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Magna Carta and Its Road through English (British) Constitutional History

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Contents

Abstract

This thesis takes a look at the most important traces *Magna Carta* has left on its peculiar road through constitutional history. It also analyzes the facts, motifs and contemporary opinions that concern the document through the prism of present-day critical perspective and tries to connect events in a retrospective way, using knowledge, acquired and shared, by modern historians, political scientists and sociologists. The main focus is to illustrate *Magna Carta* not merely as a legal document, which has in consequence largely contributed to the formulation and codification of basic rights of individual human beings, but also as a metamorphic phenomenon, that on many occasions has turned out to be a powerful pacifist weapon in the hands of great historical minds. The thesis uses a platform from the three most important time periods when the document was brought to light, adapted to the current situation, and used in order to help to enforce political changes. Along with the historical, political and legal importance, the thesis also concentrates on the social, philosophical, and sentimental value of *Magna Carta*.

The work is divided into three principal parts. The first one deals with the origin of *Magna Carta* in 1215. It provides the historical background for the events accompanying the formation of the document and the subsequent outcome. The thesis examines the document's purpose from a modern point of view and contrasts it with 17th century interpretations. Furthermore, it looks at medieval law as well as linguistic difficulties and their significance for the later emergence of the charter.

The following section is aimed at another historical period when *Magna Carta* played an important role in social and political life in England. The thesis offers a historical outline of relevant political events in 17th century England and evaluates Sir Edward Coke's opinions and logic that led to the reinterpretation of the charter. Moreover, the work explores the relationship between *Magna Carta* and its descendant; *the Petition of Rights*, and looks at the social shifts that happened through the intervening 4 centuries and were largely significant in forming the Renaissance point of view on the document.

The third part considers the circumstances accompanying the American War of Independence and the subsequent formation of the United States of America. The thesis examines the traces of *Magna Carta* in colonial law, the American identity, and the way in which the colonists rediscovered their Anglo-Saxon heritage and turned it to their advantage. Eventually, this part connects *Magna Carta* with *the Declaration of Independence* and *the American Constitution* and its amendments, collectively known as *the Bill of Rights*.

The conclusion of the thesis takes a look at the legacy of *Magna Carta* in a more general sense, paralleling the three historical periods. It contemplates the philosophical message the document carries and the transformations that Magna *Carta* underwent under different circumstances and through different perspectives. In consequence, the thesis considers *the Great Charter* as a homogenous product of human history and the natural tendency towards the pursuit of democracy, which symbolizes the evolution of humanism and value of which goes far beyond its paradoxical role in the development of constitutional law.

Abstrakt

Tato práce si klade za cíl zmapovat nejdůležitější stopy, jež *Magna Charta* zanechala během své zvláštní cesty napříč konstituční historií. Taktéž analyzuje fakta, motivy a dobové názory týkající se tohoto dokumentu skrze prizma moderní kritické perspektivy a snaží se retrospektivně propojit historické události za pomoci vědomostí, které shromáždili současní historikové, politologové a sociologové. Hlavním záměrem je vyobrazit *Magna Chartu* ne pouze jakožto právní dokument, který ve svém důsledku výrazně přispěl ke vzniku a kodifikaci základních individuálních lidských práv, ale také jakožto metamorfický fenomén, který se v mnoha situacích stal v rukou dobových myslitelů účinnou pacifistickou zbraní. Tato práce používá jako platformu tři historická období, během nichž byla *Magna Charta* vytažena na světlo světa, adaptována na aktuální situaci a použita k tomu, aby pomohla změnit politické uspořádání. Krom historického, politického a právního významu *Magna Charty* se tato práce věnuje i jejím hodnotám filozofickým a sentimentálním.

Práce je rozdělena do tří základních částí. První část se týká vzniku *Magna Charty* v roce 1215 a poskytuje historické pozadí k událostem, jež provázely ratifikování dokumentu a jeho další konsekvence. Text zde zkoumá účel *Magna Charty* z dnešního pohledu a ten pak kontrastuje s interpretacemi 17. století. Dále pak pojednává o středověkém právu a věnuje se lingvistickým problémům a jejich vlivu na pozdější využití dokumentu.

Následující sekce je zaměřena na další období, během něhož *Magna Charta* zásadně ovlivnila společenský a politický život v Anglii. Práce předkládá historický nástin relevantních politických událostí Anglie 17. století a řeší názory a logické pochody Sira Edwarda Cokea, jež vedly k dobové reinterpretaci dokumentu. Dále se text věnuje vztahu *Magna Charty* a její následovnice *Petice práv* a v neposlední řadě společenskému vývoji mezi nimi uplynulých 400 let, jenž byl velmi podstatný pro utvoření renesančního úhlu pohledu na dokument.

Třetí část se týká okolností, které provázely Americkou válku za nezávislost a následný vznik Spojených států amerických. Práce zde jde po stopách americké identity a po stopách prvků *Magna Charty* v koloniálním právu či způsobu, kterým si kolonisté našli cestu ke svým anglosaským kořenům, jež následně přetavili ve svou výhodu. Nakonec tato sekce zkoumá *Magna Chartu* v souvislosti s americkou *Deklarací nezávislosti* či *Ústavou Spojených států amerických* a jejími dodatky souhrnně zvanými *Listina práv*.

Závěr práce nazírá na odkaz *Magna Charty* z obecnějšího hlediska a snaží se porovnat ony tři historické periody. Práce zde kontempluje o filozofickém poselství, jež dokument skýtá a také o transformacích, které *Magna Charta* prodělala v různých situacích a skrze různé perspektivy. Následně se text zamýšlí nad *Magna Chartou* jakožto homogenním produktem lidské historie a touhy po demokracii, který symbolizuje vývoj humanistických principů a jehož komplexní hodnota zdaleka převyšuje jeho úlohu precedenčního paradoxu ve vývoji ústavního práva.

Chapter 1:

Introduction

Magna Carta, also known as Carta Libertatum, *Carta Baronum*, or *Carta de Runnymede*[1] has been subjected to a lot of controversies by many historians, lawyers and political scientists over the centuries. Nevertheless, the document, which will celebrate its 800 year anniversary in 2015 is embed in the social and political life of the heirs of Anglo-Saxon nations (spreading from the United States to Australia) forever. The charter, which has been recognized for almost 300 years as the ancestor of modern constitutional law may have been recently degraded to one of the biggest misconceptions in history and its practical value reconsidered as mere sentimental, but the overwhelming influence on the development of the social and political consciousness as we know it cannot be in any way marginalized.[2]

Neither the question of whether Moses really climbed Mount Sinai to deliver *the Ten Commandments*, nor whether this ancient law is traceable to the culture of Hittite, is relevant for the progression and impact of the moral values it has carried during the last two millenniums. History ought to accept *Magna Carta* as both what it really was and what it was thought to have been with all of its ultimate consequences.

It is sufficient to say that the contemporary value is by no means as clear cut as some modern historians tend to imply. Although the romantic perception of *Magna Carta* that originated in Sir Edward Coke's interpretation and lasted through to David Hume's days in the late 19th century could be largely discarded by modern research and evidence,[3] the document had, to a certain extent set a few precedents and tendencies that were largely influential and therefore affected the political

[1] William Sharp McKechnie, "Magna Carta (1215-1915). An Address Delivered on Its Seventh Centenary, to the Royal Historical Society and the Magna Carta Celebration Committee," Magna *Carta Commemoration Essays,* ed. Henry Elliot Malden (Cambridge: Royal Historical Society, 1917) 20.

[2] Viscount Bryce, "Preface," *Magna Carta Commemoration Essays*, ed. Henry Elliot Malden (Cambridge: Royal Historical Society, 1917) 10.

[3] Viscount 10.

climate and triggered significant changes even in its own time. The paradox of *Magna Carta* cannot be simply considered as accidental. It has only followed the natural process in which is the history interpreted in a new context and twisted in order to serve the current needs, nonetheless not on a conscious, self-serving basis, but rather on the grounds of sentiment and idealism.[4]

The true greatness of Magna Carta lies in the fact that it has been reinterpreted or misinterpreted in favour of liberty and democracy which was scarce both in medieval and modern times. Even the above mentioned Moses' *Ten Commandments* would often serve despotism, tyranny and oppression rather than presenting everlasting moral codex to humankind. Therefore while *Magna Carta's* genesis could have been justified as only a solution to a particular problem of a particular class, its reoccurrences in later times lifted its value into a universally applicable cure for political and social problems.[5]

It is not coincidence that the document surfaced and rose to special significance whenever the British people were facing a monarch with absolutist and despotic tendencies. Its origin was marked by inefficient home policy and the excessive taxation of John Lackland and its resurrection in the times of Renaissance was incited by the similar practices of Charles I, while during the American War of Independence it served as a precedential tool against the oppressive George III. Ironic as it may seem, the mechanism that brought *Magna Carta* repeatedly into the daylight was in all instances triggered by money. All of the three kings called the spell of the charter upon themselves by being unable to control their finances and trying to solve the situation by the arbitrary taxation of their people. Whichever group was affected, whether it was the feudal class, Parliament or the colonists, it always turned out to be a highly underestimated opponent.

