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**"The Influence of Magna Carta on the British Constitution"**  
**Conference at Amiens University to commemorate Magna Carta's**  
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Thank you very much for your introduction, and thank you very much Sophie for organising this marvellous conference; it is a wonderful gathering. And I would also like to thank and dedicate what I am going to say to my wife Paula, since there is another anniversary at the moment, which is my thirtieth wedding anniversary. It must show just how important Magna Carta is to me that I am here today celebrating the anniversary of this great constitutional document rather than at home with my wife celebrating our thirty years of happiness together. But we will do so over Christmas instead.

What I would like to offer today is some thoughts and reflections about British constitutionalism in the context of Magna Carta. And I take the principles, symbolic principles, of Magna Carta as being the Rule of Law, democracy and human rights. Now those are not precisely what the barons had in mind in 1215 but as has been emphasised by our previous speakers the significance of Magna Carta today lies in its symbolic aspects. These are the principles that it has come to represent, in embryonic form in 1215. These were that our rulers cannot do whatever they like, they are subject to limitations and principles, and government should be by consent of the nation, later giving rise to the concept of democracy itself. It came to represent the idea of human rights, that there are some fundamental rights for all that represent limits on what governments should do. Those principles of Magna Carta symbolically remain very important to us today.

However having said that I would have to say that English constitutional theory, as it seems to me, is quite incoherent and contradictory in many senses. You can really only justify or explain what we have in our unwritten constitution in a historical sense, and the reality is that it is political pressures, conflicts of interests, and de facto events that have shaped the structure of our constitution rather than any grand or big ideas about how the constitution and its essential elements should be formed and work. It is only after political occurrences have actually taken place that theories or conventions emerge in the minds of writers,

intellectuals and politicians to make sense of what has already happened and articulate some principled justification for what's already happened.

This is true of course in a big way with respect to Magna Carta itself, and these grand principles I have just mentioned certainly weren't on the minds of the barons. At the time they were thinking in terms of the contractual nature of feudal obligations, and that King John was mismanaging the country, mishandling its foreign wars, and abusing his prerogative powers to raise money. But after the event, particularly in the seventeenth century, Magna Carta came to represent something much more significant. I would have to add that the concept of the absence of arbitrary authority and the idea that our rulers cannot do whatever they like is not entirely original to Magna Carta, and you can find sentiments to the same effect in the writings of Aristotle making reference to elementary ideas of separation of powers, and that one of the first rules of good governance is that the execution of the laws should be carried out by one group of people and made by another. But what is so seismic and vital about Magna Carta is its romantic quality; it was a major event in our constitutional and social history. It was also at the time very effectively communicated. Its communication was absolutely vital, and these charters - there were a series of similar documents of course - were sent around the country and lodged at regional centres notably the Abbeys.

Referring back to what Andrew Blick was saying about seventeenth century Britain, when Magna Carta was being re-invented and invoked in support of the claims of the parliamentarians in their conflict with the Stuart kings, what fuelled revolutionary sentiment so widely across the country was the printing technology which had been invented the previous century but had now becoming commonplace so that political tracts could be easily printed and sent around the country to communicate and debate these new ideas.

From a purely observational perspective, the most singular characteristic of the British constitution has been its evolutionary and ad hoc nature. Look at some of our institutions and how they are structured, for example the parliamentary second chamber, the House of Lords. It has no real logic that has led to its present position apart from being stuck in a time warp created by its non-reform after the Parliament Act crisis of 1910-11. That statute expressly stated the principle and intention in its Preamble to move to a democratic chamber, but then this never occurred. Much more recently the House of Lords Act 1999

was expressed to be a compromise towards a democratised chamber, maintaining ninety-two hereditary peers in place as a reminder that the statute would be a temporary measure and the start of a two stage process towards completion of reform which, again, has run out of steam and never been completed.

