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Magna Carta revisited: parchment, guns, and constitutional order☆

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ABSTRACT

This paper revisits the question of substantive rules versus procedural rules to enforce constitutions. Scholars engaging in positive analysis of constitutional rules argue that procedural rules are more durable and act as better safeguards for constitutional maintenance. Chapter 61 of the Magna Carta, also known as the 'security clause,' lays out the procedural component for enforcement of the Charter. The clause provides for a council of twenty-five barons to enforce the Charter, with provisions to choose and replace the members, outline their powers, and constrain executive action. It is therefore puzzling that Chapter 61 is absent in the 1216 issue of the Magna Carta, and all reissues thereafter. On the other hand, substantive protections like Chapter 40 have been maintained through the evolution of constitutional rules over 800 years. It is even more puzzling that the Magna Carta survived for 800 years without the main clause to enforce it. This paper argues that the procedural-versus-substantive distinction is superficial, and instead focuses on polycentric arrangements creating opposing interests, to understand self enforcing constitutions and explain the failure of the 1215 Charter and the longevity of the reissues of the Charter.

1. Introduction

The year 2015 marks 800 years of the Magna Carta, an immense achievement in maintenance of constitutional principles. In this context, the word constitution is used loosely, to describe the principle of the document, which is to limit the power of the ruler. This is not an unusual description of the Magna Carta (see Adams, 1908, p. 229). The question is often raised whether the Charter is a constitution, a statute, a contract, a treaty, or a codification of old feudal law, or has no legal status.[1] In reality, the Magna Carta was a "multifarious thing," but it "was designed, not only as a statement of rights and liberties, but also as a mechanism to redress the wrongs of John's government and prevent their recurrence," lending it a strong constitutional component (Starkey, 2015, p. 71).

The Charter has had immense longevity, but not all its provisions have proved durable. This is especially true of the original, 1215 issue, which lasted a few months; some of its clauses were deleted within a year,[2] and some deemed obsolete over the years, while three clauses have survived.[3] To explore this feature, this paper focuses mainly on the question of constitutional maintenance and the self enforcing nature of the Magna Carta. In that spirit this paper borrows its title from Wagner (1993).

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[1] Holt argues that there is no evidence of anything equivalent to a modern exchange of contracts. John never signed any draft of the document. There is no evidence of any ceremonial sealing of the original document, as was commonplace with treaties of the time. (2015, 223–4). However, the contractual nature of the Charter is pervasive throughout. It is a contract in the sense that it is a codification of the fundamentally contractual nature of the feudal relationship between the suzerain and his vassals. However, it is clear that the Magna Carta is not simply a private contract. It was made in perpetuity binding future generations of the initial groups to the Charter. Further, it was a very inclusive document, and its protection extended not only to the John and the barons who were party to the contract but to "all free men of our kingdom." There are many reasons to place the Magna Carta above the status of ordinary law. The charter is not merely a law or statute, because a law made by a king in one assembly might be repealed in another assembly. But the Magna Carta was intended to be unchangeable and it was granted as a promise to the barons and their heirs in perpetuity in exchange for their loyalty to the king (McKechnie, 1914, p. 104).

[2] Chapters 10, 11, 12, 14, 15, 25, 27, 42, 45, 48, 49, 50, 51, 52, 53, 55, 56, 57, 58, 59, 61, and 62. Some of these clauses have been addressed in Chapter 42 of the 1216 reissue of the Magna Carta, and others, like Chapter 61, were silently dropped without any reference or explicit reason.

[3] Three clauses from the Magna Carta are still in force. (1) the English Church shall be free, and shall have its rights undiminished, and its liberties unimpaired; (2) the city of London shall enjoy all its ancient liberties and free customs . . . all other cities, boroughs, towns and ports shall enjoy all their liberties and free customs; (3) to no one will we sell, to no one deny or delay right or justice.

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In constitutional folklore, the Magna Carta has become the symbol of justice and due process. The Charter is often invoked to give these principles legitimacy and historical provenance. These principles are found in multiple clauses of the Charter, especially Chapter 40, one of the three surviving clauses of the 1215 version. It outlines some very specific substantive protections of the rights of the individual, most famously Chapter 40, assuring "to no one will we sell, to no one deny or delay right or justice."

On the other hand, Chapter 61 of the 1215 Magna Carta[4] laid out a procedure to enforce the Charter by appointing a council of twenty-five barons, including details of their decision-making rule, method of appointment, enforcement powers, and methods of redress. This is also known as the security clause.

