**Talk to the University of Amiens**

**The Legacy of Magna Carta. Can it help us today?**

**Introduction**

I am most grateful for the kind invitation that has been extended to me by the University of Picardie today to open your conference on Magna Carta. Over the next three days you will have an opportunity to explore every aspect of its creation, survival and current significance and impact. It seems particularly fitting that this should take place in one of France’s historic cities where the echoes of the relationship between France and England and later the United Kingdom are all around us, from the architectural style of the cathedral which provided some of the direct model for Westminster Abbey to the monument within it which records our shared sacrifice for freedom in the First World War.

In asking me to speak I am conscious that the perspective that I can best bring to this discussion is that of a British politician and therefore I want to concentrate my thoughts today on the relevance of the Charter to the current constitutional debate in my country. My views are in part informed by that experience as Attorney General but they are definitely personal to me. Indeed, I am conscious that my own perspective and that of others may differ.

 What is clear and widely accepted however, is that the UK is at present in the midst of a period of major constitutional change with unpredictable consequences. Our relationship with the European Union, which is criticised by some as a fetter on our national autonomy is up for renegotiation and approval or rejection in a referendum. The present government has announced an intention to repeal the Human Rights Act and change our relationship with or withdraw from the ECHR. Last but most importantly the future of the United Kingdom itself is in question. Despite last year’s referendum, the issue of Scottish nationalism is very much present and a lasting settlement that respects Scottish particularism but preserves our unity remains elusive and undesired by some both North and South of the Border who want separation. Devolution to Wales has at times appeared unstructured, with unpredicted consequences as to where power now resides.

So this is proving an important time to reflect on what frameworks of Rights might best help us in our governance, protect our liberties and keep us together and to draw on some lessons of history, including Magna Carta. I would like therefore to try and set out today some ideas round this subject. I should emphasise that this is not intended to be an academic’s presentation, although I hope that I may be able to inform my opinion with reasons based on evidence, as a lawyer should. But I also want to make clear my own strongly held view as a politician that we are, in the UK the beneficiaries of an exceptional heritage when it comes to our liberties and rights which goes to the heart of our national identity and national interest. This we can build upon, but we must also be careful not to wreck by neglect.

Before we look to the future, however, we need to reflect on where we are. As I am sure this conference will explore, the significance of Magna Carta, that we are celebrating, is rooted not just in historical fact but also in the creation of a national narrative that could be described as a national myth. The Barons who were responsible for obtaining it from King John had preoccupations that are perhaps a little removed from our own. They were dealing with a King who was operating outside the acceptable norms of kingship in the early 13th, not the early 21st century and directly threatening their personal interests and potentially their lives, if they could not curb his tyrannical tendencies. As a peace treaty it was a total failure, a revival of civil war occurred within weeks. It was only through the genius of William Marshal, that great Lord and long suffering but loyal adviser of the King that it was reissued after John’s death, to end the civil war and protect the young King Henry III and thus, over the next century, started to become embedded in the national consciousness of medieval England.

Today there are quite a number of distinguished historians and lawyers, including Lord Sumption, a judge of our Supreme Court, who are sceptical as to the Charter’s constitutional significance. “Some documents” he said “are less important for what they say than for what people think they say”. And he went on “When we commemorate Magna Carta, perhaps the first question we should ask ourselves is this: do we really need the force of myth to sustain our belief in democracy? Do we need to derive our belief in democracy and the rule of law from a group of muscular conservative millionaires from the north of England, who thought in French, knew no Latin or English and died more than three quarters of a millennium ago.”

But to this academic reasoning, the politician in me responds that we should do just that, because the Charter and its legacy are keys to an understanding of a widespread view in Britain today on the limits of government and of our rights as the Queen’s subjects.

Firstly, the Charter is of great importance because it was very effective in reducing the medieval monarch’s ability to raise money by arbitrary fines or levies. This meant that there was now little option but for a king to summon councils, or as they were called by the 1230s “parliaments”, to approve general taxation. By the end of the 13th century this practise was institutionalised once the Commons emerged as a distinct body with the right to grant taxes and the power to demand the redress of grievances in return. It has influenced every key phase of our constitutional history since and can properly therefore be seen as a seed of modern parliamentary democracy.

