Magna Carta and Environmental Justice:
"A Paradoxical Motif in a Modern Context"

Over the past few months, I have been asked to speak on two separate occasions on the issue of the Magna Carta – as it draws towards the 800th anniversary of its sealing (not signing) on 19 June 2015 – and environmental protection. The first occasion was in the United States, where there has always been a great deal of enthusiasm for everything Magna Carta and the second occasion was as part of a panel for a session of the Castle Debates on Magna Carta: our Legal Right to a Healthy Environment.

Having had this opportunity to consider the Magna Carta and its links – if however tenuous – with the environment, I wanted to reflect on what I considered to be the principal opportunities and challenges of bridging this most ancient text with our modern challenges.

The 800th anniversary of the Great – or Magna – Carta is an important moment to reflect on the historical significance of this seminal document. Its significance was perhaps never better captured than by a former senior member of the English judiciary, Lord Denning, when he called it "The greatest constitutional document of all times – the foundation of the freedom of the individual against the arbitrary authority of the despot".

As I am not a historian, I won't seek to go into the historical development of the text. Of course, what Magna Carta is most famously remembered for are two particular clauses: Clause 39, which says that 'no free man shall be imprisoned or deprived of his lands except by judgement of his peers or by the law of the land' and Clause 40, which says: 'To no one shall we sell, delay or deny right or justice'.

Thus, ultimately Magna Carta concerned the subjugation of executive authority – in this case, Regal authority – to fundamental principles of law. That no one is above the law remains, I would suggest, its most important contribution to legal and political thought, and it is undoubtedly the most important principle emanating from the Magna Carta. And

it is the fact that in each generation, this principle must be fought for, cherished and protected, that it is important to remember the significance of the Magna Carta.

Indeed, perhaps less well known than the sealing of the Magna Carta by King John in June 1215 was the annulment of the Magna Carta in August of the same year by Pope Innocent III at John's request for a violation of the divine right of Kings to rule, and that it had been agreed by John under duress. Those in authority rarely accept limitations on their power with grace!

Another paradox is that those provisions which remain extant in law (the rights of the English church, the rights of the City of London and the clauses I've just cited) are to be found in the 1297 Magna Carta Act…and not the 1215 original version.

Of course, Magna Carta is as famous for what it has helped prompt as for the historical document itself, and in this regard it has special significance in relation to the development of the US Constitution. As remarked by President Franklin D. Roosevelt in his Third Inauguration Address in 1941: "the democratic aspiration is no mere recent phase in human history. It is human history. It permeated the ancient life of early peoples. It blazed anew in the Middle Ages. It was written in Magna Charta".

Obviously there is – as President Roosevelt alluded to – an enduring link between Magna Carta and liberal democracy, but this connection is perhaps more evolutionary than literal. King John of course was no democrat, but nor in fact were the Barons who made him sign it. In other words, restraining executive power is a prerequisite and one key attribute of democratic society, but it is just that – one attribute. Moreover, I can go so far as to suggest that what the Magna Carta did in 1215 and what values we now attach to it are not identical in some very obvious ways – it had some very poor things to say, for instance, about women and the removal of foreign nationals, for instance which we don't need to consider here. That doesn't make such an interpretative endeavour mistaken, but I think it is always worth bearing this important distinction in mind.

For me, Magna Carta does nevertheless have something to say about environmental justice but it must be in terms of a carefully contextualised and nuanced linkage, and not through a direct literal causal effect. Of course, one can constrain some of its clauses as being environmental; clause 33 on fish weirs or clause 5, which says: "For so long as a guardian has guardianship of such land, he shall maintain the houses, parks, fish preserves, ponds, mills, and everything else pertaining to it, from the revenues of the land

itself". The same clause goes on to say: "When the heir comes of age, he shall restore the whole land to him, stocked with plough teams and such implements of husbandry as the season demands and the revenues from the land can reasonably bear."

And beyond the Magna Carta, there is another document of the same era which is lesser known but in many ways as interesting; the 1217 Charter of the Forest – its 800th anniversary being in two years' time. This would seem a more overtly environmental document (if only because of its subject matter), though again historians debate how far it reflected anything that might be considered environmental in content or tone.

