

## **Bad King John and the Australian Constitution\***

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A suggestion was made by a number of organisations that something should be done to mark the 700th anniversary of the 1297 inspeximus issue of Magna Carta which is on display here in Parliament House. The Senate Department decided to oblige by devoting one of its occasional lectures to the subject before it was known that other and grander events were planned. Considering other anniversaries which are commemorated from time to time, however, perhaps this is one which should be marked by more than one event.

In 1952 the Australian government purchased a copy of the 1297 inspeximus issue of Magna Carta of Edward I for the sum of £12 500, a lot of money in those days. The copy had long been in the possession of a British school which needed to sell it to raise money for school improvements.

An inspeximus issue of a charter is one in which the granter states that an older charter has been examined (Latin: inspeximus, we have examined), and then recites and confirms the provisions of that original.

The 1297 statute of Edward I confirms and enacts the principal provisions of the original Magna Carta which King John was forced by his rebellious barons to sign in 1215. The 1297 statute was enacted by Parliament (which did not exist in 1215)

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\* This paper was presented as a lecture in the Senate Occasional Lecture Series at Parliament House, Canberra, on 17 October 1997 and first published in *Papers on Parliament*, no. 31, June 1998.

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and is still in force in part in the United Kingdom and, indeed, in the Australian states and territories.

The purchase of the copy by the Australian government indicated a belief that the document is an important part of Australia's constitutional and legal heritage and that we ought to have a copy upon which we can gaze with awe and reverence.

Is Magna Carta significant, and should we gaze upon it with awe and reverence?

There is certainly a long history of reverence for Magna Carta. It was constantly cited during the struggle between Parliament and King Charles I in the 17th century. Parliament's Petition of Right of 1628 referred to the Great Charter and alleged that King Charles had violated its terms. Its virtually sacred status came to be encapsulated in a phrase which was repeated throughout the 18th and 19th centuries. Magna Carta was called 'the palladium of English/British liberty'. A palladium is something without which the city falls, and this phrase implied that the Great Charter was the essential basis of the whole structure of the British constitution. The phrase was also employed by some of the American colonists during their revolution.<sup>1</sup>

On the other hand, there has been an equally long history of debunking of Magna Carta. Oliver Cromwell was very rude about it when the judges cited it against him, and incidentally provided a chilling foreglimpse of modern times when he scorned the old English republicans who regarded it as holy writ.<sup>2</sup> Some of the rebellious American colonists referred to it as a symbol of the genetic defects of the British system of monarchical government and of the radical difference in the republican foundation of their constitution.<sup>3</sup> As will be seen, this disagreement amongst the Americans about Magna Carta was very significant.

The document has therefore long had a mixed reputation.

The actual content of Magna Carta is now not conducive to awe and reverence. Most of it consists of a lengthy and very tedious recital of feudal relationships which not only have no relevance to modern government but which would be of interest only to the most pedantic antiquarian. Here are two samples of what most of it is like:

No scutage or aid shall be imposed in our kingdom except by the common council of our kingdom, except for the ransoming of our body, for the making of our oldest son a knight, and for once marrying our oldest daughter, and for these purposes it shall be only a reasonable aid;

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<sup>1</sup> See two 1787 articles by Noah Webster in *The Debate on the Constitution: Federalist and Antifederalist Speeches, Articles, and Letters During the Struggle Over Ratification*, vol. 1, New York, Literary Classics of the United States, 1993, pp. 158, 669.

<sup>2</sup> E. Hyde, Earl of Clarendon, *The History of the Rebellion and Civil Wars in England ...*, ed. W. Dunn Macray, vol. vi, Oxford, Oxford University Press, 1969, p. 93.

<sup>3</sup> A. Hamilton, *The Federalist*, no. 84, 1788, Everyman edn, p. 438.

in the same way it shall be done concerning the aids of the city of London.

