LORD LESTER OF HERNE HILL QC

DO WE NEED A NEW MAGNA CARTA?

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I wish to thank the trustees of the Miriam Rothschild and John Foster Human Rights Trust for inviting me to give this 28th human rights lecture. But, as you will see from the invitation, I am myself a trustee. So with that disclosure I thank my fellow trustees. I am especially grateful to Professor Linda Colley for agreeing to chair the occasion. Her public lectures and essays are compulsory reading for anyone seeking to be guided through the tangled undergrowth of British constitutional history and politics.

More than fifty years ago, I wrote my first essay on English medieval history, at the beginning of my first year at Trinity College Cambridge. I had to compare assarting and the rise of a money economy as factors making for change in 13th century England. But I never studied Magna Carta and the other feudal charters that came before and after 1215. I am not even sure that Magna Carta was included in the Cambridge history syllabus.

Today we celebrate the 800th anniversary as a symbol of our commitment to the rule of law. If you have come for a scholarly lecture about the Great Charter now is the time to leave. I will not masquerade as a historian, especially since an eminent historian is in the chair.

Among the recent works published in anticipation of Magna Carta's birthday, I especially enjoyed Jill Lepore's essay on *"The Rule of History"* in the New Yorker, and Ferdinand Mount's *"Back to Runnymede"* in the London Review of Books, both in April. Jill Lepore informed me that Oliver

Cromwell supposedly called it "Magna Farta" and she suggested that that might well be the single thing about Magna Carta that most Americans remember from their high school history class. She wrote that:

"Like much else that is very old, it is on occasion taken out of the closet, dusted off, and put on display to answer a need. Such needs are generally political. They are often very profound."

Lord Denning described Magna Carta with characteristic hyperbole as "the greatest constitutional document of all times – the foundation of the freedom of the individual against the arbitrary authority of the despot." Certainly Magna Carta influenced the early settlers in New England, and inspired later constitutional documents, including the United States Constitution and American Bill of Rights. Certainly Magna Carta was invoked as part of the process that led to the rule of constitutional law here and across the common law world. But, with due respect to Tom Denning, Magna Carta is not the greatest constitutional document of all times.

The surviving clauses that still matter are those that proclaim that:

"39. No free man shall be seized or imprisoned or stripped of his rights or possession 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 force of law."

And that

"40. To no one will we sell, to no one deny or delay right or justice".

They matter as living symbols of the need to protect rule of law against the misuse of the powers of the State and its agents. As Tom Bingham wrote[1], it would be

[1] The Rule of Law (2010), page 11.

"a travesty of history to regard the Barons who confronted King John at Runnymede as altruistic liberals seeking to make the world a better place. But, for all that, the sealing of Magna Carta was an event that changed the constitutional landscape in this country and, over time, the world."

Readers of Trollope's Palliser novels will recall how Victorian politicians chattered about "The Constitution" as the burning topic of their time. And now the topic is back with a vengeance, with wide public discontent about the governance of the realm, and surges in nationalism - Celtic, UKIP and Little English Conservative – and political threats to destroy the Human Rights Act and the unity of the kingdom.

The constitutional problems are formidable – perhaps intractable. The Prime Minister lacks a significant number of Liberal Democrat MPs to balance against the Europhobic right wing of his Parliamentary party. The Tory manifesto commits his Government to persuade Parliament to tear up the Human Rights Act and replace it with a British Bill of Rights decoupled from the European Human Rights Convention.

The opposition parties are united in defending the Human Rights Act against its replacement by something weaker. *Amnesty International* and *Liberty* among many in civil society cry havoc at the prospect of losing the Human Rights Act. Shami Chakrabarti, director of *Liberty* describes a British Bill of Rights as "the gravest threat to freedom in Britain since the Second World War."

I am in favour of a UK Bill of Rights, but only as long as its protection is at least as strong as what we currently have under the Human Rights Act and the European Convention. We need a new Magna Carta but I doubt whether we will achieve one during the lifetime of this Government. We must unite to prevent any weakening of human rights protection in the UK and an approach that will threaten national unity.

Why do we need a new Magna Carta?

A key question is: who should decide whether Parliament or the Executive has violated fundamental human rights - Parliament itself? – or the devolved legislatures? – or the Government? - or the courts? Every other European country and almost all common law countries (apart from New Zealand) have written constitutions protecting core rights and liberties. Most empower judges to strike down legislation incompatible with those core rights.