Secondly, the Charter expresses an insistence on limiting the power of the King to control and dispense justice and to enforce law only for the benefit of his narrow self-interest. The Barons may have been northern millionaires who mainly spoke French, but they legitimised their stance by invoking concepts of justice that they saw as inherent to the realm and land of England of which they were a part and which 150 years after the Norman Conquest they clearly saw as a polity, not just a place where they had estates and wealth. The clauses speak of “the law of the land”, the law of the kingdom” and the law of England”. The law was not written down but its purpose was to offer men full justice according to their status. It drew on ideas of good and bad kingship that derived from the Bible and the coronation oath introduced in England in the 9th century which required the maintenance of peace and justice and which by the 11th century was held to be the “laws and customs of the realm”.

Today in our country the foundations of peace and justice still lie in the coronation oath taken by our present Queen at her coronation and in the oaths taken by numerous ministers, public officials, police officers and judges on appointment and which in effect bind the office holder to be a servant of the sovereign in the fulfilment of her own oath. As republicans, Tony Benn and now Jeremy Corbyn may not have liked it, but in the absence of a written constitution it is the ethical foundation of our state. Having, on becoming Attorney General, taken oaths in front of dozens of judges assembled together and kissed the Queen’s hand on appointment I can assure you that one is left in little doubt as to what you are there to do!

One of the arguments advanced against the Charter’s importance today, is that it is a re-invention of the 17th century coming from the struggle between Crown and Parliament after it had been lost from sight in the late Middle Ages and under the Tudors.

It is undoubtedly true that it was revived, but the evidence that it was never forgotten or ignored seems to me compelling. It was extended six times in the 14th century by statute under pressure from the Commons. It was first printed in the 16th century. In the oath of office taken by the Attorney General, which is of Tudor origin, I noted with amusement that I was required to say “I will duly and truly minister the Queen’s matters and sue the Queen’s process after the course of the law and after my cunning…I will duly and in convenient time speed such matters as any person shall have to do in law against the Queen as I may lawfully do, without long delay, tracting or tarrying the Party of his lawful process in that that to me belongeth…” Thus in serving as the Queen’s lawyer and representing her legal interests I was also made to promise as required by clause 40 of the Charter not to abuse my position to delay justice for anyone else.

It also helped create a much wider sense of English exceptionalism. Writing in 1453 Chief Justice Fortescue, author of De Laudibus Legum Angliae, praised the uniqueness of England’s governmental arrangements, from the the inability of the King to exercise arbitrary power to the right to trial by jury. He also deprecated the use of torture which at the time was a commonplace in the rest of Europe.

So it is not surprising that it was readily taken up again in the 17th century in the dispute between Crown and Parliament and was referred to by Sir Edward Coke, the Lord Chief Justice, in asserting the dominance of parliamentary power and the Common Law over the monarchy. James 1st, coming from Scotland appears to have entirely lacked understanding of the limits on the crown’s authority. When at Newark on his way south he ordered the summary execution of a pick pocket, without a hearing or due process to the consternation of his English entourage. He had done this freely in Scotland-it was known as Jeddart Justice. The stage was set for a conflict on the nature of legitimate authority that takes us though the Petition of Right of 1628, which proclaimed the illegality of a non-parliamentary tax and invoked the Charter in condemning arbitrary imprisonment for its non-payment, to the development of Coke’s idea of an “Ancient Constitution” coming from the Saxons, reinforced by the Charter and now being subverted. Of course this was myth but it was of the greatest potency. In 1640 Charles 1st was obliged to confirm the Petition and the Charter, before Parliament would vote taxation so that he could fight the Scots. By the end of the Civil War, the Leveller John Lilburne was claiming it as the “indubitable right and inheritance of a free born Englishman” and claiming any legislation contrary to it was void. When Parliament finally established its primacy in the Bill of Rights of 1689, after the overthrow of James II, it was to the Charter that reference was made for justification. It began by criticising James for having endeavoured “to subvert and extirpate the Protestant religion and the Lawes and liberties of the Kingdom”. Its thirteen clauses then went on to create the primacy of the law and to protect the individual from cruel and unusual punishments. Subsequent statutes gave Parliament control over the armed forces, ensured regular elections and gave judges security of tenure to ensure their independence. Since then the Charter has been invoked on many occasions in connection with political and legal rights. The Great Reform Act of 1832 was associated with its principles and the Chartist movement that demanded universal male suffrage, equal constituencies, paid MPs and annual parliaments took its name from it. It was much relied on by the Suffragettes who were certainly as confrontational as the Barons in respect of their tactics.