As a matter of fact though, *Magna Carta* has never actually served a revolution in an Aristotelian sense. Although considered constitutional, it has never instantly helped to overwhelmingly modify an existing constitution or to completely change it; at least never directly. The most significant reason for this is that the charter was

[4] William Sharp McKechnie, *Historical Introduction to Magna Carta* (Glasgow: University Press, 1913) 71-76.

[5] McKechnie, *Historical Introduction* 78.

never, even in the times of its origin, intended to change the system, but rather reassert what was already supposed to be in force. The Barons were trying to regain the position they had during the reign of Edward the Confessor or Henry I.[6] In the 17th century, both of the houses of the Parliament were pushing to reconfirm what they interpreted as already in place.[7] Also, the American colonists were only asking for the same rights that their fellow citizens on English soil had and that they considered natural.[8] Another important reason is that *Magna Carta*, although affecting people in general, was in all these instances a weapon used only by a particular group of people.

Besides the apparent extortion of King John by the Barons, *Magna Carta* has always operated smoothly, gently and with elegance as if from behind the scenes, being the moving force that has materialized its power in other fundamental documents such as *the Petition of Right*, *the Habeas Corpus Act, the Bill of Rights 1689, the American Declaration of Independence or the United States Bill of Rights*. Even though Sir Edward Coke was not quite right as far as the textual interpretation is concerned, his famous quote that "Magna Carta is such a fellow, that he will have no sovereign"[9] is somewhat a statement that from a certain point of view embodies the true operational values of the document which are to a large extent emotional and sentimental.

Nevertheless, although *Magna Carta's* journey through history is, of course, linear and the charter was through its multiple reconfirmation in one form or another alive since its ratification in 1215, my ambitions are more humble than tracing this charming trip in its homogeneous, historical entirety. The fascinating ability of the document to re-emerge in times of need is appealing to the extent that it would constitute the basic axis of this work. The fact that William Shakespeare never heard of the document while just a few years later, any farm worker in the country could cite

[6] C.H. McIlwain, "Due Process of Law," *Columbia Law Review, Vol. 14, No. 1* (Columbia Law Review Association Inc, 1914) 27, 36.

[7] McKechnie, *Historical Introduction* 78.

[8] H.D. Hazeltine, "The Influence of Magna Carta on American Constitution," *Magna Carta Commemoration Essays*, ed. Henry Elliot Malden (Cambridge: Royal Historical Society, 1917) 131-132.

[9] Faith Thompson, *Magna Carta And Its Role in Making of the English Constitution 1300 to* 1629 (Minneapolis: The University of Minnesota Press, 1948) 16.

from it[10] or the way in which it transferred into the consciousness of the American colonists points to the conclusion that the historical significance of *Magna Carta* could be likened to an irregular sinus rhythm. Therefore, the aim of this paper will be to look at the document mostly in the three periods I have already touched upon above; its origin and subsequent reconfirmations (1215-1297), its Renaissance interpretations (1625-1689), and its function as precedent during the American War of Independence (1775-1791).

[10] McKechnie, *Historical Introduction* 71-72.

Chapter 2

A Historical Introduction: 1215-1297

Henry II's efficient home policy undoubtedly helped to lift the kingdom from the problems created by the unpopular reign of Stephen. Henry in fact strengthened the Crown's power over both the feudal class and the Church, and he did it with an elegant diplomacy. His fiscal and judicial reforms such as the introduction of the Exchequer set up a system that could have lasted and worked well for many of his successors if only they had managed it well. Unfortunately, both of his sons totally failed in this task.

Richard the Lionheart might have been the peasants favourite because of his bravery and fighting spirit but the fact that he was always more concerned with his crusades to Sicily, Cyprus and the Holy Land than effectively administering his own kingdom slowly led to an economic downfall. Richard spent only a few months during his uncompleted 10 year reign in the British Isles and was therefore unable to oversee personally the practices of his brother John who was revolting behind his back aided by Philip II of France. The costs of his foreign adventures drained the treasury and his Barons were growing discontented with excessive taxation. Still, thanks largely to his military successes in Normandy, he did not have to be afraid of them breaking their allegiance.

Only John's accession to the throne marked the turning point in the Crown's relationship with the nobles, which was going hand in hand with a significant loss of influence in continental Europe. Historian Amabel Williams characterized John as "lacking even the few merits and qualities that Richard had"[11] and by those she most likely meant the military capability. John's loss of Normandy and subsequent failure to regain the territories accompanied with the scutage being asked beyond bearable level incited the Barons to undertake definite action. Nevertheless, it is important to mention that the Barons were not the only ones that were affected by John's unscrupulous reign. His long term dispute with Pope Innocent III, which was rather characteristic of his undiplomatic, narcissistic and arbitrary way of dealing with

[11] Amabel Williams, *History of English Life Political and Social* (London: Methuen & Co. Ltd., 1936) 184.

problems, impaired his affinity with the local representatives of the Church. The interdict, multiple excommunication and confiscation of the Church's property stained the relationship despite the fact that the problem itself was ultimately resolved. Furthermore, the tenants-in-chief were not the only ones affected by the King's sheriffs levying more and more money. The feudal scheme logically caused that everyone down the ladder from yeomen to villeins had to carry a part of the weight. Another class that greatly felt the monarch's greediness were merchants and citizens of larger cities, especially London. John's little popularity throughout the social spectrum is aptly illustrated by an anonymous contemporary chronicler who claimed that: "All men bore witness that never since the time of Arthur was there a King who was greatly feared in England, in Wales, in Scotland, or in Ireland."[12] Thus when the opposition was formed, there was no one who would side with the King and although those below Knight's rank had very little influence at the time, the fact that John had no one to turn to except for his mercenaries gave the Barons the higher ground.

Further taxation and arbitrary decisions of the King's Court filled the cup of patience to the brim and the kingdom found itself on the edge of a civil war. Allegedly, a secret meeting was held and according to Roger of Wendover, the Barons, Knights and Archbishop Stephen Langton summoned at the Bury St. Edmunds: "as if for prayers; but there was something else in the matter, for after they had held much secret discourse, there was brought forth in their midst the Charter of King Henry I."[13] Interestingly, the nobles were apparently quite ignorant as far as any precedential law was concerned as they had learnt about the existence of Henry I's charter not before this meeting or on another separate occasion when they had met with Langton in London. The opinions among modern historians on the role of the Archbishop, who had most likely retrieved the copy of the charter from the archives in Lambeth, vary.[14] Nonetheless, it is most likely that he sided with the Barons and offered his services as a mediator in order to represent the Church's interests in the whole affair. Although the 18th and 19th century historians would often give him credit for the broad formulation of *Magna Carta* including the famous phrase "liber homo"

[12] McKechnie, *Historical Introduction* 12.

[13] McKechnie, *Magna Carta 1215-1915* 20.

[14] Sidney Painter, "Magna Carta," *The American Historical Review, Vol. 53, No. 1* (Chicago: University of Chicago Press, 1947) 48.

from clause 1 and 39, and would ascribe to him the philosophical undertone of the document, it is probable that his active participation was along with the desired benefits for the Church[15] much less romantic and driven mostly by personal grudge.

The negotiations with John escalated during the spring of 1215 and finally led to the meeting held on July 15 at Runnymede. There, the 25 Barons and Earls and various Bishops and Abbots (serving as witnesses) presented the charter to the King who in return ratified the document with the Great Seal. John had, however, no intention of honouring the deal as he was already in talks with Innocent III and sent him a letter asking him to proclaim the charter null and void. Being formally a vassal of Rome, he argued that the excessive scutage was asked in order to carry out the crusade[16] he had promised the Pope on the occasion of renewing his allegiance to the Roman Catholic Church. Innocent III released a papal bull renouncing the charter but things eventually turned into the Barons' favour as John suddenly died and his son Henry III's regent William Marshall reconfirmed Magna Carta in 1216 and again in 1217. Ironically, there is enough evidence that not even the Barons were considering the charter as a final solution and they were only buying time to prepare a takeover of Prince Louis of France. A large portion of the kingdom including London was under Louis's control and he was proclaimed the King of England by some of the Barons at St. Paul's Cathedral and even tried to legitimize his invasion with his claim to the Pope that since John had been tried for treason during the reign of Richard, he had lost his right to succession and thus had never been a legitimate king.[17] The problem was solved by the reconfirmation of the charter as the Barons turned their backs to Louis in order to support the under-aged King.

