



NUS Law Working Paper 2015/012

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[December 2015]

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The Myth of Magna Carta — Or, How a Failed Peace Treaty with French Aristocrats Was Reinvented as the Foundation of English (and American, and Singaporean) Liberty

Simon Chesterman*

The Hereford Cathedral Magna Carta was brought to Singapore and displayed at the Supreme Court from 19 to 23 November 2015. The visit provided an opportune moment to reconsider its near-mythical status in the common law tradition. This article expands on an op-ed first published in the Straits Times.

Abstract:

Magna Carta bears an iconic status in legal history. Signed eight centuries ago by King John at Runnymede, near Windsor, it laid the foundations for constraints on arbitrary power — the basis for the rule of law, democracy, and human rights.

The only problem with the historical account is that almost none of it is true. The agreement at Runnymede was not a constitutional document intended to limit power but a peace treaty to preserve the King's rule. Despite many paintings and a commemorative £2 coin showing him holding Magna Carta and a quill, King John never signed it.

Oh, and it was not called Magna Carta.

Keywords: Magna Carta, rule of law, democracy, human rights

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¹ Frederick Pollock and Frederick William Maitland, *The History of English Law Before the Time of Edward I*, 2 vols. (Cambridge: Cambridge University Press, 1898), p. 184. This was despite the fact that much of it had been repealed even when these words were written.

Introduction

Magna Carta bears an iconic status in legal history. Signed by King John at Runnymede, near Windsor, eight centuries ago this year, it laid the foundations for constraints on arbitrary power — the basis for the rule of law, democracy, and human rights. In the late nineteenth century, F.W. Maitland declared it a “sacred text, the nearest approach to an irrevocable ‘fundamental statute’ that England has ever had”.¹ From medieval to modern times it has been invoked by those struggling against injustice around the world, from Mahatma Gandhi to Nelson Mandela.

In the past two years alone, it has been cited twice by Singapore’s High Court as the origin of liberties protected by Articles 9(1)² and 11(1)³ of the Constitution.

It is even more revered in the United States. Speaking in London in 2011, President Barack Obama observed that “when kings, emperors, and warlords reigned over much of the world, it was the English who first spelled out the rights and liberties of man in the Magna Carta.”⁴ At the launch of a celebration of this anniversary at the Library of Congress, Chief Justice John Roberts referred to it as the cornerstone on which the rule of law was built.⁵

The only problem with the historical account is that almost none of it is true.

The agreement at Runnymede was not a constitutional document intended to limit power, but a peace treaty to preserve the King’s rule. Despite many paintings and a commemorative £2 coin showing him holding Magna Carta and a quill, King John never signed it.

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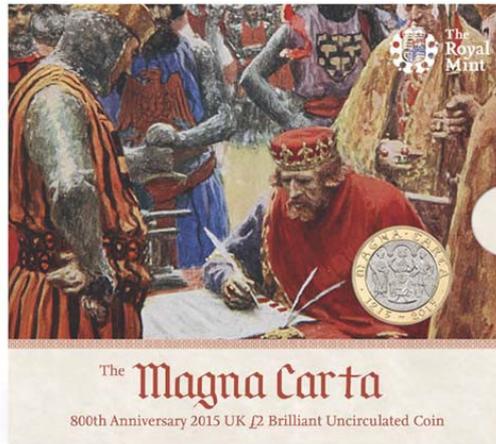
² *Yong Vui Kong v. Public Prosecutor* [2015] SGCA 11, paras. 16-18.

³ *Public Prosecutor v. Hue An Li* [2014] SGHC 171, para. 110.

⁴ President Barack Obama, Speech at UK Parliament (25 May 2011), available at <https://www.whitehouse.gov/the-press-office/2011/05/25/remarks-president-parliament-london-united-kingdom>

⁵ Chief Justice John Roberts, Speech at Library of Congress (5 November 2014), available at <http://www.loc.gov/today/cyberlc/transcripts/2014/141105law1100.txt>

Oh, and it was not called Magna Carta.



[The Royal Mint Anniversary Page.](#)

King John never actually signed Magna Carta – nor was it called at the time “Magna Carta”.

