

MAGNA CARTA: THE RULE OF LAW AND LIBERTY

The principles inherent in the document developed by incremental steps.

The document to which King John affixed his seal on this day 800 years ago was intended to be a peace treaty to end a civil war. As such, it failed. Within two months, the King repudiated it and the Pope declared it void. The Civil War reignited. However, John died about a year later and an amended version of the Charter was issued as a coronation Charter in the name of his nine year old son, Henry III, on his accession in October 1216.

This reissue of the Magna Carta, was in a long line of promises of good governance, traditionally given by a king on his coronation. Historically, when the monarchy was strong, the Coronation oath was short and expressed in general terms. When the monarchy was weak, a more detailed list of promises was required and given.

The final reissue by Henry III, in 1225, of the Magna Carta—about a third of the 1215 text had gone—and its companion, the Forest Charter, to the significance of which I will return, was not just a formal act. Nor was it simply a list of grievances to be remedied. By reason of their scope and detail, together with endorsement by the loyalist barons, the Charters constitute the first comprehensive statement in written form, formally promulgated to the whole English population, of the requirements of good governance and of the limits upon the exercise of political power.

I am asked to focus on the significance of the Magna Carta for the rule of law and liberty. My answer to the first is forthright. We can legitimately trace the strength of our tradition of the rule of law to this document. With respect to liberty, however, the position is equivocal. The Charter has often been deployed in support of the development of liberties, but that deployment was, at best, indirect.

The liberties often associated with the Magna Carta were a product of the institutions of Parliament and the Courts, over the course of centuries. However, the development of those institutions was significantly influenced by the Magna Carta.

At the heart of English constitutional evolution—particularly in the six centuries between the Norman invasion of 1066 and the aftermath of the Dutch invasion of 1688—was the tension between alternative bases for the legitimacy of the institutions of governance. On the one hand, was a top down model of legitimacy from a sovereign. On the other, was organic legitimacy from the emergence of institutions over the course of centuries.

The Magna Carta and the Forest Charter stand in, and propagate, the tradition or organic legitimacy. They draw on, and purport to reassert, the customs of the past. However, the Charters also contain promises about future conduct which were reforms.

The Magna Carta of 1215 is expressed as a ‘grant’ issued on the advice (in older translations by the ‘counsel’) of eleven named ecclesiastics, sixteen named lay barons and an unknown number of unnamed ‘faithful subjects’.



James Spigelman is a former chief justice of the Supreme Court of New South Wales and lieutenant governor of New South Wales. These remarks were originally delivered at an event of The Centre for Independent Studies on 15 June 2015.

The last inclusion is of significance. The first clause of the Charter states expressly that the promises in the subsequent clauses are ‘liberties’ granted to ‘all of the free men of our realm’, for the benefit of themselves and their heirs, binding King John and his heirs ‘forever’.

This was a document for the entire political nation, not just for the secular and clerical magnates. Both the language of ‘grant’ and the identification of the political nation are pregnant with future constitutional development. Was this list of political promises an act of benevolence on the part of the King, or was it an acknowledgement by the King of restraints on sovereignty arising from custom and law? Similarly, who is entitled to offer counsel to the King: the clerical and secular magnates alone, or a wider range of free men? These issues would not be resolved for centuries.

In the great tradition of the common law, the Magna Carta is an intensely practical document. There are few statements of high principle. Primarily, it consists of specific promises to restore compliance with proper conduct. One can, however, deduce certain themes which underlie the Charter.

First, the acts of the King are not simply personal acts. The King’s acts have an official character and, accordingly, are to be exercised in accordance with certain processes.

Secondly, the Charter manifests the obligation of the King to consult the political nation on important issues.

Thirdly, the Charter restricts the exercise of the King’s feudal powers—subsequently transmogrified into prerogative powers—in accordance with traditional limits and conceptions of propriety.

