

The Assault on Liberty

Introduction – Runnymede and all that

Winston Churchill described the Magna Carta as “the foundation of principles and systems of government of which neither King John or his nobles dreamed”.

Now in Politics we’re used to the law of unintended consequences. Normally it is the bad outcome of good intentions, that you set out to create a good law and it goes wrong, I don’t know, say the child support agency or the war on Iraq, whatever it might be, that went wrong and we’re normally afflicted with this. What we very rarely see, is something like Magna Carta, which must go down as the greatest example of the law of unintended consequences in British history, because here you had a deal, frankly a slightly squalid deal, between a bunch of robber barons, greedy, robber barons and an even greedier King. Yet out of that slightly squalid deal, we have got the underpinning of the greatest history of freedom in the history of the world. The underpinning of the greatest liberties in the history of the world. Not just ours, but America’s, all of the Commonwealth and much of the rest of the world, have copied what we’ve done from that. So a formidable, unintended consequence, but one of enormous benefit, for not just ourselves, but for the entire civilized world.

So that’s in a way a surprise, but in another way its not, because it was not conceived in isolation, it was built on the emerging common law system, created by Henry II a century before, and that created the fertile ground in which grew uniform and consistent courts, respecting the idea of ‘precedent’.

So although in reality Magna Carta’s 60 plus clauses were more concerned with the immediate interests of the barons – feudal rights, tax and trade – than the rights of man, they **were** about putting restraint on the arbitrary use of power. That has been the underpinning of British liberty. It is that **restraint** on the state that is the precursor of our individual liberties.

You can see it throughout the charter in articles which sought to subject John to some basic ground rules in the exercise of Royal power. The text is littered with articles that restrict the arbitrary use of Royal authority and restrain the levying of feudal dues. We shouldn’t forget that as much of this was about money, as anything else.

Article 40 expounds perhaps the most famous statement of all, that: ***'To none will we sell, to none deny or delay, right or justice'***. For a document created that way, it is an astonishingly, insightful, simple and to the point message. ***'To none will we sell, to none deny or delay, right or justice'***. That's what makes our country what it is today.

This codified the most basic idea of the rule of law – requiring the authority of state to be exercised in a clear, transparent and consistent way, not at the arbitrary whim of those with power.

The value of 'legal certainty' is often underestimated today, until we go abroad, to Iraq, Afghanistan or some of the countries of South east Asia or some of the countries of Africa, where it is not true and suddenly you realise that this is a foundation stone of what is considered a given in our society.

Article 39 of Magna Carta set out one of the earliest expressions of habeas corpus and trial by jury. The right of habeas corpus, again, that we take as a given, it is the individual's right to know and challenge the legal basis of his detention by the state. Article 39 also bans serious punishment 'save by the lawful judgment of his peers or by the law of the land', again all things that we take for granted.

Article 38 prevents royal officials prosecuting an individual 'without producing faithful witnesses in evidence'. These guarantees formed an early basis for the common law model of a fair trial – including the presumption of innocence and the right to elect trial by jury when faced with serious punishment.

So to come up to modern times, when the Government introduced indefinite detention without trial for foreign terrorist suspects after 9/11, one of the earliest breaches of our traditions. The legislation was heavily criticized by the House of Lords, Lord Nicholls stating that 'indefinite imprisonment without charge is anathema in any country which observes the rule of law', because that was a breach of those traditions going back to Magna Carta.

The second relevance of Magna Carta to the modern debate on rights lies in its constitutional character. Replete with quid pro quo, it is premised on the coupling of the rights of the king and his subjects with the responsibilities of the king and his subjects, and that balancing act is very much part of our constitutional balance.

The barons intended to restrain the meddling of the King in their affairs, and Magna Carta's overarching aim was to protect their freedom from the Crown, rather than obliging the monarch to do anything in particular for them. A very important acknowledgement, a restraint rather than a requirement on the crown. Those early freedoms from royal interference subsequently developed into a range of fundamental liberties demarcating the state's ability to interfere in the lives of its citizens. That demarcation, that creation of a space for the citizen and a place for the state, is the fundamental issue that passed down the centuries.

This basic idea of placing checks on the power of the state, thereby preserving the freedom of the citizen from interference, is at the heart of the current debates on the limits of state surveillance, the reach of the database state, the right of the police to take and retain DNA on innocent people and safeguards on the use of ever present coverage provided by CCTV cameras. Of this, more later.