In the reissue of 1216, the security clause was deleted. The 1225 reissue considerably revised the Charter, and did not bring back the security clause. King Henry made the 1225 reissue the fundamental law of the land, and it has formed the foundation for further reissues.

This poses a dual puzzle. First, a procedural rule of the Magna Carta disappeared while some substantive rules have continued. This is contrary to most positive analyses of constitutions, which suggest that procedural rules are more durable and substantive rules more likely to evolve and erode (see Wagner and Gwartney, 1988; Niskanen, 1990; Vanberg, 2011). Second, how does a constitutional document survive 800 years when the procedure to enforce it is deleted?

In Section 2, I discuss procedural and substantive constitutional rules in the context of constitutional enforcement and maintenance. In Section 3, I detail the various provisions in Chapter 61. In Section 4, I solve the puzzle of its early demise. In Section 5, I explore the source for the longevity of the Magna Carta by looking at structural design and polycentric institutions in self-enforcing constitutions. In Section 6, I conclude that the Magna Carta survived not despite the deletion of Chapter 61 but mainly because of the deletion of Chapter 61.

2. Procedural versus substantive rules

The most important problem in any private or constitutional contractual arrangement is enforcement. One party might violate the terms of the contract when it benefits them to do so. In the case of rulers and citizens, the problem is even greater. Private contracts may rely on external agencies or be self-enforcing through the discipline of continuous dealings and the threat of punishment. But enforcement of constitutional contracts by citizens rebelling against the monarch requires coordinated, collective action and, therefore, special mechanisms (Mittal and Weingast, 2013).

To enforce constitutional rules, two strategies are typically used. The first is to have substantive constraints, which limit the scope of state action. To interpret and enforce these rules, typically, a judiciary is created. Substantive provisions have failed to maintain constitutional limits, first, because the judiciary is not really external; second, because it typically has no independent source of revenue, and so cannot check the state's revenue-generating institutions; and third, because it may be captured by the same political process it attempts to limit (Wagner and Gwartney, 1988).

Procedural constraints instead rely on structural design, as propounded by Madison. They work better because they are usually devoid of substantive content, thereby not requiring much interpretation (Wagner and Gwartney, 1988, pp. 36–7). Further, because of their narrow and precise language, and because they touch more immediately on the interests of office-holders, procedural rules prove more resistant to constitutional erosion (Vanberg, 2011).[5] Finally, violation of a procedural rule harms the interests of the individuals the rule empowers. This idea is a particular version of what James Madison discussed in Federalist 51: "The great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.... Ambition must be made to counteract ambition." As he further wrote to Thomas Jefferson, his objective was "to modify the sovereignty as that it may be sufficiently neutral between different parts of the Society to control one part from invading the rights of another, and at the same time sufficiently controlled itself, from setting up an interest adverse to that of the entire society."[6] As with the conditions that maintain relations among primitive tribes or modern nations by having their powers check each other (Niskanen, 1990), a constitution must mutually align interests to enforce itself (Niskanen, 1999; Ostrom, 2008; Rajagopalan and Wagner, 2013).

Most constitutions, including the Magna Carta, provide both types of constraints. In this sense, the Magna Carta is not unique, even compared to other charters at the time. It encompasses protections to ensure due process.[7] It includes provisions to protect private property and limit the power of the King to take property without compensation.[8] Most importantly, it limits taxation.[9] Other substantive provisions attempt to protect certain groups, such as the clergy and towns, from the King.[10] But the most remarkable provision in the Charter is Chapter 61, the main enforcement mechanism of the Charter,[11] laying down the procedures to check the power of the king.

[4] See Appendix A for a translation of the full text of Chapter 61 of the Magna Carta issued in 1215.

[5] Procedural rules undergo very little erosion through judicial interpretation. Using data on Supreme Court Cases in the United States, Vanberg shows that of that virtually none of the 2337 decisions involving a constitutional question issued by the Supreme Court between 1953 and 2006 involved procedural provisions (2011, p. 316–7).

[6] Letter from Madison to Jefferson dated October 24, 1787.

[7] (36) Nothing in future shall be given or taken for a writ of inquisition of life or limbs, but freely it shall be granted, and never denied. (38) No bailiff for the future shall, upon his own unsupported complaint, put anyone to his "law", without credible witnesses brought for this purposes. (39) No freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land. (40) To no one will we sell, to no one will we refuse or delay, right or justice.

