**University of Leiden**

**Raymond Sackler Lecture**

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# Magna Carta: how liberty of the subject was won and how Magna Carta can be used to think about the future

*Abstract: Magna Carta was declared not to be binding within months of its execution. So is Magna Carta's reputation justified, or is it just a myth? Lady Justice Arden addresses this question, describing Magna Carta's key provisions and how, despite being declared not to be binding within months, Magna Carta lived on and became embedded in the political consciousness and legal tradition of a nation. Succeeding generations reinterpreted its important provisions, using it for what was relevant for them. She argues that the principles of Magna Carta can still be used today to create a fairer world.*

The motto of Leiden University, *Praesidium Libtertatis* or the Bastion of Liberty, is a reminder to the world of the importance which this University attaches to liberty. Gerard Noort, who developed the principles of freedom of conscience in the seventeenth century, was a law professor here. The Netherlands gave sanctuary to Spinoza. Living in the turbulent times of the seventeenth century, Spinoza wrote:

> The final end of the State consists not in dominating over men, restraining them by fear, subjecting them to the will of others. Rather it has for its end so to act that its citizens shall in security develop soul and body and make free use of their reason. For the true end of the State is Liberty.

The last sentience makes an important point. As I shall explain, it is also where Magna Carta comes in.

## Influence and constitutional importance of Magna Carta

The year 2015 marked the 800th anniversary of Magna Carta and it was, appropriately, a year of celebration in the United Kingdom and in many other parts of

the world. Much has been said in lectures by British judges and others this year about the influence of Magna Carta on the making of modern Britain.

There is, however, a dispute in some circles about the significance of Magna Carta. Some people say that Magna Carta had a profound influence on the development of the common law and the English political system, not to mention other systems in Europe and elsewhere. Some deny that it has had a great influence. They say that Magna Carta's influence is a myth and that its contribution to the growth of our constitution was much less than some like to think. Some add that everything that can be said about Magna Carta has already been said**.**

I do not take that view. There is insufficient space to answer all the points that Magna Carta's detractors have made, but I shall try to address some of them. We shall see that Magna Carta was not just another mediaeval manuscript. It was one of the great turning points in our history. Its influence has been considerable. It was indeed the beginnings of our modern constitution. The reader might wonder how that could possibly be the case. It is well known that the United Kingdom does not have a written constitution in the sense of a single document adopted by an approved mechanism which sets out what rights its citizens have, and how the United Kingdom is governed. That is exactly my point as I shall explain.

**Magna Carta as a medieval document**

Magna Carta looks like any other mediaeval document. It is written in Latin and is not arranged in neat paragraphs so that the text runs continuously from start to finish.

It was sealed by King John in an age when many monarchs executed royal charters[1] apparently giving rights and liberties. The best known is perhaps the Golden Bull of Hungary of 1222.[2]

So far as England was concerned, there was a strong legal tradition starting in the seventh century. In 696, the Saxon monarchs, Aethelbert and Bertha, instituted a code of laws for Kent. The copy that has survived is the earliest surviving Germanic code of laws. It was called the *Textus Roffensis* and it was the work of a single monk at Rochester Cathedral, a short journey from London, where it can still be seen.

Magna Carta was not a wholly original document. It drew on earlier documents, especially the Charter of Liberties, signed by Henry I on his coronation in 1100. The Coronation Charter had limited the King's power to tax or compel his barons, and it included provisions about the Church, widows and orphans, and testamentary and marriage rights. Henry I's Coronation Charter had sought to protect the property of the Church and the barons from the depredations of the monarch but monarchs had often disregarded it. Hence the drafters of Magna Carta saw the need for it to be reaffirmed by the monarch: there was as yet no parliament and it was a pretty lawless world.

Magna Carta also drew on the document known as the Unknown Charter. This was a document found in the National Archives of France in the nineteenth century. It appears to be a draft of what became Magna Carta because it starts with the provisions of Henry I's Coronation Charter and then to seek to impose further

[1] The word 'carta' is Latin for 'charter.' Magna Carta became known in English as the Great Charter of Liberties because it was a large document than the Charter of Forests, with which it was subsequently issued.

[2] The Golden Bull was also confirmed on several occasions in the 13th and 14th centuries. Among other matters, it confirmed liberties, such as that of a landowner not to be seized or brought to ruin unless first summoned and convicted by judicial procedure.

limitations on the King. Most but not all of the clauses in the Unknown Charter found their way into Magna Carta.

We think of the period as medieval. We tend to forget just how modern and progressive some of those medieval thinkers were. They were discussing ways of controlling tyranny and making market practices just, and all sorts of similar questions. There was a least one writer in the twelfth century, John of Salisbury (c.1159), who had argued that the remedy for a ruler who had exceeded his constitutional authority was revolution. Recognising that sort of right was no meagre achievement. As one eminent nineteenth century historian, William Stubbs, put it, Magna Carta was

> 'the first great public act of the nation, after it has realised its own identity: the consummation of the work for which unconsciously kings, prelates, and lawyers have been labouring for a century.'

In a nutshell it subjected the King to the rule of law.

**What makes Magna Carta so important?**

What makes Magna Carta so important is that it subjected the King to the Rule of Law. It was drawn up on the basis that a seemingly autocratic King could be subjected against his will to a document which he sealed. Indeed, the version of Magna Carta that was sealed in 1215 contained a mechanism for its enforcement against the King. Clause 61, known as 'the security clause', provided for a council of twenty-five barons to adjudicate on whether the King had breached Magna Carta, whereupon the King was to rectify the matter. Even though the security clause did not appear in later versions of Magna Carta, it was a very important early recognition of

the Rule of Law. Even sovereign power is subject to the law. So Magna Carta was the early ancestor of a modern constitution.

