MAGNA CARTA'S LEGACY: COMMON LAW AND HUMAN RIGHTS

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The eight hundredth anniversary of the sealing of Magna Carta has been marked in various ways in Britain and throughout the world.[1] The text of the various iterations of the Great Charter and their provenance have been subject to detailed scrutiny by historians, ecclesiologists, lawyers and laymen, fostering discussion and debate with increasing levels of subtlety and nuance. Sometimes the abiding myth of Magna Carta has been more in evidence than the factual reality. The distinguished jurist, Lord Bingham rightly observed that,

'The significance of Magna Carta lay not only in what it actually said but, perhaps to an even greater extent, in what later generations claimed and believed it had said. Sometimes the myth is more important than the actuality'.[2]

This paper is in four sections in the first part consideration is given to the Charter in its contemporary English political context. The second looks at other medieval European charters. The third section addresses the relevance of the Charter in the religiously diverse climate of the twenty-first century; and the paper then concludes with some reflections on the lasting effect of the Charter's fundamental terms for the development of the common law and in the drafting of human rights instruments of the modern age.

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[1] This paper derives from a lecture delivered at the *Università di Macerata* on 29 October 2015 which then formed the basis of a symposium at the *Fondazione Marcianum* in Venice moderated by Professor Andrea Pin. I am indebted to him and to the other contributors at the symposium, Professor Ermanno Calzolaio and Professor Tomasso Frosini, for the lively and stimulating discussion.

[2] T. Bingham, "The Rule of Law", Oxford, 2010.

I. HISTORY

The battle between church and state in twelfth-century England was about authority.[3] It all began as a dispute between King John and the Pope as to who should appoint the new Archbishop of Canterbury. The cathedral gave way to the King, but when the Pope heard about it, he annulled the election of the King's candidate, and, in Rome, consecrated his nominee, Stephen Langton. John responded by declaring Langton an enemy of the Crown. The Pope, who had already interdicted the secular monarchs of France and Norway, to placed England under interdict. The King was excommunicated in 1209. But, with the advice of William Marshal, John made his peace with the Pope and in 1213 sealed a charter which accepted that the pope was his superior in matters spiritual and temporal. The Pope was now John's feudal lord: and one condition was the reception of Stephen Langton into England as the Archbishop of Canterbury.

The country still drifted towards civil war. Both sides wrote to the Pope, seeking his support. Both appealed to the ancient customs of the common law. At the end of April, Langton and William Marshal, acting as ambassadors for the King, received the demands of the rebel barons. On 9 May, John issued a new charter to Londoners, from the Temple Church in London where he held court, empowering them to elect their own Lord Mayors. London opened its gates to the barons on 17 May. The throne was at stake. The rebel barons had invited the heir to the kingdom of France (later King Louis VIII), to become the King of England, and a large French army reached London. At Runnymede, John was virtually powerless. Magna Carta 1215 was a negotiated peace settlement; its terms reduced to writing. The King was made subject to the law as declared in the Charter, with the novel feature of an enforcement provision.

In many ways, the 1215 Charter was doomed to oblivion. King John had no intention of abiding by it, and quickly renounced it. Pope Innocent III, annulling the Charter, declared that the rebel barons had been inspired by Satan. The civil war resumed; the French invasion continued. Defeat for the King and the end of Plantagenet dynasty were imminent. But fortuitously, King John died. His heir was a boy aged nine. The loyal barons, led by William Marshal, arranged for his coronation: not at Westminster Abbey, since London was occupied by the French, but at Gloucester.

[3] This section of the paper draws on Lord Judge, "Magna Carta" in R. Griffith-Jones-M. Hill (eds.) "Magna Carta, Religion and the Rule of Law", Cambridge, 2015, p. 19-30.

Marshal, as regent, and the loyal barons, pledged their fealty to Henry III, the boy King. One of Marshal's first acts was to reissue Magna Carta. The next year, having triumphed in battle at Lincoln, leading his men at the great age of seventy, he reissued the charter once. He died in 1219. When the young King reached his majority, the fourth version of Magna Carta was promulgated in 1225, this time in his own name.

