Feature: Is Magna Carta More Honoured in the Breach?

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What is the difference between Magna Carta and the Human Rights Act? That might resemble the beginnings of a somewhat legalistic, and likely unfunny, joke; but the answer is rather more serious. Is it the eight centuries which separate them? Or that the former was crafted in Latin? No: the chief distinction is that Magna Carta is today but a symbol, redundant in our courts. It cannot aid the ordinary citizen in checking state power. The Human Rights Act, on the contrary, can.

But then the Great Charter has always been rooted more in myth than reality. The original of 1215 was promptly annulled by Pope Innocent III—extracted, as it was, from King John under duress. Much of it was not reintroduced for decades, rendering this year's 800th anniversary festivities slightly premature. And it would be fantasy to paint those at Runnymede as pre-Lockean visionaries, desperate to make England a fairer land.

Jurist Edward Jenks strongly criticised such fiction, accusing Sir Edward Coke of transforming 'an essentially feudal Charter' into a 'constitutional document'.[1] Jenks was onto something. Magna Carta enshrined neither jury trial nor habeas corpus—both came later. Nonetheless, its Chapter 29 is still widely acknowledged as the embryo of due process.[2] It is also, supposedly, one of three remaining active provisions. But, in practice, it has not been relied upon to

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[1] Edward Jenks, 'The Myth of Magna Carta' (1904) 4 Independent Review 260.

[2] Chapter 29 of Magna Carta, in the final revision as placed on the Statute Book, comprised of Chapters 39 and 40 of the original Charter of 1215. Chapter 29 observes thus: 'No free man shall be taken, imprisoned, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgement of his equals and by the law of the land. To no one will We sell, to no one will We deny or delay, right or justice.'

determine a British case in living memory. When parties seek to cite Chapter 29 in court, they flounder. During the *Bancoult* litigation,[3] the government even argued that Magna Carta was not a 'proper' statute.[4] While that position was ultimately reconsidered, the Charter had no effect upon the case's outcome.

Magna Carta's authority may endure, but more so elsewhere in the English-speaking world than upon its shores of birth. In the US, where it informed the Declaration of Independence and the Constitution, the judiciary holds it in high esteem. Indeed, the Supreme Court, in the historic case of *Boumediene v Bush*,[5] relied upon Magna Carta to rule that Guantanamo Bay detainees could in fact petition for habeas corpus, despite being prohibited by Congress.

That said, Magna Carta did also influence many of the freedoms in the European Convention on Human Rights—today incorporated into British law by the Human Rights Act. The Act can thus be seen as the culmination of the work which Magna Carta, by accident or design, began. If the Charter's greatest lesson is that no power is absolute, the Human Rights Act keeps that flame alive by exercising constraint over an increasingly large and powerful executive.

And yet, as Britain prepares for Magna Carta's octocentenary, the Act is in peril. It is a genuine threat, perhaps more lethal to the Charter's legacy than any other. As Magna Carta was misinterpreted from inception, so the Act has been skewed to the extent that 'rights' are now rejected as Continental imports serving only immigrants and criminals.

Many such detractors claim that the Human Rights Act is superfluous, given the existence of Magna Carta and the Common Law. But both are easily overruled by statute. Prior to the Act, instances of domestic law failing to provide sufficient protection, forcing litigants to the European Court of Human Rights, were not uncommon; and the UK's record at Strasbourg was not overly favourable.[6] And, in the home of Magna Carta, it took an incorporated

[3] *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] QB 1067.

[4] ibid [1093] (Laws LJ).

[5] 128 S Ct 2229 (2008).

[6] See, for example, *Malone v UK* (1983) 5 EHRR 385, in which the UK Government argued it was entitled to tap telephones merely because there was no

Convention to halt the indefinite detention of foreign nationals at Belmarsh.[7]

So any argument that the Charter alone can withstand the assault of government appears fanciful. And, while the Convention originated from the common law, it also goes further. There is nothing in Magna Carta, or similar, to safeguard personal privacy, or free speech. Additionally, the Act, for the first time, imposes positive obligations on the state. It is upon this string of the legislation's bow—driving up standards; offering redress where failings occur—that the Charter's spirit truly lives on.

Astonishingly, however, the Conservatives now view the Act's removal as a potential vote-winner. Their replacement 'British' Bill of Rights would,[8] amongst other measures, limit human rights law to only those matters the government deems 'most serious';[9] and dilute the unqualified protection against torture in certain cases. Meanwhile European Court judgments would be merely 'advisory' until approved by Parliament[10]—an insidious precedent worthy of, it must be said, more repressive regimes. Not only is such an approach a betrayal of all Magna Carta has come to represent; weakening of Convention rights would surely also increase the likelihood of Strasbourg finding against the UK, fuelling a return to the nocuous pre-incorporation perception that one must travel overseas for justice.

This is a sad status quo, borne chiefly out of a lack of public education. No statute is perfect, and the Human Rights Act may be no different. Incorporation of the Convention, though, can legitimately be considered one of Labour's finest achievements in office; and yet the Blair Government swiftly disregarded it in favour of post-9/11 authoritarianism. Consequently, there is scant civic pride in, or own-

British law prohibiting it (the European Court held that a proper legal framework was necessary); or *Smith and Grady v UK* (1999) 29 EHRR 493, in which the European Court found that investigation into, and discharge of, Royal Navy personnel on the basis of their homosexuality was a breach of Article 8 of the European Convention.

[7] *A and Others v Secretary of State for the Home Department (No. 1)* [2004] UK HL 56.

[8] The Conservatives, 'Protecting Human Rights in the UK: The Conservatives' Proposals for Changing Britain's Human Rights Laws' (2014).

[9] ibid 7.

[10] ibid 6.

ership over, the Act; it is not remotely as revered as the US Bill of Rights, or Magna Carta itself.

The Charter, of course, was not initially accepted either. It is easy now for powerful voices to speak fondly of an unenforceable relic; the Act, 14 years young and very much 'live', is a different beast. Prime Minister David Cameron insists that Magna Carta's principles 'shine as brightly as ever'.[11] But it is difficult to envisage a development more incompatible with those principles than the abandonment of the one true statute allowing every member of society to hold the mighty to account in British Courts.

In truth, as Magna Carta's ink fades, its values diminish also. Of what use is a mere icon, devoid of substance and its modern-day manifestation? History is more than a path from the past; it should shape our future. Precisely what kind of future, for Magna Carta, would scrapping the Human Rights Act provide? One in which, regrettably, it may forever be 'more honoured in the breach'.

[11] David Cameron, 'British Values' (*Gov.uk*, 15 June 2014) <https://www.gov.uk/government/news/british-values-article-by-david-cameron> accessed 21 November 2014.