Magna Carta—
Its Essence and Effect on International Law

by Steven M. Richman

With the benefit of hindsight, Magna Carta—the 'Great Charter'—agreed to by King John of England and a force of rebellious barons, has achieved a meaning that reaches far beyond the more immediate intentions present in June 1215. The first part of this article will provide a brief overview of the essence of the provisions of the original 1215 Magna Carta. The second part of the article will provide some thoughts on its impact on international law.

While there remains a lack of clarity regarding exactly what, if anything, was signed or sealed on June 15, 1215, at Runnymede, and various 'exemplifications' and versions exist, not to mention differences in translation, and certain 'mythologies' relating to its impact,[1] there can nonetheless be found tangible impact and reference in the development of law in America in general, and New Jersey in particular. Magna Carta was not the only such document at the time. In 1222, King Andrew II of Hungary acquiesced in a comparable set of limitations on executive authority and the rights of nobles in the Golden Bull.[2]

These documents were adopted at a time of paradoxical competition and cooperation between secular and religious law. As one scholar observed:

> [T]the concept of the rule of law was supported by the prevailing religious ideology. It was also supported by the prevailing political and economic weakness of rulers and by the pluralism of authorities and jurisdictions. Finally, the concept of the rule of law was supported by the high level of legal consciousness and legal sophistication that came to prevail throughout the West in the twelfth and thirteenth centuries. It was well understood that the preservation of legality required not merely abstract precepts of justice, equity, conscience, and reason but also specific principles and rules such as those embodied in the English Magna Carta of 1215 and the Hungarian Golden Bull of 1222.[3]

Historically, Magna Carta was not meant to be a codification of laws at the time; it was a document of truce between King John and a group of barons. Following the loss of Normandy in 1204 to the French King Philip, King John embarked on a period of significant taxation and enforcement of laws regarding the forests to raise money to fight to regain that loss. Jews in particular were singled out for excessive taxes. Among other acts directed toward the barons, of whom he was suspicious, King John "took theirs sons as hostages for good behaviour, charged hefty sums for having his 'goodwill' and pushed his feudal rights as far as they would stretch, naming exorbitant fees for heirs to enter their inheritance and extorting huge fines from widows claiming their property entitlements and pleading not to be forced to remarry."[4]

The barons rebelled, and King John also lost to the French at Bouvines in July 1214. Having been previously excommunicated after rejecting the then pope's nominee for archbishop of Canterbury, King John now relented and sought papal intervention to stop the rebellion and make peace. The result was the 1215 Magna Carta.

This did not stop war from coming. Pope Innocent III, on King John's request, annulled Magna Carta in Aug. 1215,[5] leading to the First Baron's War.[6]

The historical context is interesting, and there are ample resources available.[7] Commentators also note the mythological status achieved by Magna Carta, which was less focused on defining legal rights than providing a working document for resolving a conflict. Much of it is centered squarely in its times, but the language and iconization of it led many to read into it what they will, and cite it for contemporary positions. At least two of the provisions—Chapters 39 and 40, dealing with due process and the preclusion of sale of justice—are

taken as foundations of contemporary understandings of these rights.

The Chapters: An Overview

There is a certain confusion, perhaps, when people think about Magna Carta. Most understand that on June 15, 1215, a document was signed. That document was annulled on Aug. 24, 1215, by Pope Innocent III. Following the French invasion of England and the death of King John in 1216, on Nov. 12, 1216, the first revision of Magna Carta was issued by Willliam Marshal, earl of Pembroke, as regent, followed by a second revision on Nov. 6, 1217. In 1225, King Henry III issued another revised version, which was confirmed in 1297 by King Edward I.[8]

In anticipation of the 800th anniversary of Magna Carta, the Magna Carta Project was created as a collaborative effort between the British Library and others. Its website provides a wealth of accessible materials, and it is the Bishop William Stubbs test that it deems the most reliably accepted version, which is referred to in this article.[9] This version contains a preface and 63 clauses. The topics have been categorized in the Magna Carta Project (some of which overlap) as relating to church matters, feudal, forest, Jews, justice, king's officers, money, peace, trade, Wales and Scotland, women and "misc."

