

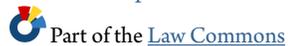
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## "Originalism" in Magna Carta

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## “ORIGINALISM” IN MAGNA CARTA

DR. AUGUSTO ZIMMERMANN\*

### I INTRODUCTION

King John’s grant of Magna Carta in 1215 is a wonderful example of the central role religion played in the development of the common law. Constituting a major shift in the social mentality of the English people, the Great Charter represents a revolutionary advancement in the law; in that, the provisions found in the Charter, and its many subsequent revisions, were predominantly concerned with recognising and endowing political and juridical rights. More importantly, the effect of the Charter was a concession from the king that he, too, could be bound by the law, thus establishing a clear formal recognition of the rule of law.

Prior to Magna Carta, customary law defined the legal rights of English subjects. In the absence of statute law, disregarding custom, the king was vested with the authority to administer the law as he saw fit. Accordingly King John ruled arbitrarily after inheriting the throne after King Richard’s death in 1199, endeavouring to liberate himself from restraints

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of the law and powerful ministers so as to govern the realm at his sole pleasure. Still, the monarch's ability to rule arbitrarily was soon called into question, especially when a number of failed military conflicts abroad (namely, losses to the French), combined with constant increases in taxes to fuel such conflicts, provoked a great deal of discontent amongst his subjects (most notably, the nobles and barons).

The 12th century was marked by a significant outburst of literature, art and culture in England, which the development of Christian ideals of law and government accompanied. The influential Archbishop of Canterbury, Hubert Walter (1160-1205), espoused the view that the royal power was inseparable from the law. As Theodore Plucknett pointed out, '[his] prestige was so great that a word from him on the interpretation of the law could set aside the opinion of the King and his advisers. King John, in fact, felt with much truth that he was not his own master so long as his great minister was alive'.

Growing discontent with King John heightened after a dispute with Pope Innocent III over the appointment of the See of Canterbury. Archbishop Walter had died and the endorsement of different candidates resulted into a bitter power-struggle between King John and Pope Innocent III. In 1205 two candidates disputed the election of the see of Canterbury. Pope Innocent III rejected both contenders and appointed his own candidate, Stephen Langton. Yet, John regarded his bishops as no more than higher civil servants and desired the English church to be entirely subservient to the Crown. Langton, however, assumed the separate sphere of Church and State, thus attacking the king's conduct and declaring that his subjects were not bound to him if he had broken faith with the 'King of kings'.

The Great Interdict followed to which the King replied by confiscating Church property. This led Rome to submit King John to severe punishments, especially interdict in 1207 and excommunication in 1209. The king eventually succumbed to the Pope's demands and was forced to resign the Crowns of England and Ireland, receiving them again as the Pope's feudatory. In 1213, under the threat of French invasion by Phillip Augustus, King John finally accepted Langton's appointment and to subject his kingdom to the lordship of Innocent III. These sources of discontent eventually led the English barons to march into London in 1215. They forced King John to sign the articles of demand encompassed in Magna Carta. By that time Langton had become the main figure in the struggle of the barons against King John.

## II      STEPHEN LANGTON'S ORIGINAL INTENT

Historians in search of the author of Magna Carta generally agree that Stephen Langton (c.1150 – 1228) was the principal drafter of the original document. But when Pope Innocent III appointed him in 1206, he had made an unusual choice since Langton had spent over thirty years outside England in the schools of Paris. This fact alone, indeed, was a very good reason for King John's complaint that the chosen candidate had lived too long among his archenemies in France. Moreover, before becoming the pontiff, Pope Innocent III—who deeply admired the learned Langton—was a student of his at Paris.

When Langton arrived in England in July 1213 and met King John on 20 July at Winchester, he immediately absolved the king from excommunication on the condition that the laws of his ancestors were fully restored, particularly the laws of Edward the Confessor (c.1003–1066) that required the monarch to rule justly. This specifically included an utterance made in 1140, which, based on the laws of Edward the Confessor, stated:

[T]he king ought to do everything in the realm and by judgement of the great men of the realm. For right and judge ought to rule in the realm, rather than perverse will. Law is always what does right; will and violence and force are indeed not right. The king, indeed, ought to fear and love God above everything and preserve His commands throughout his realm.

