

## Lord Sumption gives the Opening Address at the Franco-British Council Conference

### Magna Carta and the *Déclaration des Droits de l'Homme et du Citoyen*

11 June 2015

In July 1989, the late Margaret Thatcher, who was in Paris to participate in the celebration of the bicentennial of the French Revolution, gave an interview to *Le Monde*. It was a characteristic performance. She rubbished the whole occasion as well as the historic event which it commemorated. The French Revolution, she declared, had not invented the idea of human rights. We, the English had done that, with Magna Carta nearly seven centuries before. The French version was simply a distortion of an ancient idea, a feast of abstract thinking concocted by vain and impractical intellectuals. This version of events is in many ways a travesty. But it is a very English travesty. It embodies two powerful English instincts: a feeling of English exceptionalism especially in matters constitutional; and a deep suspicion of Utopianism, and indeed of all abstract ideas.

Of course, the French Revolution did not invent the idea of human rights. The notion that there are some rights which are inherent in our humanity has its roots in the works of the stoics and of Christian writers of the middle ages. In eighteenth century Europe, it had been part of the common currency of political discourse since Locke and Diderot. Writing in the 1760s, the great English jurist Sir William Blackstone had identified the right to life and limb, personal liberty and personal property as absolute rights, belonging to every individual by “the immutable laws of nature”. All the constitutional arrangements of the state, he thought, were ultimately directed to their protection. These ideas reappear in the American Declaration of Independence as well as in the second article of the *Déclaration des Droits de l'Homme et du Citoyen*. So the concept of innate human rights did not suddenly emerge out of thin air in 1789. It was the culmination of a long historical process. Nevertheless, the *Déclaration* is unquestionably the place where one looks for its most eloquent and complete expression. It has a simplicity and directness of language, a rhetorical force, which no other document of its kind can match.

In this and other respects, it would be difficult to find two political documents more different in tone or substance than the *Déclaration des Droits de l'Homme* and Magna Carta. Both of them can fairly be described as assertions of rights against the power of the state. That is why we are all here. Both of them have achieved iconic status in the societies which created them and

internationally, a fact which has tended to shield them from critical examination. That is one reason why a conference dedicated to both of these famous instruments is very much to be welcomed. In that spirit, I hope that I may be allowed to make some provisional remarks, if only in order to provide some food for thought and perhaps some ideas for rejection in the course of the day.

The *Déclaration des Droits de l'Homme* is a succinct and forceful rhetorical text with two main objects.

The first is to identify certain rights which can truly be regarded as fundamental. Article II lists them: liberty, property, personal security and freedom from oppression. The *Déclaration* did not claim to be enacting these rights into law. In the draftsmen's view they had always existed. The *Déclaration* merely claimed to have rediscovered them behind the cloak of ignorance and mental corruption cast over them by human institutions, specifically the institutions of the French *ancien régime*. These rights are characterised in the preamble as natural rights. By this was meant that they were not the creations of law or of any particular political or constitutional order. They were therefore incapable of being removed by law or any particular political or constitutional order. They were anterior to society itself. As the Greeks say of their holiest icons, they were *acheiropoieton*, not made by human hands.

According to the second article, the object of all civil society is the protection of these natural rights. The second object of the *Déclaration* was to lay down the constitutional principles on which a state should be constructed if this was to be achieved. In bald summary, these constitutional principles were the rule of law and freedom of thought and expression, which were the essential parts of the classic liberal agenda of the rational Enlightenment; and democracy, the "general will" which the draftsmen derived from Rousseau and was destined to destroy the other two.

Now, where does Magna Carta fit into this scheme of things? At this point, I have a confession to make to you. I am a Magna Carta sceptic. I have no problem about the values which the charter is commonly supposed to express. But I have the utmost difficulty in finding them anywhere in the charter. There are no high-flown declarations of principle here. No truths are held to be self-evident. No rights are declared to be inalienable. No claims are made to universal validity. Medieval latinists were perfectly capable of flights of rhetoric, but there aren't any in Magna Carta. The document is long. It is technical. And it is turgid.

