

## Magna Carta, Human Rights and the Archaeology of an Idea

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*Archaeology: the scientific study of ancient cultures through the examination of their material remains such as buildings, graves, tools, and other artefacts usually dug up from the ground*

When professor la Torre asked me to give a seminar on human rights I readily agreed. This was perhaps foolish of me. I have been an academic manager for too long and have done little research recently. I thought my audience would very soon discover that I was a fraud. But as is often the case when one finds oneself *in extremis*, a strange thing happened. There was an interesting concatenation of events that led me to begin thinking in a different way about human rights.

Possibly the first thing to remark is that I thought I knew a reasonable amount about the phenomena that we today call human rights. I thought I knew about the genesis of the idea; the broad structure of the international human rights system; the domestic institutionalisation of human rights, as well as some of the contemporary theories which are a major part of human rights discourse. I even thought I knew about the legal hermeneutics of human rights – how various institutions interpret human rights and the judicial devices used within particular socio-political contexts to achieve particular outcomes. Then of course, I realised that the wider my circle of knowledge, the greater the circumference of my ignorance. This realisation received further confirmation when I was asked to become part of national enterprise in the UK to celebrate the 800<sup>th</sup> anniversary of the Magna Carta in 2015 through education. (Lincoln Cathedral holds one of the four extant copies of the original English Great Charter of Liberties.)

It was then I realised that the depths of my ignorance were truly profound. I knew of course that Magna Carta was a significant constitutional document, not only for the UK, but for other common law states too. Indeed, the citizens of the USA appear to esteem Magna Carta more highly than their UK counterparts, and, significantly, it was the American Bar Association that paid for the monument that now stands at Runnymede, an island in the River Thames, where King John put his seal to the original document in 1215. Even more astounding is the fact that 15 million people turned out to view the Lincoln Magna Carta in the US when it was held in the Library of Congress for safekeeping during the Second World War. And as recently as 3 July 2010, the Queen of Great Britain and Northern Ireland laid the cornerstone of the Canadian Museum for Human Rights in Winnipeg.<sup>1</sup> The Observer newspaper in the UK reported the occasion with more than a little hyperbole as follows:

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<sup>1</sup> 'Queen lays human rights cornerstone in Canada', The Observer, 4 July 2010, p 14,.

'The stone used in the ceremony comes from Runnymede in England – where Magna Carta was issued in 1215 signalling the beginnings of democracy in Britain.'

When we look further at recent history we can see claims by a number of eminent people – some of them even lawyers – that the Magna Carta has, whether rightly or wrongly, been the source of inspiration for a number of contemporary legal or quasi-legal documents. Eleanor Roosevelt, who was a leading figure in the drafting of the Universal Declaration of Human Rights referred to it in her speech in the UN General Assembly on 10 August 1948 called the Declaration the 'Magna Carta of Mankind'. The Convention on Civil International Aviation (the Chicago Convention) has been referred to as 'the Magna Charta of public international air law'.<sup>2</sup> The United Nations Convention on the Law of the Sea 1982 has been called a 'Magna Carta' for the oceans<sup>3</sup> and the compact between the Crown and the indigenous people of New Zealand has been termed the 'Maori Magna Carta'.<sup>4</sup>

Leaving aside the imperfect use of language and the perhaps over-inflated claims in some of these descriptions, these discoveries prompted me to ask why the ideas embodied in this medieval document, the product of a feudal society, have become the touchstone against which some would wish to measure our concept of liberty under the law and one of the foundations of human rights in the 21<sup>st</sup> century. (It should also be mentioned that the Magna Carta was inscribed on UNESCO's register of the 'Memory of the World' in 2009 following nomination by the British Government.)

