

Talk for the Royal Geographical Society – Hong Kong

Speech by the Hon Chief Justice Geoffrey Ma: A Grail for All Seasons : Magna Carta¹

1. A cursory review of this month's activities in England will reveal daily events marking the 800th anniversary of Magna Carta.² This document was sealed by King John³ on June 15, 1215 in the presence of English bishops and barons⁴ in the last year of his reign, at a water meadow 20 miles west of London between Windsor and Staines called Runnymede. As part of the Magna Carta celebrations in England, the bishops and barons who “persuaded” the King to lend his seal are due to be tried on 31 July 2015,⁵ prosecuted and defended by a whole array of lawyers from the United Kingdom and the Commonwealth. The judges are

¹ I am indebted to the Judicial Assistants of the Court of Final Appeal: Mr Ian Chau Chi-hang (Barrister), Mr Thomas Wong Ka-ho (Barrister), Ms Lillian Li (Solicitor), Ms Candy Au Hoi-ki (Solicitor) and Mr Lavesh Prakash Kirpalani.

² The Great Charter.

³ 1199 - 1216.

⁴ Including the Archbishop of Canterbury, Stephen Langton who is often given credit with being the primary proponent of Magna Carta.

⁵ In Westminster Hall.

Lord Neuberger of Abbotsbury,⁶ Dame Sian Elias⁷ and Stephen Breyer.⁸

2. But what is the significance of Magna Carta, how did it attain its undoubted exalted and symbolic status, and why is it of modern relevance? The transformations of Magna Carta into a symbolic representation of the rule of law comprise the theme of my presentation. This will involve describing the event leading to its creation, then charting its progress and its transformations both in England and the United States into modern times and this will include its relevance to Hong Kong as well. Inevitably, this is very much an abridged version of the subject but I hope to provide at least a working, albeit superficial, knowledge of this document and its significance.

⁶ The President of the Supreme Court of the United Kingdom and a Non-Permanent Judge of the Hong Kong Court of Final Appeal.

⁷ The Chief Justice of New Zealand.

⁸ Associate Justice of the Supreme Court of the United States.

3. I begin by referring to the ancient civilizations. The great civilizations – Egypt, Assyria, Babylon, Phoenicia, Rome – came about essentially because humans saw a need to be in a community or a society. The desire to form a society carried with it the necessity of order. Order came in the form of leadership; in ancient times in the form of kings and emperors, usually having, according to them, godlike status. Laws – or the codification of societal norms governing the complex inter-relationship of members of a community (comprising both civil and criminal liabilities) – existed in ancient civilizations. I give two examples of what are acknowledged to be influential laws:-

- (1) My first example is the Code of Hammurabi.⁹ Hammurabi,¹⁰ who ruled in the First Babylonian Dynasty, had conquered the whole of Mesopotamia¹¹ by the time of his death. However, it is as a lawgiver

⁹ Located in the Louvre in Paris.

¹⁰ 1792 - 1750 B.C.

¹¹ Including Elam, Assyria, Isin. Mesopotamia is now in modern day Iraq, Iran, Kuwait, Syria and Turkey.

that he remains an important historical figure. His Code, which was inscribed on a stone slab, contained 282 laws, dealing with matters such as the presumption of innocence and the concept of *lex talionis* (“an eye for an eye”).

- (2) Next, the Code of Justinian¹² which contained a series of jurisprudential opinions and treatises (governing many aspects of public and private law) which have formed the basis of a number of European legal codes.¹³

4. Great and historically significant as these Codes undoubtedly were, they did not withstand the test of time. There were two main reasons for this: first, they were laws applying only to the people and not the sovereign; he or she was quite simply

¹² The Byzantine Emperor of the Holy Roman Empire, Justinian the Great (527-565 A.D.). The Code was also known as the Corpus Juris Civilis.

¹³ Such as the Napoleonic Code and the Austrian Civil Code.

above the law; secondly, even among the people, the laws did not apply equally. The manifestation of the former reason was the concept of the divine right of kings; the latter, slavery which in one form or another, survived until well into the 19th Century.

5. And so with this background we move on to how Magna Carta came about. 13th Century England was ruled by the Normans. The setting for Magna Carta cannot have been better put than by the famous historian Henry Hallam¹⁴ in his classic work *The View of the State of Europe During the Middle Ages*.¹⁵ Of the Normans, he said this:-

“The Norman conquest involved a vast confiscation of property and the exclusion of the native English from political privileges. That the government was extremely tyrannical is certain. The crown derived its revenues from feudal dues, customs duties, tallages – that is, special charges on particular towns – and the war tax, called the danegelt; all, except the first, being arbitrary taxes.”