Magna Carta had been a pragmatic document, averting civil way and securing a short-lived peace. It contained an assortment of clauses some of high-vaulting principle, others of mundane triviality. It did not immediately find its way into public consciousness. Indeed its significance did not occur to the great English playwright, William Shakespeare in creating his play *King John*. John Wilders, in a modern preface to the play, argues that:

'Historians like Trevelyan, enjoying the privilege of living in a democracy, fix on the granting of Magna Carta as the most significant occurrence of John's reign because it helps them to account for the political circumstances in which they themselves are living, since a major function of history is to explain how we have come to be as we are. Shakespeare and his predecessors, however, did not see John's reign in this light at all. Magna Carta was of such slight interest to Shakespeare that he chose not even to mention it …'[4]

It was the serious abuses of Magna Carta and freedom of religion during Shakespeare's time which led eventually to a revival of interest in Magna Carta. This owed much to the distinguished jurists, Edward Coke and William Blackstone. However, even after the 1689 Bill of Rights, the 500th anniversary of Magna Carta was marked by the Riot Act 1715. And in 1915, the First World War meant that planned celebrations, such as a 700th anniversary conference, were abandoned while people concentrated on their lived reality in fighting for the freedoms comprised in the spirit of the Charter.[5] These common law freedoms took root in the foundation documents of the United States of America, but they relied more on the abiding myth of Magna Carta than on its historical accuracy and actual content.

[4] J. Wilders, "New Prefaces to Shakespeare", Oxford, 1988, p. 72.
[5] H.E. Malden (ed.), "Magna Carta Commemoration Essays", London, 1917, available at <https://archive.org/stream/magnacartacommem00malduoft/magnacartacommem00malduoft_djvu.txt>. For church reaction to the 700th anniversary in 1915, see http://archive.thetablet.co.uk/article/26th-june-1915/5/the-church-and-magna-carta (both accessed 16 July 2014).

II. EUROPEAN PERSPECTIVES

A comparison between Magna Carta and the laws of medieval European nations reveals that these laws were being widely formulated and put into written form during the twelfth and thirteenth centuries.[6] Their provisions are worth examining alongside those of Magna Carta in a search for both common and discordant elements. Jurists counted the *ius gentium*, (a Latin phrase commonly used to describe the law of nations) as one of the basic sources of law on which all legal regimes were based. Reading Magna Carta from a European perspective provides an understanding of the Charter in the context of assumptions about law that prevailed in the time, expressed in other statements of law compiled on the Continent.

Magna Carta was 'far from unique, either in content or in form'.[7] Its adoption in England ran parallel to similar, though by no means identical, compilations of fundamental laws in several nations across the English Channel. What rendered Magna Carta special was its later history – that is, the uses to which it was subsequently put.[8] In its own time, Magna Carta did not stand alone. Looking more closely at some of the details of Continental parallels proves enlightening. In most such enactments, one finds a concern for implementing the demands of justice mixed in with detailed, even trivial, concerns of the moment. Some of the latter were quite local in their coverage and had little to do with the rule of law. In other words, the majority of them combined a concern for high principle with attention to matters of no apparent or permanent importance. What they meant to accomplish, therefore, was quite similar to what the English Charter itself did.

Like Magna Carta, some of the European statements of law were issued in the name of the king or other ruler. The circumstances surrounding their issuance and the motivation behind them varied. Sometimes they were forced on the ruler (as happened in England with John but not the later iteration in 1225 under Henry III). Sometimes they seem to have been the product of royal initiative, expressing the ruler's duty to secure the administration of justice for his people and putting the consequences of that duty into

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[6] This section of the paper draws on R. Helmholz, "Magna Carta *and the Law of Nations"*, in R. Griffith-Jones- M. Hill, *supra*, note 3, p. 70-80.
[7] J. Holt, "Magna Carta", second edition, Cambridge, 1992, pp. 25, 267–296.
[8] See J. Baker, "Oxford History of the Laws of England, Volume VI, 1483–1558", Oxford, 2003, pp. 87–88.

concrete form. The example of the Emperor Justinian was not forgotten: the ruler's law contained provisions to govern the conduct of officials, guarantee that justice would be available in his courts, secure societal peace in the kingdom and operate as a partial brake on the exercise of governmental power.

