

REALITY, MYTH AND GENEALOGY:

A MINI-SYMPOSIUM ON MAGNA CARTA

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This paper introduces a mini-symposium on Magna Carta: Its Significance and Legacy.[†] The paper outlines the main topics of the debate and proposes some reflections on the enduring worldwide interest in the Magna Carta on its 800th anniversary.

I. SUCCESS AND FAILURE OF THE MAGNA CARTA

On June 15, 2015, Queen Elisabeth joined the British Government and other political, religious, and social authorities at Runnymede to celebrate 800 years of Magna Carta. The event commemorated a milestone in the history of human rights, the rule of law, and constitutionalism; but it also, in some sense, celebrated a failure.

The 1215 Magna Carta did not achieve its goals of political peace, social stability, and limited government. It did not end the struggles of its age: the English King soon forgot to respect the document, the Crown and the Barons kept fighting for years, the Pope annulled the Charter, and excommunicated the Barons almost immediately after its inception.

There is also little doubt that the Barons who forced King John to accept the Magna Carta did not envision any longstanding destiny for the document itself. They wanted to achieve specific objectives: this is why the original Charter held spacious

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[†] The Symposium stems from a seminar held at the Fondazione Studium Generale Marcianum, with the contribution of Fondazione Magna Carta, on October 30th, 2015.

provisions about the institutions of political assemblies alongside legal minutia regarding fishing in the Thames.[‡]

The Magna Carta, however, marks a turning point in the history of Western legal tradition: in the years and even centuries that followed, the Magna Carta exerted a magnetic attraction and served as a powerful engine of change.

The outstanding importance of the Charter can be read both retrospectively and prospectively. When compared to what came before, the document was a melting pot of pivotal legal and political theories that had endured for centuries. The Charter blended legal disciplines: natural law, canon law, common law, and statutory law all have a place in it. The legal historians that have looked beyond Papal opposition have demonstrated that the Magna Carta distilled a set of legal values that had deep roots even within the Christian doctrine. One of the main promoters of the text was the Archbishop of Canterbury Stephen Langton, who drew inspiration from the Bible when he helped shape fundamental rights, such as the right to a fair trial.[§]

As for what came afterwards, Magna Carta planted the seeds for the transformation of domestic warfare into political process. Although King John soon repudiated the Charter to the clear disappointment of the Barons, all the parties realized the importance of the document, so much so that the Charter was reissued several times. In the long run, the Barons' stubborn insistence on institutionalizing an assembly would develop into parliamentarism and the rule of law.

The conceptual underpinnings of Magna Carta and the constitutional framework that it laid out have transformed it into an icon of universal legal values. More than 2,000 judicial decisions worldwide have quoted the Magna Carta throughout the centuries. While leading the drafting committee of the Universal Declaration of Human Rights, Eleanor Roosevelt called for a new “international Magna Carta for all men everywhere.”^{**} Countries that retain a Spanish legal culture use “Carta Magna” as a synonym for constitution. Popes Pius XI and XII both affirmed that Pope Leo XIII's *Rerum Novarum* encyclical letter was the “Magna Carta of Labor.”^{††} The place this Charter has in the history of legal inventions transcends time periods, traditions, and both secular and

[‡] Clause 33.

[§] J. W. Baldwin, “Due Process in Magna Carta”, in R. Griffith-Jones-M. Hill (eds.), “Magna Carta, Religion and the Rule of Law”, Cambridge, 2015, p. 111 ff., ebook edition.

^{**} Sr. R. Singh, “The development of human rights thought from Magna Carta to the Universal Declaration of Human Rights”, in Griffith-Jones-M. Hill, *supra*, note 3, p. 776, ebook edition.

^{††} G. J. Staab, “The Dignity of Man in Modern Papal Doctrine: Leo XIII to Pius XII”, Washington D.C., 1957, p. 9.

religious spheres. Its appeal is undeniable, and so overwhelming that it has become expedient rhetoric for any legal enterprise that calls itself foundational.

The contributions of this mini-symposium try to do justice to Magna Carta in its manifold dimensions. They shed light on its birth, myth and achievements; they explore its developments into parliamentarism, fundamental rights protection, and, more broadly, into constitutionalism. Professor Mark Hill, drawing on his recently edited book *Magna Carta, Religion and the Rule of Law*,[‡] leads us through the vicissitudes that prompted the release of the document, as well as its reception by English legal culture. Professor Ermanno Calzolaio places the Charter in a broader comparative context, showing how the document ramifies the law through the political and the judicial branches. Professor Tommaso Edoardo Frosini shows how parliamentarism, democracy, and human rights in Western societies took shape after the Magna Carta planted its seeds into the ground of European legal culture.

II. MAGNA CARTA: THE FOUNDATIONAL MYTH AND ITS GENEALOGICAL EXPEDIENCY FOR THE RULE OF LAW

As Jeremy Waldron has noted, we live in a time that is obsessed with foundational arguments.^{§§} Linking back a human right, a constitutional principle, or a political institution to a specific document has the consequence of magnifying it, nailing it down, and making it less volatile.

The Magna Carta condensed a long and diverse series of legal values. The rights, duties, and institutional engineering that it contained already abounded in several fundamental texts of Italian cities.^{***} Furthermore, these same rights, duties, and institutional engineering were part of the *ius commune*,^{†††} or had appeared in previous political negotiations. But the Magna Carta made one of all of them, for posterity. Later generations would identify their ideals of limited government and fundamental rights in one compact, written document.

[‡] Edited with Robin Griffith-Jones, *supra*, note 3.

^{§§} J. Waldron, "What Do the Philosophers Have against Dignity?" in *New York Law School Public Law and Legal Theory Research Paper Series*, Working Paper no. 14-59, November 2014, p. 6, available at <http://dx.doi.org/10.2139/ssrn.2497742> (last visited: 10 November 2015).