The difference between the Charter and the *Déclaration* is more than a matter of style. Unlike the *Déclaration*, Magna Carta was never intended to be a general statement of moral or political, let alone human rights. It was essentially a legal text, which addressed a large number of miscellaneous grievances against the way that King John and his two immediate predecessors had governed England. In particular, it sought to define the feudal obligations associated with the occupation of land, because of the way that the Angevin Kings had exploited the uncertainty about these obligations in order to raise money. Magna Carta may have been an ambitious document for its time, but it is nothing like as ambitious as the *Déclaration des Droits de l'Homme et du Citoyen*. Mrs Thatcher's belief that a purer concept of human rights, undistorted by French intellectualism, could be found in Magna Carta, is really very wide of the mark. Magna Carta is a document for 1215, and not for all time. And it is a document for Englishmen, not for humanity. Indeed, it is not even a document for all Englishmen but only for the small minority who were free, male and relatively rich.

Only two ideas which can properly be called constitutional can be extracted from Magna Carta.

One is the idea of representation, which makes its first appearance in the original version of the Charter, sealed by King John in 1215. The 14<sup>th</sup> article requires the King to obtain the consent of the "common counsel of the kingdom" before levying any general taxation. The 61<sup>st</sup> provides for a council of barons to supervise the enforcement of the charter. We do not know what kind of membership the barons had in mind for these institutions. If they had survived, they might perhaps have become the germ of the Parliament that was in fact created in very different circumstances half a century later. By a Frenchman be it noted. But these clauses were both stillborn. They were struck out of the charter when it was reissued in 1216 and 1217 and they never reappeared. They are not to be found in the version of 1225, which is the only text that has ever had any legal status in England.

The second constitutional idea underlying Magna Carta is that the King was subject to law. This proposition, which is the foundation of the rule of law, was not, however, a new idea at the time of Magna Carta. It had been generally accepted for at least a century before 1215. The dispute between King John and the barons was about what the law was. No one doubted that whatever it was, the King was subject to it.

The famous 39<sup>th</sup> and 40<sup>th</sup> articles provided that no free man should lose his liberty or his property except by the lawful judgment of his peers or according to the law of the land. In 1215, these provisions reflected recent experience. They were directed against the arbitrary proceedings of King John's personal court, where he was in the habit of presiding with a group of cronies

and courtiers over cases involving tenants-in-chief, i.e. the barons and other great men of the realm. They had very little wider significance. There was not much point in saying that you could not be imprisoned except according to the law of the land, when the law of the land said that a man could be arrested by the King's warrant. Indeed, that remained the case until the seventeenth century.

The *Déclaration* was intended to state the fundamental principles binding on the state. But Magna Carta has never been regarded in England as fundamental law, or as imposing any limitation on the power of the legislature. Although the 39<sup>th</sup> and 40<sup>th</sup> articles are among the very few articles of Magna Carta which remain in force today, the Appellate Committee of the House of Lords held as recently as 2009 that it did not prevent the wholesale deportation by the British Crown of the population of the Chagos Islands so as to create a military base. This was because the Crown was the legislative authority for the colonies and its decrees were law. Therefore what was done, however outrageous, was by definition done according to the law of the land.

Magna Carta is one of those documents which is important not so much because of what it says as because of what people wrongly think it says. The modern perception of the Charter as the source of all our liberties was largely the invention of Sir Edward Coke, the seventeenth century lawyer, antiquarian and politician who was one of the leaders of the opposition to James I and Charles I. Coke, who was widely regarded as the most learned lawyer of his day, rescued Magna Carta from obscurity and transformed it from a somewhat technical catalogue of feudal regulations, into the foundation document of the English constitution. It is really Coke's idea of Magna Carta that has been exported to the world, and not the version that King John or his barons would have recognised.

