MAGNA CARTA

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ABSTRACT

The Magna Carta of 1215 was a peace treaty between King John and his warring barons. It set down in writing the customary rights and liberties which kings were expected to respect. Though broadly inspired by Henry I's coronation charter of 1100, it took the precaution of spelling out the rights and liberties in minute detail. As a peace treaty it failed, and John (with papal approval) immediately repudiated it. But John died in 1216, and during the infancy of his son Henry III a more permanent document was crafted. The final version of 1225 was considered the first English statute, emerging from a great assembly which later in the century would be called parliament. It was confirmed at least thirty times, by king after king, establishing that England was a limited monarchy in which kings ruled under the law. The most influential provision down the centuries was that 'No free person shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor shall we go against him or put upon him, except by the lawful judgment of his peers or by the law of the land; to no one shall we sell, to no one deny or delay, right or justice.' These words in later times inspired the principal legal remedies against governments and public officials, the writ of habeas

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corpus and the Petition of Right (1628). By 1604 it could be claimed that Magna Carta guaranteed 'everything that anyone has in this world, or that concerns the freedom and liberty of his body or his freehold, or the benefit of the law to which he is inheritable or his native country in which he was born, or the preservation of his reputation or goods, or his life, blood and posterity.'

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King John reigned as king of England from 1199 to 1216. His grandfather, King Henry II, had ruled not only England but a vast French empire including Anjou (inherited from his father), Normandy (inherited from his mother) and Aquitaine (by marriage with his wife Eleanor). Henry had spent more than half his reign in France, while Richard hardly spent any time in England at all. During their reigns (1154-99) the king's permanent court at Westminster and the itinerant justices travelling round the country had begun to establish a regular system of common law, through which property rights could be vindicated and those dispossessed during the reign of King Stephen (1135-54) could achieve restoration by process of law. However, both the possession of the Plantagenet empire and the rule of law in England were threatened under King John.[1]

Historians from 1216 to the present have had difficulty finding much good to say about John, though Shakespeare attempted a fictional rehabilitation in the 1590s (carefully omitting all mention of Magna Carta). John's very claim to the throne was disputable. He managed to obtain it on the death of his eldest brother Richard I, even though his second older brother Geoffrey had a son still living (Arthur, duke of Brittany). When Arthur mysteriously disappeared after being captured by John's forces in 1203 it was widely believed that John had arranged his murder. The French King Philip II, who had previously accepted John's kingship, set about to remove him from his French possessions, ostensibly for

1 For the background, and the events of 1215, see Holt, 2015, pp. 378-98; Carpenter, 2015, pp. 36-69; Vincent, 2015; Loengard, 2010. For recent reappraisals of John and his supposed failings see Church, 2015; Vincent, 2020.

refusing to stand trial for homicide. By the end of 1204 John had been driven from Normandy and Aquitaine. Thereafter he lived in England, taking over the day-to-day government, and allegedly taking the law into his own hands when it suited him. Although the king's justices continued to provide regular justice for most people, the stationary court at Westminster (the Bench) ceased to exist as the judges were now expected to follow the king.

John ruled in an autocratic manner. His excesses, though not without parallel in the previous century, were causing deep unrest and they were largely beyond the reach of the legal system. Desperate to raise sufficient funds to finance the recapture of his French empire, he resorted to blatant abuses of his prerogative rights. The heirs of deceased tenants-in-chief were made to pay enormous sums to take up their inheritances, their lands were wasted (stripped of assets) while in the king's custody, and they and their widowed mothers were forced into unsuitable marriages to enrich the king. Extortionate taxes were imposed at the king's will. More and more land was declared to be royal forest, which removed it from the ambit of the ordinary common law and enabled the forest justices to raise large sums of money in fines and amercements. Church lands were exploited during vacancies in bishoprics, and large sums were demanded for elected bishops to enter their sees.

Such rapacious depredations, coupled with a reputedly depraved personal life and unreliable character, made King John deeply unpopular among the baronage and the episcopacy alike. Things became worse when John antagonised Pope Innocent III by refusing to accept his nominee, the theological scholar Stephen Langton, as archbishop of Canterbury in 1206. Langton was resident in enemy territory, having spent some years studying in Paris, and was deemed to be dangerous. In any case, the kings of England claimed that popes should not consecrate English archbishops until the king had first approved the election. The result of John's defiance was that his whole kingdom was placed under a papal interdict. No English subject now had access to the sacraments; no English subject could be buried with Christian rites. The pope's decision to punish innocent people in such a way – effectively a declaration of war – gave John a convenient excuse to confiscate Church lands and exact more money from the clergy, especially from those who had emigrated to escape the interdict. After six years, however, John capitulated. In order to obtain a withdrawal of the interdict, he surrendered England to the pope in 1213 as a papal fief, agreeing to pay 1,000 marks a year in tribute, and allowed Langton to be installed as archbishop. The last straw was added in 1214 with a failed expedition to France. Success in war might just have outweighed the nation's grievances, but the barons were exasperated by this second military failure. Having lost France, and debased England, John was now in danger of losing his English kingdom as well. In early 2015 the barons took up arms to enforce their demands for the liberty of the Church and the realm.