It has also travelled abroad. When the USA obtained its independence its Bill of rights consciously reflected the rights in the Charter. The Fifth Amendment on the need for due process of law clearly echoes clause 29. Some of its principles emerge again in France’s Declaration des Droits de l’Homme et du Citoyen. At the Global Law Summit in London last Spring in which I participated, it was seen as a shared inheritance in every common law country and respected and understood to be of global importance in many states which have civil law systems.

But despite or perhaps because of its extraordinary history, one must sound a note of caution. I find myself often being told by some constituents and even by some parliamentary colleagues that the Charter, taken together with Habeas Corpus, the Bill of Rights of 1689, the Common Law and a sovereign parliament are all that are needed to preserve our liberties and our human rights today.

Now, it is true that they together provide the basis of powerful laws and conventions about the way the State should behave and they have on occasion acted as a restraint on successive British governments trying to curb freedoms when tempted to do so by threats to public order or national security, as we saw for example a decade ago in the parliamentary debates over 90 day and 42 day pre charge detention under the last Labour government. But equally examples of past violations are all too easy to find, from the high handed behaviour of public authorities towards the vulnerable elderly or autistic children in their care, to the ill treatment of detainees during the Troubles in Northern Ireland. Their principles can and have been often ignored by a government with a parliamentary majority when enacting legislation. They are also in practise rights which are hard to invoke when a violation has taken place. The Charter (usually Clause 39 on due process) has been cited nearly 170 times in the superior courts of England since 1900. In almost every case it has been entirely rhetorical and has not formed the basis of the judgement. As was shown in the Bancoult case in the House of Lords in 2009 on the forcible removal of the inhabitants of Diego Garcia from their homes, the Charter (clause 29 of the 1225 version) may have prohibited exile unless authorised by law, but it did not prevent the lawmaker making whatever law it saw fit that might override this in a British Overseas Territory, so as to exile the Diego Garcia.

**The European Convention on Human Rights**

Today therefore the Charter is not the place to which free born Englishmen or other Britons first turn to for protection. Claimants, national and foreign, living under the Queen’s peace usually go to the Human Rights Act and to the ECHR, an international Treaty, signed up to by 47 European states and which the HRA has incorporated into our domestic law.

Much ink has been spilt on whether the Convention was or was not a brilliant British construction, willed by Churchill and David Maxwell Fyfe and crafted by British barristers; or, as sometimes claimed, some unfortunate importation of foreign abstract concepts of “Rights” alien to our national common law tradition of liberties and dangerously undermining of them.

There is no doubt that the drafting of the Convention and our adherence to it were controversial. The British participants looked to establish a detailed list of clearly defined rights, whereas the French and some other nations preferred a general list of principles that would be left to a supranational court to clarify by its decisions. There was unease at how it would work.

Contemporary Foreign office advice expressed fears that the Convention would be subverted. It said:

 “To allow Governments to become the object of such potentially vague charges by individuals is to invite Communists, crooks and cranks of every type to bring actions”.

And yet we signed and it is not difficult to see why.

For all the criticisms, the key rights originally protected under the Convention were, with the exception of Article 8 on a private and family life, in reality a classic exposition of the “Liberties” which generations of British politicians and the British public generally have insisted are our shared inheritance, traceable in some cases back to Magna Carta.

It is doubtless the case that, in the years after the Second World War, most Britons considered that our largely political tradition of rights protection offered a superior level of protection for freedom than any Continental model.

