



Article scientifique

Article

2015

Published version

Open Access

This is the published version of the publication, made available in accordance with the publisher's policy.

Magna Carta and Comparative Bills of Rights in Europe

Hertig Randall, Maya

How to cite

HERTIG RANDALL, Maya. Magna Carta and Comparative Bills of Rights in Europe. In: Magna Carta Trust Articles, 2015, n° November 24.

This publication URL: <https://archive-ouverte.unige.ch/unige:84550>

November 24, 2015

Magna Carta and Comparative Bills of Rights in Europe

Magna Carta and Comparative Bills of Rights in Europe, Maya Hertig Randall, Professor of Constitutional Law at Geneva University, LL.M. (Cambridge)

<http://magnacarta800th.com/articles/magna-carta-and-comparative-bills-of-rights-in-europe/>

It is an honour to be part of this celebration, commemorating the 800th anniversary of the Magna Carta, an iconic document which has become a symbol of liberty and the rule of law on both sides of the Atlantic. Within Europe, the text of the Magna Carta has come to express a common constitutional heritage. Textbooks and treaties on civil rights and liberties throughout Europe invariably refer to the Magna Carta as a foundational document of fundamental right, showing that the Charter's reach goes well beyond its country of origin.

The aim of this short contribution is not to trace the actual – direct or indirect – influence of the Magna Carta on the constitutions and their Bill of Rights of the various Member States of the Council of Europe. Such endeavour would be a daunting task indeed. Ideas travel across space and time; they evolve, are reinterpreted and transformed in this process. We would first need to establish the original meaning of the Charter, i.e. what it meant in the specific context of its time. We would then need to retrace the long trajectory of the ideas expressed in the Charter, their journey over the Atlantic, and the Charter's impact on the founding fathers of the United States Constitution. We would thereafter need to explore the Magna Carta's reception in various parts of the European continent, partly via the influence of the US constitution. This would be a task for which a constitutional lawyer may not be well equipped.

The contemporary relevance of the Magna Carta is not only dependent on its direct or indirect imprint on modern constitutions. The Magna Carta hugely matters because of its symbolic value, and because its ideas still resonate with us today. I will adopt a contemporary reading of the Magna Carta, highlighting its resonance and the principles it has come to embody. This approach treats the Magna Carta like a living tree, and not as a document the meaning of which is fixed in time. Put differently, it rejects an originalist reading, privileging a dynamic interpretation. This is an approach many domestic Courts – and most prominently the European Court of Human Rights – adopt when they are called upon to construe the meaning of fundamental rights provisions.

The clause of the Magna Carta which without doubt has had the strongest resonance is almost too well known to be cited:

“No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land.”

The famous clause 39 has become the embodiment of two powerful and connected principles: Firstly, personal freedom, consisting mainly of, but not limited to, the right to liberty and security, and secondly, the rule of law and due process of law. Together, these principles form a bulwark against arbitrary rule. The limits of personal freedom can only be determined by law and not by the capricious will of the sovereign.

The idea of freedom under the law has been reasserted in the following Centuries, prominently in the Declaration of Rights of Man and Citizen of 1789, which is nowadays part of the French Constitution and upheld by the French Constitutional Council. Art. 7 protects specifically the right of liberty and security, holding that “[n]o person shall be accused, arrested, or imprisoned except in the cases and according to the forms prescribed by law.” Other provisions, mainly Art. 4 and 5, protect personal freedom more generally, stating that the limits to liberty can only be determined by law, and that “nothing may be prevented which is not forbidden by law, and no one may be forced to do anything not provided for by law.”

Freedom under the law forms part of the common constitutional tradition reflected in Bills of Rights, in Europe and beyond. In addition to specific provisions on the right to liberty and security, constitutions require, either in specific or in general limitation clauses, that restrictions of fundamental rights need to be prescribed by law. We find this requirement also in the Charter of Fundamental Rights of the European Union, which can be viewed as codifying common constitutional traditions of the EU Member States. According to Art. 52 para. 1 of the EU Charter, “[a]ny limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law.”

Beyond the protection of individual rights, the Magna Carta contains the seed of the more general principle of the rule of law, or its German or French counterpart, the ‘Rechtsstaat’ or the ‘Etat de droit’. This more general principle can be derived from the precept reflected in clause 39 of the of the Magna Carta that the King is not above the law but bound by law.

