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Is Magna Carta more honoured in the breach?

As King John wearily impressed his seal on the laundry list of demands made by his rebellious barons, he may have wondered what history would make of his concession. It is unlikely he imagined his defeat being celebrated 800 years later, and still less that he was taking part in the Nativity of British democracy. But Magna Carta's statement of the rule of law still resonates today:

"*NO Freeman shall be taken or imprisoned, or be disseised of his Freehold, or Liberties... nor will We not pass upon him, nor condemn him, but by a lawful judgment of his Peers, or by the Law of the Land. We will sell to no man, we will not deny or defer to any man either Justice or Right.*

The charter is now of historical importance rather than legal significance, yet its principles are axiomatic to British society today. Everyone is subject to the law of the land, and we have an elaborate system of appeals, checks and reviews to scrutinise any deprivation of liberty. In fact, these ideas are so deeply embedded in modern life that the barons themselves would doubtless be appalled: even after the Magna Carta was signed landowners continued to enjoy arbitrary power over the majority of their subjects, who as unfree villeins remained below the law.

But anxiety remains about the spirit of Magna Carta. The furore over the Human Rights Act shows that we have not yet solved the dilemma of how far to restrain those in power, and this is the natural place to examine the legacy of the charter today. But it is also cited in a range of other debates, from cuts to criminal legal aid to extensions of detention without trial for terrorist suspects, and we must firstly ask the question: why would anyone discuss modern problems in terms of a medieval document with no practical legal force?

The answer lies in the tensions of Britain's unique and unwritten constitution. The doctrine of sovereignty means that Parliament's powers are – theoretically, at least – unconstrained. Judges have no power to strike down legislation, and there is no higher-order code with which a statute must comply. A concerned American may oppose a threat to the rule of law as unconstitutional, whereas his British equivalent can only denounce it as running counter to "values"- and Magna Carta is their most

venerable symbol. Therefore any discussion of whether its spirit is honoured must be approached with caution: it is an inherently politicised question, and all too readily reduced to a referendum on the government of the day.

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The European Convention on Human Rights was drafted in large part by British lawyers, and it is widely accepted that it was influenced by the principles of Magna Carta. Since 1951 Britain's status as a signatory to the Convention has provided an entirely new avenue of redress when these rights are breached by government or common law. This has been further strengthened by the Human Rights Act, which requires judges to interpret Acts of Parliament in line with Convention rights where possible.

Restraining a democratic government has proven to be controversial, and now the Conservatives have effectively promised to leave the Convention should they win the next election, replacing it with a 'British Bill of Rights.' Key details on how this would operate are yet to be disclosed, but a recent policy paper places heavy emphasis on restoring parliamentary sovereignty, citing the legacy of Magna Carta as it does so. It promises that in future the UK courts will interpret legislation based on natural meaning and the clear intention of Parliament, and further notes that by undermining parliamentary sovereignty, the Human Rights Act undermines democratic accountability itself.

The motives of the government in arguing this certainly bear close scrutiny: its job is to change the law, and it wants, on principle, to remove a major and inconvenient restraint to doing so. On an unkind view, this is akin to a fox taking a principled stance against chicken wire. But the deeper question remains: does parliamentary sovereignty really manifest the spirit of Magna Carta today? The charter was founded on the idea that certain rights were so inalienable that even the sanctified sovereignty of an anointed king could not interfere with them. These rights historically bound Parliament as well: for much of the middle ages statutes were deemed invalid if they conflicted with the charter. And arguably human rights are the modern descendant of Magna Carta - values so essential that they should bind even the highest of authorities.

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But this conclusion rests on a particular idea of what Magna Carta is, which will always be contested. Is it a sword to protect inalienable rights, or a shield from the arbitrary exercise of power? Even if it is the former, problematic questions remain. Is the "freeman" of modern times every man, or just those with citizenship? And exactly which rights should be forfeit in the case of criminal or terrorist activity?

As a symbolic document Magna Carta itself can provide only the vaguest of guidance in answering these questions. This is perhaps why most other democracies have favoured a written constitution: it provides an opportunity to ossify the values by which a nation defines itself in its official national story. On the other hand, Magna Carta's very flexibility means it has been used to justify constitutional innovation through the centuries, from habeas corpus and trial by jury to the Glorious Revolution of 1688.

Today it provides us with a useful mechanism for expressing concern about individual rights in an era of growing executive power. Because it is a symbol used to object to the exercise of authority, it is all too easy to conclude that it is more honoured in the breach. But our very participation in the time-honoured British tradition of fretting about its relevance suggests that, on an important level, it is not.

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