Magna Carta was reconfirmed again in 1225 as Henry III was formally crowned. Henry's reign found the kingdom at relative peace as further reconfirmations of the charter were usually bartered for a tax, but the Barons were extremely watchful and stepped up on every occasion when they felt like *Magna Carta* was not being properly adhered to. A large portion of the disputes were over *the Charter of the Forest* (originally part of *Magna Carta* but since 1225 a separate

[15] David Hume, *History of England Volume 1,* ed. William B. Todd (Austin: The University of Texas, 1982) 341.

[16] G.B. Adams, "Innocent III and the Charters," *Magna Carta Commemoration Essays*, ed. Henry Elliot Malden (Cambridge: Royal Historical Society, 1917) 35.

[17] McKechnie, *Historical Introduction* 30.

charter) and Henry's taste in the arbitrary afforestation of the land, literary meaning claiming further land, not necessarily woods, as the Crown's forest.[18] Other arguments included the system of the courts, frequency of the sheriff's tourn and last but not the least Henry's favouritism of foreign nobles and their appointment to legislative offices.[19] During this time, a regional consciousness in a modern sense developed rapidly and the counties' and hundreds' home rule favoured locals in the sheriff's office.[20] The relationship between the King and the Barons might have been tense but it was not until 1250's that the crisis reached its breaking point and escalated into the formation of *the Provisions of Oxford* (succeeded by *the Provisions of Westminster*) which paved the way for the establishment of the English Parliament. The council that had had its roots in *Magna Carta* was supposed to gain considerably more power, and Henry's attempt to defend the Crown's sovereignty culminated into the so called Second Barons' War (the first being the revolt in 1215). The rebellion led by Simon de Montfort had temporarily gained the upper hand and although De Montfort's Parliament had held out in charge of England for less than 15 months, it had formed a platform upon which was later based the "Model Parliament" established by King Edward I in 1295.

It was during Edward's reign when *Magna Carta* accomplished its first victorious round in its historical journey towards constitutional democracy. The tendencies towards regional and communal political power that had already been in progress for a couple of decades finally materialized as the representatives of the counties and hundreds were allowed to take a direct part in the Parliament's decisions and hence formed a body that could be called an ancestor to what was later known as The House of Commons. *Magna Carta* was once again reconfirmed by Edward in 1297 in order to have the full support of his nobles in his campaign against Scotland. Although Sir Edward Coke counted a further 30 confirmations during the upcoming centuries,[21] *Magna Carta* was slowly falling into oblivion throughout the Tudor era, only to re-emerge stronger than ever in the lawyer's own days.

[18] J.R. Maddicott, "Magna Carta and the Local Community 1915-1959," *Past & Present, No. 102* (Oxford: Oxford University Press, 1984) 37-52.

[19] Maddicott 31-41.

[20] Maddicott 26.

[21] McKechnie, *Historical Introduction* 91.

Contemporary Law and Linguistic Misconceptions

The precedent derived from *Magna Carta* by Sir Edward Coke and others in the course of the 17th century was based largely on the rigid legal analysis of its text. The fact that the conflict had been primarily between the monarch and his feudal tenants (aided by the Church), leaving the common people virtually excluded was well known at the time. Still, the lawyers came to the conclusion that Magna Carta was addressing people, or rather free people, in general and that it guaranteed a trial by jury, a due process of law and consent of the council or parliament over any taxation by the king.[22] Such a renowned historian as William Stubbs would even in the 19th century still claim that: "It is the collective people who really form the other high contracting party in the great capitulation," and that the Charter is therefore "the first great public act of the nation, after it has realized its own identity."[23] This opinion would have hardly stood based only on the historical facts about the rebellion. None of the 17thcentury lawyers and politicians would have succeeded and their theory would not have been universally acclaimed for another 3 centuries if they had not based their argument on logical ground. Indeed, they did, but only from the synchronic point of view.

Apart from the obvious political motivation, there were also two important reasons why they failed to see the genesis of *Magna Carta* in its true light. Firstly, they lacked knowledge of contemporary law which had been anything but homogenous, and secondly, they did not translate the document minding the diachronic nature of the language.[24] Since the practice of law is to a large extent dependent on language, these two problems complemented each other and created a basis upon which the argument could be formed while it could be hardly shaken without a complete reconstruction of its core. Neither the modern day historians are able to securely decode the formulations of *Magna Carta's* clauses and their interrelationship with the vague definition of contemporary common law.

[22] McIlwain 28.

[23] William Stubbs, *Constitutional History of England* (Oxford: Clarendon Press, 1891) 570.

[24] William A. Stuart, "The Constitutional Clauses of Magna Carta," *Virginia Law Review, Vol. 2, No. 8*, (Virginia: Virginia Law Review, 1915) 572.

Considering the fact that the document is almost 800 years old, one must admire the way it is formulated. Although it falls far short in comparison to modern legal language and terminology, the draft must exceed any expectations a layman might have about how legal documents in the 13th century looked like. Still, the charter looks completely different if looking at it through a contemporary context.

This could be very well illustrated in the famous clause 39 (in later editions 29) which contains some of the most problematic phrases, most notably "no freeman," and "by lawful judgment of his peers, or by the law of the land." The translation of clause 39, which along with clause 1 and 13 is still in force as part of the uncodified British constitution reads as follows:

> 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.[25]

Now leaving aside the potential translation difficulties from the Latin original, it is very useful to look closer at the issues of the terminology and historical meanings. Sir Edward Coke famously concluded that the clause guarantees "a due process of law and a trial by jury."[26] Whatever the document in reality referred to, it is necessary to take into consideration that the medieval trial was very different to the modern one. McKechnie goes as far as to claim that:

> It may be said without exaggeration that there was no "trial" at all in the current meaning of the word—no balancing of the testimony of one set of witnesses against another, no open proof and cross–examination, no debate on the legal principles involved.[27]

[25] King John, *Magna Carta 1215*, trans. C.R.C. Davis (London: British Library, 1989).

[26] Sir Edward Coke, *The Selected Writings and Speeches Vol. 2,* ed. Steven Sheppard (Indianapolis: Liberty Fund, 2003) 224.

[27] McKechnie, *Historical Introduction* 52.

The common practice of how to resolve a dispute between two parties was that one party (usually the defendant) was ordered to prove the truth by compurgation ("an oath with oath–helpers"), ordeal or combat. Compurgation included usually 12 persons swearing that they believe in the defendant's oath. They were supposed to declaim rigid predetermined formulae and the slightest slip of the tongue would result in the defendant losing his claim. Proof by ordeal meant simply the defendant being tortured and the outcome of the case being decided on whether they gave up or held on. The combat was a regulated fight duel between the two parties which was decided by one of them being forced to utter "craven" or the defendant holding on until the dusk. In all of these cases, the task of the "judges" was simply to decide which variant of "trial" would be enforced while the result itself was merely technical. Although, there were instances when the defendant was ordered to prove his claim by presenting a charter or by witnesses (mostly transaction witnesses, therefore officials assigned to oversee e.g. a market place and the businesses going on there) in the majority of trials, one of the three "proofs" mentioned above was applied.[28]

In this light, the supposed constitutional value of clause 39 shrinks to a cheerful paradox. Since the medieval trial has very little to do with uncovering the truth and pronouncing the judgement based on facts and proofs in a modern sense, it is not exaggerated to say that even if *Magna Carta* guaranteed a certain right to everyone, it was by no means a right for "a lawful trial" as it is perceived in present-day or as it was perceived in Renaissance.

One might argue that the constitutional value lies rather in the fact that the right seemed to be equally available to everyone. This example is not supposed to disprove this notion but rather illustrate how the missing context might twist ones first impression. If the formal way of law is juxtaposed to the practice, it is apparent that there was hardly any romantic principle to look back on in the 13th century.

To elaborate on this further, since the common court procedures were all described above, it is apparent that Coke's interpretation of "per legale judicium parium suorum" as "trial by jury" is wrong in its core. Nothing like trial by jury existed in the 13th century and although it later developed from the principle of "an

[28] McKechnie, *Historical Introduction* 51-53.

oath with oath–helpers" it is far-fetched to claim there was anything with a function similar to a jury as such. "A lawful judgement of his peers" most probably means that the Baron should be tried neither by his inferiors[29], therefore not in the County or Hundreds Courts or the courts held during sheriff's tourn, nor in the King's Court, but rather in the Feudal Courts. [30]

There are plenty of good reasons why the nobles wanted to keep their trials within their own courts. There had been a fierce competition between the Feudal Courts and the King's Court ever since the times of Henry II and strengthening the position of the Feudal Courts would also mean considerable financial gain. Furthermore, there was a so called "medial judgement" pronounced at the beginning of the trial which in fact meant whether the defendant will be required to prove his claim or not.[31] The Barons would hardly prefer a sheriff or other king's officer to make that decision. Then even if the proof was ordered, the nobles would usually opt to resolve their disputes by combat rather than by ordeal or compurgation. Most importantly, the clause was supposed to simply prevent the king from making arbitrary decisions against the feudal class.