The subjection of the King to the Rule of Law can be seen in the best known provisions of Magna Carta: clauses 39 and 40. They provide:

> (39) 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 judgment of his equals or by the law of the land.
>
> (40) To no one will we sell, to no one deny or delay right or justice.[3]

These two clauses are still in force today. The King had to comply with these clauses.

There were many other clauses in Magna Carta. Today we have a strict convention that the provisions of an Act of Parliament must all have a connection with its long title. If that rule had been in force in 1215, and Magna Carta had been an Act of Parliament, it would have been a very long title indeed. There were sixty-three clauses about all manner of grievance. There were clauses about inheritance, wardship, the rights of widows,[4] levying execution on debtors but only if they failed to pay, the repayment on death of debts due to Jews and others, a prohibition on the raising of scutage,[5] intestacy, a prohibition on fish weirs,[6] provisions for the restoration of land wrongly seized and proportionate penalties, a requirement that

[3] This is taken from the translation of Magna Carta of the 1215 version of Magna Carta used by the British Library in connection with the celebrations for its 800th Anniversary: See more at <http://www.bl.United Kingdom/magna-carta/articles/magna-carta-english-translation>. These clauses were combined to form clause 29 of the 1225 version of Magna Carta.
[4] Widows could not be compelled to remarry.
[5] Tax in the form of military service.
[6] Nets that prevented others from fishing.

common pleas were heard in one fixed place and not follow the Royal Court round the country, [7] and so on.

The last provision does not sound very important but it was. Normally the common pleas made to the King were heard by him or members of his court as the King went round the country. The barons did not like that as it meant that the result was influenced by the King. So Magna Carta provided for common pleas to be heard in a separate place. The place chosen was Westminster Hall on the King's bench, and one of the divisions of the High Court of Justice in England and Wales still has that name today.[8] This little clause (about half the length of a tweet) was one of the first bricks on the long yellow brick road to judicial independence and to the recognition of the judges as one of the arms of the constitution. There were many other clauses similarly holding golden threads.

The only other clauses still in force today are clause 1, which provides that the English Church shall be free,[9] and clause 13, which preserves 'the ancient liberties' of the City of London and states that other cities, boroughs, towns, and ports shall also all have their liberties and free customs.

In 2015, I had the opportunity to cite clause 1 of Magna Carta in a judgment. The case concerned the question whether a rector of a Church of England parish was an employee of his bishop. Why did he make this claim? The Church of England has no separate legal existence. It is composed of a number of different corporations, some corporations sole and some corporations aggregate. A bishop is a corporation sole as

[7] Clause 17 provided: "Common pleas shall not follow our court but shall be held in one fixed place."
[8] It is called the Queen's Bench Division. Just a few years ago the original bench was discovered under the floor of Westminster Halle, which is next to the Houses of Parliament.
[9] A point which Magna Carta, clause 63 repeats.

it happens. But the funds which are used to pay a priest are vested in some other body and the right of appointment in yet another body.

We concluded that he was not an employee of the bishop. The bishop could not tell him what services to hold. This was of course consistent with the ideal in clause 1 of Magna Carta: the English Church shall be free. The rector should be free from regulation by his Bishop. The link was not a strong one, because the English Church was then the Roman Catholic Church but Magna Carta is a living instrument so the English Church is now the Church of England. The Times newspaper carried an article: "Vicar works for God not his bishop".

**Why do people say that Magna Carta was an overblown myth?**

I have identified some four particular reasons relied on by detractors of Magna Carta for arging that it is an overblown myth.

First, the detractors point to the fact the King was able to persuade Pope Innocent III to issue on 24 August 1215 a papal bull to the effect that it was not binding. The exact legal basis on which the Pope was acting is not clear.[10] Professor Hendrik von Loon, in his readable *The Story of Mankind*, said that the Pope ruled that it had been sealed by the King under duress and therefore could not be binding. Be that as it may, the Pope's action meant that, so far as the King was concerned, Magna Carta was in force for less than 100 days.

Second, critics of Magna Carta also like to point out that it largely benefited classes who were privileged anyway, namely the barons, the free men, the Church, and the

[10] See GB Adams, 'Innocent III and the Great Charter' in Henry Malden Smith (ed), *Magna Carta Commemoration Essays* (Royal Historical Society, 1917).

City of London. On that basis it was never intended to be a statement of the liberties of all citizens, but only of the elite. It contained no clause directed to alleviating the burdens on those who were not free men, for example by enabling them to work for other lords.[11] The only mention of 'villeins' (peasants bound to the lord of the manor in feudal times) was in cl 20, which states that a villein's husbandry tools shall not be taken from him[12] and that fines will only be imposed on him on the testimony of reputable men of the neighbourhood. So, is it right that, as the parody on English history, *1066 and All That*, says, and critics of Magna Carta contend that "Magna Carta was a Good Thing (except for the Common People)"? I shall have to return to that point later in this article.

Third, the popular idea that clause 39 of Magna Carta secured the right to trial by jury is simply misconceived. That idea is only a later interpretation.[13] What Magna Carta in terms secured was only that knights and barons could be tried by those of the same social status. There is an illuminating tale in the Year Book for 1302 to 1303,[14] which illustrates how this works. It is a report of a case about knight, who had been accused of rape. He objected to the jury on the grounds that it was not made up of his peers, that is, of people of the same rank. The court did not require him to accept the jury. A new jury was assembled of persons who were knights. The accused again objected but this time on a different ground and the reporter does not explicitly say what that reason was because objections were heard in camera (in prison). The court released that jury and called yet another jury. The trial then took place, and at the end the jury

[11] See generally Edward Jenks, 'The Myth of Magna Carta' (1902) 4 Independent Review 260; and Lord Sumption, 'Magna Carta Then and Now', Address to the Friends of the British Library, 6 March 2015 <https://www.supremecourt.United Kingdom/docs/speech-150309.pdf>.