Examples probably illustrate the European pattern better than generalisations. A famous one is the *Liber Augustalis*, containing the constitutions of Melfi issued in 1231 by the Emperor Frederick II for the kingdom of Sicily.[9] It contained titles for protection of the church's interests, guarantees of trial by peers, promises of learned and upright judges, provisions to guarantee honest weights and measures,[10] and more along the same line – all roughly, though never exactly, similar to the provisions of Magna Carta. However, it also contained things absent from the Charter's coverage – for instance a permission for criminal defendants to be represented by lawyers, an advance in civil rights not reached in England for many centuries. It also treated matters not touched at all by Magna Carta. For example, the *Liber Augustalis* punished the preparers of love potions.[11] Perhaps this was a local problem in Sicily, one that had not reached English shores. But similar particularity was present in the English Charter: chapter 50 called for the dismissal from office of a single family, the relations of Gerard d'Athée.[12] Both the *Liber Augustalis* and Magna Carta were made up of an assortment of provisions. Some were idiosyncratic, local problems at best. Some were fundamental, necessary rules connected directly with the law of all nations. Both documents contained principles of law regarded as essential in any just legal system, and both also dealt with some quite idiosyncratic problems of importance only where they were issued.

This pattern was neither unexpected nor new in 1215. The statutes of many Italian cities and provinces – roughly similar in substance to what is found in the *Liber Augustalis* though less impressive in breadth of coverage and in some cases uncertain even today as to date of their final redaction -- went back to the twelfth century.[13] The laws of the Diet of Roncaglia, for instance, were promulgated in 1158. Among others

[9] See A. Cervonius (ed.), "Constitutiones regni Siciliarum libri III", Naples, 1773.
[10] J. M. Powell, "Liber Augustalis", I, 1–3; I, 47; I, 73; III, 51.
[11] J. M. Powell, *supra*, note 11, III, 70.
[12] For fuller explanation, see W. McKechnie, "Magna Carta: a commentary on the Great Charter of King John", Glasgow, 1914, pp. 444–447.
[13] See M. Ascheri, "The Laws of Late Medieval Italy (1000–1500)", Leiden-Boston (MA, 2013, pp. 140–164.

that have survived are enactments from Pisa (1162), Genoa (1143) and Verona (1205).[14] Spanish rulers also took part in the movement towards the statement of fundamental rights of the subject. The so-called *Fuero de León*, begun in the eleventh century and added to in the twelfth, promised in 1188 that King Alfonso would take counsel with his barons before taking military or similar serious action, would respect the property rights of his subject, would provide impartial justice and would also respect the rights of the church.[15] Promises like these were not an English invention. Statements of the liberties of the king's subjects were also not new.[16] In 1215, they were a pan-European phenomenon.

Collections of customary laws compiled during this period also shared some of these same general characteristics that linked the *Liber Augustalis* to England's Magna Carta. A German example is the *Sachsenspiegel* gathered together and edited by Eike von Repgow between 1225 and 1235.[17] It was a compilation of customary laws put together by an individual jurist rather than a royal grant, but like Magna Carta, it contained some of the same basic ideas about law and justice. It thus took careful note of the respect due to church and clergy, the need to secure property rights, the limitation of fines and penalties to reasonable levels, the protection of widows, the promise of impartial justice, and the privileges of the baronial class. The wording of these provisions was not identical to what is found in Magna Carta, and the attention paid by the *Sachsenspiegel* to questions of legal detail was greater. The procedure used in the courts of Saxony was, for instance, more elaborately described in it than its counterpart was in Magna Carta. A parallel with the juridical assumptions upon which the procedural rules of the two legal systems depended would nonetheless have been apparent at the time.