In short, the evident 17th century misconception of clause 39 is rooted in Coke committing a complex fallacy while interpreting "judicium parium" and "per legem terrae". Nothing like "trial by jury" existed at all, and in addition, any form of medieval trial would hardly be acceptable in Coke's own days and by no means regarded as "a due process of law". While these phrases entered constitutional history largely meaning "trial by jury and a due process of law," they likely referred only to the kind of court (legal judgement of peers) and the kind of process (according to a law of the land). [32]Nevertheless, the contemporary legal terms were so vaguely fixed that it is quite impossible to determine an exact meaning.

[29] F.M. Powicke, "Per Iudicum Parium Vel Per Legem Terrae.," *Magna Carta Commemoration Essays*, ed. Henry Elliot Malden (Cambridge: Royal Historical Society, 1917) 80.

[30] McIlwain 31.

[31] McKechnie, *Historical Introduction* 51.

[32] McIlwain 44-47.

For example, the translation of clause 39, which is still in use, presents these two phrases as alternatives, therefore "by lawful judgment of his peers, or by the law of the land," but C.H. McIlwain claims that:

> [...] there is no antithesis between judicium parium and per legem terrae. The former prescribes the manner of application, the latter the law to be applied. They are complementary to each other, not alternative.[33]

McIlwain along with other historians such as Pollock, Maitland, Adams or McKechnie accepts the modern popular notion that Magna Carta does not guarantee "trial by jury" or "due process of law", but perceives "the law of the land" in a more particular sense , claiming that it might be conjugated rather by "and" than "or". Although there is almost universal consent in the last 100 years that Coke's reading is wrong, there are still difficulties in finding a mutual agreement on the translation of the particle "vel" because the opinions on what "the law of the land" really refers to still vary. There were many efforts to determine the exact meaning by comparisons with other documents of the time or other clauses of *Magna Carta* itself[34], but the only outcome is that the term was found to be used in many different ways and therefore remains indistinct.[35]

Literary "law of the land" means exactly what Coke claims: "the common law, statute law, or custom of England".[36] However, the term was often used to refer not to the general but the particular e.g. the mode of trial, which is McIllwain's assertion. Nevertheless, even if an alternative to "lawful judgement of his peers" it could still allude to "the law of the fief" rather than "law of the land" in its general sense.[37] This case shows how ambiguous legal terms of the 13th century were. It was anything but an easy task for Coke to interpret the clause correctly, considering that he neither went nor was capable of going as far with the research as later historians did.

[33] McIlwain 50.

[34] Powicke 77.

[35] McIlwain 44.

[36] Coke, *Vol. 2* 218.

[37] McIlwain 50.

Furthermore, it is necessary to mention the translational issues. The Barons and Norman middle class at the time spoke French or rather Anglo-Norman, while the common people were still using their vernacular, therefore English. Latin was spoken mostly among clergy and scholars and although many of the nobles had some knowledge of it, their practical ability to use it was in many cases very limited.[38] Generally, the language situation at the time was quite chaotic and translations by different people from language to language caused many formulations which became anything but homogenous. Monkish Latin differed quite significantly from the Latin standard in the 17th century and its usage at the time varied slightly from clerk to clerk.[39] Therefore, the problem does not lie just in the fact that the legal terms were used ambiguously. It was broadened by the non-standardized language and linguistically diverse environment.

Rome educated Stephen Langton, who allegedly drafted Magna Carta, had to formulate the claims of the nobles, who were largely ignorant to the law and whose Latin skills were certainly limited. It is quite difficult to imagine that a document developed under these circumstances could be interpreted unequivocally even at the time. In fact, most of the Barons were hardly able to read the charter without the assistance of a translator. Neither, were they able to read any other charters that preceded *Magna Carta*. It is most likely that they were wholly consent with knowing what they were asking for and that their requirements were sealed by the King. Ironically, although there were many copies of *Magna Carta* distributed around England, the common people, who were supposed to be granted revolutionary rights by the charter, had virtually no chance of finding them out since most of them only spoke their vernacular or could not read at all.

To illustrate the problem from a purely linguistic point of view, it is sufficient to look at another of Coke's famous misinterpretations: "nullus liber homo" translated as "no freeman" and perceived as any freeholder in England. William A. Stuart asserts that:

[38] Jacek Fisiak, *An Outline History of English Vol. 1: External History* (Poznaň: Kantor Wydawniczy Saw, 1996) 65-67.

[39] William A. Stuart, "The Constitutional Clauses of Magna Carta," *Virginia Law Review, Vol. 2, No. 8,* (Virginia: Virginia Law Review, 1915) 580.

> [...] there is a very essential difference between the signification of liber and libertas in monkish Latin and their classical meaning. In monkish Latin a libertas was a privilege, possessed specifically by some person or class, from the enjoyment of which other persons or classes were excluded.[40]

Basically, "liber homo" means "a person possessing certain privileges" rather than "freeman." Nevertheless, this reading almost contradicts Coke's conception of rights equally available to everyone. In fact, the phrase that was once recognized as a humanistic manifest only asserts the Barons' selfish interests. They wanted to reclaim their superior rights in society, not to pioneer democracy. Ironically, a large portion of the principles derived from *Magna Carta* by 17th century lawyers rises and falls with the false translation of one word. Since privileges of a certain class go against the constitutional rights, it is apparent that the Renaissance argument was built on a paradox.

The problematic nature of the shallow, ill-assorted, 13th century legal system and terminology go hand in hand with a wild linguistic environment which proved too difficult to be correctly decoded by the Renaissance lawyers. They have therefore reconsidered *Magna Carta* largely out of its contemporary context. The question is, whether this ignorance was natural or partly intended. It is not appropriate to speculate about this matter further, however, it is interesting to consider that lawyers looking for a precedent to serve their purpose usually have no motivation to analyze their subject to that extent so it might lose its worth. It would be audacious to imply that Sir Edward Coke and his colleagues deprived Magna Carta of its contextual meaning in order to abuse it for the sake of their cause. Nevertheless, they simply might not have given as much effort to going beyond the document's textual form because what they thought about it served them well. Magna Carta was about to embark on its most historically valued task and there was no reason to stand in its way.

[40] Stuart 572.

Chapter 3

A Historical Introduction: 1625-1689

Magna Carta and its 13th century legacy had slowly disappeared under a pile of dust during the Tudor era, but we should not deprive the Tudor kings of their part in its subsequent rise. The doctrines of Jean Bodin and William Barclay were only a formulation of the tendencies that had already been favoured by the late monarchs of the Tudor dynasty. Their so called "divine rights of kings,"[41] which was a concept interpreted from Roman law, but had its roots as far back as in the times of Gilgamesh, tried to claim that the king is God's representative on earth and therefore possess absolutist privileges. Logically, this regained faith in justified autocracy sharpened the tension between the monarchs and the Parliament. James I, the first Stuart king, proclaimed his adherence to these philosophies in his works *The True Law of Free Monarchies* and *Basilikon Doron*, and clashed with the Parliament regularly, but it was not until Charles I's ascension that the problems culminated.

Soon after his coronation, Charles encountered a situation quite similar to the one some 4 centuries ago. The treasury was drained by his predecessors Elizabeth I and James I, and he needed to finance a war with Spain. In order to support England's involvement in the Thirty Years' War, Charles adopted suchlike instruments as John Lackland and therefore taxed his subjects heavily. Yet, the political situation had significantly changed since John's days and feudalism was gradually declining and the Parliament had grown to possess at least some political power. The tonnage and poundage asked by the King became increasingly excessive and despite the House of Commons trying to limit its authorisation of these taxes to a period of one year (previously the king was granted the right for life) in an effort to control the expenditures, the monarch continued to collect the duties.[42] On the top of that, Charles started to demand "forced loans" without a consent of Parliament, which resulted in gradually more individuals refusing to pay.[43]

[41] Williams 346.

[42] F.W. Maitland, *Constitutional History of England* (Cambridge: University Press, 1919) 293.

[43] Thompson 348.

