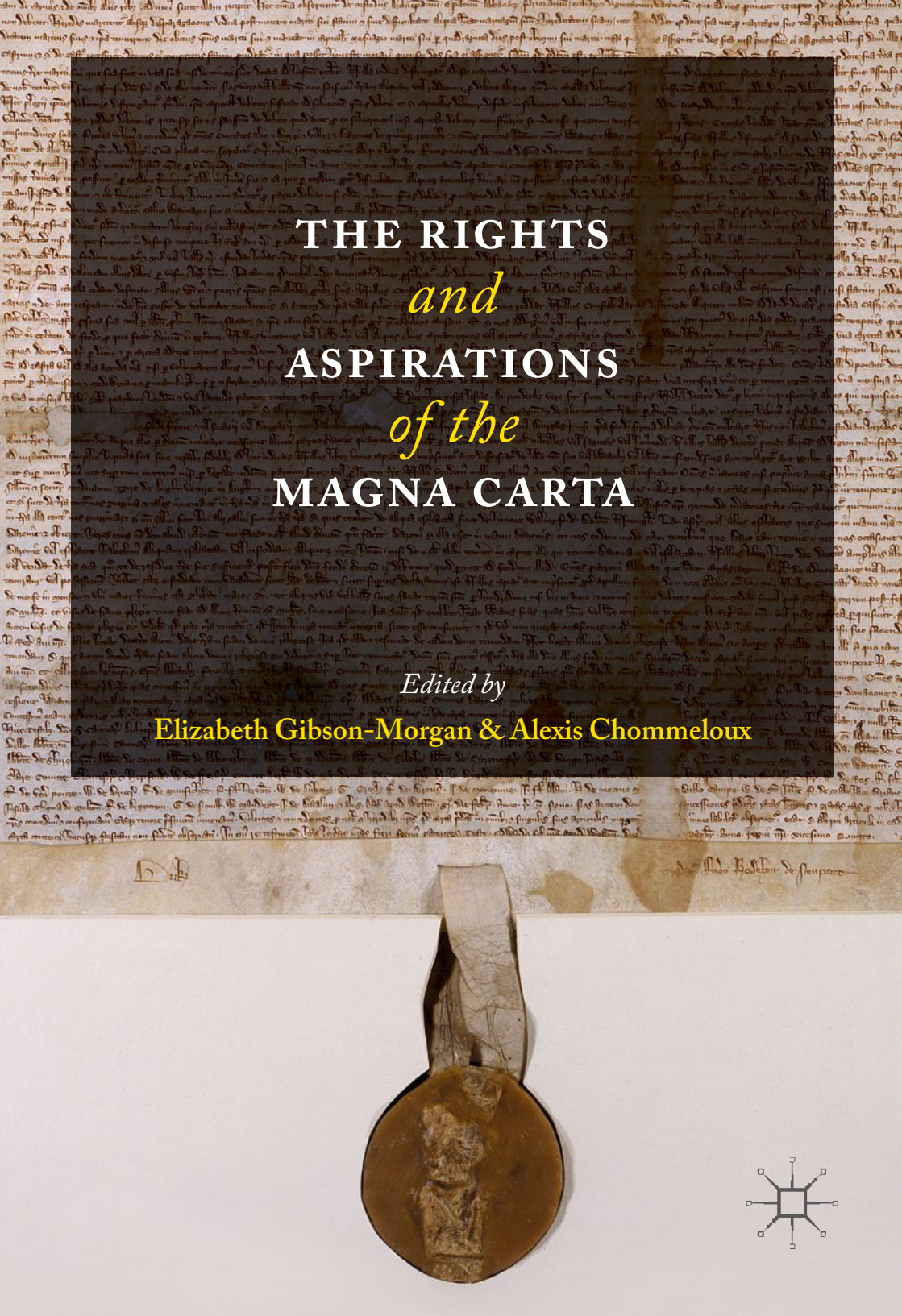
THE RIGHTS *and* ASPIRATIONS *of the* MAGNA CARTA

Edited by

Elizabeth Gibson-Morgan & Alexis Chommeloux



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Introduction

Lord Bingham: 'Aspiration without action is sterile. It is deeds that matter.' [*The Rule of Law*, 2010]

Magna Carta (1215) is a Franco-English document, a joint heritage, a common bond not only between long established democracies such as France and the United Kingdom, but also between countries which only recently experienced the rule of law and Human Rights. The Great Charter of Liberties imposed by Barons of Norman origin on King John, the son of Eleanor of Aquitaine and Henry II, King of England, decreed for the first time that nobody, not even the King, was above the law. It clearly established that access to justice had to be free, that judges needed to be qualified, and imposed the necessary consent to taxation which was later to be the rallying cry of American and French revolutionaries. It paved the way for the rule of law in the United Kingdom, *l'Etat de Droit* in France, due process in the United States, and significantly influenced their constitutional arrangements and legal cultures. Whether myth or reality, it served as a source of inspiration for American and French revolutionaries in the eighteenth century who built on it to give their own countries their founding documents: in France, the Mirabeau Declaration of the Rights of Man and the Citizen of 1789, a set of universal rights and values still part of the French Constitution and, in the United States of America, the Bill of Rights of 1791 where the influence of the English Magna Carta of 1215 is even more obvious.

In this volume, readers will be invited on a historic and constitutional journey that will take them from the troubled circumstances of the making of Magna Carta—a time of political crisis—to the contemporary constitution-making process as Magna Carta is part of a long tradition of written law and codification. In the words of the medieval historian Elizabeth Gemmill whose opening chapter will guide twenty-first century readers through the often complex, sometimes obscure, wording of the feudal charter, 'Magna Carta gave the impetus to the notion of the importance of the written word'.

In Elizabeth Gemmill's chapter as well as in the second chapter by the modern historian Kenneth O. Morgan, the historical and political circumstances of Magna Carta will be examined through the eyes of well-established historians. They will decipher the text, providing a close analysis of the feudal charter itself starting with the preamble without which it would be almost impossible to understand the full meaning of the charter and its political as well as religious dimensions. They will unveil the 'underlying truth', relying on historic facts to revisit the myths around Magna Carta. In the following chapters, practising lawyers and law academics will, for their part, use legal analysis and arguments to do so. A too often neglected aspect of the text—its religious dimension and spiritual purpose will also be explained by Elizabeth Gemmill as Magna Carta, so it was believed, 'was granted by divine inspiration' and further strengthened the liberty of the church as well as the free elections of heads of religious houses.

Far from simply extolling the virtues associated with Magna Carta (1215), the book will explore the gaps of the Great Charter, discussing the limits and myths that it conveyed in a critical, scientific way based on the learned contribution of eight scholars. They will expose not only the gaps of the original documents—regarding women, Jews and workers—but also show the manipulations and distortions of the original text—and meaning—not only by politicians but also, more surprisingly, by some lawyers and judges to serve their own purposes. The lawyer, Matthias Kelly, insists in his own chapter on the importance of lawyers' integrity both in their conduct and in their interpretation of Magna Carta. While today Magna Carta is considered as a fully written source of law and an effective legal instrument by lawyers and law-makers, many governments, including those of major democracies like the British and the American, too often ignore the rule of law. Credence Sol—a former practising American attorney—unequivocally speaks of the 'non-observance' of its key values

and principles, most notably that of the accountability of those who govern to the people. As Elizabeth Gemmill recalls in Chap. 1, ironically in the early thirteenth century—from August 1214—those who did observe Magna Carta were the ones who faced excommunication. While Matthias Kelly, in Chap. 7, refers to the 'uncontrolled executive', Credence Sol, in Chap. 4, alludes for her part to the 'non-accountability' of the American Federal government. The latter tends to turn a blind eye on the rule of law, sometimes with the help of judges themselves through their flexible interpretation of the doctrine of sovereign immunity—which they hold as a constitutional instrument even though it is not part of the American Federal Constitution—to the detriment of citizens themselves. Thus both Matthias Kelly and Credence Sol explain that there is a form of connivance on the part of the Judiciary in Britain and America even if 'Magna Carta states that the Law is King'. As for Alison Harvey she examines in Chap. 6 whether articles 29 and 30 of the Charter have made a significant impact on the treatment of both citizens and non-nationals in the United Kingdom. She covers highly sensitive issues from the acquisition and deprivation of citizenship to the restrictive measures and multiple controls imposed on non-nationals by the government. She worries about an all-powerful executive diverging from Magna Carta and the rule of law, especially in its handling of refugees, migrants and exiles. Therefore, together with Geraldine Gadbin-George, a former French judge, in Chap. 3, they all explore the contemporary legal impact of Magna Carta.

Kenneth O. Morgan—in Chap. 2—and Andrew Blick—in Chap. 5—for their part largely focus on Magna Carta and Parliament. The former shows how the Great Charter originally paved the way for parliamentary reform before explaining the way it is now used by Parliament and how parliamentarians themselves can act as the custodians of Magna Carta's key principles and values. As for Professor Blick, he places particular emphasis on the special role that parliamentary committees—especially those of the House of Commons—play in holding the government to account along the lines of Magna Carta. All conclude that if Magna Carta is still very much alive today, lawyers and parliamentarians have a special responsibility to protect it.

While a significant number of books were published on Magna Carta as part of the celebrations of its eight hundredth anniversary, the current book proposes an original multi-disciplinary and comparative approach. Instead of dealing separately with the lawyers' view of Magna Carta and the historians' interpretation as two contrasting perspectives on this major

document, it is based on the analysis of eight British, French, Danish and American scholars juxtaposing their informed opinions in a constructive way, providing readers with a thorough historic and legal analysis of the Charter and its meaning in the twenty-first century. But, far from being a highly technical debate between experts, this volume aims at being accessible to the general public in order to offer readers a better understanding of Magna Carta and its meaning today for the citizens of our modern democracies.

The lawyers gathered in this book examine Magna Carta as a founding fully written document upon which both codified and uncodified constitutions, like that of Britain, are based. They focus on Magna Carta as a written source of the English—and American—Common Law, as a living legal instrument and as a crucial part of the American contemporary jurisprudence. All eight contributors—whether lawyers or historians—fully acknowledge Magna Carta as a key constitutional instrument and as the underpinning of the rule of law and the liberty of citizens.

As mentioned above, the eight-hundredth anniversary of Magna Carta in 2015 was widely celebrated and commemorated in the United Kingdom—and perhaps even more so in the United States—throughout the year. But it is essential to look ahead and make sure the Great Charter of Liberties does not fall into oblivion now that the celebrations are over. The original charter within just a few months was declared null and void by the powerful, authoritarian Pope, Innocent III. Yet although only three of its key provisions remain on the statute book, as Geraldine Gadbin-George explains in her important chapter, it is still alive. The (English) Magna Carta served as a source of inspiration to the American founding fathers of the Constitution and it was very much at the origin of the American Bill of Rights of 1791. In Chap. 8, Peter Gjørtler, for his part, examines the protection of fundamental rights provided by Magna Carta as a source of positive law in the United Kingdom and the Charter of Fundamental Rights of the European Union as an instrument of EU law in a comparative approach. He concentrates on their common rights and principles and shows the importance they both give to the right of free movement. The Human Rights Act that the Westminster Parliament passed in 1998, by incorporating the European Convention on Human Rights and Fundamental Liberties—inspired by Magna Carta—into the English Common Law, provided the United Kingdom for the first time with a single fully written text protecting key rights and liberties. This Act, sometimes referred to as a Charter of Rights and Liberties, is now

being seriously challenged by the Conservative government which in the Queen's Speech of 2016 reiterated its proposals to bring forward a British Bill of Rights to replace it. The entire issue is swayed by the ongoing European debate.Thus it is back on the political agenda of the British government even though there is neither certainty nor clarity on what the revised measure should contain.

The original Magna Carta fell into oblivion under the Tudors before being given a new lease of life as well as a new legal centrality by eminent lawyers like Coke and Blackstone in the seventeenth and eighteenth centuries with the 1689 (English) Bill of Rights establishing the limitations of the powers of the King by Parliament. It might happen again. The best way to secure its future in the United Kingdom as well as the democratic values and principles it embodies—as Andrew Blick explains in his chapter—would be to incorporate it into a fully codified constitution for the United Kingdom. It could very well form part of the preamble of the 'new' British Constitution. As Europe is no longer a source of inspiration and aspiration for many, Magna Carta could provide that special common bond between European citizens. It could unite them around common key values and principles as all European democracies have built up their Human Rights on it. It could serve as a source of inspiration—and as an aspiration—for the young, providing them with something to cherish while ensuring that it is still a fully operating legal instrument.

At a time when civil liberties and fundamental rights are being eroded in our societies e.g. with drastic cuts in legal aid undermining access to justice for the most vulnerable, and with the rise of extremist and terrorist threats in France, Belgium, the United States and potentially in many other countries including the United Kingdom, *The Aspirations and Rights of the Magna Carta* is a call to arms, a way of reaffirming the fundamental rights and liberties that Europeans and Americans have in common and the importance of a living 'Europe of Justice' without which there can be no effective rule of law. Magna Carta could help keep the two Unions together—the United Kingdom and the European Union as a common source of fundamental rights and liberties themselves remaining a common aspiration and inspiration.

Elizabeth Gibson-Morgan and Alexis Chommeloux

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CHAPTER 1

King John, Magna Carta and the Thirteenth-Century English Church

Elizabeth Gemmill

The commemoration of the 800th anniversary of the sealing of Magna Carta at Runnymede on 15 June 2015 was attended by Her Majesty the Queen and other members of the royal family, the archbishop of Canterbury, the Prime Minister, the United States attorney general and a host of other guests and onlookers. Indeed the celebrations have reached far beyond academic circles and far beyond England. Historians of the thirteenth century enjoy unwonted celebrity status; scholarly books published in the anniversary year are pitched to appeal to wide audiences[1] and the websites of the Magna Carta Trust,[2] the British Library[3] and The National Archives[4] use a combination of texts, illustrations and video clips to bring this justly famous document and the circumstances of its making to global audiences. The anniversary has inspired creativity of many kinds—plays,[5] children's books, a television series,[6] even songs, all showing how the celebration of 'heritage' has become a social phenomenon. The commemorations have engaged with the myths surrounding Magna Carta; indeed, these, and the commemorative events themselves and the ways in which we communicate about them, have become a part of Magna Carta's history, creating as they do a record of how the Charter has been

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and is perceived to be relevant and precious today, in England, Europe and the wider world.

The grantor of this great charter, King John, lies in the choir of Worcester cathedral. His tomb and effigy suggest a king reconciled with his maker, prompting us to consider the nature of John's relations with the Church. Accordingly this chapter examines John's personal piety; the sacred nature of kingship as proclaimed in Magna Carta; the role of churchmen in counselling the king; and the issue of elections and the interdict. We examine the legacy of Magna Carta, in terms of elections and more generally in terms of ecclesiastical patronage—the king's own and those of the nobility.

Thirteenth-century chroniclers are at the root of John's personal reputation which, despite the efforts of historians focussing on administrative rather than narrative sources to cast him in a favourable light, has generally tended to be poor.[7] Perhaps most damning was the couplet by a 'certain reprobate poet' which the monk of St Albans, Matthew Paris, inserted in his chronicle to the effect that John befouled Hell itself. His own rather pious wish of course was that some good deed done during his life would speak on his behalf before the tribunal of Jesus Christ and he went on to speak of John's building of Beaulieu abbey and his dying gift of land to Croxton abbey.[8] John's foundation of the Cistercian house of Beaulieu in 1204 was, indeed, said to be an act of contrition for his persecution of the Cistercians.[9]

John was genuinely devoted to certain English saints, visiting the shrines of three (St Thomas, St Alban and St Edmund), straight after his coronation.[10] The contemporary description of his visit to Bury St Edmunds is specially telling because the engaging Jocelin of Brakelond is narrating a story about John's meanness, not about his piety. The monks were hoping for a generous gift but were disappointed for all he did was return a silk cloth (which his servants had borrowed anyway from the monks) and to make a modest cash present. Jocelin deplored the king's taking St Edmund's hospitality without offering much in return; but he let slip that John had come as a consequence of a vow and having a special devotion to St Edmund; and the 13 s which he did give were offered during the Mass on the last day of the visit.[11]

Finally, it seems to have been John's devotion to St Wulfstan which was the main reason why he was laid to rest inWorcester. He was the first of his dynasty to be buried in England (his parents, brother and later his wife were buried at Fontevrault), and the first king to be buried in an English cathedral since William Rufus, who was hastily interred at Winchester in 1100.[12] John, in his last days before his death at Crowland abbey, left a testament

indicating his wish to be buried at Worcester in the church of Blessed Mary and St Wulfstan, although his earlier intention had been that he be interred in a Cistercian house of his foundation.[13] John's interest in Wulfstan was not, however, purely personal; he enlisted (somewhat obliquely) the story of how Wulfstan had refused to give up his bishopric of Worcester to William the Conqueror and had instead fixed it in the tomb of Edward the Confessor who had given it to him. Only St Wulfstan could remove it.[14]

There is a contradiction at the heart of Magna Carta. It was a royal charter—an affirmation of the king's right to make grants that no other person or institution could. There were sections of the Charter that affirmed royal authority or even (especially in the reissues) took it to new levels .Indeed the thirteenth century was a period in which the Crown claimed as never before that there were certain rights which it was its special prerogative to give. Yet, at the same time, Magna Carta was wrested from a king whose relationships with his barons had broken down so utterly that he was forced to make concessions that struck at the core of his monarchical and lordly power. Magna Carta needed to codify law and custom because John had disregarded them. At a time when it was becoming increasingly desirable to be in possession of 'muniments'—written evidence of title—it was necessary to embody the whole community's liberties—or the limitations on royal power—in a written document. In fact the thirteenth century was a period in which a number of European rulers granted charters of liberties to their subjects. For example, the Statute of Pamiers was granted in 1212 by Simon de Montfort, leader of the crusade against the Albigensian heretics, to establish laws for the crusader state of Toulouse.[15]

The preamble to the Charter recognised the king's rule under God and addressed the influential in the kingdom, both ecclesiastical and secular, and the hierarchy of royal ministers[16]:

> John, by the grace of God, king of England, lord of Ireland, duke of Normandy and Aquitaine, count of Anjou, to his archbishops, bishops, abbots, earls, barons, justices, foresters, sheriffs, reeves, ministers, and all his bailiffs and faithful men, greeting.

The charter proceeded to explain the king's motives and intent:

> inspired by God and for the salvation of our soul, and for the souls of all our ancestors and heirs, for the honour of God and the exaltation of holy church, and the reform of our kingdom.

Thus the preamble affirmed the sacred nature of medieval kingship and associated the spiritual standing of the king with the political state of his realm. The idea was not of course new, but John's reign had experienced the harsh realities of the link in the period of the interdict which Pope Innocent III had imposed on England in 1208. The interdict—spiritual sanctions on a country or region, depriving its inhabitants of the benefits of the sacraments of the Church (with some few exceptions) had been imposed because of John's refusal to accept Stephen Langton as archbishop of Canterbury. Indeed, the political messages in the pope's letters, which form a uniquely valuable source for our understanding of the relationships between England and the papacy in this crucial period, use spiritual language throughout—that of the spiritual father correcting the transgressions of a wayward but much beloved son – in order to persuade him to return to the path of political obedience. The sphere of spiritual authority—the boundary to the pope's power over him—was, of course, precisely the issue. According to the Burton annals, John, when meeting with the papal legates at Northampton in 1211, told them:

> I admit that the lord pope is my spiritual father, and that he is in the place of Blessed Peter, and that I must obey him, that is, in spiritual matters; but in earthly things which belong to my crown, never.[17]

The very layout of Magna Carta symbolises the difficulties of drawing those boundaries: its first main clause granted the Church its liberties and thus appeared to treat the clergy separately from the rest. Between the clause granting liberty to the Church was another brief preamble introducing the liberties of all free men, as though these were another category entirely. Yet, bishops and abbots were great landowners under the Crown and owed military service to the king. Clauses in Magna Carta affecting landowners affected them too. Clause 60 of the charter required all men, both clerks and laymen, to observe the liberties granted in Magna Carta towards their own men; and clause 62 pardoned all the 'ill will, indignation and rancour' between the king and his men, clerk and lay.[18] And the archbishops and bishops named in the preamble, and Master Pandulf, the pope's representative, were to issue letters testimonial guaranteeing the security clause and the concessions made in the charter.[19]

The preamble proceeded to explain on whose counsel the charter had been given. These included a number of named churchmen—the archbishop of Canterbury, Stephen Langton, Henry, archbishop of Dublin,

and the bishops of London, Winchester, Bath and Glastonbury, Lincoln, Worcester, Coventry and Rochester. There was the Master Pandulf, member of the papal household, symbolising the continued presence of papal support for John, and Aymeric, master of the Knights of the Temple in England and the king's banker. Their names were followed by those of earls, barons and other laymen. Some of these were the king's firm supporters and ministers, while others—most obviously Langton himself—were there as mediators seeking an end to the political disturbances.[20]

It is not surprising to see the bishops included in the list of the king's counsellors. Churchmen were supposed to be mediators, a point which was made time and again by Innocent III. He had written to Stephen Langton and his fellow bishops, and also to abbots and priors and other prelates on the appointment of Nicholas, cardinal bishop of Tusculum, as papal legate to England in July 1213 after the interdict, and had instructed them to promote the cause of peace in every way they could.[21] By 1215, this general admonition had become more specific to the archbishop and his fellow bishops and to John's escalating quarrel with the barons; at least, in his letters of March and August 1215 the pope revealed that the archbishop and bishops whom he had told to mediate had failed to do so and that they had, rather, taken the side of the barons.[22]

The role that Langton himself played in bringing about the issue of Magna Carta is debatable. According to the chronicle of Roger of Wendover, writing at the royal abbey of St Albans, there were meetings at St Paul's in 1213 and at Bury St Edmunds in 1214 during which Langton drew the attention of the barons to the coronation charter of Henry I. Wendover's account suggests that Langton had made a discovery so inspirational to the barons that they took an oath on the altar of Bury St Edmunds to force John to grant their demands.[23] The story has become part of the myth surrounding Magna Carta; indeed, a plaque was erected in 1847 among the ruins of the abbey, marking the spot where the oath was taken.[24] Historians doubt that the meeting took place in just this way; and indeed, the coronation charter of Henry I was already well known.[25] But like so many stories in medieval chronicles—and perhaps as Wendover intended, as he recorded the St Paul's meeting as being a rumour—it is best understood not literally but as a way of explaining underlying truth: that people did appeal to established custom when seeking authority for what they proposed to do; that the taking of an oath on a holy site or touching holy relics was the most solemn form of binding action; that there was a written template on which Magna Carta was based; that the laity at all

social levels were dependent on the literate clergy when it came to the use of written documents; and above all that the bookish, learned Langton, like his predecessor Thomas Becket, was an archbishop who believed that the power of kings should be subject to law. Even so, Langton had to tread carefully, to adhere to the role of mediator rather than as supporter of the baronial cause; nor could he, by undertaking to invoke a sentence of excommunication if John should fail to observe Magna Carta, place himself between the king and the pope.[26]

The king's counsellors named in the charter did not however include any of the heads of the great religious houses who were among the king's most powerful and important tenants in chief. Nor were there any such heads in Roger of Wendover's list of John's evil counsellors[27]; nor did the list of the 'arbiters and administrators' of his will include them.[28] This surely leads us to inquire whether the king did seek counsel from the heads of religious houses and the evidence of the royal charter witness lists is a first recourse on this point. It was during John's reign that royal charters began systematically to be enrolled. Of course, the witness lists are not a complete guide to those who were in the king's presence on a given day. Moreover, witnessing a charter did not mean that the witness was familiar with the details of the charter itself; he was only a witness to its having been granted. Even so the evidence is compelling: heads of religious houses were very rarely called upon to witness royal charters during John's reign whereas it is usual to encounter the names of archbishops, bishops, and archdeacons and other secular clerks (that is, clergy who were not members of religious orders) among the lists of witnesses to enrolled charters. The heads of English houses who do feature are (in order of the charters in which they appear) the abbots of York, Selby, Beaulieu, Westminster, Ramsey, Cirencester, and the prior of Bradenstoke. Most of these were ancient Benedictine houses, and most were houses of royal foundation with the exception of Bradenstoke, a house of Augustinian canons dependent on Cirencester, founded by Walter le Eurus.[29] Beaulieu was John's Cistercian foundation of 1204. But these witnessed just one, or at most three, charters out of the many surviving from John's reign which are enrolled on the royal charter roll.[30]

None of this meant, of course, that abbots played no part in counselling the king. The chronicle of the election of Hugh, abbot of St Edmunds tells us that the abbot of Beaulieu was the king's confidant[31]; and trusted abbots certainly served as royal envoys—the abbots of Bury St Edmunds and Beaulieu (Hampshire) were chosen as members of John's embassies

to the pope.[32] The abbot of Beaulieu was among the proctors representing John at the Fourth Lateran Council in 1215.[33] And of course the occasions when the king visited the great religious houses were opportunities for discussion and exchange of views. Yet, the general absence of regular clergy from the witness lists is striking, especially when taken together with their non-appearance as royal ministers and with the fact that Innocent III saw the bishops, rather than the abbots, as those who should mediate with the king. It may suggest that the regular clergy saw themselves at some remove from the secular world, and even from the 'secular' clergy. In this connection the comment of the chronicler of the election of Abbot Hugh of Northwold about the proposed inquiry into the electoral process is telling:

> 'When this was told the convent they were very annoyed that a scrutiny of religious should be conducted under any condition by clerks, who always lay in wait for them.'[34]

The issue of Church–State relations was key in the first main clause of Magna Carta, but it was by no means unprecedented to grant liberties to the Church. Henry I's coronation charter had granted freedom to the English Church, undertaking not to sell or lease its property or take anything from the demesne of the Church during vacancies.[35] Stephen's charter of 1136, issued in the context of his shaky claim to the throne, had been much more liberal, denouncing simony, allowing bishops' rights of jurisdiction over the clergy and their property, protecting the rights and property of the Church and undertaking to look into claims about losses since the time of his grandfather William the Conqueror.[36] And reference has already been made to the Statute of Pamiers in which Simon de Montfort granted general and specific liberties to churches, religious houses and the clergy.

It was however the matter of elections which lay behind the terms of the first clause of Magna Carta. When an archbishop, bishop or the head of religious house died, his successor was chosen by the members of the religious community of which he had been head. Licence to elect was sought from the king (in the case of bishoprics and royal abbeys) or other patron; once the election had been held and confirmed by the ecclesiastical superior the king or other patron released the temporalities—the estates belonging to the episcopal see or abbacy. The appointment of a bishop or head of house was a matter of concern not only to the religious

community itself but also to the king or other patron, as its lord, not least because of the authority and influence that the prelate wielded. He was the wealthy holder of large estates with military tenants owing him feudal obligations and service; he had rights of jurisdiction which he exercised on behalf of the Crown. To take just one religious house, Antonia Gransden's recent work show in detail the extent of wealth and powers of the abbots of Bury St Edmunds in the twelfth and thirteenth centuries and the complexities of the relationships with kings and their ministers.[37] For bishops, there was the spiritual authority which they wielded over the clergy and the laity in their dioceses. Lastly, the clergy who served as royal and noble administrators needed to be remunerated and rewarded, and the use of ecclesiastical benefices—including bishoprics—for this purpose was an embedded practice. For all these reasons, the ideal of freedom of elections was inherently in conflict with the interests of patrons—above all, kings—in the process.

John's father Henry II in the Constitutions of Clarendon (1164) had set out his position on royal rights in elections of bishops. The election should take place in the king's chapel, with the king's assent and on the advice of persons summoned by the king for the purpose. The person elected should do homage to the king before being consecrated.[38] Pope Alexander III in 1168 had countered this, telling Henry to allow free elections and not to make his own nominations. In practice, however, both Henry and Richard I had continued to interfere.[39] Whether John's interference in elections was more egregious yet, or whether it was his misfortune that his reign coincided with the pontificate of Innocent III, that authoritarian pope deeply committed to the upholding of ecclesiastical liberties and the reform of pastoral care, but John's reign was a watershed in the conflict over elections. Innocent wrote thus to him in 1203:

> You are claiming for yourself power beyond your rights, you are applying the revenues of the churches to your own uses, you are attempting to prevent elections, and in the end by your unlawful persecution you are forcing the rightful electors to choose in accordance with your arbitrary decision…[40]

Matters came to a head with the appointment to the archbishopric of Canterbury after the death of Hubert Walter in 1205. John's favoured candidate was John Gray, a trusted chancery clerk and already bishop of Norwich,[41] but the monks of Canterbury cathedral priory secretly elected one of their own number. On being browbeaten by John, a further

election, of Gray, was conducted in John's presence. Two monastic delegations, therefore, made their way to Rome, but Innocent III quashed both elections and rejected too the claims of the bishops of the southern province to be involved. A third election was held in the pope's presence, and resulted in the choice of Stephen Langton. Langton was a genuinely distinguished scholar who had taught theology in Paris (where Innocent III had met him) in the 1180s and who had written commentaries on the Bible. He was also committed to the idea of training for priests. This was clearly a natural choice for a reforming pope with an eye to pastoral care, but unfortunately Langton was not the sort of archbishop of Canterbury that the king was looking for. John (as we know from Innocent III's rebuttal of his points) opposed the election on a number of counts: he had not been allowed to exercise the right of assent; he did not know Langton; and he had spent time living among the king's enemies (that is, in Paris). Christopher Holdsworth points out that his possible connection with Geoffrey Plantagenet, archbishop of York, would also have made John hostile.[42]

John had met his match with Innocent III. His view was that, if John did not know Langton, he ought to have done as a native of his kingdom and by reputation. Attempts had been made to seek royal assent even though it was not formally needed because the election had taken place before the pope who had plenary authority over the Church of Canterbury. He invoked the memory of England's martyred political dissident, Thomas Becket—to let John know that it would be 'dangerous' for him to fight the Church in this cause.[43] Then, on 17 June, he consecrated Langton, in Viterbo, without royal assent.

After 1170, all archbishops of Canterbury walked in the shadow of Thomas Becket[44]; Langton, when writing to the English people to justify his coming to Canterbury, spoke of his commitment to pastoral care in England, his obedience to the pope, and of the liberties for which Becket had struggled. He warned of the consequences for those (by whom he meant John), who rebelled against God.[45] Those dangerous consequences materialised in the form of an interdict imposed on England on 23 March 1208, and the excommunication of John himself in the following year. An interdict meant that no sacraments (above all, the Mass) were to be available, except baptism and confession for those close to death. The application of these strictures must have varied between dioceses in different parishes, but if strictly applied must have caused great loss of morale among both clergy and laity. In 1209 Innocent allowed conventual churches to

celebrate Masses privately and in 1212 communion was allowed to the dying. Many bishops went into exile, leaving the administration of their dioceses in the control of their officials, although it is not clear that heads of religious houses similarly fled and it is from the accounts of monastic chroniclers that much of the (albeit scant) evidence about the impact of the interdict comes. There is no doubt that John made money out of the Church during the interdict, above all from ecclesiastical property which he confiscated and then restored (at a price); and from the revenues of vacant bishoprics and abbeys.[46]

By 1213, however, John, in need of allies, had had to come to terms with Innocent, and on 13 May he surrendered England and Ireland to Rome and agreed to pay reparations and an annual tribute.[47] England became a special fief of St Peter, and John did homage to Pope in the person of the papal legate. The Barnwell chronicler tells us that his submission seemed ignominious to many, but that it was the best way of avoiding an invasion and the king's fortunes began from that day to improve.[48] There seemed also to be advantages in terms of the choice of prelates: Innocent sent letters of instruction to the papal legate saying men should be elected who were not only distinguished by their life and learning but also loyal to the king, profitable to the kingdom and capable of giving counsel and help—the king's assent having been requested.[49] The pendulum thus swung too far; the pope's effort to conciliate John had the effect of giving him too much influence and led to complaints from Langton to the papal curia.[50]

The outcome was that, on 21 November 1214, John issued a letter addressed to archbishops, bishops, earls, barons, knights, bailiffs, and all who might see it (abbots and priors were not specified). An agreement was said to have been reached between the king on one hand and the archbishop of Canterbury, and the bishops of London, Ely, Hereford, Bath and Glastonbury and Lincoln on the other (again, no heads of religious houses). The document was witnessed by a Peter des Roches, bishop of Winchester and a number of earls and barons. The freedom of election of all prelates was granted through the realm of England:

> saving only the securing to us and our heirs of the custody of vacant churches and monasteries from freely appointing a pastor over them whenever they so wish after the prelacy has become vacant, provided that permission to elect be first sought of us and our heirs, a permission which we will not refuse or postpone. And if (which God forbid!) we should refuse or postpone, the

> electors will nevertheless proceed to make a canonical election. Similarly after an election let our assent be sought, which similarly we will not refuse unless we have offered, and lawfully proved, some reasonable cause to justify our refusal.[51]

Thus the freedom of elections had been granted months before Magna Carta. It enabled the pope to absolve John from his oath to observe it without losing the liberties which the 1214 charter granted to the English Church. When the pope annulled Magna Carta on 24 August 1215 he referred specifically to the fact that, after John had become reconciled with the Church, he had conferred full liberty on it. He claimed that Magna Carta had been granted under duress and was illegal; he forbade that it be observed under pain of excommunication.[52]

The fact that Magna Carta said relatively little, other than in the first clause, about ecclesiastical liberties made the pope's annulment less significant for the Church. Clause 22 protected clerks against being amerced according to the size of their benefices, and clause 27 safeguarded the role of the Church in supervising the distribution of the goods of intestates.[53] Other clauses were concerned with the rights of patrons of churches and religious houses. Clause 18 provided that the three possessory actions, including that of darrein presentment, should be heard in the county court; while clause 46 protected the rights of patrons to custody of the religious houses which they had founded or for which they had royal charters.[54] It is to the role of the king in relation to the rights of lay patrons that we now turn.

Darrein presentment was the action available to those claiming to present a clerk for institution to a church on the basis of having previously done so. It was one of the key means by which patrons defended their patronage rights. The fact that it was included in Magna Carta (though not, in fact, in the Articles of the Barons) would suggest that its availability was welcome. Litigation over the right of presentation or advowson as it was called was an area in which royal administration and bishops had to cooperate closely. Bishops' registers, which survive for most English dioceses by the latter part of the thirteenth century, were always careful to record the identity of patrons when instituting clerks to benefices because the exercise of the right affirmed their patronal status. Advowson cases could only be heard when a church was vacant, royal writs which instructed a bishop not to admit to a litigious church, or which told him to do so when the case was complete, were crucial in ensuring that the action

in the king's court was communicated to the correct quarter and could be acted upon. To take the example of just one diocese, the register of John Salmon, bishop of Norwich (1299–1325) shows the importance placed on recording patronage rights in the process of institution. Patrons were named (and their full titles given) when clerks were instituted to churches or other benefices; and the royal writs prohibiting admission or informing the bishop of the outcome of the case were kept and are now bound into the volume.[55] The extent to which patrons engaged in litigation over their advowson rights, and the degree of continuity of possession of such rights, are topics which would merit further research in the plea rolls.

The issue of custody of religious houses was also raised in 1258, when the petition of the barons complained that the king took custody of abbeys and priories founded on their estates, preventing them from proceeding to elect without royal licence and damaging the interests of the earls and barons who were liable for the service due from these houses.[56] Both in 1215 and 1258 the suggestion is that the Crown was taking custody of houses other than those of its own patronage, and must lead us to question the extent to which this was becoming a problem. There is some evidence that the Crown in the latter part of the thirteenth century was displaying a greater interest in the ecclesiastical patronage rights of its tenants in chief, in particular in the context of its inquiries into their estates on their decease, which enabled the king to exercise those rights during periods of wardship. And as far as bishoprics were concerned, in the later thirteenth century Edward I expanded royal rights by acquiring the custody of Welsh sees during vacancies which had previously been exercised by certain marcher lords. But on the whole the case cannot be made for a systematic expansion of royal rights to the detriment of the nobility.[57]

As well as bringing income from the temporal estates, custody of a vacant bishopric or abbey gave the king the right to present to the ecclesiastical benefices normally in the bishop's or abbot's gift. Such benefices were a valuable resource adding to the stock of the king's patronage and enabling him to provide income and status to the growing body of royal clerks who manned the royal administration. For an ecclesiastical institution of royal patronage seeking to minimise the disruption and the diversion of resources into royal hands, it made sense to separate the property of the bishop, or abbot, from that of the cathedral priory or convent, to enable the community to retain control of its portion during the vacancy. Some houses paid a lump sum to buy exemption from royal custody but it

is telling that even when this happened the king retained the ecclesiastical patronage in the gift of the house as well as the knights' fees and feudal incidents.[58]

The inclusion of complaints about royal encroachments during periods of vacancy, as in 1215 and 1258, suggests that other patrons valued their own rights of custody. In fact, the practices of patrons with regard to this were varied. Some exercised their rights tenaciously, while others did so only nominally, or gave them up altogether. Edmund, earl of Cornwall gave up his patronage rights at his father's foundation of Burnham and at his own at Ashridge. He retained nominal rights of custody at St Michael's Mount in Cornwall but promised that the revenues would be delivered to the new head of house.[59] Henry de Lacy, earl of Lincoln gave up his right of custody at Spalding (Lincolnshire) but retained the right to appoint a custodian to manage its business and to present to ecclesiastical benefices falling vacant.[60]

Election of heads of religious houses in the thirteenth century seems to have proceeded on the whole more relatively smoothly, with the rights of the king and other patrons being limited on the whole to those of giving licence to elect and of assenting to the choice made. Of course, difficulties did arise, particularly in the case of dependent houses when the relative rights of the mother house, either abroad or in England, had to be balanced with those of the patron. And it is impossible to know the extent of informal influence.[61]

Agreements between individual patrons and the religious houses of their patronage held advantages for both in terms of clarity and specificity. The grantor was able to specify those rights (such as advowsons) which he intended to retain, while the religious house was clear about the limitations on those rights. It was becoming more important generally in the thirteenth century for all holders of large estates to be clear as to their properties and the rights associated with them. This was certainly the experience of the abbey of Bury St Edmunds, which not only possessed large estates but enjoyed extraordinary privileges of jurisdiction in St Edmunds' liberty. The abbey produced a detailed list of its archives in the context of Edward I's inquiries into holders of franchises, and took advantage of the king's visits in the 1290s to secure confirmation of St Edmund's liberties.[62] The path taken by religious in safeguarding their position was to do so on a bilateral basis—between the individual house and its patron because the circumstances of each individual house were specific to it. It made sense to act individually, rather than collectively. By contrast, we may consider the issues raised in the grievances ('gravamina') presented by the English

clergy to the king on occasions throughout the thirteenth and fourteenth centuries. It is true that exploitation of custodies and interference in elections were raised in such grievances.[63] Grievances of 1257 and 1261 made specific reference to Magna Carta.[64] But it was in fact issues of jurisdiction and the boundary between the ecclesiastical and secular law that were far more frequent.[65] And it was above all bishops who provided the leadership for making and presenting the complaints.[66]

And so we return to the royal charter rolls of the period. The pattern already observed for John's charters prevails throughout the more copious rolls of Henry III's long reign, that is, that heads of houses are very rarely encountered as witnesses. There is a striking exception to this. Magna Carta of 1225 which became the definitive version was witnessed by no fewer than twenty heads of the large religious houses, following the names of twelve bishops and preceding the names of many earls and barons.[67] It is not surprising that this grant, issued by Henry's minority government in return for a subsidy, should be witnessed by many, but the inclusion of the names of so many heads of houses was wholly exceptional. Elsewhere in Henry's charter rolls, the abbots of Westminster, Vaudey, Evesham and Peterborough featured as witnesses, but only very occasionally.[68] It is true that Elerius, abbot of Pershore, witnessed a number of charters in several locations between September 1251 and February 1253.[69] Elerius, unusually for the head of a religious house, was appointed as escheator south of Trent on 4 August 1251.[70] John, prior of the Augustinian house of Newburgh, sometimes referred to as Henry's chaplain, witnessed charters between November 1252 and January 1257 including grants made during Henry's visit to France.[71] He was Henry's favoured candidate for the bishopric of Carlisle in 1254.[72] But again these were exceptions that proved the rule; and during the thirty-five year long reign of Edward I, not a single royal charter was witnessed by any head of a religious house.[73] This is despite the fact that, during Edward's reign, parliaments to which ecclesiastical tenants in chief would have been summoned began to be held regularly. For example, charters granted during the parliament at Bury St Edmunds in November 1296 were not witnessed by the abbot of Bury.[74]

By contrast, and as was the pattern in John's reign, charters were regularly witnessed by bishops and other members of the secular clergy.[75] This is not surprising given that these played so crucial a role in royal administration. Secular clergy were also deployed in the administration of the nobility in this period (although Roger Bigod, earl of Norfolk, was unusual in counting a number of regular clergy, including the abbot of Tintern,

a house of his patronage, among his estate administrators). It was usual, too, for a lord to name the head of a religious house of his patronage among his executors. But the prevailing pattern of a preference for secular clergy also enabled the nobility to offer remuneration and advancement in the form of church livings.[76]

What, then, did the Church gain from Magna Carta? The subsequent reissues did not include the clause about freedom of elections, but it was not necessary that it should. Such freedom had been secured already both by John's gift and by the canons of the Lateran Council of 1215.[77] And in practice, as Katherine Harvey has recently shown in an authoritative and detailed study, election of bishops by the cathedral chapter was to be the norm in thirteenth-century England. True, the king still exercised influence, making his wishes known and using the rights of licence, assent and custody of the temporalities which canon law allowed him. Harvey's view is that, on the whole, compromise and the acceptability of candidates to all parties were the salient features of most episcopal appointments in the reigns of Henry III and Edward I.[78]

Magna Carta reveals a direction of travel. The thirteenth century was to witness continuing and growing use of the secular clergy in the business of government; ecclesiastical patronage rights were at the heart of relations between the clergy and laity; cordial relations with lords and patrons were key to the good fortune of individual religious houses; the collective seeking of redress of grievances under the leadership of bishops was to have potency as a form of political action. Magna Carta gave impetus to the notion of the importance of the written word as evidence of title to property and rights; at the same time it is the written word of the chroniclers—the hagiographies, myths and suppositions—that reveal the beliefs and values that underpinned its making.

