

## **Is Magna Carta more honoured in the breach?**

The constitutional significance of Magna Carta arises not so much from its historical importance or literal meaning as it does from the profound principles which it has come to represent. These are principles that would probably baffle and astonish those who drafted the Charter in the first place. It is, however, precisely because successive generations have reinterpreted Magna Carta that it has escaped from becoming a historical footnote. This process of reinterpretation has gradually mythologised the Charter to the point that it has become representative of a ‘sustaining myth of justice...[and] a fundamental formulation of belief in the rule of law.’<sup>1</sup>

Deciding whether Magna Carta is more honoured in the breach requires us first to define what that ‘sustaining myth of justice’ means to us today. This essay submits that the myth draws its meaning from two principles that were inspired by two of the Charter’s clauses. The first principle holds that those who exercise power should be accountable to those who are subject to its exercise. This principle is inspired by clause 39: ‘*no free man shall be taken or imprisoned...but by lawful judgment of his Peers, or by the Law of the land.*’ The second principle holds that all citizens should have ready access to justice by way of the courts. This principle is inspired by clause 40: ‘*[t]o no one will we sell, to no one will we refuse or delay, right or justice.*’ These principles provide the reference point by which the initial question may be answered.

A cursory inquiry shows that Britain continues to honour both the first and second principle, at least in the main. Citizens who are wronged by the State may find redress through the courts without suffering the repressive countermeasures that would threaten them in many

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<sup>1</sup> MT Clanchy, *England and its Rulers: 1066 -1307* (Blackwell Publishing, 2006, 3<sup>rd</sup> Ed.) p194

other jurisdictions. The courts are generally well-managed by a professional body of lawyers and judges who are committed to acting with efficiency and fairness. Despite its imperfections, the British justice system maintains the ‘sustaining myth of justice’ in a way that should not be taken for granted.

Yet it is precisely because this system should not be taken for granted that the reforms by the present Government provoke such concern. The first principle is being threatened by proposed reforms to judicial review that suggest a ‘scarcely concealed impatience’ on the Government’s part ‘with what it implicitly perceives to be an unnecessary constraint on its powers.’<sup>2</sup> The ongoing debate over the Criminal Justice and Courts Bill reflects the Government’s commitment to reforms that will, whether by accident or design, render judicial review more expensive and inaccessible to the average citizen. This threatens to undermine governmental accountability since judicial review is the primary means by which citizens may challenge the legality of decisions made by public authorities.

The first principle is being further undermined by destructive cuts to the criminal justice system. The State must enforce the criminal law but it is vital to ensure that it is not unaccountable to legal scrutiny when doing so. Upholding such accountability depends upon investing in criminal legal aid to the extent necessary to sustain a profession of expert lawyers capable of challenging the lawfulness of prosecutions and convictions. Cuts to the criminal justice system have, however, been so severe that the quality and capacity of that profession can no longer be guaranteed. The result is that citizens are becoming ever less capable of defending their rights when facing prosecution. The State, on the other hand, is under ever less pressure to exercise its authority accountably.

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<sup>2</sup> Gordon, Richard, *Judicial review – storm clouds ahead?* J.R. 2013, 18(1), 1–5

As for the second principle, it has been undermined by severe cuts to civil legal aid that have deprived the majority of citizens from having ready access to the courts. In theory, the courts remain open to anyone wishing to litigate. In practice, the complexity of civil litigation means that those who cannot access legal advice are unlikely to issue proceedings, let alone see them through to a successful conclusion. The unavailability of civil legal aid means that Britons have become less able to afford legal advice and therefore less able to access justice through the courts. This development clashes with the modern interpretation of clause 40 by threatening to cause justice to be refused or delayed to the growing number of Britons who cannot afford the expense of civil litigation.

The declining availability of legal aid and judicial review suggests that Magna Carta is being more honoured in the breach. But public statements from politicians suggest that the Charter has never enjoyed greater respect. For example, the Justice Secretary, Chris Grayling, intends to commemorate the 800<sup>th</sup> anniversary of Magna Carta with a celebration of British freedom and justice. Similarly, David Cameron recently praised Magna Carta for representing values like ‘a belief in freedom, tolerance of others...[and] the rule of law’ which are all ‘as British...as fish and chips.’<sup>3</sup> Such statements suggest a sort of cognitive dissonance on the part of a Government that venerates Magna Carta in so many words while instituting cuts and reforms that compromise its principles in practice.

The answer to the initial question is to be found in this dissonance. Magna Carta, or at least the principles inspired by clauses 39 and 40, is honoured in theory but breached in practice. This is apparent in the way that politicians like Grayling and Cameron eulogise the Charter while passing legislation that fetters judicial review and eviscerates legal aid. Such an

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<sup>3</sup> *British values: article by David Cameron* (15 June 2014, <https://www.gov.uk/government/news/british-values-article-by-david-cameron>)

approach confirms that '[m]any who knew little and cared less about the contents of the Charter have, in nearly all ages, invoked its name, and with good cause, for it meant more than it said.'<sup>4</sup> The coming year will see politicians falling over themselves to invoke Magna Carta and the principles for which it stands. Meanwhile, those same principles will fall into further disrepair at the hands of those same politicians who know little and care less about preserving our sustaining myth of justice in more than words alone.

[Word count: 997 (excluding footnotes)]

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<sup>4</sup> WL Warren, *King John*, (3<sup>rd</sup> Ed., Yale University Press, 1997), p240