Thereafter, Charles answered with a tyrannical force and imposed martial law in order to gain the loans by military power or the imprisonment of civilians that were unwilling to pay. The whole situation culminated in the Five Knights' case, also known as Darnell's case. The process with Knights, unwilling to pay the forced loans, infuriated Parliament since it showed that common law and judicial powers are dependent on the King's royal prerogatives. The absurd ruling of the court regarding the Knights' bail that "if no cause was given for the detention [...] the prisoner could not be freed as the offence was probably too dangerous for public discussion"[44] triggered a fierce opposition which led to *the Resolutions* which Edward Coke, John Selden and other members of the Committee of Grievances presented to the House of Lords. Selden had already alluded to *Magna Carta* while posing as a counsel in the Five Knight's Case, linking it to habeas corpus (a legal action through which an unlawful imprisonment could be overturned).[45] Nevertheless, this was the moment when Edward Coke, who had been studying and writing treatises about *Magna Carta* throughout his career stressed that the document was still in force, therefore:

> no freeman is to be committed or detained in prison, or otherwise restrained by command of the King or the Privy Council or any other, unless some lawful cause be shown [...] the writ of habeas corpus cannot be denied, but should be granted to every man who is committed or detained in prison or otherwise restrained by the command of the King, the Privy Council or any other [...] Any freeman so committed or detained in prison without cause being stated should be entitled to bail or be freed.[46]

The Resolutions, however, met with mixed reactions from the House of Lords and were rejected by the King, claiming that the Commons had no legitimate power to enforce them. Consequentially, Coke came up with a solution, drafting a petition with similar content to *the Resolutions*, which if accepted by both the House of Commons and the House of Lords and sealed by the King would resolve the situation in a legitimate way.[47] A polemic between the two chambers concerning the exact

[44] John Hostettler, *Sir Edward Coke: A Force for Freedom* (Southampton: Barry Rose Law Publishers, 1997) 176.

[45] J. A. Guy, "The Origins of the Petition of Right Reconsidered," *The Historical Journal 25.2* (Bristol: University of Bristol, 1982) 292.

[46] Hostettler 129.

[47] Guy 312.

wording of the petition took place and Charles was forced to accept and ratify *the Petition of Right* on June 7, 1628 in order to be able to secure himself future consents for taxation from Parliament. The provisions concerning due process of law from Magna Carta was paraphrased and included along with the clauses prohibiting unlawful taxation, arbitrary imprisonment, and the imposition of martial law (except for the case of war).[48]

Although this document did by no means resolved the situation and the King continued acting recklessly and had many further disputes with the Parliament and the Church, it marked the moment when the two chambers slowly started to work as a one body. This new situation indirectly led to the English Civil War which culminated into Charles I being tried for treason and beheaded. Nonetheless, the short existence of Oliver Cromwell's Commonwealth of England saw Parliament being for the first time in history both a legislative and executive body of England. After the restoration of the monarchy in 1660 and Charles II's ascension, Parliament finally established itself as a legislative body which was to a significant extent independent to the monarch. *The Habeas Corpus*, which was derived loosely from *Magna Carta,* was passed as a parliamentary Act in 1679.[49] Nevertheless, the tendencies for "the divine rights of kings" returned with James II, but his inconsiderate religious policies cut his spell on the throne short and he was exiled after only three years as the King of England.

Finally, soon after the coronation of Charles II's son-in-law William III (who then ruled along with his wife Queen Mary II) in 1689, *the Petition of Right* was restated in a statutory form and passed by the Parliament as *the Bill of Rights*. This constitutional offspring of *Magna Carta* started a new chapter in English political and social life. Furthermore, it has never fallen into obscurity again and its influence has spread way beyond the Islands and played one of the starring roles in the rise of another country in less than 100 years.

[48] Sir Edward Coke, *The Selected Writings and Speeches Vol. 3,* ed. Steven Sheppard (Indianapolis: Liberty Fund, 2003) 30.

[49] Maitland 340.

From Magna Carta to the Petition of Right: Renaissance Social Shifts and the Rhetoric Logic and Law of Sir Edward Coke

There is enough similarity in the historical background of *Magna Carta* and *the Petition of Right* to make the close connection seem very logical. *The Petition of Right* sprung from *Magna Carta*, but on the other hand, it is sufficient to say, that it was in a sense a reincarnation of it, adapted for the new social environment in a suchlike situation. The fact that *Magna Carta* had any value at all in the 17th century owes a lot to the evolution of the political and social climate throughout the 4 centuries. The executive, legislative and judicial system in the Renaissance, as well as social life as such, and diplomatic relations among the European powers simply formed a stable ground upon which the charter could be brought up as a powerful tool. The strongest argument to support the assertion that *Magna Carta* in the time of its drafting did not have such a general meaning as Coke, Selden and others thought, is that it was simply too soon. Fortunately, 400 years were enough for significant changes to happen so that what could only address a particular group of people in the 13th century could be generally applicable in the 17th.

The most important thing was that the obsolete feudal system that was on the top of its powers at John's times was slowly dissolving throughout the Tudor period.[50] The rigid hierarchy that limited the powers of the common people to the extent that they hardly existed at all was naturally losing the fight with the rise of the middle class. There were enough reasons that the system naturally became unfitting for the direction the society was heading. First of all, the Normans whose nobles primarily formed the feudal class in England after the Conquest in 1066 were, in consequence to the loss of Normandy, slowly losing their continental identity so as the connection with their French relatives. The intermarriages with the Anglo-Saxons and their political isolation on the Islands made them lose their original language, their former ties and they eventually co-created something that could be called a new homogenous English society.[51] This process was significantly supported and accelerated by the middle class gaining both in numbers and economical significance.[52] Thanks to the shift from peasantry to craftsmanship and trading, more and more people were

[50] Williams 269.

[51] Fisiak 68-71.

[52] Celia M. Millward, *A Biography of the English Language* (San Diego: Harcourt Brace College Publishers, 1996) 221.

moving to urban areas and the larger cities became politically influential due to the fact they were financially strong.[53] Logically, the nobles had to suddenly compete with an economical power of the low-born citizens who had climbed the social ladder thanks to their trading and business skills.[54]

In consequence, they had to adapt to the new tendencies and could not just rely on their under-tenants or villeins, who did not have to simply accept the conditions that they were bound to the fief with no other possibility whatsoever anymore. The House of Commons which had been developing since the Edwardian reforms at the end of the 13th century was officially established in 1341 and since then was gaining in influence largely due the social shifts described above. To sum it up, a great leap forward towards the more complex economical system naturally brought changes in legislature and politics and by the beginning of the 16th century, feudalism lost its fundamental control.

Another important reason was the abrupt change in the relationship with Rome. Henry VIII cut off all ties with the Roman Catholic Church and the nation progressively became protestant. Furthermore, the political influence of the clergy was reduced during the process of Reformation.[55] In result, neither the Pope, nor his clergy had any direct influence on the internal political problems. While Rome played an important role during the First Barons' War, it could not mix with English internal issues anymore. Paradoxically, John advocated the excessive taxation with his duty to serve the Pope and go on a crusade whereas his financial difficulties were caused partly by his brother Richard fighting for Rome. On the other hand, Charles claimed the forced loans in order to support England's involvement in the Thirty Years' War, therefore fighting against Rome and the catholic nations.

The most important difference between the appreciation of *Magna Carta* in the 13th and the 17th century therefore lies in the fact than in Renaissance, most of the nation was already part of political life because of the social shifts that were supported by England's relative religious autonomy, while in 1215 it was certainly not.

[53] Millward 219.

[54] Williams 292.

[55] Millward 221-222.

In short, the events that led to *Magna Carta* involved the monarch and his nobles, with Rome having the influential outside power, while in the case of *the Petition of Right*, the King had to face the concerns of the whole nation with no one else interfering with the conflict. In this light, Coke simply gave *Magna Carta* a new meaning corresponding to the contemporary circumstances.

It is important to contemplate the very progressive legal logic that Coke uses in his arguments. He does not pay too much attention to the historical context, but still can successfully operate within it. He extends the law to involve issues that came after the granting of the charter, in the way it is common in modern law, where every previously not encountered matter somehow falls under the existent legal system. For instance when he comments on the "liberties," he says that:

> It signifieth the freedomes, that the Subjects of England have; for example, the Company of the Merchant Tailors of England, having power by their Charter to make ordinances, made an ordinance, that every brother of the same Society should put the one half of his clothes to be dressed by some Clothworker free of the same Company, upon pain to forfeit and it was adjudged that this ordinance was against Law, because it was against the Liberty of the Subject, for every Subject hath freedome to put his clothes to be dressed by whom he will, And so it is, if such or the like graunt had been made by his Letters Patents.[56]

Guilds or companies gained such recognition as he uses in his example much later than 1215,[57] but his statutory reading of *Magna Carta* allowed him to stress the rights of individuals within the companies and their legislature. What is, however, so fundamental in this, is the fact that he uses a constitutional premise in the time where there was no constitutional law as we know it. In a way, he fathers the constitutional functionality of *Magna Carta*, by raising it above every other law within the legal hierarchy.

[56] Coke, *Vol. 2* 220.

[57] Williams 253-254.

Coke uses this extension of *Magna Carta's* application throughout his polemic and he achieves a quite persuasive reasoning. For example his commentary on clause 39, concretely the phrase "no freeman" uses an argument that admits a certain hierarchy is in place as he claims: "This [freeman] extends to Villeins, saving against their Lord, for they are free against all men, saving against their Lord."[58] On the other hand, he goes as far as to grant rights to the villeins and calling them, to a limited extent, freemen. This application as, paradoxical as it is, however, only strengthens his initial argument concerning the rights of the "unlimited freemen".