Yet under our system, Parliament is sovereign. It can override or ignore judgments with which it disagrees – even if that involves violating the international legal obligations that bind the UK to the Council of Europe and the European Convention. On the other hand, there is a well-observed separation of powers between the judiciary and the political branches of government. It is for Parliament to make the law and for the courts to interpret and apply the law.

A former Lord Chief Justice, Lord Judge, believes that the ultimate arbiter of basic rights should be Parliament, not the Courts. He reportedly told the Hay Festival[2] that "in a democracy power shouldn't be invested in judges anywhere and no more [in] Europe than here". Had Lord Judge's view been accepted by past Governments, the Strasbourg Court would not have persuaded the British and Irish Parliaments to decriminalise homosexual love in Northern Ireland and the Irish Republic. It was the judgments of the Strasbourg Court and not of the elected legislatures that initiated the social revolution we witnessed last month in the Irish Republic's referendum on gay marriage.

Lord Judge was also reported to have said that everything that is in the European Convention on Human Rights is to be found in the common law.

[2] *The Times*, 22nd May 2015, page 8.

If that were true it would not have been necessary to seek justice in Strasbourg where the common law failed again and again to safeguard human rights. It would not have been necessary for the Strasbourg Court to ensure that mentally ill people can adequately challenge their involuntary detention: *HL v UK* [3]. It would not have been necessary for Strasbourg to ensure that children are protected from the failures of their local authority: *Z v UK*[4]. It would not have been necessary for Strasbourg to protect us from unfettered government surveillance: *Liberty v UK*[5].

Lord Judge did not acknowledge that if Parliament remains passive in the face of abuses of fundamental rights – or worse, if Parliament perpetrates those abuses – only the courts can come to the rescue of the rule of law.

I have been convinced of the need for a modern Bill of Rights since 1968. In that year, Parliament passed emergency legislation in three days and nights to take away the right of British Asian refugees from East Africa to enter and live in the UK – their country of citizenship. The Commonwealth Immigrants Act of 1968 was racially motivated.

Such an unsightly measure could be challenged in the American Supreme Court. But the Westminster Parliament is the sovereign lawmaker and our courts were helpless to protect those affected from what JS Mill described as the tyranny of the majority. That is why we had to go to Strasbourg to seek a remedy. Enoch Powell accused me of treason for having had the chutzpah to sue Her Majesty the Queen outside her realm.

The Human Rights Act

It took thirty years of campaigning to achieve the Human Rights Act 1998. It is brilliantly designed and drafted – clear and concise. It requires all

[3] *HL. v United Kingdom* [2004] ECHR 471
[4] *Z and Others v United Kingdom* [2001] ECHR 333
[5] *Liberty & Others v United Kingdom* [2008] ECHR 568

three branches of government to respect the Convention rights, not only the judges. Ministers must certify that government bills comply with the Convention and the Parliamentary Joint Committee on Human Rights acts as public watchdog and legal adviser to Parliament on the human rights implications of what is proposed. Article 46 of the Convention imposes a binding international obligation on all States parties to abide by final judgments against them. But that is imposed as a matter of international law, not as a matter of UK law.

We do not want a government of judges, and there is no risk that we will have one. The Human Rights Act respects our unique system of parliamentary sovereignty. It does not empower the courts to strike down legislation. Instead, they may issue a “declaration of incompatibility” and the choice of remedy is a matter for government and Parliament, subject to the victims’ right to seek redress in Strasbourg.

The Tory Manifesto committed the Government to “make our own Supreme Court the ultimate arbiter of human rights matters in the UK.” But that is already the position under the Human Rights Act. It requires our judges to take into account the judgments of the Strasbourg Court but not to treat them as binding precedents.

If our own Courts could no longer provide effective remedies for violations of the Convention, that would mean more cases would go to Strasbourg.

Problems with the Human Rights Act

Though it works well for lawyers, judges, civil society, and the devolved institutions, the Human Rights Act does not command widespread public confidence. From its birth, powerful sections of the British media have attacked the Human Rights Act on a daily basis, because they oppose its protection of personal privacy against media intrusion on private lives and

because they want the UK to withdraw from the European Convention and the European Union. Senior politicians attack the Strasbourg Court, and refuse to abide by its binding judgments on prisoners' voting rights.