[8] (28) No constable or other bailiff of ours shall take corn or other provisions from anyone without immediately tendering money therefor, unless he can have postponement thereof by permission of the seller. (30) No sheriff, royal official, or other person shall take horses or carts for transport from any free man, without his consent. (31) Neither we nor any royal official will take wood for our castle, or for any other purpose, without the consent of the owner. (32) We will not keep the lands of people convicted of felony in our hand for longer than a year and a day, after which they shall be returned to the lords of the 'fees' concerned.

[9] (14) And for obtaining the common counsel of the kingdom anent the assessing of an aid (except in the three cases aforesaid) or of a scutage, we will cause to be summoned the archbishops, bishops, abbots, earls, and greater barons, severally by our letters; and we will moveover cause to be summoned generally, through our sheriffs and bailiffs, and others who hold of us in chief, for a fixed date, namely, after the expiry of at least forty days, and at a fixed place; and in all letters of such summons we will specify the reason of the summons. And when the summons has thus been made, the business shall proceed on the day appointed, according to the counsel of such as are present, although not all who were summoned have come.

[10] (1) In the first place we have granted to God, and by this our present charter confirmed for us and our heirs forever that the English Church shall be free, and shall have her rights entire, and her liberties inviolate.... (13) And the city of London shall have all it ancient liberties and free customs, as well by land as by water; furthermore, we decree and grant that all other cities, boroughs, towns, and ports shall have all their liberties and free customs.

[11] There were a few other provisions which may aid in such enforcement. For instance, Chapter 51 strove to reduce John's power of resistance under which John promised to dismiss all the foreign soldiers he had recruited.

3. Chapter 61 of the Magna Carta

Chapter 61, or the security clause, as it is commonly known, has been called "momentous" and "revolutionary" and also the "most original, part of the Articles and the eventual Charter" (Carpenter, 2015, p. 325). If the Magna Carta is a constitutional document, or has elements of one, Chapter 61 was the constitutional cornerstone (Adams, 1905, pp. 438–9). It placed such principles as separation of powers, checks and balances, judicial review, and subjecting the King to the law, all in a single clause. It placed the power for enforcement of the document with John's adversaries. It also included a mechanism to prevent post-constitutional opportunism. Even if the drafting of these features was "clumsy" by modern standards (Adams, 1912, p. 276; McKechnie, 1914, p. 472), the clause was quite an achievement.

The main purpose of the clause was to give barons the power to elect a council of twenty-five barons, which would "cause to be observed with all their might, the peace and liberties granted and confirmed to them by this charter." If the King or any of his agents transgressed any of the articles of the Charter, including the security clause, the offense was to be made known to four barons of the council. Further the clause allowed the council to seek redress. The King assured he would not amend, nullify, or set aside any clause of the charter.

The security clause is not very well known, however, for two reasons. First, it was the reason for the failure of the Magna Carta as a treaty, and it was deleted in the 1216 reissue of the Magna Carta and did not reappear.[12] Second, much of the spotlight is taken by the council of twenty-five barons the chapter created. In this section, I put this chapter back in the spotlight, focusing on the many procedural aspects.

3.1. Limiting the executive

The Magna Carta specifically applied to the actions of John, but was intended to apply in perpetuity. Its chief principle is that "the king has no right to violate the law, and if he attempts to do so, may be constrained by force to obey it" (Adams, 1905, p. 439). This was a continuation of old feudal law, but now in a form that was enforceable by a council.

Chapter 61 created a mechanism to ensure that the King was subject to the law, specifically on the subjects agreed to in the Charter, by creating the Council of Twenty-Five Barons (hereafter the Twenty-Five), "who were to put into orderly operation the right of coercion" (Adams, 1905, p. 439). This 'orderly operation' was the permission for the Twenty-Five to use all its power to redress the wrongs of the King and his agents. The Twenty-Five was to be a second power center. The form of coercion in the security clause had no precedent (Carpenter, 2015, pp. 325, 328–9).

3.2. Power to review and redress

The security clause placed scrutiny of the actions of the executive within the purview of the council. Though it is odd to use such a modern term for this medieval and feudal clause, the origins of modern judicial review are often traced back to the Magna Carta (Howard, 1968, pp. 276–83).

The council had certain specific mandates. First, if the King or his agents violated the oaths and promises made in the Charter, the council had the right to review their action and use its power to provide redress. Second, and far more broadly, if the King or his agents offended "anyone in anything" the council had the right to review their action and provide redress. This was a permanent mandate (Carpenter, 2015, pp. 326–7).