Fourthly, the King cannot act on the basis of mere whim. The King is subject to the law and also subject to custom which was, during that very period, in the process of being hardened into law.

Fifthly, the King had in fact acted contrary to established custom and, to some degree, contrary to the law.

Sixthly, the King must provide a judicial system for the administration of justice and all free men were entitled to due process of law.

The principles inherent in these themes were not established by the Magna Carta. However,

they were affirmed by its content and context in a concrete form. It is these themes, as developed and applied in changing circumstances over the centuries that gave the Charter the significance we commemorate today.

The reissues and confirmations of the Charters were distributed widely throughout the kingdom to sheriffs and cathedrals, with instructions that they be read, sometimes more than once a year, to the whole community. This happened not only in Latin, but French, the language of the upper classes, and there is some evidence that, on occasions, they were read in English. The Charters quickly penetrated the consciousness of the political nation.

Whatever their limitations and problems of enforcement, over the course of the first century, the Magna Carta and the companion Forest Charter acquired a totemic status as a statement of principles of good governance. The King was asked to confirm the Charters on numerous occasions, particularly when assent was sought for new taxation. Furthermore, grievances were generally expressed in terms of a failure to obey the Charters.

The Magna Carta was invoked when a king asserted that he was above the law.

Rule of Law

From the point of view of the rule of law, nothing was more critical than the proposition that the King was subject to the law. This principle was not established by the Charter, but there was no previous written affirmation, let alone one publicly read many times throughout the nation. The most important legal texts of the next two centuries asserted this proposition as fundamental to the polity, albeit without referring to the Magna Carta. These are the works known to lawyers as *Bracton* and *Fortescue*.

The Magna Carta was invoked when a king asserted that he was above the law. Richard II and the Stuarts did that. Shakespeare made it clear, in his *Richard II*, that this assertion was part of the

King's downfall. He did not mention that Henry Bolingbroke invoked the Magna Carta. Indeed, Shakespeare could write King John without mentioning the Charter. Victorian theatre producers introduced a Runnymede scene, as something the bard had overlooked.

It was not a favourite text of either the Tudors or the Stuarts. After all, one of the few times it was invoked under the Tudors was when Thomas More pleaded clause 1, guaranteeing the liberties of the church, before Henry VIII.

It would be accurate to describe the baronial rebellion against John, in large part, as a 'tax revolt.'

It was Sir Edward Coke, in reaction to the Stuarts, who invested the Magna Carta with the mythological status which has been handed down to us today. There is, however, nothing mythical about the proposition that the Magna Carta reinforced, even if it did not establish, the fundamental principle that the King was subject to the law.

The largest number of clauses of the Magna Carta, in all versions, were those directed to preventing the King's abuse of incidents of feudal tenure and social structure to raise revenue. Of the 37 clauses of the 1225 version, which I use, all of these provisions either imposed, or to an unknown extent confirmed, restrictions on the exercise of powers that were a product of the complex of mutual rights and obligations attached to the possession of land—which was 'held' from a superior, rather than owned.

There was a wide range of such powers which were open to exploitation by the King. Abuse was inherent in a system that permitted when, and how much, the King could demand in payment for exercising, or not exercising, his feudal rights. I give only a few examples.

When a tenant in chief died the land reverted to the King. There was no formal limit on how long he could exploit the land before allowing an heir to inherit, nor on how much he could charge to permit him to do so. Similarly, with the amount

payable to allow a widow or a ward to marry, or the amount payable to avoid the obligation to provide knights, or many other feudal payments that could be requested from time to time, in the discretion of the King.

In addition to these incidents of land holding, there were numerous other discretionary sources of revenue: fines for an offence, even payments for the king's mercy when there was no offence, and the assertion that circumstances had arisen when property could be forfeited. All of those powers were abused by King John. The same was true of the revenue raised from the extent of the royal forest and the restrictions on conduct within it—the subject of the Forest Charter. It would be accurate to describe the baronial rebellion against John, in large part, as a 'tax revolt.'

