Magna Carta and the development of the British constitution

An illustration from the Wriothesley Garter Book of the Parliament of England assembled at Blackfriars in the year 1523. Painted on vellum as part of an heraldic compendium by Sir Thomas Wriothesley (Garter King of Arms, 1505-34), it is thought to be the earliest surviving contemporary illustration of the opening of parliament.

Robert Blackburn explains why, 800 years on, Magna Carta still has relevance and meaning to us in Britain today.

Magna Carta established the crucial idea that our rulers may not do whatever they like, but are subject to the law as agreed with the society over which they govern. In establishing this point, the Charter laid the foundations for modern constitutionalism and provided the core principles on which all forms of governments should be based, whether monarchies, republics or democracies. Above all, the Charter affirmed some of the most important fundamental freedoms which were later to be embodied in written constitutions and international treaties all over the world. In a sense the Charter may be seen as 'the first great act' of the nation, by its guarantee of liberties 'to all free men of the realm' pointing the direction of travel towards the development of our representative institutions today.

The content and intention of the Charter were naturally the product of time and circumstance. Included in the 63 clauses of the original 1215 version were a number that dealt with immediate political grievances, among them the release of hostages (clause 49) and the removal of King John's foreign-born officials (clause 50). A primary concern of the Charter's draftsmen was to remedy the king's abuse of his feudal rights, by regulating, for example, payments in lieu of military service and control over the property of widows, minorities and intestate estates. At the same time, however, the Charter asserted some fundamental liberties, for example the freedom of the Church (clause 1: the English church shall be free ..) and freedom of movement abroad (clause 42: it shall be lawful for any man to leave and return to our kingdom unharmed and without fear, by land or water, preserving his allegiance to us, except in time of war).

Most famously, the Charter established the over-arching principle of due process in the administration of justice. In this connection, clause 39 said: no free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land; a clause which has been interpreted to provide for a right to jury trial. Clause 20 asserted the principle of a fair and proportionate punishment for offences (a free man shall be fined only in proportion to the degree of his offence). And clause 40 asserted the independence and free working of the courts (to no one shall we sell, deny or delay right or justice). Also included in the Charter were clauses addressing matters of good governance, such as provision for equal measures of food and drink (clause 35) and the boundaries and customs of

Parliament today: the Queen's Speech in the House of Lords
UK Parliament/Roger Harris

the forests, which covered almost a third of England's landscape (clauses 47 and 48).

The barons were prompted to rebellion against King John not by commitment to any progressive political ideology but rather by a conservative assertion of traditional customs and ancient liberties. King John had abused the customs and incidents of feudal society, and was already unpopular for his loss of foreign wars, his conflict with Pope Innocent III and his high taxation at a time when inflation was rife. If there had been a convincing pretender to the throne around whom the barons could unite, a coup to replace him would almost certainly have been accomplished – and in that case Magna Carta might never have happened. Once the Charter had been agreed, however, its effect was amplified through the reissues of 1216, 1217 and 1225, made by Henry III, and of 1297, made by Edward I. On all of these occasions the Charter was publicised across the country by way of copies circulated and then deposited for inspection at religious centres (including the two famous 'originals' still in existence today at Salisbury and Lincoln cathedrals).

The idea that the king was subject to customary law permeated the English common law as it was to develop across the centuries. The great thirteenth-century jurist Henry Bracton wrote in his work, *On the Laws and Customs of England* in Henry III's reign:

> The king ought not to be under man but under God and under the law, because the law makes the king. Let the king therefore bestow upon the law what the law bestows upon him, namely dominion and power, for there is no king where will rules and not law.

In the constitutional conflicts of the seventeenth century between the Stuart monarchy and Parliament, the common law was a potent source of argument against the pretensions

The Great Seal today – the Crown remains the ultimate authority in the British state
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for a divine right of kings and an inherent royal prerogative to make laws and collect taxes without the authority of parliament. In 1607 John Cowell, the Regius Professor of Civil Law at Cambridge, wrote that, 'all the law we have is thought in some sort to depend of [derive from]' Magna Carta. In the landmark *Case of Proclamations* in 1610 the Lord Chief Justice, Sir Edward Coke, gave judgement against the king, declaring, 'the king has no prerogative but that which the law of the land allows him', and 'the king cannot change any part of the

King William III and Queen Mary II
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common law, nor create any offence, by his proclamation. In 1628 the Petition of Right, approved by both Houses of Parliament and reluctantly agreed to by Charles I, relied on Magna Carta for its legal basis in reciting the common-law principles of freedom from arbitrary arrest and imprisonment, due process in the administration of justice, and parliamentary consent to taxation.

Magna Carta, therefore, provided a powerful source of influence in shaping the seventeenth-century settlement upon which our present constitutional arrangements are founded and establishing a balance between Crown, parliament and judiciary. The Bill of Rights of 1689, which was accepted by William and Mary on their accession following the enforced abdication of James II, established parliament as the supreme lawmaker in the state, whose consent was required to royal and ministerial requests for annual taxation and a standing army. Parliamentary control of the line of succession to the Crown and legal guarantees for the independence of the judiciary were secured by the Act of Settlement of 1701.

