

THE MAGNA CARTA AND ITS RELEVANCE TO CONTEMPORARY AUSTRALIA

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I INTRODUCTION

It is a fallacy to say that the *Magna Carta* is of no relevance to contemporary Australia. Some scholars have questioned its relevance and significance, claiming that ‘the actual content of *Magna Carta* is now not conducive to awe and reverence. Most of it consists of a lengthy... recital of feudal relationships which... have no relevance to modern government... [and] do not appear to be matters of great constitutional importance.’¹ However, the *Magna Carta* has been praised by legal scholars as the ‘cornerstone of the rule of law’,² and the foundation of the liberties of the individual.³ It has contributed to constitutional development by establishing an independent judiciary and the concept of a written constitution. The fact that legal scholars and historians are commemorating its 800th anniversary shows that the *Magna Carta* has stood the test of time rather than fading into history, and is still a relevant part of the modern law in Australia.

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¹ Harry Evans, ‘Bad King John and the Australia Constitution: Commemorating the 700th Anniversary of the 1297 Issue of Magna Carta’ (1998) 31 *Papers on Parliament* 43, 44-45.

² Raja Balachandran, ‘Magna Carta: Medieval Curiosity or Cornerstone of the Rule of Law?’ (2011) 49 *Law Society Journal* 74, 78.

³ David Clark, ‘The Icon of Liberty: The Status and Role of Magna Carta in Australian and New Zealand Law’ (2000) 24 *Melbourne University Law Review* 866, 868.

II HISTORY OF THE MAGNA CARTA

A *Origins*

In order to understand the *Magna Carta*'s relevance, it is important to first examine the history of the document and its reception in Australia. The *Magna Carta* came into existence in 1215, as a group of rebellious barons forced King John to sign a negotiated agreement. This agreement, which later became known as the *Magna Carta*, forced John to concede his supreme governmental power, which was instead to be exercised according to custom and law, and asserted the superiority of law and justice.⁴ Although King John subsequently repudiated the agreement, versions were reissued by King Henry II and King Edward I, in 1225 and 1297 respectively. The Charter laid dormant for centuries before being resurrected in the 17th Century by Sir Edward Coke, in the revolution against King James I.⁵ Cooke upheld the *Magna Carta* as a reflection of the liberties enjoyed by all which had to be respected by the King, and that the King is not an absolute monarch, but also was subject to the law.⁶

B *Reception in Australia*

The *Magna Carta* received into Australia upon settlement in 1788 was the 1297 Charter, as it provided for fundamental liberties which extended to the English colonisers. However, the *Magna Carta*'s role as a statute in Australia differs between jurisdictions. For New South Wales, Victoria, Queensland and the Australian Capital Territory, local Imperial Acts legislation has determined which version and provisions of the *Magna*

⁴ Ibid, 229-230.

⁵ Balachandran, above n 2.

⁶ Ibid.

Carta apply.⁷ In these jurisdictions, the 1297 version of the *Magna Carta* applies, and of that version, only Chapter 29 remains a part of their statutory law.⁸ In Western Australia, South Australia, Tasmania and the Northern Territory, the applicability of the *Magna Carta* depends upon the jurisdiction's reception of Imperial legislation on a certain date.⁹ The result of such Acts is that if British Parliament repealed chapters of the *Magna Carta* prior to the reception date, then only the remaining chapters were received in the jurisdiction.¹⁰ The effect of such legislation is that many of the chapters of the *Magna Carta* have been repealed in Australian jurisdictions, and the New South Wales Law Commission went so far as to say that any inclusion of the *Magna Carta* in New South Wales law was 'chiefly sentimental.'¹¹ However, much of the *Magna Carta*'s relevance is grounded in the famous Chapter 29 which has not been repealed, and is the document's 'enduring symbolic role.'¹²

III MAGNA CARTA AND THE RULE OF LAW

The rule of law has been broadly defined as:

[A] principle of governance in which all persons... including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated... it requires... measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation

⁷ See s 6 *Imperial Acts Application Act 1969* (NSW); s 8 *Imperial Acts Application Act 1980* (Vic); s 5 *Imperial Acts Application Act 1984* (Qld).

⁸ Clark, above n 3, 869-870; Castles, above n 3; Balachandran, above n 2, 76.

⁹ Balachandran, above n 2, 77.

¹⁰ Clark, above n 3, 871.

¹¹ New South Wales Law Reform Commission, *Application of Imperial Acts*, Report No 4 (1967), quoted in Alex Castles 'Now and Then: Australian Meditations on Magna Carta' (1989) 63 *Australian Law Journal* 122, 124.

