

MAGNA CARTA AND ITS HEIRS

TOMMASO EDOARDO FROSINI*

1. Can a legal document dating back 800 years still influence contemporary legal systems? As we celebrate the eight hundred year anniversary of the *Magna Carta*, this question needs to be answered.¹

It was on June 15, 1215, on the “*meadow that is called Runnymede, between Windsor and Staines*” that England’s Barons and clergy men asked – or rather forced – King John Lackland to issue a document that acknowledged warranties and liberties, which were construed as limitations on the political power.² The document was the outset of “liberal constitutionalism,” which soon would pave the way for the English legal system, and many other legal cultures as well.

Battaglia has written³ that the *Magna Carta* is but one of many agreements that were sworn between kings and barons in which barons complained that their rights had been breached, and sought protection against abuses. Of course, the *Magna Carta* would leave its own mark: with *Magna Carta*, the royal power’s absolutism ended. Feudal nobles, who formed the Great Council, now constrained this former absolutism. The Commons’ representatives would later join the nobles.

Such a reading of *Magna Carta* acknowledges its relevance, but freezes its importance to the date of its drafting in 1215. I would argue the *Magna Carta* enshrined a wisdom that extends beyond the document itself, paving the way for future legal

* Professor of Public Comparative Law, University of Suor Orsola Benincasa, Naples.

¹ All the quotations from the *Magna Carta* are taken from the online English version that is available at: <http://www.bl.uk/collection-items/magna-carta-1215> (last visited: 26 November, 2015).

² See the historical-constitutional reconstruction provided in “Magna Carta [1215]”, edited and with introduction by A. Torre, “Tutti gli uomini di re Giovanni, Macerata”, 2007. But see also the classic works by R. Thomson, “Historical Essay on Magna Carta”, London, 1829, and W.S. McKechnie, “Magna Carta: A Commentary on the Great Charter of King John”, Glasgow, 1905.

³ See F. Battaglia, “Le Carte dei diritti”, 2° ed., Florence, 1946.

achievements. In order to fully appreciate the *Magna Carta*, we must read it in its full historical scope, with a prospective view instead of a retrospective one. In fact, *Magna Carta* has evolved through new interpretations that specific time periods have accorded it. James C. Holt said it best when he stated, “*the history of Magna Carta is history not only of a document but also of an argument.*”⁴ This logic captures constitutionalism in a nutshell. Following McIlwain, it sketches the ideas of *gubernaculum* and *iurisdictio* as they have transitioned from the old understanding of constitutionalism to the modern one.⁵

The one-page Latin document called *Magna Carta Libertatum*, which we conventionally divide into sixty-three clauses, has the historical merit of having planted the first seeds of the then-unexplored ground of fundamental warranties. Through the centuries the tree of individual liberties would grow from those seeds. Such a tree would, however, need pruning to continue to grow and ultimately to thrive. *The Magna Carta Libertatum* was reenacted in 1216, 1217, 1225, and finally in 1297, when Edward I had it translated into English and reproduced as the first *Statute Roll* of the Kingdom. This translation and new embodiment gave the document power and stability.⁶

The sovereigns of the fourteenth century made *confirmationes* to *Magna Carta*. Under the realm of Edward III Parliament enacted the *Six Statutes* (1331-1354), which reinterpreted many of the *Magna Carta*'s clauses and widened its scope.

Therefore, at the end of the fourteenth century, the *Magna Carta* effectively became a legal document and was incorporated into the legal system of the Kingdom of England. It became the Charter that “*determined the idea which was at the foundation of the Britannic culture regarding the relations between rulers and the governed ones.*”⁷ That specific idea of governance, as constitutionalists would say, would develop into the original expression of *political obligation* and into a balance between liberty and equality, enabling the Britains to heed social needs⁸.

Later in this paper, I will consider more in depth the legacy of *Magna Carta* and its influences on constitutionalism. Now, however, I would like to highlight two issues of

⁴ See J.C. Holt, “*Magna Carta and Idea of Liberty*”, Malden, 1982.

⁵ This reference is to C.H. McIlwain, “*Constitutionalism: ancient and modern*”, Ithaca, 1947.

⁶ See the “*Conferma della Magna Carta da parte di Edoardo I (10 ottobre - 5 novembre 1297)*”, in L. R. Lettieri (ed.), “*La Costituzione inglese*”, , Florence, 1946, pp. 108-110.

⁷ On this note, C. Martinelli, “*La Magna Carta tra storia del diritto e diritti costituzionali*”, in *Percorsi costituzionali*, 1-2, 2015, p. 221; on this issue see F. Thompson, “*Magna Carta Its Role in the Making of the English Constitution 1300-1629*”, Minnesota, 1948.

⁸ See V. Frosini, “*La ragione dello Stato. Studi sul pensiero politico inglese contemporaneo*”, Milano, 1963.

constitutionalism that both stem from *Magna Carta*: the origins of Parliament and *libertates*.