The wronged party must make known his case to four barons among the twenty-five, who would then make it known to the King, and ask redress. If the King made no redress within forty days, the twenty-five was to seize the King's property at once. It was up to the council to decide whether the King had provided adequate redress. John thus conferred upon twenty-five of his enemies a legal right to organize rebellion, whenever, in their opinion, he had broken any of the provisions of Magna Carta. Violence might be legally used against him, until he redressed their alleged grievances to their own satisfaction.

This chapter could be viewed as an impeachment provision. It specified the cause for impeachment as violating the Charter and refusing to provide redress. It further clarified that that the King may only be removed from his position, without harm to him or his family. It also provided a mechanism for reinstatement of the usual powers once the wrong was redressed.

3.3. Limits to the power of review

Within the Charter, there were only two limitations on the power of the Twenty-Five. First, the twenty-five barons had to swear to obey the Charter. Therefore, any action on their part, either to redress a wrong or punish the King, could not be contrary to the provisions of the Charter. This was not very binding because "the Twenty-Five were the judges of the facts of each case and the assessors of the adequacy of John's compensation. It would be hard think of a more outrageously prejudiced tribunal. They included in their ranks many of the prominent casualties of John's misgovernment; and they acted as judge, jury, prosecutor—and indeed executioner-rolled into one" (Starkey, 2015, p. 75). Further, the Twenty-Five was to be the sole judge of the proportionality of its actions.

Second, as mentioned above, the council could not use violence against the person of the King or his wife or children.

3.4. Quorum and decision-making rule

On the questions of quorum required to make a decision and the decision-making rule, Chapter 61 was both vague and specific at the same time. This is partially because these provisions were an innovation, and also because of sloppy drafting.

Four of the twenty-five barons were to be intermediaries between the subjects, the council, and the King. Subjects were to make any complaints known to those four, who would inform the King and seek redress. If redress were not sufficiently granted, in forty days, the four barons would refer the matter to the Twenty-Five. This quorum of four barons to act as an intermediary is very specific and clear. However, there was no rule to resolve any disagreement among them on whether the King had provided redress. One could assume it required unanimous agreement (as with common law judges), or else the matter would go to the council. Or they may have used the majority rule, because that was the decision-making rule for the council.

For decisions of the council, the decision-making rule was clear, but the quorum required for the decision was unspecified. The Charter clearly stated that in the event of disagreement among the twenty-five barons, the verdict of the majority present shall have the same validity as a unanimous verdict. McKechnie argues that it was by necessity that the barons devised, or stumbled upon, a "peculiarly modern expedient" of majority rule instead of una-

[12] On November 16, 1216, the legate and the regent of King Henry issued the Great Charter at Bristol. Some of the most important articles accepted were omitted including Chapter 61. The 1216 issue only had 42 chapters and deleted 22 chapters from the 1215 Magna Carta. Some of these deletions were addressed in Chapter 42 of the 1216 Magna Carta while other provisions, such as Chapter 61, were silently deleted without reference.

nimity (1914, p. 470). However, the chapter specified no quorum requirement. It merely stated the majority decision will be the decision for all twenty-five, whether they were present, were summoned, or were unable to appear for the decision. Any modern legal drafting understands the dangers of having a majority rule without a quorum specification. Without a minimum quorum requirement, and without any requirement of unanimous agreement, the meetings could be inconveniently convened or manipulated by factions, and a small group of barons could attempt to capture the decision for the whole group.

3.5. Appointment of council members

The barons, from among their group, made the appointment of the council. No person or office outside could partake in the appointment process. In the first instance, the twenty-five were to be elected by the barons, and each subsequent vacancy was to be appointed by the remaining members of the council. The process would follow the majority-decision rule.

There was no provision to dismiss or impeach one of the twenty-five—whether by the other members of the Twenty-Five, the subjects, or the Crown. The provision for supplying vacancies caused by death proves that the scheme was not intended to be temporary. This is quite extraordinary, because in the first instance, the twenty-five almost entirely consisted of former rebels and John's worst enemies. And this group would be self-selecting for the future. McKechnie argues that under this method of appointments "the committee, once appointed, would form a close corporation; no one uncongenial to the majority could gain admission—an arrangement with a thoroughly oligarchic flavour" (1914, p. 469).

3.6. Impact on John's subjects

Chief among the many oaths in Magna Carta is the oath taken by the King to adhere to the terms of the Charter. Also noteworthy were the oath by the twenty-five barons to enforce and uphold the terms of the Charter and an oath by the subjects of John to obey the commands of the Twenty-Five in enforcing the Charter, even when such commands were against the King.

