EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Magna Carta and the Jurisprudence and Working of the European Court of Human Rights

Guido Raimondi

President of the European Court of Human Rights

European perspectives on Magna Carta:
Magna Carta 800th Anniversary Seminar
Human Rights Building, Strasbourg
Thursday 12 November 2015

Secretary General of the Council of Europe,

Members of the Magna Carta 800th Anniversary Committee,

Excellencies,

Ladies and Gentlemen,

I am very happy to participate in this seminar celebrating the 800th anniversary of that great charter of liberty, Magna Carta.

Before turning to the influence of Magna Carta on the jurisprudence and workings of our Court, I should like to begin by paying tribute to the work of the Magna Carta 800th Anniversary Committee.

[As Professor Blackburn has said] This is only one of a series of events the Committee has organised, in the United Kingdom and internationally, to celebrate Magna Carta's 800th anniversary.

It is fitting that one of the 800th anniversary events should take place here in the Human Rights Building in Strasbourg. However, I must confess I embark on the subject of Magna Carta with some trepidation: as you know, maybe the first Italian who spoke on the Charter was Pope Innocent III in 1215 when he tried to quash it. Happily he failed and I have the privilege, 800 years later, of saying something on the Charter and its influence on our work here at the Court.

It has been said that, when the Barons presented Magna Carta to King John at Runnymede, they did three things of enduring impact, all of them expression of the fundamental principle *sub lege rex*: first, they secured the King's acceptance of, and support for, the then emerging common law tradition; second, by making a feudal contract with a hitherto absolutist monarch they paved the way for modern constitutionalism; and third, they set down principles of liberty and the rule of law which guide us even to this day.[1]

I shall concentrate on the last of these three.

[1] J H Langbein et al, *History of the Common Law*, 2009, Aspen Publishers, pp. 123-125.

I cannot hope to be exhaustive in setting out the influence of Magna Carta's sixty or so clauses on the Convention. And one must also be careful not to use the benefit of 800 years of hindsight to impose a modern interpretation on a Charter which inevitably referred to another time and place. However, re-reading the Charter it is striking how many of those clauses resonate in contemporary human rights jurisprudence.

I would suggest that Magna Carta gave us – broadly speaking – four principles of liberty and the rule of law which have influenced, and continued to influence, the Strasbourg Court's jurisprudence.

The first of these principles emerges from those clauses of the Charter which attempted to regulate law and order in thirteenth-century England. The various clauses curbing "amercements" (or fines) and those curbing the powers of the authorities of the time to tax and take private property may seem obscure to the modern reader. So, too, those clauses which concern matters of finance, and the prerogatives of the city of London. However, while these clauses may have had, as their primary purpose, the remedying of baronial and other grievances, the essential point is surely that those grievances were remedied by clauses designed to limit executive power, and better to regulate taxation, private legal relationships and commerce.

These are all essential elements of the modern rule of law. As such, they are just as important as general commitments to liberty. They find contemporary expression in those Articles of the Convention which emphasise the need for all legal action – whether involving the State and citizen, or between private individuals themselves – to be based on the rule of law. The modern commercial rule of law, for instance, would be impossible without the protection given to private property in Article 1 of Protocol No. 1 to the Convention.

The second principle which the Charter bestowed, and which we continue to apply in Strasbourg, is the principle of proportionality of punishment. Clauses 20 and 21 of Magna Carta provided that free men, earls, barons and others should be punished according to the gravity of their offence. Those clauses were carried on into the Bill of Rights of 1689, and the prohibition on cruel and unusual punishment contained in the Eighth Amendment to the United States Constitution.

Drawing on Magna Carta, common law courts around the world, including the United States Supreme Court, have interpreted that prohibition as meaning no punishment should ever be "grossly disproportionate".[2] And it was on that common law jurisprudence which our Court relied on when, in the *Vinter and Others* case (on life imprisonment without parole), it stated for the first time that any sentence of imprisonment which is grossly disproportionate will violate Article 3 of the Convention.

The third principle of Magna Carta which is reflected in our case-law is the proper administration of justice. For instance, clause 17 of the Charter provided that judges were to sit in a fixed place rather than travel with the King around the land. The effect of that clause was to separate the administration of justice from the royal power, and to ensure that judges operated independently of the sovereign-executive.[3] The guarantee of an independent and impartial tribunal in Article 6 owes a great deal to clause 17.