A second and similar example is the *Usatges of Barcelona*, a twelfth century collection of the basic laws of Catalonia.[18] Like the English Charter, it contained provisions for advancing the interests of the church, for the protection of merchants and shipping, for upholding the jurisdiction of feudal lords over their vassals, for establishing freedom of navigation, and for the maintenance of justice on the part of the prince. Its

[14] A. Wolf, "Gesetzgebung in Europa 1100–1500", Munich, 1996, pp. 69–96.
[15] T. Muñoz y Romero (ed.), "Colección de fueros municipales y cartas pueblas de las [sic] reinos de Castilla, Leon, Corona de Aragon y Navarra", Madrid, 1847, pp. 102–106 at 103.
[16] R. Giesey, "If Not, Not: the oath of the Aragonese and the legendary laws of Sobarbe", Princeton (NJ), 1968.
[17] "Sachsenspiegel: Die Wolfenbütteler Bilderhandschrift Cod. Guelf", 3.1 Aug. 2., edited and translated by R. Schmidt-Wiegand, Berlin, 1993.
[18] J. Bastardas I Parera (ed.), "Usatges de Barcelona: el codi a mijan segle XII", Barcelona, 1984.

textual history remains somewhat tangled, but its substantive parallels with the substance of important features of Magna Carta are clear enough. No indications to suggest any 'copying' exist, but both drew from the same deep wells of thought.

Other examples of such works from the thirteenth century are well known today and were famous already in their own era. They include Philippe de Beaumanoir's *Customs of the Beauvaisis* in France, the *Siete Partidas* in Castile, or the laws of King Magnus Ladulås in Sweden.[19] Although quite different in many ways from the *Liber Augustalis* and Magna Carta, they all shared with both a dependence on a basic core of ideas. They all fit within a general European pattern of law-making and law-stating. It should be no surprise that similarities existed, although many of the details differed from place to place.

According to the learning of the Schools and Universities of the day, all law could be put within one of three or four general classifications: natural law, the law of nations, civil or municipal law and (at least among the canonists) divine law. *Bracton*[20] defined the *ius gentium* as 'the law which men of all nations use', distinguishing it from the *ius naturale*. The latter was a law that men shared with animals, as had been stated by Ulpian in the Roman law's *Digest*. The former was common to all parts of the world, but only among men and women. *Bracton*'s definition of the third, the *ius civile*, was slightly more open-ended; the term could embrace more than one meaning. However, its principal sense included statute law and customary law in place within a particular region or kingdom. Like Roman law proper, it was meant to fit local circumstance.

For understanding how Magna Carta fit within this framework, an essential starting point is a recognition that the dividing lines between these three different types of law were not fixed. The three were built one upon the other. None was complete in itself. The civil law provided specificity and sanctions to make effective in practice principles that were drawn from the laws of nature and nations. In this system, the law of nations stated specific rules that were common to all civilised peoples and were themselves derived from the law of nature; the civil law stated the specific rules adopted in individual locations or by groups of peoples. It made concrete what was stated more generally in the other two. The specific rules of the civil law might differ from place to

19 A. Wolf, *supra*, note 14 p. 311.
20 See G. Woodbine (ed.) and S. Thorne (trans.), "Bracton on the Laws and Customs of England", Cambridge (MA), 1968, fos. 3a–4b.

place according to local exigencies, but it was assumed that they would be broadly consistent with the principles found in the first two.

Thus, to take only one example, the law of nature held that parents should care for their children. Even brute animals followed this rule by instinct. The *ius gentium* added to that broad statement, establishing for instance that fathers should provide enough support so that their children could survive establish their own families or other place in the world. The civil law of individual nations or regions might add that the obligation extended to providing a dowry for unmarried daughters. The three worked together. When they did not, as sometimes happened, judges had to decide which predominated. Usually, they sought a way to do justice under the circumstances, at least if the positive law left them any room for manoeuvre. The normal assumption, however, was that the three stood in harmony.

