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Remarks on “Magna Carta Today” at the Estoril Forum 2015

**I want to thank our hosts for putting together this event and for their impressive hospitality.**

**I am particularly grateful to Professor Joao Espada, a fellow Anglophile I first met in the middle of the Anglo-Atlantic world – in the island of Bermuda – for inviting me to be part of the Estoril Forum.**

In my presentation I will put forward several questions for Mr. O’Hear, for the panel and for the conference that I hope to explore jointly with this distinguished group.

I want to begin by drawing attention to the phrase “law of the land” that appears in three places in Magna Carta. The phrase “the law of the land” seems to suggest that there is a law that is connected to the land, that this law is somehow part of the land. That is interesting. But what land? Can it be just any land? Every land? The earth? I don’t think this is what is meant by “law of the land.”

More likely, but I am not sure about this, the land refers to the territory inhabited by a certain people, who have perhaps gotten used to doing things a certain way, and have come to expect a certain set of behaviors, norms and customs. Does the “law of the land,” then, refer of England, to the island inhabited and stamped, physically and culturally by the Anglo-Saxon people? The land, then, was shaped and seemingly profoundly altered by this people’s mores, so much so in fact that perhaps even the conquering Normans were led to conform to some of the ancient ways inscribed in the Magna Carta.

There is, therefore, in this phrase – the law of the land – I want to suggest, a somewhat mystical invocation of land as something sacred or made sacred by the people who came to dwell on the land. There is an implication of a kind of sacred interpenetration of an ethnos with a territory: if you are on this land, then you can’t just do what you want. There are rules here. This is how we do things around here. Perhaps it is a message to the line of victorious noble Norman conquerors: you, too, really ought to abide by this way – the law of the land – even though you have conquered us.

Daniel Hannan has suggested at one occasion that the phrase “the law of the land” means law above the government, above the King and also above the parliament, above all of government. But it does not mean, he says, any sort of divine law. Rather, on Hannan’s reading, the law of the land is somehow **immanent** in the

people and their territory. On this reading there seems to be an ancestral, a generational, even mystical connection of the principles of Magna Carta and the land on which they apply, or apply originally, or apply in the truest and most pure form.

In his paper for this panel, Mr. O’Hear has suggested that this is wrongheaded: “None of this ... makes sense ... had it not been seen as expressing and responding to **a law higher and more objective** than any fallible and self-interested dispositions of a group of fractious medieval nobles and their unpopular and beleaguered monarch” (3). For Mr. O’Hear, Magna Carta does not make sense without the “underlying spirit” of “divine law” which was supplied, of course, by Christian philosophy, best represented and expressed by the great Aquinas.

Tradition, on this reading, is crucially supplemented by justice, and custom is ultimately rooted in the transcendent realm. Divine law is ontologically superior to the human law, and without the foundation in divine law Magna Carta is not a sensible set of propositions.

Well then, here we seem to have a disagreement. Most accounts of Magna Carta’s propositions, or principles, or charters of liberties that I am familiar with, tend not to presuppose, and certainly do not emphasize the scholastic background Mr O’Hear has emphasized. Mr. Hannan explicitly denied it.

So, my question to you, is Magna Carta rooted in divine law, or is it immanent in the land and those people who formed that land into something where certain laws were said to apply?

I’ll pose another question for the panel and the conference. I’ve heard it often said during the celebrations this year that Magna Carta is responsible for the expansion of liberties we now enjoy. My question is: if we had not had Magna Carta, would we have had common law, Coke, Blackstone, liberal constitutionalism, human rights, and all the good things we tend to attribute to Magna Carta?

And a follow up to that question: is the biological language, the biological analogy – Magna Carta as the **seed** of human liberty and human rights – the appropriate language to use? It implies, as I have suggested in the paragraph above, that the seed was absolutely critical, but it also seems to imply that slow, evolving growth, which tends to occur naturally, again, in a biological sort of way, is the proper way to understand the growth of liberties out of Magna Carta. Is this the correct way to understand the significance of Magna Carta 800 years later? And if not, what would be some alternatives?

Thank you very much for your attention.