2. To understand the origins of Parliament and of parliamentarism, we must consider Simon of Montfort's summoning a new Parliament (*Magnum Parliamentum*) in January of 1265. This event would not have been possible without the prior execution of the *Magna Carta*: clauses 12 and 14 played a crucial role in establishing the new assembly, both in its function and its form.⁹

Clause 12 provides, "No tax (scutagium) or aid (auxilium) may be levied in our kingdom without its general consent (for common consilium regni) [...]." Clause 14, specifies that:

To obtain the general consent of the realm for the assessment of an auxilium or a scutagium, we will cause the archbishops, bishops, abbots, earls, and greater barons to be summoned individually by letter [as well as] those who hold lands directly of us [...] When a summons has been issued, the business appointed for the day shall go forward in accordance with the resolution of those present, even if not all those who were summoned have appeared.

Here, individual and personal consent overcomes a potential absence. This is a novel achievement. The assembly has a special solemnity that justifies that the consent of those who are present prevails over the silence of those who are absent. The clauses also exert a check on the government, and convey the idea that taxation is permissible only with consent. This conception of the tax power would influence future developments of English parliamentarism.¹⁰ It would also later develop into the constitutional idea that there should be *no taxation without representation*.

The idea of Parliament as an autonomous body, endowed with legislative power, was yet to come. Parliament was, rather, understood as a gathering of dignitaries, each of whom retained his individual capacity and defended his privileges. Parliament simply provided these dignitaries with a form of institutional representation: the Lords represented the social classes before the Court and the bureaucracy of the King. The original Parliament did create, however, a political relationship between the royal power,

⁹ For this point, see G.G. Florida, "La costituzione dei moderni. Profili tecnici di storia costituzionale, I. dal medioevo inglese al 1791", Torino 1991, p. 36.

¹⁰ See L. Sturlese, "Il re e i lords nel parlamento medievale inglese", presentation by G. Maranini, Milano 1963, p. 33 ff.. See also, P. Spufford (ed.), "Origins of the English Parliament", London, 1967.

on one side, and the dignitaries *summoned to Parliament*, on the other.¹¹ The 1295 *Model Parliament* stabilized the concept of representation, creating a reference “model” for the modern constitutional practice of parliamentarism. If we consider the establishment of certain election rules (“*the Parliament is composed of two representatives from each village or county*”), and how parliamentary sessions were called, we notice that meetings were routinely, and not simply occasionally, held.¹²

By the end of the thirteenth century, the English system had an advanced institutional model of assembly. Its members represented sizable portions of the classes and territories of the Kingdom. Meanwhile, the *common law* of the Courts brought the nation more and more under one rule of law by «enforcing fairness-based rules that operated among individuals and non-subordination of the individual to the state»¹³.

The history of parliamentary institutions and the development of parliamentarism more broadly are complex and intricate, and beyond the scope of this paper. It is, however, safe to say that parliamentarism in general is rooted in England, thanks to the *Magna Carta*. Parliamentarism has gone through a long journey, first existing as a custom and then becoming a political necessity, until it finally matured into a detailed and stable state institution, which safeguards freedom and democracy.

3. Turning now to *Libertas*, we cannot begin to address the term without mentioning Edward Coke. In the seventeenth century Coke exalted the *Magna Carta* as a tool of parliamentary resistance to the absolutist pretensions of the Stuarts. In doing so Coke emphasized the meaning of *libertas*: it was the “law of the kingdom”, “freedom of the citizen” and “immunity and privilege”, all protecting economic initiatives.¹⁴

The word *Libertas* occurs eleven times in the *Magna Carta*. When the document mentions *liber homo*, however, it does not mean “free man.” At the time, a *liber homo* was not any individual of the kingdom, but only those individuals who were land owners, merchants, craftsmen or soldiers.

Clause 1 affirms:

¹¹ See V. Frosini, “La “Magna Carta” dopo sette secoli”, in Id., “Costituzione e società civile”, II ed., Milan 1977, p. 112.

¹² See L. Sturelse, *supra*, note 10. See, also M. Galizia, “Caratteri del regime parlamentare inglese del Settecento”, in “Studi in memoria di Carlo Esposito”, Padua, 1974.

¹³ C. Martinelli, *supra*, note 7, p. 220.

¹⁴ See the comment of Edward Coke in N. Matteucci, “Antologia dei costituzionalisti inglesi”, Bologna 1962, p. 60; on this issue, see S. Sheppard, “The Selected Writings of Sir Edward Coke”, Indianapolis, 2003.

the English Church shall be free, and its rights are intact and its freedoms inviolable” and “We have also granted to all free men of our kingdom [...] all the freedoms that are listed below, which will be owned and held by them and their descendants.

With the term “free men”, the clause alludes to the categories mentioned above. In other words, *Magna Carta*’s “freedoms” applied to the specific individuals that people in the year 1215 understood should be free. Later changes and interpretations of the *Magna Carta* expanded the concept of *liber homo* to encompass any individual, without further stipulations. The definition of the term transitioned from old libertarianism to modern liberalism, in part thanks to the efforts of intellectual figures such as Edward Coke.