This assumption about the nature and sources of law that underlay all government in the eleventh century, proves useful in understanding Magna Carta itself. It offers an answer to a puzzling question of the seemingly strange mixture of large principle with minute details of legal practice. A provision requiring removal of fish weirs from the Thames River and the Medway sat next to guarantees of impartial justice in the royal courts.[21] A chapter regulating interest to be paid on a loan made by a Jewish creditor to a Christian debtor if either died before full repayment had been made was found near to one requiring consent of the common counsel of the realm for new forms of taxation.[22] They do seem to be strange bedfellows – some seemingly of no great importance, some fundamental for proper governance of the realm.

They were different, but they were not discordant. Both were the natural consequence of the jurisprudential assumptions stated above. Magna Carta, which was meant to form part of the *ius civile* in England, was undergirded by the law of nature and consistent also with the law of nations. It stated rules of positive law that gave effect to larger principles of justice contained in more general sources of law. Removal of the fish weirs, for example, was a concrete means of securing a freedom found both in the law of nature and the *ius gentium*: freedom of navigation. In earlier centuries, it was based upon a principle of natural law. It was also widely recognised among European nations.

[21] Compare ch. 33 with ch. 39.
[22] Compare ch. 10 with ch. 14.

However, in order to be made effective, it required specificity. That is what the Charter's chapter 33 supplied. Within a European context, its inclusion in a statement of liberties would not have seemed out of place. It would have been a normal part of the process of stating positive law, and lawyers would have seen through the detail of chapter 14 to the principle that underlay it. The chapter was, therefore, positive law. But it was also founded upon the law of nations.

Several of the other provisions of Magna Carta – though certainly not all – fell within the same broad pattern. Rooted in broad legal principles, the provisions of the Charter put them into specific terms in order to fit contemporary conditions in England. They embodied assumptions of the Schools, assumptions that had passed into common acceptance in learned society. They only required specificity to be made effective parts of the law. Magna Carta gave them that specificity. This was the way the European jurisprudential system was supposed to function.[23]

The place of religion and the hand of the church are visible in provisions like these. The leading negotiator, Stephen Langton had studied and taught at the University of Paris before proceeding to the Roman curia and thence to the troubled position of Archbishop of Canterbury. It was no accident that the Charter's first chapter, unlike the previous 'Articles of the Barons', proclaimed the King's desire to respect the freedom of the English church. Nor, one should think, was it an accident that several of the Charter's subsequent provisions established and fortified special privileges of church and clergy.[24] They were the result of an insistence that the canon law be 'formally recognised' and 'incorporated' within the English customs'.[25] The sentences of excommunication that church would later visit upon violators of the Charter would seal that recognition. The bishops had a body of learning readily available for occasions when such fundamental legal questions arose.[26] What the bishops contributed also seems in line with jurisprudential ideas prevalent in the Schools and shared across Europe.

There are at least three ways in which a contemporary European vantage point helps in understanding Magna Carta's character and its importance in the history of

[23] See generally G. Post, "Studies in Medieval Legal Thought", Princeton (NJ), 1964, pp. 163–238.
[24] Chs. 14, 22, 27, 55, 60, 61.
[25] F. Powicke, "Stephen Langton", London, 1965, p. 106.
[26] See R. Helmholz, "Magna Carta *and the* ius commune", in *University of Chicago Law Review* 66, 1999, pp. 297–371.

human government. One is to make us more alert to the place of religious ideas in the Charter – not necessarily religious ideas in a strictly spiritual sense, but religious in the sense of promoting the interests of the medieval Church. A second advantage is in understanding how medieval lawyers regarded legal texts. They saw within them a 'mind' containing basic principles. That 'mind' was a means of expanding the reach of specific enactments, and some of the uses to which Magna Carta was later put become less surprising and more interesting in this light. The third relates to European integration: the *ius gentium* united the various parts of medieval Europe. Diversity of outcome on specific topics – something that is evident throughout the provisions of Magna Carta – was itself part of the European tradition.