European constitutions underscore that the rule of law is a central element of a legitimate constitutional order. Virtually all European constitutions explicitly refer to rule of law principles. A prominent example is the German Basic Law, adopted in 1949, in the aftermath of World War. But also more recent constitutions, in particularly those adopted against the backdrop of totalitarian or authoritarian past, invariably commit to the Rule of Law. To name just one example : The Constitution of Serbia holds in Art. 1 that the Republic of Serbia is a state “based on the Rule of Law”, and Art. 3 holds that “the rule of law is a fundamental prerequisite for the Constitution which is based on inalienable human rights.”

Apart from the Rule of Law, the Magna Carta is also an evocative document for us today, because it has come to embody the very idea of a modern Constitution: it represents, in Sandra Day O’Connor’s words, the “written embodiment of fundamental laws », « the more general notion of a written statement of fundamental law binding upon the sovereign state.”

The fundamental nature of the principles enshrined in the Magna Carta, and their written form, have earned the Magna Carta the attribute of the “world’s first written constitution”. This understanding of the Magna Carta resonates in the famous judgment *Marbury v. Madison*, describing the constitution as “superior, paramount law, unchangeable by ordinary

means”, and implying that laws clashing with the constitution are null and void. As is well-known, *Marbury v. Madison* founded the Supreme Court’s power of judicial review. In Europe, constitutional review is a much more recent phenomenon. The thinking of *Marbury v. Madison* has been steadily gaining ground since World War II and has become the dominant paradigm of upholding the rights enshrined in domestic constitutions.

Interestingly, the authors of the Magna Carta also provided for supervisory arrangements aimed at controlling the King. Based on clause 61, a supervisory body representing the Barons had the power to oversee compliance with the Magna Carta and to take in extremis retaliatory measures against the faulty King. Although this mechanism was ineffective, it can be viewed – based on a contemporary reading of the Charter – as expressing the idea of separation of powers : ambition must be made to counteract ambition. Maybe it can even be viewed as an embryonic precursor of judicial review.

The Magna Carta has not only come to embody the concept of a written constitution, of which Bills of Rights are today an essential part. Its provisions also encapsulate ideas which have grown over time into fundamental rights enshrined both in Europe’s contemporary Bill of Rights.

To illustrate this point, let me refer again to the famous clause 39. Apart from the right to personal freedom, clause 39 – together with clause 40 – expresses the idea of procedural due process, fair trial and access to justice. Individual liberty can according to clause 39 only be curtailed through lawful judgments; moreover, precepts of a fair trial and access to justice have to be respected: In the wording of clause 40: “To no one will we sell, to no one deny or delay right or justice.” The idea that justice must be accessible also underpins clause 17, holding that “[c]ommon pleas shall not follow our court but shall be held in some fixed place”.

Clause 45 is complementary to fair trial guarantees and related to judicial independence. It lays down a requirement which has become common place and is mentioned in the Basic Principles on the Independence of the Judiciary, adopted in 1985 within the framework of the UN – the requirement that judges have appropriate training or qualifications in law. Clause 45 reads: “We will appoint as justices, constables, sheriffs, or other officials, only men that know the law of the realm and are minded to keep it well.”

Clauses 39 and 40, and the related clauses of the Magna Carta can be viewed as the ancestors of procedural safeguards against arbitrary detention, and the right to a fair trial, enshrined in Art. 5 and 6 ECHR. Corresponding provisions in domestic constitutions have become commonplace on the European continent, mainly through the direct impact of the European Convention.

Another contemporary right which can trace its lineage to Magna Carta is the right to just and proportionate punishment. In the Magna Carta, we find it expressed in clause 20 and 21. The relevant part of clause 20 reads as follows: “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.”

A contemporary expression of the right to just and proportionate punishment can be found in Art. 49 para. 3 of the EU Charter of Fundamental Rights, holding that the The EU Charter holds that “[t]he severity of penalties must not be disproportionate to the criminal offence”.