The provisions of both Charters restraining the abuse of the King's powers for the purpose of raising revenue manifest the proposition that the King was subject to the law. This was, and is, at the very core of the rule of law. The majority of provisions of the Magna Carta require the King to cease or modify particular conduct. The most significant field in which the Charter requires the King to do more—rather than less—is in the provision of justice.

The Magna Carta contains a range of promises directed to preventing abuses and improving the institutions of the rule of law. Their very scope manifest an intention to benefit the whole community:

- Cases involving inter-personal disputes, known as common pleas, would not follow the ambulatory royal court, but be fixed in a particular place, eventually Westminster (clause 11) (I refer to the clauses of the permanent 1225 Charter, not the 1215 Charter).
- Disputes relating to the ownership of land would be heard in the counties in which the land was located and determined by visiting justices, sitting with local knights (clause 12);
- Royal justices would visit annually to hear the most common causes of action for recovery

of land and inheritance (clause 12, reduced from quarterly visits in the 1215 version, clause 18);

- Fines for offences would be extracted only for serious offences, would vary with the gravity of the offence and would be imposed only on the oath of law-abiding locals (clause 14);
- Pleas of the crown, i.e. serious criminal charges, would not be heard by sheriffs, constables or coroners, but only by justices (clause 17);
- Constables and bailiffs would not take private property without full payment in cash (clause 19);
- Sheriffs and bailiffs or, for that matter, any other person, would not take horses or carts, save on payment of a prescribed amount, nor any timber, except by consent (clause 21);
- The writ of *praecipe* would no longer issue to remove to a Royal Court a cause of action, which was properly before the court of a Lord (clause 24);
- No bailiff would put anyone on trial upon his own word, without reliable witnesses (clause 28).
- The frequency of shire courts was regulated, as was the amount sheriffs could exact in the hundred courts from the system known as frankpledge. (clause 35)

Many of these provisions appear to be promises of reform, rather than assertions of past custom. However, writing them down made those which were customary more readily enforceable. These promises constituted a guarantee of the rule of law appropriate for that era. Collectively, they built on the foundation of the existing institutions of justice—particularly as created by Henry II, John’s father—and established the basis for their future development. We can recognise this guarantee as our direct legacy.

The best known promise, and the one of abiding significance for the rule of law throughout the 800 years we commemorate today, is clause 29 of the 1225 Charter. It is an amalgamation of clauses 39 and 40 of the 1215 Charter. It states:

No free man is to be taken or imprisoned or disseised of his free tenement or of his liberties or free customs, or outlawed or exiled or in any way be ruined, nor will we go or send against him, except by the lawful judgment of his peers or by the law of the land. To no one will we sell, to no one will we deny or delay right or justice.

Like a number of other clauses, this provision is expressly addressed to all ‘free men’—not just to barons. It is wrong to say, as is sometimes said, that the Magna Carta was only designed to protect the barons.

Nevertheless, it is pertinent to note that only a minority of the population were then ‘free men.’ The bulk of the population was not free. Only clause 14 of the 1225 Charter, imposing restrictions on amercements, expressly extended to villeins. However, in the fourteenth century, the statutes of Edward III extended the protection in clause 29 to the whole population.

It is pertinent to note that only a minority of the population were then ‘free men.’

The better, albeit not unanimous view, is that the reference to judgment of ‘peers’ was a reference to social equals, not just to barons. It was soon called in aid by mere knights. Furthermore, notwithstanding many statements to the contrary that can be traced back to Sir Edward Coke, clause 25 was not the basis for the development of the jury system. The event of 1215 that caused the investigating jury—or Grand Jury in modern parlance—to develop into the ‘petty’, later the trial, jury, was the decision of the Lateran Council in Rome that very year to prohibit any priest being involved in trial by ordeal.