[12] Presumably by way of a fine.

[13] Clause 39 on its face applied only to free men. This was, however, clarified in the 14th century by legislation which made it clear that it applied to all men whatever their estate or condition: 28 Edw III c 3.

[14] Year books were the earliest law reports of England, and they contain reports of cases from about 1268 to 1535.

found that the woman had been raped but not by the defendant. She had been raped by soldiers employed by the defendant.

Fourth, the only means specified in Magna Carta for the enforcement of the rights granted by it was the security clause. That was dropped when the Charter was reissued in 1217.

In the view of the critics, the beginnings of a real constitutional settlement only came when Parliament was first convened by Simon de Montfort in 1264 and then by Edward I later in the thirteenth century. Just how strong are these criticisms? I now put the argument the other way

**A document before its time**

In my view, some allowance has to be made for the fact that Magna Carta was the product of a mediaeval society. It made little use of the word 'right'. Even so, it did proceed on the basis of the sanctity of property. It provided protection for property rights.

Magna Carta has to be seen in the context of the common law which developed many of the rights now reflected in modern statements of rights. As Sir John Baker QC has written:

> Human rights were not invented in the 1940s and they certainly did not emanate from the Continent. . . . There is inevitably a difference between principles, which are normative rather than descriptive, and what people—including governments—actually do. But that does not invalidate the principles.
>
> With that caveat in mind, it is possible to see that most of the main items in our modern lists of human rights—no slavery, the right to a fair trial, no punishment without law, and the protection of property or

> possessions—were part and parcel of the common law from an early date.[15]

Moreover, although Magna Carta addressed some current or relatively mundane grievances, such as fish-weirs and bridges, some of the provisions were written in open-textured terms which were in part visionary. Thus, for example, in 1215, clause 1, which as I have explained provides that the English Church 'shall be free', had nothing to do with the Reformation, but with the idea of freedom from interference with Church property. Nonetheless, the germ of a wider idea about independence of the Church, in terms of what Professor Gerard Noordt of Leiden University was to term freedom of conscience, was there.

Many of the other similar contemporary royal charters were forgotten as time passed. Magna Carta nearly suffered the same fate: nearly all the clauses of Magna Carta have been superseded over time or repealed, so that only four remain in effect. But Magna Carta's provisions lived on. I next turn to explain how Magna Carta survived and flourished.

**Understanding the reasons for Magna Carta's longevity**

So, how did Magna Carta survive? There were, it seems, three particular explanations for the fact that Magna Carta was kept alive through the corridors of history despite the fact that the rights for which it provided were overtaken by other legislation or events. The first explanation is that, it was often reissued by the King in order to be able to raise taxation. In addition, on at least one occasion when Magna Carta was reissued, it was made enforceable on pain of excommunication. It is not known how

[15] Robin Griffith-Jones and Mark Hill QC (eds), *Magna Carta, Religion and the Rule of Law* (Cambridge University Press, 2015) 81–3. Footnotes in the original text have been omitted.

often this sanction was enforced but the fact that it was capable of being enforced is an indication of the lasting importance which Magna Carta was considered to have.

One might have thought that that would be the end of Magna Carta, but it was not. The very next year King John died, so further confrontation was avoided. But that was not the end of Magna Carta. King John's heir was his nine year old son, who astonishingly was not deposed before reaching adulthood. He was crowned Henry III. On the advice of his wise and brave regent, William Marshall, Earl of Pembroke, Henry III reissued most of Magna Carta and in 1225 he promised to abide by it.[16] Magna Carta was reissued (with some changes) no less than some thirty-two subsequent occasions.[17]

The second explanation is that, when Magna Carta was reissued in 1265, an order was given for it to be read twice-yearly in county courts. Furthermore when it was reissued in 1297, an order was given that it had also to be read out in cathedrals up and down the land at least twice a year. In an age when we have a vast range of public entertainment, it is difficult to think that the reading out of Magna Carta was much of an attraction, but in the later Middle Ages it did no doubt draw in the crowds, and acted as a means of reminding or telling people for many generations of the important things that Magna Carta said.[18]

The third explanation was perhaps the most important. When Magna Carta was clarified and reissued again in 1297, it was made clear that, although it had not

16 It had also been reissued by his regent and the Papal emissary on his behalf on earlier occasions.

17 The clauses which remain in force today have done so because they formed part of Magna Carta when it was reissued in 1225. They subsequently became part of the Magna Carta as issued in 1297, which became a statute of the Westminster Parliament. The parts of Magna Carta as issued in 1297 which remain in force, being the four clauses mentioned in the text, can be viewed on legislation.gov. United Kingdom., the official database of United Kingdom legislation since 1267.

18 With each reissue, an official charter was written, sealed, and sent out from the Royal Chancellery to each county, and this was another way of reminding people about Magna Carta.

contained any provisions about enforcement (except in the long-abandoned security clause in the case of breaches by the Crown), it could be enforced through the courts.