¹⁴ 1777 - 1859. Author of *The Constitutional History of England* (1827).

¹⁵ Also known as *Hallam's Europe in the Middle Ages* (1818).

Macaulay¹⁶ in his famous *History of England*,¹⁷ when dealing with the Norman conquest, said it subjected England to “the tyranny of the Norman race. The subjugation of a nation has seldom ... been more complete”. There was much evidence to support these views. Every monarch since William I¹⁸ had been more preoccupied with France, or specifically French lands, than they were with England. King John’s father, Henry II had married the powerful Eleanor of Aquitaine, thus enabling him to add Aquitaine to Anjou, Normandy and Brittany. When John ascended the throne in 1199, it was not without controversy. While Norman law favoured him as heir to his elder brother Richard,¹⁹ Angevin²⁰ law favoured the son of another of John’s elder brothers,²¹ Arthur of Brittany. Almost upon ascending the throne, John was thrown into a war

¹⁶ Thomas Babington Macaulay, Lord Macaulay (1800 - 1859).

¹⁷ 1848.

¹⁸ William the Conqueror, who gained the English throne following the Norman invasion (this invasion culminating in the Battle of Hastings in 1066).

¹⁹ Richard the Lionheart, whose statue stands outside the Palace of Westminster.

²⁰ Angevin is the name given to the empire established by Henry II, this empire, which originated from Anjou, stretching from the Pyrenees to Ireland. Angevin is to be equated with the House of Plantagenet.

²¹ Geoffrey. Henry II and Eleanor of Aquitaine has five sons, John being the youngest.

with Arthur, who was supported by Philip II.²² John lost Normandy in August 1204, leaving him with only Aquitaine. He spent the remaining years of his reign in turn wishing to regain Normandy and also defending against the possibility of Aquitaine itself being lost to him.

6. Richard I who reigned from 1189 to 1199, visited England only twice in his reign and unlike John, spoke only French. His declared intention early in his reign to join the Third Crusade required much money. England partly provided the source of his funds. Taxes and dues, practically all of which were imposed arbitrarily, were imposed by the King. Afterall, he had the divine right to rule and the King was above the law. In order to fund his war in France, John not only drew on the same sources of revenue, he intensified them. Existing taxes were increased, new ones put

²² The Capetian King of France, 1165 - 1223.

in place.²³ The main targets were naturally the wealthy, meaning in those days the landed barons. For the most part, these barons who had originally obtained their lands in England after 1066 had over the years lost touch with France. In the 150 years following 1066, while perhaps not seeing themselves as English, the barons certainly did not regard themselves as French, decreasingly so and more remote the further north they were. For years, the resentment barely simmered beneath the surface.

7. The Crown was also in conflict with the Church, then inextricably connected with Rome. In 1205, the Archbishop of Canterbury, Hubert Walter, died and John lost a restraining influence on his excesses. His choice of successor, John de Gray, was rejected by the Pope (Innocent III) who nominated Stephen Langton instead. John rejected this nomination, leading to a seven-year struggle with the Vatican. England was placed under

²³ The types of taxes levied during this time is described in great detail in the Chapter “*No Taxation without Representation*” by Professor Jane Frecknall-Hughes in “*Magna Carta: Muse and Mentor*” (2014, Thomson Reuters in association with The Library of Congress). One of these taxes, scutage, is further described below.

a Papal Interdict in 1208.²⁴ John's reaction was to confiscate Church lands and impose heavy taxes. According to some accounts, 14% of the annual income of the Church was confiscated by John each year. In 1209, John was excommunicated; in 1211, Innocent III released all English people from allegiance to the King. This cold war was, however, not to last. I mentioned earlier the preoccupation that John had in defending his French lands and recovering Normandy which had been lost in 1204. This led to his making peace with the Vatican in 1213: he needed an ally to prevent the Pope from supporting Philip II in his bid to invade England. As part of the reconciliation with the Vatican, Stephen Langton was confirmed as Archbishop of Canterbury.