What is the logic for the existence of a second chamber at all? We have exported the idea of bicameralism around the world simply because we happen to have one, historically derived from Parliament representing a balance between the three estates of the realm - the Lords Spiritual and Temporal alongside King and Commons. Other countries have found a rationale in representing the regions or states of their country, and in special procedures for amending their written constitutions, something not applicable in Britain. And a central reason why the second chamber has remained in an unreformed state is that so few can agree what it should be for. The main justification for it seems to be the incompetence of the House of Commons to scrutinise and pass well-drafted legislation, so we need a revising chamber composed in a haphazard way of retired politicians, bishops, captains of industry, experts from the arts and sciences, and still ninety-two hereditaries to make good the inadequacy. I would say that the House of Lords is now in a state of crisis, with a bloated membership exceeding that of the House of Commons, with no prospect of a permanent reform in sight, all adding to the sense of public cynicism towards Parliament which is to be much regretted.

Or take our voting system as another example. Was this the product of some grand idea, some constitutional doctrine carefully worked out by intellectuals and politicians? No, it was a historical accident. When the document that is the foundation of our modern electorate system, the 1918 Representation of People Act, was being debated and formed, the House of Commons wanted the Alternative Vote and the House of Lords wanted Proportional Representation, so what did we end up with? Neither of them. We ended up by default with the status quo that was a simple plurality system, and one that made more sense in the nineteenth century when we had two or more member constituencies providing some rough and ready proportionality. With single member constituencies today we have ended up with an electoral outcome that gives a substantial deviation from proportionality and a very exaggerated majority to one party. Now this can be justified after the event, and we do justify it by saying it produces strong stable governments, but this was not a carefully

designed policy or plan. It is interesting that the Italian and Greek governments have just looked to Britain as a model of good governance in this respect because they think a way out of some of the stalemates caused by their multi-party coalitions.

The monarchy itself of course is a good example of not being the product of any contemporary constitutional logic. It is a product of history, and the case for its retention is a pragmatic one. It represents no rival source of influence or power to Executive or Parliament to demand its abolition, although in 1936 the Cabinet thought the new King Edward VIII an unsuitable person to hold the position of King so he was despatched in a fairly brutal manner, about which I have spent the last couple of months writing an article. The institution of monarchy can only be explained in terms of history like most of Britain's public institutions, and it has successfully adapted to the democratic era and new political realities, gradually diminishing its influence in government. As it represents no means of obstruction or rival to our elected rulers why get rid of it, and most people enjoy the ceremony and romance it projects, a magical piece of living history. An elected president by contrast, which would be more logical in purely logical democratic terms, however you designed it is likely to be of greater political significance than a de-politicised monarchy and a potential nuisance to the government.

So to repeat, what I have just tried to say is this is how our constitution has evolved, around the spirit of limited government and national representation, and its development and state today is not a product of a coherent constitutional design, as in America and France. Our institutions that developed, most importantly Parliament whose 750th anniversary we are also celebrating this year, have responded, adapted and been reformulated according to pressures, and after the event justifications and theories for it are found.

So how do Magna Carta's symbolic principles I have mentioned - Rule of Law, democracy and human rights - fit into contemporary British constitutional theorising? Well, from a legal perspective the Rule of Law and parliamentary sovereignty might be said to be the twin pillars of the constitution, the special characteristics of our legal system, and Professor Albert Dicey expounded these basic doctrines of English constitutional law in his classic work in 1885 entitled "Lectures Introductory to the Study of the Law of the Constitution" precisely

around those two concepts. They reflect the ideas of limited government and government by consent which we are associating with Magna Carta here today.

It is interesting that much of the classic constitutional writing in the late nineteenth century fixed our present political and legal vocabulary, and this is because particularly without a written or codified constitution providing a terminology, it required jurists and law professors to render coherence and articulate guiding principles to the morass of common law, statute and political custom developing around our institutions of state. This did not happen until the late nineteenth century because law was not taught at our universities until the 1850s, first at Oxford and then at London. We then had this new breed of law professors, who for quite some time were looked down upon by practising barristers, who gave systematic lectures and produced textbooks providing this coherence, and carving out discrete subject areas of the law. So the success of Dicey was to formulate basic principles, which still exist today - parliamentary sovereignty, the rule of law, conventions - and the terms he employed stayed with us. Other writers such as Sir William Anson and Arthur Berriedale Keith were arguably the better lawyers, and wrote extremely detailed studies of the law and working of the constitution, but precisely because they were so detailed, in comparison to Dicey's broad brush approach, focussing on a few guiding threads running through the theory and practice of the constitution, they rapidly dated and quickly went out of print, whereas a copy of Dicey can still be purchased new today.