**Use of Magna Carta in the courts in the thirteenth century**

I have explained that early records are sparse, but there is evidence that from the thirteenth century the courts developed a body of jurisprudence which took the words "judgment of his equals" and "the law of the land" to guarantee trial by lawful procedure. In addition, the courts equated "the law of the land" with the common law. So there is a record that in 1299 the widow of a mesne lord undertook to protect her dower lands from reclaiming by the lord of the fief on the ground that she should not "be removed or decesed against the form of the aforesaid Charter." [19] In 1314 another widow similarly relied on "the great Charter of Liberties, which contains that neither the King nor any of his ministers will out any man of his free tenement without reasonable justice." [20]

*Claygate v Batchelor*,[21] decided by the entire bench of the Court of Common Pleas on New Year's Day in 1600, the penultimate year of the reign of Queen Elizabeth I, illustrates how by the seventeenth century the courts used Magna Carta to extend the rights of individuals and expand the idea of freedom protected by the law. The report is very short. It appears that Mr Batchelor had a son, Robert, who had been apprenticed as a haberdasher to Mr Claygate, and Mr Claygate had exacted from Mr Batchelor (no doubt as the price of teaching Robert the skills of a haberdasher, which would enable him to earn a living) a bond for £30. This bond was payable if two

[19] *King's Bench Rolls, III, 88-95 (S. S.).*
[20] *Rot. Parl. I, 298, no.37.*
[21] (1600) Owen 143; 74 ER 961. Also reported as *Colgate v Bacheler (*1600) Cro Eliz 872; 78 ER 1097.

conditions were satisfied if: (1) his son, Robert, took up the haberdashery trade in any capacity in Canterbury or Rochester within the period of four years after the date of the bond, and (2) Mr Batchelor had not paid Mr Claygate the sum of £20.[22] So it was effectively a covenant in restraint of trade with financial penalties attached.

The Court held that the covenant was against the law:

> 'for it is against the liberty of a free-man, and against the statute of Magna Carta cap. 20.and is against the commonwealth. 2 H. 5. & 5.'.[23]

There is no reason to think that the reference to Magna Carta was anything out of the ordinary or a flash in the pan: the reference to '2H 5. & 5.' is to *Dyer's* case in the Yearbooks, which was decided in 1414 on similar points and also referred to Magna Carta. The brief report of *Claygate v Batchelor* also records that one of the judges held that Mr Batchelor might as well bind himself that he would not go to church. In other words, the judges treated the restraint on personal freedom as objectionable in the eyes of the law as if it had been a promise not to practice one's religion Accordingly, Mr Batchelor was found not liable on the bond and judgment was given against the plaintiff. The subtle change in the perception of liberty is noteworthy. Liberty was more than freedom from hearing a knock on the door at night.

**Freedom from imprisonment and the Great Writ of Habeas Corpus**

As stated, clause 39 provided:

> (39) No free man shall be seized or imprisoned…except by the lawful judgment of his equals or by the law of the land.

[22] This condition seems to have been a discount for voluntary payment.

[23] This is the 1297 version of Magna Carta. There appear to be two minor errors: "Cap 20" should be "Cap 29" and "2 H.5. & 5." Should be a reference to "2 H.5.5." The reference to Magna Carta does not appear in the Yearbook report of this case, which refers instead to the common law.

The Great Writ of Habeas Corpus, as it was understandably called, pre-dated Magna Carta. It was an invention of the common law and not of statute, and it was used to enforce the production of a detained person. The writ is not mentioned in Magna Carta by name but clause 39 includes a reference to it by description, along with other incidents of legal process.

Over the centuries the Great Writ of Habeas Corpus was used to enable many people to be released from arbitrary detention. It was used in the eighteenth century by slaves who claimed their freedom on arrival in the United Kingdom, as in *Somerset's Case.*[24] It was also used to escape from being impressed to serve in the navy or the army, because it was common for the King to issue a prerogative writ to seize people to man naval ships. In very recent times it has been used by people detained in immigration centres and by persons who have been under the control of British troops in theatres of war, such as Afghanistan.[25]

Habeas corpus does not appear by name in Magna Carta. This may be because the name habeas corpus applied to the procedure and that procedure was rudimentary and not uniform in 1215. This does not matter: the fact is that the promise of judicial protection was there.

In the fifteenth century, judges began to put two and two together. If habeas corpus gave them power to request the production of a prisoner, even the King's ministers must show that a person who they have ordered to be arrested and detained is lawfully detained. There was a string of cases when this right was enforced. To give an example, on 1 January 1693 in the Court of King's Bench, the Reverend Yaxley

[24] *Somerset v Stewart* (1772) 20 State Tr 1,(1772) Lofft 1, (1772) 98 ER 499; see also *Shanley v Harvey* (1762) 2 Eden 126; *The Slave Grace* (1827) 2 Hag Adm 94*; Hottentot Venus Case* (1810) 13 East 195.
[25] *Rahmatullah v Secretary of State for Defence* [2012] 1 AC 614.

> "…was committed by the Earl of Nottingham, Secretary of State, by virtue of the Statute 35 Eliz. For refusing to answer, being demanded, whether he was a Jesuit, seminary, or massing priest; and now he brought an habeas corpus, and prayed to be bailed.
>
> And an exception was taken to the commitment, for that the conclusion thereof was, (viz.) there to remain until he shall be from thence discharged by due course of law, when the words of the statute are, until he shall answer unto the questions; and therefore the commitment ought to be special, according to the statute; and *The Churchwardens of Northampton's case* was cited, and relied on.
>
> Besides, the commitment ought to be by a justice of peace, and a Secretary of State is no sworn justice; and it was objected, that the Habeas Corpus Act had suspended this statute.
>
> *Sed per Curiam*, Both these last objections were over-ruled, but for the first the Court held the commitment ill.
>
> Then they asked the same questions of the defendant, who answered openly and directly in the negative; and thereupon he was discharged.[26]

**Freedom from search and seizure**

The case law which the courts built up around habeas corpus was then used to develop another principle: that an official or minister of state could not enter a person's property and seize all his papers unless he had legal authority. This was established in *Entick v Carrington*[27] in the eighteenth century, and remarkably the reasoning used the habeas corpus cases.