Notes

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5. See, for example, *The Magna Carta Plays* (London: Oberon, 2015).
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13. For John's testament, see S.D. Church, 'King John's Testament and the Last Days of his Reign', *English Historical Review*, cxxv.514 (June 2010), pp. 505–28.
14. Mason, 'St Wulfstan's Staff', p. 159.
15. Claude de Vic and Joseph Vaissete, *Histoire Générale de Languedoc: Avec des Notes et les Pièces Justificatives* (Toulouse: E. Privat, 16 volumes, 1872–1893), VIII. cols 625–35. A photograph of the statute is in Nicholas Vincent, 'Magna Carta: Defeat into Victory', in *Magna Carta: The Foundation of Freedom*, pp. 67–75 (p. 71).
16. References to the text of Magna Carta are taken from the recent translation by David Carpenter, in *Magna Carta*.
17. Annales de Burton in *Annales Monastici*, ed. H.R. Luard, 5 vols (Rolls Series, 1864–9), I. pp. 210–11.
18. Carpenter, *Magna Carta*, pp. 62–3 and 66–7.
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20. Sophie Ambler, 'Advisers of King John (*act.* 1215)', *Oxford Dictionary of National Biography*, Oxford University Press, Sept.2015 [http://www.oxforddnb.com/view/theme/107220, accessed 2 May 2016].

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22. *Letters of Innocent III*, pp. 196–7 and 213.
23. *Rogeri de Wendover Liber Qui Dicitur Flores Historiarum ab Anno Domini MCLIV, Annoque Henrici Anglorum Regis Secundi Primo*, ed. H.G. Hewlett, 3 vols (Rolls Series, 1886–9), II. pp. 263–4 and 293–4.
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25. See Carpenter, *Magna Carta*, pp. 312–13 and Christopher Holdsworth, 'Langton, Stephen (*c*.1150–1228)', *Oxford Dictionary of National Biography*, Oxford University Press, 2004 [http://www.oxforddnb.com/view/article/16044, accessed 20 May 2016.
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31. *The Chronicle of the Election of Hugh, Abbot of St Edmunds and Later Bishop of Ely*, ed. R.M. Thomson (Oxford: Clarendon Press, 1974), pp. 30–1 and note.
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33. F.M. Powicke and C.R. Cheney, eds, *Councils and Synods with Other Documents Relating to the English Church, II. 1205–1313* 2 parts (Oxford: Clarendon Press, 1964), i. 48.
34. *Chronicle of the Election of Hugh, Abbot of St Edmunds*, p. 19.
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38. *English Historical Documents, 1042–1189*, p. 721.

39. For a recent summary of royal claims until the outset of John's reign, see Katherine Harvey, *Episcopal Appointments in England, c. 1214–1344: From Episcopal Election to Papal Provision* (Farnham: Ashgate, 2014), pp. 15–17.
40. *Letters of Innocent III*, p. 50.
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42. For a summary account of Langton's career, learning and the election, see Holdsworth, 'Langton, Stephen (*c.*1150–1228)'.
43. *Letters of Innocent III*, pp. 86–90.
44. See, for example, J.H. Denton, *Robert Winchelsey and the Crown 1294–1313: A Study in the Defence of Ecclesiastical Liberty* (Cambridge: Cambridge University Press, 1980), pp. 135 and 244–5.
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47. *Letters of Innocent III*, pp. 178–80.
48. *Memoriale Fratris Walteri de Coventria: The Historical Collections of Walter of Coventry*, ed. W. Stubbs (Rolls Series, 2 vols, 1872–3), ii. p. 210.
49. *Letters of Innocent III*, p. 166.
50. Harvey, *Episcopal Appointments*, pp. 18–19, 432–4.
51. *Letters of Innocent III*, pp. 199–201 and see note 9.
52. *Letters of Innocent III*, p. [00].
53. Carpenter, *Magna Carta*, pp. 46–9.
54. Carpenter, *Magna Carta*, pp. 45–7 and 54–5.
55. Norwich Record Office, DN Reg/1/1, Register of John Salmon, 1299–1325.
56. W. Stubbs, *Select Charters and Other Illustrations of English Constitutional History from the Earliest Times to the Reign of Edward the First* (Oxford: Clarendon Press, 8th edition, 1905), p. 384.
57. Elizabeth Gemmill, *The Nobility and Ecclesiastical Patronage in Thirteenth-Century England* (Wooddbridge: Boydell, 2013) pp. 101–28.
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59. Gemmill, *Ecclesiastical Patronage*, p. 161. The earl also confirmed that his officers would not enter or damage the estates of his Cistercian foundation of Rewley.

60. For the exercise of rights of custody by thirteenth-century patrons, see Wood, *English Monasteries*, pp. 75–100 and Gemmill, *Ecclesiastical Patronage*, pp. 64–6 and 105–7.
61. Gemmill, *Ecclesiastical Patronage*, pp. 178–9; and on elections in the thirteenth century see Wood, *English Monasteries*, pp. 40–74.
62. Gransden, *Bury St Edmunds, 1257–1301*, pp. 34–7, 51–62 and 81–2.
63. See Wood, *English Monasteries*, pp. 94–5.
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65. W.R. Jones, 'Bishops, Politics, and the Two Laws: The *Gravamina* of the English Clergy, 1237–1399', *Speculum*, 41.2 (1966), pp. 209–245.
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69. Morris, *Royal Charter Witness Lists*, vol 2, pp. 51, 54, 58, 59, 64, 69, 81 and 82.
70. *C.P.R. 1247–1258*, p. 104.
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73. T(he) N(ational) A(rchives) C53 (Charter Rolls Edward I)/62–93.
74. TNA C 53/82, m.1 and C 53/83, m3.
75. This included bishops of monastic sees; the distinction is between these and heads of religious houses.
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78. Harvey, *Episcopal Appointments*, pp. 47–125.

CHAPTER 2

Magna Carta 1815–2015: Filling Up the Gaps

Kenneth O. Morgan

For me, the history of Magna Carta begins not in 1215 but in 1815—the same year as another famous anniversary, one less attractive to French ears perhaps, the Battle of Waterloo. Its earlier history was clouded by symbolism and legend, and rival scholarly interpretations of the medieval past. Its language and intent were generalized. It underwent many subsequent revisions to lend it clarity, as early as 1217 after the resistance of the Pope to its terms, then in the fourth version in 1225 early in the reign of Henry III, and finally in a whole series of important statutory reinterpretations in the reign of Edward III between 1331 and 1352. Its wider significance has always been a topic for scholarly argument. The eminent medieval historian, J.C. Holt, in his authoritative study published in 1992, has written of 'the myth of Magna Carta'. Yet over time it acquired a wider universality that went far beyond the conflicts between King John and his barons and achieved an iconic status. It became hailed by the legal establishment as the classic statement of the rule of law. It fuelled what came to be known as 'the Whig interpretation of history'. Blackstone in the eighteenth century saw the Charter as a kind of fundamental law, underpinning all other constitutional arrangements.

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It became a doctrine and a legend for the elite. Sir Edward Coke, speaking for the parliamentary opponents of Charles I, revived the idea of its historic importance in the early seventeenth century to curb the excesses of the royal prerogative. He cited Magna Carta as the precedent for the Petition of Right forced on the King in 1628 and restored its centrality in constitutional and legal history. The abolition of Star Chamber in 1641 was justified against the tradition of the liberties set out in Magna Carta. By contrast, the Cromwellians some years later also used it to send John Lilburne and others of the Levellers to the Tower. This was despite Lilburne citing Magna Carta as a protection for the common man against the terrors of 'the Norman Yoke'. It was not, however, a document to assist the excluded or the dispossessed. It had little to offer villeins (who were manifestly not the 'free men' to whom key clauses of Magna Carta referred), and less still to the Jewish community or women. The barons who confronted King John at Runnymede in 1215 had no concern for them other than in their role as chattels. It is worth noting that the great popular uprising of the Middle Ages in England—the Peasants' Revolt of 1381—when tribunes like John Ball announced new democratic, egalitarian doctrines, made no reference to Magna Carta.

In subsequent centuries there were varied interpretations as to what Magna Carta had signified or achieved. It was seen as both a conservative and a radical document at one and the same time. It was cited by Edmund Burke in the 1770s as being an essential part of the 'ancient constitution' guaranteeing popular liberties. Thus he saw political leadership as 'rooted in history not in science'.[1] But Magna Carta was also hailed by the radical pamphleteer, John Wilkes, as affording protection for the individual dissenter against an arbitrary executive. More alarmingly, the Charter was also much quoted by the American revolutionaries in the 1770s as justifying the overthrow of British rule. Tom Paine actually ridiculed Magna Carta and championed instead the French revolutionary doctrines of the Rights of Man—based not on concessions wrung by self-interested feudal barons but on principles of natural reason, the principles of the sovereignty of the People. He also gave a radical prominence to the notion of social and economic rights. Paine declared that Wat Tyler's 'proposals' to the young Richard II at Smithfield in 1381 were 'on a more just and public ground' than those put by the barons to King John in 1215. It was, said Paine, Tyler who deserved a national memorial in his honour at Smithfield not the feudal anti-democratic barons on the fields of Runnymede.[2]

The popular history of Magna Carta began after the end of the Napoleonic Wars in 1815, a period of revolutionary upheaval intensified by the social transformations brought about by the war. Society was now being fundamentally reshaped in the industrial age, with the growth of large towns, and with new movements for democratic reform like the London Corresponding Society whose leaders freely cited the enduring importance of Magna Carta. These involved giving a new substance to Magna Carta, to reach out to the excluded masses. Its significance now moved on from aspects of 'natural' or inalienable rights to the status of parliament and the importance of franchise reform. Later it moved on still further to embrace social and economic reforms and the status of the workers' trade unions. It now acquired a quite new centrality and prestige by pushing on into the contemporary areas of political and social concern raised up by the industrial age. In brief summary, these covered three major categories that the Charter left out—workers, women and foreigners—and we will now examine each of these in turn.

Workers

It was notorious, of course, that the clauses of Magna Carta ignored the great working mass of the population. They held no property and therefore enjoyed no constitutional or civil status. Clause 39, the famous liberating clause of the Charter declaring against arbitrary arrest or exile for ordinary citizens, referred to 'no free man'. It therefore denied unfree villeins basic freedoms or access to the king's courts. The stronger, amended version of Magna Carta of 1225, in Henry III's reign, made the reference somewhat stronger, while two statutes in the next century passed in 1331 and 1352 in Edward III's reign changed the wording in the famous clause 39 from 'no free man' to 'no man of whatever estate or condition he may be'. It was an amendment of portentous importance for the future which showed very clearly the universality potentially embodied in the principles or Magna Carta, and enabled Coke in the seventeenth century to claim that Magna Carta embodied principles of liberty that extended to the entire realm, giving a democratic slant to the Charter that the barons of Runnymede had in no way intended. Other innovations in the Charter, of much importance at the time, such as the assertion of the community's right to regulate the forests and the royal hunting that took place within them, meant nothing to the new industrial proletariat. But new priorities, and new ways of viewing the old priorities, emerged with the bitter

sense of class confrontation in the post-war years after 1815. This was immensely sharpened by the shocking events at 'Peterloo' in Manchester in 1819, when eleven unarmed protesters calling for parliamentary reform were shot down by the militia, and another 400 injured, including women and children. The civic authorities appeared as both out of control and lacking in moral consciousness. The disaster thus inspired Shelley's imperishable verse written on their behalf with its celebrated peroration—'Ye are many, they are few'.[3]

Popular passion fortified by this crisis lay behind the successful passage of the Reform Act of 1832, when an upsurge of democratic protest drove the Duke of Wellington from office and compelled the resisting hereditary House of Lords to retreat. The victorious Whigs ventured to call their Reform Act 'a new charter of Liberty', thus attaching ancient memories of Magna Carta to their cause. But the aftermath of 1832 brought enormous shock and disillusionment. The 'new Magna Carta' brought with it a new and far more oppressive Poor Law, the pernicious doctrine of 'less eligibility' and incarceration for the industrial poor in the workhouses, 'the Poor Law Bastilles'. There was an immense mass reaction.

The legend of Magna Carta was now sufficiently robust to be reclaimed for a new popular upsurge. This was the People's Charter of 1838, originally sponsored by the London Working Man's Association. Magna Carta now offered an enduring ideological beacon for the varied categories of workers who flocked to the cause of Chartism. Occasionally, the Charter would be given direct reference. Thus the Reverend J.R. Stephens, addressing a large working-class gathering in Yorkshire, declared to his audience, 'We say give us back the good old Laws of England. And what are those Laws?' The crowd roared back 'Magna Carta'. [4] Wisely, not too much was made of the thirteenth-century precedents. There was natural contempt for the medieval barons who acted out of self-interest in 1215 to resist paying more taxes to the Crown. The distinctively English lineage of Magna Carta also seemed to carry less weight among Chartists in Scotland or south Wales. The men who marched from the valleys of Gwent to demand the freedom of Henry Vincent in Newport gaol, to be met with a volley of gunfire that shot many of them down, were far more preoccupied with contemporary social and economic grievances than with misty popular recollections of a thirteenth-century document. But there was also much respect shown for the lineaments of the 'ancient constitution'. Most significantly all the Charter's Six Points, universal suffrage, the secret ballot, annual elections and the rest, were concerned

with election to parliament with which the legend of Magna Carta was now firmly linked. Like almost all popular insurgency, the Chartists of the 1830s were retrospective in part, anxious to show their continuity with the constitutional protests of earlier times.

Chartism passed away in the more stable and prosperous years of the mid-century. But enough of it survived to provide a powerful impulse in the next triumph of parliamentary reform, the Act of 1867 which broadly legislated for household suffrage in the towns, to be followed by the still more sweeping Act of 1884 which extended suffrage to the county constituencies, rural and industrial. Thus coal miners gained the vote in large numbers for the first time and the so-called 'Lib-Lab' interest emerged as a political force. The link between Magna Carta and parliamentary reform established that degree more strongly in the public mind.

The various socialist movements that emerged in Britain from the 1880s onwards adopted a variety of views towards the Charter. But on balance they were sympathetic. They were anxious to link the socialist creed not with continental ideologies, let alone Marxism, but with native libertarian traditions. In particular, many socialists of differing outlooks looked back to the Middle Ages as a pre-capitalist golden age. The radical economist, Thorold Rogers, described the fifteenth century, following the traumatic experiences of the Black Death, as 'the golden age of the English worker'. He part inspired Keir Hardie's socialist book *From Serfdom to Socialism* (1909) which argued how in the Tudor period the liberties of the medieval craftsman had been destroyed by a new dehumanising capitalism, which had left the medieval guild system shattered in its wake. The Marxist H.M. Hyndman, founder of the Social Democratic Federation in 1884, by contrast, heaped praise on the radical preacher John Ball, a popular hero of the 1381 Peasants' Revolt. He argued that the events of 1381 embodied the notion of a native socialist tradition. John Ball and Wat Tyler had shown 'that the idea of socialism is no foreign importation into England'. But Magna Carta meant little to him. The famous craftsman and crusading socialist, William Morris, was even more emphatic in his idealisation of the medieval past as his book *News from Nowhere* fully demonstrated. His vision of feudal England hailed Magna Carta as a foundation of popular liberty, explicitly so in a chapter of reverie entitled 'An Early Morning by Runnymede'.[5] The most powerful of the new socialist movements, the Independent Labour Party founded at Bradford in 1893, also adopted an historical stance. Keir Hardie, in his untutored way, revered the libertarian traditions cherished by the common people

down the centuries, though perhaps traditions more Scottish, and later Welsh, than English. The most influential ILP ideologue at this early stage was Ramsay MacDonald who wrote a wide range of socialist tracts. His *Socialism and Society* (1907) turned to a powerful intellectual source to endorse the traditions of Magna Carta (MacDonald, whose father-in-law was a professor of chemistry, had an unusual interest in scientific themes). He now found support in the doctrines of the great biologist Charles Darwin. Darwinian evolution, thought MacDonald, rather than class war was a key to people's power down the centuries, and many other social Darwinists, socialist and anti-socialist, followed this line of argument.

There were, however, important qualifications to the view of Magna Carta adopted by British socialist and working-class leaders. First they increasingly looked to the power of the central state to redeem the injustices of the capitalist system. This meant a new potency for ancient doctrines of parliamentary sovereignty. Hence the parliamentary thrust needed from more and more socialists to achieve the election of a critical mass of Labour MPs to protect the workers' socio-economic rights through state protection. They tended, therefore, to be suspicious of unelected individuals, especially those of privileged background who might overrule a sovereign parliament elected directly by the people.

More important still, in the later Victorian era there developed immense working-class suspicion of the judges, most of them of affluent capitalist background. The crude class bias of the judiciary was a staple of popular attitudes from the savage farce of the Tolpuddle Martyrs in the 1820s, an appalling legal and social injustice which had resulted in simple working men seeking to create their own voluntary trade union being transported to Australia in inhumane conditions. Workers' spokesmen were therefore wary of the idea of a bill of rights. They were fearful of the wealthy upper-class judges who would be charged with enforcing an entrenched charter of liberties and thus giving substance to the provisions of Magna Carta in a modern world. This fear was intensified from the 1880s onwards when attempts by aggressive employers to circumvent the activities of trade unions through the introduction of alleged 'free labour' were met with more forceful responses by their workforce especially amongst the unskilled workers such as dockers or gasworkers who made up the bulk of the so-called 'new unionism'.

The creation of the Labour Representation Committee, the forerunner of the Labour Party, in 1900 was a direct response to the class hostility of the judges as seen by the unions. It was notorious that the appointment

of the higher judiciary at that time was class-ridden and socially conservative, and all too liable to detect criminal intimidation or conspiracy in the legal activities of trade unions. The basic common law doctrine of freedom of contract was also held to be under threat. In case after case in the later 1890s, the judges found against trade unions or working-class institutions, in a way not anticipated when the legislation of Gladstone and Disraeli's governments, legitimising the industrial activities of trade unions, was endorsed in the 1870s. Twenty years later, *Lyons v. Wilkins* (1898) declared in favour of the rights of picketing being restricted, and claimed that picketing in an industrial dispute was lawful only if confined to communicating information whereas 'picketing to persuade' could be an actionable offence. *Quinn v. Leatham* (1901) produced a judicial verdict that attacked the right to strike and spoke instead of 'conspiracy to injure'. *Trollope v. London Building Trades Federation* (1895) laid down that unions' publishing 'black lists' of non-union firms also amounted to 'conspiracy to injure', while *Quinn v. Leatham* (1901) stated that putting pressure on an employer not to employ non-unionists on his staff was malicious in intent and similarly a conspiratorial act. Earlier, *Temperton v. Russell* (1893) had endorsed conferring upon unions a 'legal personality' so that contracts could be enforced against them in the courts. The unions themselves wished to keep out of the courts altogether, for the same reason that they wanted to avoid compulsory courts of arbitration in trade disputes, and now found themselves plunged into great legal uncertainty.

The most important case of all was Taff Vale in 1901 when the House of Lords' decision made trade unions (in this case, the Amalgamated Society of Railway Servants) financially liable in cases of tort. In effect it made strikes practically impossible by rendering them ruinously expensive for working-class organisations. The outcome for the Railway workers was payment of the large sum of £23,000 for damages and costs.[6] Some years later, the Osborne case of 1909 attacked the political levy paid by the unions to the Labour Party (a course similar to that followed later on by the Conservative government's Trade Union Act of 2016). Working-class confidence in the impartial operation of the rule of law was seriously undermined. In the end, it needed parliament to overturn the controversial view of the judges, in the 1906 Trades Disputes Act, a Labour Party measure taken over and put into law by the Liberal government of Campbell-Bannerman. This gave the unions complete immunity from damages incurred by strike action during industrial disputes. Perhaps ironically, this liberating measure was popularly known as 'the Magna Carta

of Labour'. The same description was applied by the labour movement in the United States to the Clayton Act of 1914 after the US Court had repeatedly found against the American Federation of Labor and in favour of giant corporations in industrial cases.

Despite this, Labour suspicion of the courts and legal processes continued long after the First World War. In the 1930s trade unions complained when hunger marchers from the mining valleys seemed to be treated more severely by the police and the courts under the Public Order Act of 1936 than were violent Fascist demonstrators at a meeting in Olympia. [7] But these events were also fortunate in that they strengthened Labour Party demands for the protection of citizens' rights of protest under the common law. The National Council of Civil Liberties, a powerful pressure-group formed in 1934 which cited the Charter amongst its principles, had strong Labour Party representation on its executive, including Attlee, Cripps, Edith Summerskill, Harold Laski, Vera Brittain and H.G. Wells, joined later by Aneurin Bevan. The founders spoke admiringly of the precepts of Magna Carta. They not only protected the right to protest and dissent peacefully but they also endorsed the 'whole spirit of British freedom'. But there remained suspicion of the political and class bias of the judiciary, especially Chief Justice Goddard, a particularly reactionary and partisan figure as well as a strong defender of capital punishment. There were still important Labour lawyers who took a line critical of the judges in their view of the rule of law, especially through the Society of Labour Lawyers, founded by Gerald Gardiner QC in 1948. The Welsh academic, J.A.G. Griffith, Professor of Law at the London School of Economics, in his *Politics of the Judiciary* (1981) and *Judicial Politics since 1920* (1991) claimed that right-wing judges saw 'the public interest' as meaning simply the interests of those in authority. The three pillars of their viewpoint were the preservation of law and order, the defence of private property and the endorsement of assorted prejudices associated with the Conservative party. He poured scorn on the notion of judicial neutrality: the social background and professional training of judges told heavily against it. He was especially severe on the judicial attitude in cases involving property issues. [8] Another pro-Labour academic, K.D. Ewing, writing in *The Bonfire of the Liberties: New Labour, Human Rights and the Rule of Law* (2010) condemned the judges for their decisions on issues relating to freedom of the press, freedom of information in the 'Spycatcher' case, and freedom of expression and movement in Northern Ireland as evidenced in the Diplock courts.

Apart from sympathetic academics, the trade unions also remained hostile to aspects of legal interference, not to mention the hallowed traditions of Magna Carta. But, perhaps surprisingly, Michael Foot's three bills on industrial relations in 1974–6, at the time of the so-called 'social contract' with the TUC, marked something of a turning-point even though their effect was to be largely undermined later on by the Thatcher government, extended after 2015 by the one-sided provisions of a Trade Union Act brought in by another Conservative government, that of David Cameron. Foot's measures were carefully drafted by his legal special adviser, the barrister, Lord Wedderburn, a specialist on labour law. They were subsequently endorsed in the High Court by Lord Scarman who declared that Foot's Trade Union and Labour Relations Act (1975) only restored the original purposes of the Trades Disputes Act of 1906 by giving the trade unions proper legal protection. But 'it was now stronger and clearer than it was then'.[9] Another major step forward came in the brief period as Labour leader of John Smith in 1992–4, a lawyer with a keen interest in civil liberties issues who also advanced the cause of human rights, and led ultimately to Labour's passage of the Human Rights Act in 1998. The Home Secretary, Jack Straw, was now to relieve traditional Labour fears by showing that he had reconciled the incorporation of the European Convention on Human Rights (after all, endorsed by the Conservative government of Sir Winston Churchill back in 1951) with the doctrine of parliamentary sovereignty. The secret lay in giving European and other higher judges the power to declare against an Act of Parliament that breached the Human Rights Act but not the power to overturn it. It could be argued that this compromise decision both endorsed and contradicted the view of Magna Carta simultaneously. The judges' attacks on the Conservatives over cases involving the European Convention on Human Rights then made both Labour and the unions both more pro-judiciary and pro-European at one and the same time.

In the early twenty-first century, after much anxious deliberation, Labour and working-class opinion appeared to have finally settled on accepting the traditions linked with Magna Carta, and seeing the supreme value of the law in promoting humanitarian and egalitarian causes. Labour was now solidly committed to the Human Rights Act and strongly opposed the Cameron government's Eurosceptic proposals to repeal it and replace it with a British Bill of Rights. After some hesitancy on the part of Tony Blair, the new prime minister, Gordon Brown, who took far more interest in constitutional issues, confirmed in 2008 that Labour

would fight to retain the Human Rights Act and raised the prospect of a written, codified constitution being created to protect the individual citizen against abuses by the state as well as by capitalist employers or other individuals attempting to steamroller the rule of law. But Labour's view was subject to constant challenges. It would be tested again in 2016 when the implications of the new Trade Union Act, designed to curb the power of the unions and restrict their ability to call strikes, as well as to finance the Labour Party as affiliated organisations, would be observed. Some help was provided by amendments passed by large majorities against the government by the House of Lords. The long, tortuous saga of the approach of working people towards the message of Magna Carta and the rule of law and those individuals who administered it, from the Peasants' Revolt to the present time, was still far from over.

Women

The debates over the status of women made more direct appeal to the legacy of Magna Carta. From the start, there were many bitter criticisms at the gaps in the Charter, as far as women were concerned. It underlined the inferior, disparaged status of women in the medieval world and for further centuries thereafter. It was drafted in a world of almost total male dominance, an attitude faithfully endorsed by the doctrines of the medieval Church. It was pointed out that only three women were mentioned in Magna Carta at all, John's queen and the two sisters of Alexander II of Scotland. The word 'Femina' appeared therein just once. There was much debate over the implications of the term 'free man' and whether, in the time-worn Punch joke, men embraced women. The main concern of the Charter as regards women dealt with matters of marriage and widowhood where property rights and obligations in feudal society were important considerations, while heiresses could be an invaluable resource and investment. On such key issues as outlawry provisions, the rights of women were ignored entirely: they were 'waived' and could be killed on sight. A particularly unjust clause was Clause 54; 'No man shall be arrested or imprisoned upon the appeal of a woman for the death of any other than her husband.' On the other hand, there were a few aspects which gave comfort to later feminists and were even hailed by them as a liberating breakthrough. Thus widows were allowed to stay on in a husband's house for forty days after his death, and also could claim the right not to remarry, even though this meant facing up to challenges both from social

convention and from powerful male holders of property. There was also a proviso that widows give guarantees not to remarry without the consent of the King or otherwise of the lord from whom she held her land. Women accused of a felony could be tried for witchcraft for which the penalty was being burned at the stake. In general, for women in feudal society Magna Carta was a limited and depressing document.

Centuries went by before the processes of the law offered any encouragement to women to enjoy more fulfilling lives. Even the democratic forces behind Chartism in the 1840s comprised only men, and the Reform Acts of 1867 and 1884 confirmed this bleak reality. The most powerful stimulus for change, of course, came from the suffragettes pressing for the vote at the end of the nineteenth century. They made much use of the ideal of Magna Carta, notably in the suffragette weekly newspaper, *Votes for Women*, founded in 1907 edited by Frederick and Emmeline Pethick Lawrence. It argued that since it was direct action by the barons that had brought about the royal surrender at Runnymede it followed that it was entirely legitimate to use physical force to gain women the vote. Subsequently after the Pethick Lawrences had been sent to gaol, they disavowed violent tactics and were expelled from the WSPU. The Pankhurst family, notably Richard Pankhurst, Emmeline's husband, a lawyer, also made frequent reference to the Charter in their propaganda. The Women's Social and Political Union argued that refusing women the vote was clean contrary to clauses 39 and 40, the liberating core of Magna Carta, since it did indeed 'deny right or justice'.

One interesting suffragette active in this area was Helena Normanton QC, the first woman barrister to practise in English courts, who took a keen personal interest in historical legal issues. Her article 'Magna Carta and Women' published in *The Englishwoman* in 1915 actually took a surprisingly positive view of Magna Carta, for instance in its treatment of widows. Here she saw it as offering 'encouragement and hope'. She also claimed that it had not been a male monopoly but that several women had also been active in the campaign to bring Magna Carta into being.[10] In 1923 she branched out into a new area and launched, ultimately successfully, a campaign to protect as a national monument the fields of Runnymede, which had been threatened with a private sale. In 1929 the owners of the Runnymede estate donated it to the National Trust. It now houses a dignified memorial in the Long Mede presented by the American Bar Association. Women, therefore, virtually excluded from the terms of Magna Carta in 1215, had helped centuries later to preserve its memory

for all time. Normanton continued her crusade on behalf of women's rights long after the vote was granted to women (aged over thirty in the first instance) in the Representation of the People Act in 1918. In 1929 she founded the Magna Carta Society, a many-sided body which also campaigned for divorce law reform and supported the international peace movement. A married woman herself, she pressed for women to retain their maiden names after marriage, if only for professional reasons. She cheerfully adopted the argument that Queen Anne Boleyn lost her head but at least kept her name!

But, like other feminists, she was disappointed at the very slow pace of change thereafter. For instance the otherwise progressive Beveridge Report on social insurance in 1942 still regarded the woman as a subordinate member of the family and the male as head of the household who ran its finances, and this notion lived on in the formative years of the welfare state. Towards the end of the twentieth century, a new generation of women lawyers therefore pressed the case for an updated Magna Carta, to reform legal and social attitudes towards women's issues. They include Helena Kennedy, a prominent human rights' lawyer who wrote a powerful tract against gender discrimination in the law, *Eve was Framed*,[11] and Baroness Hale, a legal academic who was to become the only female member of the new Supreme Court when it began operations in 2009 and to press the cause of women in the making of judicial appointments. Much emotion was stirred by the views of Jonathan Sumption, an eminent medieval historian appointed to the Supreme Court in 2012 who argued against there being positive discrimination of any kind for women in judicial appointments from the High Court down. Sumption argued that this would be discriminatory against men, might impair judicial competence, and in any case might take up to hundred years to implement properly. With such judges as these in post, arguing the impossibility of any progressive change, the anti-feminist prejudices dating from Magna Carta or earlier might still require much effort to uproot.

Foreigners

There was much evidence of anti-foreigner and anti-Semitic prejudice in Magna Carta, in contrast to the remarkably non-prejudiced Declaration of Arbroath (1320) in Scotland a century later, King John was to employ no foreigners amongst his officials and to expel all foreigners who came over here bearing arms. Foreign merchants, however, were given legal protection

to safeguard business transactions. They were valued alien friends. Jews were discriminated against in provisions directed against commerce with them and in limitations placed on debts due to the Jews. Shakespeare's 'Merchant of Venice' did not help here. It is worth noting that to medieval eyes the Jews were seen as the King's personal possessions; those in debt to the Jews ultimately owed money to the King himself. The two clauses devoted to the Jews in Magna Carta (clauses 10 and 11), concerned with regulating the interest to be paid to debts owed to Jews, were intended to protect the sources of wealth open to the King not to protect Jews themselves in any way. The barons' view of the Jews was reflected by the way they destroyed Jewish houses in London in May 1215 after capturing the city. The Jewish community took refuge in ghettoes. In 1290 Edward I had them banished from the land. They were not readmitted until the time of Cromwell three and a half centuries later.

For centuries the view taken of Magna Carta was a strictly domestic one and it took long for it to be extended to immigrants. A great stir was created by Lord Mansfield's remarkably liberal judgement over the freed slave, Somersett, in the court case of 1772, but Mansfield, a sympathiser with the anti-slavery movement, used arguments that were primarily moral rather than legal, and had little relationship to the principles of Magna Carta. In 1850 Lord Palmerston, during the affair of Don Pacifico, a Portuguese Jew who claimed British nationality, grandly announced that the classical ideals of 'civis Romanus sum' applied to foreigners claiming the rights of British citizenship overseas, but that was a diplomatic demarche only, and legalistic bluff.

The application of anything close to the principles of Magna Carta to immigrants entering this country first led to political and legal debate after the incursion of aliens, many of them victims of anti-Semitic pogroms in Tsarist Russia and Poland, after 1900. The Aliens Act of 1905 was the first to discriminate between 'undesirable' and 'desirable' aliens and it did so on primarily racially prejudiced grounds. It was extended during and after the First World War when a new influx of immigrants came in, coming variously from Belgians and White Russians and Armenians after 1917. Two other Acts of 1914 and 1919 aimed to restrict numbers and to emphasise the diminished status of immigrants under the law: that of 1919 was first rejected in the House of Commons as being too mild towards aliens.[12] The next surge of interest in the issue came following the considerable increase in the influx of black Commonwealth immigrants in the 1950s and early 1960s and led to the Race Relations Act of 1965, to

be followed in 1976 by the Commission for Racial Equality. The former was acceptable on legal grounds, but was seen to be inadequate on social aspects, notably in such areas as housing and the job market. Much racial tension was stoked up by Enoch Powell in speeches from 1968 onwards, and a dismal minority of Conservative candidates in Midlands constituencies such as Smethwick fed the flames. The civic justice of Magna Carta did not apparently apply if, in the words of one egregious Tory candidate, Peter Griffiths, you had a nigger for your neighbour.

It had become clear that immigrants to Britain were a major social category largely omitted from the principles embodied in the Magna Carta. It was instructive that in 1968 a new body, founded by Jim Rose and the human rights lawyer Anthony Lester, and focussing primarily on the conduct of race relations, named itself the Runnymede Trust. It focussed its attention on the legal and social status of coloured citizens, including how they were treated within the processes of the law, the conduct of police, their comparative fortunes when tried before juries or magistrates, and similar issues. The Trust's influence lay behind an important report on Multiculturalism, chaired by an eminent Indian academic, Professor (later Lord) Bhikhu Parekh in 2000, the conclusions of which generated widespread debate. [13] A sign of changing contexts was a much later Runnymede report, *Who cares about the white Working Class?* (2009) which focussed on the sense of discrimination in such areas as social welfare and housing in this large segment of society. A far wider and more urgent controversy then followed during the massive increase of immigration, asylum seekers and refugees, initially from the European Union and then, more alarmingly from civil wars and upheaval in the Middle East, especially following the Syrian civil war from 2014. A nexus of themes, colour and ethnic prejudice, animus towards the European Court and the judgments of the external European Court of Human Rights now merged together at a time of huge global pressures, economic, environmental and demographic. This formed a powerful background to the debate in 2016 leading to the Referendum on membership of the European Union that June, even though it was forces of globalisation rather than membership of Europe that were now leading to a worldwide refugee crisis. The ethnic foundations of the Magna Carta tradition would now be placed under pressure as never before. The significance of this, however, lies far beyond the scope of this chapter and will be dealt with in the treatment of immigrants, asylum-seekers and others, elsewhere in this volume.

In 2016 the threats to Magna Carta and the rule of law in the United Kingdom had become merged and blurred. Seventeen of the sixty-three clauses of the revised Magna Carta of 1225 were struck from the statute book by the Statute Laws Revision Act of 1861, and others followed in a steady stream. Only two of the original clauses, 39 and 40, now survive—the passage of time has eliminated the remainder over eight centuries. The only original sealed copy of the 1215 Charter was damaged by fire in the early eighteenth century and is now illegible. Its principles have been frequently under attack. Its edicts on free speech, association and movement were eroded during the First World War, notably through the 1914 Defence of the Realm Act. That illiberal measure overrode legal protection in most areas of civic and social life. Many were imprisoned under DORA's provisions and ten people were actually executed for activities interpreted as giving comfort to the enemy in some form. The Emergency Powers Act of 1920 was a far-ranging anti-union measure, extending deep into civil society, with armed troops widely used as strike-breakers. Lloyd George, the prime minister at the time took solace from the fact that his hero Abraham Lincoln had taken similar measures, such as suspending habeas corpus, in conducting, and winning, the American Civil War. Somewhat similar restrictive policies were adopted during the Second World War, with Winston Churchill himself, once a liberal Home Secretary, now exercising a somewhat moderating influence in curbing policies that 'were in the highest degree odious'. One powerful dissentient against wartime restrictions on liberty was Judge Atkin, Lord Atkin of Aberdovey, in the case of *Liversidge v. Anderson* (1942) who reminded his reluctant judicial colleagues of the old Roman tag that in times of war the laws were not silent. In return some of his fellow judges ostracised him.

In recent times, the principles of Magna Carta have often been set aside as other writers in this volume will demonstrate. The provisions of the Charter as updated in the Human Rights Act of 1998 and the European Convention on Human Rights have often been swept aside. Invariably the reason has been considerations relating to national security, the more cogent in an era of international terrorism. We have had illegal rendition policies on prisoners; the civil rights of British citizens being shredded by the American authorities in Guantanamo Bay and in successive items of Anti-Terrorist legislation; the hapless Chagos islanders of Diego Garcia shockingly turfed out of their ancient homes to make way for an American air-force base in the Indian Ocean, their case being upheld in the High Court but later being rejected in 2008 in the House of Lords.

Detention without trial (now fourteen days but once threatened by the Blair government to be extended to ninety days) is a particularly alarming violation of the key principles of Magna Carta.[14] Civil detainees enjoy less legal protection than those arrested under the criminal law, and this has been seriously condemned in the Supreme Court, newly liberated with its wider powers of judicial review. Judge Stein compared United Kingdom detention orders with the house arrest in his native South Africa that existed during the dark years of the apartheid regime. Judicial decisions are being made in these cases not by judges but a politician, the Home Secretary, quite contrary to edicts of Magna Carta, not to mention the Act of Settlement of 1701 with its declaration of the separation of powers. Detention and control are being imposed by the state without the formulation of any legal charges, and without those detained having proper recourse to legal advice and protection. Even fourteen days of pre-trial detention, reduced from twenty-eight by the Coalition government, is longer than in almost all other European countries. There were prolonged protests from the judicial bench, led by Lord Bingham in his *Rule of Law*, and from influential bodies such as Liberty, Justice, Amnesty International and the legal profession's Bar Council. The veteran socialist Tony Benn commented in 2008, when the Commons discussed extending pre-trial detention to forty-two days that it was 'the day when Magna Carta was being repealed'.[15] In 2014 new secret courts, on the pattern of Star Chamber in Tudor and Stuart times, were proposed quite contrary to traditions of liberty as interpreted over the past eight hundred years. Latterly, Chris Grayling, a Conservative Lord Chancellor and a man with no legal expertise himself, has been threatening the very existence of judicial review and new forms of surveillance of ordinary citizens are being proposed. A bonfire of civil liberties thus continues to blaze. All these will have to be challenged again in both houses of parliament since they, perhaps the House of Lords in particular with its powerful legal expertise, have a unique role as custodians and guarantors of every value that Magna Carta and its traditions represent.

Two different, conflicting views have been offered on the importance of Magna Carta in modern times. The left-wing dramatist John Arden in *Left-handed Liberty* (1965) launched a serious attack on the Magna Carta mystique seeing it as having become a bland conventional wisdom and thus easily overridden. This was a dramatic production, curiously enough, commissioned by the Corporation of the City of London to commemorate

the 750th anniversary of the Charter in 1965 but it struck a distinctly non-celebratory note. Arden saw both King John and the barons in very disenchanted terms. If anything, King John was his hero, since he was at least the more intelligent and perhaps honest of the antagonists. Liberty, Arden showed, was being given with one hand and being taken away with the other. Thus a very insular, very English view of the great charter took pride of place in our 'island story'.

On the other hand, the fact that Magna Carta, though its principles are universal, is seen in very British terms (after all the Charter of 1215 pays full recognition to Scottish and Welsh law as well as to English) may be a strength. It is honoured all over the world, especially in the United States and the Commonwealth, and its universality has often been celebrated at the highest level. At the outset of the Universal Declaration of Human Rights in 1950, Mrs. Eleanor Roosevelt spoke of it being, or intending to be, 'the international Magna Carta of all men everywhere'. In recent times, Tim Berners-Lee has called for an 'online Magna Carta' to protect the integrity of the Internet. In the UK, it has also provided a benchmark for the excluded or victimized. The most important single document produced in our history, it provided inspiration for our forebears, and enabled those overlooked on class, gender or ethnic grounds to make progress, even if too slowly. Lord Judge, the former Lord Chief Justice, has written on how its basic tenets, that the authorities are not themselves above the law, the sovereignty of parliament in this land, the independence of the judiciary, are fundamental to our rights and liberties. [16] The legend and the myth have been more powerful than the historical facts: the point is that people believed these principles to exist and to be enduring. As Lord Bingham has observed, 'the myth proved a rallying point for centuries to come'.[17] These are a noble basis for 'British values' if such there be. Britain in the early twentieth-first century, may less obviously be a land of hope of glory. But, thanks in large measure to the timeless magic of Magna Carta, it could still be acknowledged and celebrated as Mother of the Free.

Notes

1. Jesse Norman, *Edmund Burke* (Collins, 2013), p. 286.
2. Juliet Barker, *England Arise* (Little Brown, 2014), p. 415.
3. Shelley, 'Mask of Anarchy', canto XCL.
4. Edward Vallance, *A Radical History of Britain* (Little Brown, 2009), p. 35.
5. William Morris, chapter 23 in *News from Nowhere*.