“The Articles of the Barons”, as it was originally known, did not guarantee freedoms for the English people. On the contrary, those limitations that it did impose on the King were primarily for the benefit of the Anglo-Norman — that is, French — aristocracy.⁶

Such documents outlining the manner in which the monarch intended to govern, known as Coronation Charters, had been issued by Kings since at least Henry I in 1100; Kings in France had sworn oaths binding themselves to the administration of justice since 877. It is true that these were often disregarded in practice, but so too was the Articles of the Barons. Neither side complied with their commitments and it was soon annulled by Pope Innocent III, leading to the First Barons’ War.

Even if it had not been repudiated, the text hardly reads like the fountainhead of liberty. Among other things, the 1215 document limited the ability of a woman to testify on the death of anyone other than her husband and included punitive provisions applicable to Jewish bankers.⁷

So how is it that this misogynistic, anti-Semitic, failed peace treaty came to assume such significance in English — and Singaporean — law?

⁶ The English text available in full here:

https://en.wikisource.org/wiki/Source_Problems_in_English_History/Appendix/Magna_Carta_1215

⁷ Magna Carta (1215), cll 10-11, 54. See Tom Ginsburg, “Stop Revering Magna Carta”, *New York Times*, 14 June 2015.

For three basic reasons. First, there was not one Magna Carta but several. Secondly, text that had lain dormant for centuries was later used opportunistically in another English battle against another King. And thirdly, Americans carried the spirit of Magna Carta across the Atlantic — without necessarily bothering to read the words.

Magnae Cartae

Though the document agreed at Runnymede was a failure, it was reissued the following year after John's death by the regents of his son, the nine-year-old King Henry III. With the conclusion of the First Barons' War in 1217, the document was issued a third time. A separate Forest Charter (*Carta de Foresta*) was also concluded, leading to the main document being called "Magna". Henry III reissued it yet again with further changes in 1225 and *his* son, Edward I, did the same in 1297.

It was this last version that was incorporated into England's statutes and three provisions do remain in force today.⁸ The first two are of marginal significance. A statement that the Church of England is to be free from royal interference reads a little oddly in a post-Reformation world in which the British monarch holds the title of Supreme Governor of the Church of England. Similarly, the promise to respect the "liberties and customs" of the City of London and other cities, boroughs, towns, and ports is of historical interest regarding the governance of London but little practical impact.

The third remaining clause is of more significance and echoes text from the 1215 original:

*NO Freeman shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed; nor will We not pass upon him, nor condemn him, but by lawful judgment of his Peers, or by the Law of the Land. We will sell to no man, we will not deny or defer to any man either Justice or Right.*⁹

Limiting such protections to freemen, however, meant that they were of little relevance to

⁸ See Magna Carta (1297), available at <http://www.legislation.gov.uk/aep/Edw1cc1929/25/9/contents>.

⁹ Magna Carta (1297), cl. 29. Clauses 39 and 40 of the 1215 version read: "39. No freeman shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, 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 will we refuse or delay, right or justice."

the vast majority of the population who were not “free” but villeins or serfs. Nonetheless, this 39th clause of the 1215 version (clause 29 in the 1225 reissue and thereafter) later came to be regarded as the basis for the jury system.

Another provision is often regarded as the foundation for parliamentary democracy — though it reads more like a consultation mechanism with a limited right of rebellion. Edited down, it reads as follows:

Since, moreover, for God and the amendment of our kingdom and for the better allaying of the quarrel that has arisen between us and our barons, we have granted all these concessions, desirous that they should enjoy them in complete and firm endurance for ever, we give and grant to them the underwritten security, namely, that the barons choose five-and-twenty barons of the kingdom, whomsoever they will, who shall be bound with all their might, to observe and hold, and cause to be observed, the peace and liberties we have granted and confirmed to them by this our present Charter,

so that if we ... or any one of our officers, shall in anything be at fault toward any one, or shall have broken any one of the articles of the peace or of this security, and the offense be notified to four barons of the foresaid five-and-twenty, the said four barons shall repair to us ... and, laying the transgression before us, petition to have that transgression redressed without delay. And if we shall not have corrected the transgression ... within forty days ... the four barons aforesaid shall refer that matter to the rest of the five-and-twenty barons,

and those five-and-twenty barons shall, together with the community of the whole land, distraint and distress us in all possible ways, namely, by seizing our castles, lands, possessions, and in any other way they can, until redress has been obtained as they deem fit, saving harmless our own person, and the persons of our queen and children; and when redress has been obtained, they shall resume their old relations toward us.¹⁰

The better foundation for democracy came fifty years later, when Simon de Montfort, the rebel earl of Lancaster, convened the first parliament in which two knights were elected from every shire and two burgesses from each town. Montfort drew upon the spirit of Magna Carta but elections were not among its provisions.¹¹

¹⁰ Magna Carta (1215), cl. 61.

