

# MAGNA CARTA, LIBERALISM, AND THE HUMAN RIGHTS AGENDA

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## I INTRODUCTION

When looking back so far, it is always necessary to beware of that imperialism of the present by which contemporary values and perspectives are imposed upon the past.<sup>1</sup>

As a constitutional text, Magna Carta provides a partial description of a system of government at a particular instance in time.<sup>2</sup> However, no constitutional text can provide a complete picture of a country's laws and system of government.<sup>3</sup> In the case of the United Kingdom and Australia, there are a number of documents and customs that fit together to form the political system and shared constitutional heritage. Magna Carta is one such document.

Magna Carta was a formal grant of liberties by a European medieval monarch, and is now more famous than ever.<sup>4</sup> Its fame however tends to obscure its original context and purpose. Magna Carta expressed

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<sup>1</sup> James Spigelman, 'Magna Carta in its Medieval Context' (Speech delivered at the Banco Court, Supreme Court of New South Wales, Sydney, 22 April 2015).

<sup>2</sup> Suri Ratnapala, *Australian Constitutional Law: Foundations and Theory* (Oxford University Press, 2<sup>nd</sup> ed, 2007) 3.

<sup>3</sup> Ibid.

<sup>4</sup> Dan Jones, *Magna Carta, The Making and Legacy of the Great Charter* (Head of Zeus, 2014).

recognisably liberal ideas,<sup>5</sup> and is therefore relevant on some level because the political doctrine of liberalism exists in contemporary Australia.<sup>6</sup> Magna Carta's real meaning however has been misused and corrupted.

This essay will link Magna Carta to liberalism and limited government, and argue that these political doctrines are still relevant to contemporary Australia. It will then examine how the human rights movement in Australia has replaced religion with human rights.

## II LIBERALISM IN MAGNA CARTA

Part of Magna Carta's relevance to contemporary Australia lies in its recognisably liberal themes.<sup>7</sup> Liberal themes are key to understanding Australia's representative democracy and constitutional monarchy.<sup>8</sup> This is because liberalism is contemporaneous with limited government.<sup>9</sup> That is, the government is not absolute; it is limited by a constitution.<sup>10</sup>

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<sup>5</sup> Roger Scruton, *A Dictionary of Political Thought* (Macmillan Press, 2<sup>nd</sup> ed, 1983) 269.

<sup>6</sup> David Clark, 'The Icon of Liberty: The Status and Role of *Magna Carta* in Australia and New Zealand Law' (2000) 24 *Melbourne University Law Review* 891.

<sup>7</sup> Scruton, above n 5, 269. Liberalism here is used to mean a loose political doctrine encompassing themes such as limited government, belief in the supreme value of the individual (his freedom and his rights), individualism in its metaphysical sense, belief that the individual has 'natural rights' which exist independent of government and advocacy of toleration of religion. Liberalism should be differentiated from libertarianism, which is an even looser term that can be said to be liberation of people from social constraints of traditional institutions, for example those of religion, family, and the customs of social conformity like sexuality.

<sup>8</sup> John O'Sullivan, 'Democratising Rights Magna Carta in the Modern World' (2015) 518 *Quadrant Magazine* 67.

<sup>9</sup> Scruton, above n 5, 269.

<sup>10</sup> *Ibid.*

Magna Carta was a written deal that outlined the extent to which the monarch could levy taxes without the consent of those being taxed.<sup>11</sup> It is conceded here that in 1215 Magna Carta was simply a narrow compact between king and barons,<sup>12</sup> and its failure meant that Magna Carta was an unsuccessful attempt at curtailment of sovereign power. However, the idea that the liberties of the individual constrain relations between the state and the individual had begun.<sup>13</sup> In 1216 the Magna Carta was reissued but omitted clauses significantly reducing interference on the King.<sup>14</sup> Again, after the failure of a French invasion force in 1217, the King attempted to restore normality.<sup>15</sup> In this instance the King's hand was not forced, with the 1217 Magna Carta resembling something of a statement of good government.<sup>16</sup> This theme continued with the significant 1225 Magna Carta, where the King adopted the Magna Carta so he could wage war, appealing to his Barons to secure what he needed.<sup>17</sup> The result was the final Magna Carta, not forced upon King, as had been the case in the earlier issues, but as the King declared: his concessions were 'spontaneous and [with] good will'.<sup>18</sup>

Importantly, the 1216 and 1217 reissues did not contain the 'security clause', which is arguably the most important clause of the 1215 Magna

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<sup>11</sup> Australian Broadcasting Corporation, 'Big Ideas: Democracy and Human Rights', *Radio National*, 15 July 2015 (Professor Paul Pickering).

