

SEOUL DIALOGUE FOR HUMAN RIGHTS

CELEBRATING THE 800<sup>TH</sup> ANNIVERSARY OF *MAGNA CARTA*: IN SEARCH OF LIBERTY AND HUMAN RIGHTS IN NORTH KOREA

11 NOVEMBER 2015, SEOUL, REPUBLIC OF KOREA

MISUSE OF POWER IN DPRK: LESSONS FROM *MAGNA CARTA* 1215

The Hon. Michael Kirby AC CMG

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MAGNA CARTA 1215

*The Provenance and Language of Magna Carta:*

In June 1215 at Runnymede in England King John of England was obliged by a group of powerful members of the elite to affix his seal to a document that became known as *Magna Carta (The Great Charter)*.

No one suggests that there is a direct line between anything written in this document and the challenges faced today in the Democratic People's Republic of Korea (DPRK) (North Korea). In 1215, John and his adversaries knew nothing of Korea. Korea knew nothing of King John.

Yet *Magna Carta* in 1215 (and the many later iterations of that instrument in England) was to become a symbol of the subjection of the power of rulers to certain basic requirements of universal application. In the evolution of English constitutional history, King John's *Charter* was to

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\* Parts of this paper are developed from a lecture by the author at the University of Buckingham, Buckingham, England.

\*\* Justice of the High Court of Australia (1996-2009); Chair of the United Nations Commission of Inquiry on Human Rights Violations in the Democratic People's Republic of Korea (2013-2014).

influence later events in the British Isles, in what became the United States of America and in the legal systems of the common law world, shared by English-speaking peoples in all continents.

In the grand sweep of history, does *Magna Carta* have any lesson for the abuse of power in North Korea today? Many of the provisions of *Magna Carta* both in 1215 and in later versions, dealt with particular concerns about the governance of medieval England that have no continuing relevance in England or anywhere else. However, a number of the complaints that were made against the conduct of King John led to clauses in the *Magna Carta* that express concerns about abuse of power that have a modern resonance.

Amongst the most important clauses (translated from the Latin) are four that should be specially noted:<sup>1</sup>

(17) Ordinary law suits shall not follow the Royal Court around, but shall be held in a fixed place...

(39) No free man shall be seized or imprisoned, or stripped of his rights of possessions, or outlawed or exiled, or deprived of his standing in anyway, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his peers or by the law of the land.

(40) To no one will we sell, to no one deny or delay right or justice.

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<sup>1</sup> Derived from M. Arden, "Magna Carta and the Judges: Realising the Vision" in New South Wales, *Judicial Officers' Bulletin*, Vol. 27 No.6 (July 2015), 1, reproduced from M. Arden, *Shaping Tomorrow's Law*, Vol.2, *Common Law and Modern Society: Keeping Pace with Change* (OUP, Oxford, 2015). Originally published (2012) 10 *The Judicial Review*, 419.

(45) We will appoint as justices, constables, sheriffs or other officials, only men that know the law of the realm and are minded to keep it well.

### *The Chief Innovations of Magna Carta:*

After executing the *Charter*, King John sent a delegation to Pope Innocent III in Rome to obtain release from its obligations. The release was duly given in return for John's submission to papal power.<sup>2</sup> This defiance by the King inflamed a rebellion. It was only extinguished by John's death in 1216. His infant son, Henry III, was advised to reissue the *Magna Carta*, deleting a few of the more burdensome provisions. Later Kings in England embraced a tradition of reissuing the *Charter* when they were crowned. Eventually it was included in the *Statute Roll of England* in 1297.

Looking back on this history, an Australian judge (JJ Spigelman) identified six major lessons that the history of *Magna Carta* provided for constitutionalism more generally:<sup>3</sup>

- “\* First, the acts of the King were not simply personal acts. The King's acts have an official character and, accordingly, are to be exercised in accordance with certain processes.
- \* Secondly, the *Charters* affirm, by their very nature and the circumstances of their issue and confirmation, the obligation of the King to consult the political nation on important issues.

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<sup>2</sup> Told in David Carpenter, *Magna Carta* (Penguin, London, 2015); A. Arlidge and I. Judge, *Magna Carta Uncovered* (Hart, London, 2015); J.C. Holt, *Magna Carta* (Cambridge); N. Vincent *Magna Carta: The Foundations of Freedom 1215-2015* (Third Millennium, London, 2015). See review of D. Jones, *Magna Carta, The Making and Legacy of the Great Charter* (Head of Zeus, 2014) by Frederick Mount, “Back to Runnymede”, *London Review of Books*, 23 April 2015, 15.

<sup>3</sup> JJ Spigelman, “Magna Carta in its Mediaeval Context” (2015) 89 *Australian Law Journal*, 383 at 385.

- \* Thirdly, the *Charters* restrict the exercise of the King’s feudal powers – subsequently transmogrified into prerogative powers – in accordance with traditional limits and conceptions of propriety.
- \* Fourthly, the King cannot act on the basis of mere whim. The King is subject to the law and also subject to custom which was, during that period in the process of being hardened into [the common] law.
- \* Fifthly, underlying [the] *Charters* is the proposition that the King [in the part]... had acted contrary to established custom, and to some degree, contrary to the law [thereby requiring repair].
- \* Sixthly, the King must provide a judicial system for the administration of justice and all free men [were entitled to due process of law].”