If any one holds from us by fee farm or by socage or by burgage, and from another he holds land by military service, we will not have the guardianship of the heir or of his land which is of the fief of another, on account of that fee farm, or socage, or burgage; nor will we have the custody of that fee farm, or socage, or burgage, unless that fee farm itself owes military service. We will not have the guardianship of the heir or of the land of any one, which he holds from another by military service on account of any petty serjeanty which he holds from us by the service of paying to us knives or arrows, or things of that kind.

Whether King John was entitled to the money to marry off his eldest daughter for the first time and whether somebody was obliged to supply him with knives and arrows do not now appear to be matters of great constitutional importance.

There are two provisions only in the document which strike the reader as being of some significance, and these are the provisions which are always quoted as evidence of Magna Carta's continuing importance and contribution to constitutional development. The provisions are as follows:

No free man shall be taken or imprisoned or dispossessed, or outlawed, or banished, or in any way destroyed, nor will we go upon him, nor send upon him, except by the legal judgement 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.

These provisions certainly have a more modern ring and appeal to them. This is partly because they appear to anticipate subsequent declarations of the rights of the citizen.

Rudyard Kipling wrote a charming story to account for the language of one of these two provisions amongst the feudal minutiae. His story tells of a Jewish money lender, a member of a despised and persecuted race, who uses the influence he has gained as a result of lending some money to the barons to have inserted in the document the reference to 'no one' being denied justice, in the hope that some day these words will be taken literally and extended even to members of his race.<sup>4</sup>

The occurrence of the words certainly has the appearance of an historical breakthrough requiring more than the usual explanation. As one authority puts it, 'Magna Carta ... assumed legal parity among all free men to an exceptional degree' (but 'free men' was a restricted category).<sup>5</sup>

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<sup>4</sup> 'The treasure and the law', in *Puck of Pook's Hill*, 1910, various editions.

<sup>5</sup> J.C. Holt, *Magna Carta*. 2nd edn, Cambridge, Cambridge University Press, 1992, p. 278.

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There is a conventional view that these two provisions are the foundation of English law about the liberty of the citizen. While this may be true, it can lead to exaggeration. It is often said, for example, that the provisions are the origins of the entitlement of the citizen to due process of law. This phrase has assumed enormous importance in the jurisprudence of all common law countries, and particularly in the constitutional jurisprudence of the United States because the phrase appears in the Bill of Rights in the first ten amendments of the United States constitution.

Magna Carta, however, does not refer to due process of law; it provides that free men are not to be dealt with except in accordance with law. What this meant was unclear in 1215 and in 1297.

The phrase ‘due process of law’ first appears in a statute of Edward III of the year 1354. This statute, which is referred to by the title Liberty of the Subject, contains the following provision:

... no man of what estate or condition that he be, shall be put out of land or tenement, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought in answer by due process of law.

The first chapter of this statute provided ‘That the Great Charter ... be kept and maintained in all points’, so it is clear that the provision about due process was thought to add something new and different. (The documents were in Latin and French respectively, but the English translations are literal.) The Petition of Right also separately cited the 1354 statute.

The direct influence of the 1354 statute can be seen by comparing its provision relating to due process with the corresponding provision from the 5th amendment of the United States constitution:

No person shall ... be deprived of life, liberty, or property, without due process of law.

The provision thus reached out over four centuries into the modern world in a more striking survival than any influence of Magna Carta.

There is a very great qualitative difference between a right to be dealt with according to law and a right to due process of law. According to law simply means in accordance with whatever the law provides; due process of law implies what the law should provide. This is certainly how the United States Supreme Court has interpreted the expression: as an entitlement to standard processes conducive to just results.

The statute of 1354 is therefore the real historical breakthrough. It is of greater significance to the constitutional heritage than Magna Carta. Perhaps the Australian government should have spent its money on a copy of the later statute so that we could gaze with awe and reverence upon the original use of this highly significant phrase.