6. Henry Pelling, 'Trade Unions, Workers and the Law', in *Popular Politics and Society in Late Victorian Britain* (Macmillan, 1968), pp. 62–81; H.A. Clegg, Alan Fox and A.F. Thompson, *A History of British Trade Unions since 1889*, Vol. I (Oxford University Press, 1964), pp. 305–25.
7. Jane Morgan, *Conflict and Order* (Oxford University Press, 1987), pp. 229 ff.
8. J.A.G. Griffith, *The Politics of the Judiciary* (Manchester University Press, 1981, 2nd edn), pp. 227 ff.
9. Kenneth O. Morgan, *Michael Foot: A Life* (HarperCollins, 2007), pp. 295 ff; Lord Wedderburn, *The Worker and the Law* (Sweet and Maxwell, 3rd edn, 1976), pp. 586 ff.
10. Helena Normanton, 'Magna Carta and Women', *The Englishwoman*, XXVI, no. 77 (May 1915), pp. 129–42.
11. Helena Kennedy, *Eve was Framed* (1992). See also her *Just Law*.
12. See John A. Garrard, *The English and Immigration* (Oxford University Press, 1971), and Kenneth O. Morgan, *Consensus and Disunity* (Oxford University Press, 1979), pp. 238–9.
13. *The Future of a Multicultural Britain* (2000), commissioned by the Runnymede Trust.
14. Kenneth O. Morgan, 'The Political and Parliamentary Aspects of Pre-Trial Detention in the United Kingdom since 2000', in Marion del Bove and Fabrice Mourlon (eds.), *Pre-Trial Detention in 19th and 20th Century Common Law and Civil Law Systems* (Cambridge Scholars Publishing, 2014), pp. 13–24.
15. Francesca Krug, *A Magna Carta for all Humanity: Homing in on Human Rights* (Routledge, 2015), p. 202.
16. Lord Judge, 'We need vigilance over the values of Magna Carta', *The Times*, 12 February 2015.
17. Tom Bingham, *The Rule of Law* (Penguin Books edn, 2012), pp. 12–13.

CHAPTER 3

UK Supreme Court Versus US Supreme Court: Modern Use of Magna Carta

Geraldine Gadbin-George

Introduction

On 31 July 2015, representatives of the barons who had rebelled against King John in 1215 were found not guilty of treason by three most reputable judges gathered at the United Kingdom Supreme Court. This is not another example of the delays of justice but a mock trial organised as part of the celebrations for the 800th anniversary of Magna Carta.[1] The Great Charter has become the symbol of the rule of law and continues to inspire common law judges around the world. In his dissenting opinion to a decision rendered in June 2015 by the United States Supreme Court, Justice Breyer said: 'It is that rule of law, stretching back at least 800 years to Magna Carta, which in major part the Due Process Clause[2] seeks to protect.'[3]

How is Magna Carta used by the courts nowadays? What legal value and beyond that, cultural value does a reference to, or quotation of the Great Charter add to a court decision? The impact of Magna Carta will be assessed through a study of recent decisions handed down by the United Kingdom (UK) and the United States (US) highest courts. The choice of Robin Hood's country was obvious: Magna Carta was born in England

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and Robin, like the barons, was a fervent opponent of John. As for the US, the choice was made based on the fact that the country finds its historical roots in Europe and in particular, in the UK.

Regarding the courts chosen, the decision was made to focus exclusively on UK and US Supreme Court case law. For the UK, this includes decisions rendered since the creation of the Supreme Court in October 2009 further to the Constitutional Reform Act of 2005 and prior to that date, by the Appellate Committee of the House of Lords. Supreme Courts only consider issues of law (as opposed to fact) and their decisions are binding on lower courts. Pleadings are excluded from the present study as they tend to be biased, mostly those filed by litigants in person who, as pointed out by Joshua Rozenberg:

> tend to invest Magna Carta with more weight than it can carry. In 2013, a man acquitted of growing cannabis sought compensation from Scottish police and prosecutors for time he had spent on remand. [He] relied on Magna Carta to support his claim that he was not bound by laws to which he had not consented.[4]

The choice was made to consider contemporary decisions. A starting point had to be defined. Two specific dates sprang to mind which both bear a symbolic weight: the year 2000 (change of millennium) and the year 2005 (when the Constitutional Reform Act was passed in the UK). The second option was rejected as it only had a symbolic value for the UK, thus leaving the year 2000 as the starting point. The end point chosen for the study was mid-September 2015.

After defining the corpus of decisions quoting or referring to the Great Charter, attention will be paid to the practical use made of Magna Carta by the highest UK and US courts and the possible reasons underlying this use.

Identification of the Corpus

UK Supreme Court and House of Lords decisions were found on the website of the British and Irish Legal Information Institute (Bailii – www.bailii.org). Keywords 'Magna Carta' and 'jurisdiction' were entered in the Bailii search engine. The list of cases obtained can be found in Table 3.1. For US Supreme Court decisions, the results obtained by entering the keyword 'Magna Carta' into the US Supreme Court's official website, www.supremecourt.gov, were grossly incomplete: decisions such as the much publicised *Boumediene* case did not appear amongst the cases listed. Therefore three other reputable

websites were used (https://supreme.justia.com, www.law.cornell.edu and www.scotusblog.com respectively referred to as Justia, Cornell and Scotus). The same keyword was entered into their respective search engines and the results obtained were cross-referenced against each other to obtain a list which can be found in Table 3.2.

Tables 3.1 and 3.2 contain reverse chronological information such as the official case reference, the name of the judge(s) who referred to or quoted Magna Carta together with an indication of whether the reference/quotation was contained in the majority, concurring or dissenting opinion and where exactly.

Magna Carta: From Yesterday to Today

2015 gave rise to many commemorations, speeches or books celebrating Magna Carta, not only in its birth country but in many other common law countries. A few points need to be made in order to stress the legal value of the Great Charter and the reasons for its impact nowadays.

History and Current Jurisprudence in the UK

The 63 chapters of the original Magna Carta, signed by King John under duress, were repealed three months later at the Pope's request. Young King Henry published two successive revised versions in 1217 and 1225, hoping to pacify the relationship between the monarchy and the barons after John's death. Another version was subsequently published by Edward I in 1297, the provisions of which were gradually repealed between 1828 and 1969. In 1369, under Edward III's reign, the supremacy of the 1297 version of Magna Carta—as opposed to the 1215 version—was confirmed by a statute in the following terms: 'If any Statute be made to the contrary, that shall be holden for none.'[5]

Nowadays only three clauses of Magna Carta 1215, or more precisely 1297, remain in force: clause 1 ('the Church of England shall be free'), clause 9 ('the City of London shall have all the old liberties and customs' which corresponds to clause 13 in the 1215 version) and clause 29 (which contains the gist of clauses 39 and 40 of the 1215 charter). Clause 29 provides that:

> No freeman shall be taken or imprisoned, or 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.

As part of the 800th birthday celebrations, the Queen's official website comments: 'With the signing of the Magna Carta in 1215 […] the leading noblemen of England succeeded in forcing King John to accept that they and other freemen had rights against the Crown'.[6] Likewise, the British Library, which played an essential part in the organisation of the celebrations, points out on its website the major role played by the courts in the construction of the Great Charter:

> Magna Carta is sometimes regarded as the foundation of democracy in England. In fact, most of its terms applied only to a small proportion of the population in 1215, and the implementation of the charter in subsequent centuries remained open to the interpretation of the courts.[7]

For Lord Sumption, one of the UK Supreme Court Justices and also a historian specialising in medieval studies, two schools of thought co-exist:

> The first can conveniently be called the lawyer's view, although it is held by many people who are not lawyers. This holds the charter to be a major constitutional document, the foundation of the rule of law and the liberty of the subject in England. The other is the historian's view, which has tended to emphasise the self-interested motives of the barons and has generally been sceptical about the charter's constitutional significance.[8]

This approach is shared by Lord Neuberger, the current president of the UK Supreme Court, who expressed it in a speech made in May 2015 at Lincoln's Inn:

> Not only the constitutional principles, but the practicalities, religious beliefs, the state of technology, and social and cultural mores governing the lives of people in 1215 England were very different from those which govern our lives today. So it requires a great leap of imaginative thought and immersion in the culture before we can begin to understand what the Barons and the King thought that they were doing when they met at Runnymede. […].[9]

The importance of Magna Carta must therefore be put in perspective, even more so since, from the seventeenth century, the Great Charter was given a new interpretation – a new lease of life so far as its application in the US is concerned—by two British lawyers, Edward Coke and William

Blackstone. The former was Chief Justice and a politician under James I. He presided over the committee which drafted the Petition of Right 1628, one of the components of today's British Constitution. The latter is the author of the *Commentaries on the Laws of England* published in 1765. For Lord Sumption:

> Coke transformed Magna Carta from a somewhat technical catalogue of feudal regulations, into the foundation document of the English constitution, a status which it has enjoyed ever since among the large community of commentators who have never actually read it. […] He regarded it as the origin of the writ of habeas corpus and of trial by jury. More generally, Coke took the provisions of the charter which protected a man's 'liberties', which actually meant his privileges and immunities, and treated them as referring to the liberty of the subject. This meant, according to him, that all invasions of personal liberty by the Crown were unlawful.[10]

In other words, Coke distorted the original meaning of the Great Charter to adapt it to the culture of his time.

A century later, Blackstone carried on with Coke's work, albeit in a different direction. He believed that former clause 39 deserved in itself the title of Great Charter as it 'protected every individual of the nation in the free enjoyment of his life, his liberty and his property, unless declared to be forfeited by the judgment of his peers or the law of the land […]'.[11] For Joyce Lee Malcolm:

> Blackstone and his countrymen no longer subscribed to Coke's view that acts against fundamental rights are null and void […]. Instead, they trusted Parliament to protect their liberties. Parliament, not judges consulting Magna Carta or any list of rights, determined what English liberties were or should be.[12]

What is the current place occupied by Magna Carta in the British Constitution? There is no simple answer as the outlines of the Constitution are not well defined. In 2004, a committee composed of members of the House of Lords defined the main components of the Constitution as being:

> Magna Carta 1297, Bill of Rights 1688, Crown and Parliament Recognition Act 1689, Act of Settlement 1700, Union with Scotland Act 1707, Union with Ireland Act 1800, […], European Communities Act 1972, […], Supreme Court Act 1981, […], Government of Wales Act 1998, Human Rights Act 1998, Northern Ireland Act 1998, Scotland Act 1998, House of Lords Act 1999 […].[13]

The Great Charter—of 1297—appears as the foundation stone of the modern British Constitution. However, its impact is limited by the fact that only three clauses still apply. As for the 1215 version, in 2013 the Information Commissioner's Office of the House of Lords was asked: 'when and how the Magna Carta (1215) was superseded, overturned or repealed. The Commissioner's decision [was] that the House of Lords does not hold the requested information.'[14]

History and Current Jurisprudence in the US

In 1965, Erwin Griswold, the then President of the Harvard Law School, said the following words: 'Magna Carta is not primarily significant for what it was, but rather for what it was made to be.'[15]

The US is a young country which, during its construction, adapted the Great Charter to its budding culture. In 1606, the Charter of Virginia—the first colony set up on the other side of the Atlantic—provided that the colonies 'shall have and enjoy all liberties, franchises and immunities … as if they had been abiding and born within this our realm of England'.[16] In 1636, the colonial assembly of Maryland passed a bill (subsequently repealed by the English king) according to which: 'the inhabitants shall have all their rights and liberties according to the great charter of England'.[17] Other colonies followed. In 1683, Thomas Dungan, the then governor of New York, adopted a Charter of Liberties which was strongly inspired by Magna Carta. However, once again, it failed to be ratified by the London government on the grounds that it: '[was] savouring too strongly of popular freedom and as counter to the prerogatives of the legal supremacy of [the London] parliament'.[18]

The 1776 Declaration of Independence led to the ratification of the Constitution in 1789. Composed of seven articles only, it has, at its heart, the principle of separation of powers. The role of the executive power is secondary to that of the legislative power, which is composed of members elected by the people. The fear of an absolute regime—similar to those which existed at times on the old continent—remained and led to the creation of a system of checks and balances, the judicial power ensuring the compliance of federal executive and legislative acts and of all state decisions to the supreme law of the land.

The fact that the Constitution failed to protect individual rights and freedoms against possible abuses from federal authorities led to the adoption of the Bill of Rights two years later. Amongst the main amendments, the 5th guarantees that: 'No person shall […] be deprived of life, liberty, or property, without due process of law; nor shall private property be taken

for public use, without just compensation'. As for the 6th amendment, it provides: 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury […]'. The provisions of these two amendments reflect the spirit of former clauses 39 and 40 of the 1215 Magna Carta.

If the Bill of Rights aimed at protecting individual rights against possible abuses from the federal government, it soon appeared that the states could also abuse their powers, for example against the former slaves freed in 1865 by the vote of the 13th amendment. The 14th amendment was passed in 1868: 'No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law […]'. Its wording is reminiscent of the 5th amendment and served as the strategic tool used by the Supreme Court to make big chunks of the Bill of Rights not only binding at federal but also state level, a process known as selective incorporation.

The similarity of the wording of some amendments to the US Constitution and Magna Carta is not a coincidence. The construction of Magna Carta in the United Kingdom by Coke and subsequently Blackstone influenced the drafters of the US Bill of Rights. For Lord Sumption, the distorted analysis of the Great Charter made by Coke (followed by Blackstone's own distortions): 'was swallowed wholesale by the early American colonists. The framers of the US Constitution and the federal and state Bills of Rights, deployed Magna Carta against the government of George III, just as Coke had deployed it against Charles I.'[19] The United States sought inspiration in Magna Carta to build upon their emerging democracy.

In 2014, Akhil Reed Amar said:

> I don't know what the hell Magna Carta says; it's like Latin […]. We read 'law of the land' into it, and 'due process,' but that came later. In 1215, it wasn't about jury trials or ordinary people. Later generations would reinterpret Magna Carta in some very interesting ways, just as we later reinterpreted the Bill of Rights. It may not matter that Magna Carta was not originally about jury trials. It came to be about that.[20]

If in the UK the theoretical and jurisprudential place occupied by Magna Carta today seems fairly limited, things are different in the US where Magna Carta continues to play a major role, at least indirectly through the Bill of Rights which was inspired by it. After discussing theory and jurisprudence, the question that will need to be addressed will be that of the modern role of the Great Charter in case law?

Modern Case Law

In order to appreciate the modern cultural impact of Magna Carta through its use by the highest courts, a study of the cases mentioned in Tables 3.1 and 3.2 is necessary to assess a possible evolution between them.

In the United Kingdom

The main issue raised in *Newhaven Port and Properties v. East Sussex* was whether East Sussex County Council was wrong at law when it passed a byelaw agreeing to register a fairly small area of land as a village green as defined by the Commons Act 2006. That piece of land had been used by the public for more than 20 years. The case also raised the question of the nature of the public's rights over coastal beaches. Talking about the law which generally applies to foreshores, Lord Carnwath explained:

> A […] discussion of the development of the law up to 1969 can be found in the *Yale Law Journal* […]. The author traced the history of the law from its Roman roots, through Magna Carta, to the more modern law in England and America. […] He […] suggest[ed] that the common law of the foreshore seemed to be entering 'a major period of reformulation', which he described as 'a sharp acceleration of the process begun by Magna Carta.'

Lord Carnwath referred to an article published in a reputable academic journal discussing the evolution of the law applicable to foreshores over time. It is understood that there was an old legal regime followed by a modern one which started with Magna Carta—no version being specified. The Great Charter would have changed the course of the law and the process would have been accelerated in 1969.

HS2 Action Alliance v. Secretary of State for Transport was about a conflict of law between European Union law and the national legal system in relation to the proposed construction of the High Speed 2 railway. Lord Neuberger and Lord Mance pointed out:

> The United Kingdom has no written constitution, but we have a number of constitutional instruments. They include Magna Carta, the Petition of Right 1628, the Bill of Rights and (in Scotland) the Claim of Rights Act 1689, the Act of Settlement 1701 […]. The common law itself also recognises certain principles as fundamental to the rule of law.

Magna Carta is mentioned generally amongst many other major documents which form part of the British Constitution, as the starting point of this Constitution.

In *Lumba v. Secretary of State for the Home Department*, the Supreme Court held that the detention of foreign nationals pending deportation who completed a prison sentence for a criminal offence is unlawful on the grounds, *inter alia*, that the policy under which they were detained was not published and was inconsistent with the actual policy published. For Lord Collins:

> This is a case in which on any view there has been a breach of duty by the executive in the exercise of its power of detention. Fundamental rights are in play. Chapter 39 of Magna Carta (1215) said that 'no free man shall be seized or imprisoned … except … by the law of the land'. […] That the liberty of the subject is a fundamental constitutional principle hardly needs the great authority of Sir Thomas Bingham MR […] to support it, but it is worth recalling what he said in his book *The Rule of Law* (2010), at p 10, about the fundamental provisions of Magna Carta: 'These are words which should be inscribed on the stationery of the … Home Office.'

With a touch of humour, Lord Collins reminds the Home Office of the importance of the provisions of Chapter 39 of the 1215 Magna Carta.

The main issue in *Bancoult v. Secretary of State For FCO* was that of the monarch's unwritten constitutional powers. Purchased by the UK at the start of the nineteenth century, the Chagos Islands were subject to a reorganisation in 1965, further to which they became known as the British Indian Ocean Territory (BIOT). Two separate Orders in Council were then issued. Under the first order of 1974, all inhabitants of BIOT were removed by force and the main island leased out to the United States government to serve as a military base. It was then repealed and replaced by another, similar Order in 2004 against which M. Bancoult lodged a judicial review claim. Mr. Bancoult relied on the constitutional right of the inhabitants to live in their island under clause 29 of Magna Carta (see paragraphs 42 and 77 of the decision). For the judges:

> Mr Crow [representing the state] did not argue that chapter 29 of Magna Carta was not applicable or suitable to the circumstances of BIOT. So I proceed on the basis that it applies and that no-one can be exiled from BIOT 'but by the Law of the Land.' […] So, unless they can be said to be invalid for some reason, there is nothing in the terms of chapter 29 of Magna Carta which would make any banishment of the Chagossians by virtue of these

> Orders unlawful. Of course, Sir Sydney [Mr. Bancoult's counsel] contended that the Orders were indeed invalid.[…] Her Majesty had no power to legislate by Order in Council 'contrary to fundamental principles'of English common law. […] In addition to chapter 29 of Magna Carta, Sir Sydney cited the statement of Blackstone, *Commentaries on the Laws of England* (1809), that 'no power on earth, except the authority of Parliament, can send any subject of England out of the land against his will; no, not even a criminal.' I accept that both of these point to the existence of such a principle […].

Unlike the other UK cases mentioned here, the Bancoult matter is the only one in which Magna Carta is at the very heart of the litigation. Therefore many other references were made by the various judges in the court's decision. Magna Carta in its 1297 version comes across as a modern text the legal weight of which remains unchanged after eight centuries and interestingly, Blackstone's work was quoted by Mr. Bancoult's counsel.

In *A & Ors v. Secretary of State for the Home Department*, the higher court considered that the unlimited detention of foreign nationals suspected of terrorism by application of a statute is incompatible with article 5 of the European Convention on Human Rights as incorporated into national law. Lord Bingham held:

> […] the appellants were able to draw on the long libertarian tradition of English law, dating back to chapter 39 of Magna Carta 1215, given effect in the ancient remedy of habeas corpus, declared in the Petition of Right 1628, upheld in a series of landmark decisions down the centuries and embodied in the substance and procedure of the law to our own day.

Magna Carta (in its 1215 version) is described as a starting point for the ongoing protection of certain liberties over the last 800 years.

The main question addressed to the higher court in *Von Brandenburg v. East London and the City Mental Health NHS Trust* was whether a social worker acting in good faith could go against an order from a mental health tribunal if he was in possession of information which had not been in the tribunal's possession, even if there has been no real change in the person's circumstances. Lord Bingham's opinion was that:

> […] it is convenient to begin by rehearsing certain familiar overriding principles, not in themselves controversial. First, the common law respects and protects the personal freedom of the individual, which may not be curtailed save for a reason and in circumstances sanctioned by the law of

> the land. This principle is reflected in, but does not depend on, article 5(1) of the European Convention on Human Rights. It can be traced back to chapter 29 of Magna Carta 1297 and before that to chapter 39 of Magna Carta 1215.

Like most of the above mentioned cases, the Great Charter (in its 1215 and 1297 versions) is referred to as the starting point of the historical protection of fundamental rights. The impact of Magna Carta extends beyond UK borders as the European Convention on Human Rights has endorsed the principles set out in clause 39 of 1215 Magna Carta.

Subject to the *Bancoult* case which revolved around the construction and application of Magna Carta, the Great Charter seems to be used by the Supreme Court—either generally or through a specific provision of its 1215 or 1297 versions—as an everlasting component of the UK Constitution, a symbol of modern common law or as a starting point for the protection of some rights. The Justices refer directly to the Great Charter, even if Counsel (in *Bancoult* for instance) may refer to it through its interpretation by authors like Blackstone.

In the United States

The first time the US Supreme Court referred to Magna Carta was in 1819 in *Bank of Columbia v. Okely*,[21] about 40 years after the country became independent: 'The 21st article of the Declaration of Rights of the State of Maryland is in the words of Magna Charta.' The message is clear: the history of the US is based on the history of the UK where many US citizens have their roots.

In *Department of Transportation v. Association of American Railroads (AAR)*, the Supreme Court held that the National Railroad Passenger Corporation (Amtrack) was a governmental entity. Amtrack is a private company to which Congress gave priority to use track systems owned by the freight railroads for passenger rail travel at rates agreed to by the parties and which a 2008 statute subsequently jointly authorised, together with the Federal Railroad Administration (FRA), to issue 'metrics and standards' addressing the performance and scheduling of passenger railroad services. Being a governmental entity, Amtrack had a duty to act in the public interest. The Supreme Court held that the lower court had erred in holding that the 2008 act breached the principle of separation of powers and the due process clause of the 5th amendment.

In his opinion and after considering the origins of the principle of separation of powers (page 3) and of the rule of law back to the Greek and Roman era, Justice Thomas discussed the delegations of authority which the then Parliament granted to Henry VIII (page 6), before referring to John Locke's and William Blackstone's respective approaches (pages 7 and 8). Regarding the role which a public authority can confer on an individual or a private company, he held:

> This is not to say that the Crown did not endeavor to exercise the power to make rules governing private conduct. King James I made a famous attempt, […] prompting the influential jurist Chief Justice Edward Coke to write that the King could not 'change any part of the common law, nor create any offence by his proclamation, which was not an offence before, without Parliament.' […] Coke associated this principle with Chapter 39 of the Magna Carta, which he understood to guarantee that no subject would be deprived of a private right—that is, a right of life, liberty, or property—except in accordance with 'the law of the land' […].

The judge demonstrates his thorough knowledge of UK history and makes it his. Whilst discussing the US constitutional principle of separation of powers, he feels the need to go further and look at the UK historical documents which inspired the Framers of the US Constitution, as if the legal value of 800-year-old Magna Carta prevailed over the more recent US constitutional documents. However, in doing so, he refers indirectly to Magna Carta, through its construction by Coke.

In *Horne v. Department of Agriculture*, the US Supreme Court held that the takings clause requires the government to pay just compensation whether it takes real or personal property from their owners. The government had passed a 'marketing order' by which grape growers were forced to set aside a percentage of their crop for the government, free of charge, in order to ensure the stability of the market. The Horne family disputed the compliance of the reserve requirement with the 5th amendment's takings clause. For Chief Justice Roberts:

> The principle reflected in the [takings] Clause goes back at least 800 years to Magna Carta, which specifically protected agricultural crops from uncompensated takings. Clause 28 of that charter forbade any 'constable or other bailiff' from taking 'corn or other provisions from anyone without immediately tendering money therefor, unless he can have postponement thereof by permission of the seller.' Cl. 28 (1215), in W. McKechnie, *Magna Carta, A Commentary on the Great Charter of King John* 329

> (2d ed. 1914). The colonists brought the principles of Magna Carta with them to the New World, including that charter's protection against uncompensated takings of personal property.

Like above, the Chief Justice relies on the work of an early twentieth-century author to support his opinion that the takings clause of the US Bill of Rights finds its roots in Magna Carta—clause 28. Its long-lasting effects give additional value to the fairly recent US Constitution.

The US Supreme Court, in *Obergefell v. Hodges*, held contrary to the due process clause of the 14th amendment a state law denying homosexuals the right to marry and refusing the ratification of a marriage celebrated in another state. Justice Thomas lingers on the interpretation to be made of the word 'liberty'. He quotes versions 1215 and 1225 of clause 39 before referring to Coke for whom 'by the law of the land' means 'by due process of the common law' (page 4). He then goes on to say:

> The Framers drew heavily upon Blackstone's formulation, adopting provisions in early State Constitutions that replicated Magna Carta's language, but were modified to refer specifically to 'life, liberty, or property'. (page 5)

As well as showing once more his knowledge of UK history, Lord Thomas explains that the Framers of the various state constitutions—as well as the US Constitution—were strongly influenced, not directly by Magna Carta, but by its interpretation by Blackstone.

In *Kerry v. Din*, the legal issue in dispute was whether the denial of a visa application for Mrs. Din's husband—a resident citizen of Afghanistan and former civil servant in the Taliban regime—which did not set out the reasons for the refusal, was in breach of the 5th amendment due process clause on the grounds that she was deprived of her 'liberty' to live with her husband in the United States. According to Justice Scalia's opinion:

> The first question that we must ask […] is whether the denial of [the] visa application deprived Din of any of these interests. […] The Due Process Clause has its origin in Magna Carta. […] ch. 29 […]. Edward Coke, whose *Institutes* 'were read in the American Colonies by virtually every student of law,' *Klopfer v. North Carolina*, 386 U. S. 213, 225 (1967), thoroughly described the scope of the interests that could be deprived only pursuant to 'the law of the land.' Magna Carta, he wrote, ensured that, without due process, 'no man [may] be taken or imprisoned'; 'disseised of his lands, or tenements, or dispossessed of his goods, or chattels'; 'put from his livelihood

> without answer'; 'barred to have the benefit of the law'; denied 'the franchises, and privileges, which the subjects have of the gift of the king'; 'exiled'; or 'forejudged of life, or limbe, disherited, or put to torture, or death.' 1 Coke, *supra*, at 46–48. Blackstone's description of the rights protected by Magna Carta is similar […] *Commentaries on the Laws of England* 125 (1769).

Clause 29 of the 1297 Magna Carta—in which the Due Process Clause of the Bill of Rights has its roots—is discussed through the writings of both Coke and Blackstone, as if to give it—and subsequently the US Constitution—more legal weight.

Williams-Yulee v. Florida Bar is about a Florida attorney, Mrs. Williams-Yulee, who personally solicited funds—instead of setting up a committee to that effect as required by Canon 7C(1) of her state—for her electoral campaign to become a judge. She was disciplined by her state bar for being in breach of its code of conduct and disputed in court its compliance with the 1st amendment freedom of expression. Chief Justice Roberts explained:

> The Florida Supreme Court adopted Canon 7C(1) to promote the State's interests in 'protecting the integrity of the judiciary' and 'maintaining the public's confidence in an impartial judiciary.' […]. Judges, charged with exercising strict neutrality and independence, cannot supplicate campaign donors without diminishing public confidence in judicial integrity. This principle dates back at least eight centuries to Magna Carta, which proclaimed, 'To no one will we sell, to no one will we refuse or delay, right or justice.' Cl. 40 (1215) […].

The clause referred to here is clause 40, for the same reasons as in the above cases.

Two issues are raised in *Wellness v. Sharif*, the scope of the bankruptcy courts' jurisdiction and the resolution of public-rights disputes through the interpretation of the principle of separation of powers. Justice Thomas mentions John Locke and William Blackstone (page 9) and, before discussing the original intention of the Framers of the Constitution (page 10), he writes in a footnote:

> The protection of private rights in the Anglo-American tradition goes back to at least Magna Carta. The original 1215 charter is replete with restrictions on the King's ability to proceed against private rights, including most notably the provision that '[n]o free man shall be taken, imprisoned,

> disseised, outlawed, banished, or in any way destroyed, … except by the lawful judgment of his peers and by the law of the land.'

Here, the Great Charter is mentioned as a document which forms part of the 'Anglo-American tradition'.

The Supreme Court, in *Southern Union v. US*, had to decide if, under the 6th amendment, a factual element had be proved to the jury if it was likely to increase a fine—as opposed to increasing a prison sentence. Southern Union had been found criminally liable for storing liquid mercury in its warehouse without leave for a couple of years, and ordered to pay a 38.1 million dollar fine. After discussing the origins of the 6th amendment, Justice Breyer held:

> The only generally applicable limitations on the judge, when imposing the fine, were those contained in the English Bill of Rights and the Magna Carta. 1 W. & M., ch. 2, §11, in 3 *Eng. Stat. at Large* 440 (forbidding 'excessive Fines'); Magna Carta §20, 9 Hen. III, §14, in 1 *Eng. Stat. at Large* 5 (1225) (fine cannot deprive offender of means of livelihood); see Auckland, *supra,* at 73 (so interpreting Magna Carta); Blackstone 372–373 (same).

In order to support his legal reasoning, the judge gives historical information, before referring directly to clause 20 of the 1225 Magna Carta, and indirectly through the works of authors like Blackstone.

Hosanna-Tabor v. EEOC opposes a religious school to the Equal Employment Opportunity Commission. The Supreme Court held that under the ministerial exception protected by the religious clauses of the 1st amendment, a minister cannot bring a lawsuit against the church which employed him and fired him. Delivering the court's majority decision, Chief Justice Roberts said:

> Controversy between church and state over religious offices is hardly new. In 1215, the issue was addressed in the very first clause of Magna Carta. There, King John agreed that 'the English church shall be free, and shall have its rights undiminished and its liberties unimpaired.' The King in particular accepted the 'freedom of elections,' a right 'thought to be of the greatest necessity and importance to the English church.' J. Holt, *Magna Carta App.* IV, p. 317, cl. 1 (1965).

The judge assimilates the political system of the US to that of the UK and implies that King John's comments about the freedom of the church should apply to the American system which has its roots in the UK.

In the *Borough of Duryea v. Guarnieri* case, the Supreme Court held that the public concern test restricts the claims which public employees may make against their past or present employer under the petition clause of the 1st amendment. For Justice Kennedy:

> [The] Petition […] is of ancient significance in the English law and the Anglo American legal tradition. See, e.g. 1 W. Blackstone, *Commentaries* 143. […] The right to petition traces its origins to Magna Carta, which confirmed the right of barons to petition the King. […] Later, the Petition of Right of 1628 drew upon centuries of tradition and Magna Carta as a model for the Parliament to issue a plea, or even a demand, that the Crown refrain from certain actions. 3 Car. 1, ch. 1 (1627). […] The Petition of Right occupies a place in English constitutional history superseded in importance, perhaps, only by Magna Carta itself and the Declaration of Right of 1689. The following years saw use of mass petitions to address matters of public concern. […] The Declaration of Independence of 1776 arose in the same tradition […].

This resembles more a British history course on the protection of the right to petition than a judicial opinion by which a judge explains his reasoning. A general reference to Magna Carta is made, as well as to the Anglo-American tradition and the works of Blackstone.

In *McDonald v. Chicago*, the Supreme Court considered that the privileges and immunities clause of the 14th amendment makes the 2nd amendment binding on the states. In his opinion Justice Thomas discussed the history of the right to bear arms:

> This tradition begins with our country's English roots. Parliament declared the basic liberties of English citizens in a series of documents ranging from the Magna Carta to the Petition of Right and the English Bill of Rights. […] As tensions between England and the Colonies increased, the colonists adopted protest resolutions reasserting their claim to the inalienable rights of Englishmen. Again, they used the terms 'privileges' and 'immunities' to describe these rights. […]

The specificity of this case is that it refers to the 'English roots' of the US, not with a view to describing the similarities between the two countries but rather, the oppositions between them which led to the US proclaiming its independence from the English king.

Justice Breyer, in *Stoneridge v. Scientific-Atlanta*, said about the principle that a victim should receive compensation for the damage sustained

through a tortious action: 'The concept of a remedy for every wrong most clearly emerged from Sir Edward Coke's scholarship on Magna Carta.'

The *Boumediene v. Bush* case revolved around the compliance of the Military Commissions Act 2006 (MCA)—which provides that ordinary federal courts do not have jurisdiction to hear applications for habeas corpus from detained foreign nationals—with the suspension clause of the Constitution according to which: 'The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.' M. Boumediene is an Algerian national who was arrested and detained at Guantanamo on suspicion of terrorism against the US embassy in Bosnia. Discussing the due process of law of the 5th amendment, the Supreme Court held:

> The Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom. […] Magna Carta decreed that no man would be imprisoned contrary to the law of the land. Art. 39, in *Sources of Our Liberties* 17 (R. Perry & J. Cooper eds. 1959) ('No free man shall be taken or imprisoned or dispossessed, or outlawed, or banished, or in any way destroyed, nor will we go upon him, nor send upon him, except by the legal judgment of his peers or by the law of the land'). Important as the principle was, the Barons at Runnymede prescribed no specific legal process to enforce it. Holdsworth tells us, however, that gradually the writ of habeas corpus became the means by which the promise of Magna Carta was fulfilled. The development was painstaking, even by the centuries-long measures of English constitutional history. […] [F]rom an early date it was understood that the King, too, was subject to the law. As the writers said of Magna Carta, 'it means this, that the king is and shall be below the law.'

Apart from its historical interest, the direct relevance to the present case of some of the information given here—such as the submission of the King himself to the law—is not obvious.

In *Hamdi v. Rumsfeld*, the Supreme Court held that under the 5th amendment, the detention of a citizen as an enemy combatant does not deprive him of the right to contest that detention before a neutral decision maker. Justice Souter commented:

> Hamdi has been locked up for over two years. […] we are heirs to a tradition given voice 800 years ago by Magna Carta, which, on the barons' insistence,

> confined executive power by the law of the land. […] For me, […] the Government has failed to justify holding him in the absence of a further Act of Congress, criminal charges, a showing that the detention conforms to the laws of war […].

The message is clear that the 5th amendment is Magna Carta's heir. The reference to the Great Charter is very general and comes across as fairly imprecise, even though the judge obviously expects to give his opinion more weight by mentioning the charter.

In *State Farm Mutual Automobile Insurance Company v. Campbell*, the Supreme Court considered that the state court decision ordering an insurer to pay exorbitant punitive damages to its insured was in breach of the due process clause of the 14th amendment on the grounds that the payment ordered was neither reasonable nor proportionate to the damage sustained, and that it deprived the insurer of his property. Justice Kennedy wrote the majority decision and said:

> While States possess discretion over the imposition of punitive damages, it is well established that there are procedural and substantive constitutional limitations on these awards. […] The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor. […] ('This constitutional concern, itself harkening back to the Magna Carta, arises out of the basic unfairness of depriving citizens of life, liberty, or property, through the application, not of law and legal processes, but of arbitrary coercion').

As for most UK decisions, Magna Carta is used here as the starting point for the protection of a fundamental right.

Generally speaking, US Supreme Court Justices seem to be of the view that a reference to, or quotation of Magna Carta—whether it is the original document or a later version—gives additional weight to the legal value of the US Constitution, due to its long lasting application in the UK. The reference to old English—or the Anglo-American—tradition is given a persuasive value. The Justices do not seem concerned about the form of hierarchy which may arise between the US written Constitution and the UK uncodified one—the latter coming across as prevailing over the former—bearing in mind that Magna Carta is usually mentioned indirectly through the writings of ancient British authors.

United Kingdom Versus United States

What comparative conclusions can be drawn from the above decisions? On both sides of the Atlantic the Great Charter seems to be used in relation to a wide range of legal issues. The number of decisions found for the period running from January 2000 to mid-September 2015 (6 for the UK and 14 for the US) is fairly nominal, which means that the importance given to Magna Carta in both countries is fairly limited. 1 and 6 decisions were respectively handed down by the UK and US Supreme Courts in 2015, the US being keener on paying its tributes to the old Charter which inspired the Framers of the US Constitution.

For the UK (Table 3.1), Magna Carta was mentioned twice by Lords Bingham and Mance, and once by Lords Carnwath, Neuberger, Collins, Hoffmann, Carswell and Roger. For the last three, this was done in the *Bancoult* case which revolved around the possible application of the Great Charter to an island leased out to the US. There are 4 references to Magna Carta and 3 quotes. For 2 decisions, there is no indication of the relevant version of Magna Carta, the other 4 decisions relating to the 1215 version. In 4 cases, clause 39 was mentioned as opposed to a general reference. The Great Charter is exclusively mentioned in majority or concurring opinions (as opposed to dissenting ones). So, far as UK case law is concerned, the use of Magna Carta in a Supreme Court decision is therefore very rare, restricted to a limited number of Justices and serves to support an assertion, which explains why it was not used in a dissenting opinion. Magna Carta is also self-sufficient and has always been referred to or quoted directly over that period: it is never used through its interpretation by third parties like Blackstone or Coke. Moreover Magna Carta is used as an objective starting point for the historical protection of rights under modern common law.

For the US (Table 3.2), Magna Carta was mentioned 4 times by Justice Thomas, 3 times by Chief Justice Roberts and Justice Kennedy, and once by Justices Scalia, Breyer and Souter. In 3 of the 5 decisions rendered in 2015, Afro-American Justice Thomas is the one who referred to or quoted Magna Carta most, thus showing his particular attachment to the protection of people's rights. There are 7 references to and 8 quotations of the Great Charter. The 1215 version appears 7 times, the 1225 version twice, the 1297 once and the Great Charter is otherwise generally mentioned in 5 cases. Clauses 1, 28, 39 and 40 of the 1215 charter are mentioned

as well as, more rarely clause 20 of the 1225 Magna Carta and clause 29 of the 1297 charter (the wording of which is similar to clause 39 of the 1215 version). Magna Carta appears more or less equally in majority, concurring and dissenting opinions. However its use in dissenting opinions does not differ from that in majority or concurring opinions, which means that there is no particular emphasis on the constitutional protection of rights in dissenting opinions. Unlike its UK counterpart, there seems to be a need for US Supreme Court Justices to turn to the construction of Magna Carta by third parties, especially old British authors (such as Coke, Blackstone or others), rather than refer to it directly (Table 3.3). Rather than reinforcing the legal value of the US Constitution, regular references to Magna Carta as its ancestor undermines, to an extent, the legal value of the US constitutional documents. References to the British Crown by US judges is all the more disturbing given that those who framed the US Constitution had fled from the UK for political and religious reasons. The fairly nostalgic message sent by those judges who refer to their British origins is somewhat confusing but shows the attachment of the US judiciary to their roots.

Conclusion

For Justin Champion, the 1215 Magna Carta has become 'a myth […], a brand'.[22] But this myth or brand is mostly exported out of the UK. Despite a common legal culture, there is a discrepancy between the way the UK and US respective Supreme Courts make use of the Great Charter. In the UK where the Constitution is uncodified, judges do not place great emphasis on the very few provisions of Magna Carta which remain in force. Conversely in the US where there is a codified and written Constitution, some Justices feel the need to rely on their UK roots to justify the decisions they take. However rather than referring directly to Magna Carta, they tend to rely on secondary documents interpreting it, rather than the original document itself.

If Magna Carta is far from omnipresent in common law higher court decisions as evidenced by the small number of cases found, its importance as a constitutional symbol should not be understated and extends beyond the borders of common law countries. During a speech made in June 2011 at London university, Lady Justice Arden said:

> Magna Carta […] finds clear reflection in the International Convention on Civil and Political Rights,[23] the Universal Declaration of Human Rights,[24] and the European Convention on Human Rights.[25] Magna Carta belongs today, not only to England, but to the world.[26]

In the 1959 BBC parody of the famous US film *Twelve Angry Men*,[27] actor Tony Hancock asked: 'Does Magna Carta mean nothing to you? Did she die in vain?'. In view of the above, there is no doubt that the spirit of the Great Charter is still very much alive.