The contents of *Magna Carta*, and the fact of imposing restrictions on an oppressive ruler’s powers, encouraged the American settlers in their revolution in 1776 to secure independence from the English Crown. Some provisions of the *Constitution* and *Bill of Rights* of the United States can be traced directly to the language of *Magna Carta*. The instrument has also been regarded as foundational in other countries, including Australia<sup>4</sup> and India.<sup>5</sup> The idea that rulers are answerable to the people of the country they rule; that they must conform to certain basic obligations such as justice and due process; and that person of the ruler is distinct from the idea of the State influenced the thinking that led to the establishment of the United Nations itself, the language of its *Charter* and the provisions of the *Universal Declaration of Human Rights* and later treaties on that subject.

The question is whether any of this history has lessons for the world of today and its human rights machinery? And specifically, whether the

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<sup>4</sup> *Ex Parte Walsh and Johnson; In Re Yeats* (1925) 37 CLR 36 at 79 per Justice Isaacs (High Court of Australia).  
<sup>5</sup> H.M. Seervai, *Constitutional Law of India – A Critical Commentary*, N.M. Tripathi, Bombay (3rd Ed., 1996), Vol 3, 3115, citing *I.C. Golak Nath v Punjab* (1967) 2 SCR 762; (1967 ASC 1643). See also *Kesavananda v Kerala* (1973).

fact, and language, of *Magna Carta*, proclaimed so long ago, has resonance for North Korea today?

## NORTH KOREA 2015

### *Mandate of the COI:*

It is a long way in time and space from Runnymede in the England of King John, in 1215, to Pyongyang in the time of Kim Jong-un, in 2015. Yet parallels exist between these times and places that need to be noticed.

King John was the comparatively recently enthroned monarch of England. His family had entered that kingdom earlier, accompanied by a large armed force from a then much more powerful and influential overseas kingdom, France. The family overthrew the local leaders with the foreign help. The ordinary people still dreamed nostalgically of an earlier, purer kingdom. Like King John, Kim Jong-un is a highly autocratic ruler. Kim causes opponents to be charged with treason and executed. He has resisted demands for the improvement of his regime. He abhors challenges to his power.

In the case of Kim Jong-un, the immediate pressure for change in his regime came not from a council of local personalities but from a Council comprising representative of the entire world: the Human Rights Council (HRC) of the United Nations. On 21 March 2013, the HRC, in virtual unanimity, proceeded to establish a mechanism to call Kim Jong-un to conform with basic principles of justice, good governance and universal

human rights.<sup>6</sup> In consequence of the HRC's resolution, a Commission of Inquiry (COI) was set up to investigate "the systematic, widespread and grave violations of human rights" in North Korea. The formal title of the country over which Kim Jong-un presides, as Supreme Leader, is the Democratic People's Republic of Korea (DPRK). However, as the COI was to discover and report, it is neither a *democratic* country with free and fair elections; nor one that engages its *people* in their own governance; nor does it have the hallmarks of a modern *republic*. Instead, it is, and was, a closed land, often described as a "hermit kingdom". It is like no other land in today's world – an absolute monarchy where a form of worship of the ruler is obligatory. The chief features of the country are set out in the ultimate conclusions of the COI:<sup>7</sup>

80. Systematic, widespread and gross human rights violations have been and are being committed by the [DPRK] its institutions and officials. In many instances, the violations of human rights found by the [COI] constitute crimes against humanity. They are not mere excesses of the State; they are essential components of a political system that has moved far from the ideals on which it claims to be founded. ...

81. [DPRK] displays many attributes of a totalitarian State: the rule of a single party, led by a single person, is based on an elaborate guiding ideology that its current Supreme Leader refers to as "Kim Il-sungism - Kim Jong-ilism". Suppressing all political and religious expression that question the official ideology, and tightly controlling citizens' movement and their means of communication with each other and with those in other countries. ...

82. The state's monopolisation of access to food has been used as an important means to enforce political loyalty. ...

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<sup>6</sup> UNHRC Resolution A/HRC/Res/22/13.

<sup>7</sup> UN/A/HRC/25/63/[80]-[83]. See also COI report, 365 [1211]-[1214].

83. The keystone to the political system is the vast political and security apparatus that strategically use surveillance, coercion, fear and punishment to preclude expression of any dissent. Public execution and enforced disappearance to political prison camps serve as the ultimate means to terrorise the population into submission. ... [T]he authorities engage in gross human rights violations so as to crack down on “subversive” influences from abroad. ... Persons who are forcibly repatriated from China are commonly subjected to torture, arbitrary detention, summary execution, forced abortion and other forms of sexual violence.

In light of these findings, the COI declared that the human rights situation in DPRK was “intractable” and that an effective response was imperative.<sup>8</sup> It made a long series of recommendations, including many addressed to DPRK itself, calling on it to:<sup>9</sup>

“Undertake profound political and institutional reforms without delay to introduce genuine checks and balances upon the powers of the Supreme Leader and the Workers’ Party of Korea; such changes should include an independent and partial judiciary, a multi-party political system and elected people’s assemblies at the local and central level that emerged from genuinely free and fair elections; reform of the security sector... limiting the functions of the Korean Peoples’ Army for defending the nation against external threats; and dismantling the State’s security department [placing] the Ministry of Public Security under transparent democratic oversight.”

*Detailed report:*

The report of the COI responded to the nine point mandate given to it by the HRC. It began with a history of the establishment of a separate state in the northern half of the Korean Peninsula after 1945.<sup>10</sup> That division

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<sup>8</sup> *Ibid*, 16 [86].

<sup>9</sup> *Ibid* 367 [1220(a)].

