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FOCUS

THE PAST, PRESENT, AND FUTURE OF RULE OF LAW

MAGNA CARTA 1215: A GLORIOUS FAILURE

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Abstract Along with the tradition of celebrating the importance of the Charter of 1215, there is a long tradition of skepticism concerning its purpose (which was not to achieve responsible government but to preserve the property of wealthy landowners), its force (it was annulled by the Pope and repudiated by the king within a few weeks), and even its success as a peace treaty (war broke out within a few months). The author will outline the reasons for skepticism, because we can only see what there is to celebrate in 2015, if we understand that the Charter of 1215 was the failed result of a reactionary armed tax rebellion by wealthy and powerful landowners, who were not trying to make a new constitution. What is there to celebrate? The author will address that question by asking why the Charter of 1215 was neither void (as the Pope asserted) for repugnancy to the King's authority, nor voidable for duress. The author challenges the idea that the Charter of 1215 is the foundation of the rule of law in England, arguing that the rule of law goes back farther, and that the Charter of 1215 was very limited in its impact. But it did promote the rule of law in two ways: by giving new specificity to legal duties and restrictions that the king had already been subject to, and by highlighting the country's need for effective processes for giving effect to those duties and restrictions.

Keywords Magna Carta, Charter of Liberties, Charter of the Forest, common law, rule of law, responsible government

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I. THE SKEPTICAL VIEW

"To no one will we sell, to no one deny or delay right or justice." It sounds excellent. In fact, for reasons that I will try to explain, it is excellent. But we should face facts. Magna Carta was the result of a reactionary armed tax rebellion by powerful barons. They were not trying to establish a new constitution to achieve the rule of law and to protect human rights; they were trying to recover opportunities they had previously had to abuse their own power. Denying and delaying right or justice had been customary privileges of the barons. And Magna Carta, needless to say, did not even address the fact that a substantial part of the population were subjected to poverty and subservience and forced labor, without freedom of movement or the right to hold property, as serfs. I do think there is something to celebrate in this 800th anniversary, but I will have to explain why.

England has been a contentious country since before 1215, and there is not only a long tradition of extravagant reverence for the Magna Carta, but also a long tradition of extravagant skepticism about Magna Carta. Let me set out some of the reasons for skepticism. If we understand those reasons, I think that we can understand better how responsible government developed in the UK, and what is necessary for responsible government in any country.

Magna Carta of 1215 was a royal decree that King John was forced to make, by an armed group of barons who wanted to protect their wealth and their income. The king had invented new ways of raising revenue to pay for his wars in France, by using his privileges as the barons' feudal overlord. By various creative techniques, he was exploiting his capacity to charge fees (including the "scutage" that could be paid in lieu of military service, and fees for judicial proceedings), to levy fines, to control marriage and succession of estates upon death, and to control the use of natural resources, in particular the forests.

The contents of Magna Carta are mentioned very little in commemorations of the 800th anniversary, except for Clauses 39 and 40 — the promise that serious penal allegations against a free man would be decided by "the lawful judgment of his equals or by the law of the land," and the promise not to sell or to deny justice. The other promises in Magna Carta are technical, archaic, and hard to understand. In fact, they are incomprehensible without an understanding of the context. The average English person today has never heard of disseisin, mort d'ancestor, darrein presentment, or the writ of praecipe, let alone wapentake, haberject, socage or burgage. The average English lawyer has not heard of them, either; it takes a historian. But then, even Clauses 39 and 40, which sound modern, cannot properly be understood without knowing just what abuses of legal process the barons were reacting against. The promises are obscure to us today because they are based on a list of the feudal privileges of the king. The king had been abusing those privileges fairly comprehensively, so the list is extensive.

And here is an irony about the content of Magna Carta: It was, partly, aimed against

that other element of English legal heritage that lawyers and politicians revere today: the common law. John was exploiting the clever initiatives of his father, King Henry II, which generated new streams of revenue for the Crown. The swiftly-developing processes of the common law (common to the realm, not different for each local power) centralized the administration of justice, through the circulation of the King's judges around the country, with a commission to do justice in the King's name. You might say that one of the best things about Manga Carta was that the barons did not try, or were not able, to reverse the development of the common law. They could only try to control abusive appointment of the King's henchmen as judges, and to require the holding of ordinary judicial proceedings in a fixed place [c 17].