*Entick v Carrington* was an action for trespass for breaking and entering the plaintiff's house and seizing his papers. The defendants (who were the King's Messengers) pleaded a warrant of the Secretary of State which ordered them to search for the plaintiff and bring him together with his books and papers in safe custody before the Secretary of State to be examined. Lord Camden LC delivered the judgment for the plaintiff in these terms:

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[26] *Yaxley's* Case (1693) *Carthew* 291; 90 E.R. 772.

[27] (1765) 19 St Tr 1030; 95 ER 807.

…This power, so claimed by the Secretary of State, is not supported by one single citation from any law book extant. It is claimed by no other magistrate in this kingdom but himself…

The arguments, which the defendants' counsel have thought fit to urge in support of this practice, are of this kind.

That such warrants have issued frequently since the Revolution,…

That the case of the warrants bears a resemblance to the case of search for stolen goods.

They say too, that they have been executed without resistance upon many printers, booksellers, and authors, who have quietly submitted to the authority; that no action hath hitherto been brought to try the right; and that although they have been often read upon the returns of Habeas Corpus, yet no court of justice has ever declared them illegal…

And it is further insisted, that this power is essential to government, and the only means of quieting clamours and sedition…

Before I state the question, it will be necessary to describe the power claimed by this warrant in its full extent. If honestly exerted, it is a power to seize that man's papers, who is charged upon oath to be the author or publisher of a seditious libel; if oppressively, it acts against every man, who is so described in the warrant, though he be innocent. It is executed against the party, before he is heard or even summoned; and the information, as well as the informers, is unknown. It is executed by messengers with or without a constable (for it can never be pretended, that such is necessary in point of law) in the presence or the absence of the party, as the messengers shall think fit, and without a witness to testify what passes at the time of the transaction; so that when the papers are gone, as the only witnesses are the trespassers, the party injured is left without proof. If this injury falls upon an innocent person, he is as destitute of remedy as the guilty: and the whole transaction is so guarded against discovery, that if the officer should be disposed to carry off a bank-bill, he may do it with impunity, since there is no man capable of proving either the taker or the thing taken. It must not be here forgot that no subject whatsoever is privileged from this search; because both Houses of Parliament have resolved, that there is no privilege in the case of a seditious libel…

Such is the power, and therefore one should naturally expect that the law to warrant it should be clear in proportion as the power is exorbitant.

If it is law, it will be found in our books. If it is not to be found there, it is not law…

By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence, but he is liable to an action, though the damage be nothing; which is proved by every declaration in trespass, where the defendant is called upon to answer for bruising the grass and even treading upon the soil.[28]

If he admits the fact, he is bound to shew by way of justification, that some positive law has empowered or excused him. The justification is submitted to the judges, who are to look into the books; and see if such a justification can be maintained by the text of the statute law, or by the principles of common law. If no such excuse can be found or produced, the silence of the books is an authority against the defendant, and the plaintiff must have judgment.

According to this reasoning, it is now incumbent upon the defendants to shew the law, by which this seizure is warranted. If that cannot be done, it is a trespass.

Papers are the owner's goods and chattels: they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of trespass, yet where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect. Where is the written law that gives any magistrate such a power? I can safely answer, there is none; and therefore it is too much for us without such authority to pronounce a practice legal, which would be subversive of all the comforts of society.

…It is then said, that it is necessary for the ends of government to lodge such a power with a state officer; and that it is better to prevent the publication before than to punish the offender afterwards. I answer, if the legislature be of that opinion, they will revive the Licensing Act. But if they have not done that, I conceive they are not of that opinion. And with respect to the argument of State necessity, or a distinction that has been aimed at between State offences and others, the common law does not understand that kind of reasoning, nor do our books take notice of any such distinctions….

…Our law is wise and merciful, and supposes every man accused to be innocent before he is tried by his peers: upon the whole, we are all of opinion that this warrant is wholly legal and void…[29]

[28] These words are reminiscent of the saying: An Englishman's home is his castle.

[29] This last paragraph is taken from the last paragraph of the short report of this case to be found in (1765) 2 Wilson, K.B. 275; 95 ER 807.

**Seventeenth Century and Magna Carta: crunch time**

The King did not pay much attention to any of this. Cometh the hour, cometh the person. Sir Edward Coke was Chief Justice at the start of the seventeenth century. By his extraordinary intellect he meted out to Parliament treatment he later meted out to the King.

The treatment Coke meted out to Parliament can be seen from *Bonham's* case. Dr Bonham claimed to be a duly qualified physician having gained a degree in Cambridge but the censors of the College of Physicians using power conferred by their charter which was confirmed by Act of Parliament claimed to be able to stop him from practising and indeed to imprison him.

Chief Justice Coke held that notwithstanding their statutory authority, the censors:

> …cannot impose a fine, or imprisonment without a record of it. The cause for which they impose fine and imprisonment ought to be certain, for it is traversable: for although they have letters patent and an Act of Parliament, yet because the party grieved has no other remedy, neither by writ of error or otherwise, and they are not made judges, nor a Court given them, but have an authority only to do it, the cause of their commitment only is traversable in an action of false imprisonment brought against them.[30]

Dr Bonham's case in 1610 extended judicial reasoning to Parliamentary acts: "when an act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it and will judge such an act to be void." And the reference to "common right and reason" was a reference to the common law. Common law was called such because it was "the law common to all". Although it was judge made law it was presented as law based on custom although of

[30] (1609) 8 Coke Reports 113b; 77 E.R. 646.

course it was capable of improving on custom. At all events, the principles of the common law were presented as fundamental. Thus the judges propounded the prohibition of *ex post facto* laws and double jeopardy, the protection of a property in one's home, a prohibition against using one's property to injure another and the principle that a delegate may not delegate. But there was no room for a notion of higher law because of the growing doctrine of Parliamentary sovereignty.