<sup>10</sup> *Ibid* 21-22 [95].



was imposed upon the Korean people by foreign nations. It terminated a long period of unified, centralised government, including during the years 1911-45 when Japan suppressed the independence of the Korean State and ruled it as a colony.<sup>11</sup> After removal of the Japanese in 1945, the first Supreme Leader, Kim Ill-sung was imposed on North Korea by the then Soviet Union. He established the Supreme Leader system (*suryong*), modelled on Stalinist principles.<sup>12</sup> He consolidated governmental power under the direction of his family. When he died in 1994, he was succeeded by his son, Kim Jong-il.<sup>13</sup> The second Kim instituted a regime fully dependent on the military. It proceeded to develop a huge army and nuclear weapons with long-range missiles.<sup>14</sup> Upon the death of Kim Jong-il in December 2011, dynastic succession passed immediately to Kim Jong-un. Shortly before, he and his aunt, Kim Kyong-hui, were promoted to four star generals, although neither had any real military experience.<sup>15</sup> Their appointments were not ceremonial.

In December 2013, an uncle of the Supreme Leader, Jang Song-thaek, (earlier described as the Supreme Leader's "control tower" such was his role to guide the Leader), was taken under guard from a Politbureau meeting; summarily tried by a military tribunal; and executed.<sup>16</sup> There have been many other recent reports of executions of high officials of the DPRK.<sup>17</sup> The country that emerges from these reports is a violent and dangerous place of royal whims and fancies. In that respect it is not

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<sup>11</sup> *Ibid* 27 [110]-[128].

<sup>12</sup> *Ibid* 34 [129].

<sup>13</sup> *ibid*, 36 [134].

<sup>14</sup> *Ibid* 40 [143]-[148].

<sup>15</sup> *Ibid* 41 [149].

<sup>16</sup> *Ibid* 43 [157].

<sup>17</sup> "North Korea Vice-Premier Executed for Talking Back", *The Australian*, 13 August 2015, 9. Reporting also alleged executions of Choe Yong-gou, reportedly killed in July 2015 and former Defence Minister Hon Yong-chol.

unlike the kingdom over which King John ruled before his encounter at Runnymede.

*MC features of COI report:*

The ambit of the report of the COI on DPRK is considerably wider than the focus for which *Magna Carta* is now taken to stand, particularly respect for the rule of law (MC 1215, c. 17); protection of deprivation of rights and possessions and outlawry or exile (MC1215, c. 39). Provision without delay or denial of rights and justice (MC 1215, c.40); and establishment of settled courts and officials (MC 1215, c. 45). Thus, chapters of the COI report deal with violations of thought and expression;<sup>18</sup> violations of freedom of movement and residence;<sup>19</sup> violations of the right to food;<sup>20</sup> and crimes against persons living peacefully in foreign countries through abduction.<sup>21</sup>

Important sections of the report of the COI deal with the intrusion of the State in DPRK into matters of religious belief.<sup>22</sup> *Magna Carta* did make provision for the status of religion in England. But in keeping with the approach in those feudal times, the only real freedom of religion was that of the Lord, whose subjects were obliged to conform to his beliefs. Nevertheless, the first article in the MC of 1215, later confirmed in 1225 and 1297, signified respect of the King for the Church, which was viewed as the ‘Holy Mother’ of the Christian religion (MC1215 c 1):

“1. In the first place we have granted to God and by this our present charter have confirmed, for us and our heirs in perpetuity, that the English

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<sup>18</sup> COI report, ch.IV A, 45 [163]-[264].

<sup>19</sup> Ibid, ch IV C.

<sup>20</sup> Ibid, ch IV D.

<sup>21</sup> Ibid, ch IV F, 270 [846]-[1021].

<sup>22</sup> COI report, ch IV A, 71-73 [253]-[258]. See also ch. V D, 333 [1087]-[1097].

Church shall be free, and shall have its rights undiminished and its liberties unimpaired. ...”

The picture of denial of religious freedom in DPRK is recounted in detail in the COI report. It describes a state where one of the four great freedoms of Franklin D. Roosevelt (the right to worship God in the way desired) is denied. Where, even on DPRK’s own statistics, religious adherence has dropped from 23% of the population at the time of partition in 1945 to less than 1% today), with much testimony of persecution. The COI was uncertain as to whether this dramatic fall was because of the murder of religious adherents or simply a reaction to hostile State policy.

More to the point, several sections of the COI report illustrate the arbitrary interference in personal freedom, seizure of possessions; proceeding against others by force; and the absence of legal regulation over officials in DPRK. In particular, this is demonstrated in the sections of the COI report that deal with discrimination on the basis of a state-assigned social class (*Songbun*), gender and disability.<sup>23</sup> Restrictions on the right to move freely in and out of the country and effective systems of outlawry and exile in the extensive system of arbitrary detention camps; systems of torture; public and other executions; enforced disappearances; and removal of entire families into political prison camps.<sup>24</sup> The camps in particular, remove suspected persons (and their families) into harsh and isolated conditions where work is arduous and food is scarce.<sup>25</sup>

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<sup>23</sup> COI Report *ibid*, 333 [1087] ff.

<sup>24</sup> *Ibid*, 74 [265]-[354].

<sup>25</sup> *Ibid*, 208 [693]-[845].