Sir Nicolas Bratza, - who gave the 2013 lecture in this series and was the elected President of the Strasbourg Court – was demonised by the British press as a "foreign" judge. He is the son of a distinguished Serb violinist. His descent from Lord Russell of Killowen did not make him sufficiently "British" to pass muster with the editors of *The Daily Telegraph* and the *Daily Mail.*

The biggest problem with the Act is not that it is too European. After all, it was Churchill who promoted the Convention and David Maxwell-Fyfe, later Lord Chancellor, who had a key role in drafting it. The problem is that the Act has an alienating effect among those for whom "Europe" is a dirty word. The use of the Convention as a substitute for a *constitution* has made the Human Rights Act an easy target for Euro-sceptics.

In 1998, Parliament missed an opportunity to create a British Bill of Rights. Instead, New Labour simply copied word for word the Convention's text into the Human Rights Act, as did my second Private Member's Bill on which the Human Rights Act was modelled. This was to avoid political argument about a British Bill of Rights and its content. It was politically expedient but it meant that the key issues were about Convention rights rather than constitutional rights.

The second major problem with our system of rights protection is that it is asymmetrical. This is a problem of the devolution settlements, not the Human Rights Act. New Labour used the Convention to limit the powers of the devolved legislative and executive bodies in Scotland, Wales and Northern Ireland. That was again politically expedient in easing the passage of the Devolution Acts, because the UK was already bound in

international law to secure and comply with the Convention rights. But again, the UK is alone in adopting that approach. In countries with federal systems of government, like the USA, Canada and Germany, the distribution of powers as between the centre and the states or provinces is defined by the Constitution and not by a treaty.

The devolution settlement is flawed and reliance on the Convention is insufficient to protect basic rights and freedoms. This is illustrated by what has happened – and not happened - to defamation law reform. The Westminster Parliament spent three years reforming English libel law to strike a better balance between free speech and the protection of a good reputation. But the political barons of Ulster within the Democratic Union Party refused to apply the Defamation Act 2013 to Ulster. Eventually they asked their Law Commission to advise on defamation law reform and then, when it was about to advise, abolished the Law Commission. So a publisher has the benefit of the Defamation Act 2013's protection for free speech in England and Wales but not in Northern Ireland, or, for that matter, in Scotland. That means publishers have to meet different standards in different parts of the country, even though free speech is a fundamental right.

In federal systems there are core rights to free speech protected by the First Amendment that trump inconsistent laws of States of the Union. In 1964, in *New York Times v Sullivan*,[6] the American Supreme Court ruled that State libel laws must enable public figures to be defamed unless the publisher acts in bad faith or with reckless disregard of truth. Alabama and every other State of the Union had to respect the federal rule.

We have no such mechanism to ensure that the right to free expression is equally protected across the UK, because the Convention leaves States

[6] 376 US 254 (1964).

with much greater discretion about how to balance free speech and reputation.

The system of devolved government also means that blasphemy continues to be a crime in Northern Ireland even though it has been abolished in Britain because it has a chilling effect on free expression. The system also allows a situation in which same-sex couples may be married in Britain but not in Northern Ireland. In the United States, the federal Bill of Rights requires equal protection of free expression and personal privacy.

To take yet another example, in the UK the principle of equality is protected by the common law and a hotchpotch of legislation. In Britain the Equality Acts 2006 and 2010 replaced a mass of inconsistent and obscure equality laws with a coherent and user-friendly framework. But the Northern Ireland devolved Government has refused to follow suit, and continues with old equality laws. On the other hand, the Northern Ireland Act 1998 contains important provisions on equality that are absent from the Scotland and Wales Acts and have not been copied in England. Written constitutions protect equality before the law and the equal protection of the law as fundamental rights.

Arguments for a new Magna Carta

There are good arguments for a new Magna Carta, as part of a broader constitutional settlement. A home-grown constitutional charter might well enjoy greater public support than the Human Rights Act that mimics a European treaty. It might give the public a greater sense of ownership. It could ensure the consistent protection of rights across the United Kingdom. We need a constitutional framework to unite the realm while meeting demands for home rule.