But it was one thing to enforce habeas corpus against the King's ministers, quite enough to enforce it against the King himself. The King claimed the Divine Right of Kings. The judges he said were the King's agents and his reason should prevail over theirs. The King was intent on exercising his powers: forced loans, compulsory billeting of troops and so on.

One of those cases was the *Five Knights'* case[31]. In 1626, the King commanded his Privy Council to assess five knights for contributions to a forced loan. The knights refused to pay and they were committed to the Fleet Prison. The Great Writ of Habeas Corpus was issued but the warden replied that the knights were detained "by the special command of his Majesty". There was then a hearing at which the knights were represented by counsel and the Attorney General represented the King. Counsel for the knights argued that the warden's response was:

> …bad in substance because no cause of imprisonment is disclosed. The object of a writ of habeas corpus is that the court should be enabled to determine whether the cause of commitment be sufficient. Here that cannot be done. Magna Carta, and statutes of Edward III's reign, require that no man should lose his liberty save by due process of law and for some reason which the common law regards as sufficient…

The Attorney General represented:

[31] (1627) 38t. Tr. 1.

> The King is *justiciarius regni;* 'all justice is derived from him, and what he doth, he doth not as a private person, but as the head of the commonwealth'. Hence he has an absolute power to commit, from which there is no appeal, and such a committal is done *per legum terrae,* and is no violation of Magna Carta. The argument *ab inconvenienti* is disposed of first by reference to the even greater harm which might befall the state had the government no power of preventative arrest, and secondly by appeal to the doctrine that the King can do no wrong. Finally, the later precedents discussed turn more to the advantage of the King than of the prisoners. The 'resolution in Anderson' by which the judges in (?) 1591 had at least not disapproved such returns as the present, clinched Heath's argument, and largely decided the judgment of Hyde C.J., which was for the King. The prisoners were accordingly remanded into custody.

At the next election the Five Knights were returned to Parliament. England was now at war with both France and Spain and the King was very short of money to fund the navy. Ship money it was called.[32] The House of Commons insisted that the King should remedy their grievances over forced loans and the like before they voted him any supplies. The House of Lords disagreed but the deadlock was broken when Sir Edward Coke, formerly Lord Chief Justice, and then a Member of Parliament came up with the ingenious idea of what is now known as the Petition of Right. This invited the King to waive his prerogative in favour of the normal process of the law. Sir Edward Coke said: "the King is under no man, but is subject to God and to law."

He expressly based his reasoning on Magna Carta. Parliament adopted his idea and thus used Magna Carta to prove that Parliament should have supremacy over the authority of the Crown.

It is in the context of the Petition of Right that Sir Edward Coke made his famous remark in Parliament on 17 May 1628:

[32] Ship money was enforced by the courts: *Hampden's* case (1637) 3 St. Tr. 825. However, the judges responsible were impeached after the start of the English Civil War in 1640.

"Magna Charta is such a fellow, that he will have no "Sovereign".'[33]

The King was between a rock and a hard place and on 7 June 1628 he agreed to the Petition of Right.

**Except the Common People?**

None of this explains what happens to the villeins. The common law did not draw any distinction between villeins and freemen but Magna Carta had done so. However, the status of villeins as the lower class in a feudal society status died out due to the work of some creative lawyers. A villein had to be illegitimate so there was a roaring trade in illegitimacy suits in the ecclesiastical courts. In return no doubt for a fee, the lord of the manor would not oppose the proceedings so from then on the applicant and his successors were free men and women. As W.S. Gilbert said, "when everyone is somebody, then no one's anybody".[34] Once everyone was a freeman the limitations in Magna Carta fell away. From then on, Magna Carta was a "Good Thing" for everyone.

A point not often made is that Magna Carta did not apply in Scotland, which was a separate Kingdom. Nor did it apply in Wales, which at the time had its own legal system. There were some incidental provisions which were meant to apply in relation to those countries, but in general Magna Carta applied only to England. That does not mean, however, that it has not since, or cannot now, be embraced by the whole of the United Kingdom.

I could go on but time does not permit. As William Stubbs said,

[33] See A. Arlidge and I. Judge, *Magna Carta Uncovered* (Hart, 2014) 134. Coke's reliance on Magna Carta is often criticised as historically inaccurate, but once Magna Carata in essence subjected the King to the Rule of Law for the first time, his reliance on Magna Cart is surely understandable.
[34] W.S. Gilbert, *The Gondoliers, Or, the King of Barataria*

> ‘the whole of the constitutional history of England is little more than a commentary on Magna Carta’.

**Conclusion in relation to the United Kingdom**

An eminent historian, Lord Sumption, has stated that there is nothing new to say about Magna Carta. I disagree. One can only admire the creative genius of mediaeval law. Nothing was expressly said in Magna Carta about freedom from servitude. Society was feudal. There were barons, free men, and villeins, and the last group were anything but free. Mr Batchelor and his son, Robert, were obviously free men though in a relatively ordinary way of life. The court clearly regarded the bond as an unacceptable restriction on the liberty of Robert. Even though Magna Carta said nothing about personal freedom from servitude, what *Claygate v Batchelor* illustrates is that Magna Carta is being used to support the proposition that a person should be free not simply in the ordinary sense of being free from wrongful imprisonment, but in the more sophisticated sense of not being bound by a covenant preventing him from working at a particular time or place.

That more sophisticated approach to freedom was, I suggest, a significant step. It marked the beginnings of a system of law which could respond over time to the development of commerce, social mobility, and political rights and freedoms. Political rights would in due course include important rights not contemplated at the time of Magna Carta, such as the right of freedom of religion and freedom of expression. Magna Carta would be used in the seventeenth century to fortify the position of the individual against the state and that of Parliament against the Crown.