The initial constitutional cast set by Magna Carta developed piecemeal, of course it wasn't set at one stage, what was built upon it afterwards was pretty much as important as Magna Carta itself. The Petition of Rights in 1628 added constitutional bars on taxation without the consent of Parliament and the use of martial law in peacetime. The Petition also provided the earliest protection of individual privacy. 'The Englishman's home is his castle', coming from that.

The Bill of Rights of 1689, written in the aftermath of Civil War and the Glorious Revolution, built on earlier rights enshrined in Magna Carta. Article 20 of Magna Carta stipulated that "For a trivial offence, a free man shall be fined only in proportion to the degree of his offence, and for a serious offence correspondingly, but not so heavily as to deprive him of his livelihood". The Bill of Rights added to this the requirement that "excessive bail ... not to be required nor excessive fines imposed." These early constitutional innovations marked out the British idea of justice as firm but fair.

Many of the protections that grew out of Magna Carta are self evident or obvious in the way they play out, but some of them are subtle, complex in operation and whilst incredibly valuable, act in ways that were certainly never intended. Take for example the right of trial by jury, of course that is a way of guaranteeing a degree of fairness and a degree of representation in the law and a way of seeing that it was your peers, not the state that was trying you. What it also does is to put a limit on the arbitrary, operation of the state and unfair laws. The introduction of juries is intimately bound up with the struggle for liberty and freedom from the persecution of the state. They provide a vital safeguard, ensuring that the ordinary individual gets a fair deal, and when evidence is not strong enough or when the law is an ass, or perhaps when the government is using the law, in a maybe technically correct or inappropriate way, then what happens is the jury throws it out.

Let me give you some more up-to-date examples. Firstly one from about when I was born, after the 2nd World War. Rationing went on for very many years after the war ended, but it was brought to an end more by the unwillingness of juries and, in some instances, magistrates to convict on breaches of what they saw as an unnecessary and out of date law, than it was by the action of government. Eventually the government gave up on it, because the law just didn't work.

More recently, the Clive Ponting case, at the time of the Falklands war. Clive Ponting was a civil servant, who had leaked information about the Belgrano. Tam Dalyell, certainly believed that he had leaked information about the operation of the war. The then Government, the Thatcher government, which I supported, brought an Official Secrets Act case against him. Technically, he was undoubtedly guilty of the charge, as the Official Secrets Act was written in those days, and indeed the Judge virtually instructed the jury to convict, but the jury didn't because it thought the law was being used to deal with somebody who had merely embarrassed the government, not put the State at risk. So again, you see jury trials acting to protect the people from unfair laws, applying a commonsense test, as well as giving us decent law in its own right – that can be very powerful indeed.

In the case of rationing, it led to abandonment of rationing, and in the case of Clive Ponting, it led to the same government, the Thatcher government, rewriting the Official Secrets Act. And the opening lines of the speech of Douglas Hurd, the then Home Secretary, made was something like this, it was “the House will want to know that the purpose of this new bill is to remove beyond the bounds of criminality, confidential information, held by the government, which maybe politically embarrassing but is not a threat to the security of the State.” You might say it didn't help Damian Green much, which it didn't. But one of the reasons they didn't take that case to trial, was because the Director of Public Prosecutions knew full well that no jury in the country would convict a Member of Parliament for doing his job, which is what he was doing! So again, this comes back time and again, as a bulwark against governments, bureaucracies that support governments, heavy handed Metropolitan Police officers, whoever they might be, acting in a way which is unfair and unjust, whatever the law says. So the jury trial turns out to be an incredibly, extraordinarily, subtle check on the power of the State.

It would be almost impossible to design such a thing and this is what we got by chance. Yet again, an unintended consequence of the organic growth of our constitution. It has given us a defence which no other non-common law country has. The defence of the common sense of the ordinary citizen.

Now its very hard to overestimate, in my view, the importance of our so called 'unwritten constitution' and the constitutional structures that go with it.

I believe our constitution and laws are the framework for how we live our lives.

Law is the structure of liberty. Freedom is the foundation of our society.

Practical Virtues

Freedom isn't just an abstract virtue. It defines our society, particularly British society.

It defines frankly the spirit and soul of our nation and it defines our civilisation on a wider scale.

The freedom which British subjects have enjoyed over the centuries has created the conditions for what is, after all, our uniquely successful history.