Magna Carta shared many of the substantive propositions and legal provisions characteristic of European law in its time. It drew from a common stock of ideas that were widely accepted throughout Europe. Although there is little doubt that many of the Charter's clauses had antecedents in English practice, it is something else again to conclude that it must therefore have been the product of an island legal culture cut off from contact with developments on the other side of the English Channel.

III. THE RELIGIOUS ELEMENT

The King sealed the Charter of 1215 *'from reverence for God and for the salvation of our soul and those of all our ancestors and heirs, for the honour of God and the exaltation of Holy Church and the reform of our realm'*. His advisors included two archbishops and seven bishops. Archbishop Stephen Langton was resolute in the promotion of the Church's interests. This guarantee for the Church was made to God, and so was inviolable. It was made freely and by a promise made prior to the dispute between John and the barons, and so was conscionable. It was commended to the king's heirs, and so was designed to be irrevocable.

What exactly were the character and extent of such freedom or freedoms remains open to question: they probably comprised: episcopal elections free from royal interference (realised more or less effectively as the king was less or more strong); special privileges for the clergy; and the consignment of some areas of life to the judgment of the Church.

Life in the thirteenth century was fundamentally informed by Christian convictions, hopes and fears. Principles of polity, justice and due process had for centuries been drawn from scripture and reiterated by churchmen with all the political and supra-mundane authority at their command. The barons who confronted King John in the Temple in January 1215 declared, if Walter of Coventry is to be trusted, that they were putting themselves in opposition to him 'as a wall for the house of the Lord' and were standing for the liberty of the church and the realm.[27] Robert fitz Walter, a leader of the baronial opposition to John, was by May 1215 styling himself Marshal of the Army of God and Holy Church.

The law today does not acknowledge any doctrinal text from any religion to be the basis of a modern polity promoting civil harmony, cohesion and good-will. We value and invoke the enduring principles of Magna Carta – no taxation without representation, due process, fair trial, and effective restraint upon the executive – without reference to divine law. Historians may point to the influence of Judaeo-Christian teaching (asserting equality and dignity before God) on modern human rights principles (asserting equality and dignity before the law); but that provenance carries no weight in law. The custodians of ancient traditions and principles that have for centuries undergirded our polity do not now earn respect or attention through that wardship alone. The conservatism natural to religious institutions and their functioning can more readily win the derision or anger of an age that readily sees in such institutions a recalcitrant, unregulated home of prejudice and malpractice.

The Charter is both a convoluted, practical document of a distant, specifically Christian, past and an icon of the benefits inherited from that past by all citizens in the multinational, multicultural, inter-religious and often secular common law world today. In the modern 'Post-Christian' age, Magna Carta challenges today's faith communities to examine the valuable part which they are still called to play in the fulfilment of a liberal democracy, the influence which the principles enunciated in Magna Carta continue to exercise on the State's approach to religion, and the active participation to which religions are still called in civil society. As society, religion and law have changed, so has the use of the Charter: and as they continue to change; so will the deployment of the Charter's principles.

[27] Walter of Coventry, "Memoriale fratris Walteri de Coventria II" , W Stubbs (ed.), London: Rolls Series 1872-3, p. 2018.

IV. TODAY'S CONCERNS

Three great principles which continue to animate today's common law date back to the original Magna Carta of 1215.[28]

Individual rights

This stems from chapters 39 and 40 of the original Charter, combined as chapter 29 in the 1216 and all later versions. The 1297 Charter wording which still appears on the British statute book today:

> *'No free man shall be taken or imprisoned, or be disseised of his freehold or liberties or free customs, or be outlawed or exiled or in any other wise destroyed; nor will we not pass upon him, nor condemn him,6 but by the 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 right or justice.'*

These words embody the individual's right to life, liberty and property which are not to be arbitrarily infringed by the rulers, but only in accordance with the law.