Annexes (MC Stands for Magna Carta)

Table 3.1 UK Supreme Court cases

Case reference	*Other relevant information*
Newhaven Port and Properties Ltd., R (on the application of) v East Sussex County Council & Anor [2015] UKSC 7	Lord Carnwath, concurring. Paragraph 124 Reference, MC and clause unspecified
HS2 Action Alliance Ltd., R (on the application of) v The Secretary of State for Transport & Anor [2014] UKSC 3 (22 January 2014)	Lord Neuberger and Lord Mance, concurring Paragraph 207. Reference, MC and clause unspecified
Lumba (WL) v Secretary of State for the Home Department [2011] UKSC 12 (23 March 2011)	Lord Collins, concurring Paragraph 219. Quotation of clause 39, 1215 MC
Bancoult, R (On The Application of) v Secretary of State For Foreign and Commonwealth Affairs (FCO) [2008] UKHL 61 (22 October 2008)	Lord Hoffmann 42; Lord Roger 77, 80, 83, 84, 86, 87, 117; Lord Carswell 124; Lord Mance 151; references + Quotation of clause 39, 1215 MC
A & Ors v. Secretary of State for the Home Department [2004] UKHL 56 (16 December 2004)	Lord Bingham, majority. Paragraph 36. Reference to clause 39, 1215 MC
Von Brandenburg, R (on the application of) v. East London and the City Mental Health NHS Trust & Anor [2003] UKHL 58 (13 November 2003)	Lord Collins, concurring. Paragraph 219. Quotation of clause 39, 1215 MC

All cases were found on www.bailii.org

Table 3.2 US Supreme Court cases

Case reference & website	*Other relevant information*
13–1080 *Department of Transportation v. Association of American Railroads* 575 U. S. (2015)	J. Thomas, concurring. Page 7 Reference to clause 39, 1215 MC + quotation in footnote
14–275 *Horne et al. v. Department of Agriculture* 576 U. S. (2015)	CJ. Roberts, majority. Page 5 Quotation of clause 28, 1215 MC
14–556 *Obergefell et al. v. Hodges, Director, Ohio Department of Health, et al.* 576 U. S. (2015)	J. Thomas, dissenting. Pages 4 and 5 Quotation of clause 39, 1215 MC + reference to 1225 MC
13–1402 *Kerry, Secretary of State, et al. v. Din* 576 U.S. (2015)	J. Scalia, majority. Pages 4 and 5 Quotation of clause 29, 1297 MC
13–1499 *Williams-Yulee v. Florida Bar* 575 U. S. (2015)	CJ. Roberts, majority. Page 9 Quotation of clause 40, 1215 MC
13–935 *Wellness International Network Ltd. v. Sharif* 575 U. S. (2015)	J. Thomas, dissenting. Page 9 (footnote) Quotation, clause 39, 1215 MC
11–94 *Southern Union Co. v. United States* 567 U.S. (2012)	J. Breyer, dissenting. Page 11 Reference to clause 20, 1225 MC
10–553 *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* 565 U. S. (2012) – Cornell	CJ. Roberts, majority. Section II A Quotation of clause 1, 1215 MC
09–1476 *Borough of Duryea v. Guarnieri* 564 U.S. (2011) – Cornell	J. Kennedy, majority. Page 14 Reference, unspecified clause and MC
08–1521 *McDonald v. Chicago* 561 U. S. (2010) – Justia	J. Thomas, concurring. Section II A 2 Reference, unspecified clause and MC
06–43 *Stoneridge Investment Partners LLC v. Scientific-Atlanta, Inc.* 443 F. 3d 987 (2008) – Justia	J. Stevens, dissenting. Page 12 (footnote) Reference, unspecified clause and MC
06–1195 *Lakhdar Boumediene et al. v. George W. Bush* 553 U.S. 723 (2008) – Scotusblog	J. Kennedy, majority. Pages 9 and 10 Quotation of clause 39, 1215 MC
03–6696 *Hamdi v. Donald H. Rumsfeld, Secretary of Defense, et al.* 542 U.S. 507 (2004) – Cornell	J. Souter, concurring. Page 15 Reference, unspecified clause and MC
01–1289 *State Farm Mut. Automobile Ins. Co. v. Campbell* 538 U.S. 408 (2003) – Justia	J. Kennedy, majority. Paragraphs 416 and 417 Reference, unspecified clause and MC

When no indication is given, the case was found on the official US Supreme Court website at the following address: www.supremecourt.gov. Other websites are indicated as Cornell, Justia or Scotus, as explained at the start of the present study

Table 3.3 US Supreme Court cases – specific information

Name of appellant	*References to origins (monarchy, old continent, old principles imported etc.)*	*Reference to/ quotation of Coke*	*Reference to/ quotation of Blackstone*	*Reference to/ quotation of other authors*
Department of Transportation	X	X	X	
Horne	X			X
Obergefell	X		X	
Wellness	X		X	X
Kerry	X	X	X	
Williams-Yulee				
Southern Union	X		X	X
Hosanna-Tabor	X			X
Borough of Duryea	X		X	
Mc Donald	X			
Stoneridge		X		
Boumediene	X			X
Hamdi	X			
State Farm Mutual				

Notes

1. See on the UK Supreme Court official website: www.supremecourt.uk/news/magna-carta-barons-found-not-guilty-of-treason-against-king-john.html, accessed 13 October 2015.
2. Due process is mentioned in the 5th and 14th amendments.
3. Kerry, Secretary of State, et al. v. Din, 576 U.S. (2015).
4. J. Rozenberg (undated) *Magna Carta in the Modern Age*. www.bl.uk/magna-carta/articles/magna-carta-in-the-modern-age, accessed 1 October 2015.
5. R.V. Turner, (2003) *Magna Carta: Through the Ages* (Harlow: Pearson Education), p. 116.
6. See on the Royal Family's official website: www.royal.gov.uk/MonarchUK/HowtheMonarchyworks/History%20and%20background.aspx, accessed 11 October 2015.
7. J. Rozenberg, as above.

8. Lord Sumption (9 March 2015) *Magna Carta then and now. Address to the Friends of the British Library*. www.supremecourt.uk/docs/speech-150309.pdf, accessed 23 October 2015.
9. Lord Neuberger (12 May 2015) *Magna Carta and the Holy Grail; Lincoln's Inn*. www.supremecourt.uk/docs/speech-150512.pdf, accessed 24 October 2015.
10. Lord Sumption (9 March 2015), as above.
11. B.H. Siegan (2001) *Property Rights: From Magna Carta to the Fourteenth Amendment* (London: Transaction Publishers), p. 31.
12. J. Podgers (2015) 'America's Magna Carta', *ABA Journal*. http://www.abajournal.com/magazine/article/americas_magna_carta, accessed 16 September 2015.
13. See the First Report of the Joint Committee on Draft Civil Contingencies Bill 28 November 2003 HL 184 HC 1074, paragraph 183. www.publications.parliament.uk/pa/jt200203/jtselect/jtdcc/184/18407.htm#a44, accessed 15 September 2015.
14. [2013] UKICO FS50464067.
15. S.E. Thorne, W.H. Dunham Jr., P.B. Kurland and I. Jennings (1965) *The Great Charter: Four essays on Magna Carta and the History of our Liberty* (New York: Pantheon Books), viii.
16. D.S. Bogen (2003) *Privileges and Immunities: A Reference Guide to the United States Constitution* (Westport: Praeger Publishers), p. 1.
17. H.D. Hazeltine (1917) 'The Influence of Magna Carta on American Constitutional Development', *Columbia Law Review*, vol. 17, no. 1, 1–33, p. 12.
18. G. Hindley (2008) *A Brief History of the Magna Carta* (London: Constable & Robinson), p. 268.
19. Lord Sumption (9 March 2015), as above.
20. J. Podgers (2015), as above.
21. Bank of Columbia v. Okely 17 U.S. 235 (1819). Page 17 U. S. 241.
22. J. Champion (1 May 2015) *Magna Carta after 800 Years: From liber homo to modern freedom*. http://oll.libertyfund.org/pages/libertymatters-mc, accessed 13 October 2015.
23. See article 9(1): 'Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.'
24. See article 9: 'No one shall be subjected to arbitrary arrest, detention or exile.'
25. See article 5(1): 'Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in

accordance with a procedure prescribed by law: (a) the lawful detention of a person after conviction by a competent court….'.

26. Lady Justice Arden (June 2011), *Magna Carta and the Judges – Realising the Vision*, p. 11. www.royalholloway.ac.uk/aboutus/documents/pdf/magnacarta/magnacarta8711.pdf, accessed 24 September 2015.
27. The original film came out in the United States in 1957 and is about the deliberations of a criminal jury in a homicide trial. The 1959 British parody was made by the BBC.

CHAPTER 4

Exploring the Magna Carta and Governmental Immunity Doctrines: The View from the United States

Credence Sol

Introduction

During the run-up to the 800th anniversary of Magna Carta, the American legal community organized numerous celebrations. The Library of Congress mounted a major exhibit of one of the 1215 exemplifications,[1] the American Bar Association created a national essay contest,[2] various law schools have held conferences[3] and organized exhibits,[4] and so on. American talk-show host David Letterman even asked David Cameron to explain the meaning of Magna Carta, an exchange that one British journalist interpreted as a signal that 'millions of American television viewers'[5] were excited about the anniversary. An American Bar Association representative told the British media that Americans learn about Magna Carta in 'grade school' and that the American judiciary views Magna Carta as 'crucial' to American law.[6]

The point that was lost in the celebratory atmosphere of the anniversary, at least as far as American law and lawyers are concerned, is that in

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modern times, Magna Carta is more honoured by American judges and lawmakers in the breach than in the observance.[7] What has not been said is that Magna Carta—or more accurately, Magna Carta's principle, as set forth in Clause 39, that *the government is not above the law*[8]—is treated as a historical relic by American judges and lawyers, something that is trotted out on significant anniversaries and put back on the shelf at most other times. Nowhere is the American government's long-ago abandonment—as early as the eighteenth century—of the principles of Magna Carta clearer than in its development and extension of a thicket of sovereign immunity doctrines that arrogate to itself and its officials immunity from being sued by its people in numerous areas of the law, including (in some situations) civil-rights law.

This chapter unfolds in four parts. First, it provides a brief overview of Magna Carta's history in the United States, focusing on the incorporation of some of its provisions into colonial and early state constitutions and laws. Second, it traces the history of the American courts' development of the sovereign immunity doctrine, describing the various types of immunity that are enjoyed by almost all levels of government in the US in many areas of the law. Third, it describes the various arguments that have been made for and against the doctrine of sovereign immunity. Fourth, it poses the question of whether the doctrine of sovereign immunity in the American courts is poised for further expansion, or whether there may be hope that Magna Carta's grounding principle of governmental accountability can find new life.

The History of Magna Carta in America and the Evolution of Sovereign Immunity

The History of Magna Carta During the Early Years of the United States

The first issue to consider in any study of the life of Magna Carta in the New World is its influence on the legal documents that are the cornerstones of American law. Legal historians of the colonial period and the decades that immediately followed it, emphasize not only that the Englishmen who formed the power structure of the young country brought with them English ideas about the law—specifically, 'the institutions and ideas that were inextricably bound up with Magna Carta and the Common Law'—but also that the American government retained those traditions.[9] From the beginning of the colonial period, in the 1606

Virginia Charter,[10] English colonists received the same rights and liberties as the home-landers who had remained in England. Later charters of other colonies continued to include those guarantees and indeed, required the colonial governments' laws to be consistent with English law, ostensibly including Magna Carta.[11] The colonies seemed to fulfil this requirement; for example, colonial Maryland implicitly recognized Magna Carta as incorporated into its laws in 1638,[12] North and South Carolina did the same in 1715,[13] and so on.

Following the Revolutionary War, various state constitutions—some of which built upon the royal charters and were drafted relatively soon after Independence, others which were drafted as late as the twentieth century—continued to incorporate Clause 39 of Magna Carta, typically in an implicit fashion by adopting all or part of the common law of England.[14] The referenced law included Clause 39 of Magna Carta, which provides that 'No freeman shall be arrested or imprisoned or deprived of his freehold or outlawed or banished or in any way ruined, nor will we take or order action against him, except by the lawful judgment of his equals and according to the law of the land' and guarantees that the government will not act against its citizens except in accordance with the law.

Clause 39 is also echoed in more modern state constitutions' due process guarantees.[15] Such guarantees typically use the same language as that of the federal constitution's Due Process Clause, which states that no person shall be 'deprived of life, liberty, or property, without due process of law',[16] and which courts and academics agree is derived from Magna Carta.[17] So in the early years of the United States, at least, it appeared that Magna Carta's principles of government accountability were taken seriously, at least in the ideals expressed in our founding documents. This is why the almost immediate development and expansion of the doctrine of sovereign immunity can (and should) be viewed as a somewhat surprising development.

The History of Sovereign Immunity in the United States

The reason that the existence of the sovereign-immunity doctrine in American law is so baffling is because the English maxim on which it is based—to wit, that 'The King can do no wrong'[18] and shall not be heard to answer in his own courts—is fundamentally incompatible with the ideals upon which the new nation purported to have been built. For example, the Library of Congress characterizes Magna Carta as 'a symbol of the

supremacy of the law over the will of the king', and claims that Magna Carta inspired the framers of the Constitution to create America's system of 'checks and balances' that is intended to prevent any of the three branches of government—executive, legislative, or judicial—from 'overreaching' its powers.[19] This description is a very interesting one. It also happens to be wrong, because it interprets Magna Carta as conferring to each branch of *the government* the exclusive right to police the other two branches. What rights do the people have against any of those branches? This account of the checks-and-balances system—which, to be fair, is a traditional view of checks and balances as taught to American schoolchildren[20] –forgets to mention the people and their ability to 'check' the executive and legislative branches through both regular and special (recall) elections. (Note here that the option of suing the government for its wrongdoing is not mentioned as a check; the reason for this omission is the doctrine of sovereign immunity that is the central topic of this chapter.) In theory, the system of checks and balances prevents overreach; in practice, however, the government does stand apart from most of the citizenry. If 'checks and balances' are the *only* mechanism that prevents governmental overreach, it is at least debatable that what the Library of Congress is saying here is that Magna gives the government the right to essentially police itself. Left unaddressed is the issue of whether Magna Carta stands for the principle that the *people*—even people as exalted as King John's 25 surety barons—might have any role to play in ensuring that the government must obey the law.

In the American context, there is increasing evidence that as far as our government is concerned, the public plays no legitimate role in shaping public policy. Recently, a widely reported study from Professor Martin Gilens (Princeton University) and Benjamin I. Page (North-western University) compared 20 years of data about public opinion to 20 years of Congressional legislation on more than 1,700 policy issues. They concluded that citizens' opinions have a 'near-minuscule impact' on public policy, and that the only reliable influence on lawmakers is not the power of the ballot box, but instead, large campaign contributions by lobbyists, corporations, and the wealthy.[21] In such an environment, the importance of keeping the courthouse doors open to people who seek to hold the government accountable is more important than ever.

Federal Sovereign Immunity Derives from the Common Law

In any event, it may be that the issue of Magna Carta's influence on the federal Constitution is a red herring when considering the question of whether the principles of Magna Carta, as imported into our national

constitution, are compatible with the American doctrine of sovereign immunity, because according to the case law sovereign immunity—at least the sovereign immunity of the *federal* government—is not actually a constitutional doctrine. In the 1882 case of *United States v. Lee*, the Supreme Court characterized federal sovereign immunity not as something that was contained in our constitution but instead, as a doctrine that was simply 'established' in English law and therefore treated as a part of American law.[22] With respect to the sovereign immunity of the states, it is notable that before independence, the American colonies expressly did not have sovereign immunity, and could be sued in their own courts, a point that Justice Souter noted in his dissent in the case of *Alden v. Maine*. At the Constitutional Convention, the issue of whether the states should have sovereign immunity was addressed, and at least some supporters of the Constitution argued that it was desirable for the states *not* to have immunity, on the grounds that government should be accountable to its citizens, who in turn should be treated fairly by the courts.[23] This argument certainly echoes the principle of Magna Carta that the government should not be above the law. Ultimately, the issue of whether the states (as opposed to the federal government) should have sovereign immunity was not resolved at the Constitutional Convention.

At any rate, even though the Constitution lacks much of a basis for federal sovereign immunity, the American courts have enthusiastically upheld sovereign immunity against the claims of American citizens—to the extent that the Supreme Court has held that as a constitutional matter,

> The contracts between a Nation and an individual are only binding on the conscience of the sovereign and have no pretentions to compulsive force. 'They confer no right of action independent of the sovereign will.' The rule that the United States may not be sued without its consent is all embracing.[24]

This notion that it is natural for a government to position itself above the law is an odd one in the American context, especially given the fact that since the birth of our nation, the Constitution has specifically provided that citizens unfairly deprived of their liberty and property rights shall have legal recourse, as set forth in both the Takings Clause ('private property [shall not] be taken for public use, without just compensation'[25] and the Due Process Clause ('no person shall be "deprived of life, liberty, or property without due process of law"'). Clearly, there is a conflict between the constitutional *theory* of an accountable government in accordance with the principles of Magna Carta and the *reality* of the judiciary's interpretation

of the law to remove that accountability. The result is that in the United States, the federal government cannot be sued except if it consents to be sued, which it has done on a limited basis through statutes such as the Federal Tort Claims Act and the Tucker Act, which are discussed below.

State Sovereign Immunity is a Constitutional Doctrine

The constitutional justification for the sovereign immunity of the states is somewhat different than for the federal government. As noted above, the issue of whether the states should have sovereign immunity was not resolved at the Constitutional Convention. However, only seven years after the 1788 ratification of the Constitution, the states ratified the 11th Amendment, which bars lawsuits against them by citizens of other states (or foreigners): 'The judicial power of the United States shall not be construed to extend to any [lawsuit], commenced or prosecuted against [a state] by citizens of another state, or by citizens or subjects of any foreign state.'[26] Even a casual reading of the text of the 11th Amendment shows that by its terms, it provides state governments with only *limited* immunity—that is, it grants immunity against lawsuits filed by plaintiffs who are either residents of other states or residents of foreign countries. Notwithstanding the clarity of the text, however, the Supreme Court, has interpreted the 11th Amendment very expansively, treating it 'as the embodiment of the doctrine of sovereign immunity'.[27] In other words, just as the courts have found principles of broad federal immunity that have a dubious foundation in the Constitution or its forebear, Magna Carta, the immunity of state governments likewise has been extended to go far beyond that which is enumerated in the 11th Amendment, although the federal courts have also held that Congress has the right to authorize lawsuits against the states (notwithstanding their 11th Amendment immunity) in certain cases, primarily related to various types of employment discrimination.[28] In addition, local governments are not protected by the 11th Amendment, and therefore can be sued for damages.[29]

Types of Governmental Immunity

As these exceptions indicate, the doctrine of sovereign immunity in the United States is significantly more complex than a blanket ban on lawsuits against the government. As noted above, the default rule, of course, is that the federal and state governments cannot be sued in court.[30] That said, there are a few remedies available to individuals who have been injured

by the government, such plaintiffs' rights are limited. For example, in the area of civil rights, plaintiffs can sue under a federal statute, Section 1983, which authorizes lawsuits for violations of *state law* in civil-rights cases.[31] However, Section 1983 has many exceptions. First, of course, a person cannot use the law as a vehicle for suing the federal government, because the federal government acts under colour of federal law, not state law. Second, a person cannot even sue a state government directly under section 1983. Instead, a person must sue the state government official involved—but there, too, there is a catch. Under *Ex Parte Young*,[32] a state official can only be sued in his or her 'official' capacity for injunctive relief, not for damages. To sue for damages, the plaintiff is required to sue the state official in his or her 'individual' capacity. On the federal side, plaintiffs who allege injury attributable to the federal government's violation of their civil rights can sue under a doctrine called the *Bivens* rule, which contains similar limitations: the federal government itself cannot be sued, but instead, plaintiffs must sue federal officials in their individual capacity.[33]

How can these limitations, which in many cases work to bar the courthouse doors completely, be squared with Magna Carta's promise to hold the government accountable to its people? The answer may be the doctrine of sovereign immunity contains numerous exceptions. For example, American law provides that although plaintiffs usually cannot sue the state or federal government directly, they can name state employees as defendants in their individual (i.e., private) capacities. Similarly, state employees can be named as defendants in their official capacities in lawsuits that seek only injunctive relief, not damages. These types of exceptions could be said to represent a 'compromise' that echoes a pre-Magna Carta procedure that was available in England, which permitted legal remedies against a *servant* of the crown ('through the prerogative writs of certiorari, mandamus, and prohibition') notwithstanding the existence of the King's sovereign immunity.[34] The theory was—and is—that if an individual officer or government employee breaks the law, the act was not done by 'the king'—or in America, by 'the government'—at all.[35] And therefore, immunity does not attach.

In reality, it would be deceptively simple to claim merely by filing a lawsuit that names a government employee as the defendant. The reason is that American law contains a veritable thicket of special rules and limitations that provide state officials—even in their individual capacity—with special types of protection against lawsuits. These protections are known collectively as the absolute and qualified immunity doctrines. Absolute

immunity is a relatively simple doctrine providing that certain government officials—for example, judges—simply cannot be sued for any acts that the individual performs in his or her official capacity, in other words, in the course of performing his or her duties.[36] For such government officials, the only real check is that legislators have the ability to impeach them. There is no recourse for the average citizen. Legislators, too, enjoy absolute immunity for acts that they perform in their official capacity.[37] Prosecutors enjoy absolute immunity for any acts that they perform in the course of initiating or prosecuting a criminal case.[38] Finally, the President of the United States enjoys absolute immunity for his official acts, although he can be sued during his term of office for acts that he committed before he was president.[39]

Qualified immunity is more complicated then absolute immunity. The qualified immunity doctrine, which is judicially created, provides that even if a government employee is not entitled to absolute immunity, he or she might still be immune from suit, albeit under more limited circumstances:

> Qualified immunity protects government officers from liability for money damages where the violated constitutional right was not 'clearly established.' If the defendant's conduct was 'objectively reasonable' in light of the existing legal principles governing the particular area, qualified immunity protects officials against damages. Qualified immunity is a significant defence to [federal civil rights] actions.[40]

The most important type of qualified immunity absolutely immunizes state employees from lawsuits unless their conduct, quote, 'violates then-clearly-established constitutional law'.[41] Another type of qualified immunity protects government employees from being sued for their 'discretionary acts'; that is, for acts that involve some element of policy choice.[42] Although a cynical view of this doctrine might result in its characterization as a mere protection of the government purse, others argue that the availability of qualified immunity frees government officials to enforce the law without constantly having to look over their shoulders and fear being sued.[43]

Although sovereign immunity is most often discussed in the context of civil-rights cases, it is important to note a second area of the law that is heavily impacted by America's doctrine of sovereign immunity: tort law. As noted above—and as suggested by the very nature of sovereign immunity—a person cannot sue the government in tort unless it agrees to be sued. In the field of tort law, there are statutes purporting to render

various levels of government amenable to suit, but the devil is in the detail, because the government's 'agreement' to be sued generally takes the form of tort claims acts' (that is, statutes) that strongly favour the government.[44] Tort claims acts impose various limitations on litigants. First, under the Federal Tort Claims Act (FTCA), a plaintiff is required to sue in the federal courts (not the state courts).[45] Second, the government cannot be found vicariously liable for the wrongful acts of its government contractors—in other words, private individuals and companies working for the government.[46] Third, a plaintiff can only sue the federal government in *negligence*. If the government has injured a person through the pursuit of the type of ultra hazardous activities that trigger the strict-liability doctrine or, worse yet, if the government has committed an intentional tort (like assault and battery, for example), the FTCA does not permit suit.[47] Fourth, the FTCA imposes procedural hurdles upon plaintiffs in lawsuits against the government that are not imposed on other litigants and that render it more difficult to sue a government-affiliated defendant than other types of tortfeasors.[48] More specifically, if a person is injured by the government's negligence, they cannot go straight to court. Instead, they must file a claim with the very agency that she accuses of wrongdoing. After the agency responds, the plaintiff has an extremely short space of time to file a lawsuit—6 months.[49] Fifth (and finally), tort claims acts restrict the types of remedies that are available to plaintiffs. Although plaintiffs can recover money, that remedy is limited to compensatory damages: plaintiffs cannot obtain punitive damages,[50] or attorney fees.[51] Moreover, the amount of compensatory damages is limited to the amount that is stated in the initial administrative claim.[52]

Criticisms of Sovereign Immunity

In summary, the above provides a brief description of how the doctrine of sovereign immunity evolved in the American system, and how that doctrine works today to essentially place a straitjacket on people who would seek to use the courts to force the government to submit to the law. This section addresses various criticisms and defences of the concept of sovereign immunity and its prominence in American law. It will begin by discussing three major criticisms of sovereign immunity: (1) fairness, or lack thereof; (2) the sovereignty of the Constitution; and (3) the sovereign immunity doctrine's incompatibility with American democratic ideals.

The first significant critique of sovereign immunity is that of fairness. This criticism is generally stated as follows: Why should the state get a 'free pass' when everybody else has to obey the law?[53] The government must be accountable to the people. Consider the horrifying case of *United States v. Stanley*.[54] That case involved an Army sergeant, James Stanley, who was stationed at Fort Knox in the late 1950s. The Army had a program in which it was testing the effect of LSD on humans for chemical-warfare purposes, and as part of that program, it secretly dosed Sergeant Stanley with LSD. He sued—using the vehicle of the FTCA—in a case that went all the way to the Supreme Court, where Justice Brennan characterized the government's actions as reminiscent of the Nazi doctors' experiments. That notwithstanding, Sergeant Stanley lost his case; in an opinion written by the late Justice Scalia, the Court held that the government was immune from suit. In Sergeant Stanley's case, after the uproar that followed the Supreme Court opinion, Congress passed a 'private bill' allowing him—and only him—to seek compensation, which he ultimately received after a private arbitration.[55] Although in the end James Stanley received some measure of justice, essentially he was the recipient of an act of grace. In a judicial system in which sovereign immunity is the rule, the government essentially has no incentive to obey the law, as Magna Carta says that it must.

The second significant critique of the sovereign-immunity doctrine is constitutionally grounded: in the American system, it is the Constitution that is sovereign—not the government. Professor Chemerinsky, in a 2001 article urging the wholesale abolition of the sovereign-immunity doctrine, provides the best articulation of this critique. He states,:

> A doctrine derived from the premise that 'the King can do no wrong' deserves no place in American law… American government is based on the fundamental recognition that the government and government officials can do wrong and must be held accountable. Sovereign immunity undermines that basic notion.[56]

In addition to the anti-nobility clause of the Constitution—article 1, section 9—the Constitution's Supremacy Clause, too, supports this critique. It is fundamental to our constitutional system of government that it is the Constitution that is the 'supreme law of the land', that it stands above the federal and state governments and their officials, who cannot act inconsistently with its requirements.[57] The existence of the

sovereign-immunity doctrine permits the government to freely violate the Constitution by taking away people's remedies even though—as noted above—the Constitution explicitly authorizes judicial remedies against the government, such as 'just compensation' when the government appropriates private property and 'due process' when the government violates a person's rights.

The third critique of sovereign immunity—and the critique that is the most closely related to the Constitution's roots in Magna Carta—is based on democracy. The United States was founded on the rejection of the monarchy and of royal prerogatives—as demonstrated by article I, section 9 of the Constitution, which bans titles of nobility. Sovereign immunity, however, was from its very creation intended to prop up royalism, the very antithesis of the American system.[58] Dean Prosser explained that in the American context, sovereign immunity rests on 'the idea that whatever the state does must be lawful, which has replaced the king who can do no wrong'.[59] That idea, however, is not only wrong now—it was wrong in Magna Carta's time, too, because there would have been no reason to adopt Clause 39 of Magna Carta if it was not realized, even in 1215, that the King not only had the *ability* to do wrong, but that he was *predisposed* to do so.[60] A conception of democracy that is limited to the ability to vote out an elected representative and the right to petition the government does nothing for the victim of police brutality, the soldier subjected to secret medical experiments, the taxpayer who is wrongfully assessed, or the innocent bystander who is injured by a government employee's negligence, none of whom find themselves any less injured simply because the wrongdoer is employed by the government. Indeed, in a democracy, one could argue that the government should not only be *as* accountable as any other wrongdoer—it should be *more* accountable, because it is acting on behalf of the people. Regardless of whether one is prepared to go that far it is fair to say that the government's special status in the American courtroom is entirely inconsistent with the democratic tendencies expressed by Magna Carta.

Defences of Sovereign Immunity

In the interest of fairness, let us turn to the issue of some of the most common defences of the doctrine of sovereign immunity. Those defences fall into three major categories: (1) the nature of sovereignty itself, (2) the separation of powers, and (3) economic considerations.

The first defence of sovereign immunity rests on the nature of sovereignty.[61] As far back as the Federalist Papers, there have been American defenders of the concept of sovereign immunity as a concept that is inherent to the nature of sovereignty.[62] As the Supreme Court has put it, 'There can be no legal right as against the authority that makes the law on which the right depends.'[63] The problem with this argument is that the idea that a person cannot have legal rights against the government that makes the laws, tends to ignore two important features of American democracy. First, of course, Constitutional rights are not 'granted' by the government: that notion is quite the reverse: it is the government whose powers are granted by the *Constitution*, which stands above the government. Second, to the extent that Constitutional rights—including but not limited to freedom of speech, the right to due process, and the right to be free from cruel and unusual punishment—can also be said to embody *human* rights, in the modern world it is universally recognized that such rights are an entitlement. They are not something that is 'granted' by a 'generous' sovereign or government or government official. In other words, the 'nature of sovereignty' is a particularly flimsy shield against accountability in cases that involve the violation of personal liberties and freedoms. And it is not difficult to see, if one looks closely enough, a kernel of recognition of the problem with the sovereignty argument in the very existence of Magna Carta and its foundational assumption that sovereignty has its limits.

The second defence of sovereign immunity rests on the principle of the separation of powers. This argument holds that sovereign immunity from suit is necessary to preserve separation of powers, because it would be improper to allow judges to interfere with the executive and legislative branches by enjoining their activities or forcing them to pay damages awards. Although this defence is theoretically interesting, it is premised on an absolutist vision of separation of powers that does not reflect how the sovereign-immunity doctrine has been implemented by the court. First, as discussed above, the sovereign-immunity doctrine does allow for *some* lawsuits against the government—lawsuits against state officials for injunctive relief, for example. Given the incredible amounts of time and money that are involved in any kind of litigation, it is difficult to see why the government wouldn't be almost as inconvenienced by a suit for injunctive relief as it would be by a suit that also contains a damages claim. In either case, the judiciary is interfering with the executive and legislative branches. In my view, any interpretation of the concept of 'separation of powers' that would strip the judicial branch of its ability to

decide matters related to other branches' wrongdoing would completely eviscerate the system of checks and balances that is so important to our system of governance. Without the ability to provide a check on the other two branches, what is the point of having a judiciary as one of the three constitutional branches of government? Why not just have disputes resolved by a non-constitutional agency instead? The answer, of course, is that disputes are generally not settled (not on a final basis, anyway) by non-constitutional agencies because article III of the Constitution explicitly provides for an independent judiciary that is not subordinate to the other two branches of government.

That said, let us move on to the third, and most frequently cited, argument in favour of sovereign immunity: economics. This argument goes that sovereign immunity conserves government/taxpayer funds.[64] This is one of the oldest justifications for sovereign immunity and goes back at least as far as the first English court case on sovereign immunity, *Russell v. Men of Devon*, in which the court dismissed a lawsuit against the population of an unincorporated English town,[65] reasoning that 'it is better that an individual sustain an injury than that the public should suffer an inconvenience'.[66] According to that reasoning, adopted by the American courts in 1812,[67] if the government is the wrongdoer, it is preferable to limit the plaintiff's remedy to injunctive relief rather than to dip into taxpayer funds to compensate him or her. To adopt this argument, of course, one must first accept the premise that money is a more important consideration than people's rights, whether that right at issue involves compensation for a personal injury, an economic injury, or a constitutional violation.[68] That said, even if one does subscribe to this view, the problem of taxpayer losses could be resolved to some extent through the purchase of liability insurance, which is what almost every other type of large organization does. So to the extent that the defence of sovereign immunity rests on practical considerations, I would respond that the government that makes the laws expects the people and companies subject to those laws to bear the financial burden of their failure to comply: why should the government be any different? If the answer is because the government operates using the people's money, my response would be threefold. First, the people can remove state officials whose conduct results in large damage claims, either at the next election or through a recall procedure. Second, the availability of insurance can limit the impact of a damage award on the government's budget. Third, if one accepts the premise that damage awards work as an incentive not to engage in future wrongdoing, one would expect exposing

the government to the 'business end' of that incentive to result in less of that behaviour. Abrogating or abolishing sovereign immunity, even if doing so results in damage awards, *should* encourage the government to act in accordance with its own laws, as envisioned in Clause 39 of Magna Carta, ultimately decreasing the frequency of the type of behaviour that can result in such awards.

The Future of Government Immunity: Are Governmental Actors More Equal than Others, or Is There Hope that the Principles of Magna Carta Will Find New Life?

Having briefly discussed the criticisms and defences of the sovereign-immunity doctrine, this chapter concludes by addressing the issue of the future of governmental immunity. Will American government officials continue to be 'more equal' than ordinary citizens? Or is there hope that the principles of Magna Carta will find new life in American case law? Notwithstanding the flowery tributes to Magna Carta from all corners of America's legal, political, and judicial establishments, its principle—as modified for American conditions—of a government that is unreservedly subject to its own laws seems further away than ever. Interest in reining in the various types of governmental immunity on the grounds that in America, the King can do wrong, seems to have peaked in the 1960s and 1970s. During that era, which legal scholars refer to as the Due Process Revolution, the American courts greatly expanded ordinary people's rights and interests against the government.[69] Although the term is often used to refer to the Supreme Court's series of cases in the early 1970s that expanded the rights of criminal defendants, the Due Process Revolution was actually broader than the area of criminal law, and expanded people's rights against government invasion of a broader set of property rights and a broader set of liberties than had previously been the case.[70] It was during that time that academic interest in providing the intellectual foundations to limit or abolish the sovereign-immunity doctrine also peaked.[71]

In contrast, more recent discussion of sovereign immunity and Magna Carta—and here I am referring to the American judiciary's treatment of the topic—has tended to be dismissive at best. Typically, in recent years, Supreme Court decisions that make reference to Magna Carta have done so in one of three ways. The first set of Magna Carta-citing cases cites

Magna Carta for its historical influence on early American law. For example, in the recent regulatory-takings case of *Horne et al. v. Department of Agriculture*,[72] the Court notes that the principles of the Takings Clause date back to Magna Carta and notes (as does this article) that the principles of Magna Carta were brought to America by the English. Notwithstanding the Court's citation of Magna Carta, the reference merely stands for the proposition that the principle embodied in the Takings Clause is a well-established one.[73] The second set of cases are those in which the court dutifully notes that one of the parties, typically the plaintiff, has argued that Magna Carta supports his or her position, whilst going on to avoid engaging the issue. An example of this type of case is *Padilla v. Rumsfeld*,[74] in which an individual suspect of being an 'unlawful combatant' in connection with the terrorist attacks of 11 September 2001, filed a habeas corpus petition challenging his detention by the US military. While the matter was still in the federal trial court (ultimately, it went to the US Supreme Court, which denied the petitioner's claim for relief on the ground that his original habeas petition had been filed in the wrong court), amicus briefs filed in the case claimed that Padilla's detention constituted a 'repudiation' of Magna Carta, a claim that the court quickly rejected.[75] The third set of cases involves citations to Magna Carta in dissenting opinions with no precedential value. This is the case in *Obergefell v. Hodges*,[76] which legalized same-sex marriage across the United States, and in which Justice Thomas cited Magna Carta in his dissent for the proposition that the Constitution's Due Process Clauses 'reach back to Magna Carta'.[77]

There are no significant cases that engage the doctrine of sovereign immunity in the course of their treatment of Magna Carta. Perhaps this is why Supreme Court Chief Justice John Roberts recently commented that, 'If you're citing Magna Carta in a brief before the Supreme Court of the United States or in an argument, you're in pretty bad shape. We like our authorities a little more current and a little more directly on point.'[78] The message is clear: although American jurists appreciate the principles and historical significance of the Great Charter, they apparently see no contradiction between its principles of government accountability and a well-entrenched shield against government liability that turns those principles on its head. For those reasons, notwithstanding America's enshrinement of Clause 39 of Magna Carta, there is no real indication that our judiciary intends to restrict a doctrine of sovereign immunity that places our government above the law.

Notes

1. '"Magna Carta: Muse and Mentor" Exhibition at the Library of Congress', Library of Congress news release, available at http://www.loc.gov/law/news/articles/2014-magna-carta.php (accessed 12 May 2016).
2. J. R. Silkenat, '800th anniversary of Magna Carta will be heralded with celebrations of the rule of law', *ABA Journal*, 1 June 2014, available at http://www.abajournal.com/magazine/article/800th_anniversary_of_magna_carta_will_be_heralded_with_celebrations/ (accessed 12 May 2016).
3. Examples include New York University Law School, which held an invitation-only symposium entitled '800 Years of the Magna Carta' in New York City on 6 November 2015 (*see* '800 Years of the Magna Carta', available at https://its.law.nyu.edu/eventcalendar/index.cfm?fuseaction=main.detail&id=42183 (accessed 12 May 2016)), and Brooklyn Law School, whose event was entitled 'From Runnymede to Philadelphia to Cyberspace: The Enduring Legacy of Magna Carta' and was held in New York City on 17 September 2015 (*see* http://livestream.com/internetsociety/magna-carta/videos/99662168 (accessed 12 May 2016)), among others.
4. A few of the law schools that mounted exhibits include Harvard Law School, whose law library hosted an exhibit titled 'One Text, Sixteen Manuscripts' from 1 September 2015 to 11 March 2016 (see http://exhibits.law.harvard.edu/one-text-sixteen-manuscripts (accessed 12 May 2016)), and Boston College Law School (see http://lawmagazine.bc.edu/2015/06/exploring-magna-carta/ (accessed 12 May 2016)).
5. H. Mount, 'Why are the Americans so excited about the Magna Carta?', *The Telegraph*, 25 November 2013, available at http://www.telegraph.co.uk/history/10465560/Why-are-the-Americans-so-excited-about-the-Magna-Carta.html (accessed 12 May 2016).
6. H. Mount, 'Why are the Americans so excited about the Magna Carta?'
7. W. Shakespeare, *Hamlet*, Act 1, Scene 4 (1602) ('But to my mind, though I am native here, And to the manner born, it is a custom, More honour'd in the breach than the observance.').
8. Magna Carta, cl. 39 ('No freeman shall be arrested or imprisoned or deprived of his freehold or outlawed or banished or in any way ruined, nor will we take or order action against him, except by the lawful judgment of his equals and according to the law of the land.').
9. H. D. Hazeltine, 'The Influence of Magna Carta on American Constitutional Development', *Magna Carta Commemoration Essays* (H.E. Malden, ed.) (The Lawbook Exchange, Ltd., 1917), available at http://oll.libertyfund.org/pages/magna-carta-and-the-us-constitution (accessed 2 November 2015).

10. The First Charter of Virginia (10 April 1606) ('Also we do, for Us, our Heirs, and Successors, DECLARE, by these Presents, that all and every the Persons being our Subjects, which shall dwell and inhabit within every or any of the said several Colonies and Plantations, and every of their children, which shall happen to be born within any of the Limits and Precincts of the said several Colonies and Plantations, shall HAVE and enjoy all Liberties, Franchises, and Immunities, within any of our other Dominions, to all Intents and Purposes, as if they had been abiding and born, within this our Realm of England, or any other of our said Dominions.'), available at http://avalon.law.yale.edu/17th_century/va01.asp (accessed 12 May 2016).
11. H.D. Hazeltine, 'The Influence of Magna Carta on American Constitutional Development'.
12. General Assembly of Maryland, An Act for the Liberties of the People (1639, Maryland Archives 1:41), *in* P. B. Kurland and R. Lerner (eds.), *The Founder's Constitution*, available at http://presspubs.uchicago.edu/founders/documents/v1ch14s1.html (accessed 12 May 2016), citing W. H. Browne (ed.), *Archives of Maryland: Proceedings and Acts of the General Assembly of Maryland,* vol. 1 (Baltimore: Maryland Historical Society, 1883).
13. D. Warren, *A History of the American Bar* 122–123 (Boston: Little, Brown, and Co. 1911) (North Carolina); W. B. Stoebuck, 'Reception of English Common Law in the American Colonies', 10 *Wm. & Mary L. Rev.* 393, 411 (1968), citing P.S. Reinsch, 'The English Common Law in the Early American Colonies', in 1 *Select Essays in Anglo-American Legal History* 367, 407–410 (1907).
14. See, e.g., Constitution of Delaware, art. 25 (1776) (adopting the common law of England); Constitution of Maryland, art. III (1776) (same); Constitution of New York, art. XXXV (1777) (same); among others.
15. See, e.g., Constitution of Alaska, art. 1, sec. 1.7 (due process) (1956); Constitution of Arizona, art. 2, sec. 4 (same) (1912); Constitution of California, art. 1, sec. 3(b)(4) (same) (1879); Constitution of the State of Illinois, art. 1, sec. 2 (same) (1970).
16. US Constitution, art. 5 (Due Process Clause).
17. See, e.g., *Doe v. Charlotte-Mecklenburg Bd. Of Educ.*, 731 S.E.2d 245, 247 (N.C. Ct. App. 2012) (characterizing Magna Carta as the 'forebear' of the Due Process Clause), citing E.S. Corwin, 'The Doctrine of Due Process of Law Before the Civil War', 24 *Harv. L. Rev.* 366, 368 (1911).
18. See *Molitor v. Kaneland Comm. Unit Dist. No. 302*, 18 Ill.2d 11, 15 (Ill. 1959) (discussing the history of sovereign immunity in England and the State of Illinois).

19. Library of Congress, 'Magna Carta: Muse and Mentor', available at http://www.loc.gov/exhibits/magna-carta-muse-and-mentor/executive-power.html (accessed 14 May 2016).
20. See Schoolhouse Rock, 'Checks and Balances', available at https://www.youtube.com/watch?v=T_foQoCHQq8 (accessed 14 May 2016).
21. See M. Gilens and B. I. Page, 'Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens', 12:3 *Perspectives on Politics* 564 (Sept. 2014) (reporting the results of a multivariate analysis measuring key variables for more than 1700 policy issues and concluding that 'average citizens and mass-based interest groups have little or no independent influence' on government policy and that all power resides with 'economic elites' and 'business interests' that make massive contributions to politicians).
22. J. Lobato and J. Theodore, 'The Scope of Federal Sovereign Immunity', Briefing Paper, *Harvard Law School Federal Budget Policy Seminar* (2006), at 1–2, citing *United States v. Lee*, 106 US 196, 205–07 (1882) ('The doctrine is derived from the laws and practices of our English ancestors; and … is beyond question that from the time of Edward the First until now the King of England was not suable in the courts of that country … And while the exemption of the United States and of the several States from being subjected as defendants to ordinary actions in the courts has since that time been repeatedly asserted here, the principle has never been discussed or the reasons for it given, but it has always been treated as an established doctrine.'); see also E. Chemerinsky, 'Against Sovereign Immunity', *Stanford Law Review* (2001) at 1 n.3 (citing Lee).
23. E. Chemerinsky, 'Against Sovereign Immunity', at n.31–32.
24. *Lynch v. United States*, 292 US 571, 580–581 (1934).
25. See E. Berger, 'The Collition of the Takings and State Sovereign Immunity Doctrines', 63 *Wash. & Lee L. Rev.* 498, 498 (2006) (arguing that the Takings Clause 'trumps' any sovereign immunity otherwise enjoyed by the government).
26. US Const., amd. XI.
27. L. S. Mullenix, M. H. Redish and G. Vairo, *Understanding Federal Courts and Jurisdiction* at 483–484 (LexisNexis 2015).
28. See, e.g., *Nevada Department of Human Resources v. Hibbs*, 538 US 721 (2003) (congress can abrogate state sovereign immunity in lawsuit for damages against state employer related to violation of Family and Medical Leave Act); *Tennessee v. Lane*, 541 US 509 (2004) (recognizing abrogation of state sovereignty in cases involving certain violations of the Americans with Disabilities Act in case in which plaintiff was required to crawl up the stairs of a courthouse because of the state's failure to comply with disability-access law).