The first chapter declares the English Church to be free and to have its "full rights and its liberties intact."[10] Other chapters relating to the church are of a more technical nature. Jews were not afforded comparable privileges; Chapter 10[11] limits interest on loans from Jews where the debtor dies before it is paid, and Chapter 11[12] exempts widows from owing money on a debt to Jews incurred by the deceased spouse.

Twelve chapters (2-6, 16, 29, 32, 37, 43, 46, 60) relate to feudal issues. These address, for example, the effect of death of a baron or earl on debts owed and what his heir is responsible for (Chapters 2 and 3), other inheritance issues relating to property (Chapters 4 and 5), limitations on distraint for services for a knight's fee or other tenement (Chapter 16), and so forth, relating to particularities of property and feudal arrangements.

Four chapters (44, 47-48, 53) relate to forests, and address jurisdiction of the "forest judges" who hear crimes relating to forests, "disafforesting" lands seized from the barons and the return of rights to the barons regarding the forests held prior to King John.

As noted, two clauses related specifically to Jews.

Eighteen chapters (17-22, 24, 32, 34, 36, 38-40, 52, 54-57) relate to justice. Some relate to the place of hearing; others involve technical issues concerning property. Of interest now are the provisions that continue to resonate. These include those that render monetary penalties (amercements) proportional to the offense (Chapter 20); guaranteeing monetary penalties to "earls and barons" to be made "by their peers," and proportionate to the offense (Chapter 21); facilitation of jury trials for those accused of serious crimes (Chapter 36); requirement of "trustworthy witnesses" (Chapter 38);[13] requirement of due process by which "[n]o free man is to be arrested, or imprisoned, or disseised, or outlawed, or exiled, or in any other way ruined, nor will we go against him or send against him, except by the lawful judgment of his peers or by the law of the land" (Chapter 39);[14] and no sale, denial or delay of the right to justice (Chapter 40). The United States Supreme Court has recognized Chapter 39 as the origin of the due process clause in the United States Constitution.[15]

Six chapters (28, 30, 31, 45, 50-51) address executive power and limitations on the king's officers to take property for various uses. Among the more interesting (and perhaps cynical) chapters that may seem ironic in today's world is Chapter 45, stating: "We will not appoint justices, constables, sheriffs or bailiffs except from such as know the law of the kingdom and are willing to keep it well."[16] Consonance may be found in the vetting process for judges and justices with bar association ranking, and statutory thresholds for years of experience. The notion that those enforcing law should know it, reaching back 800 years, bears emphasis.

Seven chapters (9, 12, 14-15, 25-27) dealt with money and taxation, and rules governing intestacy.

Miscellaneous chapters (13, 23, 42, 49) address the rights of the city of London, who may be compelled to build bridges, the right to leave and return to England (Chapter 42) and surrender of hostages.

Four chapters address issues relating to the peace (52, 55, 61 and 62, the latter also referred to in the Magna Carta Project as Suffixes A and B). In this regard, Chapter 61 (Suffix A) provided the remedies section, so to speak, setting forth a procedure for remedying default by the king and affording the barons the right to seize "castles, lands and possessions and in any other ways they can, until it is rectified in accordance with their judgment, albeit sparing our own person and the persons of our queen and children."[17]

Three chapters relate to trade (33, 35, 41), concerning removal of fish-weirs from England except for the coast; standardization of measurements for wine, ale, corn, dyed, russet and haberget cloths; and safe transit for merchants.

Four chapters concern Wales and Scotland (56-59), restoring property and liberty to Welshmen, release of Welsh hostages, and the fate of King Alexander of Scotland to be determined by judgment of his peers.

