

The Dark Sides of Magna Carta

From Working Law to Spiritual Guide

Eight hundred years on and we are still discussing Magna Carta. What began as a grubby deal, forced out of a recalcitrant John by rebellious barons (and rapidly repudiated with Papal blessing) forced itself into national and international consciousness by the underlying importance of the circumstances of its creation; a king, who considered himself to hold absolute authority in temporal matters, had been obliged to acknowledge limits to his power.

Transcending the medieval context of its creation and medieval preoccupations of many of its clauses, Magna Carta was long regarded as a central feature in the common law system of England and Wales. It became the platform on which adherents to an “ancient constitution” explanation of the governance arrangements in the British Isles built their arguments from the seventeenth century onwards. When in 1628 the two houses of parliament drafted their Petition of Right, rooted among other things in their interpretation of Magna Carta, the Lords attempted at the last minute to insert a clause recognising the monarch’s “sovereign power, wherewith your majesty is trusted, for the protection, safety, and happiness of your people”.¹ This was viewed in the Commons as an assault on Magna Carta, with Sir Edward Coke memorably explaining that

[I]t weakens Magna Charta, and all the Statutes; for they are absolute, without any saving of ‘Sovereign Power’; and should we now add it, we shall weaken the foundation of law, and then the building must needs fall. Take heed what we yield unto: Magna Charta is such a fellow, that he will have no ‘Sovereign’. I wonder this ‘Sovereign’ was not in Magna Charta, or in the confirmations of it. If we grant this, by implication we give a ‘Sovereign Power’ above all laws.²

Parliament in this era was portrayed, for Foucault, as the “true inheritor of Saxon tradition”; as the affirmed judgment of the Canadian Supreme Court, “followed the flag”³ as Norman, English and ultimately UK imperial power extended itself over new territories, Magna Carta is part of the shared constitutional heritage of the common law world:

Magna Carta, in the later Middle Ages, is looked upon and treated as an enactment in affirmance of fundamental common law, to be confirmed and observed as a part of that law ... The evolution of a “constitutional law” in America has generally been considered by British writers as without precedent in earlier English institutions. Such a view is hardly supported by a study of those institutions in the Middle Ages, before the modern doctrine of the legislative sovereignty of Parliament had taken definite form.⁴

It is often referenced in regard to new constitutional departures. To speak of any instrument as a “Magna Carta” continues to carry the meaning of it being a new departure. John Phillipppo called the 1833 Act abolishing slavery in the British Empire “the Magna Carta of negro rights”. The Durham Report of 1839 came to be feted as “the Magna Carta of colonial self government”.⁵ It is also

¹ *The Parliamentary History of England, from the earliest period to the year 1803*, vol 2: 1625-1642 (TC Hansard 1807) 355.

² *The Parliamentary History of England, from the earliest period to the year 1803*, vol 2: 1625-1642 (TC Hansard 1807) 357. See also <http://www.bl.uk/onlinegallery/takingliberties/staritems/21magnacarta.html>

³ *Calder v Attorney General of British Columbia* (1973) 34 DLR (3d) 145, 203.

⁴ Charles Howard McIlwain, ‘Magna Carta and Common Law’ in *Henry Elliot Malden, Magna Carta Commemoration Essays* [1917] 122, 179.

⁵ Eric Walker, *The Second British Empire* (1953) 56.

regularly invoked to describe any measure which is seen as having overarching significance, even by Associate Justice Thurgood Marshall of the US Supreme Court: “Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise.”⁶ There has been a Magna Carta of dentistry,⁷ a Magna Carta of hairdressers and barbers,⁸ and a Magna Carta of taxpayers.⁹ Even Marx, reacting to the Factory Acts and limits on maximum working hours in Victorian England, name checked Magna Carta, conveying the message that these measures provided for something tangible and distinct from “rhetorical” rights:

In place of the pompous catalogue of the “inalienable rights of man” comes the modest Magna Carta of a legally limited working-day, which shall make clear “when the time which the worker sells is ended, and when his own begins”.¹⁰

Magna Carta continues to be cited as a symbolic touchstone – a point of pride in the common law which judges¹¹ and politicians repeatedly reference. In his inaugural address in 1941, President Franklin D Roosevelt declared that “[t]he democratic aspiration is no mere recent phase in human history ... It was written in Magna Carta”.¹² In the *Bancoult* cases,¹³ concerning the expropriation of the Chagos Islanders by the UK’s colonial administrators in order to make way for a US military base on Diego Garcia, Laws LJ explicitly affirmed the following passage from Pollock & Maitland:

[T]his document becomes and rightly becomes a sacred text, the nearest approach to an irrepeatable “fundamental statute” that England has ever had. In age after age a confirmation of it will be demanded and granted as a remedy for those oppressions from which the realm is suffering, and this when some of its clauses, at least in their original meaning, have become hopelessly antiquated. For in brief it means this, that the king is and shall be below the law.¹⁴

And yet, virtually all of this supposedly “fundamental statute” has been repealed, with one of the key exceptions being Clause 39’s famous Royal avowal that “We will sell to no man, we will not deny or defer to any man either Justice or Right”. This journey from active statute to celebrated symbol, particularly in the last hundred years, has provoked disquiet: “[Magna Carta] ceased to be an active constitutional force and became a symbol characterized by ambiguity, mystery, and nonsense . . . it became an idol of the ruling class”.¹⁵

The Hagiography Trap

From this brief overview, Magna Carta’s journey from substantive law to underlying spirit within the UK’s legal systems leaves it ripe for hagiography at the time of its 800th anniversary. The only party in

⁶ *United States v Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972).

⁷ ‘Scarcity of Dentists’ *The Times* (London, 21 Nov 1921).

⁸ Mr J. Stewart, HC Deb 16 May 1930, vol 238, c2275.

⁹ ‘The Taxpayer’s Magna Carta’ *The Times* (London, 14 Feb 1922).

¹⁰ Karl Marx, *Das Kapital*, [chapter X, section 7](#).

¹¹ See, for example, Lord Irvine of Lairg, ‘The Spirit of Magna Carta continues to resonate in Modern Law’ (2003) 119 LQR 227, T. Bingham, *Lives of the Law: Selected Essays and Speeches: 2000-2010* (Oxford: OUP, 2011), 3-12, and M. Arden, ‘Magna Carta and the Judges - Realising the Vision’ (2011), available at: <https://www.royalholloway.ac.uk/aboutus/documents/pdf/magnacarta/magnacarta8711.pdf>.

¹² <http://www.bbc.co.uk/news/magazine-19744823>.

¹³ *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] QB 1067, 1095 (Laws LJ).

¹⁴ Pollock & Maitland, *The History of English Law* (2nd ed, 1923) vol 1, p 173.

¹⁵ P. Linebaugh, *The Magna Carta Manifesto: Liberties and Commons for All* (Berkeley: University of California Press, 2008) 192.

town seems to involve trumpeting Magna Carta as “one of the most noble documents of human history”:¹⁶

How do we deepen and reaffirm our own commitment? Exhibitions are all right. People will come and people will go. We need to catch young people and get them to realise what our history has been about, what the rule of law is about and what constraints it imposes upon executive power. Therefore we should be organising lectures and seminars in schools and in major cities up and down the country, encouraging local events and holding a national essay competition, as has happened in some other countries in relation to other events. Continuing with the point that the noble Baroness, Lady Boothroyd, made, I favour an annual lecture in Westminster Hall where the two Houses can meet to take stock of where we are in the field of the rule of law.¹⁷