29. See, e.g., *Mt. Healthy City Sch. Dist. Bd. Of Educ. v. Doyle*, 429 US 274 (1977), *Monell v. New York City Department of Social Services*, 436 US 658 (1978), cited in Shriver Center, *Federal Practice Manual for Legal Aid Attorneys*, sec. 8.1 at n.17 (2013 update).
30. Indeed, federal lawmakers have been known to pass laws *explicitly stating* not only that the government cannot be sued but that the laws themselves do not apply to Congress—in other words, that, contrary to every principle of Magna Carta, Congress is above the law. For example, Congress exempted itself from the Freedom of Information Act, which requires transparency in government. M. Woodbury, 'Clinton, Reno, and freedom of information: From Waldheim to Whitewater,' *Social Justice* 22.2 (60 (1995): 49–66. Congress also exempted itself from having to obey the federal law that it passed banning discrimination in the workplace and other federal employment laws. See C. D. Block, 'Congress and Accounting Scandals: Is the Pot Calling the Kettle Black?', 82 *Neb. L. Rev.* 365, 374 (2003). This practice did not end until 1995, when Congressional Republicans pushed through a law, the Congressional Accountability Act of 1995, which specifically required Congress to obey nearly a dozen employment laws from which it had previously been exempt. *Id*. Although Congress did not end its exemption from insider-trading laws until 2012, lawyers for the legislative branch recently argued to a federal court that lawmakers *still* cannot be investigated for violation of those laws. Why? The doctrine of sovereign immunity. See Respondents' Consolidated (I) Response to Order to Show Cause, and (II) Memorandum in Support of Motion to Dismiss or, In the Alternative, to Transfer, *Securities and Exchange Commission v. The Committee on Ways and Means of the US House of Representatives*, Case No. 14 Misc. 00193 (S.D.N.Y. 2014), available at https://www.documentcloud.org/documents/2074069-congress-vs-sec.html (accessed May 17, 2016).
31. 42 USC § 1983.
32. 209 US 123 (1908).
33. *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 US 388 (1971); see also *Gibson v. NSA et al.* (D. S.C. Mar. 12, 2015) (indicating that *Bivens* right is limited and will not be read expansively).
34. A. A. Preece, 'Legal Immunities', Paper delivered to the Annual Law & Society Conference (Melbourne, Australia), 11 December 2001, at 7.
35. L. S. Mullenix, M. H. Redish and G. Vairo, *Understanding Federal Courts and Jurisdiction* at 483–484 (2015).
36. *Bradley v. Fisher*, 80 US 335 (1872) (holding that judge was immune from suit filed by lawyer challenging disbarment decision); *Stump v. Sparkman*, 435 US 349 (1978) (holding that judge was immune from suit filed by woman who had been secretly sterilized as a teenager pursuant to court order in which judge purported to indemnify surgeon and hospital).

37. *Gravel v. United States*, 408 US 606 (1972) (absolute legislative immunity applies not only to legislators but also to their aides and covers all activities within the scope of the legislative process).
38. *Imbler v. Pachtman*, 424 US 409, 423–24 (1976) (prosecutor who knowingly introduced perjured testimony and hid exculpatory evidence immune from suit). This type of absolute immunity is also available to government lawyers' activities related to civil litigation. See *Mangiafico v. Blumenthal*, 471 F.3d 391, 396–97 (2d Cir. 2006) (absolute immunity protected state attorney general who declined to represent state employee in civil litigation).
39. *Nixon v. Fitzgerald*, 457 US 731 (1982) (President cannot be held liable for civil damages arising out of official act); *Clinton v. Jones*, 520 US 681 (1997) (President can be sued during his term of office for acts performed prior to taking in office).
40. D. Rudovsky, 'The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights', 138 *Penn. L. Rev.* 23, 26–27 (1989).
41. *Hope v. Pelzer*, 536 US 730 (2002) (permitting prisoner to pursue lawsuit against state prison guards who shackled him to a hitching post for hours at a time during the hot Alabama summer).
42. See *Berkovitz v. US*, 486 US 531, 536–537 (1988), and *US v. Gaubert*, 499 US 315, 322 (1991) (together establishing two-part test for discretionary-act immunity requiring defendant to show that his action both involved an element of individual judgment and was based on policy considerations.
43. D. Rudovsky, 'The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights' at 75–76 (citations omitted).
44. See P. F. Figley, 'Understanding the Federal Torts Claims Act: A Different Metaphor', 44 *Tort Trial & Insurance Practice L. J.* 1105, 1105 (2009) (noting that the Act's 'overall purpose is to provide a tort remedy for persons injured by wrongful acts or omissions by the federal government, but it contains numerous exceptions, exclusions, and prefiling requirements that frequently bar such claims'). Figley argues that the 'key foundation' of the FTCA is the sovereign immunity doctrine, which he argues is derived from the Appropriations Clause, which provides that 'No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.' *Id.* at 1107, citing US Const., art. I, § 9.
45. 28 USC § 1346(b).
46. See P. F. Figley, 'Understanding the Federal Torts Claims Act: A Different Metaphor' at 1112.
47. 28 USC § 1346(b).

48. J. M. Beermann, *Administrative Law* 193 (Aspen Publishers 2010).
49. 28 USC § 2401(b) ('A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.').
50. 28 USC § 2674.
51. *Stout v. State of Oklahoma ex rel. Oklahoma Highway Patrol* (W.D. Okla. Jan. 6, 2015).
52. 28 USC § 2675(b) (FTCA actions 'shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.').
53. J. Lobato and J. Theodore, 'The Scope of Federal Sovereign Immunity' at 3, citing *Atascadero State Hospital v. Scanlon*, 473 US 234, 252 (1985).
54. 483 US 669 (1987).
55. B. Erlandson, 'Ex-sergeant compensated for LSD experiments tests by Army, CIA done at Edgewood', *Baltimore Sun*, 7 March 1996.
56. E. Chemerinsky, 'Against Sovereign Immunity' at 1202 (citations omitted).
57. E. Chemerinsky, 'Against Sovereign Immunity' at 1202.
58. *Evans v. Board of County Commissioners*, 482 P.2d 968 (Colo. 1971) (in case rejecting the sovereign immunity doctrine, positing that sovereign immunity is derived from the political and personal goals of 'the Tudor monarchs, particularly Henry VIII', and arguing that 'The monarchial philosophies invented to solve the marital problems of Henry VIII are not sufficient justification for the denial of the right of recovery against the government in today's society. Assuming there was sovereign immunity of the Kings of England, our forebears won the Revolutionary War to rid themselves of such sovereign immunity prerogatives.'), cited in S. Sindell, 'Sovereign Immunity—An Argument Con', 22 *Clev. St. L. Rev.* 55, 62 (1973).
59. W. Prosser, *Handbook of the Law of Torts*, sec. 125, at 1001 (3rd ed., St. Paul, Minnesota, 1964), cited in S. Sindell, 'Sovereign Immunity—An Argument Con' at 58.
60. L. S. Mullenix, M. H. Redish and G. Vairo, *Understanding Federal Courts and Jurisdiction* at 483–484.
61. J. Lobato and J. Theodore, 'The Scope of Federal Sovereign Immunity' at 3, citing Seminole Tribe at 58 and *Idaho v. Coeur d'Alene Tribe*, 521 US. 261, 268 (1997).

62. J. Lobato and J. Theodore, 'The Scope of Federal Sovereign Immunity' at 3, citing *Alden v. Maine*, 527 US 706, 716 (1999) and *Seminole Tribe v. Florida*, 517 US 44, 54 (1996); see also *The Federalist*, No. 81, cited in G. W. Pugh, 'Historical Approach to the Doctrine of Sovereign Immunity', 13 *La. L. Rev.* 476, 482 n.29 (1953).
63. J. Lobato and J. Theodore, 'The Scope of Federal Sovereign Immunity' at 2, citing *Kawananakoa v. Polyblank*, 205 US 349, 353 (1907).
64. J. Lobato and J. Theodore, 'The Scope of Federal Sovereign Immunity' at 3, citing D. A. Webster, Beyond Federal Sovereign Immunity, 49 *Ohio St. L. J.* 725 (1988).
65. See *Belue v. City of Spartanburg*, 276 S.C. 381, 386 (1981) (so stating).
66. *Russell v. Men of Devon*, 100 Eng. Rep. 359 (1788), cited in S. Sindell, 'Sovereign Immunity—An Argument Con' at 57 n.16.
67. S. Sindell, 'Sovereign Immunity—An Argument Con' at 57 n.18, citing *Mower v. Leichester*, 9 Mass. 247 (1812).
68. S. Sindell, 'Sovereign Immunity—An Argument Con' at 60 (1973), citing *Muskopf v. Corning Hospital Dist.*, 55 Cal.2d 211, 216 (1961) ('If the reasons for *Russell v. Men of Devon* and the rule of county or local district immunity ever had any substance they have none today. Public convenience does not outweigh individual compensation…').
69. E. T. Sullivan & T. M. Massaro, *Due Process in American Constitutional Law* (Oxford 2013), 45.
70. E. T. Sullivan & T. M. Massaro, *Due Process in American Constitutional Law*, 43.
71. See, e.g., S. Sindell, 'Sovereign Immunity—An Argument Con' at 57 n.18 (1973); R. C. Cramton, 'Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant', 68 *Mich. L. Rev. 387*, 419 (1970) ('No scholar, so far as can be ascertained, has had a good word for sovereign immunity for many years'); K. C. Davis, 'Sovereign Immunity Must Go.' *Administrative Law Review* 383–405 (1970; but see E. Chemerinsky, 'Against Sovereign Immunity' at 1202 (2001) (advocating total abolition of the doctrine).
72. 576 US – (2015).
73. See also *Kerry, Secretary of State et al. v. Din*, 576 US – (2015) (in immigration case in which the Court ruled against a wife who challenged the exclusion of her Afghani-national husband, describing the origins of the American understanding of due process as beginning with Magna Carta and arguing that the scope of a person's due-process rights essentially did not expand during the 550+ years between 1215 and the late 1700s; in other words, in the context of this non-immunity case, the Court seems to be using Magna Carta to *restrict*, not to expand, Constitutional rights);

Williams-Yulee v. Florida Bar, 575 US – (2015) (in non-immunity case, noting that historically, judges are expected to behave in a manner that assures the public of their integrity and that Magna Carta is one of several sources of that rule, which also include later English laws and the federal judicial oath; the cases was ultimately decided based on case law interpreting the First Amendment);

74. 243 F.Supp.2d 42 (S.D.N.Y. 2003).
75. See also, e.g., *B.M. v. Superior Court of San Bernardino County* (Cal. App. 2009) (unpub.), in which the petitioner, a parent whose children had been permanently placed in care following numerous incidents of abuse and neglect, based the entirety of her case on Magna Carta; the court gave no indication that it even considered the argument); *Capps v. Player, et al.* (D. S.C. 2014) (unpub.) (in prisoner lawsuit against jail and jail employees, claiming that defendants' refusal to pay prisoner $144 million for a blood sample that he gave when he was booked violated 'the Geneva Conventions Act, RICO, the Magna Carta, and the Hague Action Conventions of 1899–1907'; court summarily rejected the argument).
76. 576 US – (2015).
77. See also, e.g., *Department of Transportation v. Association of American Railroads*, 575 US – (2015) (Thomas, J., dissenting) (in case involving question of whether Amtrak railway is a government entity, noting influence of Magna Carta on the jurisprudence of Edward Coke; immunity was not at issue).
78. Donna Sokol, 'Magna Carta's Legal Legacy: Law Librarian of Congress Speaks with Two Chief Justices', *In Custodia Legis: Law Librarians of Congress* (blog) (19 19 November 2014), available at http://blogs.loc.gov/law/2014/11/magna-cartas-legal-legacy-law-librarian-of-congress-speaks-with-two-chief-justices/ (accessed 19 May 2016).

CHAPTER 5

A New Magna Carta? The Written Constitution Debate in the United Kingdom

Andrew Blick

In July 2014 the House of Commons Political and Constitutional Reform Committee (PCRC) published its second report of the 2014–15 parliamentary session. It was entitled *A new Magna Carta?* (Political and Constitutional Reform Committee 2014). More than 400 pages in length, it was the most substantial output of a project the Committee ran throughout the 2010–15 Parliament and—as it would transpire—the entire existence of the Committee itself. The purpose of the overall Committee inquiry was to investigate the possibility of the United Kingdom (UK) adopting a 'written' or 'codified' constitution. These terms imply the creation of a single text or group of texts avowedly containing the core systemic arrangements of a polity, and enjoying a special legal status. For while significant parts of the UK constitution are written down in official documents, they are not gathered together in a single document officially known as the constitution, and clearly given a privileged position as fundamental law. The UK is famously unusual in lacking a written constitution. There is a longstanding academic and political debate about what

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this absence means, and whether it should and can be rectified. But the PCRC investigation represented the first full parliamentary foray into this territory.

The July 2014 report, the author of which was Professor Robert Blackburn of King's College London, broke down into three different parts. The first comprised an outline of the 'Arguments For and Against Codifying the UK Constitution'. The second part set out 'Three Illustrative Blueprints', providing options for a constitutional text. They were, first, a code that Parliament could adopt but that would not have the status of a statute; second a 'Constitutional Consolidation Act', which would set out in a single statute the existing constitutional arrangements for the UK; and third a fully blown constitution for the UK, conforming most closely to the ideal of a written constitution as set out above. The third part of the report was called 'The Preparation, Design and Implementation of a Codified UK Constitution'. As the title suggested, it considered the means by which a UK written constitution could be brought about. In publishing the report, the Committee did not endorse a particular viewpoint on the matters contained within it, but sought the views of the public on three key questions. First, was a written constitution for the UK needed? Second, if it was, of the three possible types of text set out in the report, which was preferable? Third and finally, what alterations might be necessary to the most desirable of the three blueprints, assuming that a written constitution was desirable at all?

The purpose of this chapter is to consider the implications of this inquiry, taking into account that it chose to associate itself with *Magna Carta*. Though I am employed as an academic, for present purposes I write largely from my own personal perspective. I do so drawing on my own experiences and impressions derived from my association with the PCRC initiative, to which I was research fellow. I discuss the political and policy background to the formation of PCRC, the overall historic development of the UK parliamentary select committee system, especially within the House of Commons, and what it means for the UK constitution. The chapter also analyses the unusual features of the particular investigation into the written constitution subject undertaken by PCRC. Finally, it relates this subject matter to *Magna Carta* itself and the underlying nature of the UK system of government, considering patterns from the past and the prospects for the future.

The Political and Policy Background: Gordon Brown and the Coalition

It is important to appreciate the context within which PCRC came into being and embarked upon its project. The Committee was set up in June 2010. Part of its remit was to hold to account the Deputy Prime Minister, Nick Clegg. The government in which Clegg was a participant, established following the General Election of the previous month, was an unusual one on the contemporary UK landscape. Circumstances preceding and surrounding its formation are illustrative with regards to the written constitution debate, and the specific work of PCRC. Normally, the 'First Past the Post' system employed for elections to the House of Commons in the Westminster Parliament can be relied upon to deliver single-party majorities, even though the winning party does not attain even close to 50 per cent of the popular vote. But in May 2010 it was different. The previous party of government, Labour, led by Gordon Brown, lost its majority. But while the Conservatives, under David Cameron, became the largest single party in the Commons, they were short of a majority. As we know, there was no written constitution to turn to for guidance as to what should happen in such circumstances. However, Brown had, earlier in the year, taken a tentative first step that he hoped might lead on to the creation of such a text. He authorised the Cabinet Secretary and Head of the Home Civil Service, Gus O'Donnell, to begin the production of a document setting out the key principles of the UK constitution as they existed at the time.

This text eventually appeared in its full first edition at the end of 2011, under the title *The Cabinet Manual* (Cabinet Office 2011). In itself it was far from being a written constitution. It was not subject to any form of democratic approval, and not intended to have any legal status. From this perspective the manual was a modest initiative. But it was nonetheless significant as a first official attempt publicly to encapsulate some of the core features of the UK constitution. Moreover, the larger Brown initiative to which it was connected was of historic significance. No UK Prime Minister had ever embarked on an attempt to establish a written constitution. Having already indicated that he personally favoured the introduction of such a document, Brown publicly announced his plan for a cross-party process with wide public engagement in February 2010. Around this time a paper was produced internally for the Cabinet on how to take the idea forward; and an expert consultative group met at No. 10. As we will see, this particular effort was doomed. Brown lost office in May,

and the coalition government that succeeded his Labour administration did not continue his project.

By the time PCRC came into being, then, the initiative Brown had sought to instigate was already over. But it is important, despite the fate of the project, to recognise its historic importance. We can view an effort to achieve an ambitious objective that ends in failure from different perspectives. One is to focus on the particular unsuccessful outcome, and to conclude that the goal is unattainable. But another is to note the attempt, and conclude that something that has been tried once may be tried again, perhaps in more propitious circumstances and having learned the lessons of the previous effort. The value of the latter approach is manifest if we consider UK constitutional history. Devolution, that is democratic self-government in crucial domestic policy areas for certain territories within the UK, is now regarded as a firm constitutional fixture, especially in Wales and Scotland. But its historical development was prolonged, faltering and painful (Bogdanor 2001; Mitchell 2009). The origins of the idea stretch back well into the nineteenth century. As Liberal Prime Minister, William Gladstone tried—and failed—twice to legislate for Home Rule, an antecedent to devolution, for Ireland. A later Liberal premier, Herbert Asquith, succeeded in passing provision for this reform onto the statute book, but it was never implemented. Subsequently, Northern Ireland had a system of devolution for half a century from the early 1920s. While this model survived for a significant period of time, it was not a happy experience for the significant minority group of Roman Catholic republicans who were excluded from power, subject to the Protestant, Unionist majority that permanently held office. The frozen conflict in Northern Ireland thawed by the early 1970s and the onset of the Troubles forced the suspension of devolution.

A further thwarted effort came in 1979 when proposed schemes of self-government for Wales and Scotland both fell at the referendum stage. In Wales there was a large majority opposed; in Scotland a simple majority was in favour, but not sufficient to meet the required minimum level of support that had been set. This setback precipitated the fall of the Labour government of the day. The Labour Party lost the consequent UK General Election to the Conservatives, and spent the next eighteen years in Opposition. Given all that had come before, it is understandable that many—including some within the Labour Party itself—were apprehensive about a further attempt at devolution when Tony Blair led it to victory at the 1997 UK General Election, with this plan forming an important part of the manifesto on which the new government was elected. But voters in the territories involved

approved devolution schemes in Wales, Scotland and Northern Ireland. While there was important political opposition—including from the Conservatives (though there was all party agreement over Northern Ireland), in time the new devolved institutions became politically entrenched. The balance of debate eventually shifted from whether or not devolution was desirable, to whether or not it should be extended further, to how it should be extended further. A possible conclusion we might draw from the unsuccessful Brown written constitution initiative is that an ambitious objective, though it may take several attempts over a long period of time, can be attained.

The Brown project may (or may not) prove to be a precursor of something more substantial. But its only fruit during the time that Brown was at No. 10 was in an early draft excerpt of the *Cabinet Manual*, that ironically helped smooth the path to the coalition government that succeeded his own, and the end of his written constitution plan. For while Brown saw the manual as part of this grander agenda, it served other agendas as well. One objective was the creation of a guidebook explaining the workings of government, both to insiders and the public, modelled on a New Zealand text, also called *The Cabinet Manual*. Another was to produce a written statement that would clarify the principles of government formation that would apply in circumstances where a General Election produced a House of Commons without a single-party majority. Commentators suspected that the General Election due in 2010 might produce such an outcome, which it duly did. Shortly beforehand, the Cabinet Office had issued an initial chapter from the manual that set out the rules that were believed to apply in such circumstances (Blick 2016).

Acting in accordance with already-established principles that this publication made explicit, Brown stayed on as Prime Minister after the General Election, pending the formation of a viable government. There were no rules, in the draft manual or elsewhere, dictating who had a right to form (or try to form) a government. But since Labour had lost its majority and the Conservatives were the largest party, the political momentum was with Cameron. He found the idea of attempting to form a single-party minority government unattractive, partly because he felt it would not be secure enough, a particular problem given the prevailing international climate of financial and economic instability. In arithmetical terms the most plausible deal, and the only one that would actually produce a comfortable majority in the Commons, was one between the Conservatives and the Liberal Democrats. There were some political obstacles. The two parties had clear differences in policy areas including towards the European

Union and human rights. Other apparent disagreements, particularly over economic policy, melted away more quickly than some expected. Though there was a parallel—and seemingly half-hearted—negotiation between the Liberal Democrats and Labour, it was the Conservatives and Liberal Democrats who proved more able to form a government.

Constitutional issues figured prominently in the coalition agreement. Systemic reform was a longstanding interest of the Liberal Democrats. The clinching concession from the Conservatives in negotiations had been to agree to hold a referendum on whether the UK should adopt the Alternative Vote system for elections to the UK Parliament in place of First Past the Post. Other commitments made in the programme for the new government related to the introduction of an elected House of Lords, the setting up of commissions on a Bill of Rights and on the implications of devolution for the UK Parliament, a reduction in number of parliamentary constituencies and equalisation of the size of their electorates, and the introduction of fixed-term parliaments. Suggesting that importance was attached to this constitutional aspect of the coalition agenda, Clegg, as well as being Deputy Prime Minister, was given a specific portfolio for political and constitutional reform. It was to hold him to account in this specific capacity that the PCRC was formed. This chain of events meant that the Brown written constitution project was lost, but the means of progressing it through another means simultaneously was created.

The Political and Constitutional Reform Committee in Perspective

The Liberal Democrats, like Labour, had included in their manifesto for the 2010 General Election support for the idea of a written constitution process. In this sense, since between them the two parties accounted for more than half of votes cast, a majority had endorsed this idea. (Surely most of those who voted for either party were not aware of this particular plan, but the same could be said for many other supposedly democratically mandated policies.) The Liberal Democrats had in fact been committed to a written constitution for longer than Labour, as far back as the late 1980s. But this particular objective did not find its way into the coalition agreement. Though the new government carried the *Cabinet Manual* project that it had inherited from the previous administration to completion, it did not retain the plan that for Brown had provided this text with its underlying purpose.

Clegg, therefore, had no written constitution proposal on his agenda. In as far as it was responsible for holding him to account, it was not clear that PCRC could conduct an inquiry in this area. How then did it end up doing so? A second part of the committee remit, alongside the focus on Clegg, was more generally to consider political and constitutional reform. Its open-ended quality allowed for the inquiry that is the focus of this chapter. But in choosing to interpret its terms of reference in this way, PCRC was certainly ambitious. The subject matter was substantial and had never before been investigated in the form of an official, public investigation. Moreover, the approach that PCRC took in its conduct of the work was innovative and demanding. To fully appreciate these qualities, it is necessary to consider the historic development of the Commons select committee system.

Often the term 'Parliament' is used to imply not a body comprising House of Commons, House of Lords and monarch, but merely the Commons. And within that, a popular perception is of it being the Commons chamber, the famous venue in which government and opposition members face each other. The portion of parliamentary business that more members of the public have viewed on television than any other is the weekly, heated, Prime Minister's Questions. A traditionalist view is that adversarial, partisan debates taking place in plenary sessions are the essence of Parliament, and that they ought to be. But the real position—historic and contemporary—is difficult fully to reconcile with this idealistic depiction, and should cause us to question whether a circumstance that never truly prevailed should be regarded as a model to maintain. Just as Parliament is about more than simply the Commons, the Commons is about more than clashes between government and opposition in a packed Chamber.

Committees of various kinds have long been crucial to the work of the Commons. The term 'committee' has a variety of applications. It has described bodies of varied size—from a Committee of the Whole House to a group of around a dozen. It has also referred to a wide variety of functions, including scrutiny of public finance, of legislation, or of government policy. Committees could be at the centre of major political developments, as during the frequently turbulent seventeenth century (Kyle and Peacey 2002). But what, specifically, of select committees, bodies set up by the House to work in specific areas? The 1960s saw a rising incidence of demands for the reform of Parliament, part of a wider trend at the time for the questioning of constitutional and social arrangements in the UK. Those

who saw a need for change perceived an expansion in the role of central government during the twentieth century as having left Parliament at a disadvantage in holding the executive to account. They tended to draw the conclusion that developments in the select committee system provided a key to possible improvement (Hill and Whichelow 1964; Crick 1964, 1968, 1970). But though they sought change, reformers did not regard themselves as starting with a blank sheet. They were able to draw attention to many precedents stretching back into the nineteenth century: the Committee of Public Accounts; the Select Committee on Estimates and its sub-bodies; the Standing Joint Committee on Indian Affairs; the Select Committee on Nationalised Industries; the Scottish Grand Committee; even the Select Committee on Kitchen and Refreshment Rooms.

After experiments with subject-specialist committees in the 1960s and 1970s, a lasting change occurred in 1979. The newly-installed Conservative government under Margaret Thatcher facilitated the formation of a group of select committees, each with a specific departmental focus. Their remit was to examine the expenditure, administration and policy of their allotted offices of government. This reform was important, and it is true that 1979 represents an important point of development in the Commons select committee system. But as we have seen it was not completely lacking in precursors. Furthermore, there have been major changes subsequently.

The 1979 changes were contested. During the debates leading up to and surrounding the reconfiguration of this year, a number of points of contention emerged. Was there a risk that select committees would distract from the work of the Chamber, to the detriment of the overall institution? Would select committees intrude inappropriately on the work of the executive branch of government? Would they promote among their members a mode of consensual working across party lines? If so was such a development desirable, or was it more fitting for MPs to operate as part of antagonistic tribes? The debate was also framed by the emphases placed by proponents of reform: that the entry point for committees would be the control of expenditure; and that their main purpose would be to feed into and inform debates in the main chamber (Drewry 1989; Jogerst 1993).

Much of this discourse now seems of its time. For instance, while MPs on committees do generally work in a way that suppresses more explicit partisanship, few objections are now raised to this consensual way of working, which is often regarded as a virtue. Arguably, committees have taken on an active role in certain executive activities, particularly through their

holding of pre-appointment hearings with individuals who are favoured candidates for a range of major public offices. But the government acquiesced in this practice, and there seems no prospect that it will be ended. In another sense, the capacity of committees to wield power that might challenge the position of the executive is limited. Unlike specialist committees in a number of other countries, they do not have a central role in the legislative process. While they may carry out pre-legislative and post-legislative scrutiny, and inform the House in its consideration of primary and secondary legislation, unlike their counterparts in many foreign countries, they do not directly initiate or process bills. Committees do not have a role in setting the Budget. Their impact is more generally limited by nature of the UK constitution. Governments normally rest on a majority in the House of Commons, and this balance of representation is reflected in the party make-up of committees, which therefore are unlikely to be overtly hostile to the government of the day. The contrast with a system such as that prevailing in the US, where the president may well not enjoy majorities in Congress, is striking. Expenditure is not as prominent a part of the work of committees as might once have been imagined for them. And while they do provide material for debates in plenary, their direct relationship with the outside world, through taking evidence and communicating their work via the media, is also of great importance.

Much has changed since 1979. The House of Commons has secured certain concessions over the way in which civil servants provide it with evidence. Generally, when appearing before committees, officials act on the instructions of ministers and do not speak on their own account. However, under sustained pressure, the executive has provided more extensive acknowledgement in its guidance documents of the importance of parliamentary accountability and the rights of committees to secure the cooperation they need to go about their work (Blick 2016). This change can be seen as part of a broader tendency towards a greater assertiveness on the part of Parliament with respect to the executive. Government backbenchers in the Commons, for instance, have over recent decades become increasingly likely to vote against the party whip. Parliament has in different ways encroached on varied areas that were once regarded as spheres of executive privilege. Since 2003 a convention has developed that, wherever possible, specific approval should be acquired from the Commons in advance of UK participation in conventional military action overseas. Under the *Constitutional Reform and Governance Act 2010*, the Commons acquired the ability to block the ratification of treaties; and the

Act provides the power to manage the Civil Service, previously a matter of Royal Prerogative, with a statutory basis. As we have seen, select committees have taken on a role in major public appointments, though their ability to influence the final decision is informal only.

An important set of changes to the Commons select committee system occurred in 2002, following a dispute between the House and the government. The size of each committee staff was expanded; and a further central source of staff support was created in the form of the House of Commons Scrutiny Unit. Payment was introduced for their chairs, denoting the status of the position and creating a (limited) potential for a career path for MPs that did not involve promotion to ministerial or shadow ministerial posts. Around this time a practice taking hold was for pre-legislative scrutiny of draft bills, sometimes conducted by select committees. The Commons Liaison Committee, a body made up of the chairs of the committees, began holding six-monthly evidence sessions with the Prime Minister, an extension of the accountability capacity of the committee system. In yet another significant development dating from 2002, the Liaison Committee also issued a set of 'Core Tasks' intended to provide clarity about the range of tasks committees performed, against which they could report. A revised version was approved in January 2013 (House of Commons Liaison Committee 2013).

The Core Tasks text sets an 'Overall aim' of subjecting both departments and the ministers at their head to accountability for the policies they adopt and the decisions they make, and assisting the House of Commons in scrutinising legislation. One activity involves considering the 'Strategy' of departments. Committees investigate both how departments go about deciding what their main purposes are, and how far they are able to perform them. Next is the assessment of 'Policy', including the future plans of departments, policies that are developing, and ways in which they may not be effective. Committees can take the initiative, making their own recommendations for action. 'Expenditure and Performance' is another area of interest set out in the 'Core Tasks'. And while legislation is not a focus in the way it tends to be for equivalent committees in other countries, certain legislative tasks are suggested. One is to scrutinise 'Draft Bills'. Another is to help the House in the examination of 'Bills and Delegated Legislation'. Third is the conduct of 'Post-Legislative Scrutiny', considering how laws have operated in practice. Select committees also assess EU policy and law. They 'scrutinise major appointments made by the department', and they support the wider House through providing it

with reports. Lastly, select committees carry out 'Public Engagement… ensuring that the work of the committee is accessible to the public'. The role proposed by the Core Tasks is extensive and creates the potential for many different forms of action. The PCRC inquiry was an example of how these opportunities could creatively be developed.

Another key year in the history of Commons select committees was 2010. In the wake of the MPs' expenses scandal of 2009, a Select Committee on the Reform of the House of Commons formed. In accordance with one of its recommendations, elections were introduced for select committees. Up to this point, in effect the whips—responsible for discipline within both government and opposition parties—determined who sat on committees. Whips could not directly control the activities of select committees. But this arrangement clearly had implications for the autonomy, perceived and actual, of these bodies. A particular problem was that select committees were responsible for holding government to account, yet government whips were central to determining who sat on them. Since 2010, chairs of select committees have been elected by the whole House, and other members returned by party caucuses. There were implications both for the status of committees as a whole as removed from partisan and governmental obligations, and for chairs whose relative importance within committees and beyond was arguably strengthened by a direct mandate, one that was wider than that of others on the committee.

This interlinked set of developments help explain how a House of Commons select committee came to conduct a five-year inquiry into the possibility of a written constitution for the UK from 2010. Committees had become a firmly accepted part of the constitutional landscape, and increasingly confident about placing ambitious interpretations on their terms of reference. In particular, an MP such as Graham Allen could become a chair. It is unlikely the whips would have chosen him, since he was a more independent operator than some others in the Parliamentary Labour Party. But elections for chairs, beyond the control of the whips, opened up new possibilities. The campaigns for reform of the House of Commons that gained particular force in the 1960s were of immense significance. But, as sometimes happens, the immense momentum they helped generate has now left many of the initial demands seeming strangely modest. A reading of the literature from this earlier era does not tend to create the impression that there would one day be a committee, with externally funded support from a university department, producing draft constitutions for the UK. But this precise outcome came about.

The Inquiry

As we have seen, calls for reform of the select committee system that rose in intensity from the 1960s were part of a wider impetus towards systemic change, leading, for instance, to successive overhauls of the Civil Service. One feature of this trend which took hold from the following decade onwards was for various commentators to call for the introduction of a written UK constitution (Blick 2015). They came from across the political spectrum, ranging from the Conservative grandee Lord Hailsham to the left-wing Labour MP Tony Benn. A variety of arguments have been offered in favour of such a change. It is advanced that setting out our core arrangements in writing in a single place would be beneficial from the perspective of transparency and public understanding of how the political system works. Collective, popular ownership of the system itself would be possible, perhaps inspiring greater public confidence in our democratic institutions. A further claim is that the creation of a written constitution would enable a holistic consideration of the different components involved, making it possible to configure them in such a way that they functioned together more coherently. Advocates of a written constitution also hold that such a text would ensure that certain core principles that are integral to democracy and human rights are better protected. For some, it would be a useful means of ensuring greater constitutional stability, and preventing the instability of continual systemic alteration. Another reason offered for introducing a written constitution, possibly in tension with the previous justification, would be that it would be a means of enacting a series of changes—for instance, to the voting system used for the House of Commons, to the composition of the House of Lords, and to the status of devolved and local government.

But there are opponents of a written constitution—again ranging across the political spectrum—with a variety of arguments at their disposal. Some object to the idea of societal blueprints, and argue that the UK system has developed in a gradual, piecemeal way which has proved effective. They argue that no clear need has been demonstrated for the introduction of such a text. Furthermore, some sceptics observe a lack of public support for or interest in such a change. This lack of imperative and enthusiasm is particularly problematic, it is argued further, given how substantial a task the creation of a written constitution would be. The exercise, opponents claim, would be a divisive one. It would be difficult to secure agreement about what should be included in the text, and—they hold—some would see an

opportunity to pursue their own particular reform agendas, creating further controversy. A written constitution, some believe, would deny the UK the flexibility and capacity for change, when necessary, that they suggest has proved advantageous to it. Some supporters of constitutional change argue it is preferable to focus on specific goals, rather than seeking to create a complete model in a single text. Finally, those who object to this kind of change believe that it would be democratically problematic. It would, in their account, transfer power away from elected politicians, in particular those in the House of Commons, and to the judiciary, who would be responsible for upholding the constitution, even to the point of being able to annul Acts of Parliament that they found to be in violation of the text.

Therefore, although the PCRC inquiry embarked upon in 2010 was a parliamentary first, it drew on a debate that had been gestating for some time. Furthermore, as already shown, the subject it addressed had been a policy objective of a recent Prime Minister, Gordon Brown. Select committees may have become more autonomous and wide-ranging in their approach over time, but they still need to operate with attention to their wider political environment. Furthermore, they must proceed with regard to their own political dynamics. A strength of select committees is their all-party nature. They gain in authority by virtue of appearing not merely to be pursuing particular partisan gain. But retaining this quality necessitates that they proceed by consensus. The divisions over the desirability of a written constitution were replicated within the Committee itself. While the chair was a known supporter, it was never likely that he would be able to enlist the entirety of the Committee as enthusiasts in this cause. It was not a divisive issue in a party political sense. As already noted, support or opposition to a written constitution has not correlated clearly with party affiliation. Nonetheless, the PCRC was not going to be able to produce a firm recommendation in either direction on this subject. However, members were able to agree that it was a subject that merited investigation. But how would they go about doing so?

Simply to rehearse the 'for and against' debate would be of limited value. It would probably not reach a conclusion, and could simply reinforce and even exacerbate potential divisions within the Committee about the desirability of a written constitution. Therefore, while it was necessary to afford due attention to this discussion, other parallel investigations were conducted. The first was a relatively under-investigated area: the process that would be needed to establish a written constitution. Typically, these documents internationally emerge from a 'convention' of some kind—that is to

say, a deliberative gathering that devises the text. The design of such a body is vital. It must have access to appropriate expert device if it is to produce an effective, properly considered document. Equally, it should be composed in such a way as to command democratic legitimacy. This quality is essential for a document intended to be the higher law of a society and an expression of popular sovereignty. How can a convention attain this particular goal? A common contemporary idea is that it should include within it members of the public selected at random—an adaptation of sortition as practised in the democracies of Ancient Greece. These participants might sit alongside a smaller group representatives of political parties, to ensure that there is some kind of elite involvement. The document the convention produced might then require some further form of ratification, perhaps by referendum.

But what would the document actually contain? This question comprised the final strand of the PCRC inquiry. The framers of a written constitution would need to make a series of decisions. For instance, they would need to consider the writing style they should employ, how much detail their text should contain, and how expansive its coverage should be. They might wish to include a declaratory preamble, introducing the document and setting out its underlying purpose. The text proper might address a range of matters. It could set out the powers, functions and procedures of key institutions such as the executive, the UK Parliament and the courts, and explain how they should interact with each other. It would probably contain a statement of individual rights. A question to be resolved in this regard would be whether this part of the text would address only civil and political rights, such as freedom of expression and association, or would extend into the socio-economic sphere, providing expressly, for instance, for a right to health, housing or education.

Those drafting the constitution would also need to consider whether the UK should be federal in nature, with powers firmly divided between the UK level and a series of 'states', which would presumably include the current devolved territories of Wales, Scotland and Northern Ireland. If this approach were to be taken, a further decision would involve how to provide for England, whether as a single unit or in a series of regions. All of the 'states' could be included in a federal upper chamber, potentially supplanting the present House of Lords. Whether or not to provide for some matters in the text—such as electoral systems—would be a matter of judgement. The decision might partly depend on how far it was intended to use the drafting process as a vehicle for achieving reform. But the document would almost certainly need to deal with two further matters.

The first would be how the constitution was to be enforced—whether by the courts or some other means. The second would be the procedure necessary to amending the text itself, perhaps involving a two thirds vote in one or both of the chambers of the UK Parliament, or approval through referendum.

As this discussion shows, a proper examination of the possibility of a written constitution for the UK and connected issues was going to be a substantial undertaking. The Committee had an important advantage from the outset. Because the coalition had committed to legislating for five-year fixed-term parliaments (and duly did so through the *Fixed-term Parliaments Act 2011*) it seemed likely that PCRC could, if it chose, look at the issue for a prolonged period, up to half a decade. As well as time, it was necessary to have sufficient support. Commons select committees are fortunate in having excellent teams of staff at their disposal, who prove adept at multi-tasking. However, they tend not to total more than six or seven, including logistical assistants, press officers, researchers and clerks. While the Committee conducted this long-term project, it would in parallel carry out more regular shorter inquiries, dealing with specific government initiatives and other policy issues. It would have been simply unreasonable to expect the PCRC team to carry out all of this work in-house.

At the request of the Chair I therefore took on the task of forming an academic support structure that could focus on the written constitution inquiry, leaving the PCRC staff to continue with its other work. Eventually I became research fellow to a group based at King's College London, led by Professor Robert Blackburn and advised by Professor Vernon Bogdanor, with Dr. Elin Weston and Philip Povey, among others, also playing important roles. While it was normal for select committees to engage specialist advisers, to attach a group on this scale in such a sustained way was new. So too was the way in which we resourced the programme. Funding came from two external sources: the Joseph Rowntree Charitable Trust and the Nuffield Foundation. The actual work consisted of producing a series of research papers. It culminated in the report described at the head of this chapter, on which there was an extended and exhaustive public consultation. Throughout our task it was vital that we maintained a close relationship with the committee staff proper, while at the same time not adding unnecessarily to their workload. We were very fortunate in having, over the five years, three very cooperative and able individuals with whom to interact in this regard.

Potentially, this overall model is adaptable. Different Commons select committees could choose at the beginning of each Parliament a major area of research, and receive enhanced academic assistance for the purpose. The cost, however, would probably need to be met from public rather than charitable sources, something that may be difficult to realise in the present climate.

The *Magna Carta* Context

But beyond the title of the main report in 2014, what was the connection between the PCRC inquiry and *Magna Carta*? On one level, naming the publication in this way was opportunistic. *Magna Carta* is undoubtedly a powerful brand to associate with, and interest was rising, with the 800th anniversary approaching the following year. But there were deeper links. While the term 'unwritten' is often applied to the UK constitution, in an historical sense this label can be profoundly misleading. A succession of texts—of which *Magna Carta* is the most famous example—have sought to set out in writing primary features of the political and social system. They began long before *Magna Carta*. The first document ever written in English was a law code created by King Ethelbert of Kent, probably at the beginning of the seventh century. It set out fundamental legal principles primarily connected to redress for grievances. Successive Anglo-Saxon, Norman and the Angevin rulers had their own texts issued (Wormald 2001). Those who drafted *Magna Carta* in 1215 were able to refer back to the coronation charter of Henry I dating from 1100 for some inspiration and justification.