^{***} R. H. Helmholz, "Magna Carta and the Law of Nations", in Robin Griffith-Jones-M. Hill, *supra*, note 3, p. 227.

^{†††} R. H. Helmholz, "Magna Carta and the Ius Commune" in 2 *University of Chicago Law Review* 66, 1999, 297 ff.

While the myth of Magna Carta's achievement may contradict the reality of its loose enforcement and of the discontent it prompted among top political and religious authorities of its time, it later operated as much more than a merely rhetorical device. It literally functioned as leverage for and as a yardstick by which to measure legal innovation: when American colonies found inspiration in Magna Carta, they called on the necessity of having a written text that would limit the government and secure some basic liberties,^{###} and when civil law countries today name their constitutions after the Magna Carta, they take inspiration from its foundational legal role.

The Magna Carta secured legal certainty, crystallized the basic values of political democracies in a single document, implemented certain fundamental liberties, and made these liberties available to a wider public. In doing so, it created a starting point for legal historians, engineers, and interpreters:^{§§§} Coke himself found that the Charter was the very foundational document of English liberties.^{****} The Magna Carta set out a genealogy that shaped the history of fundamental constitutional ideas. Legal narratives and foundational theories do not need to dig deeper than the Charter, since it constitutes solid bedrock upon which they can build. Magna Carta has provided a genealogy of rights, liberties, and constitutionalism that grounds the modern understanding and development of legal narratives and foundational theories, as Tommaso Frosini points out.

Many nations have envisioned their respective constitutional histories and projects within the spectrum of the Magna Carta. In this sense, despite its birth as a political compromise between a weak King and daring Barons, the Magna Carta encapsulates some part of the universal spirit of human rights and constitutionalism. In a nutshell, the Charter's myth functions as operational genealogy.

When a genealogy becomes operational, it may suffer from two different flaws. On one hand, it may exaggerate some aspects of a tradition. The meaning of Magna Carta can be stretched to the point of communicating what it originally did not mean to

^{###} J. Witte, Jr., "A New Magna Carta for the Early Modern Common Law: An 800th Anniversary" in *Essay, Journal of Law and Religion*, 2015.

^{§§§} Enshrining legal ideas in a written text is crucial. Once enshrined in a text, customs and practices acquire a special status, since they cannot be subject to doubt and challenged as invented. On the creative power of historical narratives, *see* the vitriolic observations in E. Hobsbawm, "The Invention of Tradition", Cambridge-New York-Melbourne, 1983.

^{****} S. Sheppard (ed.), "The Selected Writings of Sir Edward Coke", Indianapolis, 2003, 3, p. 1285.

communicate. For instance, it is one thing to note that the Magna Carta's provision prohibiting excessive fines undeniably conveys some sense of proportionality.^{†††} It would be another thing entirely to maintain that the fully fledged proportionality test is well embedded in contemporary legal culture thanks to Magna Carta. Quite to the contrary, the English common law itself has consistently refused to embrace proportionality as a type of judicial scrutiny,^{‡‡‡} preferring a more deferential approach toward the political branches.^{§§§§}

While the theoretical impact of some legal provisions may be exaggerated, other features of the document are easily undervalued. As we saw above, some extremely technical clauses of the Magna Carta do not easily correspond with modern constitutionalism, and others, moreover, fly in the face of the contemporary *lingua franca* of rights,^{*****} as the anti-Jewish provisions of the Charter do. But it is mostly the context in which the Charter was deployed and in which it is still embedded that deserves special consideration. Ermanno Calzolaio illuminates how Magna Carta finds its proper place in a certain legal and political framework. It is a written legal document that regulates freedoms and institutions in a country where oral judicial debates largely dominate^{††††} and where what judges say controls. It is part of British constitutionalism, which both accords sovereignty to the political branches rather than to the Magna Carta itself, and places the law in the hands of judges rather than putting it in the hands of the Parliament.^{‡‡‡‡}

After all, as Mark Hill points out in his reflections about the mythological and historical approaches to the subject, there is nothing wrong in celebrating Magna Carta's ideals and achievements, although there is still much to learn from the text regarding law's evolution from Magna Carta to contemporary ideals of human rights, the rule of

††† See V. Jackson, "Constitutional Law in an Age of Proportionality" in *The Yale Law Journal* 124, 2015, p. 3107, and T. E. Frosini, "Magna Carta and His Heirs", in 5 *Comparative Law Review* 2, 2015.

‡‡‡ M. Taggart, "Proportionality, Deference, Wednesbury" in *New Zealand Law Review* 2008, p. 423.

§§§§ I.e. the so-called *Wednesbury Test*, which the Court of Appeal forged in *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corp.*, [1947] EWCA Civ 1.

***** M. Perry, "A Religious Basis for Liberal Democracy, Hebraic Political Studies", p. 385, available at:

<http://www.cardozo.yu.edu/sites/default/files/Michael%20J%20Perry,%20A%20Religious%20Basis%20of%20Liberal%20Democracy.pdf> (last visited: 10 November, 2015).

†††† John P. Dawson, "The Oracles of the Law", Westport, 1968, p. 82.

‡‡‡‡ But see B. W. Miller, "Legislated Rights: From Magna Carta to Montgomery March", 6 *Faulkner Law Review* 1, 2014, p. 21.

law, and constitutionalism. Hermeneutic enterprises that trace modern legal ideas back to the Magna Carta run the risk of highlighting some features of that document and equating them to contemporary legal ideas, while overlooking other aspects, which may nonetheless elucidate both Magna Carta and modern law. For men and women of the 21st century, it is one thing to sympathize with the Barons; it is quite another to identify with them.