In theory, it would not be difficult to draft a British Bill of Rights that defined rights and freedoms as protected constitutionally rather than in terms of the Convention. It would need to be fully compatible with the Convention, and could go further – more and not less. For example, it could codify the principles of administrative justice, equality before the law, and the equal protection of the law. It could retain the mechanism of the Human Rights Act empowering the courts to declare provisions in Acts of Parliament to be incompatible with constitutional rights, leaving it to government and Parliament to decide whether to amend the law. Crucially, alleged victims would be free to complain to the Strasbourg Court after having exhausted domestic remedies. It could make clear that our courts are not bound to give effect to Strasbourg judgments as though they were precedents.

FM Cornford's Victorian Guide to the Young Academic Politician, *Microcosmographica Academica*, published in 1908, famously mocked the arguments for doing nothing – the Wedge and the Dangerous Precedent.

The *Principle of the Wedge* is that "you should not act justly now for fear of raising expectations that you may act still more justly in the future – expectations which you are afraid you will not have the courage to satisfy." *The Principle of the Dangerous Precedent* is that "you should not now do an admittedly right action for fear you, or your equally timid successors, would not have the courage to do in some future case .... It follows that nothing should ever be done for the first time."

Another principle is that *the machinery for effecting the proposed object already exists.* "This should be urged in cases where the existing machinery has never worked, and is now so rusty that there is no chance of its being set in motion".

Another is that the time is not ripe. *The Principle of the Unripe Time* is that people should not do at the present moment what they think right at that moment, because the moment at which they think it right has not yet arrived.

Is the time for reform over-ripe?

It is this last principle that gives human rights campaigners sleepless nights. Even if a new Magna Carta is right, is it foolish to attempt it in current political circumstances?

There is a shared interest across the UK in coherent and enduring constitutional reform. The Scottish political rebellion against English politics and David Cameron's encouragement of English nationalism make wider constitutional controversy inevitable. The SNP's electoral triumph and the restive mood in Scotland, Northern Ireland and Wales mean that the Westminster Parliament might be persuaded to usher in a new constitutional settlement, discussed in a constitutional convention, and ratified by a UK-wide referendum. The SNP has not sought a new independence referendum, there is no conflict of interest compelling SNP MPs to veto constitutional change, and if handled sensibly they might be willing to vote in favour.

But could a new Magna Carta be part of that process? The Liberal Democrats favour a written constitution, with a British Bill of Rights developed via a constitutional convention. Labour are also committed to the preservation of fundamental rights, though their manifesto pledge was limited to preservation of the Human Rights Act, rather than a new Magna Carta. Commitment to fundamental rights is also shared in the devolved countries. In 2011, I served as a member of the Commission set up by

the split Conservative/Liberal Democrat coalition to investigate the case for a UK Bill of Rights. The Commissioners went to Edinburgh, Belfast, Cardiff, Birmingham and Oxford. We encountered strong opposition particularly in Scotland, but also in Wales and Northern Ireland, to the idea of a UK Bill of Rights.

Many of those we met said that there was simply no demand for such a measure in their respective countries' and in any event, it was no longer something which could be imposed unilaterally by Westminster. The Scottish Human Rights Commission asserted that any amendment or repeal of the Human Rights Act, or legislation enacting a Bill of Rights covering the devolved jurisdictions, required the consent of the devolved nations as a matter of constitutional convention. The Good Friday Belfast Agreement promised the people of Ulster an extra Bill of Rights to meet their special needs, but successive governments have failed to act. The Irish Government recently expressed its concern about the threat to the peace process from a UK Bill.

Our report was clear that "any future debate on a UK Bill of Rights must be acutely sensitive to issues of devolution and, in the case of Scotland, to possible independence, and it must involve the devolved administrations." It must involve the peoples of these islands beyond the devolved administrations too. That is also the view of the important report published last month by the Bingham Centre for the Rule of Law - "A Constitutional Crossroads: Ways Forward for the United Kingdom". This was chaired by Sir Jeffrey Jowell QC and included Professor Linda Colley.

So if the devolved institutions could be persuaded that a new Magna Carta would strengthen the protection of liberties, we could find common cause. They campaign to keep the status quo only for fear of something worse. That is also the position of human rights NGOs. They fear a Bill would be

used to reduce existing human rights protection and the power of the European Court of Human Rights.