So what did Dicey say were the principles of the Rule of Law that we see as Magna Carta as representing? It is interesting that Dicey actually answered the question in response to what was going on in other countries. Dicey famously had said that the Rule of Law had three associated meanings, the first of which was the absence of arbitrary power on the part of government. Now this directly refers to the core of Magna Carta, although Dicey hardly mentions Magna Carta at all. So the absence of arbitrary power on the part of government is at the core of what we are talking about at this conference and the core of the Rule of Law. Secondly, Dicey said the Rule of Law requires every man to be subject the ordinary law administered by ordinary tribunals. No man is above the law, and for him this meant everyone is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary courts. Well, why did he say that, and actually it was a swipe at French administrative law. In fact he wrote a whole chapter on what he regarded as this nasty thing called *droit administratif*,

maintaining it was completely alien to English traditions of the Rule of Law, going further to explain why the English legal and constitutional system was so much better. What explains this comparison and the views expounded by Dicey is that at that time Britain was at her height of Empire, and the entire establishment exuded immense pride in our system of government, which we were exporting around the world in the self-governing colonies. Empire, and the avoidance of the horrors of the French Revolution, seemed to prove why our constitution was superior to all others.

Now as just as an aside, probably one of the most destructive aspects of Dicey's writing, successful though it was, was to stultify and stunt the development of administrative law in England for several generations. The setting up of the Donoughmore Committee on Ministers' Powers in 1929 to inquire into the new phenomena of delegated legislation and tribunal adjudication generated by the legislation required to operate the interventionist welfare state was a really significant moment in our constitutional history when Britain could have taken the opportunity to develop a statutory and coherent system of public law for dealing with this new mass of statutory regulation and powers that were developing on an ad hoc, some would say anarchic, manner. The Lord Chief Justice Lord Hewart wrote a book on the subject called, *The New Despotism*, that largely prompted the inquiry.

As William Robson commented at the time, this inquiry started life with the "dead hand" of Dicey actually written into its terms of reference, as it was asked to bring forward recommendations compatible with the supremacy or rule of law which was taken to mean exactly what Dicey said, since his book *Law of the Constitution* then dominated legal and political thought on the constitution. Dicey's influence thus set back the development of administrative law by a very long time. It was only really in the 1970s that the courts started developing some principles of administrative law on a de facto basis as part of the common law, and the establishment came to accept that we should actually have a clear process of judicial review of administrative action and that's now reflected in the 1981 Senior Courts Act setting down a special procedure for judicial review applications and subsequently naming an Administrative Court as part of the High Court.

The third proposition that Dicey said was contained within the Rule of Law was that the general rules of constitutional law are the result of the ordinary law of

the land, by which he meant that the civil rights and freedoms of individuals are secured not by positive law and a constitutional code but by the ordinary remedies of private law. He was thinking especially of habeas corpus safeguarding personal freedom, and this emphasis on the virtues and non-necessity for a Bill of Rights was really a swipe at the French again, with their declaration of the rights of man, and of course a swipe at the emerging great power across the Atlantic in America with the written constitution and declaration of inalienable rights.

So it is interesting how the Rule of Law has been formulated in English constitutional theory as an expression of what is distinctive about us in comparison to other countries, especially France and the United States; and also how the principles expressed in our literature tend to be talking points around which to discuss ideas and difficulties of good government. In the recent book on *The Rule of Law* by Tom Bingham, the former senior Law Lord, he set out a number of values and prescriptive principles he regarded as essential to compliance with the Rule of Law. One of the first pieces of research I did when I entered academic life quite a long time ago was to send round a form to teachers of public law around England and Wales to find out whether they taught the Rule of Law as a discrete subject and what the composition of that was, to which I received extraordinary variety of responses. The results were published in my article "Dicey and the Teaching of Public Law" in 1985, to mark the centenary of publication of Dicey's great work. Some rejected it altogether as pure political rhetoric ("no positivist relevance... it's purely theoretical... it's an enormously slippery and dangerous thing..." etc) with others were saying it was absolutely fundamental ("immensely important... very basic to western concepts of liberal democracy... " etc). The Rule of Law is a pretty slippery concept, marked by a proliferation of different and highly subjective interpretations.

