

Magna Carta

2015

The Eight Hundredth Anniversary of Liberty

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Two thousand fifteen is a notable year for constitutional lawyers all over the world. In June, a ceremony will take place at Runnymede in Surrey, England, to commemorate the signing, eight hundred years ago, by King John of England (who reigned from 1199 to 1216) of Magna Carta, which some have claimed to be one of the world's “most defining and influential documents.”

Magna Carta is a special document indeed—much has been written and said about it over the years, and in 2015 the interest will be overwhelming. It remains, however, medieval, distant, even mystical on the one hand, and yet pertinent, necessary, and contemporary on the other.

Magna Carta, 1215, in the background (held by: British Library)

Magna Carta—An Intriguing Document

What does it mean? Why does it enjoy its status? And what is its relevance for us today?

Well, of course everyone knows that Magna Carta is Latin for “great charter”—well, nearly everyone. In September 2012, David Letterman had, as one of the guests on his late night chat show, British Prime Minister David Cameron, who was unable to provide a literal translation of the phrase—much to the amusement of the studio audience and the bemusement of the British public.

But Magna Carta means much more than its literal translation. It is a basic foundation of the rule of law and a statement of the liberties and freedoms from which many countries derive their constitutions. Lord Denning, the great twentieth-century British judge, said that it was “the greatest constitutional document of all time—the foundation of the freedom of the individual against the arbitrary authority of the despot.”

King John behaved like a despot—most popular images of him come from Robin Hood stories and movies where the outlaws of Sherwood Forest seek to protect the poor Saxons from the evil depredations of the wicked king and his gangsterish associate, the sheriff of Nottingham. Whether the hero is a 1930s Errol Flynn or a Millennial Russell Crowe, the message is the same; prior to becoming king, John tried to steal the kingdom from his brother King Richard who was waiting to be ransomed in an Austrian jail. In doing so, John broke all the “good and ancient laws” by using torture, committing theft and murder, imprisoning people without due process, and misappropriating property and funds. After promising to mend his ways, and a period of exile following Richard’s death, he became king and reverted to type. The litany of misdeeds went on and the character of a tyrant became firmly embedded in the popular imagination. The trouble about this view of King John is that it fits with contemporary accounts (although many of these are written by opponents). His criminal behavior as a monarch resulted in open revolt by many of the barons of England, disapproval by the church and the papacy, and insecurity and fear on the part of his people.

His failure to live up to the ideal of a “good and parfait” feudal monarch, a king who complied with the ancient Anglo-Saxon laws and the Coronation Proclamations of his predecessors (especially Henry I), meant that his legitimacy was deeply questioned by the most powerful in the land. An open disagreement with Pope Innocent III over the appointment of the archbishop of Canterbury led to England being excommunicated. Only after six years was this resolved, by John submitting to papal authority. His unlawful taking of hostages, continuous lechery at court, the use of cruel punishments such as starvation and crushing to death, and his abuse of the feudal system for personal gain by illegal



The ancestry of King John in the genealogical roll of the kings of England. Created c.1300, held by the British Library.

seizures of land and manipulation of wardship, heirs, and unreasonably high taxes, all amounted to a series of abuses, which when coupled with military defeat in France, led to only one conclusion: that the king must change his ways or go.

During the winter of 1214–1215, the rebellious barons, the church, and the king entered into negotiations, and some concessions were wrung from the king. Over the course of the spring, the king attempted to placate those with whom he was at odds, but these negotiations were unsuccessful. Rebellious barons seized London in May and the king was forced to make further concessions. The creation of Magna Carta was a serious attempt to avoid war between the king and his barons by the commitment to writing of the liberties of the barons and by extension the liberties of all English people.

What Does the Charter Contain?

The charter is a declaration of liberties. There were many such charters in Europe. The Emperor Frederick Barbarossa gave a charter to the Italian towns of the Lombard League in 1183, and Alfonso of Leon confirmed feudal privileges in 1188. The charter contains, in 3,600 words, a statement of the king's acknowledgment that he would be bound to act according to the terms of the charter. The initial clauses deal with the royal relationship with the church and acknowledge that the church should have certain liberties. Later clauses focus on the role of the barons and the king's relationship with them. These contain the best known of the charter's contents, including those

Pope Innocent III, fresco at the cloister Sacro Speco by an unknown artist, circa 1219



provisions about due process and other restraints on the exercise of royal power.

The charter ultimately failed in its immediate objective of preventing war. It was nullified by the pope in August 1215, war followed, and the charter was not reintroduced until after King John died in 1216. The charter was reissued in 1216, 1217, and 1225. It was finally placed on the statute roll in October 1297 by Edward I.

For Scots, Magna Carta was of limited direct effect—some Scots were at Runnymede as official observers or in their personal capacity as feudal vassals of King John, but to all intents and purposes and certainly as a statement of the law, the charter did not apply in Scotland.