It is true that Magna Carta may also be of some residual legal significance. In 1973 the Australian Capital Territory Law Reform Commission prepared a report on imperial statutes still in force in the territory, recommending which statutes should be repealed and which should be retained in force. The report recommended that the 1297 version of Magna Carta, which is still in force in the ACT, should be retained. The commission mildly dissented from the conclusion of its New South Wales counterpart that the value of the statute is chiefly sentimental. The ACT Commission thought that the phrase relating to the deferral of justice may make it unlawful for the executive government to delay unreasonably the rights of the citizen.<sup>6</sup> Similarly, in June of this year the ACT Supreme Court referred to Magna Carta as creating an overriding right to be dealt with by a court in relation to the traffic laws of the ACT.<sup>7</sup> So Magna Carta may be regarded as a living statute.

Even so, the conclusion may be drawn that the two provisions in question are a mere legal fragment, hardly worth the purchase of 1952 and the regard for the document before and since.

I want to suggest that Magna Carta has a significance which is not dependent on its content. This is its contribution to the history of constitutionalism, and, in particular, to the development of the concept of a constitution.

In order to appreciate this significance, it is necessary to realise that many concepts and institutions of government which we now take for granted and which we regard as obvious developed extremely slowly over a long period and in very small accretions. Even the most simple ideas and institutions have been a long time in developing. It is also necessary to appreciate that there are very few really new ideas or institutions. The modern epoch has made very few original contributions to government. A history teacher of mine used to ask his pupils to imagine that a Roman citizen of the 2nd century BC was brought back to life early in the 18th century, 2000 years later, to find that there were very few things in the world with which he was not familiar. If he were revived merely 200 years later, he would be amazed by the things he saw around him. Suppose, however, he were brought to this building and taken into the Senate chamber. He would immediately recognise the physical layout, the institution and its function. He would know that he was in a senate, a body for debating and resolving public affairs on behalf of the community. He would no doubt be delighted to learn that its very name is taken from his language and his institution. And however amazed he might be by the technology of the modern world, he would not be unfamiliar with most of the institutions and methods of government of the modern state. No doubt the vast scale of modern societies would surprise him, but there would be few political institutions not essentially similar to their ancient counterparts. (It is not true that representative government is an innovation of medieval times; it too was known to the ancients.<sup>8</sup>)

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<sup>6</sup> Law Reform Commission of the Australian Capital Territory, *Imperial Acts in Force in the Australian Capital Territory*. Canberra, AGPS, 1973, p. 7.

<sup>7</sup> 'Speed fine makes slow trip through court', *Canberra Times*, 23 June 1997, p. 1.

<sup>8</sup> As James Madison pointed out in *The Federalist*, no. 63, 1788, p. 324.

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There have been two inventions in government in modern times. One of them is federalism as we now understand that term, the constitution by a people of two different levels of government each having a direct relationship with the people through election and the application of laws. Another modern invention is the written constitution. Both of these institutions were invented by the founders of the United States, justifying the boast of one of their mottos that they created *novus ordo seclorum*, a new order of the ages.

The idea of a written constitution, a supreme law of the country to which all other laws are subordinate and which can be changed only by some special process different from that applying to ordinary laws, now appears to us to be too obvious even to think about. Most countries now have constitutions. Historical references to the British constitution remind us that constitutions were not always the modern type of written constitutions; the expression was used to refer simply to the system of government of a country, which until modern times was prescribed simply by ordinary laws and practices.

The written constitution, although it first appeared at a particular point in history, was also the product of a very slow process of evolution. It was not discovered overnight by the gentlemen of Philadelphia in 1787.

There were two essential stages in the evolution of the written constitution. The first stage was the medieval charter. We would regard it as a massively simple and obvious concept that some of the principal rules of government should be codified and set down in writing. This also, however, had to be developed in stages. Ancient states largely depended on practice and custom, and when Aristotle set about collecting the 'constitutions' of states what he collected were descriptions of the governmental practices of the ancient cities. There were certainly some ancient antecedents of law codes, such as the Twelve Tables in which the principal laws of the early Roman Republic were codified. Medieval charters, however, added a significant new element. They were granted by kings to their subjects. The kings were placed in their positions by God, but they granted boons to their subjects. Medieval government was highly monarchical and personal: the king *was* the government. On the other hand, feudalism and the church created a sort of primitively pluralistic society. Those grants therefore often were concerned with agreed limitations on the otherwise unrestrained personal powers of kings and agreed rights of the subject (if only *great* subjects) which kings ought not to take away. Thus came about the notions of limitations on the power of governments and of subjecting governments themselves to law, as well as the notion of rights of citizens which could not be taken away by governments. These were great discoveries, however simple they may appear to us now, and they represent the contribution to constitutional history made by the medieval charters. The ancient republics had contributed checks and balances, the division of powers between different institutions of government and different office-holders, whose individual powers were limited, but the power of government itself was thought to be by definition limitless. The concept of personal rights was embryonic in ancient times. The notions of limiting the powers of government itself and recognising rights of the citizen against government were essentially medieval contributions.