His skilful rhetoric[59] gives the impression that he can simply do without the historical context since he backs his premise with the argumentation that in fact originates in it. This logical twist operating in both ways provides him with a space to move freely within the textual form without any contextual restrictions. In reality, Coke had a long career as the Chief Justice of King's Bench and Attorney General and he was by no means just a romantic truth seeker and defender of human rights as it may seem from the very emotional events accompanying *the Resolutions* and the granting of *the Petition of Right*. Usage of sophisms and pathos in speeches were not unfamiliar to him. For instance, William Johnson, Coke's 19th century biographer, comments on his 1603's prosecution of Sir Walter Raleigh for treason: "There is, perhaps, no reported case in which the proofs against the prisoner were weaker than in this trial [...] never was an accused person condemned on slighter grounds"[60] while Harry Stephen adds "This case was no case at all [...] It supports the general charges in the indictment only by the vaguest possible reference to 'these practices,' and 'plots and invasions' of which no more is said."[61] Even though, it is not in place to condemn Coke for this case as he was under a great deal of pressure from the King being Attorney General and therefore basically his subordinate, this example shows that Coke possessed a powerful weapon in his experience with legislative and judicial practices. As Allan Boyer remarks Coke was always privileging rhetoric and also was

[58] Coke, *Vol. 2* 218.

[59] Allen Dillard Boyer, "'Understanding, Authority, and Will': Sir Edward Coke and the Elizabethan Origins of Judicial Review," *Boston College Law Review Vol. 39, Issue 1, No. 1* (Boston: Boston College, 1998).

[60] Cuthbert William Johnson, *The Life of Sir Edward Coke, Lord Chief Justice of England in the Reign of James I: With Memoirs of his Contemporaries* (London: Henry Colburn, 1845) 157.

[61] Harry L. Stephen, "The Trial of Sir Walter Raleigh: A Lecture Delivered in Connection with the Raleigh Tercentenary Commemoration," *Transactions of the Royal Historical Society* (London: Royal Historical Society, 1919) 175.

more concerned about what the law may be than about the actual practice.[62] The fact that Coke wrote most of his works about *Magna Carta* as early as the beginning of the 17th century when he was a loyal King's attorney and his involvement in Sir Walter Raleigh's case illustrate that he was very astute in using his interpretations of the law to suit the current purpose.

Nevertheless, the most important point of this contemplation is that although in reality Coke committed quite a few mistakes in incorporating historical, legal and linguistic difficulties into his readings, he would have not been able to use *Magna Carta* as a precedent if there had not been a fitting social environment for it. Being a skilful lawyer and politician, he found a way to implant his arguments into the text of *Magna Carta*. From this point of view, *Magna Carta* gained its powers thanks to the evolution of medieval society and therefore its misinterpretation was only a natural outcome of this shift. As mentioned already in chapter 2, it is difficult to conclude exactly to what extent his reasoning was utilitarian, self-deceptive and calculating. However, there is enough evidence that his perception of *Magna Carta* was not as romantic as that of Stubbs or Hume two centuries later. Nevertheless, the situation in Renaissance England was naturally leading towards the necessity of such a document as *the Petition of Right*, or *the Bill of Rights* anyway, and if there was anything to look back on for inspiration, then it was nothing else than *Magna Carta*. *The Great Charter* itself had an example in Henry II's charter, therefore Coke primarily did the same thing as Stephen Langton in 1215; he brought up a precedent that the King is not above the law.

[62] Boyer 49-51.

Chapter 4:

A Historical Introduction: 1775-1791

In 1765, the British Parliament imposed a tax directed at the American colonies in order to finance the troops that fought in the Seven Years' War and were still present on American soil in the aftermath of the conflict. *The Stamp Act* was supposed to generate revenue from all printed materials such as newspapers, legal documents, bureaucracy documents etc. Since the colonists did not have any representation in Parliament, there were no MPs that would oppose the Act.[63] In consequence, a large wave of protests broke out in America and also in England since a significant number of manufacturers and merchants had their business based on contact with the colonies, and therefore financially suffered from the tax too. The colonists argued that all the statutory documents of Britain should apply to them in the same manner as to the citizens living on the British Islands. Therefore, they should not be taxed without their consent, in this case the consent of Colonial Government.[64]

The Act was soon repealed because the protests were negatively affecting the British economy, which was recovering from post-war depression. Nevertheless, in order to assure Parliament's supremacy over the Colonial Governments, the annulment of *the Stamp Act* was accompanied with the passing of *the Declaratory Act*, which asserted that "[Parliament] ought to have, full power and authority to make laws and statutes of sufficient force and validity to bind the colonies and people of America."[65] The victory in *the Stamp Act* dispute therefore turned sour for the colonists since they knew the consequences from the example of Ireland and *the Irish Declaratory Act* from 1719.

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[63] Charles A. Beard and Mary R. Beard, *History of the United States*, Project Gutenberg, Oct. 28 2005, Dec. 27 2011 <http://www.gutenberg.org/files/16960/16960-h/16960-h.htm>.

[64] Parliamentary Business, "No Taxation Without Representation," *UK Parliament Website*, Dec. 27 2011 <http://www.parliament.uk/business/publications/parliamentary-archives/archives-highlights/archives-stamp-act/>.

[65] The Parliament of Great Britain, "An Act For The Better Securing the Dependency of His Majesty's Dominions in America upon the Crown and Parliament of Great Britain," *Constitution Society*, 28 Dec. 2011 <http://www.constitution.org/bcp/decl_act.htm>.

It took less than a year for the fears of the Americans to materialize. A series of bills collectively known as *the Townshend Acts* were passed in 1767 and imposed further taxes on the colonies. Another outrage of fury among the colonists followed, and the Massachusetts Government (and after their example most of the other American colonies) sent a petition to King George III, asking him to repeal the Act. Since the King and Parliament rejected all the petitions, the riots and boycotts of British goods raised both in frequency and intensity. The epicentre of the disorders was Boston because the American Custom Board, which was supposed to oversee that *the Townshend Acts* were enforced, had its residence there. The conflicts became so tense that the British Army was ordered to Boston and the city was occupied by troops for more than a year. All the tensions culminated in the so called Boston Massacre in March 1770 when a number of civilians were killed by British soldiers.[66]

Around the same time, *the Townshend Acts* (concretely *the Revenue Act*) were partially revoked by Parliament, but it did not take the MPs too long to plant another seed of wrath by passing *the Tea Act* in 1773. This resulted in the infamous Boston Tea Party after which Boston was in consequence deprived of its self-government and seized by the British Army once again. After a brief period of relative peace, the British army found out that the Massachusetts militia was collecting weapons in Concord. Their effort to confiscate the weapons led directly to open conflict and so called Battles of Lexington and Concord. In the aftermath, the Boston area turned into a warzone and militias from other colonies joined the fighting which resulted in the bloodshed at the Battle of Bunker Hill.

The colonists failed in their attempt to secure themselves a hearing in the British Parliament and King George III proclaimed the Continental Congress (a convention of the delegates of the 13 American colonies) traitors by *A Proclamation for Suppressing Rebellion and Sedition*.[67] The Congress responded with *the*

[66] Beard.

[67] King George III, "A Proclamation, For Suppressing Rebellion and Sedition," *The U.S. National Archives and Records Administration*, Dec. 28 2011 <http://www.archives.gov/historical-docs/todays-doc/index.html?dod-date=823>.

Declaration of Independence on July 4, 1776[68] and the American War of Independence broke out.

Most of the fights subsided in 1781 when the British army surrendered to the joined forces of the Continental and French armies, however, the war ended formally in 1783 as the Treaty of Paris recognized the United States as a sovereign nation. In May 1987, delegates from all the states met in Philadelphia to discuss and draft *the United States Constitution*. The document that owes a lot not just to *Magna Carta* and *the Bill of Rights*, but also to Sir Edward Coke, William Blackstone and John Locke[69] was fully ratified and adopted as a statute in June 1788. The first ten amendments of *the United States Constitution* under the collective name *the Bill of Rights* were drafted in September 1789 and ratified in December 1791.

[68] Thomas Jefferson, John Adams, and Benjamin Franklin, "The United States Declaration of Independence 1776," *The U.S. National Archives and Records Administration*, Dec. 28 2011 <http://www.archives.gov/exhibits/charters/declaration_transcript.html>.

[69] Alex Tuckness, "Locke's Political Philosophy," *The Stanford Encyclopedia of Philosophy*. Winter 2011, 25 Dec. 2012 <http://plato.stanford.edu/archives/win2011/entries/locke-political/>.