One hundred years ago, at the height of the First World War, the pressure to trumpet Magna Carta was greater still, with commemorative events intended to provide a not too subtle affirmation of the ongoing “democratic” struggle against the “authoritarian” central powers.¹⁸ The academic discussion of the place of Magna Carta in constitutional history, at least, was more real than contrived in the early years of the twentieth century. Following W S McKechnie’s exploration of Magna Carta’s feudal context, some of the leading legal historians of the era, from Vinogradoff to Powicke, were locked in debate over the charter’s significance. Before the guns of August 1914 silenced debate, Whiggish paeans to Magna Carta as foundation point for unique English identity¹⁹ vied with vigorous critiques of such hagiography.²⁰

It is important to note that power is not simply negative: that power always has productive effects. As Foucault once put it, “[w]e must cease once and for all to describe the effects of power in negative terms: it ‘excludes’, it ‘represses’, it ‘censors’, it ‘abstracts’, it ‘masks’, it ‘conceals’. In fact, power produces; it produces reality; it produces domains of objects and rituals of truth.”²¹ What makes Magna Carta so malleable is that it can be harnessed to contrasting conceptions of liberty; it has been cited to support republican ideas of non-domination and liberal imperialists’ “civilising mission” of empire. It has also been cited in support of both traditional civil liberties to restrain government power and positive extensions of government powers to enable it to provide for “public goods” such as healthcare and education. All of which rather bears out historian J. C. Holt’s warning over invocations of Magna Carta:

Sometimes Magna Carta stated the law. Sometimes it stated what its supporters hoped would become law. Sometimes it stated what they pretended was law.²²

The intention in this project is not to replace hagiography with a thesis of repression, but rather to build up a fuller picture of the power relations in which the Magna Carta is implicated. When discussing something which, like the Magna Carta, tends to be celebrated uncritically, this necessarily means shifting focus towards less appealing parts of the Magna Carta’s recent history.

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¹⁶ Lord Elystan-Morgan, HL Debs., col. 1335 (17 Dec 2012).

¹⁷ Lord Parekh, HL Debs., col.423 (7 Nov 2013).

¹⁸ Henry Elliot Malden (ed.), *Magna Carta Commemoration Essays* (Royal Historical Society, 1917).

¹⁹ W. Stubbs, *Constitutional History*, vol 1, 532-543

²⁰ Jenks, ‘Myth of Magna Carta’ (1904) 4 *Independent Review* 260.

²¹ M. Foucault, *Discipline and Punish: the birth of the prison* (A. Sheridan trans., Penguin 1991), 194.

²² J. Holt *Magna Carta* (Cambridge: CUP, 2nd Ed., 1992) 300.

This project seeks to recover a hitherto stifled debate by considering the uses and abuses of the Magna Carta's legacy. The exigencies of the First World War might have made an uncritical (if muted) celebration of Magna Carta seem imperative in 1915, but there is no excuse for orchestrating an uncritical celebration of Magna Carta on the occasion of its 800th anniversary. In the eight centuries since Magna Carta, the charter's terms have been invoked in support of many contestable political causes, with five prominent strands of criticism being levelled against any simplified celebration:

[1] Magna Carta, Jingoism and Propaganda

An uncritical celebration of Magna Carta in 2015 runs the risk of descending into jingoism. At the time of previous centenaries, the Magna Carta was "living law", a statute debated in Parliament and relied upon before courts. In 1878, in the course of parliamentary debate over the deployment of Indian troops in Malta, Gladstone directly invoked Article 51 of the original Runnymede Charter (calling for foreign knights and mercenaries to leave the kingdom), even though the provision had not been included in the later statutory versions. As Blass puts it, "Gladstone ... still thought of Magna Charta as something modern",²³ showing his audience that his civil liberties arguments were founded within the "ancient constitution". Even fifty years later such claims would have marked Gladstone out as a crank. As a sovereign Parliament overlaid the supposed ancient constitution with modern statute, the legal force of Magna Carta was lost. Following the First World War, in a case in which Magna Carta was invoked to challenge constraints upon landlords housing munitions workers, Darling J batted away the suggestion:

Magna Carta has not remained untouched; and, like every other law of England, it is not condemned to that immunity from development or improvement which was attributed to the laws of the Medes and Persians.²⁴

If Magna Carta is a law with very limited current positive force, then today we are celebrating its spirit within the legal system, and not necessarily its terms. Divorcing the "idea" of Magna Carta from its detail, however, is a risky business. At a time the use of Magna Carta as a propaganda tool in the First World War should be at the forefront of debate, a mere celebration neglects the need to debate the significance of ancient constitutional documents in building national foundation myths. When harnessed to support a state's military struggle, even a document heralded as a way-point in progress towards limited government in human history can be used to enhance the power and control of a government. Perhaps the most rousing invocations of Magna Carta in this regard came from Winston Churchill in the darkest days of the Second World War. When the United States Lend-Lease Bill was under debate in 1941, he told Parliament:

The most powerful democracy have, in effect, declared in solemn Statute that they will devote their overwhelming industrial and financial strength to ensuring the defeat of Nazism in order that nations, great and small, may live in security, tolerance and freedom. By so doing, the Government and people of the United States have in fact written a new Magna Carta, which not only has regard to the rights and laws upon which a healthy and advancing civilisation can alone be erected, but also proclaims by precept and example the duty of free men and free nations, wherever they may be, to share the responsibility and burden of enforcing them.²⁵

²³ P. Blass, *Continuity and Anachronism: Parliamentary and Constitutional Development in Whig Historiography and in the Anti-Whig Reaction Between 1890 and 1930* (Martinus Nijhoff, The Hague, 1978) 194.

²⁴ *Chester v Bateson* [1920] 1 KB 829, 834.

²⁵ HC Deb, vol 369, col.1292 (12 March 1941).

The Bill passed, and the war would ultimately be won in no small part due to the influx in military hardware it allowed. But there is no denying the usefulness of Magna Carta to governments as a martial rallying cry as shorthand for the principles that they claim to be fighting for. Churchill would again invoke Magna Carta, after the Second World War had ended, in his famous Iron Curtain Speech.²⁶

Even as Magna Carta ceased really to be a law, it continued as a kind of mask, justifying and possibly motivating governmental actions. In this way, Magna Carta continued to develop as an idea. As Nietzsche once suggested, "it is precisely here that we are discovering the realm of our *invention*, that realm where we too can still be original, perhaps as parodists of world history".²⁷ The point is that we should not simply reject modern uses of Magna Carta as cynical political manoeuvres: rather than holding on to an 'authentic' reading of Magna Carta and identifying the disingenuity of politicians who have continued to make use of it beyond the end of its practical value as a legal document, we might ask what political games are involved in its continued use.

[2] Magna Carta and the UK's "Civilising Mission"

Magna Carta was not simply a touchstone for liberal politicians like Gladstone, in the eighteenth and nineteenth centuries it was as likely to be invoked by conservative constitutional theorists such as James Fitzjames Stephen and Edmund Burke.²⁸ In this key period in the UK's history what bound together many liberal and conservative actors in a shared reverence for Magna Carta was an understanding that the charter's conclusion marked the UK out as a country apart, with an imperial destiny. This thinking can be seen in the writings of Massachusetts colonist James Otis Jr:

The subjects of a free and happy constitution of government have a thousand advantages to colonize above those who live under despotic princes. ... An empire built upon the principles of justice, moderation, and equity, the only principles that can make a state flourishing, and enable it to elude the machinations of its secret and inveterate enemies.²⁹

As Burke would subsequently declare, "[t]he British Empire must be governed on a plan of freedom". Magna Carta was central to a project of good imperial management which provided a moral justification for the UK's acquisition of colonies across the globe. Speaking on Fox's India Bills, Burke would declare that "this bill, and those connected with it, are intended to form the Magna Charta of Hindostan," because, just as "Magna Charta is a charter to restrain power,"³⁰ the India Bill would move colonial rule away from what Burke saw as arbitrary government, thereby enhancing the UK's control over India.