The interpretation of Magna Carta in the courts and in public life has become wired into the social and political psyche of the nation, so that Magna Carta is now symbolic of our appreciation of freedom. Magna Carta was seamlessly extended by interpretation and usage and made responsive to the needs of a developing society. In assessing the legacy of Magna Carta 800 years on, it matters not that its provisions are not all contained in statute law which is in force today, or that the courts now rarely refer to Magna Carta. It is indeed part of the 'hidden wiring' of our constitution.

**Magna Carta reduced need for written constitution**

I began this lecture by saying that Magna Carta reduced need for written constitution, and will now explain why.

It is often said that the United Kingdom has no constitution, but it is more accurate to say that it has no comprehensive written constitution. It is, however, partly written. Moreover, in recent years, the balance between written and unwritten law has somewhat changed. A number of statutes in areas that would normally be covered by a written constitution have been passed since 1998, including the Human Rights Act 1998, the Scotland Act 1998, the Northern Ireland Act 1998, the Freedom of Information Act 2000, the Government of Wales Act 2006, and the Fixed-term Parliaments Act 2011. But the reality remains that there are still significant areas which are not defined in any enactment, such as the fundamental concepts of independence of the judiciary, ministerial responsibility,[35] the rule of law, and the procedure for changing our constitutional arrangements.

[35] There is, however, a very important and comprehensive ministerial code, to be found on the Cabinet Office website, which sets out the standards of conduct expected of ministers and how they discharge their duties.

The reason for this is that the United Kingdom constitution is not static but constantly evolving. It follows that, if constitutional change is made by legislation, it is at least possible that it will need amendment, as has happened already with some of the statutes that I have mentioned. Moreover, if there is legislation, the courts have the responsibility for interpreting that legislation in accordance with its language and purpose. But many fundamental constitutional concepts are not contained in any statute but in unwritten constitutional understandings or "conventions".

Why did the United Kingdom never adopt a written constitution? Paradoxically, the United Kingdom gave many colonies and dominions written constitutions when they gained independence. The reason can only be that the United Kingdom felt that the protection of a written constitution was unnecessary at home. Magna Carta—or rather, the use made of it—is one of the reasons why this is so. Quite simply, over time, the values in Magna Carta became hard-wired in our law. Magna Carta reduced the need for a written constitution. England's history has ridden on its back.

**Influence overseas**

**1. America and the United States**

Undoubtedly Magna Carta had a considerable influence on the constitutions of the newly independent American colonies, which in many cases made specific reference to the two great clauses of Magna Carta, clauses 39 and 40. When the Constitution of the United States was drafted, one of the purposes of the drafters was to ensure that the people of America had the same rights as Englishmen. The famous clauses of Magna Carta were evident in the Fifth Amendment—the due process clause—which

provides: 'Nor shall any person be deprived of life, liberty or property, without due process of law.'

This clause led to a flowering of jurisprudence about due process, both procedural and substantive, which is of great importance in US constitutional law. Procedural due process ensures, for instance, that before depriving a person of his property, the government follows the correct procedure: this may involve giving notice and an opportunity to speak. Substantive due process is a more radical doctrine. It enables the courts to assess the justification for an exercise of official power, and to impose substantive limits on such exercise. In modern times, that led to landmark cases such as *Roe v Wade*[36] – the right of a woman to make up her own mind about the termination of a pregnancy - was protected. Originally, gay rights were not protected but the decision was overruled by *Lawrence v Texas.*[37] Same sex marriage is now protected (*Obergefell v Hodges*).[38]

There were, however, some important differences between Magna Carta and the Bill of Rights in the US Constitution. In particular, in contrast to Magna Carta, which secured the rights and liberties of the English Church, the First Amendment to the Bill of Rights in the US Constitution precludes Congress from making laws on the establishment of religion.

**2. France: Declaration of the Rights of Man and the Citizen**

The Bill of Rights in the US Constitution was one of the influences which led to the adoption in 1791 of the Declaration of the Rights of Man and the Citizen in France. However, the Declaration is different in many respects from Magna Carta. It is in any

[36] 410 U.S. 113 (1973).
[37] 539 U.S. 558 (2003).
[38] 576 U.S. (2015)

event difficult to compare with Magna Carta because it comes at a much later point in time, and was the product of different circumstances.

Nevertheless, certain points can be made. First, the Declaration proceeds not upon the basis of the grant of rights by a king but on the basis that the rights of man were inherent, natural, universal, and inalienable. By the time it was adopted, France was a republic. The Declaration was adopted after the French Revolution and marked the beginnings of an entirely new society. In contrast, Magna Carta did not bring about an end to feudal society in mediaeval Britain. If anything it enhanced the rights of the barons, the Church, and the City of London, and not those of everyday citizens.

Second, there was another specific difference in relation to freedom of religion and freedom of expression. The Declaration of the Rights of Man and the Citizen guaranteed freedom of conscience and religion, on which Gerard Noort had a profound influence. It also contained the germ of the thinking that led ultimately to the separation of religion from the state now found in the current French constitution (*laïcité)*. That means that religion can play no part in public life organized by the state. This is a totally different approach from Magna Carta but the difference is understandable since Magna Carta was a pre-Reformation and pre-Enlightenment document.

Other differences include the fact that, unlike the Declaration of the Rights of Man and the Citizen, Magna Carta contained a mixture of provisions, some public law, and some private law. Magna Carta was not, therefore, a document which looked like a modern bill of rights.

Nonetheless, we can see some echoes of Magna Carta in the Declaration of the Rights of Man and the Citizen. For example, clause 7 of the Declaration provides that 'no person shall be accused, arrested, or imprisoned except in the cases and according to the forms prescribed by law'.