Those fears are not fanciful. The terms of reference of the Bill of Rights Commission were limited to considering a Bill that built on all our obligations under the European Convention on Human Rights, ensured that these rights continued to be enshrined in UK law and protected and extended our liberties. Three Conservative Commissioners did not accept the premise of our terms of reference[7]. They made it clear that they wished to break the link with the Convention and the Strasbourg Court. Our chair, Sir Leigh Lewis, a former senior civil servant, used all his diplomatic skill to try to bridge the gap between Eurosceptic Conservatives and the rest of us – Liberal Democrat and Labour – who agreed with the terms of reference. In the end, Baroness Helena Kennedy and Professor Philippe Sands dissented because of the risk that a British Bill of Rights would decouple our legal system from the Convention.

Since the Commission published its report in December 2012, my own optimism has been shaken. The risk emanates from a powerful faction of the Conservative Party now in government seeking to sabotage the protection that we fought for thirty years to achieve. One of the three Conservative Commissioners, Edward Faulks, has been promoted – first as Chris Grayling's and following the election, Michael Gove's Minister in the Lords. Chris Grayling has become Lord President of the Council, with responsibility for constitutional and devolution reform. When he was in charge of the Ministry of Justice, he vandalised the legal system and threatened to invent something weaker than the Human Rights Act. His views, like those of the Home Secretary, are well known.

The new Lord Chancellor and Justice Secretary, Michael Gove assured the Commons encouragingly that "We want to preserve and enhance the

[7] Anthony Speaight QC did not agree with his Conservative colleagues. His papers were positive and forward-looking and repay careful study.

traditions of human rights. There will be no diminution in that area; indeed there will be an enhancement of Convention rights as a result of the changes that we propose to make". Less encouragingly, he has already ruled out open discussion with the SNP and others who disagree with his proposals[8]. Still less encouragingly, he wrote in 1998 that the abolition of the death penalty had "led to a corruption of the criminal justice system and the erosion of all our freedoms"[9]. Michael Gove's junior minister is Dominic Raab MP, noted for his hostility to the European Court of Human Rights.

We will not know the Government's plans until September at the earliest, but the outlook is not promising and does not suggest open-mindedness, still less a Socratic dialogue. The shadow Lord Chancellor, Lord Falconer, has described the Government's plans as a "dishonest muddle". He suggested that, contrary to the Salisbury Convention, the Lords would be acting properly in throwing out the British Bill of Rights without allowing it to be debated and amended. He predicted that there is likely to be a major clash between Parliament and the Government[10]. Unlike their Ministerial leaders, there are influential Conservatives who have a deep respect for the Convention system. They rightly reject the idea of a weak Bill of Rights not anchored in the Convention.

So we need a new Magna Carta but I doubt whether we will achieve it during the lifetime of this Parliament. The reform process cannot be rushed. It requires patient and skilful handling. It took many years to secure agreement for a United States Constitution and Bill of Rights. The

[8] HC Deb, 28th May (cols. 291-2) He went on to say that, because the Opposition and the SNP oppose the Government's plans, "they have already ruled themselves out of the debate on the reform that we need to have". NB: In the debate on constitutional, legal and devolved affairs on the Queen's Speech, on 1 June, Lord Faulks emphasised strongly that the government would not get rid of human rights, nor ignore the convention. He assured the House of Lords that , "The Bill of Rights is likely to reflect all the rights in the convention": HL Deb, 1 June (Col 166 and 283).

[9] Writing in 1998 as a *Times* columnist, he said Britain was "wrong to abolish hanging" in the 1960s, when the death penalty was outlawed: *The Independent,* 10 May 2015.

[10] Lord Thomas of Gresford also doubts the Salisbury Convention would apply: HL Deb, 1 June (Col 166).

conflicts of interest and ideology that had to be overcome during the making of the United States Constitution were formidable. The arguments were passionate. But in the end there were compromises that worked until the Civil War. Thankfully we do not have to contend with slavery, even though we have the bitter legacy of discrimination and segregation in Northern Ireland and murder and mayhem during "the Troubles".

If the government were interested in coherent and enduring reform, a broad-based Constitution Commission could prepare the ground for a constitutional convention and referendum. Its chair should not be a politician but someone able to command public confidence across the nations of the UK. The obvious candidate for that task would be our chair if she were willing to lie upon a bed of nails. Regrettably I doubt whether the present Government will be willing to take that consensual approach. I hope I am wrong and hope that the Government will prove me wrong.

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