That question is, I suspect, incapable of a simple answer. The provisions of the Magna Carta concerning the protection of property rights and personal liberty clearly resonate with US constitutionalists and Canadian human rights lawyers, but as we reveal the layers of history we perhaps find that the original ideas of the Great Charter have become ... well, what have they become? Distorted? Warped? Refined? Elevated? Transmuted? Can we really treat it, as so many modern collections of human rights documents do, as some kind of proto-human rights document?<sup>5</sup> Much, I would suggest, depends on what our teleological understanding of human rights is. And in asking this question we must not fall into the trap, as some authors and commentators do, of anachronism. We must also avoid the risks inherent in adhering to an unduly linear or culturally specific view of history or one in which the importance of social context is disregarded.<sup>6</sup> Furthermore, we – or

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<sup>2</sup> Kay Heilbronner, 'Freedom of the Air and the Convention on the Law of the Sea', (1983) 77 AJIL 490.

<sup>3</sup> Choon Ho Park, *The Law of the Sea and Northeast Asia: A Challenge for Cooperation*, (2000), p ix.

<sup>4</sup> Paul McHugh, *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi*, (1991).

<sup>5</sup> See, for example, Micheline R Ishay, *The Human Rights Reader*, (1997), p 57.

<sup>6</sup> An author who has possibly fallen victim to these errors is A C Grayling who in his book on the development of liberty and human rights, *Towards the Light*, (2007) not only sees the history of liberty

at least some of us - need to shift our thinking from that which automatically associates human rights with a progressive liberalism. Human Rights, and human rights institutions, as Prof Koskenniemi has cogently argued are as much the product of hegemony as other rules of law and are capable of holding all possible positions within them, as long as the discourse take place using the grammar and vocabulary of human rights.<sup>7</sup>

Without wishing to rehearse rights discourse in detail, it might be argued that the fundamental characteristic of human rights is that they have a value that is superior to ordinary law. To put it in the words of Ronald Dworkin, rights operate to 'trump' other rules.<sup>8</sup> How they acquire that status is, in a general sense, unclear, but in many constitutions, human rights provisions are given protected status - for example by entrenchment - and can only be repealed by exceptional measures, such as a special majority of the legislative body. In some states, the US is the prime example here, legislation that is inconsistent with specially entrenched rights documents, will be null and void as unconstitutional. In this sense we (lawyers? politicians? the general populace?) have willed human rights (or civil rights) to be special; they transcend ordinary law and render it its subject. It might also be something of a cliché to remark that the special status accorded to human rights emerge after periods of great political upheaval - the French Declaration of the Rights of the Man and Citizen (1789), the US Bill of Rights (1791) and the Universal Declaration of Human Rights (1948) - are examples of this proposition. Human rights documents function to cement in place the new constitutional order (hegemony) and might therefore be regarded as both radical in their origin but conservative in their purpose. (This does not mean that I would adhere to the idea of originalism exemplified by Justice Scalia in the US Supreme Court or the literalist interpretation of Judge Fitzmaurice in the early decisions of the European Court of Human Rights.)

In one sense, the Magna Carta was the product of a similar perturbation of the existing political and social order in which one hegemony was replaced by another. It was a compact forced on the monarch, King John, by his over-mighty subjects - his barons and clerics.<sup>9</sup> John had overtaxed his subjects to support his adventures in France, acted ruthlessly to extort taxes and, to add insult to injury, he had excluded them from his inner council in favour of 'new men'. The barons rebelled and in an attempt to avoid civil war, John agreed to sign a charter that proposed to remedy their grievances. It was a

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since the Reformation as one long and consistent march towards enlightenment, but also suggests that today's citizens can be compared to the nobility of the past in the range of the rights which they enjoy. On the other hand, we have the US Supreme Court originalists such as Justice Antonin Scalia who would have us interpret the provisions according to their meaning at the time of their adoption.

<sup>7</sup> Martti Koskenniemi, 'The Politics of International Law - 20 Years Later', (2009) 20 EJIL 7.

<sup>8</sup> Ronald Dworkin, *Taking Rights Seriously*, (1977).

<sup>9</sup> The authoritative scholarly work on the Magna Carta remains J C Holt, *Magna Carta*, (2<sup>nd</sup> ed, 2001). For a more readable background on the political origins of the Magna Carta see Frank McLynn, *Lionheart and Lackland: King Richard, King John and the Wars of Conquest* (2006).

long document that focused primarily on property issues, for example whether a widow could be compelled to marry a man of the king's choice in order to keep the estates at the service of the king; who was permitted the right to take fish and where and so on. It was in its very essence a feudal document; a product of its time and social context. In a Foucauldian sense, it could be characterised as an example of resistance to power, but only by one privileged group against, in feudal terms, the sole source of legitimate authority. (Of course the Charter, somewhat predictably, appealed to God in this matter as a superior authority.)