Having listed the abuses as they saw them, the barons forced King John to promise to stop them. It did not work. King John renounced the charter as soon he could escape the armed force of the barons. And August 24, 2015 marked the 800th anniversary of the nullification of the Charter by Pope Innocent III (whom John had accepted as his own feudal overlord). The Pope denounced the Charter as "illegal, unjust, harmful to royal rights and shameful to the English people," and declared it "null, and void of all validity forever." The fiasco led to war within a few months. King John's strife with the barons was not ended by Magna Carta, but by his untimely death from dysentery during the war.

As an act of coercion by the barons, the Charter of 1215 was a failure. As a peace treaty it was a failure. As a constitutional charter of rights, it did not rise as high as a failure, because that was not its purpose. As a protection of the wealth of the aristocracy, the techniques in Magna Carta very quickly became obsolete, for two reasons. First, the evolving economic condition of the country changed the basis on which the kings could finance their wars in France. Second, successive kings began to respond to political imperatives by holding regular summit meetings or parliaments of the wealthy men of the country (starting later in the 1200s), and those meetings (and the institution of Parliament that developed out of them) provided a more effective way of negotiating of royal revenue.

There are two further reasons for skepticism about Magna Carta 1215. First of all, it was not a first. And secondly, it was not the last. Magna Carta 1215 is just one of a long series of similar charters, stretching from before the tenth century until the fifteenth century.

II. BEFORE 1215

The most famous charter that does not have the word "magna" in its title is the Charter of Liberties issued by Henry I, on his coronation in 1100. Like Magna Carta, it was addressed to the bishops and the barons and the king's officials, and it said,

> *...[B]ecause the realm has been burdened with unjust exactions, I, out of respect for God and the love I have towards you, in the first place cause God's church to be free…And all the bad customs by which the realm of England was unjustly burdened I take away from*

it, which bad customs I here record in part.

And then he went to on list the abuses that his brother William Rufus had inflicted on the barons. This is all strikingly similar to Magna Carta 1215. Both focus on exploitation of the feudal powers to levy fines, to control marriage and the succession of estates upon death, and to control the use of natural resources, in particular the forests. The 1100 list is shorter than the 1215 list, because King John was more comprehensive than William Rufus in his abuse of feudal privileges. One notable missing item in the 1100 Charter is the general promise in Magna Carta 1215 Clause 39, not to inflict penal deprivations except according to law. Yet there are similar promises: To give just remedies for murder according to the law of Edward the Confessor, and a general proclamation of the rule of law: "I restore to you the law of Edward, along with the improvements by which my father improved it with the counsel of his barons." We know that Stephen Langton, the influential Archbishop of Canterbury who mediated the making of the Magna Carta 1215, used the 1100 Charter as a model for Magna Carta.

So you see that Magna Carta 1215 was not a first. Like all the later Magna Cartas, the Charter of 1215 was an updated and extended reissue of the Charter of 1100. The legal historians Frederick Pollock and Frederic William Maitland tried to establish the historical importance of the Charter of 1100, but it will never be as famous as the ones called "Magna Carta." If the English had started calling the Charter of 1100 "magna," I am sure we would have been celebrating a 900th anniversary in 2000.

Another common feature of the charters of 1100 and 1215 is that both made promises to abide by old laws. If we knew the law of Edward the Confessor, we would know what it was that Henry I actually promised in the 1100 Charter. But we do not, and perhaps the people of 1100 did not know, either. As Lord Sumption puts it,

> *The exact content of the laws of Edward the Confessor was a matter of some doubt. Edward the Confessor is not known to have issued any code of laws…What people really meant by the laws of Edward the Confessor was not so much an ascertainable body of laws as an ideal state of law belonging to imagined golden age before the Norman conquest.*[1]

We do know, however, that Edward the Confessor (who reigned 1042–1066) had himself sworn on his coronation to abide by the laws of King Cnut, who reigned over England 1016–1035. Edward the Confessor made that promise in order to secure the support of the barons of his day (although they were called earls or thanes before William the Conqueror). And Patrick Wormald has shown that the coronation Charter of Henry I in 1100 "made the same sort of promises about same sort of abuses" as King Cnut's great codes of 1018 and 1020. As Wormald put it, "each has the air of a political gesture that drew its effect from the extent of government abuse available for remission." It is evident that the codes of King Cnut were intended to give effect to existing norms. There was a

