of a non-feudal age. In this sense, the answer to the question that I raised at the beginning – what does Magna Carta have to say to us today? – is perhaps a surprisingly negative one. Magna Carta has nothing at all to say. Or, rather, it has nothing at all to say beyond the very obvious point that in England written constitutions have never worked. Written constitutions not only become fossilised; they are also extremely difficult to enforce. Written constitutions have proved most effective in those societies which are either entirely new (the United States) or in which the existing order has completely collapsed and government has to be created anew, as in France after 1789 or Germany after 1945. In Britain neither condition has applied. We are an old country; our constitutional growth has

been incremental; and, other than partially in 1649 and 1689, our government has never collapsed. With our history of largely seamless development we have found that parliament has done the job of controlling the executive perfectly well without the need for some sort of fundamental law.

But are we, if we follow this line of argument - in emphasising the dominance of parliamentary sovereignty - in danger of being too negative and too dismissive? Are we in danger of undervaluing Magna Carta's historic achievement? I think, perhaps we are. If we sweep Magna Carta aside as an historic failure, we must immediately redress the balance by saying that it has registered one big achievement. And that has been to embed the rights of the individual against the state. What Magna Carta has done, above all, is raise awareness. Throughout its long history, it has provided a touchstone of good government, a yardstick against which actual government may be judged and, if necessary, found wanting. Magna Carta stands as the conscience of the English people.

Let me amplify this point a little. In regard to our own time, the point could be made, indeed has been made, that we live in the conditions of an elected dictatorship: that the power of that dictatorship – the power of a Prime Minister backed by a large, easily biddable parliamentary majority – has succeeded to the place of the absolute king of the Middle Ages. Going on from this, the point has also been made that now, more than ever before, we need the support of a document, a fundamental law, like Magna Carta, which entrenches individual rights. It is for precisely this reason that in recent years we have heard so much about the need for a modern-day Bill of Rights, a twenty-first century successor to the Charter of the thirteenth century.

These arguments were rehearsed in Continental Europe after the end of the Second World War. In the wake of the appalling horrors of the Nazi period, a widespread need was felt for some sort of document which entrenched fundamental human rights. Perfectly drafted constitutions had shown themselves to be woefully inadequate. Germany's Weimar constitution had included all the paraphernalia of proportional representation, provision for referendums, a division of powers between a federal government and the states, and so forth. Yet it had done absolutely nothing to prevent the rise of Hitler. Somehow, the importance of individual rights had to be entrenched more deeply in the public psyche. To this end, the European Convention of Human Rights was duly drawn up, with British jurists involved in

its drafting. It was ratified in 1953 by Churchill's Government, and British subjects were allowed access to it. Despite this, however, successive British governments made no attempt to bring UK laws into conformity with the ECHR. Only in 1998, with the passing of the Human Rights Act by the Blair government, was the ECHR incorporated into UK law. And that legislation, it could be argued, does represent an attempt to engage with the legacy of Magna Carta and to explore ways in which its meaning can be made relevant to the problems and preoccupations of our modern age.

Is it enough, however? Six years ago, in his Magna Carta lecture given at my own institution, Royal Holloway, Professor Vernon Bogdanor, argued that it is probably not enough: Bogdanor's case is that we ought to think of giving more power to the judges in a new constitutional settlement. Others might take issue with that, saying that the judges are unelected, are out of touch with the public mood, are unaccountable, and given to making some pretty bizarre utterances from the Bench. An alternative suggestion, heard more recently, particularly from the Liberal Democrats, is, of course, to give stronger powers to a reformed House of Lords. In the light of what happened to Mr Clegg's initiative on House of Lords reform last summer, however, it may be thought that this idea is unlikely to see the light of day again very soon.

What all these problems and possibilities remind us of is this: that the essential challenge which faced the barons at Runnymede in 1215 – namely, how do you control the executive power, and how do you make it accountable so that it does not pose a threat to the individual citizen? – is one which is with us still.

So we are bound to ask: should we come up with a new Magna Carta and, if so, what should we put in it? I'm not going to offer any answers to that question this evening, because it's not my concern. But, from an historian's perspective, and in the light of reflecting on the achievement of 1215, may I offer two observations by way of background?

The first is this: that, if any new Magna Carta-style fundamental law is to establish itself and secure long-term public acceptance, it must transcend the circumstances of its birth, pronouncing values which are both timeless and universal. And the second, following on from the first, is that to achieve that end, such a document, such a fundamental law, must avoid partisanship, being rooted in a broad national consensus. What is clear is that a

fundamental law can only succeed if people have already decided what they want. In 1215 Magna Carta failed because that essential quality of consensus was lacking. In 1225 it succeeded because such a consensus had been formed. A fundamental law cannot tell people what they want. They have to come up with some idea themselves first.