The libertarian tradition in England is one of this country's great contributions to the development of the modern world. But its power does not depend on its antiquity. One can firmly believe in it without having to fix its origins in the early thirteenth century. Our libertarian tradition actually dates from the constitutional settlement which followed the civil wars of the seventeenth century and the deposition of King James II in 1688. Magna Carta frankly has nothing to do with it.

The French *Déclaration* of 1789 is the only one of these two documents that speaks to us in the 21<sup>st</sup> century. It has a good claim to be regarded as the founding document of international human rights. It is significant not only for the values which it proclaims, also because of the objections that it has provoked ever since its first appearance. These divisions go, I think, to the heart of some of the modern dilemmas about international human rights. The *Déclaration* begs

many questions. But they are among the most important and profound questions of the modern age.

The *Déclaration's* critics have focused mainly on two related points: its claim to universality and its claim to fundamental status for the rights which it declares. Rights are claims against the community. Both of these depend on the idea that human rights are anterior to society and inherent in our humanity. The alternative view is that rights are claims against the community, which exist because they are consonant with its collective values. They necessarily have a social context. They cannot therefore exist in the abstract, or attach to men and women simply by virtue of their humanity. Rights, however fundamental, are the creation of social institutions. Their legitimacy, according to this view, depends not on their absolute moral value but on the authority that each society chooses to give them. They may therefore differ from one society to another. They are not absolute and not universal. They are not icons.

The chief contemporary exponent of this view was Edmund Burke, whose *Reflections on the Revolution in France* was published in 1790. Burke has gone down in history as the philosopher of English Toryism, largely on the strength of the *Reflections*. In fact he was neither English nor a Tory. He was an Irishman, a Whig, a political reformer, an opponent of slavery and of British imperialism in India and Ireland, and a champion of the American Revolution. Tom Paine, the author of *The Rights of Man* and the most powerful contemporary advocate of the French Revolution writing in English, felt betrayed by Burke. So did the Revolution's principal American supporter Thomas Jefferson. They thought that everything in Burke's past should have made him their ally. This is true, and I think it lends a special interest to his criticisms of the values of 1789.

Burke objected to the universality claimed for the *Déclaration*, chiefly because he distrusted human reason. If the rights of man are anterior to all human institutions, they are a purely intellectual construct, to which the collective experience of men contributes nothing. This was the notion to which Burke objected. Political systems reflected the cumulative wisdom and experience of the societies which produced them. What struck the revolutionaries as unreasoned prejudice was often the fruit of the inarticulate experience and historic compromises of the past. "We are afraid," Burke wrote, "to put men to live each on his own private stock of reason, because we suspect that this stock in each man is small, and that individuals would do better to avail themselves of the general bank and capital of nations and of ages."

Lest it be thought that this was simply an Anglo-Saxon conspiracy, it should be pointed out that a very similar difference of opinion arose among the membership of the French National

Assembly and within the committee charged with drafting the *Déclaration*. The text was attacked from the right by conservatives and royalists like Lally-Tollendal and Mounier, who believed that the document should be based on the values, traditions and historical experience of France. They commended the English Bill of Rights of 1689 as an example. Revealingly, they were often referred to the *le parti anglais*. Marat, writing from the left, protested in very similar terms against what he called the *Déclaration*'s "metaphysical speculations". A shorter, more down-to-earth text modelled on the American Declaration was drafted by Lafayette. But, as is well-known, the *Déclaration* in its final form was substantially the work of Mirabeau and of that great bugbear of Burke's, the abbé Sieyès. They rejected the American Declaration as being too parochial, too deeply rooted in American experience. Mirabeau was quite open about this. He wanted what he called "a code of reason and wisdom to be held up as a model for other nations."

Not all of Edmund Burke's arguments command respect today. Some of them are purely rhetorical. But he surely put his finger on a critical dilemma, which is still with us. The world of politics is divided into two camps. There are those who seek to found public institutions on moral principle. And there are those who regard public institutions as a mechanism for reconciling the competing interests and prejudices of humanity. The former undoubtedly has the more powerful emotional appeal. But the latter reflects a historical truth which has a habit of reasserting itself and is not easily ignored.