[1] Lord Sumption, *Magna Carta Then and Now*, Mar. 9, 2015, at 5, available at https://www.supremecourt.uk/docs/speech-150309.pdf (last visited Apr. 23, 2016).

long-standing royal custom of securing support from the aristocracy by promising to act according to customary laws. We can see the same custom at work in the coronation oaths sworn by William the Conqueror, who borrowed the oath of the Anglo-Saxon kings:

> *[T]hat he would rule the whole people with righteousness and royal providence, that he would establish and hold fast right law, and utterly forbid rapine and unrighteous judgment.*

King Stephen on his coronation in 1135 and Henry II in 1154 added oaths to abide by Henry I's charter of 1100.

III. AFTER 1215

The Charter of 1215 was only a set of promises by King John. The "liberties" were said (as in all the later charters) to have been "granted, for us and heirs for ever…to have and to keep for them and their heirs, of us and our heirs." But if future monarchs were bound by it, they never admitted it. Charters were proclaimed in successive reigns. A carefully reduced version of the 1215 charter was proclaimed by Henry III's regent in 1216 and 1217, and it became in effect the king's coronation charter (it was reissued by Henry III personally in 1225). Successive kings reissued the 1225 version until 1423. Each one of those proclamations was the particular king's declaration that he had chosen to respect customary duties that went back before the Norman conquest. The fact that there were successive charters is itself an indication of their lack of constitutional effect. It became politically useful, and at times essential, for kings to issue a charter, but the practice of reissuing implied (1) that the new king was not bound by the issuance of a charter by his predecessors, and (2) that whether to declare his commitment to the rules in Magna Carta was a matter for each new king. As will become apparent below, however, I do not believe that the practice of reissuing charters implied that the customary law of the realm did not bind the king. In 1297, Edward I adopted the 1225 Charter in Parliament, giving it legal force as statute, and that is the version that is partly still in effect. Even then, in law, Parliament could contradict or repeal Magna Carta. It can do so today. There has never been any constitutional protection of the promises in Magna Carta against legislation; they were promises by the king to adhere to the customary law of the realm.

We would look in vain for the anniversary of legal protection for the rights that were protected in Magna Carta. Some of them go back to some unknown time before King Cnut's Oxford Code of 1018. And it might be argued that the 800th anniversary of Magna Carta should come in 2025, to mark 1225 when King Henry Ⅲ adopted a new version willingly and with the backing of the Pope. Or in 2097 to mark the 800th anniversary of its enactment as a statute.

Why, then, is the 1215 Charter famous, and why are we celebrating in 2015? On the skeptical view, the reasons lie partly in the misleading, very grand sound of the name "Magna Carta." That name was not even used in 1215, and is an accident. The throne passed from King John to his son, Henry III, who was nine years old. As part of the

negotiations to end the war with the barons, the new boy king's regent issued new charters in 1216 and 1217 (taking out some of the parts that were most difficult for the King). He put the clauses about forests into a separate "Charter of the Forest," and the other charter was called "Magna Carta" (which could be translated "long charter") to distinguish it from the Charter of the Forest. I am sure that no one but medieval historians would know about it today, if it had been referred to as "the Long Charter." Another accidental feature of the symbolic importance of Magna Carta is that the lawyers who started compiling collections of statutes in the thirteenth century were unfamiliar with earlier legislation, and adopted the practice of putting "Magna Carta" first in their chronological collections, which made it look like a foundational document.