The barons did not seek to depose John, but rather a return to the rule of law, with assurances as to the future. John may have hoped in 1214 to appease them by making ad hoc concessions and reforms, but this was too precarious a solution to the problem, and after 1214 it was overtaken by the threat of civil war. What was needed was a written guarantee that the king would never again act outside the law or established custom, and some definition of what the relevant law and custom was. According to some chroniclers, Archbishop Langton had insisted at the time of John's absolution in 1213 that he should swear to observe the laws of King Edward the Confessor (d. 1066). These laws had achieved a somewhat mythical significance as the legacy of supposedly better times, though the text entitled *Leges Edwardi Confessoris* had in fact been concocted after the Norman Conquest of 1066, perhaps as late as the 1130s. The text said nothing of liberty or of the issues which concerned the barons. About half was concerned with the position of the Church, and most of the remainder with crime. The appeal to the *Leges Edwardi* was therefore symbolic rather than practical, representing a desire to turn the clock back to an imaginary golden past.

A more fruitful inspiration was the coronation charter of Henry I (1100).[2] This, too, contained references to the 'lagam Regis Edouardi', here meaning simply the law as it stood before the Conquest.[3] But the

2 Liebermann, 1894, p. 40; *Statutes of the Realm*, I (London, 1810), Charters of Liberties, p. 1; Bémont, 1892, p. 3 (from a manuscript with the incorrect date 1101).

3 William I had likewise promised to everyone 'legem Eadwardi regis': Liebermann, 1903, p. 488 (*c*. 1070).

king also promised, more specifically, to abolish all bad customs and to restore all property wrongfully confiscated during the reign of William II (1087–1100), and to set a firm peace throughout the realm. Even more specifically, he promised not to take the profits of a bishopric or abbey during a vacancy, and that the heir of a tenant-in-chief should be allowed to take up the inheritance without having to pay an unreasonable sum (as 'relief') to redeem it. The charter moved into the realms of legislation when it ordered that this last provision should also be observed by the barons in respect of their own tenants. It was, nevertheless, seen as a personal declaration which did not extend beyond Henry's lifetime. Henry's successors Stephen (1135) and Henry II (1154) both confirmed it, adopting the language of charters of grant and confirmation, but there is no evidence that Richard I (1189) or John did so. It seemed high time for it to be revived.

The chronicler Roger of Wendover (d. 1236) claimed that Archbishop Langton was responsible for rediscovering the charter of 1100 and bringing it to the attention of the barons at a meeting in St Paul's, London, in 1213, whereupon they all swore oaths in Langton's presence to fight to the death for the liberties which it contained.[4] Some historians concluded that it was Langton who promoted the production of the greatly extended formulation of English liberties which became Magna Carta. But this is disputed by other historians, who see Langton rather as a go-between attempting to achieve a peaceful settlement between the barons and the king which might also gain the pope's acquiescence. It will probably never be known for certain whether there was a single promoter. There is little doubt, however, that the charter of Henry I was the starting point. Its confirmation was one of the first demands made by the barons in late 1214.[5] There followed over five months of negotiation with the king in 1215 and the production of various drafts of the many new clauses to be added.

Negotiations came to a head during the summer of 1215, and on 15 June the text of Magna Carta was finally settled and sealed at a place

4 *Matthaei Parisiensis Chronica Majora*, ed. H. R. Luard (Rolls Series, 1872–83), vol. II, pp. 552–4. For a sceptical assessment of the story see Holt, 2015, pp. 200-202.