The King would not stop any man from taking an oath of loyalty to the Twenty-Five and could compel any individual who refused to take such an oath. To enforce the Charter, the Twenty-Five could enlist the commune of all the land. The oath was to be taken by everybody, and required all to obey the orders of the Twenty-Five in harming the King. This is an extraordinary way to draft the clause—because the loyalty of the oath was not to the Charter but to obeying the Twenty-Five *against* the King.

One of the most substantive portions of this chapter creating an alternate power center to the King was the treatment of the King's subjects. Where the King violated the charter, or if the Twenty-Five insisted the King violated the Charter, this chapter authorized the King's subjects to side against him. His subjects were to swear obedience to the executors. John solemnly authorized his subjects, in certain circumstances, to transfer their allegiance from himself to the committee of his foes without the fear of committing treason.

3.7. Amendments to Magna Carta

The very last part of Chapter 61 was an assurance from the King that he would not seek to diminish or revoke any of the clauses in the Magna Carta, which, one can assume, included Chapter 61. This provision was meant to be permanent, rendering the Charter unamendable (except by the interpretation by the Twenty-Five), or irrevocable.

4. Solving the puzzle of the Magna Carta

Once we deconstruct the asymmetry of interests embedded in Chapter 61, the puzzling feature of the transience of the Charter's procedural constraint is solved.

The main reason that procedural rules tend to be durable is that at the time of constitutional drafting (some scholars presume under the veil of uncertainty) the individuals protect their individual interest, and would not consent to a constitutional agreement that placed them at a disadvantage in the future. Procedural clauses simply reflect this fact of constitution making, and manifest as rules balancing symmetrical interests. The Magna Carta was signed under different circumstances, and did not balance opposing interests.

Therefore, it is not simply a question of procedural versus substantive rules. The distinction between procedural and substantive rules (while discussing durability) is superficial. Procedural rules that reflect a structural design balancing opposing interests are more likely to prove durable. The 1215 charter failed on this account, and thereby it is no longer puzzling that the security-clause was contentious and deleted at the earliest opportunity.

There were four main problems with the design of the procedural components of Chapter 61. The first problem was that the twenty-five barons had remarkable powers, especially those I discussed above in Sections 3.2 and 3.5, while there was no mechanism to constrain and balance their powers against the powers of the King.

Second, there was a lot of room for interpretation of the terms of the Charter. And if there was disagreement, the ruling of the Twenty-Five was final. As noted above, though John could not change the terms of the Charter, the Twenty-Five could do so by interpretation. Holt maintains "the Charter failed to produce lasting peace in 1215 because this looseness of phrasing hid a real and irreconcilable difference of interpretation" (2015, p. 37).

The third problem was that the council was almost entirely made up of former rebels. Who applied Chapter 61 brutally and with calculation to serve their interests. John had no choice as he rushed to meet the claims against him—he feared rebellion. This resulted in opportunistic behavior (sometimes abuse) by the Twenty-Five in the use of their unchecked power. Fifty claims were settled in ten days following the meeting on 19 June. Twelve members of the Twenty-Five obtained letters of restitution of one kind or another between 19 and 28 June (Holt, 2015, p. 300). Holt argues that the twenty-five were "were less concerned with the constitutional implications of these clauses than with their vigorous exploitation for immediate and material gain."

The barons pressed the attack just as enthusiastically as the King had earlier used his powers. Holt (2015, pp. 300–1) and Carpenter (2015, pp. 388–9) have chronicled some of these claims made by the Twenty-Five.[13] As a result, there were often questions about

[13] William de Lanvallei recovered his right in the manor of Kingston in Somerset. Richard de Munfichet claimed his right to be the custodian of the Essex forest. Geoffery de Say regained the wardship of the heir of one of his tenants. Richard de Clare claimed Buckingham, which had been the marriage portion of his daughter, who had been widowed when William de Briouze's son died in prison. Robert de Vere was recognized as the Earl of Oxford and conceded the earl's third penny of the county. Saer de Quincy claimed the Castle of Mountsorrel that he had claimed since 1204 as his wife's inheritance. Eustace de Vescy' claimed his right to have his dogs roam in the forest of Northumberland. Robert Fitzwalter claimed Hertford Castle of which he had had custody earlier in the reign. William de Mowbray made territorial demands in Yorkshire far beyond his entitlement within the strict terms of the Charter. Henry de Bohun now demanded a settlement of his claims to the honour of Trowbridge. Geoffrey de Mandeville, demanded rights of advowson in the abbeys and religious houses that his predecessors had founded in Gloucestershire and Somerset.

the nature of claims made against the King.[14] On many of these claims, the Twenty-Five was the last word, whether or not justice was served (see Holt, 2015, pp. 300–1 and 402–3).