The implementation of the companion Forest Charter was of equal significance for the rule of

law. The Royal Forest was not an area of minor significance. It is estimated that something between one quarter and one third of England was part of the Royal Forest. This 'forest' was not simply woodland. It encompassed cultivated areas, even villages, which were privately held.

Forest law trumped common law. The draconian rules of the Forest, governing virtually anything that people could do in this substantial part of the nation, including on their own property, was administered in a tyrannical manner. It constituted an abuse of the royal prerogative in its most absolutist form. This is the background to the story of Robyn Hood, still the only fictional character in the Dictionary of National Biography.

The Forest Charter did result in improvements in the administration of forest law. For example, the death penalty for taking deer was abolished, although deer hunting remained the exclusive preserve of the Kings. The promise to reduce the extent of the Royal Forest was continually delayed, until late in the reign of Edward I. It will no doubt come as a great shock to this audience to hear that in medieval times, political promises were not always kept. It took a century, but these promises were eventually honoured.

From the point of view of the majority of the population, not just free men, the Forest Charter was of greater practical significance than the Magna Carta. Much of the forest was a commons—including for timber, the essential fuel and building material—available even to peasants. The Forest Charter deserves to be more widely remembered for its significant contribution to the rule of law in England.

Over the course of centuries, these 'liberties' have transmogrified into 'rights.'

The combined effect of the restraint on the ability of the King to extract revenue by abuse of feudal incidents, and by the enforcement of the Forest Charter, resulted in a major curtailment of royal revenue. The development of Parliament, out of the feudal assemblies which were called to agree to periodic royal taxation, was a direct result of this

curtailment. Whenever assent was given by the political nation to new taxation in the first century after the Charter, Henry III and Edward I, John's son and grandson, confirmed the two Charters as part of an express exchange for a new tax.

Liberties

The Magna Carta is often referred to as a Charter of Liberties. The Latin word usually translated as 'Liberties' appears on a number of occasions in the Charter. However, the word 'Liberties' was not then understood in the sense that we use the word 'rights.' It was closest to what we would call 'privileges and immunities.' Nevertheless, these medieval 'liberties' constituted a sphere of autonomous conduct, free from constraint by government and, in that sense, constituted 'freedoms,' close to contemporary usage.

The Charters contained a list of restraints on executive power, addressing the abuses of the day. What came down over the centuries, was the general idea that the powers of the sovereign were restricted. It is anachronistic to characterise these restrictions as a recognition of the 'rights' of subjects. However, over the course of centuries, these 'liberties' have transmogrified into 'rights.' As the Lancastrian warrior turned Chief Justice, Sir John Fortescue, put it in the late fifteenth century: in France the king was 'regal,' but in England, the king was both 'regal' and 'political.'

It is possible to eke out of particular provisions of the Charter an underlying principle, which could be stated at a higher level of generality than the time bound grievances expressly addressed. For example, protection of the right to property can be deduced from the provisions which restricted the King's revenue generating powers. Many clauses impose controls on such powers, usually in general terms, but sometimes in detail—with amounts stipulated, circumstances of imposition excluded or a standard of reasonableness, or of custom, expressed.

Further, the principle of no expropriation without compensation can be inferred from specific restraints on sheriffs and bailiffs from taking property with compensation and, in the case of horse carts, stipulating a particular rate. The companion Forest Charter, similarly, removed

some restrictions on what people could do on their own land.

Other traditional liberties are more difficult to identify in the Charter. One must not overlook those parts of the Magna Carta that are inconsistent with liberty. For example, one provision expressly forbids a woman to give evidence in any case against a person for murder, unless the deceased happens to be her husband when, presumably, even a woman could be believed.

The 1215 Charter prohibited the payment of interest on debts owed to Jews in certain circumstances. This clause was not repeated in the 1225 Charter, but that did nothing about existing discrimination, derived from the combined effect of usury restrictions on Christians lending money and the restrictions on Jews engaging in other economic activity, e.g. the prohibition on any Jew owning land.