5 Carpenter, 2015, pp. 290–295.

called Runnymede. This was an ancient meeting point on the River Thames, not far from the king's castle at Windsor and within a day's reach of the barons' stronghold in the Tower of London. Kings did not, and still do not, sign charters. But the agreed version was authorised by affixing the king's great seal in the presence of numerous named witnesses. Clerks were at once employed to make copies, all dated 15 June, which could be distributed through the kingdom. Four of these contemporary charters survive, two in the cathedral libraries of Salisbury and Lincoln, where they have been since 1215, and two in the British Library which were acquired by the seventeenth-century collector Sir Robert Cotton. They are all of different shapes and sizes,[6] and only one retains a fragment of the great seal, but the text is exactly the same. The clauses were not numbered, but it is usual to follow the numbering used by William Blackstone in the first scholarly edition (1759).[7]

Magna Carta was in no sense a written constitution. In political terms it was a peace treaty, with relatively short-term aims, although it was – significantly – expressed to bind the king and his heirs in perpetuity. What was most remarkable about it was the level of detail represented by its sixty-three clauses, framed with an elegant economy of words which would admit of creative reinterpretations over the centuries. The only contemporary parallel for such a detailed document was Simon de Montfort's so-called 'Statutes' or Customs (*Consuetudines*) of Pamiers (1212), the forty-six clauses of which dealt (inter alia) with a few of the same issues but in different phraseology and from a different perspective.[8]

Like the charters of the twelfth century, Magna Carta began by assuring the liberties of the Church. It proceeded according to the scheme of Henry I's charter by dealing next with inheritance, relief and wardship, but in greater detail. The amount of a reasonable relief was now fixed as £100 for an earl's barony and £5 for a knight's fee, and in other cases

6 For plates illustrating all four see Vincent, 2014, pp. 76-79.

7 There are modern editions, with parallel English translations, in Holt, 2015, pp. 378-398; and Carpenter, 2015, pp. 36-69. Since it was a charter, not a statute, its provisions are called 'clauses'.

8 Translation in Sibley, 1998, pp. 321-329. The emphasis here was on regulating the barons rather than limiting the sovereign, though De Montfort took an oath to be bound by the customs as well.

ancient usage was to be followed (cl. 2); guardians were not to waste the property of their wards (cl. 4–5) or to 'disparage' them with unsuitable marriages (cl. 6), and no relief was to be payable when a ward came of age (cl. 30). The charter then dealt with widows. A widow was to receive her marriage-portion and her own inheritance after her husband's death without delay and without paying to redeem them, and was to be allowed to remain in her husband's house for forty days while her dower land was assigned (cl. 7). No widow was to be compelled to remarry if she did not wish to do so (cl. 8). Debtors' lands were to be protected from distraint for rent so long as there were sufficient movables to cover the debt (cl. 9), and if a debtor died owing money to the Jews – or (it was added) other creditors – the debt was not to carry interest while the heir was under age, and the debtor's widow was to have her dower free of the debt (cl. 10–11). The next set of provisions concerned the taxation of feudal tenants, making more specific provisions than the vague promises in earlier charters to abrogate 'bad customs'. No ad hoc tax was to be imposed on tenants except by the common council of the realm, unless it was an aid for ransom of the king's body, for knighting of his eldest son, or for the first marriage of his eldest daughter, and such aids were to be reasonable (cl. 12); other lords were not to impose aids on their tenants at all, except in the like three cases (cl. 15), or to demand more service from their tenants than was due (cl. 16). The city of London – and (it was added) all other cities and boroughs – were to have their old liberties and free customs, which doubtless referred primarily to exemptions from taxation (cl. 13). Procedures were then set out for assembling the council of the realm referred to in Clause 12. All archbishops, bishops, earls and greater barons were to be summoned, and also all tenants-in-chief, on forty days' notice, and if any did not attend on the day the business was to be done by those who did (cl. 14). Next came judicature. Common pleas – those which did not concern the king – were no longer to follow the king's court but were to be held in some certain place (cl. 17).[9] Assizes – procedures devised under Henry II for making factual enquiries in order to settle

9 This was confirmed in 1225, c. 11, and was a revival of the old 'Bench', later known as the Court of Common Pleas; the 'certain place' was normally Westminster Hall. The court before the king was then called the King's Bench.

possessions and inheritances – were to be held in the counties, which were each to be visited four times a year by a pair of royal justices for that purpose (cl. 18-19).[10] Amercements (financial penalties) were to be proportionate to offences (cl. 20-22). Sheriffs, constables, coroners and other royal officials were forbidden to hear pleas of the crown (cl. 24), that is, serious criminal cases. Other provisions regulated the conduct of sheriffs, constables and bailiffs (cl. 25-31), especially in relation to purveyance – the pre-emption of property for the king's use. All forests created in John's time were to be disafforested at once, and bad forest customs abolished (cl. 44, 46-48). In between these provisions about forest law (cl. 45), the king made a general promise not to appoint justices, constables, sheriffs or bailiffs other than men who knew the law of the realm and meant to observe it well.