<sup>12</sup> James Spigelman, 'Magna Carta in Its Medieval Context' (2015) 518 *Quadrant Magazine* 56.

<sup>13</sup> Justice Susan Crennan, 'Magna Carta, Common Law Values and the Constitution' (2015) 39(1) *Melbourne University Law Review* (advance).

<sup>14</sup> Spigelmann, above n 12, 56.

<sup>15</sup> Dan Jones, *Magna Carta, The Making and Legacy of the Great Charter* (Head of Zeus, 2014) 94. 1217 also saw the 'Charter of the Forest', which, to differentiate it, gave Magna Carta its name.

<sup>16</sup> Spigelmann, above n 12, 56.

<sup>17</sup> David Carpenter, *Magna Carta* (Penguin Books, 2015) 419. And the 1225 issue is significant because it was enrolled on the statute books by Edward I in 1297.

<sup>18</sup> *Ibid.*

Carta.<sup>19</sup> Clause 61 seeks to find a way to bind the monarch to his word, and this mechanism goes to the heart of Magna Carta. The community of the realm now possessed the foundation stone of constitutional monarchy: the ability to override the monarch's universal authority. The barons now had licence for civil war should the monarch repudiate.<sup>20</sup>

Another important aspect of the 1225 issue is that it extended the limited liberties seen by the 1215 issue to 'everyone' – free and unfree. So it was 'everyone' who supposedly granted the tax that secured the concessions.<sup>21</sup> Whether the peasants could really be said to have had a stake in 'granting' a tax is debatable, but importantly they were now recognised in it.<sup>22</sup> The failure of the early charters was then on account of coercion. The early charters say that they had been given by the hand of the King, however, the 1225 Magna Carta ends with it saying that it was given by no one in particular.<sup>23</sup> The recognisably liberal ideas in the 1217 and 1225 Magna Carta of limited government, curtailment of power, and forms of representation to guarantee individual rights, had begun.

In response to Stuart tyranny in the 17<sup>th</sup> century, Sir Edward Coke reinvigorated Magna Carta's relevance and rediscovery as a constitutional document.<sup>24</sup> He expanded the idea of 'liberties' in Magna Carta, to arrive at an idea of individual liberties believed to be under threat from the monarch.<sup>25</sup> Coke put forth that Magna Carta 'was declaratory of the

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<sup>19</sup> Ibid. 'Clause' here is used here as it is popularly used, as instigated by Sir Edward Coke. The original text of the Magna Carta however did not have 'clauses' or 'chapters'.

<sup>20</sup> Ibid 81.

<sup>21</sup> Ibid 421.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> Jones, above n 15, 102.

<sup>25</sup> Crennan, above n 13, 9.

principal grounds of the fundamental laws of England'.<sup>26</sup> The Bill of Rights was not just loosely modelled on Magna Carta; it sprang out of an age that had close parallels with the 13<sup>th</sup> century.<sup>27</sup>

British constitutional history holds Magna Carta in an important place. Magna Carta, while inchoate as a standalone document, outlines fundamental political principles and seeded the idea of the liberty of the subject. The *United States Constitution* also relies heavily on Magna Carta.<sup>28</sup> Magna Carta is relevant then, as Australia's *Constitution* draws heavily on both the British constitutional tradition of responsible government, as well as the doctrine of the separation of powers derived from the *United States Constitution*.<sup>29</sup>

### III THE HUMAN RIGHTS MOVEMENT ADOPTS MAGNA CARTA AS ITS TOUCHSTONE

A fierce debate abounds in contemporary Australia regarding the establishment of human rights and civil liberties.<sup>30</sup> Magna Carta, or at least the perception of Magna Carta, is used to promulgate and elicit sympathy for various causes.<sup>31</sup> This takes Magna Carta out of context. As a result, there are a number of problems with attributing Magna Carta

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<sup>26</sup> Crennan, above n, quoting Edward Coke, *The Second Part of the Institutes of the Laws of England* (W Clarke and Sons, 1817) Proeme.