There is an irony in the fact that while Britain has pioneered major constitutional documentation in its history – through, for example, Magna Carta, 1215, the Provisions of Oxford, 1258, the Declaration of Arbroath, 1320, the Bill of Rights, 1689, the Act of Settlement, 1701, and the Acts of Union of 1707 – it has yet failed to produce a documentary ('written') constitution of its own for the democratic era, as has virtually every other democratic state in the world over the past 250 years (the other two exceptions being New Zealand and Israel). Britain could be regarded as having fallen victim to its own earlier successes, having resolved its relationship with the monarchy at an early stage through the civil wars of the seventeenth century and developing a robust parliamentary system to facilitate opposition and protect civil liberty. Being the greatest imperial power in the world in the nineteenth century lent credence to claims for the superior form of its domestic constitutional arrangements.

In recent times there have been clearly identifiable Acts of Parliament which are of a major constitutional nature. These include: the Parliament Acts of 1911-49 establishing the balance of power between the two Houses of Parliament; the Representation of the People Acts establishing universal voting and the electoral system; the European Communities Act of 1972 providing for the UK's membership of the European Union; the Scotland Act, Government of Wales Act, and Northern Ireland Act, all in 1998, creating new devolved executives and legislatures; the Human Rights Act of 1998 enabling individual rights and freedoms to be enforced through the courts; and the Constitutional Reform and Governance Act of 2010 starting a process of placing the royal prerogative on a statutory basis.

What this legislation amounts to, however, is a patchwork of constitutional documentation and not a coherent joined-up structure of constitutional law. Furthermore, a primary characteristic of the existing constitution is the prevalence of 'conventions', these being unwritten rules of constitutional practice, which control important parts of the political structure. Thus the office of Prime Minister, our head of government, is a pure creature of convention, unregulated by legislation on matters of appointment, powers or tenure. Some conventions bring political sense to archaic law, such as the unlimited power at common law for the Queen to say yes or no to a government Bill, whereas by *convention* she must automatically give her Assent: there is, however, no legal means to enforce this convention if she, or in the future King Charles III, were ever to fail to do so. Some conventions are firmly settled, such as the requirement for a minister to have a seat in parliament, while others remain unclear and only crystallise with time, such as whether the government must always seek the consent of the House of Commons before entering into armed conflict abroad.

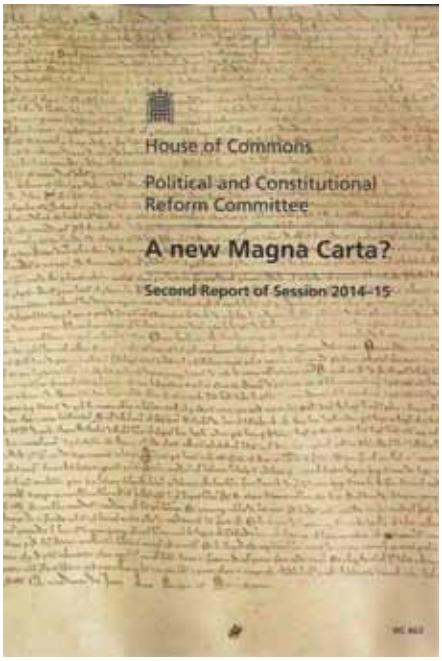
Should there, therefore, be a written constitution for the UK – a new Magna Carta – a document that codifies all the main rules by which we are governed and sets out the relationship between the state and its citizens? Such a document would not only consolidate and preserve what is best in our current arrangements, it would also provide an opportunity for resolving inconsistencies or problems that have arisen in recent years (such as reform of the House of Lords and the question of a British Bill of Rights to replace the Human Rights Act). A primary argument for a written constitution is simply that people will then have a clearer understanding of how we are governed, what are the rules and responsibilities on ministers and officials, what the relationship is between the UK and the rest of the world, and what our rights and responsibilities are as citizens. Some advocates of a written constitution go further by arguing that the parliamentary constitution we have inherited from the seventeenth century is an anachronism in the democratic era, and a new constitution is required that clearly expresses the sovereignty of the people. This need not be a republican constitution, as drafted and proposed in the Commonwealth of Britain Bill

Will conventions on the monarchy evolve under King Charles III?
UK Parliament/Roger Harris

by Tony Benn in the 1990s, and the monarchy could be retained with its position as head of state and its duties circumscribed. However, an entrenched written constitution would replace the Crown as the ultimate source of authority in the state. Three illustrative blueprints for the form that such a written constitution might take have recently been published for discussion by the House of Commons Political and Constitutional Reform Committee in its inquiry into codifying the constitution during the 2010-15 parliament. If a written constitution is to be prepared, it must be one that engages and involves everyone, especially young people, and not simply legal experts and parliamentarians.

It has been said that the whole constitutional history of Britain has been little more than a commentary on Magna Carta. Throughout 2015 the Charter's legacy of freedom under the law is being commemorated by a large programme of lectures, exhibitions, pageants, and broadcasts organised by the Magna Carta Trust's 800th Anniversary Committee, culminating in a ceremony at Runnymede on 15 June 2015. There is much to celebrate and the symbolic quality of the Great Charter remains immense. As Lord Denning, the most famous of our judges in recent times, once said, Magna Carta 'is the greatest constitutional document of all times – the foundation of the freedom of the individual against the arbitrary authority of the despot'.

A New Magna Carta? Should the UK now adopt a written constitution?



Further reading

Sir Ivor Jennings, *Magna Carta and its Influence in the World Today* (London, 1965)

R.V. Turner, *Magna Carta through the Ages* (Harlow, 2003)

House of Commons, Political and Constitutional Reform Committee, *A New Magna Carta?* (2014)

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