Tucked away among the miscellaneous provisions in the second half of the charter was the stirring guarantee of liberty which was to resound down the centuries (cl. 39-40):[11]

> *No free person (homo) shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor shall we go against him or put upon him, except by the lawful judgment of his peers or by the law of the land. To no one shall we sell, to no one deny or delay, right or justice.*

No one has suggested a satisfactory reason why this was given such an inconspicuous position in the charter as settled in June 1215, especially since in one of the drafts it had been placed first.[12] Nor has it proved entirely clear what the words meant. Judgment by peers certainly did not mean – as was later thought – trial by jury. Trial juries were not used in criminal cases until ordeals came to an end (following

10 In 1225 (c. 12) the circuits were only required to be annual. The system, which soon became biannual and was given wider functions, continued until the abolition of the assizes in 1972.

11 These two clauses became Chapter 29 in the statutory version of Magna Carta (1225), as numbered in the printed editions. The only change was the addition after 'disseised' of the words 'of any free tenement of his, or of his liberties or free customs'.

12 Holt, 2015, p. 352, cl. 1.

the Lateran Council of 1215), while in civil cases they were still known as assizes. In any case, jurors never gave judgments; they delivered verdicts or 'recognitions' – findings of fact on oath – whereupon a court could give judgment. As the draft shows, [13] the emphasis was on the need for a judgment by someone other than the king; and perhaps that is all that 'peers' meant.[14] More puzzling was how judgment by peers could be an alternative to the law of the land, unless the word 'or' could be read subdisjunctively.[15] But the general sense was clear enough. Life, liberty and property were not to be subject to the king's pleasure but could only be taken away by a court administering the law of the land. Moreover, following the precedent of 1100, this and the other provisions of the charter were to be observed not only by the king but by everyone else with respect to their own men (cl. 60).

The most remarkable provision in the Magna Carta of 1215 was the enforcement clause (cl. 61). After a number of promises to restore property taken contrary to Clause 39, a new mechanism was put in place to ensure the king's compliance. The barons were to elect twenty-five of their number to maintain the liberties granted by the king, with the power to coerce the king by seizing his castles, lands and possessions, or using any other possible means (except against the king's person or that of his queen and children).

No one can doubt the importance of this document, and yet it never became law. King John, seeing it as an abject defeat, had no intention whatever of observing it and lost no time in sending envoys to Pope Innocent III – now his feudal superior – to obtain an annulment. This was a breach of the king's promise at the end of Clause 61 that he would

13 Ibid.: 'King John grants that he will not take anyone without judgment, nor accept anything in return for justice, nor do injustice'.

14 It was later taken to mean that 'peers of the realm' (nobility) could not be tried by a common jury but only by the House of Lords. The last 'trial by peers' in that sense was in 1935.

15 There is a parallel, but with *et* in place of *vel*, in the *Constitutio de Feodis* of the Holy Roman Emperor Conrad II (1037): Monumenta Germaniae Historica, *Legum Sectio IV: Constitutiones*, vol. 1 (Hanover, 1893), p. 90, lines 17–18: 'nisi secundum constitucionem antecessorum nostrorum et iudicium parium suorum'. The similarity of wording may be evidence that the *Libri Feudorum* were known in England in 1215.

never do anything of the kind, and that if he did so it would be void. The pope was nevertheless pleased to oblige, declaring it shameful and demeaning for a king to make such concessions to his subjects. By the bull Etsi karissimus of 24 August 1215 he forbade the king on pain of anathema from keeping his promises.[16] The bull carried little weight in England, when set against the king's solemn oath. The twenty-five barons tried to depose the king, the king resisted, and the country descended into civil war. The barons were now desperate enough to consider offering the throne to the king of France. The crisis was averted, however, by the sudden death of King John from dysentery – some suspected poisoning – in October 2016, aged 49. Thus ended the first phase of Magna Carta: a period of little over one year. It was hardly, as yet, a success story. Repudiated by king and pope, it had been largely ineffective.

A long peace followed. John's heir was his son Henry III, aged nine, and the government of England was now de facto in the hands of the leading barons. One of their first acts was to issue a new Magna Carta on 12 November 1216. It was sealed by William Marshal, the chief minister, and by the papal legate Guala: a charter no longer tainted by coercion or doomed to papal condemnation. The content was considerably scaled down and carefully redrafted. Notable omissions were the provisions about the great council of the realm and the twenty-five enforcers. The former was the nearest England ever came to a written parliamentary constitution. But the makers of the 1216 charter were not concerned with future legislation or taxation. They were setting down the old law as they conceived it to be, and it was assumed that most of the provisions would be implemented promptly, since the implementation lay in their own hands. There was no need to establish a constitutional structure or an enforcement mechanism. Whether private subjects could enforce the charter against the king would remain an uncertain question until the sixteenth century.

