

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

In Act 1, Scene iv of *Hamlet*, the eponymous prince spies his usurping uncle Claudius drunkenly carousing with the Danes. He expresses his characteristic disgust to his friend Horatio, and describes the revelry as ‘a custom, /More honour’d in the breach than the observance’.

New York Times grammarian Phillip Corbett has pointed out that the phrase is often used to refer to ‘a good custom that, unfortunately, is often breached’, whereas the puritanical Prince meant it was *more honourable* to forgo the practice than to take part. This distinction will prove fruitful for an analysis of Magna Carta and its constitutional legacy.

Indeed, parallels between Magna Carta and drinking customs in Hamlet are uncannily multiple: Both emerged to externalize loyalty and prevent future conflict, to harden allegiances and protect the interests of a tiny male elite. And just as Claudius participates with gusto in the celebrations to disguise the illegitimacy of his ill-gotten position, the current government seeks to celebrate the 800<sup>th</sup> anniversary of the Magna Carta in June 2015 - complete with thirteenth century ‘beer’ and commemorative stamps - while steamrolling over the rights that they argue it initiated.

Magna Carta, then, is more honoured in the breach in both senses of the phrase: Its legal applicability is approaching zero, and the need for enforceable rights must

propel us beyond the scope of a fetishized medieval 'custom' and towards meaningful sources of constitutional justice.

Juxtaposition of Magna Carta Chapter 29 and the Legal Aid, Sentencing, and Punishment of Offender Act (LASPO) 2012 is sufficient to demonstrate the Charter's practical impotence. 'We will sell to no man, we will not deny or defer to any man either Justice or Right', it promises, and yet LASPO has done precisely that. The Bill sliced £350m a year out of the civil legal aid budget, and areas of law now almost entirely excluded from legal aid include child custody, employment, education, debt, housing and welfare; complex and sensitive areas where publicly funded legal assistance protects the ability of individuals to effectively protect their rights against third parties and the State.

In combination with attacks on human rights, attempts to curtail judicial review, and restriction of no-win, no-fee cases, LASPO is a crushing blow in the governments ongoing assault on access to justice, and ongoing self-insulation from accountability.

The obvious question now might be; where does the Magna Carta fit into this? Would it not be overly reductionist to expect a document from 1215 to be critical in contemporary decisions about government spending?

Surely Magna Carta is what Bagehot called the dignified rather than efficient part of our constitution? Surely it is valuable as the symbolic cornerstone in England's temple of liberty? And isn't this how common law works, with new rulings underpinned by their predecessors, and Magna Carta origin of the rule of law itself?

These reasonable intuitions can be challenged with a reminder that a lack of enforceable rights is the same as having no rights at all, common law or no, and that we therefore have an imperative to reject any ‘symbol’ that mitigates the effect of unenforceable rights.

This is the crux of the problem; Magna Carta’s danger derives from its exploitable hovering between statue and symbol. Were it purely symbolic, we could indeed celebrate its anniversaries as historical holidays, laud its foundational, dignified status, and ignore the difficulty of its unenforceable medieval provisions as easily as we ignore the difficulty of Guy Fawkes’s moral predicament on bonfire night. Were it statute backed up by constitutional guarantees (historical anachronisms aside), citizens could conversely rely on it to enforce their legal rights.

As it stands, however, Magna Carta presents a wonderful opportunity for politicians to have their cake and eat it: To call upon Magna Carta as document evidencing ‘British’ legal and moral preeminence while simultaneously legislating against the very rights they claim it initiated.

Prime Minister David Cameron, for example, recently pledged in an interview in the *Sunday Times* (June 2014) to teach all school children about Magna Carta as part of an effort to be ‘more muscular’ about promoting ‘British values’. He intends to use the upcoming 800<sup>th</sup> anniversary as an opportunity for every child to learn about ‘the foundation of all our laws and principles’ such as the ‘democracy, the equality, the respect, and the laws that make Britain’.

The immediate irony is that Magna Carta is a document written in Latin to appease not the long-suffering English people but a small number of Anglo-Norman barons, and that only 3 of its 63 clauses remain on the statue book.

But that is not the point. The point is that the primary function of Magna Carta in this representative tableau is to allow our Prime Minister to draw on the rhetoric of rights and freedoms without ever having to refer to the existing laws that protect them, namely the European Convention on Human Rights and the Human Rights Act which made ECHR rights enforceable in UK courts.

The European Convention, in particular Articles 5 and 6 and Protocol 1, supersedes Chapter 29 of Magna Carta by every conceivable measure except exploitable vagueness and suitability for nationalist mythologizing, which also seem to have been motivating factors in proposals for a British Bill of Rights which would no longer require UK courts to 'take into account' Strasbourg jurisprudence and thus further isolate British citizens from the guarantees of international law.

Samuel Taylor Coleridge, commenting on Act 1, Scene iv of *Hamlet*, wrote that the scene reminded him of men 'endeavour[ing] to elude the pressure of their own thoughts by turning aside to trivial objects and familiar circumstances'.

Magna Carta is a familiar part of our cultural landscape, but is ultimately a trivial object that is unable to restore access to justice in the UK and unhelpful to those trying to do so. Something is rotten in British constitutional justice, and,

paradoxically, in order for the principles of Magna Carta to be honoured, the worship of the charter itself must be breached.