The American Legacy

The American colonists had learned to appreciate the legacy of *Magna Carta* long before the conflicts with the British Empire. Interestingly enough, it was directly through Sir Edward Coke who was the principal drafter of the 1606's *Virginia Charter*.[70] His formulation of the document enabled people born and living in the colonies belonging to the British Empire to posses the same rights as their compatriots from the British Isles. Paradoxically, since this happened before the events preceding *the Petition of Right*, neither Parliament, nor the King were at the time aware that this would give the colonies an opportunity to refer to Coke's interpretation of Magna Carta in the future to come. It is, however, possible that Coke already had this in mind since his most notable work *The Institutes of the Lawes of England* which contains his most precise analysis of *Magna Carta* was being shaped around the same time, although it was not published sooner than 1628.[71]

Nonetheless, constitutional law took a very concrete shape during the first century of the colonization. *Magna Carta* became universally considered statutory and was complemented by many important constitutional documents coming one after another in a short period of time. *The Petitions of Right, Habeas Corpus, the Bill of Rights* and *the Act of Settlement* all came within 75 years; therefore the Americans had enough precedents to look up to while drafting their own, local bills. Already the composition of 1646's *Body of Liberties* which was passed by the self-government of Massachusetts was accompanied by a broad re-examination of *Magna Carta*. Furthermore, to make sure that the laws are in agreement with English Common Law, the General Court of Massachusetts sent a letter to the British Parliament which contained their draft paralleled with the precedents.[72] However, the first effort to incorporate *Magna Carta* into American legislature took place 8 years earlier with the *Act of the Assembly of Maryland* recognizing *Magna Carta* as the part of the law of the province which was disallowed by the King. Many other provinces followed with bills, acts and statutes referring to *Magna Carta, Habeas Corpus* and *the Petition of Right* founding their basic principles on these documents.

[70] Sir Edward Coke, *The Selected Writings and Speeches Vol. 1,* ed. Steven Sheppard (Indianapolis: Liberty Fund, 2003) 40.

[71] Coke, *Vol. 1* 73.

[72] Hazeltine 137.

It is sufficient to mention, that Maryland's Act was not the last instance in which the law was revoked by the King or did not get the royal assent.[73]

Apparently, the King was quite reluctant regarding this matter as in many cases he felt that his prerogative was being endangered. This, however, does not mean that the Acts and Codes became invalid. They were used within the local, colonial law, but were legally powerless against the British Parliament or the monarch.[74] The fact that both the King and the Parliament were very cautious and reserved in relation to the incorporation of the British constitutional documents in to colonial law, points to the conclusion that they were aware that these charters might be counterproductive in retaining the upper hand of the British Isles over their dominions. In any case, they had two examples in history when these documents determining the relations between the individual subjects proved not just important but eventually decisive. There was plainly an apprehension that the colonist might eventually turn out to be like the Barons were for John, or what Parliament was for Charles. The 18th century situation was simply different. There was no need for *Magna Carta* to rise out of nowhere and be brought to light as all the parties that could have possibly been involved in any constitutional conflict were quite aware of it. It became somewhat a ticking bomb that everyone wanted to be on the opposite side of in case it exploded.

This assumption, nevertheless, led to a fierce and tangled polemic during the events that culminated in the American War of Independence. Although this time there was a universal consensus on the meaning of *Magna Carta* (basically Coke's interpretation), and what was unclear happened to be fixed by *the Habeas Corpus, the Bill of Rights* and *the Act of Settlement*, there was no principal agreement on to whom it applies to. While the colonists felt that the *Stamp Act* and *Townshend Acts* were violating their constitutional rights referring to *the Virginia Charter*, Parliament and the King argued that it does not. Even though there were many efforts to restrict the legacy of *Magna Carta*, which was firmly embed in the systems of colonial law and government, to the local application, there was not an explicit dismissal of the notion that the colonists posses the same constitutional rights as the

[73] Hazeltine 137-140.

[74] Hazeltine 138.

people in England. The principal argument of the English was that *Magna Carta* and the other statutes regulated the relationship between the King and Parliament, which represents the rights of the common people. The problem was that the colonists did not have any representatives in Parliament therefore could not directly look after their interests.[75] Therefore, there was, indeed, a bit of a different reading of *Magna Carta* by the colonists. Not in the principle, however, but in the way they could enforce the rights that were guaranteed to them. There is a certain parallel with Coke's retrospective logic as the Americans felt that since they were not represented in any of the Houses on English soil, any act that concerns them must be consented by their local government. A part of the speech that Samuel Adams delivered to Boston representatives in 1764 instructing the representatives of the Massachusetts Assembly to oppose *the Sugar Act* (the other bill imposing taxation on the colonies, which was not met with such a wild reaction as *the Stamp Act*) sums up the colonial approach towards the problem:

> This we apprehend annihilates our Charter Right to govern & tax ourselves--It strikes at our Brittish Privileges, which as we have never forfeited them, we hold in common with our Fellow Subjects who are Natives of Brittain: If Taxes are laid upon us in any shape without our having a legal Representation where they are laid, are we not reduced from the Character of free Subjects to the miserable State of tributary Slaves?[76]

Adams, later one of the Founding Fathers, was the embodiment of opposition to "no taxation without representation" and his famous scream "Treason" and "Magna Carta" as a response to the passing of *the Declaratory Act* symbolizes the American perception of the British constitutional rights.[77]

The Declaration of Independence authored by Thomas Jefferson referred to natural and god-given rights in its famous introduction:

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[75] Parliamentary Business, "No Taxation Without Representation," *UK Parliament Website*, Dec. 27 2011 <http://www.parliament.uk/business/publications/parliamentary-archives/archives-highlights/archives-stamp-act/>.

[76] Samuel Adams, "Instructions to Boston's Representatives," *Samuel Adams Heritage*, 23 Dec. 2011 <http://www.samuel-adams-heritage.com/documents/samuel-adams-instructions-to-bostons-representatives.html>.

[77] F.A. Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press, 2011) 261.

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, which among these are Life, Liberty and the pursuit of Happiness. [78]

Nevertheless, some of its phrases derive directly from *Magna Carta* or its contemporary reading, for instance:

> He [King George III] has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their Acts of pretended Legislation [...] For imposing Taxes on us without our Consent, For depriving us in many cases, of the benefits of Trial by Jury [...] For abolishing the free System of English Laws in a neighbouring Province, establishing therein an Arbitrary government, and enlarging its Boundaries so as to render it at once an example and fit instrument for introducing the same absolute rule into these Colonies[79]

As a matter of fact, *the Declaration of Independence* uses very similar argumentation as *Magna Carta* in its original purpose. So as the Barons listed the grievances towards the monarch, so did the colonists. While the Barons were backed by the feudal system and the customs arising from Henry's charters, the Americans were building their claim on the basis of constitutional history and their Puritan doctrine. In both cases, these tools were complementary. In fact, the platform that stood behind *the Declaration of Independence* derived both from English and Separatist heritage. Naturally, the national self-consciousness and the American identity itself were very closely tied to the theological question. While society in Europe had developed a distinct social hierarchy and a class system loosely built on the obsolete feudal system, American society was formed bearing this legacy only to a limited extent. Alexis de Tocqueville asserts in his famous publication *Democracy in America* that the political development towards democracy and capitalism throughout the 19th century in the United States owes a lot to the Puritan ideology of

[78] Jefferson

[79] Jefferson

the Pilgrim Fathers,[80] which forms a fertile ground for the political philosophy of John Locke.[81]

In this light, the colonists' logic combines theological God-given rights with constitutional rights. The Americans depended both on their British ancestry and their unique identity originating from the first settlers. The democratic principles and so the notion of self-governance was rooted deeper in the colonists than it was in the people from Europe, and their perception of *Magna Carta, Habeas Corpus* or *Bill of Rights* was less secular and more theological. Thus in a way, they followed a similar genesis as the Barons who derived their rights from the fixed system of Norman feudalism and legislatively settled relationship with their monarch. Although the two events operate on the basis of a different principle, they could be paralleled as far as the logic of argumentation is concerned.

Nevertheless, the document that established the values, originating in *Magna Carta* and its historical applications and interpretations, on American soil is undoubtedly the set of amendments to *the United States Constitution*, so called the *Bill of Rights*. The drafting of the document was accompanied by a very passionate debate with, for example, Alexander Hamilton, which driven by more radical adherence to John Locke's philosophy, stresses that:

> It has been several times truly remarked that bills of rights are, in their origin, stipulations between kings and their subjects, abridgements of prerogative in favor of privilege, reservations of rights not surrendered to the prince. Such was Magna Carta, obtained by the barons, sword in hand, from King John. Such were the subsequent confirmations of that charter by succeeding princes. Such was the Petition of Right assented to by Charles I., in the beginning of his reign. Such, also, was the Declaration of Right presented by the Lords and Commons to the Prince of Orange in 1688, and afterwards thrown into the form of an act of parliament called the Bill of Rights. It is evident, therefore, that, according to their primitive signification, they have no application to constitutions professedly founded upon the power of the people, and executed

[80] Alexis De Toqueville, *Democracy in America* (Fairford: The Echo Library, 2007) 23.