Further revisions were made in 1217, accompanied this time by a separate Charter of the Forest, and then in 1225 the definitive version

16 Bémont, 1892, pp. 41–44. The original bull is in the British Library.

was issued in the infant king's name.[17] The 1225 document was still expressed as a charter of grant, but it was clearly more than just a concession by an individual king. It purported to have been issued in return for a tax – a fifteenth part of all their goods – granted to the king by the bishops, abbots, priors, knights, freeholders and 'everyone of our realm', comprehensive words which seemed to imply a great council in which everyone in the realm was somehow represented. This was, in effect, a parliament; and the 1225 charter came to be received as the first Act of Parliament on the notional English statute-book.[18] Chapter 29 (the new version of Clauses 39-40) was clarified in 1354 as applying to 'all persons, whatever their estate or condition', and as requiring 'due process of law'.[19] In 1368 it was even enacted that any statute made contrary to Magna Carta should be treated as void,[20] though this could not and did not bind future parliaments.

Thereafter Magna Carta lost much of its impetus for two centuries. Many of its provisions became obsolete, or were impliedly repealed, in the late medieval and Tudor periods. Those who lectured on it in the fifteenth and early sixteenth centuries did not treat it as a constitutional document of special importance but as a miscellany of points of law, some of which were obsolete or impliedly repealed. Magna Carta would probably not be remembered today, except by medievalists,[21] were it not for the revival and reinterpretation of Chapter 29 between the 1580s

17 Latin text in Bémont, 1892, pp. 45-60; *Statutes of the Realm*, I, Charters, pp. 14-25; Holt, 2015, pp. 420-428. A version in the Bodleian Library is printed with translation in Vincent, 2015, pp. 274-280.

18 It was the first item in manuscript and early printed volumes of the *Statuta Vetera*. In later statute-books the text is often taken from the parliamentary reissue of 1297, but it was still placed first. Some considered that the confirmation in the Statute of Marlborough (1267), c. 5, was the moment when it achieved statutory status, but the matter was settled in favour of 1225 by a judicial decision of 1607: Baker, 2017, pp. 6-9, 531-533. Since it is a statute, the 1225 Magna Carta is reckoned to consist of 'chapters' rather than clauses, though the division and numbering are not contemporary.

19 28 Edw. III, c. 3. Cf. the *ordo judiciarius* of the Golden Bull of 1222, cl. 2.

20 42 Edw. III, c. 1.

21 All but three chapters have been repealed. Those left in force are c. 1 (liberties of the Church), c. 9 (liberties of London and other cities and towns) and c. 29 (liberty of the subject).

and the 1620s.[22] It then became the legal foundation for *habeas corpus*, a procedure whereby anybody in custody could have the reason for his imprisonment examined by a superior court. And this became a potent means of protecting the rule of law against creeping abuses of the royal prerogative, since all powers of government and taxation depended ultimately on imprisonment. Magna Carta soon became a symbol of English liberty. Sir Edward Coke (d. 1634), chief justice of England (1613–16) and a bold champion of the rule of law, was fond of pointing out that the great charter had been confirmed over thirty times by the king's predecessors. This meant that the kingdom descended from king to king as a limited monarchy, constrained by the provisions of Chapter 29. Kings themselves professed to accept Coke's premise, if not all the deductions he made from it, and in 1628 King Charles I was forced to reaffirm it by giving his assent to the Petition of Right. By then Magna Carta had become 'the law of laws',[23] worthy (as Coke said) to be written in letters of gold.[24] 'Everything that anyone has in this world,' wrote Coke, 'or that concerns the freedom and liberty of his body or his freehold, or the benefit of the law to which he is inheritable, or his native country in which he was born, or the preservation of his reputation or goods, or his life, blood and posterity: to all these things this act extends.'[25] It was far more than anyone could have foreseen in 1215. But its mystical power was now indelible.

22 Thompson, 1948; Baker, 2017.

23 Francis Ashley's lecture on Magna Carta (1616), quoted in *The Reinvention of Magna Carta*, p. 428.

24 Ibid, p. 1 (remark of *c.* 1605 related by Ashley). It came to pass that Blackstone's edition of Magna Carta was the first English book printed in gold (in 1816).

25 Treatise on Magna Carta, c. 29 (1604), first published in J. Baker ed., *Selected Readings on Magna Carta* (Selden Society vol. 132, 2015), pp. 394–402 (law French and parallel translation); *The Reinvention of Magna Carta*, pp. 500–10 (translation only).

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