Of course, kings were sometimes forced ‘at the point of the sword’ to agree to limitations on their powers and to recognise rights of their subjects. This was famously the case with Magna Carta. King John was not only tyrannical but exceptionally devious, and so when his grand subjects rebelled they determined not only to make him change his ways but to force him to sign an agreement which would be difficult for him to slide out of in the future. It could be said that in this process bad kings make good laws: the more oppressions your king engaged in, the more prescriptions against them you would seek. As we know from A.A. Milne’s poem and *1066 And All That*, King John was a very bad king, and when he was brought to book, without intending any pun, he made an exceptionally good law by the standards of the time. Thus occurred Magna Carta, the Great Charter. The statutes of 1297 and 1354, usually depicted as the work of wise and benevolent monarchs co-operating with good parliaments, had a great deal to do with those monarchs’ need of money.

It is significant that the barons of 1215 had the advice and assistance of a clerk, in the original meaning of that title, the Archbishop of Canterbury, Stephen Langton. Clerks have a proclivity for writing things down. In its uneasy relationship with the secular powers, the church had a great interest in protecting its rights and in getting things in writing, and this also contributed to the development of charters.

Magna Carta was repudiated by King John virtually immediately after its signature, and, although confirmed by needy sovereigns on subsequent occasions, was also ignored by other monarchs. This only served to ensure its survival, because every subsequent resistance to royal power, especially those of the 17th century, was able to have history on its side by appealing to the Great Charter. What is often called the myth of Magna Carta reflected the relative successes of the English revolutions.

The other stream contributing to the development of the written constitution was the covenant, an agreement between a people and their God, and later between people to constitute a church, a society and ultimately a form of government. The biblical idea of a covenant was revived during the Protestant Reformation and played a large part in the revolution and civil war in England in the 17th century. It was taken by the refugees from those events to the New World. Covenants were a feature of the American colonies from the earliest settlement. The Mayflower pilgrims agreed to ‘covenant and combine together in a civil body politic’.<sup>9</sup> The history of colonial America thereafter is littered with covenants, which became more and more secularised and more sophisticated as they developed one from another. They were the forerunners of the various state constitutions which were the forerunners of the federal constitution of 1787.

Of course, America also had royal charters, and these also influenced the development of the various constitutions, in a significant way, as will be seen.

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<sup>9</sup> W. Berns, *Taking the Constitution Seriously*. New York, Simon and Schuster, 1987, p. 25.

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Establishing a system of government by a covenant meant that the covenant could be changed only by agreement of the whole people, which necessarily involved a procedure different from that applying to ordinary laws. The institution of federalism also reinforced the special status and different method of changing the constitution: because it was an agreement between the people of the states it could be changed only by the people of the states speaking through their representatives at state level, and necessarily it had to be supreme over state laws. Thus arrived the modern written constitution.

The founders of the United States were insistent that their constitution was a covenant not a charter, in other words, an agreement between a people not a grant from a king. They retained, however, the charter tradition of limiting government power and recognising rights. This was so even before they amended the constitution to include a bill of rights: the unamended constitution of 1787 contained a number of prohibitions on the national government and protections of the rights of the citizen.