[81] Tuckness

> by their immediate representatives and servants. Here, in strictness, the people surrender nothing; and as they retain every thing they have no need of particular reservations. We are the people of the United States, to secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America. Here is a better recognition of popular rights, than volumes of those aphorisms which make the principal figure in several of our State bills of rights, and which would sound much better in a treatise of ethics than in a constitution of government.[82]

This illustrated how the evaluations of the constitutional legacy became rather inconsistent after the separation from the monarch, and at the outset of a brand new political system. Naturally, the United States were not subjected to the British Empire anymore, so there was not such a need to accentuate the precedent to support the right for disobedience. On the other hand, the American legislature was a descendant to the British one to an extent that it simply could not be ignored. Hamilton and others saw the constitution as something that was not necessary in the current political climate and rather limiting. Eventually, *the Bill of Rights* is a sort of compromise between the inclination towards the British political and legislative heritage and the new way of thinking at the dawn of American democracy. With a bit of simplification, The First Amendment reflects upon Coke's 1628's actions by guaranteeing the right to petition, The Third and Forth repeat *the Petition of Right's* restriction of the martial law, while The Fifth, Sixth, Seventh and Eighth go as far back as to cite *Magna Carta* (although rather in Coke's interpretation's sense) and concern the trial by jury, due process of law, arbitrary imprisonment, and excessive bails and punishments.[83]

On the other hand, the other provisions guaranteed by The First, Second, Ninth and Tenth Amendments suit rather the original philosophy of the new-born United States. The First and Second Amendments speak of religious freedom, freedoms of speech and press, and a right to assembly or to bear arms. Most importantly The Ninth Amendments deal with the issues arising from the democratic

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[82] Alexander Hamilton, "The Federalist 84. - Certain General and Miscellaneous Objections to the Constitution Considered and Answered," *Constitution Society*, 11 Nov. 2011, 23 Dec. 2011 <http://www.constitution.org/bcp/decl_act.htm>.

[83] James Madison, "The Bill of Rights 1791," *The U.S. National Archives and Records Administration*, Dec. 29 2011 <http://www.archives.gov/exhibits/charters/bill_of_rights_transcript.html>.

system of government,[84] (which is distinctly established through *the Constitution of the United States*)[85] therefore in a way resolves the problems brought up by Hamilton: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[86] The Tenth Amendment continues in a similar manner ascribing further democratic rights, not delegated to the United States as a whole by *the Constitution*, to the individual states or people as such. [87]

The United States' Bill of Rights therefore marks the moment in the constitutional history, when the statute is used to govern the rights between individual people rather than between particular social classes and monarchs, or common people and monarchs. Although the United States had to go a long way yet to overcome the evils of slavery and segregation, and crystallize into the democratic country in a modern sense, this remote descendant of *Magna Carta* set them on the right track. Many countries have followed the example, and at the end of the day, *the United States' Bill of Rights* and *the Declaration of Independence* served a great deal during the formation of *the United Nations' Universal Declaration of Human Rights*.[88] Even though, more of in a form of an ancient spirit, *Magna Carta* has forced its way into the statutes of 193 countries all around the world.

[84] Madison.

[85] United States Congress, "The United States Constitution 1788," *The U.S. National Archives and Records Administration*, Dec. 29 2011 <http://www.archives.gov/exhibits/charters/constitution_transcript.html>.

[86] Hamilton.

[87] Madison.

[88] "Fiftieth Anniversary of the Universal Declaration of Human Rights," *United Nations' Department of Public Information*, June 1998, Dec. 30 2011 <http://www.un.org/rights/50/broch.htm>.

Chapter 5:

Conclusion

Magna Carta's road throughout constitutional history has been long, complicated and anything but black and white. However, the fact that 3 of its original 63 clauses are still in force as a part of the British uncodified constitution is by no means the only and the most important trail the document has left for further generations. *Magna Carta* absorbed a great deal of spiritual power that greatly helped to standardize human values and rights we now consider self-evident, indisputable and natural. From a historical point of view, the various metamorphoses of the charter might seem disparate and one could get the impression that *Magna Carta* is nothing but a paradoxical farce. That it is something that is famous mostly because it was simply misapprehended by far too many and has a genesis that is certainly neither linear nor logical but rather clumpy and accidental. Partly, this is all true. There has been a lot of evidence presented to illustrate how ignorance, misconception, reading out of context, cultural, social, legal and philosophical environment and development or partial blindness caused by personal motivation could twist the meaning in a way so that the original one gets lost in the process. On the other hand, using Saussurean terminology, the document has not changed much as a signifier. It, nonetheless, changed a lot in relation to what it signified. It is not of such importance what the mechanisms were that have driven the shift. In this sense the evolution was perfectly natural.

History is changing and society is developing in such a complexity that the process cannot be simplified to the extent as to claim that it is coherent, synchronous, consistent, and intended. For instance the Great Plague hastened the course of urbanization, Christopher Columbus discovered America while trying to find a new way to India, and the Russian winter greatly helped to defeat Adolf Hitler's armies. All of these incidents have triggered a chain reaction in the historical development, and all of these events have had consequences of great importance. As far as the outcome that we have inherited is concerned, there is no need to ask how or why it happened. It is, nevertheless, not sufficient to relativize *Magna Carta's* journey in

that manner although it was necessary to picture that historical development is in many cases dependent rather on accidents than intended and logical progression.

Even under the most rigid and critical scrutiny, *Magna Carta* deserves praise for more than just being an accident that proved to be of a fundamental impact. Although the Barons acted undoubtedly in self-interest, they have set an example of a principle that accompanied all the incidents that would eventually lead to the rise of democracy. The same principle which would David Henry Thoreau more than 700 years later describe in his essay *On the Duty of Civil Disobedience*.[89] The same principle adopted by Alice Stokes Paul, Mohandas Gandhi, Martin Luther King Jr. or Henry Milk. *Magna Carta* did not embody just the legacy that one should stand up against the oppressive monarch or government. It also set an example that it is possible. Furthermore, the notion could finally connect with the developing legal system as the events of Runnymede materialized in the charter in a way that could more directly influence the upcoming generations.

Magna Carta was certainly not the first document that might be considered proto-constitutional. There were older important documents in Eurasia such as the Sumerian *Code of Ur-Nammu*, the Babylonian *Code of Hammurabi*, *the Hittite Code*, *the Roman Twelve Tables* or the Greek *Solonian Constitution* or *the Constitution of Athens*. Even in England, there were predecessors and precedents to *Magna Carta* such as some of the law of Edward the Confessor and Henry I's *Charter of Liberties*. The uniqueness of *the Great Charter* lies in the way it was achieved and in the fact that it was formulated by another party than the monarch, or any other governing body.

Sir Edward Coke misunderstood and misinterpreted many things in the document. He also built his argument on an inaccurate premise. Nevertheless, he applied *Magna Carta* to the contemporary situation and therefore made it refer to what it should rather than what it in reality did. Generally, any meaning is a very fragile concept, and it was even more fragile in the time when legal language was still in a cradle and when the unambiguous correspondence to reality was scarce. In this

[89] Henry David Thoreau, *Walden; or Life in the Woods and on the Duty of Civil Disobedience* (New York: Holt, Rinehart and Winston, 1963) 281-304.

sense, it is not too surprising that *Magna Carta* was provided with an updated reading more than once.

It cannot be said the 1215's *Magna Carta* did not have itself any impact. Even if there were no Coke or Madison and others, it still helped largely to establish the British Parliament and prepared the ground for further arrangements of the relationship between the monarch and his subjects. Already the following events in the 13th century showed that the document provided the people with more consciousness and made them more aware and cautious in relation to their rights. In reality, *Magna Carta* just outlined the shifts that seemed to be anything but natural. The voice of the people as such would eventually be heard anyway, but the document was by all means a perfect tool to regulate this process. In all cases, it was not just the Barons and Stephen Langton who formulated the charter. From the current point of view, it was also Edward Coke, John Selden, John Locke, Thomas Jefferson, James Madison and basically everyone who was involved in any of the events which accidentally, deliberately, consciously or unconsciously made *Magna Carta* rise on several occasions. It was everyone's hand who made it act and help to move closer to the principles of democracy.

In the end, if there is anything that is eternal and fundamental about *Magna Carta*, then it is in its symbolical value. By the time the colonists stood up against their oppressors, *the Great Charter* had already almost archetypical nature embodying freedom, law and justice. It was not *the Petition of Right, the Bill of Rights, the Habeas Corpus, the Act of Settlement* or any other successor of *Magna Carta* which sprung to the minds of the Americans when they felt that their rights were being repressed. It was the original document itself which signified won liberties, although a long time ago and on a smaller scale. The spirit of *Magna Carta* that has accumulated and formed over the centuries is now retained in a constitutional law as such. It is a symbol that sets a mirror to society and shows how long distance we have covered in our pursuit of democracy and humanism. The complex legacy of *the Carta Libertatum* will live on and will prove many more times just how important and fundamental the principles it holds are.

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