But how secure was this compact and how long was it intended to last? To understand these questions, it is necessary to consider King John's relationship with the Church. In 1213 John had refused to accept Pope Innocent III's candidate, Stephen Langton, as Archbishop of Canterbury. Relations between the Pope and John broke down; John was excommunicated by the Pope and a Papal interdict declared against England. By the time of the meeting with the barons and clerics at Runnymede, John had been forced to acquiesce in the Pope's appointment and Langton had become Archbishop. Significantly, it is thought that Langton was the brains behind the Charter, which also included a provision protecting the 'liberties of the Church'. No sooner was the Charter sealed, however, than Innocent III, encouraged by John, condemned it as having been exacted by coercion and declared it by Papal Bull to be null and void. In response to this, John reneged on his commitments to surrender castles, borrowed money to hire foreign troops, and rallied his forces to subdue the nobles. John's plans - and the impending civil wars - were averted when he conveniently died in October 1216. The Charter, however, survived and, after three incarnations, was eventually entered onto the statute rolls by Edward I (the 'Father of Parliament') in 1297. This transformation of the Magna Carta from an extra-legal, higher form constitutional document to an 'ordinary statute' raised some interesting issues in subsequent centuries, as we shall see. The preamble, however, suggests that the Magna Carta was supposed to be the foundations of an autochthonous constitutional settlement that was to subsist in perpetuity. As King John declared:

'... our will is that it be observed in good faith by our heirs forever. We have also granted to all freemen of our kingdom, for us and our heirs forever, all the underwritten liberties, to be had and held by them and their heirs, of us and our heirs forever.'

If we examine more closely the provisions of the Magna Carta, we can identify those that might be said to have had the most profound effect on the development of norms that could be viewed as having the characteristics of proto-human rights. In modern parlance we might refer to these as rules of due process of law and other norms relating to the fair administration of justice. These are as follows:

'20. 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.

'38. In future no official shall place a man on trial upon his own unsupported statement, without producing credible witness to the truth of it.

'39. 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 other to do so, except by the lawful judgement of his equals or by the law of the land.

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

'45. We will appoint as justices, constable, sheriffs, or other officials, only men that know the law of the realm and are minded to keep it well.'

Let us focus on Chapter 39 of the Magna Carta (Cap 29 of the original 1215 Charter), however, since, not least, it is the only provision of the document that remains in force today. Taken at face value, this formulation might seem to us a little strange, but if we examine it in its original context, it becomes less so. Take the words of Chapter 39 themselves, for they manifest the feudal, social context, particularly the earlier translation of original pig Latin that forbade a free man to be diseised. Seisin was only a quality of full legal entitlement that existed in real property, so the extension to property in the later document is an extension of the prohibition to chattels - or moveable property - also.

Status is clearly important, although the medieval understanding of status is not coterminous with our own. It is only freemen who shall not be so mistreated and they shall be judged only by his (not her) peers or by the law of the land. Furthermore, no one can be deprived of their standing (i.e. status) except by lawful judgment of his equals or by the law of the land. Thus the rights in the Magna Carta were applicable only to certain people; they did not have universal application. And if the hallmark of human rights is that they are universal and equally applicable to all persons no matter what their rank or status, then we have an anachronism. It is arguable that until a society has an understanding of equality regardless of sex, ethnic origin or other status, then the rights in question, though they might be constitutional legal rights they are not *human* rights.