The clauses that remain part of the statutory law of England and Wales are Chapter 1 (noted above, relating to the rights of the church), Chapter 13

(addressing London) and Chapters 39 and 40 (the right to trial by jury and due process).[18] A cursory review of many of the chapters would show their obsolete nature.

Magna Carta and International Law

Having briefly summarized the various chapters of Magna Carta, it is possible to trace certain provisions that have influenced international law. International law encompasses both private and public aspects; however, there are certain norms that achieve universal recognition across judicial systems. These are known as *jus cogens*, "which are nonderogable and peremptory, enjoy the highest status within customary international law, are binding on all nations, and can not be preempted by treaty."[19] International law, therefore, may be viewed as including *jus cogens* but not exclusively so; certain other principles have general application in the jurisprudence of a broad spectrum of countries across different legal systems.

Perhaps the core principle of Magna Carta is that there must be due process and a fair trial. While due process is embedded in the American legal system, does "fair trial" rise to the level of *jus cogens*? One leading jurist, serving on the International Court of Justice, has argued that the right to a fair trial should be considered one of the established *jus cogens* norms.[20] On the other hand, British diplomat and scholar Anthony Aust has suggested that due process does not equate with the "generally accepted examples" of "aggression, genocide, slavery, racial discrimination, torture and crimes against humanity," concluding that "[d]espite what may be said or written, it is wrong to assume that many important provisions of human rights treaties, such as due process, are *jus cogens,* or, for that matter, even rules of customary international law."[21]

Whether or not this particular principle, articulated in Magna Carta, rises to the level of a *jus cogens* norm remains open to debate. At least in the 9th Circuit, there is a suggestion that due process and fair trial could be deemed a *jus cogens* right. The question was raised in *United States v. Struckman*,[22] where the defendant, indicted for tax fraud, was handed over by Panamanian officials to U.S. agents. He claimed, among other things, that the facts warranted dismissal of the indictment based on violation of his *jus cogens* "right to habeas corpus in a foreign land, the right to counsel, the right to due process and the right of access to the courts." In this particular case, the court rejected the argument, not because of the inapplicability of *jus cogens* and the arguments about due process generally, but because as a factual and legal matter, the defendant had not developed the argument.

On a less rarefied level, though, certain other concepts currently forming the foundation of areas of international law have been identified as being raised in Magna Carta, and continue to have viability in American jurisprudence. For example, Chapter 42 addresses the right "for every man to depart from our kingdom, and to return to it, safely and securely, by land and water, saving our allegiance, except in time of war for some short time, for the sake of the common utility of the kingdom, [and] excepting those imprisoned and outlawed according to the law of the kingdom, and people from the land against us in war, and merchants who are to be dealt with as aforesaid."[23] This found resonance in *Kent v. Dulles,*[24] in which the United States Supreme Court addressed State Department denials of passport applications of two persons on the grounds that they were Communists. The Court stated that "the right to travel is part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment," and noted that right under Anglo-Saxon law reaching back to 2015 and Chapter 42.[25] The Court ruled that the applicable statutes did not authorize the secretary of state to exercise the authority that had been applied in the case. Interestingly, as pointed out by the District of Columbia Circuit, in *Briehl v. Dulles,* the documented right of travel was short lived, and was not found in versions of Magna Carta following King John's death.[26] Nonetheless, the importance of this fundamental right of movement in international law traces back to initial recognition in Magna Carta.

Similarly, in *Rusk v. Cort*,[27] the Court held unconstitutional a federal statute that deprived defendants of their American citizenship "automatically—without prior court or administrative proceedings."[28] In this particular case, the automatic forfeiture of citizenship was imposed "for the offense of leaving or remaining outside the country to evade military service," which was invalid due to the lack of procedural safeguards under the Fifth and Sixth amendments, essentially leaving such persons stateless.[29]

In its conclusion, the majority noted:

> We recognize that draft evasion, particularly in time of war, is a heinous offense, and should and can be properly punished. Dating back to Magna Carta, however, it has been an abiding principle governing the lives of civilized men that 'no freeman shall be taken or imprisoned or disseised or outlawed or exiled…without the judgment of his peers or by the law of the land….What we hold is only that, in keeping with this cherished tradition, punishment cannot be imposed 'without due process of law.' Any lesser holding would ignore the constitutional mandate upon which our essential liberties depend.[30]

In the context of more recent issues relating to Guantanamo, the Court

reached back to Magna Carta to hold that petitioners, designated as enemy combatants, hold the privilege of *habeas corpus,* and that the statutory regime then in place was "not an adequate and effective substitute for habeas corpus."[31]

Magna Carta was raised in a case involving a subpoena of a resident alien and Lithuanian national regarding his activities during World War II. In *United States v. Gecas,*[32] Gecas claimed the constitutional privilege against self-incrimination. The Court found the facts could warrant conviction of Gecas under foreign law, but ultimately the privilege did not apply in this case. Chapter 38 of Magna Carta became relevant to, and addressed in, the Court's analysis of the question of whether the privilege against self-incrimination was intended by the drafters of the Constitution to extend to possible incrimination under *foreign* law, as opposed to United States law.

The Court noted that:

> Before the Norman Conquest in 1066, the English common-law courts heard both secular and religious cases according to the ancient accusatorial system of ordeals, battles, and oaths. Religious and secular jurisdictions were unified. During this period of shared jurisdiction, the common-law courts effectively adopted the *nemo tenetur* principle: an individual could only be forced to face the ordeal, fight, or swear if properly accused. The *nemo tenetur* maxim was enshrined in chapter 28 [sic] of the Magna Carta, the first English bill of rights: "No Bailiff can put any one to his Law upon his single accusation, without sufficient witnesses." Magna Carta ch. 28 [sic] (1215).[33]

This led the Court to conclude that only justly accused persons could be made to appear and, once before the court, had to prove innocence by "ordeal, battle, or oath," and had no privilege in either secular or ecclesiastical proceedings.[34] Ultimately, the Court concluded:

> the history of the privilege against self-incrimination indicates that the Fifth Amendment's Self-Incrimination Clause was intended as a limitation on the investigative techniques of government, not as an individual right against the world. The privilege developed in opposition to systems of law enforcement that relied on self-incrimination for the prosecution of crime.[35]

The dissent disagreed over the interpretation of what Magna Carta guaranteed regarding self-incrimination.[36] What makes this fascinating is that, notwithstanding that only a few of its chapters survive in codified form, the rationale of Magna Carta and its place in understanding the development of common law was not merely mentioned in passing, but actively debated by a vigorous dissent as part of a contemporary issue.

Parting Comments

Magna Carta remains as a fundamental statement for the rule of law, and in particular, the subjugation of the sovereign to that rule of law. It stands for principles of due process and trial by jury. Some of it is antiquated, locked in its own time frame, and some of it is plainly anti-Semitic while at the same time offering strands of freedom of religion as far as the church was concerned.

Magna Carta's significance has evolved. In the 16th and 17th centuries, Sir Edward Coke relied on Magna Carta to support parliamentary supremacy over the monarchy.[37] That tension remains today across the democracies of the world. But fundamental notions of property rights, due process, fairness of proceedings and judgment by one's peers persist. They are embodied in the New Jersey Constitution and its predecessor East Jersey and West Jersey constitutions as well.[38] Even where fundamental concepts may not rise to the level of *jus cogens,* the debate continues.