Just as significant is clause 45. That provides that judges were to apply the law of the realm. To the modern reader that may seem obvious. But to the 13th century barons it was not. Law in thirteenth-century England could mean the King's law, canon law or local law depending on which judge tried a case.[4] When clause 45 ordained that judges were to apply the law of realm, it was saying that judges were required to know and apply, not the various laws of the King, the church or the area in which

[2] See *Vinter and Others v. the United Kingdom* [GC], nos. 66069/09, 130/10 and 3896/10, §§ 73, 83 and 102, ECHR 2013 (extracts).
[3] On this aspect of clause 17 see Lady Justice Arden "Magna Carta and the Judge – Why Magna Carta matters" in R. J Holland (ed), *Magna Carta: Muse and Mentor*, 2014, Thomson West, at p. 184.
[4] Ibid at p. 184-185.

they happened to be sitting, but the common law of the country. And they were to apply that common law faithfully, fairly and consistently. Sitting 800 years later, our Court has frequently stressed that, not only must all interferences with a person's human rights have some basis in law, but the law in question must be clear, accessible and foreseeable. It is also perhaps no accident that some of our leading authorities on this point – *Golder*, *Silver*, *Malone*, and *Gillan and Quinton* – are all judgments involving the United Kingdom. That jurisprudence surely owes a debt to clause 45.

The fourth principle given to us by Magna Carta is of course the principle of due process contained in the most famous of all clauses in Magna Carta, clauses 39 and 40. Even after 800 years those clauses have, in the famous words of Lord Bingham, "the power to make the blood race".[5]

"To no one," says clause 40, "will we sell, to no one will we deny or delay, right or justice."

How important those words remain today. How much of work here in Strasbourg is dedicated to ensuring that those seventeen words are observed across Europe. How many challenges still remain in ensuring that justice is not sold by corruption, that is not denied by a failure to apply the law fairly and consistently, and that it is not delayed by chronic underfunding or inefficiency. Those were challenges in 1215, and they remain so today.

Yet perhaps the most important words in clause 40 are not the references to selling, denying or delaying justice, but the opening words: "no one". To *no one* will we sell, deny or delay justice.

Each time we as judges administer justice without fear or favour, each time we provide access to court without regard to means or money, each time we uphold the due process rights, even with respect to those individuals who pose threats to our way of life on a scale unimaginable 800 years ago, we live up to the promise of Magna Carta and the principles it gave us.

Surely the greatest and most enduring influence of Magna Carta on the work of our Court is the principle that rights should not be denied to anyone but rather apply, in the words of Article 1 of our own Convention, "to everyone".

Those opening words of clause 40 show too that there is no inherent contradiction between the Convention and the common law tradition. Indeed, quite the opposite: the Convention and the common law have always been mutually supportive of each other, sharing a common heritage in Magna Carta's timeless principles.

Of course, like any legal text, Magna Carta has its shortcomings. It suffered the fate of other charters of rights when it was swiftly repudiated by King John, annulled by Pope Innocent and, for long periods of its subsequent history, honoured only in the breach. With the possible exception of the security clause, clause 61, the Charter was also silent on the question of remedies and what would happen if its clauses were violated.

It was perhaps the fate of Magna Carta (and one all too often repeated with many of Europe's later charters of freedom) that led the framers of our own Convention to include the right to an effective remedy in Article 13 of the Convention, and to create the Court here in Strasbourg as means of ensuring that States respected their obligations under the Convention.

But for of all its shortcomings, the principles laid down in Magna Carta live on, and so it is right to celebrate its 800th anniversary.

I deliberately say "celebrate" rather than simply "commemorate", because we should consciously choose to celebrate Magna Carta, just as we celebrate, rather than commemorate, liberty itself.

---

[5] *The Rule of Law*, Penguin, 2010 at p.10.

However, there is another and perhaps more important reason to celebrate Magna Carta.

In celebrating Magna Carta we celebrate, not just the continuity of the English constitutional tradition and its commitment to liberty, but the contribution it has made to the international rule of law. It was no accident that, when the drafters of the Universal Declaration sought to capture the importance of their achievement, they invoked Magna Carta, Eleanor Roosevelt telling the General Assembly of the United Nations that the Declaration "may well become the international Magna Carta of all men everywhere".[6] This is proof, not only of Magna Carta's resonance down the centuries, but of the importance of the British legal tradition it symbolises to the development of the international rule of law.

Perhaps then the contemporary challenge which Magna Carta poses to us in Strasbourg is to ensure that it retains its distinctive position in the European constitutional tradition, to ensure that its influence on the international rule of law continues, to ensure that rights we protect continue to apply to everyone, and, above all, to ensure that, 800 years later, the central clauses of Magna Carta continue to make the blood race.

Thank you.

[6] Speech to the General Assembly, 9 December 1948, Paris. Available at: http://www.kentlaw.edu/faculty/bbrown/classes/HumanRightsSP10/CourseDocs/2EleanorRoosevelt.pdf