So in signing up we were doing something novel. We were intent at the risk of innovation, through the creation of rights that we ourselves enjoyed as liberties, not so much on protecting ourselves but on setting a standard of behaviour for states towards their citizens which would prevent the re-emergence of tyranny in Western Europe. It was Eleanor Roosevelt, who in promoting the UN Charter of Fundamental Rights and Freedoms described it as “the Magna Carta of the 20th century”. It was in order to give the aspirations of the UN Charter some possibility of implementation in practise that the member states of the Council of Europe created the Convention and bound themselves by treaty to observe the rulings of the court. It was the same impulse which allowed them later to agree to the right of individual petition which gave citizens as well as governments access to the Strasbourg court. As we have seen with Magna Carta, the interesting thing was that the Barons were prepared to accept limits on their own power, in return for creating a more predictable set of rules governing their relations with the King. In the ECHR, the state parties accepted potential checks on their own actions in return for the security that others would likewise be bound.

For alongside our tradition of national exceptionalism is another long tradition of international engagement, the fruit of our having been for more than the last two hundred years at the heart of globalisation. As one of the smaller global powers in history it has been our policy to seek to make the world a less dangerous, more predictable and better place to trade and develop human contact by encouraging the creation of international agreements governing the behaviour of states and helping create a system of international law which is the reflection of our own national experience and history. We know from our religious and political conflicts in the 16th and 17th century that a free society living under the rule of law enjoys a system for conflict resolution of inestimable value.

 When I was Attorney General, I enquired of the Foreign Office how many Treaty commitments we were adherent to. They were unwilling to go back before 1834, but indicated that since then they had some 13,200 records of treaties and agreements that the UK had signed and ratified. Many thousands are still applicable and range in importance from the UN Charter to local treaties over fishing rights or maritime access. Over 700 contain references to the possibility of binding dispute settlement in the event of disagreements over interpretation-as does of course the ECHR. And with the passing years these Treaties, be they the UN Charter and the Treaty International Convention on the Prohibition of Torture or the creation of the International Criminal Court, have dealt not just with inter-state relations but standards of behaviour between a State and those over whom it exercises power. The Convention lies squarely within this tradition. So important has been this treaty making that until last month the Ministerial Code specifically stated that it is the duty of UK ministers and civil servants to respect our international obligations. It is this duty which is now seen in Lord Bingham’s eighth principle, as being a key underpinning of the Rule of Law.

This is not to say that everything concerning the Human Rights Act and the ECHR is perfect. Entirely valid criticisms have been made by our own judiciary and by politicians that the Strasbourg Court has failed at times to respect national differences of interpretation of the Convention, which should be allowed under the principles of subsidiarity and of the margin of appreciation that states should have in its interpretation.

In part the Strasbourg court has, I think been the victim of its own success as it has been transformed from an international tribunal dealing with a very limited number of cases into a final court of appeal for some 700 million people. In service to what has been an understandable desire to protect human rights in countries with challenging records, it has micro-managed the Convention too much and sought to impose a uniformity that is undesirable in the interpretation of an international treaty that specifically gives to national parliaments and courts the primary obligation to uphold it. But there are good signs that following a review of the Convention and the working of the Strasbourg Court which culminated in the Brighton Declaration of 2012, change is occurring. The court’s backlog of cases for processing is substantially down. Judgments from Strasbourg, such as that upholding our national ban on political advertising, show a growing willingness to respect the reasoned decisions of our senior national courts.

We have also seen a much greater willingness by our own courts to disagree with previous decisions of the Strasbourg Court, where they think it right, rather than just applying them. Equally welcome is that the Strasbourg Court has then accepted our Supreme Court’s approach. There has also been, through a process of academic critique led by leading members of our judiciary a proper dialogue on the way the Strasbourg Court might better operate.

**The Convention in Europe**

It is also important to bear in mind that there is ample evidence of the benefits the Convention has conferred more generally.. Some of the earlier cases such as Marckx v Belgium 1979 6383/74 on the rights of illegitimate children or Ireland v UK 1978 5310/71 on how interrogation techniques constituted inhuman/degrading treatment are well known landmarks in the development of human rights norms for member states which we now take for granted.