We forget in this small country of ours, with not too many resources, cut off in many ways by the sea, from other flows of history. We have had a uniquely successful history in the last five hundred plus years, maybe eight hundred years. Why is that? It's freedom that did it. Let me give you some examples.

Freedom of speech is the parent of freedom of thought, and freedom of thought is the midwife of creativity. Without freedom of speech, we would not have had our astonishingly successful literary, scientific and creative traditions. Shakespeare, Newton, Faraday, all arise from an environment of freedom.

Freedom of action, and property rights to enjoy the fruits of that action, inspires vigour and dynamism in our national character – which is why we were the first nation in the world to have the Industrial Revolution.

Political freedom engendered the greatest and longest lasting parliamentary democracy in the world. And one of the fairest and most effective judiciaries, based on the idea that justice demands two views.

So these freedoms, and the judicial and political systems and conventions that support them, are more than moral rights. They have enormous practical benefits to not just our society. If you want to test that, look at those societies that didn't have it. In extreme cases, there are the totalitarian societies, of course, which invariably ended up poverty stricken, uncreative and following the rest of the world; through to the even wider differences to the peasant societies, which have had no property rights down the centuries; we have been more successful than any of them.

I make this rather obvious point because the strengths that are imbued in our nation arise from a subtle interplay of our freedoms and institutions. This subtle interplay means that small reduction in freedom can have large effects.

If there is such a thing as national character, it is in our institutional DNA, not our biological DNA.

This is particularly relevant when we consider the modern erosions of liberty.

It is very easy to slip into a battle of hyperbole when arguing about freedom. On the one side, the authoritarians argue that without crucial increases in state power we are all at risk of our lives from suicide bombers.

On the other side, it is too easy to throw about accusations of "police states" and Orwellian predictions of another "1984" scenario.

And even if the libertarian side of the argument do not make the accusation, the authoritarian side throw it up as an Aunt Sally to be easily knocked down.

Are We a Police State?

The clearest case of this was when, earlier this year, Jack Straw asserted “We are not a police state.”

Well, no, of course we are not. If we were, this meeting could not take place – or at least could not be publicly advertised.

Dangerous left-wingers like, err, me, would be in prison.

But to see it in such black and white terms is a serious mistake.

Try turning the question around and asking “When do we become a police state?” and you will see what I mean.

So, when are we a police state?

When the Government knows everything? When the Government knows everything about every citizen anywhere in the country?

When they keep all our information on a centralised National Identity Register?

Where they know our every text, our every e-mail, our every web access, our every phone call?

When they can track every citizen through their car, to wherever they are in the country?

When the police are able to enter your computer and search it without you even knowing about it?

When virtually any state organisation can put you under surveillance without supervision or control, even including Local Government.

When the police can arrest you for heckling the foreign secretary? You should deserve a medal quite frankly!

Or for wearing a "Bollocks to Blair" T-shirt.

Or reading out the names of the Iraq war dead at the cenotaph.

The police can now arrest you for photographing a London bobby, which will lead to a lot of very surprised Japanese tourists, at some point.

So is that a police state?

Or does it become a police state when MPs are arrested simply for doing their job of holding the government to account and, yes, occasionally embarrassing them.

Or, very much more seriously, is it a police state when the governments collude in or condone torture as an act of policy?

Is that a police state? Are we there yet? And if the answer is no, now let's turn it round and say, okay how many MPs do we arrest before it becomes a police state?

How many innocent people on a DNA database before it becomes a police state: a million, as now, or 2 million? Or ten? Or maybe all of us?

How many days do you lock people up without charge before it becomes a police state? 42? 90?

And remember that 90 days detention without charge was the first number picked by South Africa under apartheid. It then became 180, and then indefinite. I am glad to say that State fell and was replaced by a better one.

I don't know the answer to those questions. But I do know this: every erosion of our freedom diminishes us as a people, as a nation, as a civilisation.

I also know this – this is clear: that when we do know it is a police state it will be too late.

Because by then we will have lost the right to dissent. And we will have lost our right to justice, because justice demands two views.

But long before we get to that point, the casual corrosion of our freedoms will have changed the nature of our society.

Why Governments Do It

So why do governments do this?

Why do they set about taking away our liberties and our privacy? Why do they appropriate our identities?

Why do they do this?