As well as Magna Carta's octocentenary, this year also marks the 250th anniversary of the great case of *Entick v Carrington.*[29] It was concerned with the delicate balance between the needs of effective government and the freedom of individuals to oppose such government. Oliver Cromwell had little doubt about which should prevail, allegedly saying that "your magna farta cannot control actions taken for the safety of the Commonwealth". Entick had been arrested and his home ransacked but, wisely his claim was not for false imprisonment, but for trespass to land and goods. The jury returned a special verdict, setting out the facts and asking whether the search and seizure in pursuance of the warrant were lawful; if not, they awarded £300 in damages. The court found for the plaintiff. It accepted that there were binding precedents recognising the power of the Secretary of State to issue warrants of arrest and committal, not only for high treason, but also for seditious libel. But it refused to go further and allow for searches and seizures. The appeal was to history, to the common law. The real gravamen was the interference with privacy. This became a clear foretaste, not only of article 4 of

[28] This section of the paper draws on a lecture by Baroness Hale of Richmond, Deputy President of the United Kingdom Supreme Court, delivered in Gray's Inn, London, on 19 October 2015, available on the Court's website.
[29] (1765) 2 Wilson KB 275.

the American Bill of Rights, but also of the 'right to respect for his private and family life, his home and his correspondence', now protected by article 8 of the European Convention on Human Rights.

If Parliament wanted to permit the seizure of seditious libels before they were published, it would have to legislate to do so. Furthermore, if Parliament wanted to authorise state officials to commit torts, it would have to do so in clear terms. This is a clear forerunner of what we now call the principle of legality – that if Parliament wishes to legislate to interfere with fundamental rights, it must make itself absolutely clear, so that Parliamentarians understand what they are voting for and are prepared to take the political risk in doing so.

An early case heard in the Supreme Court of the United Kingdom, *Ahmed v Her Majesty's Treasury*,[30] concerned whether the power in the United Nations Act 1946, to make Orders in Council to comply with obligations under the United Nations Charter, entitled the government to over-ride fundamental rights and thus make provision for freezing the assets of suspected terrorists without due process of law. Governmental power must not only be exercised in accordance with the law, but that the object of the law is to avoid the arbitrary and capricious use of power, and that there must be proper judicial safeguards for that purpose. All of these principles are with us to this day. They are enshrined in the European Convention on Human Rights and explain why so many of its guarantees are as much concerned with process as they are with outcomes. These principles are also present in the common law.

Consent of the governed

The second pervasive principle is to be found in the archaic language of what became chapter 12 of the Great Chapter:

> *'No scutage or aid is to be imposed in Our Kingdom except by the Common Counsel of Our Kingdom unless for the ransoming of Our person and knighting of Our first-born son and for marrying once Our first-born daughter and for these only a reasonable aid is to be taken.'*

The King promised not to violate the rights of free men except by the lawful judgment of their peers or the law of the land. But what was the law of the land? In the

[30] [2010] UKSC 2.

medieval times, it could only have been ancient custom and practice, which developed into the common law, and perhaps the decrees of the King. Glanvill, writing in about 1190, before Magna Carta, included the statement that 'what please the Prince has force of law'; but Bracton, writing in about 1230, left this out, saying that 'whatever has been rightly decided and approved with counsel and consent of the magnates and general agreement of the community, with the authority of the king or prince first added hereto, has the force of law'. As he explained, 'the King ought not to be subject to man, but subject to God and the Law'.

In the original Magna Carta, the King had also promised not to levy taxes without consent, save in a very limited number of customary circumstances: no taxation without representation. Another anniversary which falls in 2015 is the 750th anniversary of Simon de Montfort's second Parliament in 1265, evidencing the first faltering steps towards a real democracy. Many Kings would have done without Parliament if they could. But the reality was that they needed Parliament's consent if they were to be able to raise the taxes they needed to wage their wars. By the mid 15th century, Sir John Fortescue, Chief Justice of the King's Bench, in his treatise *In Praise of the Laws of England,* was able to conclude that 'The King of England cannot alter nor change the laws of his realm at his pleasure. . . . he can neither change Lawes without the consent of his subjects, nor yet charge them with strange impositions against their wils'.