The Constitution of Cyprus contains a similar provision. In addition to these explicit guarantees, the right not to be subject to disproportionate punishment is implied in the prohibition of inhuman and degrading penalties. The Vinter judgment of the European Court of Human Rights ruling out incompressible life sentences is a recent link in this chain of development.

Another clause of the Magna Carta which still resonates with us today is clause Clause 42: “In future it shall be lawful for any man to leave and return to our kingdom unharmed and without fear (...)”.

Clause 43 also refers to free movement, reflecting economic rationales: “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.” Clause 43 evokes to contemporary readers economic liberties, enshrined in many European constitutions under different names (‘occupational freedom’ in Germany, ‘economic freedom’ in Switzerland, ‘liberté d’entreprendre’ » in France). For the EU-Member States, it evokes the four fundamental market freedoms. Moreover, the Magna Carta contains clauses which regulate the taking of horses, carts, wood, issues of inheritance and guardianship, or the remarriage of widows. These clauses respond to concrete grievances against the King. Abstracted from their specific context, they aim at safeguarding interests protected nowadays by the fundamental rights to property, and the prohibition of forced marriage.

Contemporary Bills of Rights are worded in a more abstract and principled way than the Magna Carta, expressing atemporal and universal principles. Nevertheless, like the many detailed provisions of the Magna Carta, fundamental rights have emerged from history, from grievances against the concrete experience of injustice.

This is clearly expressed in the UDHR, referred to by Eleanor Roosevelt as “the international Magna Carta of all men everywhere.” According to its preamble, the UDHR has been declared, as a reaction to “barbarous acts which have outraged the conscience of mankind”.

Put differently, fundamental rights and freedoms are “Rights from Wrongs” (Alan Dershowitz). They are concrete answers to centuries’ old experience of injustice and human suffering which have shaped our understanding and the meaning of human dignity. The insight that human rights are deeply rooted in our history makes them fixed stars to navigate by at difficult times. The star of the Magna Carta has been shining, for instance, in the context of the “war against terror”: It has been invoked as a ‘fixed star’, reminding us to remain eternally vigilant when human rights come under pressure and are set aside for security concerns. In the United States, the Magna Carta was referred to in the major cases involving the indefinite detention of enemy combatants, *Padilla v. Rumsfeld*, *Hamdi v. Rumsfeld*, and *Boumediene v. Bush*. In the *Boumediene* decision, Justice Anthony Kennedy, writing for the majority, referred to Article 39 of the Magna Carta. He held:

“Magna Carta decreed that no man would be imprisoned contrary to the law of the land...Important as the principle was, the Barons at Runnymede prescribed no specific legal process to enforce it...gradually the writ of habeas corpus became the means by which the promise of Magna Carta was fulfilled.”

Kennedy’s understanding of Magna Carta is to view it as a document whose principles have grown over time. He traces the United States Constitution, and habeas corpus, back to the Magna Carta, establishing a link between the ancient guarantee of Art. 39 with 21 Century guarantees through historical progression.

In a similar vein, In the United Kingdom, Lord Bingham’s opinion referred to the Magna Carta in the famous judgment *A. and others v. The Secretary of Home Department*, handed down on 16 December 2004. This judgment concerned indefinite detention of foreign nationals suspected of terrorism under the Anti-terrorism, Crime and Security Act of 2001.

Lord Bingham held:

“In urging the fundamental importance of the right to personal freedom (...), 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. In its treatment of article 5 of the European Convention, the European Court also has recognised the prime importance of personal freedom.”

In referring to Magna Carta and linking it to the subsequent developments in the 17th Century and contemporary law, Lord Bingham emphasises continuity. The long liberal tradition and the constitutional values traced back to Magna Carta embody stability at times of crisis; they offer reassurance at times of turmoil. They provide the normative, lasting framework which cannot be set aside by current majorities.

The legacy of Magna Carta is not confined to the United Kingdom. Lord Bingham implies this by referring to Art. 5 of the European Convention, which – like the Magna Carta – recognizes the prime importance of personal freedom. Through the of liberty and security, and the right to a fair trial, enshrined in the European Convention, the spirit of Magna Carta has been spread in the 47 Member States of the Council of Europe.