Although DPRK has denied the existence of such detention camps, they were described in compelling detail by witnesses before the COI. Moreover, they are confirmed by precise satellite images. They certainly exist. They entail crimes against humanity. They are outside effective supervision in the ordinary prison system.<sup>26</sup> They are not under the control of independent courts. They represent forms of forced labour amounting to enslavement.<sup>27</sup> They constitute a “vast prison system [with] inhumane acts which follow regular patterns that victimise tens of thousands of inmates at any point in time”.<sup>28</sup>

The COI was unconvinced that there were, in DPRK, any independent courts, judges or officials who could enforce accountability for the crimes and wrongs described in its report. The COI acknowledged that in other places<sup>29</sup> a partly international and partly national tribunal had been created to investigate and establish accountability for the wrongs found to have occurred.<sup>30</sup> The COI on DPRK went on:<sup>31</sup>

“[T]hese models rely on the consent of the State concerned. Even if the DPRK were to provide such consent, the Commission takes the view that, in the absence of profound reforms to the DPRK’s political and justice system, any DPRK judges designated to participate in such a high court would lack the impartiality and independence to carry out criminal trials that would likely involve any very senior officials as defendants.”

The elements of stable courts made up of judges or like officials, who know the law and are minded “to keep it well” (MC1215, c. 45) is absent from the DPRK. This is why the COI recommended referral of the case

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<sup>26</sup> *Ibid.*, 330 [1008]-[1086].

<sup>27</sup> *Ibid.*, 332 [1078].

<sup>28</sup> *Ibid.*, 333 [1083].

<sup>29</sup> E.g. Cambodia and Sierra Leone. See [1673] fn.

<sup>30</sup> COI Report, *ibid.*, 362 [1202].

<sup>31</sup> COI Report, *ibid.*, 361[1201.1].

of DPRK to the Security Council of the United Nations. That body has the power, under the *Rome Statute*, to refer the case of DPRK to the International Criminal Court (ICC), even though DPRK is not itself a party to the *Rome Statute*.

Several sections in the COI report also portray a country that has very grave policies and practices of discrimination against women. Women are often the citizens of DPRK who have first sought refuge, food and work in China.<sup>32</sup> Attitudes of racial purity in DPRK lead to severe discrimination against women who come from China pregnant, or with children fathered, by Chinese men.<sup>33</sup>

The position of women in Norman England was also greatly disadvantageous at the time of *Magna Carta*. However, there were provisions in MC1215 which afforded a measure of respect for women's rights which was enlightened for its time. Thus it was provided:<sup>34</sup>

“Ch 7: After her husband's death, a widow shall have her marriage portion and her inheritance at once and without any hindrance; nor shall she pay anything for her dower, her marriage portion or her inheritance which she and her husband held on the day of her husband's death; she may stay in her husband's house for 40 days after his death, within which period her dower shall be assigned to her... No widow shall be compelled to marry so long as she wishes to live without a husband...”

*Magna Carta* contained, in its successive iterations, important protections for the customs of the City of London and for merchants and

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<sup>32</sup> Ibid, 118 [417] (describing the interrogation of women detainees); 122-126 [424]-[428] (forced abortion); and 132-139 [485]-[471] (female trafficking).

<sup>33</sup> COI Report, *ibid*, 140-141 [474]-[476].

<sup>34</sup> Quoted in T. Blackshield and G. Williams, *Australian Constitutional Law and Theory*, *Magna Carta* (The Great Charter) of 9 Henry 3 (1225) as confirmed by 25 Edw.1 (1297) quoted in par [2.6], paged 42-43. However, limits were imposed on acting on the testimony of a woman. See MC 1225, ch.34 (at Blackshield and Williams, 44).

free trade.<sup>35</sup> The freedom of persons to move between classes was greatly restricted by the feudal system in operation when *Magna Carta* was sealed. However, inflexible social regulation by reference to birth and class has disappeared today in most parts of the world. It is inconsistent with universal human rights. Yet forms of feudal control have been imposed in the DPRK by the State-assigned social class system (*Songbun*). This was devised by Kim Ill-sung.<sup>36</sup> Indeed, the implementation of *Songbun* was attributed to a purge of rivals of Kim Ill-sung.<sup>37</sup> It is difficult to move to a higher social class. Yet it is less difficult to move down the ladder. The system appears to have some similarities to the fixed inherited social status that existed in feudal Korea. It has been strongly imposed in DPRK by the regime, as a method of social and economic control. There is now no equivalent social system in the Republic of Korea (ROK) (South Korea).

#### *COI follow-up:*

The COI report on the DPRK was approved and adopted by the Third Committee of the General Assembly of the United Nations, reflected in a strong vote.<sup>38</sup> It was then transmitted to the plenary session of the General Assembly. This also adopted it with a strong vote that reached across geopolitical regions.<sup>39</sup> Then, in accordance with the recommendation of the COI,<sup>40</sup> two important follow-up proposals were accepted by the United Nations.

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<sup>35</sup> *Ibid*, 30 (freedom to leave and enter England) (Blackshield and Williams, 44), ch.37 (customs and liberties).

<sup>36</sup> COI Report, 74 [265]. This is incompatible with the Universal Declaration of Human Rights, article 2 and ICCPR/ICESCR, art.2. Also CEDAW, art. 1.

<sup>37</sup> COI Report, 76 [273]. The COI recommended an end of discrimination based on social class. See *ibid*, 368 [1220(h)].

<sup>38</sup> Resolution of the Third Committee: United Nations, A/RES/69/188, (18 December 2014).

<sup>39</sup> Resolution of the General Assembly: United Nations/ A/RES/60.1

<sup>40</sup> COI Report, *ibid*, 370 [1225(a)].

