MAGNA CARTA AND THE LAW

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Magna Carta is accorded an iconic status in British constitutional doctrine. To those who are trained in the common law tradition of jurisprudence it is seen as a Great Charter of the liberties of the subject – the font of the notion that the King is not above the Law but subject to it, and as a written guarantee of the right to trial by a jury of one's peers. If you study the text, however, you will not find any express statement of the principles of democratic government or the rights of man. Winston Churchill in his *History of the English Speaking Peoples* says 'it is not a declaration of constitutional doctrine but a practical document to remedy current abuses of the feudal system. It implies on the King's part a promise of good government for the future, but the terms of the promise are restricted to the observance of the customary privileges of the baronial class'.

It was assented to by King John at a time of great political unrest bordering on civil war and, as Churchill says, 'the actual Charter is a redress of feudal grievances extorted from an unwilling King by a discontented ruling class insisting on its privileges, and it ignores some of

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the most important matters which the King and baronage had to settle, such as the terms of military service'. Nevertheless it did secure for all men above the status of villeins or serfs, who then formed the majority of the population, tenure of land secure from arbitrary encroachment, and clauses 28, 29 and 30 of the original document are the beginning of a long series of enactments designed to prevent abuses of the royal prerogatives of purveyance and pre-emption. For example, Clause 28 provides that 'no constable or other royal official shall take corn or other movable goods from any man without immediate payment, unless the seller voluntarily offers postponement of this'. Purveyance and pre-emption, as former High Court Justice, Sir Victor Windeyer explained in his *Lectures on Legal History* first published in 1938, 'was the right claimed by the King and his servants to compel subjects to supply provisions, to pay for them at the lowest price and in their own time, which might well mean never. These exactions by the Crown continued to cause resentment during the Middle Ages. But the prerogative was by degrees limited. Magna Carta contains the first statement of the doctrine that the government ought only to acquire the property of subjects on just terms.' This is mirrored in our own Federal Constitution, section 51(xxxi).

The Charter involved a promise by the King to remedy the barons' complaints and to recognise their liberties and those of the Church, the merchants and the City of London. As Windeyer says, '[i]It was a charter of liberties not a proclamation of liberty. A liberty was then a special privilege or immunity. Liberties were the established rights by feudal law of certain people or places to be exempt from the arbitrary power of an overlord. The Charter promised to the free man his liberties.' But who was the 'free man' mentioned in Magna Carta? Many scholars contend

that the term applied not to each and every subject but only to the freeholder of feudal law and certainly not to the villain of the feudal manor who, though not a slave, was bound to the soil and owed labour service to his lord. So it is contended that the liberties protected by the Charter were those not of the common man but of those further up the social scale such as the barons, knights, churchmen and merchants.

The clause which has engendered most enthusiasm for the proposition that Magna Carta guaranteed all the King's subjects protection from arbitrary arrest or restraint and a right to trial by a jury of his peers is clause 39 in the original 1215 version of the Charter. In the following decade the document was re-issued in 1216 and 1217 and again in 1225. Many clauses which were of import only to individuals or to specific localities, having in the meantime effected their purpose, had been expunged and it is the 1225 version with its re-numbering of the clauses which is now usually printed in the Statute Book. The original clause 39 read:

> No free man shall be seized or imprisoned, or stripped of his rights or possessions, or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.

I should point out that there are several translations of the Charter. I am using the translation appearing on the British Library web site.[1] The site claims that the translation sets out to convey the sense rather than the precise meaning of the original Latin. It also points out that in the charter itself, the clauses are not numbered and the text reads continuously.

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1 <http:/www.bl.uk/magna-carta/articles/magna-carta-english-translation>.

Windeyer's translation, which he describes as literal, is this:

> No freeman shall be taken or imprisoned or disseised or outlawed or exiled or in any way destroyed, nor will we go upon him nor will we send upon him, except by the lawful judgment of his peers or (and) the law of the land.

The original clause 40 read:

> To no one will we sell, to no one deny or delay right or justice.

In the 1225 version issued by Henry III these two clauses were amalgamated, clause 40 being added to clause 39 and the entirety of the clause re-numbered 29.