More importantly, the 1215 Charter came to be revered because later lawyers, with little understanding of the events of 1215, and pursuing political purposes unrelated to those of the barons in 1215, invented a mythology of Magna Carta. This was an exercise of the remarkable English trait of creating innovative forms of government by alleging that they are ancient and customary. Sir Edward Coke was the chief myth-maker. The Stuart kings claimed an absolute right to rule that the Anglo-Saxon, Norman, Angevin and Plantagenet kings had never claimed. Coke stood up against those claims (which would only be conclusively refuted in the Glorious Revolution of 1689), holding in his capacity as a judge that the king could not rule by proclamation, and that he could not personally exercise the role of a judge.[2] Now, those limitations on the power of the king were not ancient. Some aspects of the promises in Magna Carta concerning judicial proceedings, you might say, are antecedents of Coke's moves to separate the judicial power of the Crown from the personal authority of the monarch (appointment of experts in the law as judges (Clause 45); ordinary lawsuits to be held in a fixed place (Clause 17)). But no one in 1215 would have claimed that the king had no lawful authority to decide legal disputes in person, or that he could not rule by decree (Magna Carta itself took the form of a decree). Those notions developed (if Coke did not invent them) well after 1215. But Coke treated Magna Carta as giving the force of constitutional law to limits on the power of the state. As Lord Sumption says of "Coke and his generation," "The authority of their legal programme depended in large measure on its supposed antiquity."

Coke treated Magna Carta as enshrining the best parts of the common law (including habeas corpus and jury trial, neither of which had emerged by 1215). The legal reforms that Coke sought to bring about have informed modern constitutional law; he cited Magna Carta as a foundation for them, but in fact they were reforms that the barons could not have foreseen in 1215.

So here is the skeptical view: Magna Carta did not enshrine the rule of law. It was renounced and annulled within a few weeks; if it can be argued to have had any force after those few weeks, it died with its maker in 1216. It was the result of a power struggle

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[2] *Case of Proclamations* (1611) 77 ER 1352, *Prohibitions del Roy* (1607) 77 ER 1342.

within a feudal elite, none of whom wanted responsible government. Anything good in the heritage of Magna Carta emerged much later, in a myth of responsible government invented by Coke and not corresponding to anything that happened in 1215. And anything good in the 1215 Charter itself was already part of the customary law of England before 1215.

IV. AGAINST SKEPTICISM

Some who see the force of the reasons for skepticism have concluded that the important thing about Magna Carta is, precisely, the myth: It is worth celebrating today not because of what was done in 1215, but because later generations turned the idea of Magna Carta into a political and legal force for responsible government during and since the sixteenth century. Leading UK judges have taken this view:

Lord Neuberger:

> *[I]t is not so much what Magna Carta meant at the time but what it started, what it represents.*[3]

And Lord Sumption:

> *Yet Magna Carta matters, if not for the reasons commonly put forward. Some documents are less important for what they say than for what people wrongly think that they say. Some legislation has a symbolic significance quite distinct from any principle which it actually enacts. Thus it is with Magna Carta.*[4]

And Lord Bingham:

> *The significance of Magna Carta lay not only in what it actually said but, perhaps to an even greater extent, in what later generations claimed and believed it had said. Sometimes the myth is more important than the actuality.*[5]

There is, of course, something to it. But I think that the reason to celebrate the Charter of 1215 is not that later generations misunderstood it, or lied about it, when they were making improvements that were inconceivable in 1215. There is something worth celebrating in the demands of the barons in 1215 — even though they were using military force to pursue their own interest in wealth. It is a very important fact that the gist of those demands was not new in 1215. As Lord Sumption put it,

> *[K]ings could not afford to act in a way that defied the contemporary consensus about how a king should behave. One of the key elements of that consensus was that the king should act in accordance with law.*[6]

That is true, but we can say more. It is an important element in English political

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[3] Lord Neuberger, *Magna Carta and the Holy Grail*, available at https://www.supremecourt.uk/docs/speech-150512.pdf (last visited Apr. 23, 2016).

[4] See Sumption, fn. 1 at 17.

[5] Tom Bingham, *The Rule of Law*, Oxford University Press (Oxford), at 12 (2011).

[6] See Sumption, fn. 1 at 4.

history, that successive kings needed willing cooperation from the barons, if they were to raise the funds they needed for their wars in France. But it is also very important that cooperation with the barons was not merely necessary to make it easier to fund wars; it was widely understood and accepted that there was principle of law that the King could not just do whatever he chose. English legal history may look like a slow progression — only successful in the Glorious Revolution of 1688 — toward subjecting the monarchs to duties and restricting their powers. In fact, everyone knew, all along, before and after the Norman conquest in 1066, that the monarchs had duties, and that royal power was restricted.