It is not just Labour governments, I will grant you that, though it has been significantly worse in the last decade.

Is it misplaced machismo?

Or is it something more subtle? Peter Mandelson used to talk about the idea of the continuous campaign, an idea imported from Bill Clinton's Democrats.

This idea says that whereas previously you essentially campaigned in opposition and governed in government, now you campaign in opposition, and campaign **harder** in government.

The pursuit of good governance is subordinated to the pursuit of re-election.

You use the apparatus of the state to deliver your campaigning message. This of course means that the techniques of the political campaign, the opinion poll and the focus group, become the compass in government.

This in turn means that government becomes much more populist, much more prone to the macho populist gesture, much more hungry for the tough sounding headlines.

And they know what they are doing. Who was it that said “I have struggled for eight years against the 19th century idea that it is the priority of our justice system to prevent the innocent from being wrongly convicted.”

No, not Robert Mugabe. It was Tony Blair, who also crowed about the reversal of the burden of proof in ASBO cases.

Are Tony Blair and David Blunkett and John Reid and Jacqui Smith doing this simply to look tough on crime and terrorism, and make the opposition parties look weak?

Of course it is partly that, but it is also based on something else. It is based on fear. It is based on fear of failure.

Fear of the Daily Mail headline when they can't quite do what they said they were going to do about crime or immigration, or most particularly, preventing terrorism, preventing terrorist attacks. These so-called tough policies are actually driven by the fear of negative headlines.

The Home Office is notoriously difficult to succeed in. It is ferociously difficult to cut crime, control immigration, and prevent terrorism.

And what ministers do is, in desperation, reach out for the nearest glittering toy - the nearest piece of magic that will solve their problem. Databases, face recognition programmes. Number-plate recognition programmes, biometrics, cameras, DNA databases, electronic surveillance of all sorts

These intrusive technologies, they believe, will magically solve their problem. And so piece by piece they have eroded our liberty, our privacy, our control of our own identity, one tiny step at a time.

Similarly, Ministers see the difficult process of the law as a problem that prevents them catching criminals, controlling immigration, preventing terrorism.

So they bypass the law, with on the spot fines and other summary justice.

They try to put the entire operation of the asylum system beyond the reach of the British courts, so the State can act unfettered by the law.

And in the control order regime, they introduce secret courts to put people under house arrest, for crimes which they are not told of, on evidence they are not shown.

Every action was apparently reasonable. So, slowly, without realising it, almost by accident, we lose our liberty.

We acquired it by accident – if we are not careful, we'll lose it the same way.

The Paradox of the Human Rights Act

The irony of all this is that most of this erosion of our liberties has occurred in the decade immediately following the passage through Parliament of the Human Rights Act.

The HRA is effectively the explicit introduction into British law of the European Convention on Human Rights.

The history is not good.

The ECHR did not stop a Conservative government from disastrously using internment in the early Northern Irish troubles.

That provided a case study in how draconian and authoritarian laws made security problems **worse**, not better, a case study from which the current government has not learned.

The HRA did not stop the government almost introducing 90 day detention without charge, let alone 42 days.

It did not stop them successfully introducing control orders – house arrest without conviction by another name – and has only slowly led to the restriction of their use.

It did not deter the police from keeping the DNA of a million innocent people, and even after the European Court of Human Rights ruled against, the government is still able to propose the most draconian policy on DNA retention in the entire world.

And so on, and so on....

In summary, it did not stop a government from trampling on the conventions and inhibitions that make up much of the unwritten part of our constitution.

Why is this?

There are four reasons.

Firstly, the Convention was drawn up in the aftermath of WW2 and designed to prevent the most egregious violations of human rights. It was also designed to some extent as a propaganda weapon against the Soviet empire.

But it was an abstract document. It was written in language that was sufficiently vague for it to grow in subsequent years to something the original drafters would not have recognised, a common problem in international agreements with all their linguistic compromises.

Secondly, it has evolved across many different types of judicial regime, and as a result has not reflected the subtlety of some of them, particularly the common law judiciaries. That is one reason, for example, why we have not seen any objection to the various government attempts to restrict jury trials.

Thirdly, its judges are pretty poor, as was pointed out in a brilliant if controversial lecture by Lord Justice Hoffmann earlier this year. This has led to some pretty variable decisions over the years.