The rule of law always begs two questions: Whose rule and whose law? Law that is abhorrent, even if legitimately passed in accordance with governing procedure, does not mandate acceptance. The apartheid laws of South Africa, the slavery laws of the United States and the anti-Semitic laws of Germany under the Nazis are cases in point. Indeed, the Declaration of Independence makes clear that untenable laws cannot stand. For 800 years, though, the core principles of a few chapters of Magna Carta have withstood the test of time and remain an integral part of New Jersey and American jurisprudence. To not understand something of that history is to not understand the source of fundamental law that governs today. ⚖

Steven M. Richman *practices commercial and international law in New Jersey, New York and Pennsylvania. He is vice-chair of the 21,000-member Section of International Law of the American Bar Association, chair of the International Law Committee of the New Jersey State Bar Association, president of the New Jersey State Bar Foundation, and chair of the Multidisciplinary Practice Committee of the International Bar Association.*

ENDNOTES

1. For a discussion of the historical background, among other sources, *see* Daniel Barstow Magraw, *et al., Magna Carta and the Rule of Law* (American Bar Association 2014) at 1-47.
2. *See* hunsor.se/magyar1000ev/golden_bull1222.htm [accessed Feb., 14 2015]; *see also* Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press: 1983) at 293-294.
3. Berman at 293.
4. The Magna Carta Project, Historical Introduction, magnacarta.cmp.uea.ac.uk/ about/ historical_intro [accessed Feb. 15, 2015].
5. British Library, *Magna Carta: People and Society*, bl.uk/magna-carta/articles/ magna-carta-people-and-society [accessed Feb. 15, 2015].