<sup>27</sup> Ibid.

<sup>28</sup> See especially James Madison's list of constitutional amendments that effectively limit state power over individuals; the Fifth and Sixth Amendments state that no person should be 'deprived of life, liberty, or property ...' and a 'right to a speedy and public trial'.

<sup>29</sup> Crennan, above n 13, 10.

<sup>30</sup> An example of the establishment is the push for Australia to adopt a Bill of Rights. An example of erosion of civil rights is the mandatory detention practices.

<sup>31</sup> Australian Broadcasting Corporation, 'Big Ideas: Democracy and Human Rights', *Radio National*, 15 July 2015 (Dr Tania Colwell); Jennifer Button, 'Celebrating the Origins of the Rule of Law: 800 years of Magna Carta', 73 *Advocate Vancouver* 341 2015.

as the defining human rights document. The first is that Magna Carta was not solely focused on ‘rights’.<sup>32</sup> In particular, the reissues of Magna Carta were more easily attributable to early liberalism and the development of the rule of law. Thus the human rights movement overstates Magna Carta’s significance to their numerous causes.<sup>33</sup> Magna Carta ought to be primarily remembered as an attempt to limit the power of the monarch and an important time in the development of liberalistic thought. It ought not to be considered as *the* ‘touchstone’ for human rights.

### A *Magna Carta’s Development*

The 13<sup>th</sup> century charters lacked a political theory to support the concepts in them. For this reason, attributing Magna Carta as the sole foundation of the modern concept of ‘human rights’, is inaccurate and an overstatement. It was not until the 17<sup>th</sup> and 18<sup>th</sup> centuries that rapid changes in political institutions reformulated and restated Magna Carta.<sup>34</sup> John Locke’s political writings in the 1680s and 1690s expanded and justified Magna Carta’s notions of limited government and liberalism. From this time onwards the political doctrine of liberalism, with its key tenets of limited sovereign incursion and guarantee of individual rights was confirmed in economic, social and political life.<sup>35</sup>

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<sup>32</sup> Lord Irvine of Lairg ‘The Spirit of Magna Carta Continues to Resonate in Modern Law’, (Speech delivered at the Great Hall of Parliament House, Canberra, 14 October 2002).

<sup>33</sup> Examples of human rights veiled behind other causes in Australia are same-sex marriages under the veil of marriage equality, and euthanasia (physician-assisted death) and abortion under the veil of individual choice.

<sup>34</sup> Scruton, above n 5, 269.

<sup>35</sup> *Ibid.*

Importantly, Locke was able to align constitutional government with individual's 'rights'.<sup>36</sup> He put forth that natural rights – to life, limb, freedom of action and private property – are 'inalienable' and implanted by God in all reasoning beings.<sup>37</sup> On Locke's theory, it is then a matter of reason to perceive these rights independent of social order.

The Magna Carta is said to be a clear statement imparting human rights.<sup>38</sup> Relying solely on Magna Carta, however, overstates the text's significance. Attributing the Magna Carta as being the basis of, or starting point of human rights, ignores important human rights theory. In the rhetoric of human rights, the concept of 'natural rights' (as described above by John Locke) has largely been forgotten or overlooked. The human rights movement fails to distinguish natural law from positive law, such as that laid down by a particular body like a monarch. As Magna Carta was a human creation, and essentially a contract between monarch and barons, it is in essence positive law.

The result is that Magna Carta should only be viewed as part of the contribution to the constitutional history of Australia. Anything else is the imperialism of the present attributing something to Magna Carta that it was never intended to achieve.

## B *Magna Carta and Religion*

From colonial law through to the Australian *Constitution's* protection of government involvement in religion, organised religion has played a significant role in Australia. However contemporary Australia is

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<sup>36</sup> Scruton, above n 5, 275.

<sup>37</sup> Ibid.