²⁴ Meaning that regular church services were forbidden. This caused great distress to the people. As Lord Birkenhead (FE Smith) describes in his Chapter on Magna Carta in *Turning Points in History* (1930):

“The Pope in 1208 placed the whole Kingdom under an interdict. We read how on the appointed day the Churches were closed, the bells were still; administration of the sacrament was refused to all but to children and the dying; the bodies of the dead were placed silently in unconsecrated sepulchres. This abrupt extinction of the outward forms of religion impressed the people with horror;”

8. And so we reach 1215. Distrusted – or more accurately, hated – by the barons and the Church alike, John, rather than remaining passive, continued his ambitious plans to regain the lost French lands. The barons bore the brunt of the levies and taxes.²⁵ They rebelled against this form of unilateral taxation and effectively declared war on the King. The barons gathered a massive army mainly from the North and Midlands, they marched on and took Lincoln, Exeter and eventually London. After negotiations, the climax came on June 15, 1215 when, at Runnymede, John sealed Magna Carta.²⁶ He simply could not engage the barons in a war. London, indeed the whole country as he knew it, had been paralyzed – something had to be done quickly and that ‘something’ was Magna Carta.

²⁵ Among these was scutage – a payment that could be made in lieu of military service. John levied scutage payments even when there was no war. He did so 11 times in his 17 years reign, as many as the three monarchs previous to him, spanning some 55 years.

²⁶ Some historians, however, put the date at June 19, 1215.

9. As I have mentioned, Stephen Langton, the Archbishop of Canterbury, is sometimes credited with the drafting of Magna Carta but it contains so many diverse subjects that probably it was drafted by committee. It was also the culmination of a number of attempts to produce a charter of rights. It is romantic to think of a group of learned persons drafting into the night and then producing Magna Carta in the morning, but quite wrong. The origin of many of the clauses of Magna Carta can be found in what is known as the Charter of Liberties – or the Coronation Charter – of Henry I.²⁷ Incidentally, this Charter, like Magna Carta itself, came about for practical and not altruistic reasons: Henry I's claim to the throne was not clearcut and he needed the support of influential groups, namely, the Church and those with military backing.

²⁷ 1068 - 1135 (reign 1100 - 1135). He was the fourth son of the William the Conqueror and followed his brother William II to the English throne.

10. Magna Carta²⁸ was drafted in Latin.²⁹ It begins by stating just how John saw himself: “John by God’s grace, King of England, Lord of Ireland, Duke of Normandy and Aquitaine, Count of Anjou...”. This is followed by a list of clergymen (beginning with the Archbishop of Canterbury) and the barons – the two main beneficiaries of the Charter. As recorded at the end of the document, it was sealed by King John “in a meadow called Runnymede between Windsor and Staines”. Its words suggest it is a solemn document. It proclaims at the outset that the Charter was confirmed “for ourselves and our heirs in perpetuity”, and this is repeated at the end. Clause 61³⁰ stated that the King would not do anything to undermine the effect of the Charter.

²⁸ The document is not headed Magna Carta; this is the popular name of the document by which it is known.

²⁹ The quotes I take from Magna Carta are a modern translation by a team of academics whose work has been reproduced by the Office of the Clerk of the Crown specially for this year.

³⁰ The Charter contains 63 unnumbered clauses. However, they are usually identified by number.

11. Despite these solemn promises that the Charter would remain in perpetuity, King John wasted no time in trying to repudiate it once he avoided the immediacy of war. John turned to the Pope for help, alleging (correctly) he had put his seal on the document under duress. On August 24, 1215, barely two months after the great day, by Papal Bull, Magna Carta was annulled. This resulted in the First Baron's War, led by Robert Fitzwalter, one of the 25 barons designated under Magna Carta to ensure compliance.³¹ The war also involved the French who planned to invade England. Incidentally, there is a dubiously accurate film made in 2011 about this war.³² In 1216, John died of dysentery. He was succeeded by Henry III, then still in minority. The war eventually ended with a general amnesty. A symbolic act of goodwill was made when Magna Carta was reissued in 1217.³³ Over the course of the rest of the 13th Century, the Charter was

³¹ Under Clause 61 of Magna Carta, 25 barons were named to ensure that John complied with the Charter. They were given liberty to seize the King's castles, lands and other possessions in case of non-compliance.

³² Ironclad. An American, Paul Giamatti, plays King John!

³³ The 1217 version of Magna Carta, one of only four, is now housed in Hereford Cathedral. The others are in the Bodleian Library in Oxford.

modified, reissued and reaffirmed by monarchs (again for pragmatic reasons), culminating in 1297, when Edward I reissued the Charter and it entered the English statute books for the first time.³⁴ There are perhaps several dates one can choose to mark the significance of Magna Carta but June 15, 1215 remains the date history has chosen to mark the event.³⁵

12. So far, I have largely provided an English medieval history lesson dealing with the background to the sealing of Magna Carta and there is perhaps nothing unique here. Afterall, history, and not of course just English history, is full of important events. Yet why should this year have sparked a whole series of events and celebrations to mark the sealing of Magna Carta in particular? An impressive monument stands at Runnymede today, unveiled in 1957 by the American Bar Association. The Magna Carta

³⁴ As *Confirmatio Cartarum* (25 Edw I)

³⁵ There are a number of revised Magna Cartas still in existence. There are only four of the June 15, 1215 version: two in the British Library, one in Salisbury Cathedral, one in Lincoln Cathedral. The National Archives in Washington D.C has an original 1297 version, as does the Australian National Parliament.