6. Medieval Times, *First Barons' War (1215-1217),* medievaltimes.info/ medieval-wars/first-barons-war-1215-1217/.
7. In addition to the online resources cited, *see also* Nicholas Vincent, *Magna Carta: A Very Short Introduction* (Oxford University Press: 2012) and Daniel Barstow Magraw, *et al., Magna Carta and the Rule of Law* (American Bar Association 2014).
8. British Library, *Magna Carta,* bl.uk/magna-carta/articles/ timeline-of-magna-carta [accessed 12 April 2015].
9. *Id.,* Magna Carta Introduction, magnacarta.cmp.uea.ac.uk/read/magna_carta_1215/Introduction__Magna_Carta_1215 [accessed Feb. 14, 2015]. The different versions and translations may also explain why there is disagreement as to exactly how many of the "original" provisions still exist in current legislation in England.
10. The 1215 Magna Carta: Clause 01, The Magna Carta Project, trans. H. Summerson et al. [magnacarta.cmp.uea.ac.uk/read/magna_carta_1215/Clause_01 accessed Feb. 14, 2015].
11. The 1215 Magna Carta: Clause 10, The Magna Carta Project, trans. H. Summerson et al. [magnacarta.cmp.uea.ac.uk/read/magna_carta_1215/Clause_10 accessed Feb. 14, 2015].
12. The 1215 Magna Carta: Clause 11, The Magna Carta Project, trans. H. Summerson et al. [magnacarta.cmp.uea.ac.uk/read/magna_carta_1215/Clause_11 accessed Feb. 14, 2015].
13. The 1215 Magna Carta: Clause 38, The Magna Carta Project, trans. H. Summerson et al. [magnacarta.cmp.uea.ac.uk/read/magna_carta_1215/Clause_38 accessed Feb. 14, 2015] ("No bailiff is in future to put anyone to law by his accusation alone, without trustworthy witnesses being brought in for this.").
14. The 1215 Magna Carta: Clause 39, The Magna Carta Project, trans. H. Summerson et al. [magnacarta.cmp.uea.ac.uk/read/magna_carta_1215/Clause_39 accessed Feb. 14, 2015].
15. *Daniels v. Williams,* 474 U.S. 327, 331 (1986) ("The Due Process Clause of the Fourteenth Amendment provides: '[N]or shall any State deprive any person of life, liberty, or property, without due process of law.' Historically, this guarantee of due process has been applied to deliberate decisions of government officials to deprive a person of life, liberty, or property... This history reflects the traditional and common-sense notion that the Due Process Clause, like its forebear in the Magna Carta…was intended to secure the individual from the arbitrary exercise of the powers of government,") (citations and internal quotations omitted); *see also Duncan v. Louisiana,* 391 U.S. 145, 169 (1968) (Black, J., concurring).
16. The 1215 Magna Carta: Clause 45, The Magna Carta Project, trans. H. Summerson et al. [magnacarta.cmp.uea.ac.uk/read/magna_carta_1215/Clause_45 [accessed Feb. 14, 2015].
17. The 1215 Magna Carta: Suffix A, The Magna Carta Project, trans. H. Summe son et al. [magnacarta.cmp.uea.ac.uk/read/magna_carta_1215/Suffix_A [accessed Feb. 15, 2015]. Note that the Magna Carta Project terms this chapter "Suffix A," though it is referenced as Chapter 61 in other sources, such as in Vincent's *Magna Carta: A Very Short Introduction* at 124.
18. Vincent at 4. *See also* Houses of Parliament, *Magna Carta and Parliament* at 36, parliament.uk/documents/Magna-Carta-and-Parliament-Booklet.pdf [accessed Feb. 15, 2015] ("During the 19th century Parliament repealed many of the clauses in Magna Carta. In particular, the Statute Law Revision Act of 1863 repealed certain clauses in the 1225 reissue of Magna Carta, which had been entered onto the statute roll in 1297. Today only clauses 1 (part), 13, 39 and 40 remain in force.").
19. *United States v. Matta-Ballesteros,* 71 F. 3d 754, 764 n.5 (9th Cir. 1995).
20. Hon. Patrick Robinson, The Right to a Fair Trial in International Law, with Specific Rference to the Work of the ICTY, 3 *Berkeley J.L. Int'l L. Publicist* 1 (2009) [accessible online at bjil.typepad.com/Robinson_macro.pdf].
21. Anthony Aust, *Handbook of International Law* 10 (2nd ed. Cambridge University Press: 2010).
22. *United States v. Struckman,* 611 F. 3d 560, 575-576 (9th Cir. 2010).
23. The 1215 Magna Carta: Clause 42, The Magna Carta Project, trans. H. Summerson et al. [magnacarta.cmp.uea.ac.uk/read/magna_carta_1215/Clause_42 [accessed Feb. 14, 2015].
24. *Kent v. Dulles,* 357 U.S. 116, 125-126 n. 12 (1958).
25. *Id.* at 125.
26. *Briehl v. Dulles,* 248 F. 2d 561, 568-569 (D.C. Cir. 1975).
27. *Rusk v. Cort,* 372 U.S. 144 (1963).
28. *Id.* at 31.
29. *Id.* at 33.
30. *Id.* at 64 (citation omitted; ellipses in original).
31. *Boumediene v. Bush*, 128 S. Ct. 2229, 2240 (2008). The Court cited Chapter 39 for the proposition "that no man would be imprisoned contrary to the law of the land." *Id.* at 2244. The Court further noted that "from 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.'" *Id.* at 2245 (citations omitted).
32. *United States v. Gecas*, 120 F. 3d 1419 (11th Cir. 1997).
33. *Id.* at 1439.
34. *Id.* at 1440.
35. *Id.* at 1456.
36. *Id.* at 1473 n. 89 (Birch, J., Anderson, J., Dubina, J. and Barkett, J., dissenting).
37. Houses of Parliament, *Magna Carta and Parliament,*parliament.uk/documents/Magna-Carta-and-Parliament-Booklet.pdf [accessed Feb. 15, 2015].
38. Herbert Levi Osgood, *The American Colonies in the Seventeenth Century, Vol. II (the Chartered Colonies)* (McMillan Co. 1904), accessible online at https://books.google.com/books?id=EQgOAAAAIAAJ&pg=PA192&lpg=PA192&dq=%22magna+carta%22+%22east+jersey%22+%22west+jersey%22&source=bl&ots=XeRBZII9Ew&sig=ZHZI3ysv2N2LeYjEQa9TQNdblrI&hl=en&sa=X&ei=dtngVNCPDPiKsQTk34CYBg&ved=0CEIQ6AEwBzgK#v=onepage&q=%22magna%20carta%22%20%22east%20jersey%22%20%22west%20jersey%22&f=false [accessed 15 February 2015] at 192-193.