None of these texts were fully-blown written constitutions as we might understand them today, the concept of which had not yet developed. But they did share some features with this later variety of instrument. *Magna Carta* illustrates the point well. It dealt with the organisation and role of different public institutions, such as the courts, central and local government, and the church. In particular, it sought to establish firm rules about the way in which the king could go about obtaining money from his subjects. It even stipulated a form of authorisation that was required for certain forms of tax-raising that we can regard as anticipating Parliament, an institution that began to come into being later in the thirteenth century. *Magna Carta* provided for the rights or perhaps privileges of certain groups (though it did not establish universal rights in the sense they are understood today). It insisted on adherence to

due legal process. Indeed, it is seen as a crucial text in the international development of the concept of the rule of law, according to which both those who are governed and those who do the governing are subject to the same legal principles. In accordance with this idea, an underlying theme of *Magna Carta* is that of restraint on executive authority, another function common to contemporary written constitutions. Much of *Magna Carta* was concerned with protecting the position of a social elite group—the barony—with respect to the monarchy. But the document did also propose that its principles should extend downward, with lords treating those beneath them with the same respect they expected from the king (Carpenter 2015; Vincent 2012).

The analogy can be extended further. The process that led to *Magna Carta* had some qualities we might today associate with a written constitution. There was relatively wide social involvement. A broad coalition, encompassing barony, Londoners, some clergy and others, combined to exert pressure upon King John, and eventually agree a text with him. The document itself was the product of prolonged deliberation and negotiation, as we would expect a written constitution to be. Like a systemic text of today, it sought to establish itself as fundamental law, declaring that it was in force forever. Furthermore, it provided for a means of its own enforcement. *Magna Carta* stipulated the formation of a group of barons empowered to monitor whether the king was complying with the rules prescribed in the document, and if he was not, take measures to force him to do so.

The *Magna Carta* of 1215 was a failure. King John resented having it forced upon him by his subjects. Faced with the prospect that he might actually be expected to adhere to what had been agreed, he soon had Pope Innocent III annul the text. Less than two months into its existence, *Magna Carta* seemed dead. But fortuitous circumstances, including the death of John the following year, saw it reissued in altered form on three further occasions: 1216, 1217 and 1225, and reconfirmed many times thereafter. *Magna Carta* came to be regarded as a fundamental part of the English constitution. Those who resisted Stuart absolutism in the seventeenth century called on it in ways that the original drafters could not possibly have envisaged. It was also an international export, inspiring the revolutionaries against British colonial rule in what became the United States of America. Indeed, *Magna Carta* is not only comparable to a written constitution, it influenced the development of the very concept of a written constitution, in the US and elsewhere. While some of the meaning

has been distorted along the way, the wording of *Magna Carta* is closely followed in declarations of political principle across the world.

Perhaps in our own modest—very modest—way, those of us involved in the PCRC written constitution inquiry should draw some lessons from the *Magna Carta* experience. No-one involved expected that the process would lead directly to the introduction of a written constitution. It was never going to be possible to get the Committee to make such a recommendation. Even if it had, the government of the day was not receptive to the idea, and would not have altered its position purely on the basis of a select committee report. But as already discussed, major constitutional changes can take substantial amounts of time from conception to adoption and execution. It took important and prolonged changes, as well as chance, for a circumstance to come about in which a select committee might even inquire into this subject matter. The opportunity was exploited, and the PCRC project laid down a potential marker for the future. Any politicians who might wish to return to this issue in the future will at least have a precedent to refer to, and a body of work to take into account. However, PCRC itself will not be the forum for that work. Following the General Election of May 2015, its existence was allowed to lapse. But as we know from the *Magna Carta* story, what may appear a reverse in the short time is not necessarily a final defeat.

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CHAPTER 6

'*Omnibus liberis hominibus*': The Rights of Refugees, Migrants and Exiles

Alison Harvey

It is established[1] that Magna Carta was a charter describing the rights of 'all free people of our kingdom,'[2] a class restricted to some, not all, of those in the England of the time. The extent to which Jews and villeins could look to the charter was limited.[3]

This chapter examines some of the freedoms proclaimed in Magna Carta in relation to a person's status as a citizen or foreigner, to acquisition and deprivation of British citizenship and to the rights of refugees and persons under immigration control in the United Kingdom. It examines Magna Carta as part of the statute law of England, later Britain, and later still the United Kingdom, rather than as some form of constitution or as an expression of older, common law principles.

Article 29 of the Charter, still in force, proclaims:

> 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.[4]

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Two other articles of Magna Carta[5] are particularly in point. The first, following Coke, is referred herein to as '30':

> (30) All merchants may enter or leave England unharmed and without fear, and may stay or travel within it, by land or water, for purposes of trade, free from all illegal exactions, in accordance with ancient and lawful customs. This, however, does not apply in time of war to merchants from a country that is at war with us. Any such merchants found in our country at the outbreak of war shall be detained without injury to their persons or property, until we or our chief justice have discovered how our own merchants are being treated in the country at war with us. If our own merchants are safe they shall be safe too.

Mr. Justice Holroyd in Toy v Musgrove before the Supreme Court of Victoria in 1888 identifies that,

> …in the charter of the following year a reservation is introduced, which rather countenances the authority of the Sovereign to deprive even merchants on occasion of the benefit of this old and excellent usage. The merchants are declared free to come and go, 'nisi publicè ante prohibiti fueriut,' 'unless they shall have been'publicly prohibited beforehand.[6]

We find this change in the Article as cited by Coke[7] who records Article 30 thus:

> All Merchants, if they were not openly prohibited before, shall have their safe and sure Conduct to depart out of England, to come into England, to tarry in, and go through England, as well by land as by water, to buy and sell without any manner of evil tolls by the old and rightful Customs, except in time of War; and if they be of a Land making War against Us, and be found in our Realm at the beginning of the Wars, they shall be attached without harm of body or goods, until it be known unto Us, or our Chief Justice, how our Merchants be entreated there in the Land making war against Us; and if our Merchants be well intreated there, theirs shall be likewise with Us.

Article 30 is not repealed until the Statute Law (Repeals) Act 1969 (c.52).

The next article appears in the 1215 charter, but it has gone from that of 1225. Coke[8] makes no commentary upon it. For the avoidance of confusion, it is referred to herein as 30 A.

> (30A) In future it shall be lawful for any man to leave and return to our kingdom unharmed and without fear, by land or water, preserving his allegiance to us, except in time of war, for some short period, for the common benefit of the realm. People that have been imprisoned or outlawed in accordance with the law of the land, people from a country that is at war with us, and merchants – who shall be dealt with as stated above – are excepted from this provision.

Have articles 29 and 30 made a difference to the way in which citizens and foreigners have been treated in the UK? Might that treatment have been different had Article 30 A remained in force?

...PRESERVING HIS ALLEGIANCE TO US: THE SUBJECT/CITIZEN

Article 30 A recalls Article 3 of Protocol 4 to the European Convention on Human Rights:

> 3(1) No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national.
> (2) No one shall be deprived of the right to enter the territory of the State of which he is a national.

The UK has signed, but not ratified, Protocol 4.

Common law generally attributed subject status to those born within the Crown's territories.[9] At Common law, birth outside the Crown's dominions generally meant that birth was outside the Crown's allegiance. The 1350 statute *De natis ultra mare* established an early statutory exception, which may or may not build on an earlier common law exception.[10] The ambit of the statute has been the subject of much discussion over the years, with later commentators concluding that common law exceptions were children born to a British Ambassador on an official posting and children born on a British ship[11] and that other children born outside the Crown's allegiance, whatever the nationality of their fathers,[12] were aliens.[13]

Although the name changed from 'British subject' to 'Citizen of the UK and Colonies' on 1 January 1949,[14] throughout the British Empire all were equal subjects or citizens. No distinction was made between 'citizens of the UK' and those of 'the colonies'. This continued to be the situation until the Commonwealth Immigrants Acts of 1962 and 1968.

An early expulsion is the July 1289 expulsion of the Jews from England by King Edward I. It is not simple to determine whether this should be understood as an expulsion of foreigners or of subjects. In the late eleventh century William of Normandy brought Jews to England.[15] The Leges Edwardi Confessoris[16] record their permission to reside in the Kingdom, where they answered directly to the King. Rights of free movement throughout the kingdom are recorded in the charter granted to the Chief Rabbi in London during the reign of Henry I and echoed in Richard I's Charter by which many rights and liberties are confirmed to the Jews of 22 March 1190. King John too granted Jews their rights and liberties by a charter of 1201. But the twelfth century was a period of harsh persecution of the Jews in England and indeed Robert C. Stacey[17] draws on the patent rolls of 1216–25 to identify that Jews were among the targets of the Magna Carta rebels also, with homes and synagogues looted for stones for fortifications against the King's army.

Henry I's Mandate to the Justices of 1253 required that 'No Jew remain in England unless he do the King's service, and that from the hour of birth every Jew, whether male or female, serve us in some way', describing the allegiance they owed directly to the King in terms that conjure images of enslavement.

In the 1250s, at the time of Henry I's Mandate to the Justices, Jews asked to be allowed to depart the Kingdom but were told that this request could not be granted 'inasmuch as the King of France had but recently issued an edict against his Jews and no other Christian State would receive them'.[18] They were not free to leave, but whether as a matter of prohibition or practicality is not clear. The eviction of 1290 demonstrated that they were not free to stay either. They were ordered to depart on the Feast of All Saints and granted safe passage,[19] but, if not violent, this was nonetheless a mass expulsion.

Jews in England in the thirteenth century were not 'free men', and nor were they were treated as 'merchants'. They owed allegiance and more to the King, but enjoyed none of the privileges of the natural born.[20] Such rights as Magna Carta gave to the Jews in England were specific.

Given the particular status of the Jews in England, we cannot derive from their treatment any principles as the protection against expulsion or other harsh treatment that Magna Carta afforded either citizens or foreigners, save for a confident assertion that these were not human rights accorded to all.

The Commonwealth Immigrants Acts of 1962 and 1968

> Prior to the passing of the Commonwealth Immigrants Act 1962, the respondent as a British subject had the right at Common Law to enter the United Kingdom without let or hindrance when and where he pleased and to remain as long as he liked. That right he still retained in 1967 save insofar as it was restricted by the provisions of the Act.[21]

But severely restricted it was. The Act, a response to rising immigration, and in particular of immigration of persons who were not white, distinguished Citizens of the UK and Colonies with a particular connection with the UK from those whose connection derived from another part of empire. Henceforth all 'Commonwealth citizens/British subjects'[22] were subject to immigration control save those born in the UK or holding passports issued in the UK (and the Republic of Ireland) rather than elsewhere in the Commonwealth. Those with the requisite connection with the UK had all the rights and entitlements of citizens. Nationality status was severed from what most countries' laws just assume are the rights of any national: to enter, reside in and leave the country of nationality, the rights proclaimed in Article 30 A of Magna Carta.

The long title of the 1962 Act describes it as 'An Act to make temporary provision for controlling the immigration into the United Kingdom of Commonwealth Citizens'. The 1962 Act did not affect those Citizens of the UK and Colonies who had come to reside in a different part of the Commonwealth than that from which they derived their connection with the UK. One group were the East African Asians. In Africa policies of Africanization were being pursued. With effect from midnight on 30 November 1967, East African Asians in Kenyatta's Kenya who did not hold Kenyan passports were required to apply for entry certificates, even if they had been born there.[23] It was feared that the 200,000 East African Asians in Kenya holding Citizen of the UK and Colonies passports would come to the UK.

The response to a likely large scale movement of persons, potentially refugees fleeing persecution because of their race or national origin, was the Commonwealth Immigrants Act 1968, rushed through parliament in three short days as emergency legislation. *The Times* described it as 'probably the most shameful measure that Labour Members have ever been asked by their Whips to support'.[24] Article 29 of Magna Carta was cited in debates on that legislation.[25]

In the case of the ensuing East African Asians v United Kingdom[26] before the European Commission on Human Rights it was held that the racial discrimination resulting from the legislation constituted 'degrading treatment' in breach of Article 3 of the European Convention on Human Rights.

In UK law today rights to enter, stay, leave and return fall to be treated as a separate package: the statutory right of abode. The rights of British citizens to enter and stay in the UK are set out in the Immigration Act 1971.[27]

In most countries of the world the notion that there could be a nationality without a right of abode would not make sense, just as it would not have made sense to the barons of Magna Carta.

The UK has ratified the International Covenant on Civil and Political Rights, which states at Article 12 that 'no one shall be arbitrarily deprived of the right to enter his own country'. The UK has entered a reservation to the Covenant, in the following terms.

> The Government of the United Kingdom reserve the right to enact such nationality legislation as they may deem necessary from time to time to reserve the acquisition and possession of citizenship under such legislation to those having sufficient connection with the United Kingdom or any of its dependent territories and accordingly their acceptance of article 24 (3) and of the other provisions of the Covenant is subject to the provisions of any such legislation.

Holders of British passports other than passports proclaiming them British citizens such as British Overseas Citizens or British Nationals (Overseas) do not enjoy rights to enter the UK, but are subject to immigration control.

…by land or water: The Chagos Islands

In the 1960s, in the Indian Ocean, the rights of British subjects/citizens to leave and return were being attacked in another way: instead of taking away the passports; the UK State took away the land. The Chagos Islands, Diego Garcia and the outlying islands, were leased to the United States for a military base. The original lease was until December 2016, but with an option, to be exercised by December 2014, to extend it to 2026, which option is purported to have been exercised.

The history of what happened is set out by Lord Hoffmann in R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs ('Bancoult No. 2').[28] The islands were a dependency of Mauritius when

it was ceded to the United Kingdom by France in 1814 and until 1965 were administered as part of that colony. In 1964 the UK agreed to provide the island of Diego Garcia to the United States for use as a base. To prevent its becoming independent when Mauritius did, as was envisaged, the British Indian Ocean Territories Order 1965[29] was passed creating the separate British Indian Ocean Territory. Those inhabitants of the territory who had been citizens of the United Kingdom and Colonies by virtue of their birth or connection with the islands retained their citizenship. When Mauritius became independent in 1968 they acquired Mauritian citizenship but, by an exception in the Mauritius Independence Act 1968, did not lose their UK citizenship.

At the end of 1966 the Commissioner of the territory, using his powers under the order, made the Immigration Ordinance 1971 which imposed a requirement of a permit[30] to enter or to remain in the territory. Between 1968 and 1971[31] the population was removed from the territory.

Before the House of Lords in the Bancoult case, heavy reliance was placed on Article 29 of Magna Carta. It is extensively discussed in one of the opinions of the majority, that of Lord Rodgers of Earlsferry. The first question was, did Magna Carta apply? The Court held that under the terms of the Treaty of Paris, French law continued to apply when Mauritius was ceded to the British Crown in 1814. Therefore in 1965, Magna Carta formed no part of its statute law. This remained the case until 1 February 1984[32] which provided for the law of England from time to time in force to be the law of the territory.

Lord Rodgers proceeded on the basis that Magna Carta was applicable at the time of the Bancoult case. All then turned on the phrase 'but by the Law of the Land'. Were the ordinances and orders invalid, or simply part of the law of the land? The majority of the House of Lords found no invalidity in the instruments.

The Bancoult litigation has not stopped there. It was argued that a decision taken on 1 April 2010 to create a Marine Protected Area of some 250,000 square miles in the British Indian Ocean Territory was unlawful *inter alia* because it was actuated by an improper motive, namely an intention to prevent Chagossians and their descendants from resettling in the islands. The challenge failed.[33] The case of R (Bancoult No. 2)[34] has been heard by the Supreme Court and judgment is pending. It is concerned with whether the judgment of the House of Lords in R (on the application of Bancoult No 2) v Secretary of State for Foreign and Commonwealth Affairs[35] should be set aside on the alleged ground of material non-disclosure

by the respondent and, if so, whether the appellant should be permitted to adduce fresh evidence at the rehearing of the appeal.

…unharmed and without fear: deprivation of citizenship and exile

Until 2002, only those who had acquired British citizenship as adults could be deprived of it, on grounds of character or of acquisition by fraud. In 2002 the law was changed so that the 'natural born' could be deprived of their citizenship on grounds of character, but only where to do so would not leave them stateless.[36] Again, reference was made to Magna Carta in the debates. Professor the Earl Russell pointed out that Magna Carta had been cited in the United States Supreme Court against the denial of a passport as recently as 1955,[37] a reference to Trop v Dulles,[38] in which the United States Supreme Court held deprivation of citizenship to constitute cruel and unusual punishment, contrary to the United States Constitution. Justice Warren, giving the lead judgment, refers to Magna Carta in affirming that the need to respect the dignity of man imposes limits on the punishment the State can inflict, and that deprivation of citizenship lies outside that limit.

In 2014, section 66 of the Immigration Act 2014 changed the law again,[39] to permit deprivation of citizenship on grounds of character, even where this would leave a person stateless. The UK was forced by the terms of a declaration it had made on ratifying the 1961 UN Convention on the Reduction of Statelessness to limit the scope of this new power. Article 8(1) of that Convention prohibits deprivation of nationality where this would result in statelessness but this is subject to exceptions including, as set out in Article 8(3), those specified at the time of signature, ratification or accession on grounds 'existing in its national law at that time'.

The UK declaration reflected UK law at the time of ratification[40] and preserved a right to deprive a person who had naturalized of their citizenship on the grounds that the person

(i) Has, in disregard of an express prohibition of Her Britannic Majesty, rendered or continued to render services to, or received or continued to receive emoluments from, another State, or
(ii) Has conducted himself in a manner seriously prejudicial to the vital interests of Her Britannic Majesty.

The consequences of the 2014 change were all the more severe because in 2004, seemingly by accident,[41] the UK had greatly reduced the procedural protection afforded to those deprived of their British citizenship. It had enacted laws[42] which ensured that, rather than take effect only after all rights of appeal against deprivation had been exhausted, deprivation took effect at once, with citizenship restored in the event that the appeal was successful. No longer had an appellant a British passport on which to return to the UK to exercise his or her in-country right of appeal.

If the original powers were taken by accident, the subsequent reliance upon them followed a pattern. The UK proceeded to use the powers to effect summary exile, depriving persons of their citizenship while they were outside the UK, as was the case for L1, Madhi Hashi, subject to 'extraordinary rendition', and former British citizens killed in drone strikes.[43] The MP Diane Abbott forced a debate on these matters just days after the debate on the new clause.[44]

What of the natural born? On 1 September 2014 the Prime Minister made an announcement[45] on EU Council, Security, and the Middle East to parliament that the UK would legislate for a police power to seize a passport at the border and for a targeted, discretionary power to exclude British nationals from the UK. The Prime Minister indicated that the measure was especially designed for those whom the British Nationality Act 1981 would not reach, although he wrongly characterized these as the 'solely British' rather than as those British born, regardless of whether they had retained their other nationality.

By the time the Counter-Terrorism and Security Bill was presented to parliament in 2014, the focus was less on banishment than on 'controlled return': 'temporary exclusion orders', excluding a person from the United Kingdom. Under the Counter Terrorism and Security Act 2015, the default duration of an order is two years. Orders may be placed end to end, with no maximum duration. The Secretary of State is under an obligation to issue a permit to return unless the individual fails to attend an interview with an immigration officer. The permit may be subject to conditions and can be revoked where the Secretary of State considers that it was obtained by misrepresentation or where a subsequent permit is issued.

The Secretary of State must permit an individual to be deported to the UK, suggesting that the Government had heeded debates in the House of Lords during the passage of the Immigration Act 2014 as to obligations toward other States who have admitted an individual on the strength of

his or her British passport with its implied promise that the UK would accept them back.[46]

The Act provides a theoretical possibility of challenging the decision to impose a temporary exclusion order but one with nugatory prospects of success given that the review is limited to judicial review principles and that the court must determine these cases, and whether a matter is urgent, on the basis that the decision of the Secretary of State is 'obviously flawed', a high test, particularly in cases involving closed material procedures.

Magna Carta, and specifically Article 29[47] was cited in the debates. The Rt. Hon Dominic Grieve MP told the House of Commons:

> The biggest threat to the common law is the statutes we pass in the House that undermine it. The principles of the common law are crystal clear in respect of the right of a British-born citizen and the Queen's subject to reside in their homeland. Parliament, if it so wished, could undermine that. That has always been the problem with the common law. It is one of the reasons why we have such things as Magna Carta and habeas corpus, because the common law was insufficient.[48]

Had what is herein called 'Article 30 A' of Magna Carta survived the twelfth century, it would nonetheless have been impliedly repealed by the passage of later statutes on the same point.[49] But perhaps the debates in 2014–2015 would have been more pointed had the very specific provisions of Article 30 A shored up the prohibition on exile contained in Article 29. Given that prohibition and the principle of generalia specialibus non derogant,[50] however, it is arguable that the 'temporary exclusion orders' of the 2015 Act cannot be used to effect indefinite exile.

….may enter or leave England unharmed and without fear, and may stay or travel within it, by land or water, for purposes of trade, free from all illegal exactions, in accordance with ancient and lawful customs

The second part of this chapter is concerned with non-nationals. How far can a foreigner rely on Article 29 of Magna Carta, or, until 1969,[51] how far could a foreigner rely on Article 30?

Mr. Justice Holroyd in Toy v Musgrove[52] adopts the suggestion that merchants may have been specifically mentioned in Magna Carta having suffered so much from King John's exactions.[53]

There is reference in the debates on the Removal of Aliens Act of 1848, in the same breath as a reference to Magna Carta, to a Statute of 27th Edward III[54] by which merchant strangers and others were liberally encouraged to visit the UK.[55]

Coke, discussing at length the complexities of the laws on aliens holding and entailing property, distinguishes an alien merchant's holding a house, without which he cannot trade, and holding lands and meadows. The distinction does not hold for aliens who are not merchants, or for enemy aliens.[56]

Coke records that 'By the auncient Kings (amongst whom King Alfred was one) …defendu fuit que nul merchant Alien ne hantast Angleterre forsque aux 4 foires, ne que nul demurrast in a terre ouster 40. Jours'.[57]

He is surefooted in attributing the protection to 'friendly' alien merchants of Magna Carta, identifying the overlapping categories of 'friendly' aliens, merchants and aliens 'from a country that is at war with us'. Before Magna Carta he records, merchant strangers 'in amitie' could be prohibited, for Magna Carta itself provides for the prohibition of enemy merchant strangers. The protections it affords friendly alien merchants he identifies as.

> 1. To depart out of England. 2. To come into England. 3. To tarry here. 4. To goe in and through England, as well by land as by water. 5. To buy and to sell. 6. Without any manner of evill tolles. 7. By the old and rightfull customes.

Of the reference in Article 30 to the 'ancient and lawful customs' Coke[58] explains that consuetudo can be read to mean common and statute law but also as a reference to tolls, which is how he reads it in context.

Tolls, special restrictions on Jews, local allegiance, the categories of denizens and merchants all suggest a system of internal controls as multifaceted as that being rebuilt in the twenty-first century United Kingdom.[59] In Coke's discussion of the tolls, which is by far the largest part of his discussion of Article 30, we find mention of the denizen, a special category of non-national[60] who took an oath of allegiance but was not treated as a subject.[61] Sir William Blackstone in his *Commentaries* of the 1760s described a denizen as 'a kind of middle state, between an alien and a natural-born subject, and partakes of both'[62] and the status is a useful reminder of the importance of not oversimplifying the concept of allegiance.

Coke concludes his examination of Article 30 with the observation that many Statutes have been made since the Charter for 'the well intreating and ordering of Merchant strangers and denizens'.

Aside the ability of aliens and denizens to hold land, an alien robbed had the right to a writ of restitution on conviction of a thief who has robbed them. Viscount Finlay, setting out the facts of Johnstone v Pedlar[63] cites Hale's[64] identification of the source of the right as a statute of Henry VIII and Hale's gloss on it:

> Though the Statute speaks of the King's subjects, it extends to aliens robbed; for though they are not the King's natural born subjects, they are the King's subjects, when in England, by a local allegiance.

An alien friend also had the right to sue on a contract or in tort. Viscount Cave in the case of Johnstone v Pedlar[65] says that these rights were established by the end of the sixteenth century.

Sylvester's case (1701) 7 Mod 150 concerned a French refugee living in England. He brought an action in the civil courts, the subject of which is now lost. It was pleaded by the person sued that Sylvester was an alien enemy, born under the allegiance of the French king, at that time at war with England. It was held that alienage was a proper plea to make in an appropriate case. That a person was an enemy alien would allow the person sued to resist the suit. In Sylvester's case, however, he was not an enemy alien but a 'poor refugee and under the queen's protection' and was therefore allowed to sue. He could, however, be required to prove that he was under special protection as an individual, or under a general, proclaimed protection.[66]

The description of Sylvester recalls Blackstone's *Commentaries on the Laws of England*, the first edition of which, of 1765, is cited in argument in Toy v Musgrove in the Supreme Court of Victoria.[67]

A foreigner, even one enslaved, enjoyed rights before the law which extended beyond property rights. This is evidenced by Somerset's case.[68] Somerset was the slave of a US citizen. Brought to the UK, he escaped but was recaptured and was put on a ship to be taken to Jamaica and sold. Anti-slavery campaigners sought a writ of habeas corpus. The return (reply) to the writ was 'that the slave departed and refused to serve; whereupon he was kept, to be sold abroad'. Lord Mansfield held that the law of the United Kingdom did not recognize a right of a master to take a slave by force because he had deserted, and thus that Somerset must go free.

The right to liberty is one protected by Article 29 of Magna Carta, even though, by the time of the case, the area was governed by the Habeas Corpus Act of 1679. Sir William Holdsworth in his *History of English Law*[69] identifies

that at about the same time as Somerset's case, in 1771, the prerogative power was used to direct that Jews 'unable to pay the usual freight', should, unless they had a passport from an ambassador, be excluded from British territory. This would fit with the analysis above that Jews were not envisaged in Article 29 or 30 of Magna Carta and did not benefit from it.

The approach in cases such as Toy v Musgrove[70] before the Supreme Court of Victoria in 1888 (the Privy Council in Musgrove v Toy[71] deciding the case on a seemingly narrower point and reversing the decision); R (European Roma Rights Centre & ors) v Immigration Officer at Prague Airport & Anor [2004] UKHL 55 (9 December 2004) and Ruddock v Vardalis[72] before the full Federal Court of Australia, has been to try to trace the existence of a prerogative. But the same line of authority can be followed to try to trace the influence of Magna Carta as a source of positive law, limiting whatever prerogative powers the King had to exclude friendly aliens and as a source of rights for them.

In R (European Roma Rights Centre & ors) v Immigration Officer at Prague Airport & anor,[73] a case on whether there is a right to come to the UK to claim asylum, Lord Bingham of Cornhill concludes that:

> The power to admit, exclude and expel aliens was among the earliest and most widely recognised powers of the sovereign state. In England, it was a prerogative power of the crown.

He relies on the judgment of Jeffreys CJ in The East India Company v Sandys:[74]

> But the crown's prerogative power over aliens was increasingly questioned, and since 1793 the power to exclude aliens has in this country been authorised by statute, whether temporary in effect (33 George III c.4; 56 George III c.86; 11 & 12 Victoria c.20) or permanent (for example, the Aliens Act 1905, the Aliens Restriction Act 1914).[75]

Ian Macdonald QC, in his Immigration Law and Practice,[76] is dubious of the passage from East India Company v Sandys quoted by Lord Bingham. If safe conduct, albeit with limitations ('All Merchants, if they were not openly prohibited before') was guaranteed to merchants by Magna Carta, this might provide an explanation for the conduct described.

Lord Bingham suggests that a different attitude was taken to a prerogative power to exclude aliens from 1793. This is a reference the Aliens Act of 1793, 33 George III c. 4. of which Sir William Molesworth wrote:

> This Bill had been opposed on principle, without reference to its details or period of duration, …… an Alien Act was contrary to the practice of our ancestors, contrary to the spirit of our Constitution, contrary to the tenor of our laws prior to 1793, and contrary to the recorded opinion of every high authority on this side of the House 'since the year 1793'.[77]

The preamble to the Act 'Whereas, under the present circumstances, much danger may arise to the tranquillity of the Kingdom from the resort and residence of aliens' is a reminder that the Act was passed while the French revolution was underway a short distance across the channel. It was passed in the year of the notorious French Loi des Suspects of 17 September 1873, and in Great Britain in the following year the Habeas Corpus Suspension Act 1794 was passed.[78]

The Act makes provision for the registration of foreigners arriving in Great Britain and for aliens 'of any description' contained in an Order in Council '(not being merchants within the true intent and meaning of this act)' to be refused landing or to be transported. Those who return after being transported may face capital punishment. The express reference to merchants suggests that the statute is not intended to interfere with Article 30 of Magna Carta, although it avoids this by a very specific reference to 'merchants' in a way that may be said to confine the earlier statute to a narrow interpretation to which it had not been expressly confined in the intervening centuries.

The Act also makes provision for cases of dispute as to whether a person has naturalized or is or is not an alien merchant. An alien merchant is defined as a person carrying out bona fide trade or commerce, importing or exporting merchandise and seeking his or her living thereby who continues to be engaged in such trade or commerce in 'foreign parts'.

The Act was a temporary, emergency measure although in the event it was renewed for 33 years, with some modifications.[79] We are told that the first person against whom the Act was used was the widow of Lord Edward Fitzgerald.[80] The Act was also used against Talleyrand.[81]

The report continues with a challenge to the notion that, contrary to what is said in Coke, there exists a prerogative

> which had not been exercised **in** a single instance for a period of 500 years, although so many occasions had occurred within that period in which such a prerogative was most likely to have been called into action, if it had really been recognised.[82]

There then follows a long catalogue of foreigners successive monarchs could have done without.

The following year, in an echo of 1793, saw the passage of the Habeas Corpus Suspension Act of 1817.[83] The legislation continued to be fought and Magna Carta was relied upon by those who fought it.[84]

In 1826 Sir Robert Peel was pleased to inform the House of Commons that the time had come to dispense with the powers included in the Alien Act 1824 'of compelling aliens to leave the country'.[85] In its place he brought forward a Bill to provide, as a permanent measure, for the registration of the names of aliens who took up residence in the UK. He declared:

> He could sincerely assure the House that no man could be more willing to part than he was with the authority which this bill had officially in-trusted to his execution; … during the five years in which he had exercised it, …he had only in a single instance applied them. It was also due to his predecessor to state, that he had only resorted to the measure five or six times, so that altogether its extraordinary powers had been but rarely brought into operation. The single case in which he had been under the necessity of applying it was not at all of a political character. It was where an individual had threatened to resort to personal violence against a foreign ambassador.[86]

Re Adam (1837) 1 Moo. P.C. 460[87] takes us back to Mauritius. As with Bancoult case, it is identified that Magna Carta was not part of the law of that land at the time of the expulsion, for French law prevailed there.[88] Under French law, the Privy Council found, the Executive Government had power to remove any alien not domiciled by its authority.

When the Bill that became the Aliens Act 1848,[89] which permitted deportation, was introduced, Lord Russell emphasized its status as an emergency and temporary measure.[90] Magna Carta's specific protection for merchants was discussed in the debates.[91] Unlike its predecessors, however, the Bill made no special provision for merchants. It was suggested that those carrying on business had the option of naturalizing, the Naturalization Act 1844, the forerunner of modern naturalization,[92] having been passed four years earlier.[93] Thus, in debates in the mid nineteenth century, the solution suggested to the imposition of controls is the one migrants have identified for themselves in the twentieth century as the only way to guarantee the possibility of circular migration. Naturalize, and one is free to come and go.

For those carrying on trade who were from a country which prohibited dual nationality, which was frequently the case, naturalization was unlikely to be a practicable option. No mention is made of the possibility of endenization in the debates.

Counsel in Toy v Musgrove draws attention to a case reported in *The Times* newspaper of the 17 October, 5 November and 26 November 1855 of a number of French refugees who had settled in the island of Jersey and had 'established a news-paper 'which published outrageous libels''.[94] The Executive, without consulting the legislative body of the island, expelled them. The question raised was whether the legislature ought to have been consulted, which could have been treated as further evidence that legislation was required for expulsion.

On the refugees, another parliamentary debate deserves mention, that on the Conspiracy to Murder Bill of 1858, for it contains a statement of 'that sacred right of asylum' by Sir Robert Peel, albeit one hedged around with caveats.[95]

Like Somerset's case, Mugrove v Toy was brought as an action for habeas corpus. Mr. Toy was an immigrant from China and his ship put into Melbourne where he was prohibited from landing, despite being willing to pay the £10 customs tax, because the maximum number of Chinese immigrants permitted to land from a ship was 14, and there were 268 such immigrants on the ship that carried him. He succeeded before the Supreme Court of Victoria[96] but lost before the Privy Council.[97] The Privy Council ostensibly decided the case on a narrow question of statutory construction: the Collector of Customs could not be required to receive the requisite payment for Mr. Toy to land in circumstances where the ship carried more than the permitted number of Chinese immigrants; without making the payment, Mr. Toy was not permitted to land. There was no cause of action.

The Privy Council went further however. It held that Mr. Toy could only maintain the action if he could show that an alien has a legal right, enforceable by action, to enter British territory. It held that he had not, and therefore declined to answer the questions on which the Supreme Court of Victoria had expended so much effort.

Chief Justice Black, in his dissenting opinion in Ruddock v Vardalis,[98] made as short work of the judgment of the Privy Council in Musgrove v Toy as the Privy Council had made of that of the Supreme Court of Victoria in that case. He held that it turned on the limited extent of an alien's ability to maintain an action in the courts and did not support the proposition that the King can refuse an alien permission to land.

It is difficult to be content with the reasoning decision of the Privy Council but it is also difficult to be any more content with Chief Justice Black's dismissal of it than with the way in which the majority of the Court in Ruddock v Vardalis relies on it. The action Mr. Toy had purported to bring was for a writ of habeas corpus. The comments on whether he could maintain an action are concerned with whether Mr. Musgrove's return on the writ was a complete answer to Mr. Toy's loss of liberty. Must they be read as implying that he could not bring the application for habeas corpus in the first place?

Resentment shines through the Privy Council judgment that an alien

> can, in an action in a British Court, can compel the decision of matters such as these, involving delicate and difficult constitutional questions …

There are echoes of this resentment in the Court below. While Mr. Justice Holroyd, giving one of the majority judgments, describes the Chinese immigrants as 'innocent passengers, and not offenders'[99] one of the other judges, Mr. Justice Williams, also giving an opinion in Mr. Toy's favour, is less gracious:

> …it leaves us in this most unpleasant and invidious position, that we are at present without the legal means of preventing the scum or desperadoes of alien nationalities from landing on our territory whenever it may suit them to come here.[100]

Reference is made Toy v Musgrove to the case of Leong Kum before the Court of New South Wales.[101] The case concerned a man on the same ship and the report records that it was reported in the *Sydney Morning Herald* on May 24, 1888 and that the court reached a decision to the same effect as that reached by the Supreme Court of Victoria in Toy v Musgrove. The case is also cited in Ruddock v Vardalis as SS Afghan: Ex parte Leong Kum (1888) 9 NSWLR 251:

> The applicant is the subject of a friendly foreign power … It has been contended… that an alien has no right to apply for 'a writ of habeas corpus'… There are abundant authorities to show that no such argument could for one moment prevail… Every person, whether the subject of Her Majesty or an alien, who is within our jurisdiction, is entitled to the protection of the law. He is amenable to the law. If he commits a crime, he can be punished. … Being thus amenable to the law, he is also under the protection of the law.

This is a point that could usefully have been addressed by the Privy Council in Musgrove v Toy. Presumably it would answer that Mr. Toy or Mr. Kum were not detained by the action of the respondent, but each by his own act, or that of the master of the ship that had carried him. But would it have acknowledged that each would have a cause of action against the master of the ship? In Ruddock v Vardalis there appears another case from the SS *Afghan*: Ex parte Lo Pak (1888) 9 NSWLR 221.

Macdonald situates the beginning of the modern era of control in the series of statutes beginning with the Alien's Act 1905:

> Immediately prior to the Aliens Act 1905, friendly aliens were as free to come to Britain as British subjects and could not be removed or deported by executive act… every removal or exclusion of aliens during the previous 200 years or more had been taken to parliament for authorization whether temporary in effect[102] or permanent.[103]…The first appearance of a reservation is in the Aliens Restriction Act 1914, passed on the outbreak of World War I,[104] intended to preserve the Crown's undoubted prerogative power in relation to enemy aliens.[105] … Dicta in the Privy Council cases…[106] and further dicta in the mid- twentieth century cases …[107] are not matched by the practice or views of successive British governments. [all references given]

With the Aliens Act 1905 we come full circle back to the thirteenth century, for what prompts the Act is the migration of Jews from Russia following the 1882 May laws there.[108]

The 2005 Act required those arriving at ports to seek leave to enter from immigration officers, and required the officer to withhold leave from those who appeared to be undesirable immigrants within the meaning of the Act. Those were persons without the means of 'decently supporting' themselves and any dependants; lunatics, idiots or those who because of disease or infirmity might become a charge upon the rates or a detriment to the public; those sentenced to a crime for which they could be extradited, 'not being a crime of a political nature' or those given an expulsion order by the Secretary of State under the Act. Such an order could be given to a person sentenced to a crime for which they could be imprisoned if the person has been in receipt of certain parochial relief, 'found wandering without ostensible means of subsistence' or living in insanitary conditions due to overcrowding. In addition to the requirement that extradition not be for a crime of a political nature, there is specific provision for refugees.

To an immigrant who 'proves' that he or she is seeking admission 'solely to avoid prosecution or punishment on religious or political grounds or for an offence of a political character, or persecution, involving danger of imprisonment or danger to life or limb, on account of religious belief', leave to land shall not be refused merely on the ground of want of means or the probability of his becoming a 'charge upon the rates'. The language of the Act foreshadows that of the 1951 UN Convention Relating to the Status of Refugees.[109]

The 1905 Act and the Aliens Restriction Act of 1914 are the forerunners of modern controls, leading Macdonald to conclude that the prerogative power has been extinguished.[110] They must be read with the British Nationality and Status of Aliens Act of 1914 and the Aliens Restriction (Amendment) Act 1919.[111] In the debates on the latter, Lord Parmoor traced the line from Magna Carta to that act:

> …from Magna Carta, which was in 1215, down to the present time our law has been that foreign merchants in this country shall be left at liberty and at peace, although their Governments happen to be at war with our King.[112]

Which is not, of course, what Magna Carta says, although no one spotted that during the debate.

We can today in the UK distinguish two groups of non-nationals, and then divide the second group still further. The first group is a relatively recent invention, the 'Commonwealth citizen', a term created in the British Nationality Act 1948 (where it is synonymous with the term 'British subject' as that term is used in the Act.[113]) The term is defined in Schedule 3 to the British Nationality Act 1981 and the definition is independent of whether a country is, at any given time, a member of the Commonwealth[114] although Gambia left the Commonwealth voluntarily on 3 October 2015. The distinction between Commonwealth citizens and aliens is still operative today; for example aside the Brigade of Gurkhas from Nepal, only Commonwealth citizens can serve in the British armed forces.

The parallels between Musgrove v Toy[115] and Ruddock v Vardalis[116] are striking. The Full Federal Court of Australia considered the case of a Norwegian ship, the MV *Tampa*. 'On 26 August 2001, in accordance with the law of the sea, as codified in the UN Convention on the Law of the Sea, it rescued 433 persons seeking asylum from a sinking boat and proceeded toward the nearest place of safety, the Australian territory

of Christmas Island.' But the captain of the ship was not permitted to enter Australian territorial waters. To keep him from doing so, Australian military from the Special Air Service were deployed to the ship. Lawyers for the persons seeking asylum applied to the Federal Court of Australia in Melbourne for a writ of habeas corpus. The Full Court of the Federal Court held by a majority[117] that whatever the position as far as the prerogative was concerned, the Government had the power under article 61 of the Australian Constitution (echoes of the Supreme Court of Victoria's focus in Toy v Musgrove on the powers of the Governor of Australia as opposed to the sovereign) to detain the ship and its passengers. The Government subsequently passed the Border Protection (Validation and Enforcement Powers) Act 2001[118] to put its powers beyond doubt and give a statutory basis to its stance toward persons seeking asylum.

A couple of final comments are necessary. First, that the legislation of the early decades of the twentieth century is not the last word on the complexities of allegiance.

Johnstone v Pedlar,[119] cited above, concerned a citizen of the United States of America who had taken part in the 1916 Dublin rebellion, been deported, returned to Ireland and been convicted of illegal drilling. Cash found on him had been seized, and he sued for its return. The case turned on whether the seizure of monies of his had properly been adopted as an act of State, given his status as a friendly alien. Not very friendly, one might think, but the United States was at peace with the Crown.

Viscount Finlay, setting out the facts, has no hesitation in recording as uncontroversial that 'An alien in British territory is normally regarded as a British subject for the time being in virtue of local allegiance'. He goes to cite from Hale, as recorded above, and the court finds for Pedlar.

Then, at the time of the Second World War, a case similar to that of Sylvester arose, that of Kreglinger v S. Samuel & Rosenfeld.[120] The defendant resided in Berlin. It was held that the test of a person being an alien enemy is not his nationality but the place in which he or she resides or carries on business. A person voluntarily resident in, or who is carrying on business in, an enemy's country is an alien enemy. An alien enemy, 'unless he be within the realm by the licence of the King', cannot sue in the King's Courts but may be sued in those courts. An alien enemy who is sued has a right to enter an appearance and to defend the action and right to appeal against a decision But an alien enemy who is plaintiff in an action

commenced before the outbreak of war has no right of appeal; the right to appeal is suspended until the conclusion of peace.