But these ways of framing the activities of the imperial state could cut both ways. In the Revolutionary period of American history, for example, "the customary constitution was a framework for argument"³¹ as much as it was a question of historical fact. And in 1918 a letter to *The Times*, discussing constitutional reform previously promised for India, but which appeared increasingly unlikely, argued that the earlier promise 'now ranks as the Magna Carta of India, and I doubt not there are thousands of Indians who have learned it by heart. To the English mind, with its

²⁶ W. Churchill, *Complete Speeches, 1897-1963* (R. James (ed.), 1974).

²⁷ F. Nietzsche, *Beyond Good and Evil* (R.J. Hollingdale trans., Penguin 2003), 152.

²⁸ P. Blass, *Continuity and Anachronism: Parliamentary and Constitutional Development in Whig Historiography and in the Anti-Whig Reaction Between 1890 and 1930* (Martinus Nijhoff, The Hague, 1978) 194-195.

²⁹ James Otis, *The Rights of British Colonies Asserted and Proved* (1764), available at: <http://ota.ox.ac.uk/text/3177.html>.

³⁰ *The Works of the Right Honorable Edmund Burke* (Boston: Little, Brown & Company, 1865-67) vol 2, 441.

³¹ Larry D. Kramer, *The People Themselves: popular constitutionalism and judicial review* (OUP 2004), 13.

various preoccupations, it is at best but one in a multitude of stars. To the educated Indian it is as the sun obscuring the stars, but bathing his whole world in light.³² The point was that the expectations of these “thousands of Indians” would have to be satisfied if the Imperial state was to continue to govern effectively. In understanding the UK’s “civilising mission” and this mission’s connection to the Magna Carta, it is just as important to seize hold of moments of resistance (resistance understood in its Foucauldian sense as something existing “in the strategic field of power relations”,³³ and therefore constituted within it) as it is to chart those moments in which the Magna Carta has been used to justify an expansion of colonial power. In fact, the use of Magna Carta as a *justification* already suggests a kind of game in which appeals to its principles become possible under certain conditions. An important part of understanding Magna Carta’s role in colonial power, then, must be to understand how this game actually worked in practice: who was entitled to play it, and how (and whether) they did so.

[3] Exceptionalism in Constitutional Discourse

Setting up Magna Carta as a basis for the UK’s manifest destiny had domestic constitutional implications, as well as implications for the UK’s imperial project. Being able to point to a chain of constitutional authority stretching back 800 years and more is apt to justify refusal to break with such a tradition, for example by codifying and entrenching a constitutional document. Where an ancient constitution can be invoked to underpin civil liberties it may strengthen the hand of “liberal” causes, but it can also be more widely employed to stymie extensions of government power which overrun such ancient foundations.³⁴ Both trends can be seen in contemporary political debate. A good example, from amongst many such talks and lectures of the last decade, of a sweeping invocation of Magna Carta as a basis for contemporary civil liberties and restrictions on arbitrary government can be seen in this section of a speech by Lord Irvine:

The primary importance of Magna Carta is that it is a beacon of the rule of law. It proclaimed the fundamental nature of individual liberties, notwithstanding that many of the liberties it protected would not find direct counterparts in modern democratic states.³⁵

Such an approach to Magna Carta attempts to insulate judges, as the defenders of such liberties, from criticism. But such claims give way to subsequent backlash:

Until the late ‘60s and early ‘70s, there was virtually no administrative law in this country. It is therefore slightly over-egging the case for judicial review to say, as some distinguished judges do, that it has been an inherent part of our system since Magna Carta. That is not correct. It has grown up from a root that was in the common law. Through the various prerogative orders, such as mandamus and certiorari, it was constructed by judges into a judicial tool as society and government action became more complex in the ‘50s and ‘60s. It is a fairly recent feature of our system and it fulfils a valuable role [although it has now “become so oppressive that it has overbalanced the system”].³⁶

³² L. Curtis, ‘Pledges to India’ *The Times* (London, 24 Jul 1918).