¹¹ See generally John Robert Maddicott, *Simon de Montfort* (Cambridge: Cambridge University Press, 1996).
SC Magna Carta - Essay (11-Dec-15)

The (Re)Invention of Magna Carta

So the failed peace treaty that started a war was amended and reissued, perhaps explaining its longevity.¹² But its so-called liberties helped only those who were rich and originally French. How did it come to be regarded as the font of English liberty?

Lawyers.

Four hundred years later, Edward Coke (1552-1634) revived — or perhaps reinvented¹³ — Magna Carta during the seventeenth century as Britain's "ancient constitution". Coke had served as Solicitor-General, Attorney-General, and Chief Justice before being sacked by James I for rejecting the King's argument that the monarch could withdraw cases from the judiciary and decide them himself. The King might not be subject to man, Coke argued, but he was at least subject to God and to the law.

This was not the sort of thing that kings liked to hear from their Chief Justices. After being dismissed from the bench, however, Coke returned to Parliament (which was by then well-established) and set about trying to limit the powers of the King through legislation. James I had died and the trigger was the imposition by Charles I of forced loans to cover expenses in the Thirty Years' War, imprisoning those who did not pay. Coke led a rebellion of parliamentarians who adopted resolutions declaring that Magna Carta was still valid, that it prohibited detention without trial, and that the King could not levy what was essentially a tax without Parliament's consent.

Not everyone was persuaded. Oliver Cromwell notoriously dismissed the argument with a scatological quip: "I care not for the Magna Farta!" (Writing in the *New Yorker*, Jill Lepore noted that this may be the single thing that most Americans remember about Magna Carta from high school history. Cromwell apparently had a flair for such lines; he is also said to have called the Petition of Right the "Petition of Shite".¹⁴)

¹² J.C. Holt, *Magna Carta*, 2nd ed. (Cambridge: Cambridge University Press, 1992), pp. 1-2.

¹³ See, e.g., Lord Sumption, "Magna Carta then and now: Address to the Friends of the British Library" (9 March 2015), available at <<http://www.supremecourt.uk/docs/speech-150309.pdf>>.

¹⁴ Jill Lepore, "The Rule of History: Magna Carta, the Bill of Rights, and the Hold of Time", *New Yorker*, 20 April 2015.

It took a civil war, the beheading of Charles I, the failed rule of his son, Charles II, and the overthrow and exile of his second surviving son, James II, before the Bill of Rights Act was adopted in 1689.¹⁵ This provided, among other things, that it was “illegal” for the sovereign to suspend or dispense with laws, to establish his own courts, or to impose taxes without parliamentary approval. It also provided that election of members of parliament should be free, and that parliamentary proceedings should be subject only to parliamentary scrutiny.

The monarchy remained powerful and institutions supporting the rule of law weak, however. Judges were given security of tenure only in 1701; deprivation of trial by jury was one of the abuses cited in the American Declaration of Independence in 1776; Bills of Attainder were abolished only in 1870. Political participation in Britain remained deeply flawed through the nineteenth century; the franchise became universal only in 1928.

It was in this period, then, that the rule of law really came to mean something. Although Magna Carta might have been an inspiration for Coke and his contemporaries in their political struggle with the crown, it was certainly no precedent on which they could rely as a matter of law.

American Exceptionalism

So a flawed document negotiated with a weak King is revived opportunistically four centuries later in another struggle with a series of weak monarchs. Yet how is it that the same document comes to be revered not just as a weapon used against the excesses of power but as a kind of secular gospel for our age?

Enter the Americans.