V. WHY WAS NOT THE CHARTER OF 1215 VOID ON CONSTITUTIONAL GROUNDS, OR VOIDABLE FOR DURESS?

The Pope claimed authority to annul Magna Carta on both of these grounds: The 1215 charter was, he said, void because it was contrary to King John's rights, and because his promise to do as the barons demanded was made under duress. I propose that the Pope had no good grounds for annulling it.

But there would have been ground for saying that the Charter of 1215 was void for repugnancy to the king's authority, if it imposed duties and restrictions that were incompatible with his constitutional role as king. And it would have been voidable for duress, if the barons had been improperly forcing the king to agree to new duties and restrictions. In fact, I propose that it was clear in 1215, that what the barons were forcing King John to do was to admit and to adhere to his existing duties, and to abide by restrictions to which he was already subject. This is the conclusion we should draw from the history of oaths and charters before 1215.

It is a common view that Magna Carta, as Baroness Hale as put it in a speech this year, invented "the idea that government as well as the governed is bound by the law."[7] Coke was, as we have seen, a proponent of that view. The legal historians Pollock and Maitland made the same point: "in brief it means this, that the king is and shall be below the law."[8] And Lord Justice Laws approved those words of Pollock and Maitland in the Court of Appeal in his reasons for judgment in the *Bancoult* case in 2001: "This describes the enduring significance of Magna Carta today."[9]

Insofar as the content of the 1215 Charter can be traced back to the coronation oaths and the charters of his predecessors, there is excellent ground for concluding that King John was agreeing to duties and restrictions that were part of the customary constitutional

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[7] Baroness Hale, *Magna Carta: Did She Die in Vain?*, at 3–4, available at https://www.supremecourt.uk/docs/speech-151019.pdf (last visited Apr. 23, 2016).

[8] Frederick Pollock & Frederic William Maitland, *History of English Law* (2nd edition), Cambridge University Press (Cambridge), vol. 1, at 173 (1923).

[9] *Regina (Bancoult) vs Secretary of State for Foreign and Commonwealth Affairs* [2001] Q. B. 1067 at 1095.

law of the realm, that were implicit determinants of his power as king, and that were compatible with the authority of any king of England. And then, the propositions that "the government as well as the governed is bound by the law," that "the king is and shall be below the law" are ancient. Much older than Magna Carta 1215. Those propositions are the only justification for the violence of the barons in 1215. I think that this conclusion is a very important feature of English constitutional history (and, therefore, of the constitutional history of all the countries that share the common law heritage).

But what was there in the 1215 Charter that was new, and what was different from the later charters?

First of all, the content of the promises was so much more specific than in the Charter of 1100, or in the other oaths and charters of John's predecessors. It was evidently much more specific than the legendary, undefined "laws of Edward" that previous monarchs had committed themselves to uphold. I am sure that this is partly because the barons had some very specific abuses to object to, and that was in part because the Charter of 1215 was aimed against wrongs that John himself had been perpetrating, where earlier charters such as that of 1100 were promises to give relief from the abuses of a predecessor.

Now you might object that King John was not merely agreeing to adhere to duties and restrictions that were part of the customary constitutional law of the realm, if the barons were making the rules a lot more specific. You might say that the 1215 Charter did make new law, by specifying what the law had never specified before. And that is true of course. Take the famous Clause 40:

> *To no one will we set, to no one deny or delay right or justice.*

You will not find it in earlier charters; I would presume that it was not set out in "the laws of Edward." It should have been obvious: Those duties ought to have been viewed as necessarily accompanying the indisputable royal authority to do justice. By coming out and saying what ought to have been understood since well before the Norman conquest, Magna Carta made new law — but law that was compatible with the King's authority, and law that the King could not possibly object to. We might say the same of the statute of 1354, which for the first time guaranteed due process (and not merely the lawful process that the Charter of 1215 had promised). That statute, too, made new law by stating explicitly, as a legal duty, what ought to have been understood to be the duty of the king all along.