In addition to strengthening their own financial and political position through the redressal mechanism provided under Chapter 61, the Twenty-Five tried to prevent the King from extending his patronage and regaining his political power. In cases involving disseisin the Twenty-Five often dealt with competing claims. The King would favor the claim of one party while the Twenty-Five would restrict his ability to reward his loyalists.

Under Chapter 61, any complaints were to be brought to a group of four of the twenty-five barons, who would inform the King and seek redress. However, frequently the council did not go to the King, and instead ordered the King to appear before the council. In one anecdote, Anonymous of Bethune says the Twenty-Five came to the King's court to make a judgment. The King was ill in bed, with his feet so painful he was unable to walk, presumably due to gout. He asked the Twenty-Five to come to his chamber. They refused. It would, they said, be against their rights. So John was carried to the Twenty-Five, who refused to rise to meet him (Carpenter, 2015, p. 394). This severely diminished the position of the King and was symbolic in establishing that the Twenty-Five was the "real" center of power.

The fourth problem was that the council often had interests contrary to the enforcement of the Charter and the oath that was to be taken under Chapters 61 and 63 was extremely problematic. The City of London and the Tower of London were to revert to the King at the feast of the Assumption (15 August) if the oath to obey the Twenty-Five had been taken throughout the country by then or if the failure to achieve this could not be blamed on the King (Cheney, 1968, p. 293). However it was in the interest of the Twenty-Five to find ways to keep John powerless and keep London outside John's control. The interest of the Twenty-Five in enforcing the Charter conflicted with the other interests of its individual members.

The poorly designed and loosely drafted chapter was one of the foremost reasons for the failure of the 1215 Magna Carta. In large part because of the excessive provisions of Chapter 61, in July 1215, John appealed to Pope Innocent III to quash the Magna Carta. As the pope set aside the Charter, civil war broke out and the barons appealed to King Louis to take over. Due to many events, including the death of John in October 1215, the death of Pope Innocent III, and the backing by many barons of infant king Henry III, the political landscape changed within a few months. Almost immediately after Henry's reign began, his advisors reissued the Magna Carta in 1216, deleting some of its most egregious provisions against the King. Chapter 61 was one of the first clauses to be deleted. In 1225 under Henry's reign, the Magna Carta was reissued, this time with significant changes, and it was made the fundamental law of the land to be obeyed by all.

[14] For instance, one member of the council, Henry de Bohun, demanded a settlement of his claims to Trowbridge. The King sought a postponement of the case, but had to order a restoration of the manors of the honor on 19 June. The most Henry would allow him was respite until 28 June on the claim to Trowbridge castle. John argued such cases should be left open until the usual investigations by juries had taken place. But this was unavailing. In another instance, Geoffrey de Mandeville demanded rights of advowson in the abbeys and religious houses which his predecessors had founded in Gloucestershire and Somerset. John first ordered the sheriffs of the two counties to make inquiries into the earls' rights through local jurors whose names were to be sent to him. On the same day, these instructions were replaced by orders that the sheriffs were to give Geoffrey such claim as his predecessors had enjoyed.

5. Self enforcing constitutions: parchment, guns, and constitutional order

It is clear that rules intended to limit the authority of the King failed almost immediately, and civil war broke out. Many centuries later, in Federalist 48, James Madison concluded, "A mere demarcation on parchment is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands."

Wagner (1993) concurs that parchment is rarely self-enforcing. To the extent enforcement is possible, it is through the construction of opposing interests. Yet he agrees there may be some value in articulating principles. In this sense, articulation of principles on parchment, placement of guns, and placement of self-interest are complementary for maintenance of constitutional order.

The articulation of principles on parchment was not the problem with the Magna Carta. It listed both substantive and procedural/structural constraints. It included many different groups within its scope and protected barons, towns, clergy, and "all the free men."

The main problem with the 1215 Magna Carta in general and Chapter 61 in particular was its structural design. While it attempted to create a procedural design to set up opposing interests and limit monarchy, it failed to create a polycentric system of checks and balances. Opposing interests have to be in a polycentric structural arrangement to provide a genuine check against concentration of power. Even though Chapter 61 distributed power, it led to a monocentric structure, all the different levels leading to one final power center. This is because John had no recourse from the tyrannical decisions of the Twenty-Five.

The problem was one of concentration of power instead of a separation of powers. As discussed in section IV, Chapter 61 did not create different power centers in the King, the public, and the barons, and thereby effectively create mutual interests in enforcing the Charter. This meant it was not in the interest of the different parties to enforce the Charter, as it was tipped too heavily in favor of one over the others. This becomes apparent from some of the events immediately before and after Runnymede.