First, the General Assembly transmitted the COI report to the Security Council of the United Nations. The COI had recommended that the United Nations should refer the situation in DPRK to the ICC “for action in accordance with that court’s jurisdiction.” Secondly, the Office of the High Commissioner for Human Rights (OHCHR) implemented the recommendation of the COI that a field structure should be established in ROK “to help to ensure accountability for human rights violations in [DPRK], in particular where such violations amount to crimes against humanity.”<sup>41</sup>

The placement of the recommendations of the COI before the Security Council was itself a step unusual for the United Nations system. Generally, the Security Council avoids direct involvement in human rights issues. However, a procedural resolution was adopted by the Council in December 2014, placing the issue of DPRK on the agenda of the Security Council.<sup>42</sup> It will remain on that agenda at least for the next three years. That resolution was also adopted by a strong vote of the Council.<sup>43</sup> The presence of the subject matter on the agenda of the Security Council means that it can be raised at short notice, by any Council member, including to consider referral to the ICC or, as the COI proposed, to “adopt targeted sanctions against those who appear to be most responsible for crimes against humanity.”<sup>44</sup>

The DPRK has not so far acquiesced in any action demanded by its critics. Its response so far has been like the reaction of King John to the

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<sup>41</sup> *Ibid*, 371 [1225(c)].

<sup>42</sup> Security Council Resolution: S/RES 2141 (2014).

<sup>43</sup> (11-2-2). China and Russian Federation contra; Chad and Nigeria abstained. Three Permanent Members of the Council (France, United Kingdom and United States of America) voted in favour.

<sup>44</sup> COI report, *ibid*, 370 [1225(a)]. The COI made it clear that “in the light of the dire social and economic situation of the General population the Commission does not support sanctions imposed by the Security Council or introduced bilaterally that are targeted against the population or the economy as a whole”.

*Magna Carta*. It has remained belligerent, hostile and uncooperative with the UN Human Rights system. Furthermore, in more recent times, it has stepped up hostile military action; entered into a 'wartime state' to be fully 'battle ready' to 'launch surprise operations'; and engaged in incidents constituting the worst escalation of hostilities between the Korean states since 2010.<sup>45</sup>

A number of conciliatory gestures offered by DPRK during a "charm offensive" in 2013 and early 2014, designed to avoid referral of its record to the Security Council, were immediately withdrawn once the Security Council added the issue of human rights in DPRK to its agenda. The possession of weapons of mass destruction; the recent and current political and military posture; and the repeated incidents of violence against its own former elite, present the spectacle of a country that is very dangerous for its own people, to its neighbours, to the region and (through the risks of nuclear accidents or detonations) to the environment of the planet.

It is this grave escalation of danger that presents the urgent need for strong action to implement the COI report. But how will that action come about? Can a Runnymede moment be created for Korea?

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<sup>45</sup> "North Korea troops ordered to prepare for war", *Sydney Morning Herald*, 22 August 2015, 9. On 27 August 2015 it was reported that, following a form of apology the military situation eased.



### III

#### TEN PARALLELS

##### 1. *Action and reaction:*

The demand of the barons for the agreement to *Magna Carta* was a direct outcome of intolerable conduct on the part of King John. Abroad, he threatened to conduct expensive and dangerous wars in France. At home, he sought to raise taxes; offended the Church; and harmed trade and commerce. The *Great Charter* was not the product of a popular uprising, like the later Peasants' Revolt in England of 1381. In 1215, it was an uprising of the elite which, at last, responded to what it came to see as intolerable strains on the country and their own safety and rights.<sup>46</sup>

Witnesses before the public hearings of the COI told of their admiration for, and love of, Kim Il-sung. Kim Jong-il developed the nuclear arsenal; but he was generally cautious in his handling of the elite. Kim Jong-un, on the other hand, has disappointed the high expectations that accompanied his arrival. They had hoped for modernisation and liberalisation of the regime. He has proved violent in his disposal of enemies and oppressive in his dealings with most of the population.

Regime change in DPRK was never on the agenda of the COI, any more than military intervention in DPRK. That country is a member state of the United Nations which created the COI. Military action was not contemplated by the COI's mandate from the HRC and it had no power to propose it. However, ideas from without and within now challenge the situation in DPRK. In England in 1215, such challenges led to *Magna*

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<sup>46</sup> Plunknett, above n.6, 20.

*Carta*. Where it will lead in the case of DPRK is still unsure. That country was not obliged to join the United Nations. Yet, having done so, it is obliged to conform to universal human rights. They are expressed in the United Nation's *Charter* the UDHR and the treaties that have followed it. DPRK has itself ratified several of those treaties.<sup>47</sup>

Violence begets violence. Discontent growing from chronic food shortages, economic impoverishment, technological deprivations and other wrongs seem likely to produce demands in DPRK for radical reform. Hopefully, such reforms will follow the recommendations of the COI addressed to DPRK.<sup>48</sup> High in the list of those recommendations was the introduction of sound principles of governance; the implementation of restrictions on the exercise of public power; and the observance of due process and basic rights for ordinary people in DPRK. Just as *Magna Carta* demanded centuries earlier in the case of King John's England.

## 2. *Nostalgia feelings:*

The demands expressed by the barons in MC1215 did not purport to express fresh insights. They were demands for the restoration of modes of governance that had existed during earlier reigns of the Norman and Saxon Kings of England. The Norman monarchs prided themselves on their strong centralised administration. To some extent, they drew legitimacy from nostalgic ideals that were traced back to the reign of the Anglo-Saxon King Edward: the only English monarch to have been named a saint ("St. Edward the Confessor").

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<sup>47</sup> COI, A/HRC/25/63, 6 [21].

<sup>48</sup> COI report, *ibid*, 367-369 [10220(a) - (s)].