Memorial has inscribed on it “To commemorate Magna Carta, symbol of Freedom under Law”. This pledge has been renewed by US lawyers through the years and June 15 will have seen the latest reaffirmation, with 750 lawyers and the Attorney General of the USA (Loretta Lynch) present before Her Majesty The Queen. Just what is it that is being commemorated?

13. I have not so far gone into the contents of Magna Carta. On the whole, the contents benefit the two main opponents of King John: the barons and the Church. Clause 1 begins by stating the Church to be free and its rights to be undiminished and its liberties unimpaired. However, as mentioned earlier, the Charter also contains a diverse subject matter. For example, it deals with problems associated with Wales and Scotland, marriage and commercial debts. Even beer is mentioned: clause 35 states that

there should be standardized measures for wine and beer.³⁶ I should perhaps just for interest mention two more aspects: -

- (1) In a way, women were protected; more accurately, wealthy aristocratic widows. King John, who never wasted an opportunity to impose a tax, would (as apparently was a royal prerogative) marry off wealthy widows to mercenary officers.³⁷ For this privilege, he naturally extracted a fee from the mercenary. If a widow did not wish to be married off in this way, she would have to pay for her freedom. Clauses 7 and 8 of Magna Carta effectively got rid of this.

- (2) The powers of the sheriffs under King John were curbed by clauses 24, 30 and 45, which made it illegal for a sheriff to appropriate chattels in the absence of

³⁶ It is perhaps not a coincidence that June 15 is also National Beer Day in England.

³⁷ Like a Babylonian Marriage Market (see the 1875 painting by Edwin Long).

agreement or generally to act illegally. Under John's reign, sheriffs enforced the oppressive taxes and fines; they therefore did as they pleased. One of the worst, Philip Mark, is credited as being the model for the Sheriff of Nottingham created by folklore.

14. However, it is clauses 39 and 40 which represent the lasting significance of Magna Carta. These state as follows: -

“No free man is to be arrested or imprisoned or disseised or outlawed or exiled or in any other way ruined nor will we go against him or send against him except by the lawful judgment of his peers or by the Law of the Land.

We will not sell or deny or delay right or justice to anyone.”

Put shortly, these clauses stood for due process and the independence of the judiciary: key concepts in the modern view of the rule of law.

15. It is the association of Magna Carta (exemplified by these two clauses) with the concept of the rule of law that marks its significance for all common law jurisdictions, of which Hong Kong is one. Lord Bingham of Cornhill³⁸ refers to Magna Carta in these understated terms in his well known book “*The Rule of Law*”³⁹:-

“...Magna Carta was an event that changed the constitution landscape in this country and, over time, the world”.

16. It is commonly accepted that the barons and clergymen who produce Magna Carta for the king’s seal were far from altruistic. Motivated by their own interests and pockets, they did not for one moment think that they were doing any favours for the vast majority of the population. Even clauses 39 and 40, now of such immense importance, did not in real time give the majority of people much comfort at all. Clause 39 applied only to freemen.

³⁸ Thomas Bingham (1933-2010), the first person to have held the three principle judicial offices in the United Kingdom: Master of the Rolls, Lord Chief Justice and Senior Law Lord of the House of Lords (now President of the Supreme Court).

³⁹ 2010, Allen Lane, at P. 11

Under the feudal system, serfs and villeins, who were tied to the land owned by their masters, were not freemen. They were effectively the equivalent of slaves. There is (or at least used to be) an amusing popular parody of English history written by two former writers for Punch magazine⁴⁰, *1066 and All That*.⁴¹ In the Chapter on Magna Carta, a summary of the Charter is given:-

- “1. That no one was to be put to death, save for some reason – (except the Common People).
2. That everyone should be free – (except the Common People).
3. That everything should be of the same weight and measure throughout the Realm –(except the Common People).
4. That the Courts should be stationary, instead of following a very tiresome mediaeval official known as the *King's Person* all over the country.
5. That “no person should be fined to his utter ruin” – (except the King's Person).
6. That the Barons should not be tried except by a special jury of other Barons who would understand.”