In April 1215, John sent Stephen Langdon and the Earl of Pembroke to the barons to get an exact statement of their demands. They returned with a schedule which was recited to the King point by point. These were no doubt the same as the "Articles" presented to the King afterwards, on which the Charter was based. When John was made to understand the meaning of the various clauses, he lost his temper and cried, "Why do they not go on and demand the kingdom itself?" and added with a furious oath that he would never make himself a slave by granting such concessions (Adams, 1905, p. 436).

Based on this, the barons prepared for war. John sent various proposals of his own which were more acceptable to him. One such proposal even had a provision to enforce the agreement between John and the barons. John's offer was far more symmetric in its construction of the enforcing council compared to the council in Chapter 61. He proposed to submit to arbitration by eight barons, four chosen by him, and four chosen by his opponents, sitting under the direction of the pope as the supreme arbiter. He announced this scheme in a charter on 9 May, 1215, in which he stated that pending such arbitration, he would not be bound by any previous discussion or offer (Holt, 2015, p. 208).

None of this made it to the articles of the Charter negotiated in Runnymede. Mathew Paris described John's reaction to the events at Runnymede: "gnashing his teeth, scowling with his eyes and seizing sticks from the trees, [he] began to gnaw at them and after gnawing them to break them, and with increased extraordinary gestures to show the grief and rage he felt" (Arlidge and Judge, 2014, p. 8). It was clear that John found the Charter against his interests.

The twenty-five barons were aware of John's reluctance to sign the Charter. Further, they did not trust him to uphold the unfavorable terms of the Charter. This was the main reason for the security clause and the oath to not have any terms revoked or diminished. However, instead of modifying the Articles such that it was in John's interest to uphold the terms of the Charter, they strengthened the rules that diminished John's power and turned the balance of the Charter in favor of the rebel barons. The later Chapters, specifically Chapter 61 demanding the security from the King, is a consequence of this dynamic. And John had no incentive-except by the force of the Charter—to publicize the Charter, because it diminished his powers and required his subjects to take an oath of loyalty to his greatest enemies.

This raises the general question of the self-enforcing nature of constitutions, and the conditions required for such enforcement (See Mittal and Weingast, 2013). The crux of the issue rests on aligning interests. First, this requires different groups within the constitutional contract to have an interest in maintaining such a contract. As discussed above, this requires a structural design (either on paper on in reality) that creates polycentric relationships between the different groups. The argument also rests on publicizing the constitutional contract to coordinate expectations. However, these conditions are closely related.

Given the problem of collective action faced by subjects rebelling against the ruler, when the terms of a constitution are violated, some coordinating mechanism to organize protest or rebellion is necessary. The most important requirement in this mechanism is that a constitutional document be publicized. Without the citizens being aware of their rights and interests against the ruler, the chances of the citizens acting as a collective counterweight to the power of the ruler is diminished. Weingast (1997) points to public proclamations of constitutional rules as significant events precisely because their salience can coordinate citizen expectations regarding impermissible actions.

However, publicizing constitutional provisions also requires effort and resources, which different groups are likely to invest only if it is in their interest to enforce the constitutional document. It was never in John's interest to publicize this document, especially since it required his subjects to take an oath of loyalty to the Twenty-Five against the King. While in 1215 John's enemies wrote Charter, the reissues of 1216 and 1217 were the work of his friends and supporters, forming a small clique to protect the infant king. The 1225 Charter was more symmetrical. It limited the monarchy without giving extraordinary powers to the Twenty-Five. In fact there was no Council of Twenty-Five in the 1225 Charter. The 1225 Charter provided substantive protections to "all the free men" – barons, towns, clergy, etc. – and created interests of different groups to promote the document. It was in the monarch's interest to publicize the document. The 1225 Charter added another clause declaring that any policy or enactment contrary to the terms of the Charter was to be held invalid. It gave the 1225 Charter the status of fundamental law.

By deleting the pernicious clauses, and willingly binding the Crown to the Charter, Henry's administration found it in its interest to make the Charter the fundamental law of the land, and also publicize the document. The 1225 Charter had many more issues distributed among the public, relative to the 1215 document, as it was declared the law of the land. Future reissues were distributed to each shire as the original had been in 1215. The government assumed that a copy was available in every county.