³³ M. Foucault, *The Will to Knowledge: the history of sexuality volume 1* (R. Hurley trans., Penguin 1998), 96 (emphasis added).

³⁴ K. Kumar, *The Making of English National Identity* (CUP, 2003) 204.

³⁵ Lord Irvine of Lairg, ‘The Spirit of Magna Carta continues to resonate in Modern Law’ (2003) 119 LQR 227, XX.

³⁶ Robert Neill, HC Debs, col 112 (24 Feb 2014).

In other words, to lift an expression from Jeremy Waldron's writing on the rule of law, Magna Carta has come to mean little more than "hooray for our side" (with an attendant nationalistic pride).³⁷

UK exceptionalism with regard to not codifying its constitution can be compared with US exceptionalism. In many ways Magna Carta lies at the heart of both forces. Just as the UK looks back over a supposedly unbroken constitutional history towards the start point of Magna Carta, so too do the foundation myths of the United States emphasise the War of Independence as a struggle to assume an inheritance dating from Magna Carta which had been lost in the land of its creation because of the oppressive power of the Georgian state.

In the UK (as in the US), this exceptionalism can be used to insulate UK political debate from pan-European forces, with the European Convention on Human Rights (ECHR) taking the brunt of this challenge.³⁸ Once the tradition that protecting liberty against an overweening executive "came to be attributed, in origin, to the victory of the barons over King John",³⁹ opponents of such Europe-wide developments have the opportunity to tap into Magna Carta as a foundation myth to bolster their position. As David Cameron stated, before he became Prime Minister, "[i]n many ways the Government has a choice between this country's ancient rights of habeas corpus and the right not be detained without trial; between Magna Carta and the ECHR".⁴⁰ This is a call to exceptionalism; a reactionary opposition to European human rights developments drawing upon the peculiarities of the UK's constitutional history. It is also a call which seeks to minimise the impact of the "spirit of Magna Carta" on the UK legal advisers who played such an important role in the drafting of the ECHR. Once again, Magna Carta can be seen to have an intensely contested legacy.

At other times, Magna Carta has been used as a justification for the expansion of common-law approaches to justice *into* international law. At a meeting of American newspaper editors held in London in 1918, the editor of Alabama's *Birmingham News* explained:

We are born of British blood, most of us. We have the highest regard and veneration for the fundamental principles of justice. All our laws and constitutions are bottomed on the common law of England. Our own Declaration is only a renewal of the Magna Carta of your country, and we are determined, as far as we may be able, to insist in establishing these principles throughout the world. We hope out of this war will come a day of sunshine for all the world, in which there will be real international law, some sort of international court, and maybe some sort of international police to enforce the ruling of that court. English justice, American justice, English and French and American ideals, must prevail in the world, and, God willing, they shall.⁴¹

³⁷ J. Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Florida)?' (2002) 21 *Law and Philosophy* 137, 139.

³⁸ It should be noted that the Royal Historical Society's 1917 celebration of Magna Carta seems to have been meant as a cosmopolitan project, rather than a simply jingoistic one. It included a chapter on medieval Spanish jurisprudence, and in his introduction Malden noted that without the intervention of the first world war the volume would have included German, Swedish and Belgian contributions: Henry Elliot Malden, 'Introduction' in Henry Elliot Malden ed, *Magna Carta Commemoration Essays* (Royal Historical Society 1917) xxi-xxii. As has already been noted above, the first world war was of great importance to the 700-year celebrations; but it is important to note the ambivalences at play in this importance.

³⁹ A. Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (OUP, 2001) 24.

⁴⁰ See <http://ukconstitutionallaw.org/2014/01/06/joshua-braver-counter-interpretation-constitutional-design-and-the-right-to-family-life-how-the-conservatives-learned-to-stop-worrying-and-love-the-hra-briefly/>.