Just as it takes clear words to empower the executive to interfere with fundamental rights, it takes clear words to empower the executive to raise revenue. Levying taxes and authorising the government to spend the proceeds is the one area of control of the economy over which Parliament does have some oversight. It may be in today's world that Parliamentary control of taxation and expenditure is not wholly effective, but at least the principle first established in Magna Carta is still maintained.

In most other countries in the world, there is a superior law, a Constitution or a Bill or Charter of Rights, which limits the powers of the legislature to pass laws which infringe such fundamental rights. In Britain, there is a recognition that not all Acts of Parliament are equal. Some of them may have a special constitutional status, which means that they cannot be impliedly repealed or amended by a later Act of Parliament. Once again, clear words would be needed to bring about such a constitutional change.

Thus, in the 'Metric Martyrs' case,[31] section 1 of the Weights and Measures Act 1985, an ordinary Act of Parliament, which permitted the continued use of imperial weights and measures, could not be taken to have impliedly repealed section 2(2) of the European Communities Act 1972, which recognised the supremacy of community law by empowering the use of subordinate legislation to comply with a European Directive requiring the primary use of metric measures. Among the 'constitutional' statutes listed was Magna Carta.

The sovereignty of Parliament places a heavy burden on Parliament to legislate with great care when fundamental rights are at stake. Dominic Grieve, a former Attorney-General, has referred to

'an entirely distinctive national narrative, embodying the Common Law; its confirmation through Magna Carta and its numerous reissues in the Middle Ages, the outcome of the conflict of authority between King and Parliament in the 17th century, in the Petition of Right, the abolition of the Star Chamber and the prohibition of torture; habeas corpus and the Bill of Rights of 1689, Lord Mansfield's ruling on slavery in Somerset's case and the Commentaries of William Blackstone.'[32]

He suggests that this national narrative has been so powerful that it has acted as an almost mythic restraint on successive British governments preventing them from curbing freedoms when tempted to do so by threats to public order or national security.

The Rule of Law

The third principle permeating the whole Charter, is that the King and his officials are as much subject to the laws of the land as are his subjects. The rule of law is not one-way traffic: not only do the governed have to obey the law, but so do the governors. This was reinforced by chapter 42 (omitted from the later reissues):

> *'We will not appoint Justices Constables Sheriffs or Bailiffs except from such as know the law of the Kingdom and are willing to keep it well.'*

The closing words of chapter 29 also embody the individual's right to access to justice, before an incorruptible decision-maker who will judge according to law and not

31 *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin).
32 D Grieve, "Why Human Rights Should Matter to Conservatives", *lecture at University College*, London on 3 December 2014.

by the size of the bribe, which is the first requirement of any 'impartial tribunal'. Further, by chapter 60 of the original Charter, the promises made by the King to the barons were to be cascaded down through the feudal ranks.

The rule of law means that everyone is subject to it, the governors as well as the governed. The King had to act within the limits of what the law allowed. Today, the government and all other public bodies have to act within those limits of what the law allows. It is the task of the higher courts to ensure that they do. This means that the court is acting as the servant of Parliament. Most public bodies, being creatures of statute, derive their powers from Acts of Parliament or subordinate legislation. The role of the court is, not to exercise those powers for them, but to ensure that they are exercised in accordance with the law, not outside the limits of what their powers allow, in a fair and proper manner and not without reason. Since Magna Carta there have been limits on the exercise of the royal prerogative and it is now the role of the higher courts to ensure that government stays within those limits.

Magna Carta was not intended as a constitutional instrument declaring and embedding fundamental freedoms. It was a pragmatic short-lived peace treaty designed to avert a civil war. But it has come to represent an articulation of basic rights enjoyed by all citizens under the rule of law. No amount of historical illiteracy can detract that the spirit of the charter has informed and animated the development of the common law in the eight centuries since the deal was brokered at Runnymede. Upholding the rule law, preventing abuses of government power, and promoting the rights of all citizens is both the myth and the message of Magna Carta in the world today.