Let us examine the notion of freemen a little further, since it is only freemen to whom the rights are originally given.<sup>10</sup> In this period freemen were those of

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<sup>10</sup> For a fuller account of these developments see J C Holt, 'Magna Carta: Why Celebrate', unpublished paper given on May 1997.

free status in the eyes of the law (that is, not villeins, serfs or bondsmen who were bound to their masters) and as such they enjoyed certain rights denied to the 'unfree', such as access to the King's courts in certain actions, freedom to move about the realm, to marry and exemption from certain duties. As Magna Carta became institutionalised through the statutory process, 'no free man' became 'no man' and then ultimately in 1354 'no man of whatsoever estate or condition he may be'. This might look like an early progression towards a fundamental legal equality of men (women were certainly not part of this formulation either in word or in fact), but what it fails to reveal are the fundamental changes that had taken place in English society over the 140 years or so since the sealing of Charter in 1215. While there were those who were still unfree and bound to their lords, the categories of freemen had – with developing urbanisation – increased markedly, and these new status categories needed to be brought within the scope of the common law. Thus the motivation to include men of 'whatsoever estate or condition' was to render them subject to the common law, and therefore the process attendant upon the common law. In other words, it was an extension of hegemony uninformed by any anachronistic notion of fairness or equality.

If we then look at the process we find that no free man is to suffer in person or property by action of the King except by the lawful judgement of his peers or by the law of the land. The Latin text here is '*per legale iudicium parium suorum vel per legem terrae*'. Again, this phrase went through an interesting – and historically contingent – evolution. By the middle of the 14<sup>th</sup> century, trial by jury had become through custom and practice, part of the *legem terrae*. In order to regulate the *process* of trial by jury, however, a number of statutes (the Six Statutes) were passed between 1331-1368. These might be seen as the beginnings of due process of law since they laid down the procedures through which a person might be brought before a court. The statutes of 1352 declared that no one was to be 'taken by petition or suggestion made to our lord the King or to his council, unless it be by indictment of good and lawful people of the same neighbourhood where the deeds be done in due manner, or process made by writ original at the common law.' (What requires further investigation here is how a developing self-conception of the legal profession and lawyering might have influenced these developments some 140 years after the original Magna Carta.<sup>11</sup> Almost certainly, the England of the mid-14<sup>th</sup> century was not the England of the early 13<sup>th</sup> century which was still in the relatively early days of colonial occupation.)

None the less, here, in legislative form was the fusion of two compelling ideas: the notion that the common law applied to all men and that for the administration of the King's justice clearly established procedures had to be followed if decisions were to be regarded as formally correct. (Here again, the

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<sup>11</sup> On this matter see Anthony Musson, *Medieval Law in Context: The Growth of Legal Consciousness from Magna Carta to the Peasants' Revolt*, (2001).

conception of proper, professional lawyering is of particular importance.<sup>12</sup>) In this fusion we can discern the genius – and genesis – of the concept of due process in both its substantive and procedural aspects. These provisions remain in statutory force in England today, and the 1297 Magna Carta remains, chronologically, the first statute in the statute books to this day.<sup>13</sup>

So an archaeological investigation of the admittedly slender foundations of Magna Carta has brought us to the point where we can see the emergence of a structure that is beginning to take on a recognisable modern form, distinct from its feudal origins. Time does not permit a thorough rehearsal of how the words of Magna Carta and their transformation from a limited pragmatic solution to a local conflict into a sophisticated legal edifice occurred. In order to do that we would need to look at the many layers of history that takes us from Coke CJ's reinterpretation of the Great Charter as simply a restatement of the liberties of Englishmen enjoyed from time immemorial – a great legal fiction if ever there were one – that rendered the monarch subject to the law to the so-called universal international human rights documents of the 20<sup>th</sup> century that seek to establish due process of law as a fundamental right for all humankind.

What I would like to do in the remaining time, however, is to uncover a little more of how the original radicalism of Cap 29 of the Magna Carta was rediscovered and how it eventually found its way across the Atlantic.<sup>14</sup> To do this we must leap forward to the 18<sup>th</sup> century to the English radicals who sought to challenge a corrupt parliamentary system which protected the vested interests of the landed and mercantile classes through the use of arbitrary arrest and impeachment to protect parliamentary privilege. Radicals such as Beardmore and Burdett resorted to Cap 29 of the Magna Carta to defend themselves against the arbitrariness of Parliament's proceedings against them. Their actions were recorded in the pamphlets of the day and the MC achieved iconic status, even influencing the Chartist movement. It was with this radical view of the Magna Carta that the American colonists associated themselves, and when they came to order their own affairs it was to the liberties of England enshrined in the Magna Carta and the common law to which they turned. It is, for example, known that William Penn had a facsimile copy of the Magna Carta and that it was the taxation clauses of the Charter that underpinned the colonists' resistance to the Stamp Act of 1765.