¹² Clark, above n 3, 891.

in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.¹³

Further, the rule of law is said ‘to ensure that people are not at the mercy of the momentary will of a ruler or a ruling group, but enjoy stability of life, liberty and property.’¹⁴ The rule of law is proclaimed to have originated in the famous Chapter 29 of the *Magna Carta*, which states:

No free man shall be taken or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or in any other wise destroyed; nor will we pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land. We will sell to no man, we will not deny or defer to any man either justice or right.¹⁵

One basic principle of the rule of law that has come from Chapter 29 as noted by Isaacs J in *Ex parte Walsh and Johnson; Re Yates* is that ‘every free man has an inherent individual right to his life, liberty, property and citizenship.’¹⁶ The *Magna Carta* rejected the use of arbitrary power, placed limits on the power of the State, and proclaimed that no one is deemed to be above the law. This forms the basis of the understanding of the rule of law, in line with the definition above. The *Magna Carta* established the understanding of the supremacy of the law and that all are to adhere to the law. This understanding of the *Magna Carta* and the rule of law is of great relevance to Australia today, as it ensured that Australians today are not at the hands of arbitrary power, and that there is equality before the law.

¹³ Secretary-General of the United Nations, Kofi Annan in 2004, quoted by Nicholas Cowdery QC, ‘Magna Carta: 800 Years Young’ (2015) 40 *Australian Bar Review* 101, 103.

¹⁴ Suri Ratnapala, *Australian Constitutional Law: Foundations and Theory* (Oxford University Press, 2002) [7].

¹⁵ *Magna Carta* 1297 (Eng) 25 Edward 1.
¹⁶ (1925) 37 CLR 36, 79-80.

IV MAGNA CARTA AS A CHARTER OF RIGHTS

Many fundamental human rights and liberties, entitled to by all people, have their origins in the *Magna Carta*. Murphy J in *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* cited the *Magna Carta* as one of the ‘great principles of human rights.’¹⁷ Further, Heydon J in *Momcilovic v The Queen* listed a number of fundamental rights and freedoms which he purported can be traced back to the *Magna Carta*; such as procedural fairness, the right of access to the courts, the right to a fair trial, open justice, freedom of speech, the liberty of the individual and freedom from arbitrary arrest.¹⁸ Such liberties are not gifts of the King or the State, but freedoms people hold prior to the State and which cannot be taken away, and have been acknowledged as ‘a collection of principles [and] a source of overriding constitutional standards.’¹⁹ Kirby J in *Newcrest Mining (WA) v Commonwealth* further acknowledged the *Magna Carta*’s contribution to human rights on an international scale.²⁰ He described the roots of Article 17.2 of the Universal Declaration, which prohibits the arbitrary deprivation of property, as tracing back to the *Magna Carta*.²¹ The basic rights acknowledged by the *Magna Carta* continue to be enjoyed by Australians today, and reflect the Charter’s continuing presence in Australian law and society.

V MAGNA CARTA AND PROCEDURAL FAIRNESS

¹⁷ (1982) 152 CLR 25, 109.

¹⁸ (2011) 245 CLR 1, 177 cited in Darryl Browne, ‘Celebrating 800 Years of Fundamental Rights and Freedoms’ (2011) 49 *Law Society Journal* 76, 76-77.

¹⁹ Castles, above n 11, 122.

²⁰ (1977) 190 CLR 513.

²¹ *Newcrest Mining (WA) v Commonwealth* (1997) 190 CLR 513, 658-659, cited in Robert McClelland, ‘The Magna Carta’ (Speech delivered at the Constitutional Law Conference, Sydney Parliament House, 20 February 2009).

The *Magna Carta*'s relevance to contemporary Australia is also grounded in its contribution to procedural fairness and access to justice.²² The majority in *Ebner v Official Trustee in Bankruptcy* held that '[f]undamental to the common law system of adversarial trial is that it is conducted by an... impartial tribunal... this...can be traced to *Magna Carta*'.²³ This understanding of being judged before fair and impartial tribunal further stems to the ideas of due process and equal protection before the law; which are deemed to be objectives of court administration,²⁴ and also credited as having their foundations in the *Magna Carta*.²⁵ The *Magna Carta*'s proclamation of a right of access to justice has also been the subject of a number of Australian cases; most notably, *Jago v District Court (NSW)*.²⁶ It was argued that there is a fundamental right to a speedy trial, which comes from the *Magna Carta*. However, the High Court held that such a right does not come from the *Magna Carta* as there is no textual support, but Australians do have a right to a fair trial.²⁷

VI MAGNA CARTA, THE JUDICIARY AND THE LEGAL PROFESSION

²² See, eg, Lord Irvine, 'The Spirit of the Magna Carta Continues to Resonate in Modern Law' (2003) 119 *Law Quarterly Review* 227, 236.

²³ (2011) 205 CLR 337, 343.