Now, for many people the Rule of Law and the absence of arbitrary authority signifies the separation of powers, and certainly the Americans do who probably think they own Magna Carta even more than the English - freedom of the American colonies from the English! And of course the American constitution was founded upon big ideas, the separation of powers, democracy, and the inalienable rights of the individuals. Very unlike ours. In the late Victorian era another great constitutional writer, this time a successful journalist who had trained as a barrister sought to make sense of what we have, and this was Walter

Bagehot and his book published in 1867 *The English Constitution*. Now for Bagehot, the efficient and brilliant element of the constitution was quite the opposite to the separation of powers - it was precisely the fusion between the executive and the legislative branches. This was the efficient secret of the constitution, hidden behind the dignified facade of majesty and pomp as represented by the Monarchy and House of Lords.

Which takes me on to a constitutional idea or doctrine that has been formulated, again in response to de facto historical developments and the evolution of the constitution from Monarchy to "disguised republic", and this is the doctrine of ministerial responsibility. Now some of my colleagues recently have said that the doctrine of ministerial responsibility has evaporated in significance and is not really of any great importance any longer, but this is quite untrue. In fact, actually you can write an essay about the entire British constitution around it all being about the doctrine of ministerial responsibility. There is ministerial responsibility for the Crown, for the queen: all her acts and utterances are covered by ministerial advice and responsibility, and in Parliament you cannot criticise the Queen, you can only criticise ministers for anything she does because they are advising her. There are joint or collective ministerial responsibilities: that ministers must have a seat in the House of Commons; that if the government is subject to a no confidence motion then it must resign; and the unanimity rule, that all ministers in the government must publicly support government policy and decision-making, or else resign office. Then there are individual ministerial responsibilities on conduct and vicarious liability for officials, and that a minister must have a seat in Parliament, and it is interesting how this fundamental rule came into being and the origins of it are that House of Commons reserved the power of impeachment and interrogation. As Parliament developed, the early struggle was to keep it in continuous existence, or at least meet annually, but after that was secured by the 1688 settlement in the Bill of Rights, Parliament increasingly became dominated by placemen of the King and his ministers, people who were in the pay of the crown and supported the royal position, so limits had to be placed upon how many ministers were in the House of Commons. So now there is a statutory limit of 95 ministers and of course the executive appoints ministers right up to the maximum so you have a strong "payroll" vote supporting the executive.

I would like to say something in the time available about democracy itself, and the pride that most nations especially the Americans have in the concept of

government by the people. The connection of Magna Carta with democracy is that it represents the first great act of the nation, whose agreement and consent was required to how we should be governed. Now, democracy has two aspects to it: there is representation and there is responsibility. Some countries have emphasised the representative nature of democracy, and some have emphasised its qualities and requirements in terms of responsibility. In Britain, traditionally we have emphasised its responsible nature, and this is reflected in our institutions and processes of government, as well as our constitutional doctrines. We have a system of responsible government, and the reality is that we do not have a system of government by the people, that is a literal impossibility in practice, even if it sounds good in theory. Instead we have a system of government for the people, and with the people, and we have framed our constitutional procedures around this reality.

Because of this emphasis, it is easier not to be too bothered about the representative quality of, for example, our voting system because it's a mechanism for kicking an unpopular government out of office, and that is what is most important. Now it seems to me that in Britain we are slowly moving towards an era where there is a growing expectation that our institutions should in fact be more representative, but this underlying theorising about what democracy is about is not addressed at all in any of the political debates around the desirability or otherwise of referendums. In fact the reason we have referendums in Britain is not because the government wants to know our views, but because it is a mechanism for resolving disunity within the party in power. For many, referendums are nasty majoritarian tools and are at odds with electing political representatives to make decisions on our behalf, but a fashion for them is growing in the Britain, underpinned by claims for them being a democratic way of proceeding.