The Court held:

> When considering the enforcement of civil rights a person may be treated as the subject of an enemy State, notwithstanding that he is in fact a subject of the British Crown or of a neutral State. Conversely a person may be treated as a subject of the Crown notwithstanding that he is in fact the subject of an enemy State. As Lord Lindley said in Janson v. Driefontein Consolidated Mines [1902] AC 484[121]: 'When considering questions arising with an alien enemy it is not the nationality of a person but his place of business during war that is important'.

Thus it was envisaged that a British subject could be treated as an enemy alien as far as enforcement of civil rights were concerned.

A more recent example is the case of Commonwealth citizen, David Hicks, who was imprisoned in Guantanamo Bay. Receiving little assistance from the Australian government, he applied to register as a British citizen on the grounds of birth to a British mother.[122] The registration requirements at the time did not include that the person be of good character but the Secretary of State fought Hicks' registration on public policy grounds. She made clear that if forced to register him, she would move to deprive him of his citizenship straight away. In the course of argument there was discussion on one ground of deprivation, disloyalty or disaffection to the Queen. It was conceded and held that disloyalty must relate to a time when the person concerned owed some allegiance to the Queen in her capacity as representing the Government of the United Kingdom. That she is titular head of state of Australia was irrelevant. Similarly, disaffection was more appropriately used to cover the actions or words of a citizen who owes allegiance.[123]

The Court of Appeal, upholding the judgment of the High Court, considered the Joyce v DPP [1946] AC 347, in which a dual US/British citizen, after the outbreak of war between Great Britain and Germany in 1939, delivered from German territory broadcast talks in English hostile to Great Britain. A conviction for treason was upheld. It held that Joyce could not be relied upon to 'create allegiance where none exists, rather it illustrated circumstances in which allegiance may exist without citizenship'.[124]

Conclusion

Have articles 29 and 30 of Magna Carta made a difference to the way in which citizens, in the context of exile and expulsion, and foreigners have been treated in the UK? Might that treatment have been different had Article 30 A remained in force? Article 30 appears to have been little called upon to defend the rights of citizens against expulsion until the 1960s, when it did not prove efficacious. We may speculate that had Article 30 A remained in force it might have been cited in debates on the second Commonwealth Immigrant Act, given the parallels with Article 4 of Protocol 4 to the European Convention on Human Rights, which entered into force on 2 May 1968, just two months after the Act received Royal Assent.

Article 29 does indeed appear to have provided some protection to merchants and arguably more broadly. As with Article 30, romantic appeals to it, in particular but not only in the eighteenth century, appear to have been as much the means by which its provisions have influenced the provisions of subsequent legislation as its terms.

Let us give the final word to an historian, Professor the Earl Russell, speaking in 2002:

> I fear that we are slowly on the way back to a world where the executive is freeing itself from legal control and working its way back to the world before Magna Carta.[125]

Notes

1. See, for example, J.C. Holt, *Magna Carta*, Third Edition, 2015, Cambridge University Press, Cambridge, May 2015.
2. Dr. Sophie Ambler of the University of East Anglia and of the Magna Carta project points out that *homino* is usually translated as person and that where 'men' is intended, *vir* is used. (Sophie Ambler attended the *Magna Carta Rights* international conference organised by the editors at the University of Tours on 12 and 13 November 2015)
3. See Coke, *The Second Part of the Institutes of the Lawes of England. Containing the Exposition of Many Ancient, and other Statutes; whereof You may See the Particulars in a Table Following*, London, 1642, commentary on Article 29.
4. Translation from the UK Statute Law Database.

5. British Library website's translation.
6. Supreme Court of Victoria, 9 October 1888 C. No. 23 [4 s] 2003, page 156. Overturned by the Privy Council in *Musgrove v Chun Teeong Toy* [1891] AC 272. Described herein, respectively, as *Toy v Musgrove* and *Musgrove v Toy*.
7. Coke, *Institutes of the Lawes of England*.
8. Coke, *Institutes of the Lawes of England*.
9. See Fransman's *British Nationality Law*, Third Edition, 2009, Bloomsbury, London.
10. Translation from the official UK statute law database www.legislation.gov.uk. See *Acquisition and loss of nationality: policies and trends in 15 European States*, Countries (two volumes) – Bauböck, R., E. Ersbøll, K. Groenendijk and H. Waldrauch eds., IMISCOE Research 2006.
11. *Marshall v Murgatroyd* (1870) LR 6 QB 31.
12. Women could not transmit their British Nationality to children born overseas until 1983 (British Nationality Act 1981s 2(1)).
13. *De Geer v Stone* (1882) 22 Ch D 243. See Blackstone, *Commentaries on the Laws of England*, Vol. 1, 354–62.
14. British Nationality Act 1948. The term 'British subject' continues to be used in the Act, but with a different meaning.
15. See P. Skinner,ed., *Jews in Medieval Britain: Historical, Literary and Archaeological Perspectives*, 2003, Boydell Press, especially Part 1.
16. Compiled in the reign of Henry I, 1120–30.
17. *Op.cit.*
18. A. Montefiore Hymanson, *History of the Jews in England* , 1908, London, Chatto.
19. Hymanson, *History of the Jews in England* at p. 77.
20. Suggestions that they are the King's property perhaps read too much into the statement of the Leges Edwardi Confessoris, understanding '... if someone detains them or their money, the king shall demand them as his own property [tanquam suum proprium]' referring to the Jews rather than to their possessions. 'The Jews…are the King's' can be read as a statement of direct allegiance.
21. *DPP v Bhagwan* [1972] AC 60 per Lord Diplock.
22. British Nationality Act 1948, s. 1(2).
23. Legal notice 244 of 30 November 1967, published in the Kenya Gazette.
24. Cited by Baroness Asquith of Yarnbury, HL Deb 2 February 1968 col. 1015.
25. HL Deb. 29 February 1968 Vol. 289 c1131 per Lord Moynihan.
26. 4403/70 [1973] ECHR 2 (14 December 1973).
27. Section 2.

28. [2008] UKHL 61 (22 October 2008). For the first case, see *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] QB 1067.
29. SI 1965/1920.
30. Section 4(1).
31. 1973 for the small population on the Saloman Islands.
32. With the coming into effect of the British Indian Ocean Territory Courts Ordinance 1983, s. 3.
33. *R (Bancoult) v Secretary of State for Foreign & Commonwealth Affairs* [2014] EWCA Civ 708 (23 May 2014).
34. UKSC 2015/0021.
35. [2008] UKHL 61.
36. British Nationality Act 1981, s 40(4) as substituted by the Nationality, Immigration and Asylum Act 2002, s 4, with effect from 1 April 2003, see the Nationality, Immigration and Asylum Act (Commencement No 4) Order SI 2003/754, Schedule 1, Article 2.
37. HL Deb 8 Jul. 2002: Col. 510.
38. *Trop v. Dulles* 356 U.S. 86.
39. Amending s 40 of the British Nationality Act 1981.
40. 29 March 1966.
41. See HL Deb 04 May 2004: Col 999 per Lord Falconer (Amendment 52), HL Deb 15 June 2004: Column 720 per Lord Rooker: 'Although the earlier amendment was actually unintentional…'.
42. Repeal of s 40A(6) of the Nationality, Immigration and Asylum Act 2002 by the Asylum and Immigration (Treatment of Claimants etc.) Act 2004 Sched. 2, para. 4 on 4 April 2005 by SI 2005/565. See the Lord Rooker, HL Deb 06 July 2005 cols. 782–784 and see *L1 v Secretary of State for the Home Department*, SC/100/2010.
43. See *L1 v SSHD*, [2010] SIAC (3 December 2010) per Mitting J: 'The Secretary of State's decision to deprive the Appellant of his citizenship was one which had clearly been contemplated before it was taken. The natural inference, which we draw, from the events described, is that she waited until he had left the United Kingdom before setting the process in train' (paragraph 12(i)). See HC Deb. 30 January. 2014, col. 1043, 11 February 2014 cols. 261–262 WH and 7 Apr. 2014: Column 1180 and HC Deb, 11 February 2014, col. 260–261 WH and see *Former British citizens killed by drone strikes after passports revoked*, Chris Woods and Alice K. Ross, Bureau of Investigative Journalism, 27 February 2014.
44. HC Deb., 11 February 2014: cols. 260–261 WH.
45. HC Deb., 1 Sep. 2014: col. 26.
46. See the papers of Guy Goodwin-Gill: *Mr. Al-Jedda, Deprivation of Citizenship, and International Law Revised draft of a paper presented at a*

Seminar at Middlesex University, 14 February 2014, submitted to the Joint Committee on Human Rights and published by it at http://www.parliament.uk/documents/joint-committees/human-rights/GSGG-DeprivationCitizenshipRevDft.pdf; *Deprivation of Citizenship resulting in Statelessness and its Implications in International Law: Opinion*, 12 March 2014; *Deprivation of Citizenship resulting in Statelessness and its Implications in International Law Further Comments*, 5 April 2014; *Deprivation of Citizenship, Statelessness, and International Law More Authority (if it were needed...)*, 5 May 2014.

47. HL Deb 6 January 2015, col. 184 per David Winnick MP.
48. HC Deb 6 January 2015 col. 181 per Rt Hon Dominic Grieve MP. See also col. 194, per Mr. Mark Field MP.
49. *Lex posterior derogat legi priori*.
50. *The Vera Cruz (No. 2)* (1884) 10 App. Cas. 59.
51. Statute Law (Repeals) Act 1969 (c.52).
52. Supreme Court of Victoria, C. No. 23 [4s] 2003.
53. Page 156 of the judgment.
54. Edward III reigned 1327–77.
55. HC Deb 01 May 1848 Vol. 98 col. 565.
56. See Coke, *Institutes of the Lawes of England*, chapter 30 and see Hale, *Pleas of the Crown*, vol. i, p. 542.
57. Coke cites Mirror. cap. 1. § 3 and Coke cites Int. leges Ethel. cap. 2.
58. Coke, *Institutes of the Laws of England*.
59. See, for example, the Immigration Act 2014.
60. See Fransman's *British Nationality Law* at 5.5.1 and see the Home Office Nationality Instructions, Vol. 2, Part 2 *Denization*.
61. 33 & 34 Vict c 13. The last endenization took place in 1873 according to the UK Home Office Nationality Instructions. See Blackstone, *Commentaries on the Laws of England*, Vol. 1, 354–362. Schedule 3 to the 1701 Act of Settlement lists the restrictions on the rights of denizens who, like the naturalized at the time, could not stand for parliament or be granted land by the crown. The British Nationality and Status of Aliens Act 1914 changed the position of the naturalized but, like the Naturalization Act 1870, 33 & 34 Vict c 13 before it, preserved the category of denizen (s 25).
62. Blackstone, *Commentaries*, 1965, Book 1, Chapter X, p. 374.
63. [1921] 2 AC 262.
64. Hale, *Pleas of the Crown*, vol. i, p. 542.
65. [1921] 2 AC 262.
66. See Blackstone, *Commentaries*, page 254: 'great tenderness is shown by our laws not only to foreigners in distress, but with regard also to the admission of strangers who come spontaneously.' In an echo of both

Sylvester's case and of Blackstone, a letter in the *Daily Telegraph* on 29 August 2015 reminded readers of the inscription at the entrance to the French Protestant chapel in the crypt of Canterbury Cathedral 'the large and liberal spirit of the English church, and the glorious asylum which England has in all times given to foreigners flying for refuge against oppression and tyranny'.

67. At page 7 of the report.
68. Somerset v Stewart (1772) 98 ER 499.
69. W. Holdsworth, *History of English Law*, Vol. X, Sweet and Maxwell (1938) at 396–7.
70. 9 October 1888 C. No. 23 [4s] 2003.
71. [1891] AC 272.
72. (2001) 110 FCR 491 (Full Federal Court). See Commonwealth, *Parliamentary Debates,* House of Representatives, 28 August 2001, 30359 and 30 August 2001, 30663and D. Clark, 'Jurisdiction and Power: habeas corpus and the Federal Court', *Monash University Law Review* (2006), 13.
73. [2004] UKHL 55 (9 December 2004).
74. (1684) 10 ST 371, at pp. 530–1.
75. For the text see Holdsworth, *History of English Law*, Vol X, Sweet and Maxwell (1938) at 396–7.
76. Ninth edition, Butterworths, 2014.
77. *Toy v Musgrove*, report, page 11, citing *Hansard*, Parl. Debs., 3rd series, vol. 98, pp. 563–6.
78. 34 Geo. III, c. 54.
79. HC Deb. 01 May 1848 Vol. 98 col. 563. See Fripp, Moffatt and Wilford, *The Law and Practice of Expulsion and Exclusion from the United Kingdom: Deportation, Removal, Exclusion and Deprivation of Citizenship, Oxford: Hart, 2014,* and Cohen, *Migration and its Enemies: Global Capital, Migration and the Nation State*, Ashgate, 2006.
80. HC Deb. 01 May 1848 Vol. 98 col. 575.
81. Cohen, R., *op.cit.*
82. Cited in argument in *Toy v Musgrove*, page 11 of the report.
83. HC Deb. 27 June 1817 Vol. 36 cols. 1208–53.
84. HC Deb. 01 May 1848 Vol. 98 c 571. The Acts being temporary, it was possible to speak in 1822 of repeal of Magna Carta although similar acts had been passed since 1793.
85. HC Deb. 20 April 1826 Vol. 15 c 498.
86. HC Deb. 20 April 1826 Vol. 15 c 499.
87. Cited in *Toy and Musgrove*, page 47 of the report.
88. See *Donegani v Donegani* III Knapp 63, cited *Ruddock v Vardalis* for another example.

89. 11 & 12 Victoria 20.
90. HC Deb. 19 April 1848 Vol. 98 col. 508.
91. HC Deb. 01 May 1848 Vol. 98 c 577.
92. See Fransman's *British Nationality Law* at 5.5.2.1, p. 136.
93. HC Deb 01 May 1848 Vol. 98 col. 572–3.
94. Page 48 of the report.
95. HC Deb 19 February 1858 Vol. 148 cols. 1741ff.
96. Judgment of 9 October 1888 C. No. 23 [4s] 2003.
97. *Musgrove v Chun Teeong Toy* [1891] AC 272.
98. (2001) 110 FCR 491.
99. Judgment, page 160.
100. Judgment, page 154.
101. Report, page 13.
102. For example the Aliens Act 1793, 33 George II c.4; Aliens Act 1848 11 & 12 Victoria c.20.
103. For example the Aliens Act 1905, the Aliens Restriction Act 1914. Dr. Prakash Shah, *Refugees, Race and The Legal Concept of Asylum in Britain* , 2000, Cavendish Publishing, chapter 3.
104. Aliens Restriction Act 1914s 1(6).
105. *R v Commandant of Knockaloe Camp, ex p Forman* (1917) 82 JP 41.
106. *Musgrove v Chun Teeong Toy [1891] AC 272, 282*; *A-G for Canada v Cain [1906] AC 542, 546*, *Johnstone v Pedlar [1921] 2 AC 262, 283.*
107. *R v Bottrill, ex p Kuechenmeister* [1947] 1 KB 41 at p 51 per Scott LJ,*; R v Governor of Brixton Prison ex p Sobllen* [1963] 2 QBG 243, 400, CA and *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149, 168, *R (on the application of BAPIO Action Ltd) v Secretary of State for the Home Department* [2008] UKHL 27, [2008] 1 AC 1003, para 4, per Lord Bingham.
108. See Cohen, *op.cit*, and Fripp, Moffatt and Wilford, *op.cit.*
109. There are also saving for those who have lived in the UK for more than six months, embarked from the UK and been refused permission to land who went directly to the place where permission was refused and returned directly from it, and for those who satisfy the immigration officer that they were born in the UK 'his father being a British subject' The latter is a surprising requirement given that until 1983 birth on the territory sufficed to make a person a British subject and suggests a notion that allegiance could be lost.
110. Citing *Attorney General v De Keyser's Royal Hotel Ltd.*[1920] AC 508 and *Re Mitchell, Hatton v Jones* [1954] Ch 525, see paragraph 135 of MacDonald, in which deprivation of citizenship case *of G1 v Secretary of State for the Home Department* [2012] EWCA Civ 867 is also considered.
111. 9 & 10 Geo 5 c 92.

112. HL Deb. 27 November 1919 Vol. 37 cols. 435–82.
113. British Nationality Act 1948s 1(2): citizens of the UK and its colonies but also of the Dominions: Canada, Australia, New Zealand, South Africa, Newfoundland, the Irish Free State from 1922, India and Pakistan from 1947 and Ceylon (now Sri Lanka) in 1948.
114. See, for example, British Nationality (The Gambia) Regulations 2015 (SI 2015/1771) amending the British Nationality Act 1981.
115. *Musgrove v Chun Teeong Toy* [1891] AC 272.
116. (2001) 110 FCR 491 (Full Federal Court). See *Commonwealth, Parliamentary Debates,* House of Representatives, 28 August 2001, 30359 and 30 August 2001, 30663. The case is discussed in Clark, 'Jurisdiction and Power: habeas corpus and the Federal Court' , 13.
117. [2001] FCA 1329.
118. Long title, cited in Clark, 'Jurisdiction and Power: habeas corpus and the Federal Court' : 'An Act to validate the actions of the Commonwealth and others in relation to the MV *Tampa* and other vessels, and to provide increased powers to protect Australia's borders, and for related purposes'. See Commonwealth, *Parliamentary Debates*, House of Representatives, 18 September 2001, 30872 and 19 September 2001, 31020.
119. [1921] 2 AC 262.
120. [1915] 1 K.B. 857. Also known as *In Re Merten's Patents* also known as *Porter v Freudenberg*).
121. In the *Janson* case, which involved a pot of gold, the defendant was a corporation under the laws of the Transvaal. The Transvaal was a British protectorate from 1881 to 31 August 1900 and thence, to 30 May 1910, within the Crown's dominions as a British Colony. War was declared at 5 pm on 8 October 1899. The older case of *McConnell v. Hector* 3 B. & P. 113; 6 R. R. 724 is cited with approval.
122. British Nationality Act 1981s 4C.
123. *R (Hicks) v Secretary of State for the Home Department* [2005] EWHC 2818 (Admin) (13 December 2005).
124. Secretary of State for the Home Department v Hicks [2006] EWCA Civ 400 (12 April 2006).
125. HL Deb. 8 Jul. 2002: col. 499, per Earl Russell.

CHAPTER 7

Where Is Magna Carta Today?

Matthias Kelly

Magna Carta, or 'The Great Charter', is often thought of as the embodiment of the Rule of Law. When first issued by King John in 1215 it was merely a practical and pragmatic solution to the political crisis he faced. It did, of course, establish in England for the first time the principle that the king was subject to the Rule of Law.[1] Of course, a huge chunk of the original (about one third) was deleted or rewritten fairly rapidly (within 10 years) and almost all the clauses have been repealed in modern times. Most of the 63 clauses granted by King John dealt with specific grievances relating to his rule. However, buried within them were a number of what are recognized as fundamental values that both challenged the autocracy of the king and have proven highly adaptable in later centuries, often inspirational to many. Most famously, the 39th clause gave all 'free men' the right to justice and a fair trial. The core principles find an echo in the United States Bill of Rights (1789 ('Men are born and remain free and equal in rights'.) and in many other constitutional documents around the world, as well as in the Universal Declaration of Human Rights (1948) and the European Convention on Human Rights (1950).

Magna Carta begins thus: 'TO ALL FREE MEN OF OUR KINGDOM we have also granted, for us and our heirs for ever, all the liberties written

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out below, to have and to keep for them and their heirs, of us and our heirs.' Of the original 63 clauses only four are still law. Of these the only two I wish to address are the two for which it is famous: Clauses 39 & 40:

(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 way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.'.

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

How do those clauses (39 and 40) stand today? What is the 'magic' they convey or are said to convey? To many they convey the idea of freedom, of liberty, of equality and the Rule of Law. By that latter term I mean that society operates by clear, readily accessible rules binding upon everyone, whether powerful or weak, rich or poor. 'Everyone bound by the same rules and accountable in the same way' does have a democratic resonance. We can, I think, best consider its influence and import in the twenty-first century, by substituting 'the Executive' or 'the Government' where the original was directed to the King. We can ask what impact it had, and currently has, in the wider world. We can ask where the values it represents stand today in the UK, the USA and Ireland?

Whilst the actual words used in clause 39 and 40 do have a modern democratic resonance, judged by twenty-first century standards, they have their limitations. Amongst those are the fact that they do not cover all citizens, as they were directed to and for the benefit of 'free men', who were the Barons and the words fail to cover women.

However, Magna Carta has given us a great legacy: *the Role of Law in controlling the Executive*.

There is, very often, a tension between the Courts and politicians. Politicians tend to assume, when elected to office, that they are there to 'rule' over the people, as opposed to be the elected representatives of the people in government. In this mind set, the Law and the Courts are seen as being obstructions, by many politicians. A good example of this is a recent Court of Appeal case: Public Law Project v Secretary of State for Justice (2014) EWHC 2365 (Admin). In that case a piece of delegated legalisation was being used to yet further restrict legal aid, this time based on a residency test. It would have had severe ramifications. The UK Government made plain its hostility to the Court reviewing the legality of its proposals. Moses LJ in the Court of Appeal said:

> The constitutional importance of judicial review does not require elaboration, but it is worth drawing attention to the fact that the residence test will exclude from access to legal aid individuals resident abroad who have been subject to serious abuses at the hands of UK forces. Cases such as those brought by Mr Al Skeini, whose judicial review claim established important principles relating to the jurisdiction of the ECHR in the instance of the operations of British armed forces personnel overseas, and Mr Ali Zaki Mousa, who successfully challenged on Article 3 grounds the independence of the Iraqi Historic Allegations Team set up to investigate allegations of abuse by British forces against Iraqi civilians, would fail to satisfy the residence test.

During the course of his Judgment in which he ruled the legislation was discriminatory in its effect and unlawful he said:

> It does not seem to me necessary to choose between the many different ways in which PLP[2] seeks to advance the same argument, whether it is equal treatment under the common law, or a breach of Art. 14, read with Art 6. I conclude that residence is not a lawful ground for discriminating between those who would otherwise be eligible for legal assistance by virtue of Schedule 1 LASPO.

The Statutory instrument in question purported to exclude those who had a better than fifty-fifty chance of establishing a claim, the subject-matter of which is judged as having the highest priority need for legal assistance, but without the means to pay for it, on the grounds that they lack a sufficiently close connection with the country to whose laws they are subject.

Moses LJ was unimpressed by the position adopted by the Government:

> That is the justification for the test that is proffered, that it is designed to restrict legal assistance to those with a closer connection to the United Kingdom than foreigners. The Lord Chancellor has said as much to the Joint Committee on Human Rights: 'I am treating people differently because they are from this country and established in this country or they are no'' (26 November 2013). Unrestrained by any courtesy to his opponents, or even by that customary caution to be expected while the court considers its judgment, and unmindful of the independent advocate's appreciation that it is usually more persuasive to attempt to kick the ball than your opponent's shins, the Lord Chancellor has reiterated the rationale behind the introduction of the residence test, in the apparent belief that the Parliamentary Under-Secretary had not been as clear as he thought he had been:

> 'Most right-minded people think it's wrong that overseas nationals should ever have been able to use our legal aid fund anyway, and when it comes to challenging the action of our troops feelings are particularly strong…We are pushing ahead with proposals which would stop this kind of action and limit legal aid to those who are resident in the UK, and have been for at least a year. We have made some exceptions for certain cases involving particularly vulnerable people, such as refugees who arrive in the UK fleeing persecution elsewhere. But why should you pay the legal bill of people who have never even been to Britain?

And yes, you've guessed it. 'Another group of Left-wing lawyers has taken us to court to try to stop the proposals' (*Daily Telegraph* 20 April 2014, sixteen days after the argument had been concluded).

This tension has a long history. On some occasions the tension is marked by the reluctance of Judges, but not all Judges, to stand firm upon legal principle when the Executive arm seeks a departure from legal norms and values. In May 1940 a Mr. Liversidge was interned by the British Government, that is, he was locked up, without a trial, in Brixton Prison for the duration of the War, on the orders of the Home Secretary. This was under 18B of the Defence (General) Regulations, 1939. That Regulation, 18B of the Defence (General) Regulations, 1939, empowered 'the Secretary of State to detain any person whom he has reasonable cause to believe to be 'of hostile origin or association or to have been recently concerned in acts prejudicial to the public safety or defence of the realm', provided that any such person was given the opportunity to make representations to an advisory committee appointed by the Secretary of State.' The Home Secretary believed Mr. Liversidge to be a person of 'hostile origin or association' who had recently been engaged in 'acts prejudicial to the defence of the realm'. Mr. Liversidge was not happy. He decided to contest his internment. Unsurprisingly he wanted to know why he had been interned. The Home Secretary was not saying why. So Mr. Liversidge sued the Home Secretary for false imprisonment. His hope was, in doing so, he might be able to force the Home Secretary to say in a public Court why he had acted as he did, in short to have him explain his actions. In that litigation he asked for particulars from the Home Secretary. What he wanted to know was:

(a) The grounds upon which the Home Secretary claimed to have reasonable cause to believe the Mr. Liversidge to be a person of hostile associations and

(b) The grounds upon which the Home Secretary had reasonable cause to believe that by reason of such hostile associations it was necessary to exercise control over Mr. Liversidge by interning him.

Unsurprisingly, the Home Secretary refused. The High Court Master at first instance refused, a High Court Judge refused on appeal, the Court of Appeal refused. The matter then went to the House of Lords (as our Supreme Court was then called). There, in that Court, the tension which can, and often does, exist, between the Rule of Law and the desire of the Executive to act as it sees fit without constraint by the Courts was clear. Mr. Liversidge's counsel made the point: 'that the liberty of the subject is involved. He referred in emphatic terms to Magna Carta and the Bill of Rights, and contended that legislation dealing with the liberty of the subject must be construed, if possible, in favour of the subject and against the Crown.' A reasonable enough point the reader might think. However Viscount Maugham thought otherwise. His reasons were:

1. Those who enacted the law could not have believed it would be challenged in court
2. The Home Secretary can act on hearsay and is under no duty to tell the person the case against him. The Home Secretary was not bound to act judicially.
3. 'And this is of even greater importance' the Home Secretary will be acting on 'confidential information'. 'It is beyond dispute that he can decline to disclose the information on which he has acted on the ground that to do so would be contrary to the public interest, and that this privilege of the Crown cannot be disputed'

His statement that those who enacted the Law did not believe it would be challenged in Court seems, by modern standards, bizarre, all the more so given that he thought such a belief was in any way a relevant factor. He held that the Court could not and would not intervene. Lord MacMillan took a similar line, save that he commented that the Appellant had not averred[3] that he was wrongly imprisoned. That was, in fact, Lord MacMillan asserting a reversal of the normal burden of proof. 'Innocent until proven guilty' became, many thought 'guilty until proven innocent'. Lord Wright thought that it was for the Home Secretary to decide if he himself had reasonable

grounds and 'act accordingly'. Many dispassionate readers might conclude that his words suggest that there was not much scrutiny there, from the highest court in the land. Lord Romer, after giving the matter '*my most earnest consideration*' concluded that if the Home Secretary were required to say why he detained Mr. Liversidge then a person who may be a '*fifth Columnist*' may be released to continue '*his traitorous activities*'. Again, the reader might think his choice of such words suggested a degree of pre-judgment, given nothing at all had been proven.

But then we come to what has become possibly the most famous dissenting Judgment in the Common Law World. Lord Atkin made clear his view of the majority of his fellow Law Lords in upholding the Order detaining Mr. Liversidge and the Home Secretary's wide power to detain people (a power, I imagine, many Home Secretaries over the years would have liked). In Lord Atkin's view the Judges had abdicated their responsibility to investigate and control the Executive, and were being 'more executive-minded than the executive'.[4] Lord Atkin protested that theirs was 'a strained construction put on words with the effect of giving an uncontrolled power of imprisonment to the minister,' Lord Atkin dealt a deadly blow to the supine approach of his colleagues. He said: 'In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law. In this case I have listened to arguments which might have been addressed acceptably to the Court of King's Bench in the time of Charles I.' He added crushingly:

> I know of only one authority which might justify the suggested method of construction: ''When I use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean, neither more nor less.' 'The question is,' said Alice, 'whether you can make words mean so many different things.' 'The question is,' said Humpty Dumpty, 'which is to be master – that's all.'' ('Through the Looking Glass,' c. vi.) After all this long discussion the question is whether the words 'If a man has' can mean 'If a man thinks he has.' I am of opinion that they cannot, and that the case should be decided accordingly.

Lord Atkin's view was that the phrase '*reasonable cause*' in the statute at hand indicated that the actions of the Secretary of State were meant to be evaluated by an objective standard. As a result it would be within the Court's purview to determine the reasonableness of those actions. The potential power of this dissenting judgment was clearly recognized even before it was published. The then Lord Chancellor, Viscount Simon, wrote to Lord Atkin asking him to amend the proposed terms of the speech. To Lord Atkin's lasting credit, he declined to do so. Lord Atkin had, many may think, a solid grasp of the values of Magna Carta and the concept of judicial independence.

The reluctance of Courts to challenge the Executive was again obvious, this time in Northern Ireland with internment without trial in the 1970s, followed by Special Diplock Courts where the test as to whether a 'confession' was admissible in evidence was altered from whether it was obtained fairly and was voluntary to one which asked whether the confession had been obtained by torture and inhuman or degrading treatment. The practical effect when combined with the ending of the right to silence was that the burden of proof was reversed and the legal test weighed in favour of the prosecution, so that the accused bore the burden of proving he was tortured. That era also saw the abolition of Jury trials in favour of Judge only trials. That you may think was a radical departure from the values of Magna Carta ('the lawful judgement of his equals…'). It may be recalled that in the 1970s the ECHR found Britain guilty of using inhuman and degrading treatment towards those interned, but not guilty of torture, something which the UK, remarkably, trumpeted.

This tension or reluctance to challenge the Executive is also obvious in the USA, where 'National Security' and the so-called 'War on Terror' feature. The USA's use of Guantanamo Bay, extraordinary rendition and the reluctance of its Courts to become involved in vindicating the human rights of detainees, have not been attractive. This is evident in the refusal of its Supreme Court to act in the case of Mr. El-Masri. He was a German citizen detained by Macedonian officials. He was handed over to the CIA who held him, beat him and drugged him in a detention centre in Kabul before releasing him five months later. He sued the CIA. His case was dismissed in the Federal District Court, the Court of Appeals without any hearing on the merits, or on the ground that it could not be tried without

revealing state secrets concerning the operations and activities of the CIA. The Supreme Court refused to hear any appeal. This may be thought by many not to be a ringing endorsement of clause (39) of Magna Carta: '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 way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.'

However, the US Supreme Court did, to its credit find that Habeas Corpus was available as a remedy for detainees in the case of Boumediene v Bush 553 US (2008). Kennedy J even made reference to Magna Carta.

He said:

> The Framers (of the US Constitution) viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom. Experience taught, however, that the common-law writ all too often had been insufficient to guard against the abuse of monarchical power. That history counselled the necessity for specific language in the Constitution to secure the writ and ensure its place in our legal system.
>
> Magna Carta decreed that no man would be imprisoned contrary to the law of the land. Art. 39, in Sources of Our Liberties 17 (R. Perry & J. Cooper eds. 1959) ('No free man shall be taken or imprisoned or dispossessed, or outlawed, or banished, or in any way destroyed, nor will we go upon him, nor send upon him, except by the legal judgment of his peers or by the law of the land'). Important as the principle was, the Barons at Runnymede prescribed no specific legal process to enforce it. Holdsworth tells us, however, that gradually the writ of habeas corpus became the means by which the promise of Magna Carta was fulfilled. [5]

This issue of 'National Security' does continue to haunt our law. There has been, in many countries, in recent years, an increase in the use of so called 'secret evidence', that is evidence which the State says it has but which it is not prepared to use in an open and public Court. This tension brought about by 'National Security' and 'intelligence' evidence being admitted against a citizen is obvious in dealing with suspects who have, in fact, been convicted of nothing. Often the State is not prepared to even

disclose it, nor even its gist to the person who is affected by it. In the UK this is dealt with by the Special Immigration Appeals Commission procedure (SIAC) where a Judge hears all the evidence, the accused hears only part, that which is not classified as 'secret' or confidential. His interests are said to be protected by having a Court appointed Special Advocate. That is a Barrister who has been 'security cleared' or vetted by the State and its intelligence agencies. In most cases it is those same agencies who produce the secret evidence. I can well understand how many people are sceptical of this system. Firstly, there is no relationship between the Advocate and the accused. In fact, once the Special Advocate has seen the evidence he/she cannot speak about it to the Accused. Secondly, it destroys the basis upon which the Bar in England and Wales has operated, whereby all advocates must accept a case whether they believe in it or not. Thirdly it leaves the UK open to the charge of 'closed Courts' and the use of 'secret evidence'. Fourthly, the accused can't give his version since he does not know what is being said about him. There is, in my view, no place in a State based on the Rule of Law, for the use of secret evidence by a government agency to impugn a person's good name and character.

In A and others v. U.K., App. No. 3455/05, 19 February 2009, the Grand Chamber of the European Court of Human Rights considered detention aspects of the system under SIAC. The applicants were terrorist suspects detained at Belmarsh prison. The Grand Chamber determined that procedural fairness required a suspect to be provided with the gist of the secret evidence supporting the allegations made against him. Without sufficient information, the suspect was not able to challenge the allegations effectively.

> [220] […] While this question must be decided on a case-by-case basis, the Court observes generally that, where the evidence was to a large extent disclosed and the open material played the predominant role in the determination, it could not be said that the applicant was denied an opportunity effectively to challenge the reasonableness of the Secretary of State's belief and suspicions about him. In other cases, even where all or most of the underlying evidence remained undisclosed, if the allegations contained in the open material were sufficiently specific, it should have been possible for the applicant to provide his representatives and the special advocate with information with which to refute them, if such information existed, without his having to know the detail or sources of the evidence which formed the basis of the allegations. An example would be the allegation made against several of the applicants that they had attended a terrorist training camp

> at a stated location between stated dates; given the precise nature of the allegation, it would have been possible for the applicant to provide the special advocate with exonerating evidence, for example of an alibi or of an alternative explanation for his presence there, sufficient to permit the advocate effectively to challenge the allegation. Where, however, the open material consisted purely of general assertions and SIAC's decision to uphold the certification and maintain the detention was based solely or to a decisive degree on closed material, the procedural requirements of Article 5 § 4 would not be satisfied.

However, some fine Judges in the UK have been prepared to stand up and point out the fundamentally unfair system the Executive has sought to operate. In A v Secretary of State for the Home Department (2004) UKHL56 & (2005) 2 AC 69, 'the Belmarsh case', nine detainees held in Belmarsh high security prison challenged the lawfulness of their detention. The House of Lords Judicial Committee gave judgment in December 2004. They held that it was incompatible with Article 4 of ECHR to detain without charge or trial non-nationals suspected of international terrorism, while exempting UK nationals similarly suspected from that same detention. Today we have SIAC which imposes curfews, tags, restrictions on who a suspect can meet, where he goes and with whom he communicates. This, too, may well be thought to offend those lofty principles espoused by Magna Carta.

In his book *Common Sense* the pamphleteer Tom Paine famously declared that *'in* America the law is king'.[6] We have been repeating the sentiment in patriotic and legalistic ceremony ever since. Common law lawyers the world over like to trot it out. Many genuinely believe that the law is King. Many pay lip service. Lord Denning famously said '*be ye never so high, the Law is above you*' in Gouriet V CWU (1977) 1 QB 729 at page 762, quoting Thomas Fuller. His rationale was that everyone was bound by law and, as he put it, 'are the Courts to stand idly by?' when the law is broken, Yet, the same Judge could see his way clear to dismissing the legal actions of the Birmingham Six a few years later. They were 6 innocent Irish people who were wrongly, it subsequently transpired, convicted of bombing a pub in Birmingham, killing 21 people. They had spent 16 years in prison for a crime they did not commit. It may well be that Lord Denning was not prone to self-doubt and in common with some other Judges may not have readily accepted there might be a view other than his own. He certainly firmly believed in the infallibility of the English legal system.

In the civil case of McIlkenny v Chief Constable of the West Midlands (1980) 1 QB 283 the English Courts considered the question of dismissal of an action where a Court had previously made a ruling on a central issue. In that case Mr. McIlkenny had been one of the six men convicted of the Birmingham bombing. Mr. McIlkenny and his other co-accused alleged that their confessions, upon which their convictions were based, had been induced by police violence. The trial judge ruled that their confessions were voluntary and thus admissible in evidence. They were accordingly convicted by the jury. Mr. McIlkenny and the others then brought a civil claim against the police for damages for assault based on the alleged violence inflicted in the course of extracting their confessions.

The Court of Appeal held that re-litigation of an issue which has previously been finally decided by a court of competent jurisdiction was an abuse of process. The court refused to allow the case to go ahead because the allegations were so serious they could not be believed. Lord Denning MR said: 'If the six men win it will mean that the Police were guilty of perjury, that they were guilty of violence and threats, that the confessions were involuntary and improperly admitted in evidence and that the convictions were erroneous. That would mean that the home Secretary would either have to recommend that they be pardoned or he would have to remit the case to the Court of Appeal under section 17 of the Criminal Appeal Act 1968. This is such an appalling vista that every sensible person in the land would say: It cannot be right that these actions should go any further.' How wrong he was in the Birmingham Six case, as subsequent events demonstrated. In R v McIlkenny and Others [1992] 2 All ER 417 a unanimous Court of Appeal allowed the men's appeal and so recognized that an appalling miscarriage of Justice had occurred, something, which was subsequently recognized in the succeeding appeals of the Guildford Four and the Annie Maguire case.

My point is this: any legal system is only as good as the integrity of those who operate it. There must be a will to uphold the law, apply it fearlessly and independently. Merely having high principle and paying lip service to clear ringing declarations is not enough. Where Judges bend the law to facilitate the Executive, disaster invariably follows. Magna Carta and similar documents help, but if ignored or twisted are worse than useless.

Some Judges have been a real model of impartiality and the embodiment of a Judge applying impartially the Rrule of Law. One shining example is the late Lord Bingham. In his book *The Rule of Law* he quoted the

1955 declaration of the International Commission of Jurists at Athens as to what constituted the Rule of Law:

1. The State is subject to the Law
2. Governments should respect the rights of individuals under the rule of law and provide effective means of their enforcement
3. Judges should be guided by the rule of law, protect and enforce it without fear or favour and resist any encroachment by Governments or political parties in their independence as Judges
4. Lawyers of the World should preserve the Independence of their profession, assert the rights of an individual under the Rule of Law and insist that every accused is accorded a fair trial.

Tom Bingham, that great Judge, a man of integrity, courage, intellect and wisdom added ruefully 'These are fine aspirations. But aspiration without action is sterile. It is deeds that matter. We are enjoined to be "doers of the word, and not hearers only".', quoting the Epistle of James 1:22. He concluded: 'And it is on the observance of the rule of law that the quality of Government depends.'

Ireland was not a participant in the Bush and Blair 'War on Terror', one of the main drivers of the recent onslaught on personal freedom and attempts to adjust the citizen's rights in the State's favour. However, some Judges have shown some disturbing tendencies to be, as Lord Atkin said, 'more executive minded than the Executive'. The case of Mallak v Minister for Justice Equality & Law Reform [2011] IEHC 306 is instructive. Mr. Mallak was a Syrian Refugee. He had been granted Refugee status in Ireland in 2002. He subsequently (about 2005) applied for naturalisation (to become a citizen). He was refused. The receiving state is, of course under a duty to integrate any legal Refugee within its borders into its society. The Geneva Convention of 1951 relating to the Status of Refugees is scheduled to the Refugee Act 1996 in Ireland. The long title to the Act declares that its intention is to give effect to the Convention. Article 34 of the Convention provides that: 'The Contracting States shall as far as possible facilitate the assimilation and naturalisation of refugees. They shall in particular make every effort to expedite naturalisation proceedings and to reduce as far as possible the charges and costs of such proceedings.' When Mr. Mallak applied, the Minister turned him down initially on the basis of an insufficient period of residency in the State. Undaunted, he waited and reapplied. The Minister's letter of refusal of 20 November 2008 stated:

'The Minister has considered your application under the provisions of the Irish Nationality and Citizenship Acts 1956 and 1986, as amended and has decided not to grant a certificate of naturalisation. In reaching this decision, the Minister has exercised his absolute discretion, as provided for by the Irish Nationality and Citizenship Acts 1956 and 1986 as amended. There is no appeals process provided under this legislation. However, you should be aware that you may reapply for the grant of a certificate of naturalisation at any time. Having said this, any further application will be considered taking into account all statutory and administrative conditions applicable at the time of the application.'

The appellant's solicitor wrote to the Minister requesting access to documents pursuant to the Freedom of Information Acts, 1997 and 2003 in Ireland. Some documents, but not all, were provided. The solicitors then applied under the Freedom of Information Act 1997 for a statement of the reasons for the refusal of his application for naturalisation. Section 18(1) imposes a general obligation on every head of a public body, on application by any person affected by any of its acts, to provide a written statement of reasons for the act. The Minister responded,[7] declining the request 'in accordance with Section 18(2)) of the Act'. That provision refers to a situation where 'the non-disclosure of [the record's] existence or non-existence is required by this Act'. The effect of this response, as later explained, was that the Minister was not obliged to provide a statement of reasons. The Office of the Information Commissioner informed the appellant's solicitors,[8] that he was satisfied that the Minister's decision to refuse to provide reasons for the decision to refuse his request for naturalisation was '*in line with section 18(2)*' of the Act and was correct. I can do no better than quote from the law report what was advanced by way of reasoning in the decision of the Senior Investigator of 9 February 2010 'The FOI Act requires a public body not to disclose whether or not a record exists in circumstances where to do so would cause the harms envisaged in particular exemptions in the Act. For example, section 27(4) of the FOI Act provides that a public body shall not disclose the existence or non-existence of a record if to do so would prejudice the conduct or outcome of contractual or other negotiations of the person to whom the information relates (section 27(1)(c). Similar provisions are contained in sections 23, 24, 26 and 28 of the FOI Act.' The reality in plain language, for which the Irish Ministry of Justice is not particularly well known, is that he was refused on grounds of National Security.