Secondly and most importantly, while the kings of England had always been subject to the law, the Charter of 1215 invented new processes to give effect to the customary laws. The two important processes were outlined in Clause 14, setting up a process for obtaining the general consent of the realm for the imposition of revenue measures (aids and scutage), and in the provision for securing the peace in Clause 61.

If it had been given effect, Clause 14 would have set up a proto-Parliament:

> *To obtain the general consent of the realm for the assessment of an aid or a scutage,*

we will cause the archbishops, bishops, abbots, earls, and greater barons to be summoned individually by letter…

It was a genuine innovation, and you might say that this element of Magna Carta really would have been voidable for duress, except that (1) it was based on the accepted customary practice of consultation over feudal revenue measures, and (2) the King had laid himself open to such an arrangement, by his abuses. But it would take further generations to accomplish the purpose of Clause 14.

Clause 61 really is remarkable, and was unprecedented, and was never replicated in later Magna Cartas. You can see why: It established a council of twenty-five barons, selected by the barons without any control by the king. It authorized them to seize any of the king's property, and to wage war against him ("assail us in every way possible"), if he or his servants "offend in any respect against any man." Clause 61 would have created a council outside the control of the king. You might call it a very early model of government by a cabinet of persons accountable to the people, except that its role would only have been to react to violations of the 1215 Charter (and perhaps of other laws), rather than to govern. And its radical lack of accountability to the king would have made the monarchy unsustainable. Under Henry III, the Provisions of Oxford of 1258 amounted to a compromise in which the king and the barons shared control over a governing council; even that arrangement lapsed. Proper accountability of the administration would have to wait until the seventeenth century, and the development of that brilliant modern English invention, the accountability of the king's ministers to Parliament.

Here is one final striking innovation in Magna Carta 1215: The politics of the day (presumably involving the King's resistance to the barons' demands) led to a provision that applied the limits on royal power to the barons' power, too:

All these customs and liberties that we have granted shall be observed in our kingdom in so far as concerns our own relations with our subjects. Let all men of our kingdom, whether clergy or laymen, observe them similarly in their relations with their own men.

So the 1215 Charter is important, but mostly for what was not retained in the later Magna Carta. It was not so much a foundation of responsible government, as an ill-fated attempt to invent extraordinary techniques to cope with King John's lawlessness.

What was new and sustainable? Not the idea that the king was subject to the law (that was old), but the idea that there could be lawful processes for compelling him to do his duty. The heritage of the 1215 charter lies in the possibility of new legal mechanisms for prevention of tyranny, justified according to ancient (and rather undefined) duties.

VI. LESSONS FROM 1215

800 years is a long time. Does China have anything to learn from a reactionary rebellion by wealthy landowners in a corner of Western Europe, that took place while

Genghis Khan was laying siege to Beijing? England in 1215 was a very different place from China in 2015. But then, England in 1215 was a very different place from England in 2015. Does the UK have anything to learn?

None of us can learn the content of a good constitution from Magna Carta. It was many centuries before the UK developed most of the crucial features that should be valued in its constitution today. I will not even attempt a complete list of those features, but they include the direct involvement of women in the political and legal affairs of the country, an independent judiciary, accountability of executive officials to the legislature and to the courts, effective devolution of power to local and regional levels of government, democratic techniques for controlling the use and abuse of public power, and effective participation in international regimes for the pursuit of common goods with other nations. Magna Carta did not even move us toward any of those developments, or toward justice for the poor.

But there is a lesson that we can all take from the 1215 Charter. The rule of law is promoted when the law is made more specific, and more effectively enforceable. I have argued that Magna Carta 1215 was not the foundation of the rule of law; there is every reason to say that the rule of law had been a principle of the English constitution before 1215. But King John and other kings were able to flout the principle, because the laws had been insufficiently specified, and there were no effective techniques for redress against unlawful acts by the national authorities. This lesson — the value to the community of transparent, clearly established norms, and the value of redress against officials of the state — is just as important today in China, as it was in England in 1215.

And it is just as important today in the UK, as it was England in 1215. My university has somehow ended up with four pre-1300 versions of Magna Carta (three from 1217 and one from 1225). They make marvelous museum relics. But it makes no sense to treat Magna Carta as a museum relic of the attainment of responsible government. Responsible government is not something the English-speaking world attained in 1215, and it is something we need to work to sustain today.