I think looking at the recent election of Jeremy Corbyn as leader of the Labour Party in this context is interesting, because when the political parties democratised, if that's the right word, their rules for choosing party leaders, they cannot have been thinking clearly about the constitutional implications of what they were doing. Is a political party seeking office the group of politicians sitting in the legislature or is it the national campaigning organisation outside Parliament? You need to have a clear distinction between the two. So while it seems very democratic to open up the electorate for who selects the party leader - as Prime Minister designate - to thousands of party members outside

Westminster who have no direct personal working knowledge of that person, difficulties arise because our system has been traditionally geared around producing political leaders who have been forged through the parliamentary process, with parliamentary colleagues forming a selectorate for the leader and potential Head of Government. It has been one of the strengths of the Westminster political system that ministers and Members are jostling with one another the whole time, and they discover first hand what the qualities of a person are, how suitable to lead the party in opposition in the House of Commons, and in government as Head of Government. There is an argument for widening the pool for who chooses the party leader but it is a presidential one, not a parliamentary one. So we do not know how exactly Corbyn-mania among Labour's rank and file membership in the country will end, but I think it has caused a crisis for the Labour parliamentary party arising from a conflict of thinking about the nature of democracy and in particular about our system of parliamentary government.

Now, at the June commemoration at Runnymede a new statue of the Queen was set up which, while there is no doubt she has been an outstanding and popular Monarch, for some this was a curious symbolic physical manifestation of what Magna Carta does or should represent. The monarchy's connection with Magna Carta however is one that interests me because I have been doing a great deal of work on the monarchy recently, and my point concerns the enforcement of Magna Carta and the enforcement of constitutional documents generally. In one version of Magna Carta the enforcement of the charter would be simply brute force, so that in clause 61, "The barons shall elect twenty five of their number, four of them shall go to see the King and shall require and if there's no redress within forty days then the barons may distrain upon and assail us in every way possible with the support of the whole community of the land by seizing our castles, lands possessions or anything else saving only our own person, the queen and our children..." So that is quite a basic way of enforcing the document, and how does that translate today in terms of enforcing rules of compliance against the Monarchy?

The person of the Monarch is still immune from legal process, so if the Queen refused to comply with her legal and constitutional obligations there is no mechanism that can act in her name. If, for example, after dissolution of Parliament she refused to authorise a royal proclamation summoning the meeting of its successor, there is no other institutional or legal mechanism that

could actually call Parliament into existence. Only she can appoint a Prime Minister, and she exercises this power by reference to political convention, that it is whoever can command the confidence of the House of Commons, but in legal terms the appointment is made under the royal prerogative and only the Monarch can do that, and there is absolutely no mechanism to enforce that today. There were some mechanisms built into the seventeenth century interregnum documents, notably the Instrument of Government, and there was one in the Triennial Act 1641 because parliamentarians were very concerned that Parliament might not be called into existence especially after the 1629 to 1640 "eleven years tyranny " under Charles I. So they went to great lengths to lay down a procedure whereby if the King did not call a Parliament into existence then the Lord Chancellor or Lord Keeper could do so, and if they did not then twelve peers of the realm could do so, and if they did not then Sheriff of the County could. But that statute was repealed at the Restoration as being contradictory to the dignity of the King. This state of affairs somehow symbolises the British constitution for me, for any written constitution would very clearly provide for such basic acts of state to be enforceable in law on the authority of the constitution and a Supreme Court. But some say why worry, as such hypothetical scenarios will never arise. The genius of the British constitution, it has been said, is that it is geared to the real world.

To sum up, the principles symbolised by Magna Carta - the Rule of Law, democracy and human rights - are very definitely reflected in the daily working of the British constitution and have been of immense importance in terms of influence upon the development of its structure, law and conventions, but this has been in a somewhat loose and ramshackle way. There is no contradiction here because what each of these terms means in terms of their detailed substance and application is open to a multiplicity of different interpretations and nuance. They are reflected in the law and conventions of the constitution as it evolves with time and with shifting opinion. For many of course the symbolic qualities of Magna Carta lies not so much in the law of the constitution but in the spirit and attitude of the British people on matters relating to how we are governed.

And finally to return to the subject of my wife Paula, she often tells me that I have a high tolerance for ambiguity. In other words I am able to live in a state of uncertainty about things and take a long time to make up my mind about how to change things for the better. I think the very same thing or observation can be

said of the British constitution itself - it has a very high tolerance for ambiguity - and maybe this has been one of the secrets of its success.

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