The subsequent debate over whether the constitution should include a bill of rights illuminates the vital contribution of the medieval charter to constitutionalism. Reference has been made to the ambivalent attitude of the Americans to Magna Carta. Those who favoured a bill of rights, that is, provisions explicitly limiting the power of government in respect of the expressly recognised rights of the citizen, tended to look favourably upon the great precedent of the Magna Carta. Those who opposed a bill of rights did so partly on the basis that the concept of a bill of rights was derived from medieval charters such as Magna Carta which were handed down by kings, and was therefore inappropriate to a constitution established by the contrary process of an agreement between people. James Wilson, the greatest constitutional theorist among the founders, explained that a grant of rights like Magna Carta could be made only by a king with sovereign powers, not by a government with a limited delegation of power by a sovereign people who retain their *natural* rights.<sup>10</sup> Contrary assessments of Magna Carta were thus central to the debate over a bill of rights.

As the debate progressed it became clear that agreement to a bill of rights was essential to achieve the adoption of the constitution. Opponents of central government regarded it as worthy of the same suspicion as kings. The operations of the new state constitutions had also taught a valuable lesson: even popularly elected governments should be explicitly limited; rights had to be safeguarded against popular majorities as against kings. The leading opponents of a bill of rights therefore undertook to support amendments to insert one. So a bill of rights was included by the first ten amendments in 1791. The charter and the covenant were combined and the medieval discoveries represented by Magna Carta thereby entered into the modern world.

The Australian Constitution exhibits an explicit combination of the charter tradition and the covenant tradition. It is a charter in the sense that it was handed

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<sup>10</sup> Debate in the Pennsylvania Convention, 1787, in *The Debate on the Constitution*. vol. 1, p. 808; see also items in notes 1 and 3, and G.S. Wood, *The Creation of the American Republic, 1776–1787*. New York, Norton & Co., 1972.



down by the British sovereign through her Parliament and bestowed on the people of the country. It is a covenant in that it was drawn up by the representatives of those people and approved by them in a referendum, and it can be changed only by the same means. It neglects the charter tradition, however, by not having a statement of rights. In that respect the American constitution emphasises the charter tradition to a greater extent than its Australian counterpart. It is ironic that by the 19th century the British had repudiated the charter tradition by their hostility to declarations of rights.

If Australia becomes a republic one of the changes required will be to turn the Constitution into a completely autochthonous product instead of a document bestowed by the monarch. This requirement particularly affects the so-called covering clauses of the Constitution, the provisions which are part of the British statute containing the Constitution but not part of the Constitution itself. There are differences of opinion about whether the covering clauses can be amended by the people in a referendum under section 128 of the Constitution, or whether they would need to be amended at all if the change were to take place. This problem is really a problem of turning a charter bestowed by a monarch into a covenant agreed to by a people. On the other hand, if a bill of rights were to be included in the Constitution this would introduce and emphasise the more significant element of the charter tradition.

In one respect Australia could benefit by a large injection of the charter tradition. Perhaps because of our convict origins, when we started with governors possessing absolute powers, we do not have a great understanding of the virtues of limiting governments and putting safeguards between the state and the citizen. We tend to think that, provided that governments are democratically elected, they should be able to do anything. In short, we do not have a strong tradition of constitutionalism properly so called. Our version of the so-called Westminster system encourages our leaders to think that, once they have foxed 40 per cent of the electorate at an election, they have the country by the throat. Our prime ministers and premiers are averse to being told that anything is beyond their lawful powers, and are angered by restraints applied by upper houses or judges. They frequently behave in ways which make King John and Charles I seem moderate by comparison. When they have majorities in both houses of Parliament they become more like those monarchs' eastern contemporaries. We have not had a Magna Carta, or a Petition of Right, or a Bill of Rights as part of our own history, and we have not sufficiently valued what we have inherited from those great events. We should, particularly at this time, tap into that inheritance.

So perhaps after all we may gaze upon our copy of the Magna Carta with some awe and reverence, not because of its content or for its legal significance but for the contribution it made to the development of the written constitution and the concept of rights of the citizen. In a sense, all written constitutions, including our own, and all declarations of rights, are its descendants. Remembering that, and other aspects of history to which I have referred, may help us a little on our way into another century.