It began in literary form. Two years before the English Bill of Rights, William Penn, after whom Pennsylvania is named, carried Magna Carta across the Atlantic and printed the first American edition under the title *The Excellent Priviledge of Liberty and Property, Being the Birth-right of the Free-born Subjects of England*.¹⁶

¹⁵ In legal contexts, the Bill of Rights is often assigned the year 1688 for historical reasons, though it received Royal Assent on 16 December 1689. See the discussion at note X1 available at <http://www.legislation.gov.uk/aep/WillandMarSess2/1/2/introduction>.

¹⁶ William Penn, *The Excellent Priviledge of Liberty and Property Being the Birth-Right of the Free-born Subjects of England* (Philobiblon Club, 1687), available here <http://press-pubs.uchicago.edu/founders/documents/v1ch14s5.html>.



[William Penn, *The Excellent Priviledge of Liberty and Property*](#)

The volume began with a note to the reader:

It may reasonably be supposed that we shall find in this part of the world, many men, both old and young, that are strangers, in a great measure, to the true understanding of that inestimable inheritance that every Free-born Subject of England is heir unto by Birth-right, I mean that unparalleled privilege of Liberty and Property, beyond all the Nations in the world beside; and it is to be wished that all men did rightly understand their own happiness therein; in pursuance of which I do here present thee with that ancient Garland, the Fundamental Laws of England, bedecked with many precious privileges of Liberty and Property, by which every man that is a Subject to the Crown of England, may understand what is his right, and how to preserve it from unjust and unreasonable men.

So the text made its way into the American political consciousness. Several decades later, writing in *Poor Richard's Almanack* for June 1749, Benjamin Franklin enjoined his fellow colonists to remember that "On the 15th of this month, anno 1215, was *Magna Charta* sign'd by King *John*, for declaring and establishing *English Liberty*."¹⁷

In the succeeding years, those colonists were becoming increasingly unhappy with the taxes imposed on them. Following Franklin's lead, some began to cite *Magna Carta* as authority for their position. Summoned to the House of Commons, Franklin himself was asked on what basis the colonists could assert that the Stamp Act was an infringement of their rights.

¹⁷ Benjamin Franklin, *Poor Richard's Almanack* (New York: Barnes & Noble, 2004), 168. Available here: https://books.google.com.sg/books?id=FvoL_BQ0YOwC

In response he cited “common rights of Englishmen, as declared by Magna Charta, and the Petition of Right”.¹⁸

Note that the Stamp Act was legislation adopted by the British Parliament — not an extra-legal tax — but by now Magna Carta was more symbol than text. When Massachusetts adopted a new seal in 1775, it featured a man holding a sword in one hand and Magna Carta in the other. The 5,000-word Articles of the Barons had become a four-word slogan: “no taxation without representation”.



[Great Seal of the Commonwealth of Massachusetts](#)

After independence, the idealized Magna Carta as a constant, a kind of constitutional pole star, contributed to the myth of the new American Constitution itself as unalterable — disregarding one of the main virtues that Thomas Paine and others saw in a written constitution: the fact that one could amend it. (It is astonishing how many Americans hold their Bill of Rights, for example, to be inviolable and immutable truths — the clue is in the name “*First Amendment*”, “*Second Amendment*”, and so on.) Sixteen U.S. states are said to have incorporated the text of Magna Carta wholesale into their statute books between 1836 and 1943,¹⁹ though it is unclear what they made of references to “scutage” and the promise to remove all “kiddles” from Thames and Medway.

More seriously, the Fifth and Fourteenth Amendments to the U.S. Constitution — which protect against deprivation of liberty without “due process of law” — were adopted in 1791 and 1868 and can be read as elaborations of the 39th Article of the Barons. Other rights now protected in the United States can also be attributed to the influence of Magna Carta, though as the Library of Congress delicately put it in the notes of its exhibition, that

¹⁸ John Phillip Reid, *Constitutional History of the American Revolution, Volume I: The Authority of Rights* (Madison: University of Wisconsin Press, 2003), p. 167. The spelling “Magna Charta” is an alternative to Magna Carta but pronounced the same.

¹⁹ Lepore, *supra* (note 14).

influence was shaped by “what eighteenth-century Americans *believed* Magna Carta to signify”²⁰ — rather than, say, its actual text.