Whilst some witnesses before the COI clearly contemplated the entire replacement of the Kim Dynasty, others were themselves nostalgic for the founder of DPRK: Kim Il-sung. In part, that may have been the product of propaganda undamaged by current experience. In part, it might have derived from his leadership of the DPRK during the Korean War that ended in a stalemate. In part, it might be a result of the Soviet subsidisation of the DPRK economy before 1989 and the operation, at that time, of a comprehensive food rationing system. Whatever the reasons, discontent with, and even disrespect for, the regime of Kim Jong-un appear to be substantially higher than in the case of his predecessors as Supreme Leader of DPRK.

When King John died in England in 1216, the salvation of his dynasty was the conduct of his infant successor (Henry III) under a regency controlled by a gifted and loyal leader, the Earl of Pembroke. The closest parallel to this in DPRK appears to have been the uncle by marriage of the Supreme Leader (Jang Song-taek) who was speedily removed and executed. Reportedly, he favoured the adoption of Chinese-styled market reforms. His death removed an important actor in a potential process of transition. Regents have sometimes been viewed as rivals in history, and eliminated. Such appears to have been his fate.

### *3. Institutional solutions:*

An important motivation for the barons who challenged John in 1215 was their objection to the deployment of royal power on the basis of the “whims” of the monarch. An achievement of the earlier Norman Kings (and indeed the late Anglo-Saxon monarchs) had been an improved

system of clerks and processes of consultation ('counsel') involving a form of collective leadership. The absence, and infancy, of some of the succeeding monarchs tended to show that a regent, assisted by a council of magnates, could sometimes rule well. They could set a standard of administration that a single individual would find it difficult, unaided, to attain, simply because of the complexity of a country's public affairs.

The highest bishop in England, the Archbishop of Canterbury - a most powerful official at the time of King John – perceived the growing divorce between the *person* of the monarch and the *concept* of the English Crown. Thus, Stephen Langton (whom Pope Innocent III forced John to accept as Archbishop of Canterbury) expressed this notion well:<sup>49</sup>

“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.”

A distinctive feature of governance in DPRK is the concentration of supreme power in the personal hands of the Supreme Leader. As the COI pointed out in its report:<sup>50</sup>

“Apart from exercising power through his dominant role in the Party and the National Defence Commission, the Supreme Leader also acts as an autonomous decision-making institution. Former officials of the DPRK who provided testimony to the [COI] underlined that orders issued by the Supreme Leader are considered the highest type of normative command, overruling decisions of all other Parties or state institutions. The Constitution provides the normative underpinning by stipulating that the Supreme Leader ... “directs the overall affairs of state” [and] has the

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<sup>49</sup> Langton quoted in Powicke, *Cambridge Medieval History*, Vol VI, 219, cited in Plunknett, above n.6, 21.

<sup>50</sup> COI Report, *ibid*, 358 [1191] (footnotes omitted).

constitutional power to issue orders... superior... to, and abrogate, the decisions of any other organ of state.”

According to testimony received by the COI, agencies had to submit detailed reports on the implementation of actions involving gross human rights violations to the Supreme Leader.<sup>51</sup>

Symbolising this concentration of power (and illustrating the personality cult built around the Supreme Leader) each member of the Kim Dynasty is repeatedly shown in media of all varieties, surrounded by adulation and crowds charged with high emotion, sometimes bordering of hysteria. Moreover, each of the Kim leaders has toured the country giving “guidance”. He is surrounded, and followed, by senior officials who are shown taking dutiful notes and recording his every word. This is what “guidance” involves. It equates to the itinerant conduct of medieval monarchs and reverence to their persons. It is not a feature of modern democratic governance, where the people, as electors, reserve to themselves a questioning and often sceptical attitude about leaders and would-be leaders that is healthy.

It was in 1215 that questioning spilt over into action by the barons in England that they presented their charter to John at Runnymede. Just as later their successors in England presented an indictment that led to the trial, conviction and beheading of Charles I in 1649; the protestation against the King’s lawless conduct that drove James II from the kingdom in 1688; the demand for a Bill of Rights that was granted in 1689 by William III and Mary; as a condition to their assuming the Crown; and the assertion of the parliamentary supremacy of the House of Commons

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<sup>51</sup> *Loc. cit.*

agreed to by George V in the *Parliament Act of 1911* that removed the last vestiges of the House of Lords' power to defeat or delay indefinitely the laws passed by the Commons. These were defining moments in English constitutionalism. But where are their equivalents in the constitutional narrative of DPRK?

#### 4. *From grant to right:*

An important feature of the successive versions of *Magna Carta* was that they moved from concessions and grants, in the Coronation Oath of Henry II, and in the 1215 *Charter* of John, to the language of “*given* and granted” in the MC 1225 also and subsequent versions. Moreover, arguably, by referring to the “liberties” of “free men”, later versions of MC 1215 also acknowledged the antecedent entitlements that the monarch was simply recognising (and promising to uphold) rather than “granting” (and thus entitled to withdraw). This was a shift from donation (out of the ruler's supreme powers) to acknowledgment of pre-existence, which the ruler agrees to respect as the price of continued kingship. It is an important distinction, Archbishop Langton's concept of the differentiating of the person of the ruler and the office that he or she holds.

Such a distinction may exist in the minds of some theoreticians of DPRK. But it appears nowhere in voice or writing. In the actuality of the way in which the country is governed, as described in the COI report, the differentiation is never observed in practice. Yet it is vital to good governance because of the inherent fallibility of all human beings. Monarchies still exist in the world. Britain and Australia are amongst them. However, the hereditary principle only survives in contemporary governance where the Langton differentiation is consistently observed.