⁴⁰ Walter Carruthers Sellar and Robert Julian Yeatman.

⁴¹ 1930.

17. And yet despite the somewhat unremarkable origins of the document, it is equally commonly acknowledged that it is one of the greatest and most important documents in world civilizations. Our story moves to the 17th Century.⁴²

18. I made the point earlier that the great legal documents of the ancient civilizations failed to withstand the test of time for two reasons, namely, that the sovereign was above the law and that despite the impressive and high sounding rights articulated in these documents, they did not apply equally to all persons. Magna Carta, seemed destined to follow suit. And yet, the lasting importance of Magna Carta has been the simple but fundamental notion that all are to be treated equally before the law, including or if you like especially, the sovereign.⁴³ This is where the symbolic value of

⁴² Nothing particularly remarkable occurred as far as Magna Carta was concerned for the three centuries following the introduction of it into English statute law. It was virtually unknown during Tudor times, as shown by the fact that Shakespeare's play, King John (written in the late 16th Century), makes no mention at all of Magna Carta.

⁴³ In modern times, for sovereign, read government.

Magna Carta becomes considerably more important than its contents.

19. Following a relatively uneventful 300 years for Magna Carta, its importance was revived in the early 17th Century. Following the immense successes enjoyed in Elizabethan England, when James I ascended the English throne in 1603,⁴⁴ many people were beginning to question the concept of the divine right of kings, the concept that was so dear to the early Stuarts and before.⁴⁵ The stage was set for the battle between the King and Parliament, which ended with the execution of Charles I in 1649.

20. Questioning royal excesses and the concept of the divine right of kings could not in Stuart England just take the form of political or physical struggles. There had to be a legal basis; even the Tudors recognized that. This was where Magna Carta

⁴⁴ He was also James VI of Scotland.

⁴⁵ James I wrote *Basilikon Doron* in 1597, a treatise about the divine right of kings.

gained the momentum to become what it symbolizes today.⁴⁶ The legal answer to the King's excesses was the legal fiction that England had fundamental liberties that were passed down through the ages: ancient liberties or an ancient constitution as it was known. These liberties were said to transcend royal power. Reference was made to the coronation of William the Conqueror in 1066 when the new King bound himself to the laws established by Edward the Confessor.⁴⁷ The concept, doubtless a mythical one, of an ancient constitution as symbolized by Magna Carta, was developed by Sir Edward Coke, a powerful and influential jurist in Stuart England.⁴⁸ Coke's *Reports* on cases (13 volumes) and his *Institutes* of the Laws of England (4 volumes) identified Magna Carta to be the crucial link in a chain of royal confirmations of liberties stretching back to Edward the Confessor. He used this

⁴⁶ I am indebted to the book written by Ralph V Turner (Emeritus Professor of History at Florida State University) "*Magna Carta: Through the Ages*" (published 2003, Pearson Education Limited).

⁴⁷ Edward the Confessor (1003 - 1066).

⁴⁸ Edward Coke (1552 - 1634) was Attorney General to Elizabeth I and James I. Among his notable cases were the prosecution of Sir Walter Raleigh and of the perpetrators of the Gunpowder Plot. Later he became Chief Justice of the Court of Common Pleas and King's Bench.

concept as the basis for drafting the Petition of Right in 1628 which confirmed rights and liberties of subjects against the sovereign. It remains today, together with Magna Carta and the Bill of Rights 1689, as one of the three most important constitutional documents in English legal history. It was ratified by Charles I in 1628 (although, like many monarchs before him, he did so by force of circumstances).

21. There is no doubt that Coke's use and interpretation of Magna Carta was a distortion of history as we can see from my earlier narrative, but it served its purpose: it provided the legal basis for the challenges to the Stuart Kings. He laid emphasis on clauses 39 and 40 describing them as "pure gold". All this laid the foundation for a document to which I have just alluded - the Bill of Rights in 1689. This document followed the Glorious Revolution which saw James II flee England, and replaced by William and Mary. The Bill of Rights contains the following important

principles: the sovereign could not pass or suspend laws without Parliament's approval nor could the sovereign impose taxes arbitrarily without Parliament's approval (no taxation without representation). This was what Magna Carta had come to represent at this stage of English history. Rule by monarchs without regard to Parliament came to an end. I would just add here that even Oliver Cromwell⁴⁹ displayed absolutist tendencies. He had no time for Magna Carta. When in 1656 a legal objection was taken against the imposition of some customs duty by the Protectorate, he said, "Your magna carta cannot control actions taken for the safety of the Commonwealth."