**Continuing use and value of Magna Carta**

So Magna Carta has been used over the centuries to support liberal causes. As explained, it was used particularly in the seventeenth century, in the struggles against the Crown. In the twentieth century the Magna Carta has helped social and political change to take place in this country and has encouraged our appreciation of liberty to grow. It was even argued by suffragettes that it was a breach of Magna Carta to deny women the vote. It encouraged the development of the common law, and the common law became one of the mechanisms within our unwritten constitution for controlling the exercise of political power.

Moreover, the name of Magna Carta is revered in many parts of the world. In the fanfare of celebration, Magna Carta's most important role following its 800th anniversary may be in the promotion of the rule of law and democracy throughout the world. In his recent lecture entitled *Barzini's Question: United Europe and the United Kingdom*,[39] David Anderson Q.C. relates an amusing story of how he and others went on a goodwill mission to Estonia after that country won her independence from the Soviet Union,:

[39] D. Anderson, 'Barzini's Question: United Europe and the United Kingdom' (European University Institute 2015/02) < http://cadmus.eui.eu/bitstream/handle/1814/37520/AEL_WP_2015_02.pdf?sequence=1&isAllowed=y >

> "… a number of us were invited on a Saturday afternoon to the new offices of Estonia's first independent law firm, where we were proudly greeted by what seemed to be almost the entire membership of the Estonian Bar, some of them recent veterans of the Singing Revolution. Taped to the walls by way of decoration were photocopies of Magna Carta and the Declaration of Independence; and set into the great wooden partners' table was a brass plaque engraved with the miraculous words PACTA SUNT SERVANDA. The rule of law had arrived and was spreading across the continent of Europe that was formerly behind the Iron Curtain.

China proves the point! As part of the 800th anniversary celebrations, the United Kingdom took a contemporary copy of Magna Carta to Beijing. The Chinese authorities at the last minute refused to permit it to be exhibited at Renmin University. Of course, they gave bureaucratic reasons for this but I would argue that this incident shows what an extraordinary power Magna Carta has worldwide.

Today some of what Magna Carta stands for is emblematic. We treat it as a synonym for a statement of fundamental rights even though those rights were quite rudimentary and have undergone much further development since. Magna Carta has become so hard-wired into our national life and culture that we take it for granted and no longer appreciate its contribution. But, like any hidden wiring, it has a strong influence on our thinking and values. It is also an important reminder of the virtues of our unwritten constitution and the common law as tools for reflecting social and political development over time.

In my view the legacy of Magna Carta is to provide inspiration for further development of the right to liberty in all its facets.

**Magna Carta and the future**

Magna Carta was kept alive by each generation reinterpreting the text and finding a meaning in it which was relevant to them. Many of the detailed provisions are obsolete today but the principles of freedom, liberty and justice are still relevant to society in the present day.

What of the future? Especially as the Raymond Sackler lecture is given to commemorate Human Rights Day, we must remember that it is for each generation to find its own interpretation of Magna Carta. Every era faces its own battles. The present era faces terrorism, climate change and pollution, privacy, migration, national security, access to justice.

So this is my take-home challenge today: how can the peoples of Europe use the underlying principles of Magna Carta to create a fairer world? How can we achieve liberty in all the areas I have mentioned? If we need to impose restrictions, whose powers should we reign in and whose rights should we restrict?

Let me give the example of privacy. Until 2000, English law did not have a cause of action which could be used to protect information because it was private matter about an individual. That all changed – so far as information at least was concerned - in 2000 when Convention rights were made enforceable in domestic law. In one of the first cases, Lord Nicholls in *Campbell v MGN*[40] said in words reminiscent of Spinoza,

[40] [2004] 2AC 457.

> Privacy lies at the heart of liberty in a modern state. A proper degree of liberty is essential for the well-being and development of an individual. And restraints on government to pry into the lives of the citizen go to the essence of a democratic state.[41]

Yet another perspective on liberty!

One of the many issues which challenges society today is the right of people to know information on the internet, this is the right of a person to enjoy anonymity and to store their data by electronic means. People should have freedom from intrusion but there are times when this cannot be balanced with national security. If people are to have freedom to choose, can this apply in the same way to everybody or does it apply in some different way to public figures or to those who choose to let details of their private lives become public? Do different norms apply according to whether a person is "on" or "off" grid?[42] Society's views on these issues are moving very fast. But the essential issue has not changed. It is the issue of how the person exercising authority on behalf of the state can be controlled so that his actions are not arbitrary.

In England and Wales, the right to privacy is still at a very early stage. A line is drawn between a right to control your private information and the right to bodily integrity. The latter is not yet part of the right to privacy.

In some situations, the right has to be curtailed as in the case of the pilot of the German Wings plane. This crashed into a mountainside north of Nice. The pilot was intent on committing suicide because he had mental health issues. His psychiatrist knew about these issues but had not reported them to his employer. Public health and safety must be one of those areas which afford defence to person who wishes to disclose another's private information.

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[41] Above, at [12].
[42] That is, on or off the internet and social media.

## Conclusion

Magna Carta was a wonderful chapter in the struggle for liberty. It has guided the struggle in the United Kingdom for 800 years. This article has explained how the meaning of liberty was developed even as early as the fifteenth century to include the right to earn one's living without hindrance, and how it was developed to include an enforceable freedom from arbitrary arrest and detention.

If one had to pick one message from Magna Carta it would surely be that the King, now the state, was to be subject to the law. This was the great achievement of Magna Carta and it meant acceptance of a rule of law. Magna Carta became something of a dead letter during the Tudor times. Still it bounced back in the turbulent times of the seventeenth century and made a great difference to the constitutional structure of England. It had always survived in the common law - but how? The judges gradually absorbed the rules and principles into the common law.

But the story is not yet over yet. May the ideal of Magna Carta lead us forward to a fairer, freer world!