²⁴ Michael Gething, 'A Pathway to Excellence for a Court – Part II: Defining Excellence' (2008) 18 *Journal of Judicial Administration* 22, 24; Clark, above n 3, 885. Clark defined due process as the 'entitlement to the due process of the time and place at which the hearing is to be held.'

²⁵ *R v Mackellar* (1977) 137 CLR 461, 483.

²⁶ (1989) 168 CLR 23.

²⁷ *Jago v District Court (NSW)* (1989) 168 CLR 23, 78.

The *Magna Carta* has also been celebrated as the birth of the legal profession and judicial power,²⁸ and has contributed to the constitutional development of the separation of powers. Chapter 45 of the 1215 *Magna Carta* states that ‘[w]e will appoint as justices, constables, sheriffs, or other officials, only men that know the law of the realm and are minded to keep it well.’ The *Magna Carta* established the judiciary as a separate arm of government, as it ensured that ‘the judicial power of the [S]tate should be entrusted exclusively to those with an expert understanding of the law.’²⁹ The concept of an independent judiciary is an important doctrine of constitutional governments like Australia, as it ensures political liberty and prevents the abuse of power.³⁰ According to Baron de Montesquieu:

[T]here is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control... Were it joined to the executive power, the judge might behave with violence and oppression.³¹

The chapter for an independent judiciary in the *Magna Carta* ensured that King John and future monarchs were answerable to the common law of the people. Likewise, in Australia today, Parliament must act in a way that is consistent with the law; as per the rule of law. The legal profession developed from the *Magna Carta* as a profession where the administration of justice was conducted by people who know the law, and

²⁸ Justice Patrick Keane, ‘Magna Carta and Beyond: The Rule of Law 800 Years On’ (2015) 35(5) *Proctor* 22, 23.

²⁹ *Ibid.*

³⁰ Thomas Cooley, *The General Principles of Constitutional Law* (Little Brown and Co, 1898) [22]; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 11.

³¹ Baron de Montesquieu, *The Spirit of the Laws* (1748) Book XI, Chapter VI [152].

who ensured everyone abided by it.³² The responsibility of applying the law today rests in the hands of those trained in the law, as a result of the *Magna Carta*. In Australia, the federal judiciary was established under s 71 of the *Constitution*, which vested Commonwealth judicial power in the High Court of Australia. Today, Australia's independent federal judiciary serves as a reminder of the *Magna Carta*'s relevance in establishing the legal profession and separate power of the judiciary.

VII MAGNA CARTA AND THE WRITTEN CONSTITUTION

The *Magna Carta*'s continuing relevance to Australia is reflected in the Australian Constitution, which has its roots in the principles of the *Magna Carta*.³³ Isaacs J in *Ex parte Walsh and Johnson; Re Yates* praised the *Magna Carta* as the 'great confirmatory instrument... which is the groundwork of all constitutions.'³⁴ Its relevance and significance has been noted to be not simply its contents but in 'its contribution to the history of constitutionalism, and... to the development of the concept of a constitution.'³⁵ The *Magna Carta*, as a written charter, contributed to the development of the concept of the written constitution. A written constitution is enacted as a single body of fundamental and supreme law of a country, and is difficult to change.³⁶ The *Magna Carta* was forged in a time when most laws were proclaimed orally. As an early example of written law, the *Magna Carta* became 'the great precedent for putting legislation into writing,'³⁷ and forms the 'first comprehensive statement

³² Keane, above n 28, 24.

³³ See Irvine, above n 22, 236; *Ex parte Reid; Re Lynch; Ex parte Burgess; Re Lynch* (1943) 43 SR (NSW) 207, 223.

³⁴ (1925) 37 CLR 36, 79.

³⁵ Evans, above n 1, 47.

³⁶ *Ibid.*

³⁷ M. T. Clanchy, *From Memory to Written Record: England 1066-1307* (Harvard University Press, 1979) 211-212, quoted in Irvine, above n 27, 230.

in written form...of the requirements of good governance and of the limits upon the exercise of political power.³⁸ Australia's *Constitution*, a written constitution, is arguably descended from the *Magna Carta*. Thus the *Magna Carta* has a significant role in the tradition of writing down a country's fundamental laws and has shaped Australia's constitutional inheritance.

VIII CONCLUSION

The *Magna Carta*'s continuing importance to Australia goes beyond the chapters alone to what the document as a whole represents. It remains today a symbol of the rights of the individual, liberty and the rule of law. It is the origins of the judiciary and has played a role in the development of the constitutional tradition. The human rights, legal system, and Constitution that many Australians take for granted today have their roots in the *Magna Carta*. 800 years on, the *Magna Carta* has persisted and remained relevant to contemporary Australia, and its significance should indeed be commemorated.

³⁸ James Spigelman, 'Magna Carta in its Medieval Context' (2015) 89 *Australian Law Journal* 383, 388.