It is really the 1225 reissue of the Magna Carta that has endured all these centuries. Tout (1905, p. 5) argues that the Bristol Charter marked an even more important moment than Runnymede. The reissue of the Charter by free will converted "a treaty won at the point of the sword into a manifesto of peace and sound government" (Stubbs, 1875; Vol II, p. 21). It set into motion mechanisms for the long-term survival of the Charter: "Instructions were issued on the occasion of each re-issue that the Charters should be read in full county court, and this was repeated in the case of the 'small' Charter in 1237. The system was continued in subsequent confirmations until 1265, when the sheriffs were instructed to publish the Charters twice yearly. Thus every step was taken to make sure that the texts were known" (Holt, 2015, p. 331).

6. Conclusion

As mentioned before, the Magna Carta has shown longevity, but not all its provisions have proved durable. This is not a contradiction. Often when certain rules erode or evolve with the times, it can make a constitutional document sustain longer. Rigid rules that do not change at all may actually be the end of a constitutional contract as a whole. The puzzle with the Magna Carta is *which* of the rules were maintained or eroded. Contrary to the prevailing analysis and research on constitutional maintenance, some of the substantive rules of the Magna Carta have survived longer than the most important procedural rules. More puzzling is that the substantive rules have survived, without any procedure enforcing them.

The details of Chapter 61 show the remarkable extent to which it limited the authority of the King, and the unprecedented powers it vested in a legal body outside the monarchy. However, it also demonstrates the problematic structural design inherent in Chapter 61, and the 1215 Charter as a whole. While it limited the power of the King, it did nothing to limit the power and scope of the Twenty-Five. This provides us a glimpse of the power struggle and the insecurities of both sides while negotiating the Charter. And it also manifests how the barons got the upper hand in getting the great charter signed. Second, unlike modern-day procedural constraints, Chapter 61 was sloppily drafted, and left much room for disagreement and misuse. And once again it vested the power to interpret the document asymmetrically in the hands of the Twenty-Five. These features of Chapter 61 caused its quick demise. However, with the deletion of Chapter 61, the power and interests of the different parties came into balance.

Simultaneously, Chapter 61 was the cause of the failure of the Magna Carta and its deletion was one of the most important reasons for the success and longevity of the reissues of the Charter from 1216 onward. Counterintuitively, one of the main reasons the Charter became self-enforcing for many centuries *because* of the deletion of the enforcement clause.

Appendix A. Translated text of Chapter 61, Magna Carta, 1215

SINCE WE HAVE GRANTED ALL THESE THINGS for God, for the better ordering of our kingdom, and to allay the discord that has arisen between us and our barons, and since we desire that they shall be enjoyed in their entirety, with lasting strength, for ever, we give and grant to the barons the following security:

The barons shall elect twenty-five of their number to keep, and cause to be observed with all their might, the peace and liberties granted and confirmed to them by this charter.

If we, our chief justice, our officials, or any of our servants offend in any respect against any man, or transgress any of the articles of the peace or of this security, and the offence is made known to four of the said twenty-five barons, they shall come to us – or in our absence from the kingdom to the chief justice – to declare it and claim immediate redress. If we, or in our absence abroad the chief justice, make no redress within forty days, reckoning from the day on which the offence was declared to us or to him, the four barons shall refer the matter to the rest of the twenty-five barons, who may distrain upon and assail us in every way possible, with the support

of the whole community of the land, by seizing our castles, lands, possessions, or anything else saving only our own person and those of the queen and our children, until they have secured such redress as they have determined upon. Having secured the redress, they may then resume their normal obedience to us.

Any man who so desires may take an oath to obey the commands of the twenty-five barons for the achievement of these ends, and to join with them in assailing us to the utmost of his power. We give public and free permission to take this oath to any man who so desires, and at no time will we prohibit any man from taking it. Indeed, we will compel any of our subjects who are unwilling to take it to swear it at our command.

If one of the twenty-five barons dies or leaves the country, or is prevented in any other way from discharging his duties, the rest of them shall choose another baron in his place, at their discretion, who shall be duly sworn in as they were.

In the event of disagreement among the twenty-five barons on any matter referred to them for decision, the verdict of the majority present shall have the same validity as a unanimous verdict of the whole twenty-five, whether these were all present or some of those summoned were unwilling or unable to appear.

The twenty-five barons shall swear to obey all the above articles faithfully, and shall cause them to be obeyed by others to the best of their power.

We will not seek to procure from anyone, either by our own efforts or those of a third party, anything by which any part of these concessions or liberties might be revoked or diminished. Should such a thing be procured, it shall be null and void and we will at no time make use of it, either ourselves or through a third party.

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