In my home country, Switzerland, we celebrated last year the 40th Anniversary of Switzerland’s membership of the Convention. Looking back four decades, legal scholars concluded that Art. 5 and 6 of the Convention are the provisions which have left the most profound imprint on the Swiss legal and constitutional order. It was thanks to the ECHR, for instance, that Switzerland revised its legal framework to put an end to the practise of so-called administrative detention: Between the 1930s and the 1980s, thousands of people were detained on vague grounds and without access to a court.

Administrative authorities locked up people for years without a trial, on the grounds including being “work-shy” or “immoral”. The Swiss Government apologised to the victims of

administrative detention in 2010 and acknowledged the injustice suffered. The process of rehabilitation and dealing with this dark chapter of our history is still ongoing.

Unfortunately, these debates do not occur in a context celebrating the spirit of Magna Carta as part of our common constitutional heritage. They occur in a context where it has become commonplace to invoke another foundational document, the Swiss Federal Charter of 1291, which is considered the first building block of what was to become the Swiss Federal State. Designed to free Switzerland from Habsburg rule, the Swiss Federal Charter of 1291 expresses opposition to “foreign judges”, e.g. judges imposed by the Habsburg rulers. Fears of foreign rule are mobilised today to reject the European Convention – inaptly labelled as foreign law – and the judges of the European Court of Human Rights – decried as “foreign judges”.

This example shows that symbols and myths matter. Human rights and constitutionalism need powerful symbols like the Magna as an expression of a long lasting and transnational tradition. The importance of anchoring human rights in history and tracing them back to a foundational document has also been recognised outside Europe. On the African continent, a document dating back to the same period as the Magna Carta receives increasing attention. The so-called Manden-Charter was declared by the founder of the Mandingo Empire and the assembly of his wise men in a region located today in Mali. The content of the Charter has been orally handed down from generation to generation. It has been annually celebrated at commemorative ceremonies to keep its content alive. In 2009, it was inscribed by UNESCO on the Representative List of the Intangible Cultural Heritage of Humanity. In the same year, the Magna Carta was inscribed on UNESCO’s Memory of the World Register.

Like the Magna Carta, the Manden Charter can be read as expressing fundamental values underlying human rights and constitutionalism. In simple language, the Manden Charter underscores freedom and equality, with a universalist aspiration. Based on a contemporary reading, we can find the seeds of essential human rights, including the right to life, the prohibition of slavery, the right to food, the right to bodily integrity and freedom of expression. The Manden Charter reads:

1. The hunters declare:

Every human life is a life.

It is true that a life comes into existence before another life

But no life is more ‘ancient’, more respectable than any other

In the same way no one life is superior to any other

2. The hunters declare:

As each life is a life,

Any wrong done unto a life requires reparation.

Consequently,

No one should gratuitously attack his neighbour

No one should wrong his neighbour

No one should torment his fellow man

(...)

5. The hunters declare:

Hunger is not a good thing

There is nothing worse than this on this earth

As long as we hold the quiver and the bow

Hunger will no longer kill anyone in the Manden

If by chance hunger were to arrive,

War will no longer destroy any village for the acquiring of slaves

That is to say that no one will from now on place the bit in the mouth of his fellow man

In order to sell him.

Furthermore no one will be beaten

And all the more so put to death because he is the son of a slave

6. The hunters declare

The essence of slavery is today extinguished

'from one wall to the other' from one border to the other of the Manden

Raids are banned from this day onwards in the Manden

The torments born of these horrors have ended from this day onwards in the Manden

What an ordeal this torment is!

Especially when the oppressed has no recourse

The slave does not benefit from any consideration

Anywhere in the world.

7. People from the old days tell us:

'Man as an individual

Made of flesh and bone

Of marrow and nerves

Of skin covered in hair

Eats food and drink

But his 'soul', his spirit lives on three things:

He must see what he wishes to see

He must say what he wishes to say

And do what he wishes to do

If one of these things were to miss from the human soul

It would suffer and would surely become sick

In consequence the hunters declare:

Each person from now on is free to dispose of his own person

Each person is free to act in the way he wishes

Each person disposes of the fruit of his labour from now on

This is the oath of the Manden

For the ears of the whole world.

It is up to us to ensure that the Manden Charter and the Magna Carta will continue to resonate on their respective continents and beyond – for the ears of the whole world.