And since the adherence of so many states that had previously been governed by Communist tyranny, the Convention and the Strasbourg court have been instrumental in facilitating the creation of the Rule of Law in environments where it has never previously existed.

**Would a United Kingdom Bill of Rights be better?**

It is with this history in mind that we can then look at the current debate on whether the UK would be better off with a Bill of Rights.

It must be emphasised that the idea of a Bill of Rights, rather than the incorporation of the Convention into our own law through the HRA is not new. Its merits were considered in the early 1990’s. The idea was, of course, for a Bill of Rights entirely compatible with and additional to the European Convention as interpreted by the Strasbourg Court. That it did not lead to legislation was due to a realisation of the potential magnitude of the task. Was the Bill of Rights to be entrenched so that Parliament could not override it by simple majority? Were judges to be allowed to override Statutes in interpreting it? What other rights might it contain or protect? Should it include socio-economic rights? At the end of the process the incoming Labour Government shied away from these complexities and went for a very conservative option in enacting the Human Rights Act and simply allowing our courts to apply the Convention directly. But the same questions remain as relevant today.

In 2009, I was asked by David Cameron, then Leader of the Opposition, to look at the issue again. It was clear that the HRA had been of limited value in curbing creeping authoritarianism. It had not protected, us any more than had Magna Carta, against the project to introduce ID cards, the arbitrary use of stop and search powers brought in on the justification of combating terrorism, attempts at curtailing the right to trial by jury or the disproportionate use of the RIPA by local councils to spy on school parents or dog walkers. It was also the case that the HRA had acquired little popular appeal and was often seen as a protector of the undeserving rather than a bench mark of national liberties. So a home grown document that could engage a wide public debate of the principles affecting both rights and liberties and ultimately promote a sense of popular ownership of the concept, principles and content of human rights seemed to me to have merit. This could be facilitated by the possibility of bringing key constitutional principles from elsewhere into our existing law and protecting rights and liberties which are not covered by the Convention, but which now are seen as part of our core values, such as freedom from discrimination, encompassing gender and sexual orientation. We might enshrine in one statute those clauses of the Bill of Rights of 1689 and the Parliament Acts which provide the framework of our democracy. We could define and protect the right to trial by jury and place limits on the power of the state to impose sanctions without due process of law, thus curbing the trend towards fixed penalties and other extra judicial sanctions. There was also the potential to examine if particular rights might be enshrined which concerned other parts of the United Kingdom. We could also see if there were areas of the Convention text, where Convention rights are not absolute and a balance has to be struck between competing rights, which could benefit from further definition as to how that balance should be struck in a way that was compatible with our obligations under the Convention.

The intervening six years has not changed my view on this being a possibility, if that is what the government wants to do. But the questions raised in the original work of the 1990s and in my own are as relevant today as they were then. If we proceed we will be taking on a task of considerable complexity.

The proposals published by my Party last October however envisage a Bill of Rights that does not meet these aspirations. It sets out to diminish the rights of individuals against the state, not to clarify or reinforce them. How else, for example, can one interpret the suggestion that what is recognised as the “inalienable rights” under Article 3 not to be exposed to torture or inhuman and degrading treatment should be capable of being a little alienated in respect of deportation or extradition by substituting a new unspecified test for that of a”real risk” applied by the other 46 member states.

It is impossible to escape the conclusion that the paper intended that once enacted the new Bill of Rights should be incompatible with our adherence to the Convention. The suggested solution that we should negotiate a special status to enable future judgments of the Strasbourg Court to be uniquely, merely advisory for us, with no international obligation to implement them is simply not realistic as it would entirely destroy the credibility of the Convention as an instrument for improving human rights. There is no sign that our fellow signatories will ever consent to this happening. I am therefore very pleased that this idea now seems to have been dropped.

There are however also two further fundamental problems that would have also to be addressed if we wish to replace the HRA with a Bill of Rights.