Jews were protected by the King as a source of feudal revenue. For example, when a Jewish lender died, the King expropriated his rights as creditor. Indeed, when Edward I, to popular acclaim, ordered the expulsion of all Jews, he was expressly compensated for his loss of revenue by an additional tax.

It is also necessary to remember the restrictions on liberty about which the Charter offered no amelioration. A substantial proportion of the population was held in a condition of slavery and remained so. People were still executed for heresy for some three centuries and the executive continued to detain subjects at will and to deploy torture in interrogations for four centuries. It was also four centuries before any intrusion was made into the restrictions on freedom of religion and freedom of expression, and it was well into the 19th century before Roman Catholics and Jews had equal civil rights. Homosexuals had to wait for another century. In the actual control of the exercise of executive power, the courts were constrained until the Act of Settlement, 1701 took away the power of the King to remove a judge from office at will, as James I removed Coke as Chief Justice.

With respect to human rights, the Magna Carta was not much of a start. But by entrenching the rule of law and promoting the expansion

of royal courts, it created the institutional basis for the future expansion of personal liberties by Parliament and the Courts.

Although the constitutional impact of the Magna Carta was greatest in its first century and in the 17th century, it was of more consistent significance for the legal system. The Charters were referred to in legal proceedings on a minimum of fifty eight occasions in their first century. Furthermore, in an era when the quantum of litigation increased dramatically, the Magna Carta became a basic tool of the legal profession. It was no doubt, in large measure, its concreteness as a text that facilitated reference to its provisions for purposes of litigation. The Charters acquired the status of a statute and, at the end of the century, the Magna Carta became the first statute in the official Roll of Statutes.

It is appropriate to note what a good investment the Menzies government made when it bought our copy for £12,500 in 1951.

A good representation of the use of the Charter by lawyers is found in the 1330 printed compilation of 20 statutes, commencing with the Magna Carta and the Forest Charter, presently on display at the State Library of New South Wales. This antiquarian volume, in its original binding, was probably the property of a practising lawyer, for use when on circuit throughout England and Wales. This is a physical embodiment of the rule of law at work in the technology of the era.

The version in the statute book was the 1297 confirmation by Edward I of the 1225 Magna Carta. The copy in our Parliament House is one of only four surviving copies of that 1297 confirmation. Because that is the version which acquired the formal status of a statute, it has been of greater practical importance than the 1215 Charter.

It is appropriate to note what a good investment the Menzies government made when it bought our copy for £12,500 in 1951. In 2007, the only copy of the 1297 confirmation in private hands sold at auction for US\$21.3 million.

Abiding Relevance

A classic example of the significance of the Magna Carta was its deployment in the conflict between the Stuarts and Parliament arising from the historic Five Knights case, culminating in the Petition of Right of 1628. After failing to obtain additional taxation from his first Parliament in 1626, Charles I dissolved Parliament and proceeded to raise funds without Parliamentary approval by way of a forced loan.

A number of subjects refused to advance the funds demanded by this executive measure and were imprisoned without charge by the Privy Council, acting as a prerogative court. They were refused bail on the basis of an assertion on the part of the prosecution that the king had an absolute right, as a matter of state necessity, to keep anyone in prison without giving reasons. Some of the accused wanted to force the prosecution to state that the only reason was their refusal to pay the loan.

The Charter became a ‘myth,’ in the sense that it has been invested with a scope and with purposes that none of its progenitors could ever have envisaged.

Almost without precedent, five of them applied to a common law court by habeas corpus to challenge the order of the Privy Council. In an interlocutory hearing for release on habeas corpus, a weak-kneed court appeared to give credence to the power to imprison without stated cause. The case turned on this crucial issue of personal liberty and on the principle of legality.

The prosecution wanted to avoid an express statement that imprisonment was based on a demand for money that had no lawful basis. Submissions for the knights expressly invoked the Magna Carta, namely, the general words of clause 29 preventing imprisonment other than in accordance with the law. The great lawyer, John Selden, submitted that ‘the law of the land’ in clause 29 must mean due process as understood by the common law.