Mr. Mallak instituted Judicial Review proceedings. Those were tried by Mr. Justice Cooke in the High Court. In cases of this sort (Citizenship), in Ireland, under the applicable Act of the Oireachtas (Parliament) the Minister's decision to grant or refuse a certificate of naturalisation is one which is within his or her absolute discretion. This meant the judge (Mr. Justice Cooke) ruled 'that the Minister does not need to have or to give any reason for refusing an application for a certificate'. Thus, he continued, if the Minister 'does have a reason he is not obliged to divulge it to a disappointed applicant.' Consequently, 'it would clearly fly in the face of the unambiguous intention of the Oireachtas as thus expressed for this Court to attempt to hold otherwise'. He pointed out that 'under the Act of 1956, no obligation is imposed on the Minister to give reasons for a refusal decision'. In his view, 'as the Act gives no right of appeal against the exercise of the absolute discretion when a refusal decision is made, it is not possible to imply any entitlement to a statement of reasons'. This most remarkable opinion, many thought, was judicial approval of, and a recipe for, arbitrary and random decision making wholly at odds with any concept of logic or adherence to the rule of law as understood in the Common Law world. The decision was appealed to the Irish Supreme Court who reversed the decision on appeal [2012] IESC 59. Amongst the Grounds of Appeal was 'The decision of the Minister to grant or refuse a certificate of naturalisation is a decision regarding the acquisition of citizenship of the European Union to which general principles of EU law apply, in particular, Article 41 of the Charter of Fundamental Rights of the European Union, and, thus, that the Minister was obliged to give reasons. Clearly without a reason it was effectively impossible for a person in the position of Mr. Mallak (1) to address whatever the concern was, (2) to point out that the information could be wrong, (3) might relate to someone else, or (4) was a result of some obvious error or mistake'. The list could go on. It was not possible for the appellant or indeed any person in a similar position, without knowing the Minister's reason for refusal, to ascertain whether he had a ground for applying for judicial review and, by extension, not possible for the courts effectively to exercise their power of judicial review.

In the Supreme Court, Fennelly J said: 'The developing jurisprudence of our own courts provides compelling evidence that, at this point, it must be unusual for a decision maker to be permitted to refuse to give reasons. The reason is obvious. In the absence of any reasons, it is simply not possible for the applicant to make a judgment as to whether he has a ground

for applying for a judicial review of the substance of the decision and, for the same reason, for the court to exercise its power. At the very least, the decision maker must be able to justify the refusal. No attempt has been made to do so in the present case and I believe it would be wrong to speculate about cases in which the courts might be persuaded to accept such justification'.

> The general principles of natural and constitutional justice comprise a number of individual aspects of the protection of due process. The obligation to give fair notice and, possibly, to provide access to information or, in some cases, to have a hearing are intimately interrelated and the obligation to give reasons is sometimes merely one part of the process. The overarching principle is that persons affected by administrative decisions should have access to justice, that they should have the right to seek the protection of the courts in order to see that the rule of law has been observed, that fair procedures have been applied and that their rights are not unfairly infringed.

Thus, the Supreme Court, in the end, set right an obvious legal failure and did much to restore legal creditability in reasserting what many would consider as a basic right, the right to know the case being made against you.

However, the Irish Department of Justice was and still is undaunted. It continues to hide behind 'reasons of National Security' in other similar cases, which seems to me to fly in the face of any idea of open justice and reasoned logical decisions. This is a retrograde development.

Where a person is declared a refugee, rights under EU law are engaged. By endorsing the Refugee Convention, EU law gives efficacy to Article 34 of that Convention, as does Article 18 of the EU Charter of Fundamental Rights. Article 34 provides: 'The Contracting States shall as far as possible facilitate the assimilation and naturalisation of refugees. They shall in particular make every effort to expedite naturalisation proceedings and to reduce as far as possible the charges and costs of such proceedings.' In EU law, the use of secret information is greatly restricted.[9]

In Commission, Council, United Kingdom v. Yassin Abdullah Kadi (joined Cases C-584/10P, C-593/10P and C595/10P), 18 July 2013, the Grand Chamber of the CJEU emphasised the need to disclose to the individual concerned the evidence underpinning the challenged decision, even if National Security considerations apply and it can only be done by summary: see paras. 119–131. In ZZ v. Secretary of State of the Home Department (C-300/11) the applicant, who had dual French and

Algerian nationality had resided lawfully in the UK from 1990 to 2005 and was married to a British citizen, had his residence permission in the UK revoked while outside the State and was subsequently refused admission. In his appeal in respect of that decision, he was denied access to the information on which the decision was based, although the SIAC procedure applied. The Grand Chamber of the CJEU, in its judgment dated 4 June 2013, analysed what procedures were required for effective judicial protection where State security was involved and stated, inter alia:

> 65. … first, in the light of the need to comply with Article 47 of the Charter, that procedure must ensure, to the greatest possible extent, that the adversarial principle is complied with, in order to enable the person concerned to contest the grounds on which the decision in question is based and to make submissions on the evidence relating to the decision and, therefore, to put forward an effective defence. In particular, the person concerned must be informed, in any event, of the essence of the grounds on which a decision refusing entry taken under Article 27 of Directive 2004/38 is based, as the necessary protection of State security cannot have the effect of denying the person concerned his right to be heard and, therefore, of rendering his right of redress as provided for in Article 31 of that directive ineffective.

In Genovese v. Malta, 11 October 2011, App. No. 53124/09, the European Court of Human Rights (Fourth Section) stated:

> The Court also reiterates that the concept of 'private life' is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person. It can therefore embrace multiple aspects of the person's physical and social identity … The provisions of Article 8 do not, however, guarantee a right to acquire a particular nationality or citizenship. Nevertheless, the Court has previously stated that it cannot be ruled out that an arbitrary denial of citizenship might in certain circumstances raise an issue under Article 8 of the Convention because of the impact of such a denial on the private life of the individual …

In the Irish case of A.P. v. Minister for Justice and Equality *(No. 2)* 2014 IEHC 241, at para. 31 McDermott J. said in his judgment of 17 January 2014:

> It is difficult to see how the applicant can be expected to address in a future application the issues raised against him if he simply has no knowledge, even in general terms, of what they are. He is placed in a very difficult position

> which is not simply frustrating for him as acknowledged by the respondent. He is placed at a complete disadvantage in attempting to formulate a challenge to the decision or to make a new application for a certificate at a later date. He has simply no understanding on the basis of the letter received of what the problem is or may be.

The applicant in that case had the decision in question quashed. The Department of Justice were undaunted and simply re-took the decision, once again refusing him citizenship on the basis of 'National Security', declining to explain even the gist of the case against him. The Department's view is the applicant was given a reason, namely '*National Security*'. That, many may think, is a conclusion as opposed to a reason. This issue is now back in Court again.

In order for a person's rights to be determined in accordance with generally accepted standards of justice, and for the right to his/her good name to be protected and vindicated, the person must be entitled to know what information is being held against him/her, particularly where that secret material is being acted upon. In these circumstances, the State cannot and should not be permitted to hide behind the cloak or mantra of National Security and, in blanket fashion, make an assertion of privilege. The Courts, if they are to be truly independent, must act to uphold human rights, including the right to a fair trial or determination of the disputed issue. That must, it seems to me, necessarily include procedural fairness, a concept now rooted in most international instruments and advanced legal systems. Where human rights, due process and fairness are concerned, the values have been espoused for centuries in Magna Carta, the French Declaration of Rights (1789), the Universal Declaration of rights, the ECHR, and so on. They are not a recent invention.

Some politicians, some sections of the press and some members of the public often want to get rid of 'refugees', to turn against those who are seen as different. It is to ensure that all human beings are treated equally (not just those we like) that we have the system of law in the Western World that we do. Human rights are of no value to the ordinary citizen who is never in conflict with authority, always conforming and sharing majority values. It is when a dispute with authority arises that such rights come into their own. It is then that these values matter and it is then that we can and should expect our Courts to do the job they claim to do, i.e. to impartially uphold the law, including international and supra-national institutional law. It is our

duty as lawyers to make those values real. The temptation that many have, in times of difficulty, to go with the flow, to do down the 'bad' man is a disastrous approach repeated time and again. Lord Bingham remarked: 'it is on the observance of the rule of law that the quality of Government depends.' The Barons in 1215 thought the rule of law mattered, certainly in relation to their own affairs. As he so rightly said: 'These are fine aspirations. But aspiration without action is sterile. It is deeds that matter.'

Notes

1. It is often thought that it established the principle that everyone was subject to the Rule of Law. However, it related only to 'Free Men' who were, essentially the Barons.
2. PLP is the Public Law project who brought the case.
3. That is, he failed to allege or plead in his written Court documents that he was innocent of any wrongdoing.
4. 'I view with apprehension the attitude of judges who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more executive minded than the Executive.'
5. In the USA there have also been Judicial decisions which have had a profound impact, when considering personal rights and freedom as well as equality of human beings:

   (1) Miranda v Arizona (1966) 384 US 436 (evidence obtained in breach of fundamental rights is excluded)
   (2) Brown V Board of Education of Topeka (1954) 347 US 483. The Constitution does not permit segregation in Education nor discrimination, based on race.

6. See Thomas Paine, *Rights of Man: Being an Answer to Mr. Burke's Attack on the French Revolution*, 1791, in *Collected Writings*.
7. In a letter dated 26 January 2009.
8. By letter of 17 December 2009.
9. See Marcelle Reneman, *EU Asylum Procedures and the Right to an Effective Remedy*, Hart Publishing 2014, chap. 10.

CHAPTER 8

Magna Carta and the Charter of the European Union

Peter Gjortler

Introduction

The purpose of this chapter is to compare elements of regulation in respectively the 1215 Magna Carta and the 2001 Charter of Fundamental Rights (hereinafter the Charter), published originally with the 2001 Nice Treaty of the European Union,[1] and given binding legal effect with the 2007 Lisbon Treaty.[2]The intention is to establish the extent to which parallel and opposite lines of thought may be identified in the two documents, without any attempt to establish causality as to effects from the Magna Carta upon the drafting of the Charter. The ambition of the chapter is to examine the degree to which similarities in legal thinking might be found over the gap of 800 years between the two documents.

The version of Magna Carta, signed at the island of Runnymede near Windsor,[3] used for the present chapter, is the English translation of the 1215 version, which includes also the 1225 revisions.[4] For the EU treaties and the case law of the CJEU, the respective databases of Eur-Lex[5] and the CJEU[6] have been followed. The jurisprudence of the CJEU includes that of the Court of Justice (COJ) itself, as well as that of the General Court

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(GCT), while case law of the Civil Service Tribunal (CST) has not been included. Currently, the GCT is being expanded to double the number of judges and this will include an integration of the CST into the GCT.

Structure

The Magna Carta contains a preamble, thus following much the same structure as presently applied to international treaties, such as the EU treaties, and indeed also followed in the secondary legislation of the EU. In the jurisprudence of the CJEU, the preamble constitutes a very important basis for interpretation. Previous case law constitutes an even more important basis for interpretation, although the principle of *stare decisis* does not as such apply in EU law.

The preamble of Magna Carta places the legislative text in a clearly Christian context by referring explicitly to concepts of God and Church:

> To the honour of God, the exaltation of the holy Church, and the better ordering of our kingdom, at the advice of our reverend fathers.

By comparison, the preamble of the Charter contains only oblique references to the values on which the EU is based:

> The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values.
>
> Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity.

During the negotiation of the 2004 European Constitution,[7] which preceded the Lisbon Treaty but was refused in referenda held in France and the Netherlands, it was proposed to give the EU treaties an explicit basis in Christianity, as especially supported by Poland, and also recommended by the Pope of the Catholic Church. Against this background it may be argued that the reference to a spiritual and moral heritage, which for the current EU is mainly Christian, could be seen as an accommodation of the wish to refer to Christian values. The choice of an oblique reference allowed this to be done without bringing the text into direct conflict with other belief systems.

Apart from the Christian reference, the above quote from the Magna Carta makes clear that the document should not be read as only a reaction to King John, but rather as also establishing fundamental values concerning the role and powers to be accepted under monarchical rule. Thus, one comment has been[8]:

> Magna Carta was a response to an entire tradition of royal government, not merely to the tyranny of one particular king.

In this sense, Magna Carta as a reaction to the system of tyranny,[9] a direct parallel may be drawn to the speech given by Winston Churchill at the University of Zurich in 1946, calling for cooperation rather than retaliation as the way forward from the end of World War II, so as to preclude the reoccurrence of tyranny[10]:

> The salvation of the common people of every race and every land from war and servitude must be established on solid foundations, and must be created by the readiness of all men and women to die rather than to submit to tyranny. In this urgent work France and Germany must take the lead together.

The immediate fate of Magna Carta was turbulent, as the Runnymede peace settlement was undone essentially within three months, followed by several years of war and French invasion. It was fortunate that King John died the following year, as the reign of his underage son, Henry III, allowed for the advisors of the king to insist on the Magna Carta being revised and reissued in 1216, and on having some of the more controversial elements removed from the text.[11]

The Charter may also be claimed to have had a turbulent fate during its first years, where its standing as a guidance document issued as treaty protocol created confusion as to how binding the guidance was to be considered. In the jurisprudence of the CJEU, it was therefore possible to find both rejections of any binding effect and rulings which appeared to give direct effect to the Charter, without formally acknowledging any such effect.[12]

It was therefore seen as an important clarification when the 2004 Constitutional Treaty proposed to make the Charter legally binding. With the negative references mentioned above, the Constitutional Treaty was given up, and most of its visibly constitutional elements were removed, so as to create the Lisbon Treaty as essentially a technical clarification

and revision of the existing treaties in their most recent Athens format.[13] However, at no stage of this de-constitutionalisation was any revision of the Charter undertaken. As a result, the Lisbon Treaty, and accordingly also the current versions of the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), contain inconsistent repetitions and, in a limited number of cases also, internally conflicting provisions. These technical issues have not yet come to play any central role in jurisprudence.

Discrimination

The prohibition of discrimination may be claimed to be one of the core values and mechanisms of the EU treaties. Originally, focus was on discrimination on grounds of nationality, so as to promote cross border market activities, with a more limited focus on gender discrimination. The prohibition of gender discrimination in turn raised problems as to whether it should be regarded only as a measure supplementing the prohibition on nationality discrimination, so as to ensure effective implementation of what became the Internal Market, or whether it was in its own right to be regarded as the expression of a core value of the European Union.

The opening section of Magna Carta expresses a general, but also restricted principle of equality:

> To all Free Men of our Kingdom we have also granted, for us and our heirs forever, all the liberties written out below.

It has been argued that the concept of Free Men should not be seen as an expression of gender discrimination, and that women could also qualify as Free Men, especially when continuing their households following the death of a husband.

However, it remains clear that the equal treatment was segmented, applying as it did only to a certain part of society. Such segmentation has been imposed since the origins of democracy. Although it has now mainly been removed from the European continent, it persists in certain aspects, such as the voting rights of prisoners in the United Kingdom.

In contrast, the basic prohibition on nationality discrimination in the EU treaties has not been made subject to any segmentation, and it is repeated in Article 21.1 of the Charter that:

> Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.

Thus, the prohibition presents itself as absolute and limited. It can have effect only within the fields of law where the EU treaties do apply. However, to this must be added the general interpretation of the CJEU whereby fundamental rights are not absolute, but only have strength relative to their social function.

This principle of relativity, explicitly provided for in the provisions of the European Convention on Human Rights (ECHR), has never been codified in the EU treaties. But it may be seen to serve the same function as in ECHR, thus allowing the CJEU to evaluate the relative merits of contradicting claims under the EU treaties. In this manner, it functions much as the famous principle of Cassis de Dijon, which has never been codified either, and which allows the CJEU to balance national interests against those of the Internal Market.

In this sense, the Magna Carta may be seen as going beyond the bounds of what would be accepted today under the principle of relativity, as it explicitly allows in Section 11 for discrimination based on one traditional specific nationality or ethnicity:

> If a man dies owing money to Jews, his wife may have her dower and pay nothing towards the debt from it.

Concerning substantive rights, Article 45 of the Charter provides:

> Every citizen of the Union has the right to move and reside freely within the territory of the Member States.

Although the text of this provision appears not to contain any element of relativity, it is restated in the main text of the TFEU, where it is subject to the conditionality set out in Article 20.2.2:

> These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder.

These conditions, as defined in the secondary legislation of the EU, include the requirement for any person not gaining sufficient income from

his own work to have access to sufficient funds, so as not to become a social burden for the host country, and to possess a medical insurance from the home country. It has been debated whether developments in the case law of the CJEU, especially cases such as C-34/09 Zambrano,[14] pointed towards the conditions becoming inapplicable, as might also have been imagined, based on the unconditional formulation of the right of free movement in the Charter.

However, although never a political court in any party political sense, the CJEU has always been acutely aware of the political environment in which it held jurisdiction, showing itself quite willing to push the limits of expectation of the founding Member States in individual cases, but always staying within the confines of what could be expected to be accepted by those same Member States in the longer run.

This delicate balance of judicial activism and political awareness was demonstrated in case C-333/13 Dano,[15] where the CJEU explicitly accepted the conditions on free movement, as currently expressed in Directive 2004/38[16]:

> To accept that persons who do not have a right of residence under Directive 2004/38 may claim entitlement to social benefits under the same conditions as those applicable to nationals of the host Member State would run counter to an objective of the directive, set out in recital 10 in its preamble, namely preventing Union citizens who are nationals of other Member States from becoming an unreasonable burden on the social assistance system of the host Member State.

Although no reference was made to the refugee crisis, it may be argued that the application of restrictive conditions would be seen as especially important by the member states at a time when their social service systems are otherwise placed under strain by the influx of refugees.

Apart from the possible element of gender equality, which might be interpreted into the concept of Free Men, the text of Magna Carta does also contain elements of both gender equality and gender discrimination, as set out in respectively Section 8 and Section 54:

> No widow shall be compelled to marry, so long as she wishes to remain without a husband.
>
> No one shall be arrested or imprisoned on the appeal of a woman for the death of any person except her husband.

However, the Charter now carries a general statement of gender equality, which was previously discussed as a principle of law, since the EU treaties only specifically provided for gender equality in wage matters. Thus, in Article 23, the Charter provides:

> Equality between women and men must be ensured in all areas, including employment, work and pay.

The general principle of equal treatment was previously ensured mainly by secondary legislation in directives, which could have direct effect only in relation to public, but not private employers under the limitations established for the effect of directives. This may serve to explain how the Member States, when acting as members of the legislating Council of Ministers, came to have the opinion that they could submit gender equality to conditions in secondary legislation, as established above in relation to free movement, although no such conditionality is prescribed in either the Charter or the EU treaties. Further, the Member States may have relied on the general approach of the CJEU, whereby all fundamental rights are relative, as set out above, which would seem to allow for the relativity to be regulated by secondary legislation. However, in case C-236/09 Association Belge,[17] the CJEU drew a very clear line in the sand:

> Accordingly, there is a risk that EU law may permit the derogation from the equal treatment of men and women, provided for in Article 5(2) of Directive 2004/113, to persist indefinitely.
>
> Such a provision, which enables the Member States in question to maintain without temporal limitation an exemption from the rule of unisex premiums and benefits, works against the achievement of the objective of equal treatment between men and women, which is the purpose of Directive 2004/113, and is incompatible with Articles 21 and 23 of the Charter.

As a final element of discrimination, freedom of religion may be considered, which appeared to be ensured by Section 1 of the Magna Carta:

> The English Church shall be free, and shall have its rights undiminished, and its liberties unimpaired.

This was one of the issues that caused conflict over Magna Carta in 1215–16, as the Pope issued a papal bull which denounced the Magna Carta as illegal, unjust and harmful to royal rights and shameful to the

English people. Consequently, he declared the Charter to be null and void of all validity forever but, as referred to above, it was in effect reissued in 1216 and reaffirmed in 1225.[18]

No similar reaction has been raised concerning the equally explicit regulation of religious freedom expressed in Article 21.1 of the Charter:

> Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

As mentioned above, the drafting of the 2004 Constitutional treaty caused a discussion on whether explicit reference should be made to Christianity as the historical roots of Europe. This wish was expressed mainly by Poland and other predominantly Catholic countries, such as the Czech Republic, Italy, Lithuania, Malta, Portugal and Slovakia. It was further argued that the position of the Pope in favour of such an explicit reference may have persuaded ministers of Catholic countries to support the reference, so as to safeguard a positive approach to any referendum on the Constitutional Treaty. However, the European Parliament refused the inclusion of any such explicit reference, even when modified to refer to Judeo-Christian roots and, as referred to above, the Constitutional Treaty was in any event refused by referenda, whereas the subsequent Lisbon Treaty contains only the oblique references to the spiritual and moral heritage of Europe.[19]

Principles of law

Some of the currently fundamental principles of EU law were originally not mentioned at all in the Community treaties, but instead developed by the CJEU and only subsequently, to some degree, codified in the subsequent EU treaties. This includes the principles of proportionality and subsidiarity, while the equally important principle of legality was included in the treaty texts from the origin.

An expression of the principle of proportionality may be identified in Section 20 of the Magna Carta, which provides:

> 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.

Apart from the general expression of the principle of proportionality, in TEU Article 5, a similarly specific expression of the principle in relation to criminal law may be found in Article 49.3 of the Charter, which provides:

> The severity of penalties must not be disproportionate to the criminal offence.

As an example of the wider application of the principle of proportionality, reference may be made to case C-331/88 Fedesa, where the CJEU found [20]:

> The Court has consistently held that the principle of proportionality is one of the general principles of Community law. By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.

The application of this principle of proportionality clearly calls for a careful scrutiny of all public measures, so as to establish whether they are really necessary and do not go further than necessary, and whether they constitute the alternative with least side effects. As a general principle, it is formulated in TEU Article 5 as an obligation upon the EU institutions and other organs, but in practice it is applied also on the Member State authorities.[21]

As most contentious issues of EU law concern interaction between public authorities and private entities, the question of proportionality enters into almost all such cases. Accordingly, the application of the principle of proportionality may be characterised as the very core of the application of EU law.[22] As for the principle of legality, it serves more of a gatekeeping function, so as to ensure that public action is authorised when undertaken. This is also expressed in Magna Carta, where Section 12 provides:

> No 'scutage' or 'aid' may be levied in our kingdom without its general consent.

The specific concern with the legality of taxes may be found even today in the constitutions of Member States. For example, Section 43 of the Danish Constitution, originally from 1848, provides:

> No taxes shall be imposed, altered, or repealed except by statute; nor shall any man be conscripted or any public loan be raised except by statute.

Within the EU, the principle of legality has a wider range, reflecting that the competence of the EU is limited to that of the powers that have explicitly been conferred upon it. Thus, TEU Article 5.2 provides:

> Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.

As an example of the respect for the principle of legality, reference may be made to case C-50/00-P Unión de Pequeños Agricultores, which concerned the issue of whether private parties, denied access to national courts with claims against EU law, might as a last resort have access to the CJEU, despite the limitations on legal standing for private parties, as set out in TFEU Article 263. The CJEU Found[23]:

> While it is, admittedly, possible to envisage a system of judicial review of the legality of Community measures of general application different from that established by the founding Treaty and never amended as to its principles, it is for the Member States, if necessary, in accordance with Article 48 EU, to reform the system currently in force.

While entirely in line with the principle of legality, this judgment seemed at odds with the initiative that the CJEU has demonstrated in other cases, where principles such as supremacy, direct effect and liability were established without any apparent legal basis in the treaty texts, but were seen necessary for the functioning of the EU.

The principle of subsidiarity is different from the principles of legality and proportionality. It was neither included in the original text of the EU treaties, nor developed as a principle in the CJEU. Instead, it was included in the 1992 Maastricht Treaty[24] as a countermeasure to the centralising policy orientation of the European Commission at the time and to the activist jurisprudence of the CJEU.

With its emphasis on retaining member states' competences, the principle of subsidiarity was also expressed in the Magna Carta, where Section 13 provides:

> The city of London shall enjoy all its ancient liberties and free customs, both by land and by water. We also will and grant that all other cities, boroughs, towns, and ports shall enjoy all their liberties and free customs.

However, it may be objected that this is not true subsidiarity, as the local prerogatives are given definite rather than relative protection, which is the subsidiarity mechanism as expressed in TEU Article 5.3:

> Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level.

From a judicial point of view, the interesting question is whether subsidiarity should be regarded as a political message, for the EU legislator to show moderation, or whether it is truly a principle that may be given judicial application. In this regard, case C-491/01 British American Tobacco provides[25]:

> As regards the question whether the Directive was adopted in keeping with the principle of subsidiarity, it must first be considered whether the objective of the proposed action could be better achieved at Community level.
>
> The Directive's objective is to eliminate the barriers raised by the differences which still exist between the Member States' laws, regulations and administrative provisions on the manufacture, presentation and sale of tobacco products, while ensuring a high level of health protection, in accordance with Article 95(3) EC.
>
> Such an objective cannot be sufficiently achieved by the Member States individually and calls for action at Community level, as demonstrated by the multifarious development of national laws in this case.
>
> It follows that, in the case of the Directive, the objective of the proposed action could be better achieved at Community level.

The judgment may be read in two distinct manners. On the one hand, it may be seen to confirm subsidiarity as a principle that may be given judicial application. On the other, it may be read as a confirmation of the general approach of the CJEU, whereby EU legislator and administration are only subject to limited judicial scrutiny.[26]

Thus, the CJEU will not in general replace the political and administrative evaluations performed by the EU legislator and administration, but

will confine itself to asserting whether the evaluations have been performed within the confines of the powers confered and the procedures defined for their exercise. While the text of the judgment gives the impression of a substance evaluation, it may also be seen as a confirmation that no immediate indications have been found of power and procedure transgressions.

As a final element, the principle of recovery presents an additional variation of the above, constituting a long standing principle of the CJEU, which has not yet been codified. The same applies to several other CJEU principles, including the fundamental principle of Cassis de Dijon, in relation to cross-border trade, and the principle of Member State liability for economic loss caused by violation of EU law.

In Magna Carta, however, the principle of recovery may be claimed to be expressed in Section 55, which provides:

> All fines that have been given to us unjustly and against the law of the land, and all fines that we have exacted unjustly, shall be entirely remitted or the matter decided by a majority judgment of the twenty-five barons referred to below in the clause for securing the peace.

This expression of unconditional repayment is very close to that established for undue taxes in the jurisprudence of the CJEU, where reference may be made to case 199/82 San Giorgio,[27] which provides:

> A member state cannot make the repayment of national charges levied contrary to the requirements of Community law conditional upon the production of proof that those charges have not been passed on to other persons if the repayment is subject to rules of evidence which render the exercise of that right virtually impossible, even where the repayment of other taxes, charges or duties levied in breach of national law is subject to the same restrictive conditions.

Thus, the unconditionality sets it apart from a claim for damages, which is subject to the usual criterion of causality, which also exists in EU jurisprudence: the causing act constitutes not only a breach of EU law, but a qualified breach, which in the terminology of the court constitutes an objective criterion, not linked to whether the Member State is culpable but to whether the Member State objectively should have been aware of committing a major breach of EU law.

As indicated in the above case however, even for taxes the unconditionality is not absolute, since a Member State may raise the defence that the tax imposed has been passed on in the chain of commerce, and that

recovery would therefore constitute a windfall profit. The limit set by the CJEU is that the burden of evidence in relation to passing on may not be placed on the party seeking recovery.

Trade

In relation to trade, the EU treaties cover a multitude of issues, of which only some examples are included here for comparison with similar elements of the Magna Carta. They includes the issues of free movement, reverse discrimination and standardisation.

In many aspects, free movement was a norm in previous historical periods, with restrictions being placed by nation states only in relatively newer times and subsequently removed to a wide extent by the implementation of the EU treaties throughout large parts of Europe, where presently the refugee crisis is once more causing free movement to be reconsidered.

In Magna Carta, the principle of free movement may be identified in Section 41, which provides:

> All merchants may enter or leave England unharmed and without fear, and may stay or travel within it, by land or water, for purposes of trade, free from all illegal exactions, in accordance with ancient and lawful customs.

This appear very similar to the original approach to the Common Market of the European Communities, subsequently the Internal Market of the EU, which was focussed on the rights of the economically active parties, and with other EU citizens only later gaining a right of free movement.

For example, in relation to the provision of services, TFEU Article 56 provides:

> Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.

Thus, less generously than the Magna Carta, free movement in the EU treaties is limited to movement between the Member States and not in relation to third countries, apart from the free movement of capital where third countries are also included. However, even within the EU, the right of free movement is not unconditional, but subject to the needs of other

EU and Member State policies, as set out in case C-341/05 Laval, where the CJEU found[28]:

> Since the Community has not only an economic but also a social purpose, the rights under the provisions of the EC Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy, which include, as is clear from the first paragraph of Article 136 EC, inter alia, improved living and working conditions, so as to make possible their harmonisation while improvement is being maintained, proper social protection and dialogue between management and labour.

One of the core principles underlying the right of free movement is the prohibition of nationality discrimination, which in turn has often raised the question of whether reverse discrimination would also be prohibited, i.e. in cases when foreigners were to be treated better than nationals.

In connection with this, Magna Carta provides in Section 42:

> It shall be lawful for any man to leave and return to our kingdom unharmed and without fear, by land or water, preserving his allegiance to us, except in time of war, for some short period, for the common benefit of the realm.

No provisions of the EU treaties, including the Charter, provide a regulation of reverse discrimination and, as a general principle, such reverse discrimination has been seen to fall outside the scope of EU law. However, in special circumstances, the CJEU has taken a more extensive approach, closer to that of Magna Carta, as in case C-370/90 Singh, where the CJEU provided[29]:

> A national of a Member State might be deterred from leaving his country of origin in order to pursue an activity as an employed or self-employed person as envisaged by the Treaty in the territory of another Member State if, on returning to the Member State of which he is a national in order to pursue an activity there as an employed or self-employed person, the conditions of his entry and residence were not at least equivalent to those which he would enjoy under the Treaty or secondary law in the territory of another Member State.

In relation to the final element of standardisation, Magna Carta provides in Section 35:

> There shall be standard measures of wine, ale, and corn (the London quarter), throughout the kingdom. There shall also be a standard width of dyed

> cloth, russet, and haberject, namely two ells within the selvedges. Weights are to be standardised similarly.

There is no corresponding provision on standardisation in the EU treaties, but this subject is seen to fall clearly within the competence of the EU legislation, as a matter of importance for the promotion of cross-border trade. Against this background, the Council had, as early as 1971, adopted Directive 71/354 on measurement units.[30] Following the United Kingdom's accession to the Communities, and a metrication process that subsequently stalled in the United Kingdom, the original was replaced in 1980 by Directive 80/181, which allowed a transition period in which that country could continue to use imperial measurements.[31]

There is a certain element of irony, given the clear provision of Magna Carta on standardisation, in that even at the end of the transition period, the issue of using metric measurements continued to constitute a problem in the United Kingdom. For the purposes of cross-border trade it seems obvious that standardisation of measurements remains an essential issue.

Justice

The final part of this chapter concerns themes that have attracted scholarly attention down the centuries–access to justice and the application of presumptions, as well as the issues of anti-corruption and supervision.

On access to justice, Magna Carta provides in Section 17:

> Ordinary lawsuits shall not follow the royal court around, but shall be held in a fixed place.

Although not directly addressing the issue of who shall have access to justice, it may be argued that the provision promotes access to justice by providing for fixed places for courts to be held.[32] More generally, the Charter has major provisions corresponding to those of the ECHR on access to justice, as Article 47.1–2 of the Charter provides:

> Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
>
> Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.

In case C-50/00-P Unión de Pequeños Agricultores,[33] where the CJEU refused last instance access to the courts of the EU, it also established the obligation for the member states to ensure a complete system of access to justice, where necessary by the courts undertaking appropriate interpretation of any procedural limitations on the hearing of EU related cases. Thus, the CJEU found:

> In accordance with the principle of sincere cooperation laid down in Article 5 of the Treaty, national courts are required, so far as possible, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the legality of any decision or other national measure relative to the application to them of a Community act of general application, by pleading the invalidity of such an act.

Within the field of what is today covered both by ECHR and the Charter, the text of Magna Carta also addresses the issue of presumption of innocence in criminal proceedings, as set out in Section 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 way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.

The corresponding provision in the Charter is found in Article 48.1, which provides:

> Everyone who has been charged shall be presumed innocent until proved guilty according to law.

However, even prior to the adoption of the Charter, the CJEU had recognised in general the application of the principles of ECHR as an unwritten part of EU law,[34] and more specifically found in case C-235/92 Montecatini concerning the presumption of innocence[35]:

> The Court observes first of all that the presumption of innocence resulting in particular from Article 6(2) of the ECHR is one of the fundamental rights which, according to the Court's settled case-law, cited above in paragraph 137, reaffirmed in the preamble to the Single European Act and in Article F(2) of the Treaty on European Union, are protected in the Community legal order.

> It must also be accepted that, given the nature of the infringements in question and the nature and degree of severity of the ensuing penalties, the principle of the presumption of innocence applies to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments.

This constituted a reversal of earlier case law, where an attempt had been made to distinguish administrative sanctions conceptually from penal sanctions, and to claims that the ECHR principles of criminal law would not apply to administrative law. The European Court of Human Rights (ECtHR) had found no basis for any such distinction.

As for what would today be termed anti-corruption issues, the Magna Carta is explicit in Section 40, which provides:

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

By contrast, the issue of anti-corruption is not covered as such by provisions of the EU treaties, but under the scope of what was previously referred to as Home and Justice Affairs, presently referred to as the Area of Freedom, Security and Justice, several conventions on the issue were adopted. This included:

> Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union.[36]
>
> Convention on the protection of the European Communities' financial interests.[37]

The EU has been more restrictive in legislating on the corruption of third country officials, where the Member States have had differing opinions as to whether this might be justified in order to ensure access for EU business operators. However, in relation to the Common Foreign and Security Policy, the EU has commenced to use sanctions against third country politicians and officials claimed to be involved in corruption, which has raised issues both in relation to the competence of the EU and the manner in which sanctions were applied. In case T-290/14 Portnov, the CJEU established:

> The Council maintains, first, that Article 1 of the contested decision should not be interpreted as applying only to persons who have been the subject of a judicial decision finding them guilty of misappropriating State funds and,

> secondly, that transferring misappropriated State funds outside the Ukraine may constitute the offence of misappropriation of funds itself.
>
> It should be noted that, although the Council has a broad discretion as regards the general criteria to be taken into consideration for the purpose of adopting restrictive measures, the effectiveness of the judicial review guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union requires that, as part of the review of the lawfulness of the grounds which are the basis of the decision to include or to maintain a person's name on the list of persons subject to restrictive measures, the Courts of the European Union are to ensure that that decision, which affects that person individually, is taken on a sufficiently solid factual basis.

In the specific case, the CJEU found that the Council had responded to a simple request from the Prosecutor General, without undertaking a sufficient check of the underlying facts and that, for the sake of ensuring an effective judicial review, the decision of the Council to sanction the person concerned would have to be set aside as invalid.

Finally, on the issue of supervision, Magna Carta provides in Section 61:

> The barons shall elect twenty-five of their number to keep, and cause to be observed with all their might, the peace and liberties granted and confirmed to them by this charter.

This notion of a power, above the judiciary, to oversee the effective application of the foundation document, here the Magna Carta, may be argued to be found also in the EU treaties, where TEU Article 7.2–3 provides:

> The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations.
>
> Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council.
>
> In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

However, in line with the principle of the rule of law, the EU treaties do also provide for a limited judicial review of the excise of these powers by the European Council, as TFEU Article 289 provides:

> The Court of Justice shall have jurisdiction to decide on the legality of an act adopted by the European Council or by the Council pursuant to Article 7 of the Treaty on European Union solely at the request of the Member State concerned by a determination of the European Council or of the Council and in respect solely of the procedural stipulations contained in that Article.

Thus, as with the general approach adopted by the CJEU in relation to judicial review of the legislator and administration, Article 289 does not provide for a judicial review as such of any sanctions adopted against an erring Member state, but merely allows for a review of whether the correct procedures were applied in adopting the sanctions.

Conclusion

This analysis does not purport to constitute a complete analysis of all points of contact between the Magna Carta and the Charter of Fundamental Rights of the European Union. Nor does it purport to demonstrate that the Magna Carta has had a demonstrable impact on the formulation of the Charter. The ambitions have been more limited, given also the space available for the present chapter, in relation to identifying issues that have been addressed in either similar or different manners in respectively the Magna Carta and the Charter.

Many of the judicial principles addressed here are normally regarded as characteristic and special for the European Union, and part of the curriculum that a lawyer must master in order to be able effectively to apply EU law. It is noticeable how many of these principles may be seen as reflected also in the Magna Carta. In any event, there are strong grounds for us to celebrate the 800th anniversary of the Magna Carta. It was highly relevant at the time of its adoption, remained relevant for the debates leading to the English Civil War,[38] and is crucial today for discussions on how the rule of law should best be ensured.[39] In this respect, it remains a highly contemporary document, eight centuries on.

Notes

1. Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related Acts, OJEU 2001, C 80, p. 1.
2. Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, OJEU 2007, C 306, p. 1.
3. Geoffrey Rivlin, *Understanding the Law*, Oxford University Press 2006, p. 47.
4. See https://www.bl.uk/collection-items/magna-carta-1215, visited 1 June 2016.
5. See http://eur-lex.europa.eu, visited 1 June 2016.
6. See http://curia.europa.eu/juris/recherche.jsf?language=en, visited 1 June 2016.
7. Treaty establishing a Constitution for Europe, OJEU 2004, C 310, p. 1.
8. Nicolas Vincent, *The Origins of Magna Carta*, British Library 2015.
9. Norman Davis, *Europe – A History*, Pimlico 1997, p. 354.
10. See www.coe.int, visited on 1 June 2016.
11. Vincent, *The Origins of Magna Carta*.
12. John Morijn, *Judicial Reference to the EU Fundamental Rights Charter*, Ius Gentium Coniumbrigae Institute 2003.
13. Consolidated versions of the Treaty on European Union and of the Treaty establishing the European Community, OJEU 2006, C 321, p. E-1, incorporating the amendments made by the Treaty of Athens, signed on 16 April 2003.
14. Judgment of the Court (Grand Chamber) of 8 March 2011, Zambrano, C-34/09, ECLI:EU:C:2011:124.
15. Judgment of the Court (Grand Chamber) of 11 November 2014, Dano, ECLI:EU:C:2014:2358.
16. Directive 2004/38 of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221, 68/360, 72/194, 73/148, 75/34, 75/35, 90/364, 90/365 and 93/96.
17. Judgment of the Court (Grand Chamber) of 1 March 2011, Association Belge.
18. Claire Breay and Julian Harrison, *Magna Carta in Context*, British Library 2015.
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20. Judgment of the Court (Fifth Chamber) of 13 November 1990, Fedesa, C-331/88, ECLI:EU:C:1990:391.

21. Wolf Sauter, 'Proportionality in EU law: a balancing act?', *Nederlandse Zorgautoriteit*, 25 January 2013.
22. Tor-Inge Harbo, 'The Function of the Proportionality Principle in EU Law', *European Law Journal*, Vol. 16, No. 2, March 2010, pp. 158–85.
23. Judgment of the Court of 25 July 2002, Unión de Pequeños Agricultores, C-50/00-P, ECLI:EU:C:2002:462.
24. Treaty on European Union, OJEU 1992, C 191, p. 1.
25. Judgment of the Court of 10 December 2002, British American Tobacco, C-491/01, ECLI:EU:C:2002:741.
26. Lars Bay Larsen, 'The Judicial Review of the Principle of Subsidiarity at the Court of Justice of the European Union', 6th Subsidiarity Conference 18 December 2013 in Berlin.
27. Judgment of the Court of 9 November 1983, San Giorgio, 1992/82, ECLI:EU:C:1983:318.
28. Judgment of the Court (Grand Chamber) of 18 December 2007, Laval, C-341/05, ECLI:EU:C:2007:809.
29. Judgment of the Court of 7 July 1992, Singh, C-370/90, ECLI:EU:C:1992:296.
30. Council Directive 71/354 of 18 October 1971 on the approximation of the laws of the Member States relating to units of measurement, OJEU 1971, L 243, p. 29.
31. Council Directive 80/181 of 20 December 1979 on the approximation of the laws of the Member States relating to units of measurement and on the repeal of Directive 71/354, OJEU 1980, L 39, p. 40.
32. O.F. Robinson, T.D. Fergus and W.M. Gordon, *European Legal History*, Butterworths 2000, p. 139.
33. See footnote 23.
34. Federico Fabbrini, *Fundamental Rights in Europe*, Oxford University Press 2014, p. 10.
35. Judgment of the Court (Sixth Chamber) of 8 July 1999, Montecatini, C-235/92, ECLI:EU:C:1999:362.
36. Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, OJEU 1997, C 195, p. 2.
37. Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests, OJEU 1995, C 316, p. 49.
38. Davis, *Europe – A History*, p. 551.
39. Rivlin, *Understanding the Law*, p. 62.

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[1] Note: Page numbers followed by "n" refer to notes.

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