At present the HRA underpins the devolution settlements for Wales, Scotland and Northern Ireland and in this latter case it is also part of the Good Friday Agreement which is an international treaty with the Irish Republic. Human Rights are a matter reserved to Westminster, so Parliament could in theory legislate to change the position and repeal the HRA and replace it with a new Bill of Rights. But there is ample evidence that this would be against the will of all the devolved administrations and they will argue that such legislation should only proceed with their consent. At a time when the very future of the UK is in question in Scotland and the Northern Ireland peace process is still fragile, it opens the prospect of serious and damaging political discord. The other alternative which I have heard suggested is to enact an English Bill of Rights creating the possibility of our Supreme Court having to operate different systems in one country. This smacks of incoherence. For a Unionist Party such as mine to promote such an outcome would be contrary to our fundamental aims and principles.

Furthermore, any Bill of Rights which is incompatible with our obligations under the Convention risks a serious problem with the EU at a delicate time for our renegotiation of membership. Adherence to the Convention is explicit in EU membership and a prerequisite for any state wishing to join. At present the European Court of Justice in Luxembourg, which is of course quite separate for the Strasbourg Court, is confined to applying the convention as set out in the Charter of Fundamental Rights, only to matters within EU competence. But it has been expansive in this respect and the government has properly tried to limit this trend. I can think of nothing more likely to accelerate this than claims being brought before the ECJ by persons who consider that they are being denied convention rights and can get no redress either domestically or at Strasbourg. The likely consequence is that the ECJ would expand its jurisprudence to give that redress and these judgments unlike those from Strasbourg would then have direct effect here-a far more serious infringement of national sovereignty than anything under the ECHR. Some Eurosceptics might of course welcome this as ushering in the final confrontation between the EU, viewed as an overweening supranational power, and our principles of parliamentary sovereignty. But on the basis that we desire a renegotiated but continuing relationship, it is not wise. The great merit of Clause 2 of the HRA, has been to preserve the principle of parliamentary sovereignty.

**A written Constitution?**

These points emphasise for me that a new Bill of Rights or a new Magna Carta cannot and should not be used as a vehicle to solve a short term political agenda. That is not however to say that there are not good arguments that can be made that our rights and liberties could do with a more structured framework. Indeed as our country continues to evolve rapidly towards a quasi-federal state with increasing asymmetrical devolution, the absence of a single document containing the ground rules for the relationship between the state and its devolved parts and all parts of the state and its citizens becomes remarkable and in global terms exceptional. There is evidence that its absence contributes to a lack of legal clarity which then compels resort to the courts, as I saw as Attorney General in the references to the Supreme Court for the interpretation of the Wales Act 2006 and the Scotland Act 1998. These references illustrate the growing role of the judiciary in answering constitutional questions here. Examples from other jurisdictions, from the USA to Germany, suggest that constitutions that are unalterable by bare parliamentary majority and thus give stability to complex power relationships might be desirable and beneficial for us as well. There are plenty of academics to advocate it and plenty of lawyers who would be happy to make their careers out of it! But it is entirely contrary to our national tradition and there are few politicians at present seeking to promote it. It would be revolutionary in its scope and impact for us and could only be done after a thorough national conversation. I would myself favour it only if it was clearly going to cement in all parts of the United Kingdom a lasting constitutional settlement which preserved the unity of our country. Such a marriage of the philosophies of Magna Carta and the Declaration des Droits de l’Homme would not, however, be easy.

**Conclusion**

But whatever the future holds and whether or not we move to a written constitution or framework document of rights, the legacy of Magna Carta can and will continue if we wish it to do so. That requires of us however to show respect to the principles that underlay it and which are as well expressed in the restraints and limits on our government that come from convention or custom as they are from any document. In an age when government becomes ever more complex and frequently more intrusive in its activities as a result, it is there that the real challenge lies for the maintenance of our liberties. Remembering and celebrating the Charter as we are doing this week here in Amiens and ensuring that future generations do it as well, is half the battle won to ensuring that its legacy endures.

Dominic Grieve