In response to the failure of the Court to act, the House of Commons drafted what became the Petition of Right of 1628. Drawing on the Magna

Carta, together with its elaboration in statutes of Edward III, the House demanded that the King acknowledge that no person could be imprisoned without cause shown.

In the course of the interchange between the House of Commons and the House of Lords, the latter appeared to support the King’s position by inserting a qualification in the draft: adding the words ‘saving the Kings sovereign power.’ In his vehement reply, Sir Edward Coke declaimed: ‘Sovereign power is no Parliamentary word... in my opinion it weakens the Magna Carta... Magna Carta is such a fellow, that he will have no sovereign.’ As Coke often had to do, he offered a weak explanation of why he had not always applied these principles when he was a judge, let alone when he was the Crown’s chief prosecutor as Attorney General.

After much prevarication, the King accepted the Petition and the ability of the executive to deprive citizens of liberty without cause, henceforth, became illegal. Acceptance of the Petition, which encompassed some other rights, was celebrated throughout the nation, with bonfires and the like. It was a constitutional moment, although there was still much work for the judiciary to do in developing the writ of *habeas corpus*.

This is only one, albeit dramatic, example of how the general words and underlying themes of the Magna Carta were given content over the course of the centuries. The Charter became a ‘myth,’ in the sense that it has been invested with a scope and with purposes that none of its progenitors could ever have envisaged. It was a myth of great historical significance.

As one of the greatest common law judges of our time, the late Tom Bingham, the former Senior Law Lord, put it: ‘The significance of Magna Carta lay not only in what it actually said but, perhaps to an even greater extent, in what later generations claimed and believed it had said. Sometimes the myth is more important than the actuality.’

The principle of the rule of law and of due process inherent in clause 29 of the Magna Carta was developed by incremental steps. What we came to know as civil liberties or, in earlier centuries as the ‘rights of Englishmen’, were the practical manifestations of experience of the law over the

centuries as manifest in judicial decisions and in legislation.

There is virtually no aspect of the trial process that does not manifest these considerations. Equally important for the protection of liberty are the principles of statutory interpretation. There is a strong presumption that Parliament does not intend to abrogate basic rights, freedoms or immunities. A statute will only be found to do so if the language is unambiguous. A few years ago I compiled a list of specific circumstances where this presumption has been applied. In my opinion, this list constitutes a ‘Common Law Bill of Rights.’

With some support from Parliament these protections emerged from a process of induction, based on experience, rather than deduction from an abstract level of language. This was judicial creativity, before it came to be derided as ‘activism.’ This characteristic English approach to the development of the law was frequently in tension with, and often in competition with, an approach based on natural law. However many lawyers, including Coke and Blackstone, invoked both.

The 17th century revival of the Magna Carta, led by Coke, deployed it as a text which reflected what

he asserted was an ancient constitutionalism of custom extant in England from time immemorial. This, like most of Coke’s antiquarianism – for example, his espousal of the myth that King Arthur’s ancestors came from Troy – was and is nonsense. Nevertheless, the Magna Carta stands in the organic tradition of the common law. The contemporary human rights movement is based on the alternative jurisprudential tradition of natural law.

The utility of the Charter is not only historical. The proclivity of the executive branch to manifest intolerance of anything that frustrates its will was never limited to the Stuarts, either before or since. An overweening confidence in the purity of their motives appears to be an occupational hazard of executive power.

Indeed, Oliver Cromwell rejected constraints on his authority, dismissing the Magna Carta contemptuously as ‘Magna Farta.’ No doubt even stronger language was used in the White House about litigation over Guantanamo Bay. Strong language on such issues it appears is not unknown in the deliberations of our own Cabinet! This will not, regrettably, be the last time that it is appropriate to celebrate the anniversary of the Magna Carta.