The U.S. love affair with Magna Carta continues today. A quick search reveals that the combined courts of Britain have cited Magna Carta around 150 times,²¹ including 14 citations by the House of Lords and UK Supreme Court.²² A similar search in the United States finds more than three *thousand* references to Magna Carta, including around 200 by the U.S. Supreme Court alone.²³

We do not yet have figures for the number of people participating in the current Magna Carta jamboree, but in 1939 the Lincoln Cathedral Magna Carta was sent to New York for the World’s Fair. Some 15 million Americans are estimated to have seen it. With Churchill urging the U.S. to enter the Second World War at the time, he apparently contemplated offering it as a gift to the United States — “the only really adequate gesture”, as it was noted in Cabinet papers discussing the prospect, “which it is in our power to make in return for the means to preserve our country.”²⁴ In the end it was not Churchill’s to give, though the war delayed its return to Lincoln Cathedral — safely sitting out the conflict in Fort Knox alongside the Declaration of Independence and the original Constitution.

By extension from the United States it went on to influence the United Nations and human rights. Speaking on the occasion of the adoption of the Universal Declaration of Human Rights in 1948, Eleanor Roosevelt expressed her hope that this new document “may well become the international Magna Carta of all men everywhere.”²⁵

²⁰ “Magna Carta: Muse and Mentor”, exhibition notes available at <http://www.loc.gov/exhibits/magna-carta-muse-and-mentor/magna-carta-and-the-us-constitution.html> (emphasis added).

²¹ Lexis search of “UK Cases, Combined Courts” database, November 2015.

²² In a search in November 2015, [BALI](#) finds 14 citations by the UK Supreme Court; Westlaw says 16.

²³ In a search in November 2015, Lexis finds 207, Westlaw says 190. In a recent [speech](#), Chief Justice Roberts put the number at 150.

²⁴ Cabinet papers proposing that Magna Carta be gifted to the USA, with annotations by Sir Winston Churchill, available at <http://www.bl.uk/collection-items/cabinet-papers-proposing-that-magna-carta-be-gifted-to-the-usa>

²⁵ Eleanor Roosevelt, "On the Adoption of the Universal Declaration of Human Rights" (United Nations, Paris, 9 December 1948), available at <http://www.americanrhetoric.com/speeches/eleanorrooseveltdclarationhumanrights.htm>.

Not bad for a hastily drafted set of demands negotiated under threat of arms by a King and his barons.

Conclusion: A Great Charter?

Magna Carta literally means “Great Charter”. As this brief history shows, the document was not born great but instead had greatness thrust upon it.²⁶

Perhaps that is not surprising. Myths have power not because of their ties to the world as it was, but to the world as we might wish it to have been. Magna Carta is one such myth.

First drafted as a stalling tactic by a weak King buying time in his fight against the aristocracy, it gained traction through repetition, eventually entering the statute books. There it lay for almost four hundred years until some enterprising lawyers saw it as a tactical means of justifying their own efforts to restrain another monarch in another age. It then crossed the Atlantic to be embraced by the Americans, becoming almost an article of faith in a country where faith plays a far larger role than in other democracies.

And so, through this chain of events, a document crafted to keep King John in power came to symbolize the freedom of English and American citizens — and citizens in Singapore and everywhere else — to enjoy the rule of law, democracy, and human rights.

Postscript: Two days after the exhibition of the Hereford Cathedral Magna Carta at the Supreme Court concluded, the Court of Appeal declared for the first time that a detention without trial under the Criminal Law (Temporary Provisions) Act was unlawful.²⁷ Coincidence? Probably.

²⁶ Or, as Simon Schama nicely put it, “if Magna Carta was not the birth certificate of modern democracy it was the death certificate of despotism.” Simon Schama, *A History of Britain: At the Edge of the World? 3000 BC-AD 1603* (London: BBC Publications, 2000), p. 162 .

²⁷ *Tan Seet Eng v Attorney-General* [2015] SGCA 59, concluding that the detention of alleged match-fixer Dan Tan Seet Eng “was unlawful because it was beyond the scope of the power vested in the Minister, which was to detain persons in the circumstances where activities of a sufficiently serious criminal nature threatened to or did undermine public safety, peace or good order in Singapore” (para 148). Magna Carta was not cited in the judgment, though it did make reference to the development of the doctrine of *habeas corpus* from “the early part of the 13th century” (para 23).