A different expression of the theory of “limited government” was developed and expressed in the Declaration of Arbroath (1320), which was a letter from Robert the Bruce to Pope John XXII seeking recognition from the papacy of Scotland's status as an independent nation. The declaration resonates today in the United States following Senate Resolution 155/1998, which established National Tartan Day as a celebration of Scots/U.S. heritage.

From a Charter of Liberties to a Bill of Rights

Most of the charter has been repealed. It started out with sixty-three clauses, and now only three are still on the statute book: the guarantee of the position of the English Church, the status of the City of London, and the guarantee of due process.

This last is one of the most important clauses because it represents the basis of some of the most significant civil liberties that have been adopted across the world. Clauses 39 and 40 state “No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land. To no one will we sell, to no one deny or delay right or justice.” The guarantee of due process in the charter is the origin and basis of procedural safeguards throughout the common law world.

Between the sixteenth and eighteenth centuries the status of the charter changed significantly. Constitutional and mortal struggles between king and parliament, religious strife, the Bill of Rights (1689), the Act of Settlement (1701), and eventually the ascendant Hanoverian monarchy resulted in a redesign of the British constitution.

A significant event was the posthumous publication of Sir Edward Coke’s *Institutes of the Lawes of England* in 1642. This influential book, published with the encouragement of the House of Commons, contained an extensive commentary on Magna Carta, and through his scholarship Coke was able to develop and promote a concept of liberty and constitutional monarchy.

It has recently been noted in Nicolas Vincent’s *Magna Carta: The Foundation of Freedom 1215–2015* that the eighteenth century saw the Magna Carta become a document that legitimized “protest and resistance”—against

strict censorship laws that penalized criticism of the government and other limitations of freedom such as illegal imprisonment. Even the revolution that was beginning in the American colonies in the 1760s based its legitimacy on the rights that Magna Carta declared and supported. Indeed, the American Revolution pioneered the transportability of the charter. Through the use of Blackstone’s *Commentaries on the Laws of England*, Magna Carta became part of the background philosophy of the American founders. Inalienable rights granted by the “Laws of Nature and of Nature’s God” such as the rights to “life, liberty, and the pursuit of happiness” laid the foundations of the new state. This expression of natural law meant that law that contravened these natural law rights could be subject to challenge. Furthermore the

recognition that the common law formed the bedrock of the constitutions of many of the new states in the new republic meant that Magna Carta became woven into the fabric of the United States. The constitutions of New Jersey and Delaware expressly refer to the validity of preexisting common law, and principles derived from the charter such as trial by jury were reflected in North and South Carolina, Pennsylvania, and Georgia.

No fewer than seventeen states have the text of the charter included in their statutes, the earliest being South Carolina in 1836 and the latest North Dakota in 1943, and many more (thirty-five) include a “due process” clause derived from clauses 39 and 40 of the charter. At the federal level the U.S. Constitution contained limited reference to Magna Carta rights, although there is express reference to trial by jury. This left the concept of general rights to be incorporated into the Constitution by the amendments

King John of England, 1167–1216. Illuminated manuscript, De Rege Johanne, 1300–1400. MS Cott. Claud DII, folio 116, British Library.





Magna Carta, 1297 version with seal, owned by David M. Rubenstein, on public display in the West Rotunda Gallery of the National Archives Building in Washington, D.C.

contained in the Bill of Rights. These ten amendments build on the legacy of Magna Carta, and decisions of the U.S. Supreme Court show that Magna Carta still runs like a golden thread through judicial thinking.

Magna Carta in Recent Times

Eleanor Roosevelt, chair of the Human Rights Commission of the United Nations in 1948, said of the Univer-

sal Declaration of Human Rights, “This declaration may well become the international Magna Carta for all men everywhere.” The 1948 declaration, created in the wake of the Second World War, laid the foundations for future rights instruments on racial (1969) and sex discrimination (1979), against torture (1984), and for localized or regional statements such as the European Convention on Human Rights (1950) and the African Charter of Human and Peoples Rights (1981). However, for all these declarations, we know that human rights are today under constant threat from governments, states, organizations, and individuals.

We must all be aware and guard against infringement of human rights—we cannot afford to let the memory of Magna Carta, and those who defended it over the centuries and through its many interpretations, fade. We did not obtain these rights we enjoy today easily but we could easily lose them. Education about Magna Carta and its successors is of supreme importance. Twenty five—eight hundred years is a great anniversary to celebrate.



Michael Clancy graduated from the University of Glasgow in 1979, earning an LL.B. degree, and, in 1985, an LL.M. degree. In 1987 he graduated LL.B. (Hons) from the University of London. He is a solicitor and notary public. After qualification as a solicitor in private practice he attained a partnership with the Glasgow firm of Franchi Wright & Co. He resigned this partnership in 1988 to become a deputy secretary of the Law Society of Scotland. Since 1996 he has been a director of the society with responsibility for law reform. He has published widely on a range of legal topics. Clancy was awarded an OBE in the Queen’s Jubilee Birthday Honours List in June 2002.

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