Given England's colonial history it is not surprising that cap 29 of the Magna Carta has found its way into a significant number of post-colonial

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<sup>12</sup> See Musson, *op cit*, *supra*.

<sup>13</sup> **XXIX.** NO Freeman shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed; nor will We not pass upon him, nor condemn him but by lawful judgment of his Peers, or by the Law of the Land. We will sell to no man, we will not deny or defer to any man either Justice or Right.

<sup>14</sup> For a fuller consideration of these issues see Ralph Turner, *Magna Carta through the Ages* (2003)

constitutions and bills of rights. The US Fifth Amendment replicates in almost precise form the wording of cap 29 by providing in the material part that:

'no person shall ... be deprived of life, liberty, or property, without due process of law ...'

There is, of course, now a significant and rich corpus of law based on this single provision of the US Bill of Rights that has Magna Carta DNA running through its veins.

In Australia, Laws LJ as recently as 2001 stated that, Magna Carta had enduring significance as a 'proclamation of the rule of law' and 'in this guise it followed the English flag even to the Chagos Archipelago.'<sup>15</sup> And in India, a number of decisions have been heavily influenced by provisions of Magna Carta.<sup>16</sup>

Given the pervasive influence of the Anglo-American legal system in the early 20<sup>th</sup> century, it is perhaps unsurprising that the post World War II settlement - presaged by the Atlantic Charter - was heavily influenced by ideas inherent in those systems, particularly by concepts of US constitutional rights given the material and political dominance of the US at that time, and the leading role played by Eleanor Roosevelt in the drafting of the Universal Declaration. As noted above, it was Roosevelt who referred to the Universal Declaration as the 'Magna Carta of mankind', an unsurprising remark, given the driving force behind it. And also as noted above, while the disposition of human rights is assumed to be liberal, here they manifest themselves as hegemonic and designed to secure a particular (US dominated) world view.

If we examine the Universal Declaration we can see resonances of the Magna Carta in a number of its provisions:

Article 3: Everyone has the right to life, liberty and security of person.

Article 9: No one shall be subjected to arbitrary arrest, detention or exile.

Article 10: Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11: Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

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<sup>15</sup> *Chagos Islanders v The Attorney General* [2003] EWHC 2222, para 34. For an analysis see Sulina Bangaroo, 'A short analysis of the exile of an indigenous population from beginning to end', [http://www.herts.ac.uk/fms/documents/schools/law/HLJ\\_V3I1\\_Bangaroo.pdf](http://www.herts.ac.uk/fms/documents/schools/law/HLJ_V3I1_Bangaroo.pdf) accessed 7 January 2011.

<sup>16</sup> See, for example the Supreme Court of India's judgment on *habeas corpus* in *Joginder Kumar Vs. State Of U.P.* 25/04/1994.



Article 17(2): No one shall be arbitrarily deprived of his property.

To a greater or lesser extent these provisions can be identified in the due process rights contained in the International Covenant of Civil and Political Rights, the European Convention on Human Rights, the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, the African Convention on Human and Peoples' Rights and a whole host of similar binding and non-binding human rights instruments.

The transformation of the contents of a medieval political settlement that took place in the 13<sup>th</sup> century in a meadow on a small damp off-shore European island ought, I think, to command our wonder. Some of the legal concepts and principles contained in these modern instruments might to us seem self-evident, but the tortuous path that has brought them here spans changing conceptions of lawyering and the role of law throughout the centuries. I make no statement about hegemonies or the virtue or otherwise of the various protagonists and antagonists that have brought us to this point, but the evolution of these ideas over a significant period of time shows how virile and durable these fundamental ideas of law have proved to be.

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