Thus, whilst a purist may take objection to some of the wider claims made about the ongoing relevance of Magna Carta, I personally don't think it is ahistorical to consider it as part of a wider development of political ideas. As another English judge, Lord Woolf said of the Magna Carta: "it was the first of a series of instruments that now are recognised as having a special constitutional status". In other words, it forms part of a larger history of how we should govern ourselves, what our society should look like, and how to protect our values and priorities. If Francis Fukuyama talks of the end of history in relation to the advent of liberal democracy, it presumably had its origins – and the Magna Carta is certainly part of that evolution.

So where does the environment fit into this? Increasingly, and especially since the 1970s, matters of environmental protection and nature conservation have not only risen up the consciousness of the general public, but they have increasingly been the subject of political debate and legal regulation. Though there is an important philosophical debate about the nature of environmentalism and its link to human existence – for instance, whether there can be a human right to a healthy environment – the idea that the environment is a valid, and essential, object of social and government action is now recognised.

Moreover, in this evolution of ideas, one cannot divorce Magna Carta from the advent of human rights. Thomas Jefferson said in a letter from Paris to James Madison during the drafting of the US Constitution, in which he pleaded for the inclusion of individual rights in the US Constitution: "A Bill of Rights is what the people are entitled to against any Government".

Whether it concerns respecting the freedom of speech and other basic human rights, placing limitations of how much information the State should acquire on us, ensuring

procedural safeguards in our criminal justice processes, enforcing the prohibition on torture, or ensuring a satisfactory environment, on each of these – and many other – issues, safeguarding the right of the individual against the arbitrary power of the State, though never easy to achieve, is essential.

Magna Carta – be it the intention or not – has come to symbolise our values. What values should be safeguarded is a matter of context for each generation to decide. As will be seen, no two societies – no two constitutions – are the same; what is included – and thus what is considered important – can differ remarkably. More recent constitutions – such as the post-apartheid South African constitution – have, for instance, expressly included a provision on a right to a healthy environment.

Moreover, it is increasingly accepted that environmental protection is not purely a matter of environmental regulation. In other words, it is more than just developing environmental policies and programmes, setting environmental standards, creating agencies to monitor pollutant levels, and then giving them the power to enforce them. These are, of course, all very important but they in themselves won't ultimately be sufficient. Much of this action is top-down, regulatory, and government-led. In enlightened form, it can achieve much.

Another – equally stirring statement – was contained in the 1972 United Nations Stockholm Declaration on the Human Environment, which whilst not directly mentioning environmental justice captures a similar idea of where the true focus of interest should be: "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations".

However, overtime, it has been recognised that government action (be it benign or malign) is never enough. What is equally significant is the empowerment of local communities to have a voice in the protection of their own environment. The freedom of speech and the freedom of association are, in particular, fundamental to environmental protection.

To quote Benjamin Franklin: "Without freedom of thought there can be no such thing as wisdom, and no such thing as public liberty without freedom of speech, which is the right of every man …" (1722). It seems to me no coincidence that those countries which have poor human rights records, which do not tolerate civil society activity, on the whole enjoy

much poorer environmental quality. The exact link needs further study, but the likely nature of a strong correlation seems inevitable.

Closer to home, is the ongoing attempt to embed the letter and the spirit of the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters into our law, including around the contentious issue of costs. Unaffordable justice is no justice at all. Recent changes – including through the elaboration in the Civil Procedure Rules of the protective costs orders (CPR 45.41) and further changes envisioned in the Criminal Justice and Courts Act 2015 – will hopefully support a move towards a more even playing field in certain environmental proceedings. But whatever its present success, one must not ignore the sea-change in approach the Aarhus Convention introduces; it seeks to assert the role of the active citizen in promoting good environmental governance.

Thus, in conclusion, if Magna Carta represents the principles that the government should act within the law and that the rights of the governed should be respected, protecting the environment is as much an area that these principles can play out as any other area of political regulation. Or in the words of the Magna Carta: its purpose is “the better ordering of our kingdom”. In more modern parlance, we might talk about good governance, the rule of law and legitimate regulatory action. Now that has been 800 years in the making…and the struggle goes on.

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