Then monarchy can be a convenient historical fiction of governance. However, such a differentiation is not observed in DPRK. This fact denies the citizens of DPRK a full measure of civic and political (including democratic) rights, promised in universal human rights law<sup>52</sup> and observed in varying degrees in most modern nation states.

#### *5. Liberty – controlling detention:*

Some of the worst features of DPRK, described in the COI report, involve arbitrary conduct by agents of the state, including in the treatment of ordinary prisoners; the conditions of prison facilities; the extermination and murder of prisoners; the subjection of prisoners and detainees to torture, rape and grave violence; the enslavement and enforceable transfer of populations; and the lack of effective control over long-term detention not only of suspects but of their extended families.

Functionally, it was conduct of this type in the England of John that led to seizure, imprisonment and deprivation of rights without a judgment or control by the law (MC1215, c. 39). By interposing the scrutiny of a decision upon such matters, by a third person official acting in accordance with the law, there is built into such actions a dual virtue. It is the provision of a second look at public actions by an outsider with a measure of dispassion and separation from the original actor. And careful examination of the challenged by reference to pre-existing rules that are discoverable, upheld and applied by people who know the law and are minded to keep it (MC1215, c. 45).

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<sup>52</sup> The right to participate in democracy in UN treaties was discussed in *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 at 603 [174] ff; [2003] HCA 67: referring to article 25 of the *International Covenant on Civil and Political Rights*.

According to the evidence received by the COI, these central features, reflected in the concessions extracted from King John in 1215, are not present, at least in many circumstances, in the DPRK today. Beyond the ordinary prisons, an extensive system of extrajudicial detention camps exist. They constitute a form of political prisons where detention, torture, executions and enforced disappearances are an ongoing feature of uncontrolled governmental power.<sup>53</sup> The most basic feature of a civilised community is thus missing in DPRK. Security of one's person and significant possessions is not available, and certainly not from any official who is independent of the Supreme Leader and those immediately around him.

#### *6. Feudalism to Songbun:*

Successive versions of charters of liberties in England were extracted initially by unlikely champions. Those champions were themselves barons and other members of the nobility who were among the main beneficiaries of the feudal system. That system governed not only the land law that influenced the labour and status of the subjects. It also imposed on them duties of loyalty and service according to their rank at birth, which it was difficult to escape.

Into that world, where birth was destiny, was intruded *Magna Carta*, with its promises that went beyond the rights of the barons. The various chapters of MC1215 also spoke of the entitlements of the bishops and clergy of the Church; of the merchants and traders; and of foresters, knights and "free men". In this sense, *Magna Carta* was the beginning

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<sup>53</sup> COI Report, *ibid*, 330-343 [1068]-[1130].



of the end of the universality of feudal fealty to a lord, imposed by birth and reinforced by oaths and other means of enforcement.

In DPRK, as the COI report shows, the assignment of the people to a state-specified social class (*Songbun*) continues to this day. It is the worst form of discrimination because of its universality and virtual inescapability.<sup>54</sup>

### 7. *Awareness of the people:*

When the barons extracted the promises from John, they did not leave it in the form of a Latin text on parchment. They provided, in terms, for the contents of the *Charter* to be drawn to the notice of the people of the kingdom. Specifically, they provided for the document to be read in the great cathedrals, where presumably, at least the educated subjects would know and understand and where recorders would translate for the common people. Word would get around. In the original *Charter*, sealed by John (MC1215) the barons also created a detailed mechanism to ensure that the promises would be kept. This was Ch.61 of the 1215 document (“the security clause”). It set out a procedure by which a Council of 25 persons (archbishops, barons and other notables) were delegated to monitor any royal evasion.

The members of this extraordinary council were even authorised, in the event of evasion, to seize the King’s castles, lands and possessions. Perhaps this is what persuaded Pope Innocent III to annul the document as “shameful, demeaning, unjust”, as well as “obtained under duress”.<sup>55</sup>

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<sup>54</sup> *Ibid*, 270-319 [846]-[1021].

<sup>55</sup> *Ibid*, 74 [265].

Although the security clause was dropped in all subsequent versions of *Magna Carta*, it showed an awareness on the part of the barons of the need for enforcement and collective leadership. Later, in 1258, a Council of 25 was again created to keep John's son, Henry III to his word.<sup>56</sup> Eventually councils of such a kind would evolve into an increasingly insistent royal court and later still a Parliament.

The COI report on DPRK evidences deficiencies in governance of the same generic type that exercised the barons of England in 1215. Such is the status and power (including constitutional power) of the Supreme Leader in DPRK that there are no effective sanctions against him in the formal institutions of the country. Moreover, DPRK strictly controls access to knowledge and information.<sup>57</sup> All forms of media are severely controlled by the governing party (Korean Workers' Party). Access to the internet is generally unavailable to the people. Any having illicit and forbidden access (including to popular television dramas from the ROK) are monitored by an intense surveillance system. If apprehended, they are severely punished.<sup>58</sup> Freedom of expression is forbidden.

Despite repeated requests by the United Nations, the report of the COI has not been made available to the people of the DPRK, on the internet or intranet or otherwise. The COI itself, its members and officers of OHCHR were forbidden access to the people of DPRK. Since its report, the COI has been denied entry to explain its conclusions and findings, to justify its recommendations and answer criticisms. Recommendations for free access to the internet has been ignored.<sup>59</sup> Copies of the COI

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<sup>56</sup> Spigelman above n.11, 386.

<sup>57</sup> *Ibid*, 54-67 [197]-[239].

<sup>58</sup> *Ibid*, 385.