22. The end of absolute rule by the sovereign in England did not of course mean that England took quite such a benevolent attitude regarding her colonies. It is at this point we have to travel to America to assess the influence of Magna Carta beyond England

⁴⁹ Who was Lord Protector of England, Scotland and Ireland from 1653 to 1658.

and the origins of what was become the lasting, modern relevance of Magna Carta.

23. Between 1600 and 1640, many people left Britain to settle in America. Some were in modern terms economic migrants, others to escape religious prosecution such as the Pilgrim Fathers. When James I ascended the English throne at 1603, he did not wish to engage Spain in a race for colonial expansion; in fact he did not wish to engage Spain in any acts of aggression. England was heavily in debt when James ascended the throne. The war waged by Elizabeth I against Philip II of Spain, in many ways the most romantic of any period in English history, came at great expense. Taxation was, as always, causing widespread grievance. England was in the red to the tune of £400,000.00.⁵⁰

⁵⁰ The modern equivalent of this is £24 billion. According to the Office for National Statistics, as at April 2015, the United Kingdom's national debt was about £1,487 billion. With the population at about 64 million this year, this averages out at £23,428 a person. With the 1603 population of England of 4 million, the average of the total indebtedness per capita was the equivalent of £60,000.00.

24. James I was persuaded by a group of entrepreneurs that Virginia could provide a lucrative source of wealth and despite his reluctance to engage Spain, the bankrupt King agreed, using the pretext that it was only a commercial venture. Whatever the origins, in 1607, a small group of settlers reached Chesapeake Bay and settled 35 miles upriver to set up Jamestown. Jamestown is regarded by many historians as being the foundation of the United States of America.⁵¹ The Jamestown colony, like many others, was set up by royal charter – the Virginia Charter. This Charter was based on Magna Carta. It declared that all inhabitants “shall have and enjoy all liberties, franchises and immunities ... as if they had been abiding and borne within this realm of Englande”. Other colonies followed and later in the 17th Century, the American colonies moved away from royal charter to draft their own legal codes. These codes also drew from Magna Carta:-

⁵¹ *‘Birthplace of American Democracy: Jamestown’* (National Geographic History, June/July 2015).

- (1) The *Massachusetts Body of Liberties* (1641), considered to be the first American legal code, began with a declaration that no one's life, person, or property be proceeded against save by virtue of “*some expresse law of the Country*”- a direct link to the preamble in Magna Carta. Together with Coke's *Institutes and Reports*, the *Massachusetts Body of Liberties* ultimately resulted in a comprehensive compilation of the laws of Massachusetts known as the *Laws and Liberties of Massachusetts* (1648), which reflected principles of due process as well as the right to a trial by jury deriving from chapter 39 of the 1215 Charter.
- (2) In 1682, William Penn drafted his blueprint for the colony of Pennsylvania, the *Frame of Government for Pennsylvania*. The liberties which it conferred

were based on “*laws agreed upon in England*”; the language drew heavily on Magna Carta and Coke's writings. Chiefly, chapters 39 and 40 were expressly included.

Years later, with the onset of the American War of Independence,⁵² the symbolism of Magna Carta was exemplified by the State seal of Massachusetts, a militiaman with a sword in one hand and Magna Carta in the other.

25. The present discussion is, however, not about US history, even in abbreviated form: it is about Magna Carta. I have just mentioned the American War of Independence. The origins of this, which of course led to the Declaration of Independence on July 4, 1776, bore a resemblance to the events leading up to Magna Carta, and Magna Carta was used to support the American cause. One gets a hint of this in the Preamble to the Declaration:-

⁵² 1775 - 1783.

“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”⁵³

26. The pursuit of happiness obviously included the maintenance of one’s financial well-being. The early settlers thought they had found paradise in America, away from the harsh economic realities they had experienced. As time went by, like the Normans who settled in England after Hastings, their affinity to their new home meant correspondingly that their links with England diminished, notwithstanding (as shown by their reliance on Magna Carta and the common law of England) that they originally regarded themselves as essentially English. However, the King in England saw the wealth in America as the answer to

⁵³ The immortal words of Thomas Jefferson. These are inscribed in the Jefferson Memorial in Washington D.C.

England's economic problems. In 1754,⁵⁴ the Seven Years' War began, involving all the major European powers, in particular England (who was allied to Prussia) and France (allied to Austria). The war was waged in Europe, North America and India. At the end of the War, although Britain gained vast chunks of what had been French North America (mainly Canada), Spanish Florida, parts of the West Indies and Africa, the cost was crippling. To finance the War, Britain had to borrow heavily from English and Dutch banks. To repay debts as well as to meet other expenditure, Britain looked to the American colonies. There followed a number of taxation measures that were imposed: the Stamp Act 1765⁵⁵ and

⁵⁴ By now, the King was George II of the House of Hanover.