<sup>38</sup> Interview with Gillian Triggs (Constitution Day 2015 Speakers' Forum: Magna Carta – is it relevant to 21<sup>st</sup> Century Australian democracy? 9 July 2015).

undergoing a decline in the influence of organised religion,<sup>39</sup> and for some people, human rights now supplants religion.<sup>40</sup> Despite its decline in influence, religion is still important for contemporary Australia. Religion was also important when the *Constitution* was created, with the central importance of God and the Christian faith acknowledged in Magna Carta reflected in the *Constitution*.<sup>41</sup>

A look at the debates surrounding the inception of the Australian *Constitution* show that religion was a key point of the discussion.<sup>42</sup> The result was s 116 that limits the power of the Federal Government in respect to religion. The remainder of the *Australian Constitution* is free of Bill of Rights-style guarantees, however s 116 is one main exception:

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

The significance of religion in Magna Carta for England and Australia is an important point. As Wayne Martin CJ points out, the impact of Christianity on the Magna Carta is neglected in the rush to acknowledge the more commonly discussed (and perhaps more glamorous) aspects of the great text, that is, the chapters with recognisable legal or human rights

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<sup>39</sup> Shimon Cowan 'God, Religious Tradition and the Australian Constitution' (2015) 514 *Quadrant Magazine*, 63.

<sup>40</sup> Andrew Heard, *Human Rights: Chimeras in Sheep's Clothing* (1997) Simon Fraser University <<http://www.sfu.ca/~aheard/417/util.html>>.

<sup>41</sup> The *Constitution's* Preamble references an 'Almighty God'.

<sup>42</sup> Augusto Zimmermann, 'Constituting a 'Christian Commonwealth': Christian Foundations of Australia's Constitutionalism' (2014) 5 *The Western Australian Jurist* 123, 130.



implications.<sup>43</sup> It may be that the clauses in Magna Carta were directed to the protection of the church's property and money;<sup>44</sup> however, one of Magna Carta's major legacies is the notion that the government cannot discriminate by establishing a religion or imposing religious observance.<sup>45</sup> The reference to keeping the church free in the Magna Carta is therefore relevant to Australia.

The impact for Australia is that the *Constitution* specifically recognizes that the church should be free from governmental influence (s 116). This means that the *Constitution* conveys freedom on Australians to practice any religion free from government interference. It does not limit the church or religion. This is relevant because Magna Carta was in response to an abuse of power, and the recognition of religious freedom in the *Constitution* is a similar restriction on the abuse of power. In a multicultural society such as Australia, this recognition serves two purposes. Firstly, it acknowledges that freedom of religion is a fundamental right and is not subject to Parliament's sovereign power. Secondly, it acknowledges that Australia was, and is, multicultural and that diversity of religion and religious expression is something to be protected.

This is however subject to some qualification. In *Adelaide Company of Jehovah's Witnesses Incorporated v Commonwealth*<sup>46</sup> it was held that s

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<sup>43</sup> The Honourable Wayne Martin AC, Chief Justice of Western Australia, 'The Significance of Magna Carta' (Speech delivered at the St George's Cathedral Evensong, St George's Cathedral, Perth, Sunday 14 June 2015). <[http://www.supremecourt.wa.gov.au/\\_files/Magna\\_Carta\\_St\\_Georges\\_Cathedral\\_Evensong\\_CJ\\_14\\_June\\_2015.pdf](http://www.supremecourt.wa.gov.au/_files/Magna_Carta_St_Georges_Cathedral_Evensong_CJ_14_June_2015.pdf)>. Examples of more famous sections of Magna Carta are chapters 39 and 40.

<sup>44</sup> Carpenter, above n 17, 300.

<sup>45</sup> Ratnapala, above n 2, 308.

<sup>46</sup> [1943] HCA 12; (1943) 67 CLR 116 (14 June 1943).

116 does not operate where the result would cause a breach of the protection of the community or in the interests of social order.<sup>47</sup>

#### IV CONCLUSION

Contemporary Australia recognises liberalism as a political theory, with its ideals of limited government, the supreme value of freedom, toleration of religion and the protection of the individual against incursions by government. These are themes that are also found in Magna Carta. Since Magna has been reshaped and reinterpreted in the 800 years since, it is not a clear statement imparting rights on the individual. Claims of a clear link between Magna Carta and the current human rights movement must be met with healthy scepticism and careful evaluation.

Magna Carta is a document with liberal ideals. Its lasting relevance is as a document that contributes to the constitutional history of Australia. It is easy to dismiss Magna Carta as anachronistic, but this would be akin to dismissal of the rich history that contributes to contemporary Australia's *Constitution*. Magna Carta would however have been inchoate had it not been for the developments by Locke and Coke that took the Magna Carta's ideas and developed them into what we now recognise today.

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<sup>47</sup> Ratnapala, above n 2, 308.