<sup>59</sup> COI Report, *ibid*, 45 [163] ff.

report, in various formats, are smuggled into DPRK. But they are not read to the people from cathedrals or their local equivalents. It must be assumed that most of the people of DPRK have less knowledge today of the condemnations of the United Nations than the ordinary people in 1215 had of King John's *Magna Carta*.

#### *8. Stability and bellicosity:*

In 1214, King John had tried to deflect unrest in England by engaging in a war against France. His forces were defeated in the Battle of Bouvines. This resulted in his loss of lands of the Duchy of Normandy, from where the English King's family had derived. The failure of this overseas distraction resulted in further attempts to raise monies to recapture the lost territory. King John continued his unpopular policies at home. This led to the now little remembered attempt to invite a French Prince to England to take the English Crown. Such overseas distractions only came to an end when King John fortuitously died. He was not the first, nor the last, ruler to attempt to overcome domestic disaffection by embracing a foreign diversion. The Korean War of 1950-1953, beginning with an attack by the armed forces of DPRK on the South, eventually resulted in the series of misfortunes that still haunt that country to this day.

In DPRK there remains deep animosity towards the United States of America, and its Allies, that fought under the United Nations flag in the Korean War. Although DPRK has long taught its people that the War was commenced by South Korean forces, supported by the United States, access to Soviet archives, now widely available and cited in the COI report, show that this was false. The war was initiated by Kim Il-

sung.<sup>60</sup> This notwithstanding, the stalemate that followed relief to DPRK, initiated by the People's Republic of China, certainly enlarged the hostility to the United States that continues to the present time. Even food aid, provided by the United States during the devastating famine ("arduous march") of 1996-8, was represented to the people of DPRK as "reparations" afforded by the Americans for their war crimes against DPRK.<sup>61</sup>

Hatred and mistrust run deep in DPRK. Following his election in December 2009, a personal letter was sent by President Obama to Kim Jong-il. It invited a new beginning to relations between the two countries. The President's open hand was slapped away. The personal envoy carrying his letter was not permitted to deliver it to the Supreme Leader. Instead, soon after, a ballistic missile test was conducted by DPRK that overflew Japan in the direction of the United States. Within a month of this event, a second nuclear test was conducted by DPRK. And a year later, a DPRK submarine torpedoed a ROK naval vessel, killing 56 young ROK sailors.<sup>62</sup> On the face of things, this constitutes the modern equivalent of King John gnawing branches. The appeal now is not to a Party or philosopher or a supposedly superior form of governance of society. It is to nuclear weapons, missiles and submarines.

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<sup>60</sup> COI report, *ibid*, 24 [103] fn. 28.

<sup>61</sup> *COI report*, 193 [633].

<sup>62</sup> *Victor Cha, The Impossible State: North Korea, Past and Future* (ECC, Harper Collins, New York, 2012, 10).

### 9. *Intractability and action:*

At the end of 1215, with *Magna Carta* annulled by the Pope, King John's position had been restored to the condition it was in prior to the sealing of the instrument. However, John continued to face many challenges, including the imported alternative prince from France. Only his human mortality terminated the dangers of an uncertain outcome involving invasion and open rebellion. Only the wise regency that followed, and a revised *Magna Carta*, confirmed and reconfirmed, changed the direction of English history. It did so in terms that retained the external trappings (and some powers) of the King. Whilst conceding the central idea of MC1215 that the King's powers were subject to limits and separate to some degree from his person. That point has not yet been reached in DPRK.

### 10. *Internal solutions:*

There is one final lesson for the Korean Peninsula today from the struggle of King John with *Magna Carta* in 1215. It is a lesson that goes beyond the text or even the context of that document. It arises from the situation faced in 1215 and the way the dangers of that time were avoided and addressed.

In the end, solutions were found. But they were found within England itself. The immediate solutions (a wise regency; confirmation of a modified *Magna Carta*; and reconfirmation by the same by later kings) was by no means the end of the constitutional story. That story continued to evolve during later centuries. Subsequent chapters of the story were added as the influence of the idea of limited governmental

power expanded to include England's colonies former colonies and dominions beyond the seas. Eventually, principles of limited government, the rule of law and respect for fundamental human dignity and rights spread far beyond the English-speaking countries, with their memories of *Magna Carta*. Through the proclamation of the Four Freedoms during the Second World War, they spread to the whole planet: even beyond countries of similar constitutional background. In truth, today, the United Nations *Charter* is a contemporary global reflection of the central idea of *Magna Carta*. That is the idea of limited power in, and between, the nations and rulers. This idea now extends to all the countries of the world.

That extension came only just in time. Without it, it would not have been possible for independent nation states, however powerful, to protect the planet, from the ravages of war; the derogations of universal rights, the defiance of the rule of law and the debasement justice; the oppression of colonialism, apartheid and foreign domination; the dangers of HIV/AIDS, ebola, malaria and other diseases; the creeping risks of climate change; and the horrors of nuclear proliferation, accident and destruction.

Human history advances by human endeavour. Lodged somewhere in the DNA of human beings is a tendency that favours rationality, intelligibility and justice. That is why humans have created the United Nations. It is why they have created the Human Rights Council and the Office for the High Commissioner for Human Rights. It is why they established a Commission of Inquiry and a Special Rapporteur on DPRK. It is why the global community must now ensure that the recommendations of these office-holders are known, considered and followed up with action.

It is the responsibility of all nations and of human beings everywhere to protect the people of DPRK from crimes against humanity. We must not default in that responsibility. In 2015 the world, through the United Nations, must advance the idea of control over rulers and accountability for crimes against the people. One historic source for that grand idea was the event that happened at Runnymede in England in June 1215.