Indeed, the House of Lords has complained, the Strasbourg Court's case law is so haphazard that the fact that a case against one country is decided in one way does not by any means guarantee that a similar case will be decided the same way against Britain.

Finally, it has no serious democratic oversight. I am a believer in the entrenchment of constitutional principles, but there must be some ability to learn and evolve

through democratic oversight. International bodies are notoriously bad at this, including the ECHR and Council of Europe.

A Case for a Bill of Rights?

Which is why I have come to the conclusion today after 21 years in Parliament that we need the beginnings of a written constitution, a Bill of Rights for Britain.

It would give us a vital opportunity to actually understand what it is about our liberties that we have to protect and how we should protect them. That seems to be a massively important piece of national stock taking about where we are going to as a nation.

A Bill of Rights, would by definition, root our sense of rights in British law and restore a sense of national ownership of that law. One of the problems we have today is that government can attack our rights and liberties, because they are frequently operated in a very clumsy way, by European institutions, which loses the intrinsic support of the British population. They see people who are terrorists being allowed to stay in a country for year after, after year and get compensation for being kept in jail. All these sorts of cases which you read about in The Daily Mail, if you do read the Daily Mail, are ones that undermine our ability to fight the case for liberty on a traditional British basis.

A British Bill of Rights would therefore, have two fundamental advantages over the Human Rights Act or any other constitutional arrangements. First, it would allow the UK to anchor and re-orientate a conception of human rights in the British liberal tradition.

Second, a home-grown Bill of Rights would help bridge the democratic deficit generated by the seemingly endless judicial legislation emanating from Strasbourg.

This would offer Britain the opportunity to celebrate its liberal tradition –the inspiration of Locke, Mill and Berlin and the legacy of Magna Carta. It would protect the ancient rights that this country has fought to defend through the centuries, at enormous human cost.

It would preserve the freedom, respect – but also the responsibilities – of the individual. It would humble an increasingly arrogant and abusive state, obliging greater humility from government ministers and officials in justifying the assumption of power, authority and the control they exercise in our daily lives.

A Bill of Rights should be limited to the core of rights in the European Convention, as **originally** inspired and formulated, adding only those quintessentially British rights left out.

This would also have the major advantage of allowing us to tailor the text to our own national traditions, priorities and constitutional structures. For example, trial by jury can be properly protected and freedom of speech given greater emphasis than would be the case in other European countries.

A British Bill of Rights would also make full use of the doctrine of the margin of appreciation under the Convention, to spell out in greater detail the scope of rights and their corresponding qualifications, correcting one of the failures of the Human Rights Act.

It would strengthen the exercise of judicial power in return for refocusing and limiting it to the application of fewer – core – rights. Crucially, the legislative role would be removed and returned to our elected representatives in Parliament, who would draw up the Bill of Rights.

Judges would not be creating new rights, just applying those already set by our democratically elected Parliament.

Such a Bill of Rights would not immunize the UK from adverse rulings from the Strasbourg Court. There are proper limits on the how far the UK can refine its interpretation of Convention Rights.

Take the moral quandary of deportation of a known terrorist to a regime that is suspected of mistreatment, **short** of torture or execution. There is a real moral quandary here, with a real balance of justice to be struck. A Bill of Rights would allow the government to specify a clearer burden of proof of the risk of persecution, before it is claimed as grounds for blocking deportation proceedings.

Some have suggested that replacing the Human Rights Act with a Bill of Rights would require UK withdrawal from the Convention, the Council of Europe and even the EU. That kind of scaremongering ignores fifty years of British practice prior to the Human Rights Act and the experience of other constitutional courts throughout Europe.

Far from being pointless, a Bill of Rights would have a decisive, practical effect, allowing for the most serious violations of fundamental liberties to be dealt with in UK courts. Moreover, it would reinforce the pillars of our liberal tradition, bridge the democratic deficit and correct the failures of the Human Rights Act, which has failed to safeguard us against the erosion of our hard won civil liberties.

Now I do not pretend that this is an easy area to legislate. When the USA created its Constitution it had half a dozen geniuses on hand to draft it, in an era when the greatest minds in a country thought it their duty to concern themselves with these affairs of State.

I am afraid that I do not see that many geniuses in our national political arena at the moment. So it will be difficult.

The quandaries are real, and both intellectually and morally taxing. But what I do know is that the defences of liberty provided by our so-called unwritten constitution are fragile, if not illusory. So we have much work to do.