Archbishop Langton shared the view of his predecessor, Hubert Walter, that 'loyalty was devotion, not to a man, but to a system of law and order which he believed to be a reflection of the law and order of the universe'. From Romans 13 Langton concluded that the royal power derived from God and that such power was always limited by the rule of law. He stated: 'If someone abuses the power that is given to him by God and if I know that this bad use would constitute a mortal sin for me, I ought not to obey him, lest I resist the ordinance of God'. Elsewhere Langton also stated that 'when a king errs, the people should resist him as far as they can; if they do not, they sin.' Additionally, he commented that 'if someone has been condemned without a judicial sentence, the people are allowed to free the victim.' Consequently, as Plucknett noted, 'conflict was inevitable between such statesmen and John, whose life had been spent in constant turbulence, intrigue, treachery, with complete

indifference to those principles of harmony in life and nature which underlay all the current belief in justice and responsibility.’ It was Langton, therefore, who drafted the Great Charter as way of addressing the baronial grievances. His biblical studies at Paris anticipated the direct challenges of Magna Carta to the royal power, which manifestly asserted the superiority of the written law over political arbitrariness. In Chapter 18 of Deuteronomy the Holy Bible seemed for him to convey the principle that the law of the land should be reduced to writing for the instruction of the civil ruler. Since the idea of written law had played a fundamental role in the formation of the Hebrew nation, Langton concluded that a similar function should be applied to the grievances levied against King John. These grievances should be expressed in writing and the king compelled to affix his royal seal to the written law. As Baldwin points out, ‘the law of the realm should be written down to guide the king in ruling the kingdom and that due process facilitated by the judgement of peers and guided by the law of the land should be applied not only in the king’s courts but also to the king himself’.

Magna Carta was therefore primarily the work of Archbishop Langton, who sincerely hoped through this written document to realise an Old Testament, covenantal kingship in England. His concerns for freedom and due process were made explicit in several provisions of Magna Carta, especially Article 39 (‘No freeman shall be taken or imprisoned or disseised [dispossessed] or outlawed or exiled or in any way ruined ... except by the lawful judgement of his peers or by the law of the land’), Article 40 (‘To no one will we sell, to no one will we deny or delay right or justice’), and Article 52 (‘If anyone has been disseised or deprived by

us without lawful judgement or his peers of lands, castles, liberties, or his rights, we will restore them to him at once’).

Langton’s biblical studies at Paris deeply shaped those important provisions. Because of this, Magna Carta can be read not just as a historical, constitutional or legal document but also a *religious* document. Langton had, in his Parisian exile, been among the most famous lecturers on teachings of the Old Testament. He strongly believed that the law written down in Deuteronomy prevented the monarch from going beyond the power explicitly authorised to him. He had studied Saul’s acclamation as king over Israel by the prophet Samuel, who ‘declared to the people the law of the kingdom and wrote it in a book and deposited it in the presence of the Lord (1 Samuel 10:25)’. As such, Langton expected that a written law should become an ‘English Deuteronomy’ that would work in the form of a covenant between God, king and people, thus ensuring that common-law polities had at their heart a covenantal foundation in which the king would be constitutionally accountable to a higher authority. For Langton wholeheartedly believed, as Lord Sacks noted, that:

[w]hat has been true in ancient Israel was to be true in medieval England. Langton was trying in his contributions to the Charter to realise in England a biblical, covenantal kingship. The Charter would soon be known as the Great Charter of Liberties. It is in the form of a *covenant* of liberties: a covenant between God, the king and the people, laying down the principles on which the king would reign.

Archbishop Langton was a learned theologian and his massive commentaries on the Bible contain thousands of pages of explanation about the meaning of scriptural words and phrases. He applied his

knowledge of biblical hermeneutics to draw modern parallels between England and the Old Testament stories of good kings and bad kings who abused their powers by violating God's laws. The good kings of Scripture, Langton argued, had been wise to acquaint themselves with the legal rules of Deuteronomy, a book of laws that Moses wrote in the form of a treaty (or social contract) between the king and his subjects, calling the nation of Israel to faithfully uphold God's laws. By contrast, the bad rulers were those who sought to evade both the advice of their priests and the obligation to rule according to the law. Thus Langton concluded, among other things, that 'necessity', or absolute need, was the primary reason for taxation, although he complained that contemporary 'rulers taxed for trivial reasons, from mere vanity or pride'. As Nicolas Vincent points out:

Those who attended Langton's lectures would have heard him contrast the priesthood recruited by Moses with modern bishops 'recruited from the Exchequer in London'. Those who read his commentary on the book of *Chronicles* would have found him railing 'against princes who flee from lengthy sermons, surely a reference to King John's attempts to escape the sermonizing of St Hugh of Lincoln. Kingship itself, Langton argued, had been decreed by God not as a reward but as a punishment to mankind. As the Old Testament of Hosea (13:11) proclaims, 'I have given you a king in my wrath.'

Archbishop Langton wholeheartedly embraced the scriptural thesis that civil government is not God's original plan for humankind but rather a result of original sin. The first reference to civil government in Scripture is located in Genesis, Chapter 9, where God is reported to command capital punishment for anyone who takes innocent life since humans are

created in the image of God. Yet the state is regarded as not being envisaged in God's original plan for humankind. Rather, the state is deemed a 'necessary evil' since it is conceived only after sin has entered in the world, when it becomes therefore necessary to establish a civil authority that must curb the violence ushered by the Fall (Genesis 6:11-13). At the beginning of God's creation, however, the biblical account reports that man and woman lived in close fellowship with their Creator, under his direct law and sole authority. According to Baldwin, this biblical worldview led Archbishop Langton to conclude that:

[t]here was no government in the Garden of Eden before the Fall, and there will be none at the end of the world. Just as God allowed divorce before of human frailty, so he has permitted the existence of rulers only to curb the original sin that resulted from the Fall. When Yahweh in the Old Testament narrative (1 Samuel 8 and 9) agreed to the children of Israel choosing Saul as their king, therefore, he allowed it only with severe reservations and misgivings. After Saul was acclaimed king, the prophet Samuel proclaimed the law of the real (*legem regni*) and had it inscribed in the book that was placed before the Lord (1 Samuel 10:24-5) ... Langton argued that the law not only stated the peoples' obligations to the king, but also what the king could exact from the people; for that reason the law was written down to prevent the king from demanding more. Most specifically, the law was the book of Deuteronomy, truly the send written law of the children of Israel. Chapter 17 prescribed the duties of the king.

### III RELIGIOUS SIGNIFICANCE OF MAGNA CARTA

Magna Carta signalled a remarkable advancement in English law. King John, acting on the advice of two archbishops and nine bishops, sealed Magna Carta 'from reverence for God and for salvation of our soul and of

all our ancestors and heirs, for the honour of God and the exaltation of Holy Church and the reform of our realm'. Furthermore, the barons justified their actions as legally permissible under God and the Church. In so doing, Archbishop Langton and Robert Fitzwalter led them, with Fitzwalter declaring himself the 'Marshal of the army of God and Holy Church'.

From 1225, subsequent versions of the Charter 'were reinforced by sentences of excommunication against infringers'. Although this appears to be a strange form of punishment to our modern standards, it was for the breaking of their oaths that King Stephen after 1135 was stigmatised as a tyrant and usurper. Oath-taking was taken seriously and, in an age without effective judicial sanctions, 'the consequences of oath-breaking could prove disastrous for individuals as for nations.' J C Holt commented on the efficacy of ecclesiastical penalties for breaches of the Charter:

Reinforce the charters by the threat of excommunication; promulgate the penalty in the most solemn assemblies of king, bishops, and nobles, as in 1237 and 1253; reinforce the threat by papal confirmation, as in 1245 and 1256, have both charters and sentence published in Latin, French, and English as in 1253, or read twice a year in cathedral churches as in 1297; display the Charter of Liberties in church, renewing it annually at Easter, as Archbishop Pecham laid down in 1279; embrace the king himself within the sentence of excommunication, [as] Archbishop Boniface did by implication in 1234. To modern eyes it is all repetitive and futile. In reality it was a prolonged attempt to bring the enforcement of the Charter within the range of canon law, to attach the ecclesiastical penalties for breach of faith to infringements of promises made "for reverence for God", as the Charter put it, promises repeatedly

reinforced by the most solemn oaths to observe and execute the Charter's terms. This was perhaps the best the thirteenth century could do to introduce some countervailing force to royal authority.

In this sense, Magna Carta can be historically described as a medieval treaty between the English king and his barons, concerning such matters as the custody of London and, in the Letters of Testimonial signed by the Archbishop and the bishops, a 'charter of liberty of Holy Church and of the liberal and free customs' that the monarch had conceded. The primary intent behind the original draft was to bring about an end to a state of civil war through signing a document that declared the liberties that it itself conveyed. In his *Second Institutes*, Sir Edward Coke identified 'four ends of this Great Charter, mentioned in the Preface, viz. 1. The honour of Almighty God, &c. 2. The safety of the Kings Soule, 3. The advancement of the holy Church and 4. The amendment of the Realm: foure most excellent ends'. So customs were not predominant, but rather keeping the peace and liberties of the realm. Indeed, throughout Magna Carta, customs are subsidiary to liberties since they are conveyed as liberties in relation to practices that were commonly described as *consuetudines*. Above all, the Great Charter was explicitly granted not only 'for the honour of God and the exaltation of Holy Church', and out of 'reverence of God and for the salvation of the [king's] soul and those of all [his] ancestors and heirs', but also, and particularly significant, for 'the reform of our realm.'

#### IV FINAL CONSIDERATIONS

For those who honestly seek to understand the historical legacy of Magna Carta, the document must be analysed primarily in light of the original drafter, Stephen Langton's, legal-political philosophy. The Great Charter was primarily the work of this great Archbishop, who sincerely hoped to realise an Old Testament, covenantal kingship in England. Indeed, Langton's biblical studies at Paris deeply shaped the provisions of Magna Carta, including those who still endure even to this present day as great declarations of rights and freedoms. As Lord Sacks points out, '[t]he torch handed down from Magna Carta to the present day is a torch that Langton had fuelled from the Bible he knew so well.' Lord Sacks correctly reminds that Magna Carta can be read as a historical, constitutional or legal document, but the document is first and foremost a religious document that underlies the biblical justification for limited government under the law. This reflects an ideal of limited government that is inseparable from a biblical worldview that makes civil authorities subject to legal rules that can be enforced against them if such authorities fail to comply with its explicit terms.