Clause 39 lays the foundation for constitutionalism by saying,

No man shall be arrested or imprisoned, or deprived of the goods, or exiled, or in another way punished [...], except by lawful judgment of his peers or by the law enforcement.

Later, this concept would be enshrined in the *Petition of Rights* of 1628 and, later still, in the law of *Habeas Corpus*, which to this day protects the individual freedoms of the British.

It has been written that «concepts and foundations of the *common law* like *due process of law*, also found in the Fifth Amendment of the U.S. Constitution, *trial by jury*, and the principle of legality stem from this clause»¹⁵.

We also must read clause 39 in conjunction with clause 40, which declares, “*We do not deny or defer right or justice to anyone.*”

Finally, we should remember and quote clause 20, which lays out the principle of proportionality, “*A freeman shall not be amerced for a slight offence, except in accordance with the gravity of the offence.*” But the next sentence is even more remarkable: “*and for a grave offence he shall be amerced in accordance with the gravity of the offence, yet saving always his contentment; and a merchant in the same way, saving his merchandise.*”

On the other hand, according to clause 21, Counts and Barons shall be amerced by their peers, according to the degree of the offence. The *Magna Carta*’s substantial legacy for modern constitutionalism is encapsulated in the aforementioned clauses, as well as in a

¹⁵ On this point, see A. Torre, *supra*, note 1, p. LV.

few others.¹⁶ As will be mentioned, Hazell and Melton's book focuses precisely on this feature.¹⁷

4. It is worth considering the multiple scholarly efforts to trace *Magna Carta's* historical genealogy back to England and all over the world. Such an attempt is extremely difficult, especially since *Magna Carta* is considered a symbol of constitutionalism, even its *Holy Grail*,¹⁸ and not simply a constitutional code whose rules could be transplanted into legal systems many centuries after its inception. Indeed, if we take a closer look, it is evident that it is the *Magna Carta's* principles, and not its clauses, that have left an everlasting mark on constitutionalism.

Some have suggested that we should distinguish the types of influences that *Magna Carta* has exerted, classifying these influences into direct and indirect, actual and symbolic ones.¹⁹ A direct and actual influence has been traced to the UK, where a few clauses are still in force. This influence has also been found in New Zealand²⁰ (in, for example, the *Imperial Laws Application Act* (1988)), and also in several American States (for example South Carolina (1778) and Virginia (1776)). , A direct and symbolic influence can instead be found within the debate on the U.S. *Bill of Rights* (for example in the statements of James Madison and Alexander Hamilton). Such an influence can also be found in the six Brazilian constituent assemblies, where the *Magna Carta* has been the most quoted constitutional document, particularly during the assembly of 1966-67.

An indirect and actual influence of *Magna Carta* can be found in modern Constitutions, with regards to legal protection, and in the text of the U.S. *Bill of Rights*. Indeed, the Sixth Amendment derives from clauses 39 and 40 of the *Magna Carta*. Finally, an indirect and symbolic influence occurs wherever a generic reference is made to the values of constitutionalism or the rule of law.

Of course, these classifications are useful at least to understand the attractiveness of *Magna Carta* as a constitutional document and as a constitutional argument. Despite its age, this document is still able to foster direct and indirect emulations in many different

¹⁶ Such as Clause 52.

¹⁷ See R. Hazell and J. Melton (eds.) *"Magna Carta and Its Modern Legacy"*, Cambridge, 2015.

¹⁸ J. Melton and R. Hazell, "Magna Carta... Holy Grail?", in R. Hazell and J. Melton (eds.) *supra*, note 17; on constitutional simbology, v. M. Neves, "La constitucionalización simbólica", Lima, 2015.

¹⁹ See R. Hazell and J. Melton (eds.) *supra*, note 17, p. 9 ff.

²⁰On this note, see, D. Clark, "The Icon of Liberty: The Status and Role of Magna Carta in Australia and New Zealand Law", in *Melbourne University Law Review*, 24, 2000.

ways. The document proves that the very first seed of constitutionalism was planted eight hundred years ago in the “*field called Runnymede, between Windsor and Staines.*”

I began by posing the following question: can an 800 year old legal document still exert an influence on contemporary legal systems? My answer is that it indeed can. Perhaps *Magna Carta* has become a myth, as we have said; but it is surely a necessary myth.²¹ Indeed, the *Magna Carta*'s heritage does not consist in the clear and accurate clauses that its text codified, but mainly in its spirit. By affirming the rule of law and the principle of separation and limitation of powers, *Magna Carta* gave rise to the subject of constitutionalism.

That's constitutionalism, for yesterday and today.

²¹ Cfr. C. Breay, “Magna Carta: Manuscripts and Myths”, London, 2002; for “necessary myth” see V. Bogdanor, “Magna Carta, the Rule of Law and the Reform of the Constitution”, in R. Hazell and J. Melton (eds.) *supra*, note 17, 25 ss.