⁵⁵ The effect of this statute was the compulsory use of specially stamped paper for all business activities and such use of course attracted stamp duties. Even playing cards were included. Even prominent figures in England opposed this Act on the basis of taxation without consent, most notably William Pitt, the former Prime Minister. Benjamin Franklin, who was in London at the time, appeared before Parliament in January 1766 to speak for four hours about the Stamp Act. The following is a part of his testimony in Parliament:

“Question: If the Act is not repealed, what do you think will be the consequences?”

Answer: A total loss of the respect and affection the people of America bear to this country and of all the commerce that depends on that respect and affection”.

the Tea Act 1773.⁵⁶ These and other measures of taxation without consent or representation were the catalysts for independence. The significant aspect for our purposes was Magna Carta was consistently relied on as the legal basis to justify revolution. This is well documented and has been the subject of countless books and articles. States like Massachusetts declared that “essential Rights, Liberties, Privileges and Immunities ... had been guaranteed by Magna Charta”.⁵⁷ This especially included the concept of no taxation without representation.

27. The loss of the American colonies marked a decline of British influence there, matched by a corresponding rise in an American identity. From a legal point of view, Magna Carta

⁵⁶ Whereby it was intended that the East India Company would have a virtual monopoly on the sale of tea. This led to the Boston Tea Party on 16 December 1773, in which shipments of East India Company tea were destroyed in Boston harbor. This led to the passing of a series of statutes known as the Coercive Acts whereby liberties in the American colonies were severely curtailed.

⁵⁷ Edmund S Morgan “*Prologue to Revolution: Sources and Documents on the Stamp Act Crisis 1764 – 1766*” (1959). Professor Morgan was the Emeritus Professor of History at Yale.

therefore declined as a reference point in the 19th and early 20th Centuries in America.

28. But just when that document was about to go the way of the ancient great legal documents into the annals of legal history, it was revived into what I see personally as its modern significance. And this transformation has been for me the most important transformation of all, justifying all the celebrations this year.

29. The Supreme Court of the United States (SCOTUS) was built in 1935 as a monument to the rule of law. As one enters the building,⁵⁸ one faces the words “Equal Justice Under Law”. In the bronze doors leading into the court itself, there is depicted the scene of King John sealing Magna Carta. This is repeated in the marble frieze at the ceiling of the courtroom depicting the lawgivers of history: King John stands holding a copy of Magna Carta. The influence of Magna Carta on modern US constitutional

⁵⁸ Its address is 1, First Street in Washington D.C.

development can be seen from this summary provided by the much admired Sandra Day O'Connor⁵⁹: “The impact of Magna Carta on our constitutional development is not merely a historical one. The Supreme Court continues to refer to Magna Carta for inspiration and guidance in identifying those rights that are fundamental ... These references, moreover, are not merely the sentimental acknowledgement of a fondly but dimly remembered ancestor.”⁶⁰

30. So this has become the modern relevance of Magna Carta; as a symbol of the rule of law itself, as a symbol of the twin components of this concept as we know it: the existence of rights and liberties that respect the dignity of the person and the concept that there is an independent judiciary to administer these rights and liberties equally as between all persons, including the sovereign (the government). The concept of equality is a critical one: it means not only that governments and those in power are subject to

⁵⁹ Formerly an Associate Justice of SCOTUS.

⁶⁰ *The Majesty of the Law* (Random House, 2004) at P. 35.

the law but also that everyone is so subject. In broader terms, it signifies the ultimate objective of the rule of law: a respect for one's rights and the rights of others. It is a concept that is intended to be timeless and this modern relevance of Magna Carta sees its utility not only in times of rebellion or conflict, but at all times. It is, as the title of this talk indicates, for all seasons.

31. SCOTUS has constantly cited Magna Carta in its judgments, utilized the most when a generous view of human rights and liberties has been taken. Prior to 1959, there were 32 references to Magna Carta in its judgments. In the past 50 years, Magna Carta has been cited in more than 80 judgments of SCOTUS. This modern interpretation of the impact of Magna Carta is not of course restricted to the US. The United Kingdom

courts have also relied on and referred to Magna Carta in the context of human rights.⁶¹

32. What of the impact of Magna Carta in Hong Kong? At first blush, it perhaps requires a stretch of the imagination to connect us here with the struggle of the Church and barons 800 years ago, the Stuart Kings, and the American Revolution and its aftermath. When this document was created, the Song Dynasty⁶² was into its last century. Last year, during the excavation of a site in Kowloon City in preparation for the Mass Transit Railway, antiques dating back to this Dynasty were unearthed.⁶³ Yet, there is a connection.

