

Is Magna Carta More Honoured in the Breach?

The past 800 years have done little to soften the force which the Magna Carta retains in legal and political culture; if anything, time has been kind to the Charter, ensuring its conception and ratification as defining moments in British legal history. Yet in response to the question posed, this paper adopts a more critical approach, arguing that Magna Carta is currently neither breached *nor* followed, attributing this to the simple fact that those provisions which have survived possess little relevance or legal weight within modern society. Rather, the charter has come to undertake a purely symbolic role; that of *representing* the embodiment of our constitutional standards, and thus as an entity to which may judges and members of the public alike may have recourse in attempting to find a justification for 'traditional' ideals'. Such action, I argue, is unfortunately misplaced.

Prior to examining the 'Great Charter' in its modern context, we must first assess the historical background of this infamous document. We must of course remind ourselves of its true purpose, which was to protect the property of the Barons and to situate their power vis-à-vis the Monarch. Indeed, in its original form, the Charter makes few references to the rights of 'freemen' and is substantially lacking in provisions on civil and political rights. A further reminder must be made of the numerous adaptations which have been made to The Charter over the course of its enactment – first signed in 1215 at Runnymede, the Charter underwent revisions in 1216, 1225 and 1297 – these changes have generally occurred at the discretion of the monarch and political elite and in response to the political crises of the day. Nowadays, only three provisions of the 1297 Charter retain their legislative force, which provide that (a) the church and all freemen shall possess the liberties contained within the statute, (b) all cities, boroughs, towns and ports shall have their liberties and customs and finally (c) that no freeman shall be imprisoned, or have his property or liberty taken, restrained or destroyed,

apart from under law.¹ Of these three provisions, arguably only the third retains any significance.

We come, then, to the present day. Despite the significant passage of time, the Charter continues to find regular mention in the press and courts, and continues to be (quite literally)² paraded as a bastion of fundamental principles and quintessential ‘Britishness’. This has become all the more apparent due to current discussion on the potential introduction of a British Bill of Rights, with multiple politicians “*already claiming Magna Carta as their own.*”³ Arguably, the current trend towards traditionalism and patriotism is the perfect setting in which to demonstrate allegiance to the piece of legislation which, it may be suggested, is the closest that the country has come to possessing a written constitution; although the accuracy of this view is debateable, it has undeniably become persuasive within modern political rhetoric.⁴

The consequences of this rhetoric should not be understated. The importance of written constitutions has grown significantly over the last decade, particularly in the context of transitional justice (such as in Iraq and Burma) and the growth of self-determination. As a consequence, I suggest, in the absence of a written constitution the British people have turned to the Magna Carta as representative of principles of natural justice, despite its largely ineffectual nature. The Charter has taken on a symbolic role, partly due to its longevity but also because of its representation of stability and consistency of certain fundamental norms. Thus, it remains ‘honoured’ in the manner which it is respected, yet ‘breached’ in how its articles have been deconstructed and overruled over time. Furthermore, it is important to note

¹ Magna Carta (1297) – Articles 1, 9 & 29

² See <http://www.bbc.co.uk/news/uk-england-london-29968347>

³ UK Human Rights Blog, ‘Whose Magna Carta is it anyway?’ (2014)

<http://ukhumanrightsblog.com/2014/06/17/whose-magna-carta-is-it-anyway/>

⁴ See for example <http://www.parliament.uk/new-magna-carta-consultation> and

<http://www.telegraph.co.uk/news/uknews/law-and-order/10964150/Does-Britain-need-a-new-Magna-Carta.html>

that despite this political and public sanctification of the Charter, this has failed to prevent contemporary Governments from enacting policy which contravene the provisions it contains. This has become particularly apparent in the field of anti-terrorism; the introduction of Control Orders in 2005 and of Closed Material Procedures in 2013 may both be said to act contrary to Article 29.

It would admittedly be rash however, to argue that the charter is completely without any legal significance. For example, in the infamous *A and Others v Secretary of State for the Home Department* [2004] UKHL 56, Lord Bingham cites the Charter to prove the existence of a “long libertarian tradition of English law”.⁵ Similarly, in *Re: S-C* [1996] Q.B. 599 he names the Charter as the source of the “fundamental constitutional principle” that “no adult citizen of the United Kingdom is liable to be confined in any institution against his will”.⁶ These statements are encapsulations of Article 29 of the 1297 Charter, which remains the only provision with any true weight. However, such comments potentially overstate the power of the Article, whose content is largely contained in Article 7 of the European Convention of Human Rights.⁷ Given that the Human Rights Act has incorporated the ECHR, one is left wondering why Article 29 remains in force.

We are left therefore at a peculiar juncture. The Magna Carta remains on a pedestal, with its history firmly embedded in the development of British political culture, yet having had its content gradually eroded away. As such, the Charter has consequentially remains a truly symbolic document, to which reference is had in the justification of both progressive and conservative ideals and which has become the embodiment and therefore the ambassador for British integrity. Although this of course is to be promoted, the arguments presented here are made to serve as a reminder that we risk consecrating a document which in reality can serve

⁵ *A and Others v Secretary of State for the Home Department* [2004] UKHL 56 [36]

⁶ *Re: S-C* [1996] Q.B. 599 [603]

⁷ European Convention on Human Rights (1953) – Article 7

no tangible legal purpose, and that our time may be better spent looking towards further constitutional development and the protection of individual freedoms.

Word Count

1,009