⁴¹ 'United States Editors' *The Times* (The Times Digital Archive, London, 11 Oct 1918), 3.

Viewed from one angle, this is the complete opposite of the urge to withdraw common-law systems from international human rights standards. This impetus is at the root of Arden LJ's claim that "Magna Carta belongs today, not only to England, but to the world".⁴² But in some respects, this is still the same exceptionalist dichotomy as that posited by David Cameron when he contrasted the Magna Carta and the European Convention. While English, French and American *ideals* must prevail, it is only English and American *justice*, rooted in Magna Carta, which offers an appropriate model for the practical expression of these ideals. Magna Carta itself, on this account, becomes the Magna Carta of international law, and alternative approaches to the protection of rights are necessarily inferior (and perhaps even illegitimate).

[4] Magna Carta: Ossifying Legal Discourse on Rights

As Lord Irvine was eager to gloat, Magna Carta was not so named because of the importance of the principles of "limited government" therein contained (as Sir Edward Coke had explained its title nearly 400 years previously⁴³), but 'to distinguish it from the separate and shorter Charter of the Forest'.⁴⁴ This act of separation is not simply of symbolic significance, for the two charters dealt with distinct subject matter. Although both Charters (separated in 1217) dealt with grievances arising from perceived abuses of Royal authority, the Forest Charter was directly related to the increasing amount of land within the realm defined as royal forests. Such forests were not necessarily areas of dense woodland at all, but within any such designated land "common land" usages were displaced. Whilst Magna Carta can be considered an antecedent to modern civil and political rights instruments, the largely forgotten Forest Charter can be thought of as dealing with the still more contested territory of economic and social rights. Noam Chomsky draws upon common land rights as the antecedents of the modern debate:

[The Charter of the Forest's] goal was to protect the source of sustenance for the population, the commons, from external power -- in the early days, royalty; over the years, enclosures and other forms of privatization by predatory corporations and the state authorities who cooperate with them, have only accelerated and are properly rewarded. The damage is very broad.⁴⁵

The celebration of Magna Carta and the neglect of the Forest Charter⁴⁶ is therefore symptomatic of the ongoing preoccupation of human rights discourse with civil and political rights at the expense of economic and social rights (and even the debate as to whether the latter amount to rights at all). Celebrating only the Magna Carta backs rights discourse into a narrow corner.

But even this is not simply an accident of history: at the time of Magna Carta's last centenary celebrations, this point was being made by academics⁴⁷ and being reported in newspapers. Rather than simply asking *what* we have lost by focusing on the Magna Carta to the exclusion of the Forest Charter, it will be important to ask *how* and *why* this aspect of the Great Charter's history has been

⁴² M. Arden, 'Magna Carta and the Judges - Realising the Vision' (2011), 11. Available at: <https://www.royalholloway.ac.uk/aboutus/documents/pdf/magnacarta/magnacarta8711.pdf>.

⁴³ A.B. White, 'The Name Magna Carta' (1915) 30 English Historical Review 472.

⁴⁴ Lord Irvine of Lairg, 'The Spirit of Magna Carta continues to resonate in Modern Law' (2003) 119 LQR 227, XX.

⁴⁵ N. Chomsky, 'Destroying the Commons: How the Magna Carta Became a Minor Carta' (2012). Available at: <http://www.chomsky.info/articles/20120722.htm>.

⁴⁶ See generally P. Linebaugh, *The Magna Carta Manifesto: liberties and commons for all* (University of California Press 2008).

⁴⁷ See in particular Charles Howard McIlwain, 'Magna Carta and Common Law' in Henry Elliot Malden ed, *Magna Carta Commemoration Essays* (Royal Historical Society 1917) 124-125, criticising Coke for discussing the Magna Carta but not the Forest Charter.

lost, despite having always been known. What choices have been involved in the persistent refusal to recognise the Little Charter? What possibilities remain open to those wishing to resist this wilful forgetting, other than simply reaffirming the Forest Charter's existence?