⁶¹ See, for example, *Walumba Lumba v Secretary of State for the Home Department*, [2012] 1 AC 245, a case about the liberty of the subject; *Thomas v Baptiste* [2002] 2 AC 1 dealing with due process in Trinidad and Tobago.

⁶² 960 – 1279 A.D.

⁶³ The last two boy emperors of the Song Dynasty lived in Hong Kong from 1277 to 1279.

33. First, the protection given by Magna Carta to the Church⁶⁴ was to become a constant theme in British history, cemented by the concept that the sovereign was (and still is) the head of the Church. Loyalty to the Vatican of course gave way to the supremacy of the Church of England. The link between State and the Church of England was reflected in the British Empire and Hong Kong was no different in this regard. When the British arrived in Hong Kong in 1841, the spiritual well-being was left in the hands of the Anglican Church. I was reminded recently⁶⁵ that St John's Cathedral started only as a parish church, attaining Cathedral status only in 1850. St John's Church was established by statute in 1847⁶⁶ which confirmed that the land occupied was to be held as freehold property,⁶⁷ reconfirmed in 1850⁶⁸ when the

⁶⁴ In the first clause of Magna Carta: see para 13 above.

⁶⁵ Here, I acknowledge the time given to me by the Dean of St John's Cathedral, the Very Reverend Matthias Der to be interviewed on June 10, 2015.

⁶⁶ No. 2 of 1847.

⁶⁷ It is the only property to retain this status in Hong Kong. The University of Hong Kong was granted freehold status in 1911 but this was subsequently converted to leasehold.

⁶⁸ By Ordinance No. 3 of 1850.

Church was consecrated a Cathedral. The freehold status reflects the important position held by the Church.

34. Nowadays, there are of course many religions in Hong Kong and the Anglican Church exercises its religious freedoms, like other churches, for the benefit of the community. The freedom of religion in Hong Kong can find its origins in the common law and this common law freedom can be traced to Magna Carta.

35. This leads me to the second connection between Magna Carta and Hong Kong. Hong Kong is a common law jurisdiction and the system of law practised here is the common law system. This was the position before 1 July 1997 and the Basic Law confirms this to be the legal position after that date. Article 8 of the Basic Law states: “The laws previously in force in Hong Kong, that is, the common law, rules of equity ... shall be maintained”.

Hong Kong is recognized worldwide to be a common law jurisdiction. We invite judges from other common law jurisdictions to sit in the Court of Final Appeal.

36. The common law is characterized by the concept of the rule of law and this spirit is symbolized by Magna Carta, as I have endeavored to articulate. Day in and day out, judges and courts do their best to implement the rule of law. Often they succeed in achieving justice but, as history shows, perfection is impossible and perfect justice is ultimately the Grail to which we can only aspire and do one's best to achieve. Like the Grail, Magna Carta represents something that is, to put it as simply as I can, good in us; we ought to do our best to live up to it.

37. Finally, I should say this about justice. Justice requires the respect for rights and liberties, not just our own rights and liberties but also those of others. Further, it is not any part of

justice that laws or notions of justice can be dispensed with whenever this suits us, however noble or righteous one may believe one's cause to be. Justice is for everyone and for all seasons. I end with a quote from that wonderful play *A Man for All Seasons*.⁶⁹ It is the scene when Sir Thomas More has an exchange with his future son-in-law, William Roper and answers Roper's point that laws can be dispensed with when this is justified in the name of a perceived higher cause.⁷⁰

“William Roper: So, now you give the Devil the benefit of law!

Sir Thomas More: Yes! What would you do? Cut a great road through the law to get after the Devil?

William Roper: Yes, I'd cut down every law in England to do that!

Sir Thomas More: Oh? And when the last law was down, and the Devil turned round on you, where would you hide, Roper, the laws all being flat? This country is planted thick with laws, from coast to coast, Man's laws, not God's! And if you cut them down, and you're just the man to do it, do you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake!”

⁶⁹ By Robert Bolt.

⁷⁰ The example he uses is when one is pursuing the devil.

38. Whatever transformation Magna Carta may in future take, the concept of justice and the spirit of the law which it now represents – our Grail – are timeless, and they are in terms of the rule of law, simply non-negotiable.

Geoffrey Ma
June 18, 2015