By way of completeness I add that the copy of Magna Carta held in Parliament House Canberra was one issued by Edward I in 1297 using the numbering of the 1225 version. Clause 29 is translated by Nicholas Vincent, Professor of Medieval History at the University of East Anglia, as follows:

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

Windeyer argues that the reference to 'lawful judgment of his peers' is not a guarantee of trial by jury as we understand it. In the first place the freeman to whom the clause relates is different from the villain or peasant occupier entirely subject to a lord and furthermore the Latin word '*judicium*' is not an apt word for the verdict of a jury which differs from the formal judgment of a court. He raises the question whether the barons

sought by this clause to provide for the trial of a feudal vassal by his fellows in the court baron of their lord and to ensure that they, themselves, were tried by their own equals, a right that persisted for the members of the House of Peers until 1948. But whatever the precise meaning of the clause it has been valuable not because of its precise and technical meaning but because of its vague but grand meaning in later times. Clause 39 was not given particular prominence in 1215 but its intrinsic adaptability has given succeeding generations the opportunity to re-interpret it for their own purposes. In the 14th century Parliament saw it as guaranteeing trial by jury; in the 17th century Sir Edward Coke interpreted it as a declaration of individual liberty in his conflict with the Stuart kings and it has echoes in the American Bill of Rights (1791) and the Universal Declaration of Rights (1948).

In the century after 1215 the Charter was re-issued 38 times and little was heard of it until the 17th century when Parliament sought to curb the encroachments of the Stuarts. Throughout the document it is implied that the Law is above the King. For the first time the King himself is bound by the Law. Clause 61 was quite revolutionary and was directed personally at King John, for it was never included in any of the subsequent re-issues. In part it read:

> Since we have granted all these things for God, for the better ordering of our kingdom, and to allay the discord that has arisen between us and our barons, and since we desire that they shall be enjoyed in their entirety, with lasting strength, for ever, we give and grant to the barons the following security:

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

If we, our chief justice, our officials, or any of our servants offend in any respect against any man, or transgress any of the articles of the peace or of this security, and the offence is made known to four of the said twenty-five barons, they shall come to us – or in our absence from the kingdom to the chief justice - to declare it and claim immediate redress. If we, or in our absence abroad the chief justice, make no redress within forty days, reckoning from the day on which the offence was declared to us or to him, the four barons shall refer the matter to the rest of the twenty-five barons, who may distrain upon and assail us in every way possible, with the support of the whole community of the land, by seizing our castles, lands, possessions, or anything else saving only our own person and those of the queen and our children, until they have secured such redress as they have determined upon. Having secured the redress they may then resume their normal obedience to us.

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

The remainder of the clause deals with filling casual vacancies within the twenty-five, the oath they are required to take, and provides that in the event of disagreement among them on any matter referred to them the verdict of the majority present is to have the same validity as a unanimous verdict of the whole twenty-five. The clause enabled the barons to compel the King by force of arms to keep the Charter. Back from Runnymede, at Windsor, John was decidedly not happy with

the inclusion of this clause and, as one historian, John Richard Green, noted in his *Short History of the English People* '"They have given me five-and-twenty over-kings" cried John in a burst of fury, flinging himself on the floor and gnawing sticks and straw in his impotent rage.' Thereafter he repudiated the Charter, the Pope annulled it and John hired mercenaries to take up arms against the barons who in turn invited the French king, Philip's, son, Louis, to invade England and take the Crown. Matters were only resolved when John fortuitously died in 1216 and was succeeded by his son, Henry III, then only nine years old, whereupon William the Marshall assumed the regency and had the Charter re-issued without clause 61. The French were defeated and Louis withdrew.

Although the explicit means of compelling the King to obey the law was withdrawn, to quote Churchill again:

> The root principle was destined to survive across the generations and rise paramount long after the feudal background of 1215 had faded in the past. The ASfacts embodied in it and the circumstances giving rise to them were buried or misunderstood. The underlying idea of the sovereignty of law, long existent in feudal custom, was raised by it into a doctrine for the national State. And when in subsequent ages the State, swollen with its own authority, has attempted to ride roughshod over the rights or liberties of the subject it is to this doctrine that appeal has again and again been made, and never, as yet, without success.

Let another iconic English figure, Shakespeare, have the last word. In *Twelfth Night* he coins the time honoured phrase: 'But be not afraid of greatness: some men are born great, some achieve greatness and some have greatness thrust upon them.' I suggest that most people would agree that Magna Carta was not born great and although some might say that

after a very long time it achieved greatness, it is the third category which is most aptly applied to it, namely that Magna Carta has had greatness thrust upon it. However we should not forget the preamble to Malvolio's *bon mot*: 'But be not afraid of greatness.' There is a greatness about the Magna Carta which all now recognise and respect. It has served, possibly despite itself, to generate the notion of the sovereignty of law over arbitrary government which we venerate as a guarantee of our liberty and one which deserves our respect, not fear.