MAGNA CARTA: LESS THAN IT SEEMS (CAMPION COLLEGE CENTRE FOR THE STUDY OF WESTERN TRADITION, MENZIES HOTEL SYDNEY, 28 NOVEMBER 2015)

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Magna Carta is mostly a myth, but provides a great example of an enduring truth: that in political matters, mythology matters far more than truth.

Popular history tells us that Magna Carta was sealed on the meadow at Runnymede on 15 June, 1215. So this year, on 15 June - we commemorated 800 years since it was sealed.

First, the document that was sealed on 15 June 1215 was the Articles of the Barons. Magna Carta was based on it and was prepared and engrossed a few days later, some say on 19 June.

Winston Churchill wrote about the signing of Magna Carta in volume 1 of his great History of the English Speaking Peoples:

"On a Monday morning in June, between Staines and Windsor, the barons and Churchmen began to collect on the great meadow at Runnymede. An uneasy hush fell on them from time to time. Many had failed to keep their tryst; and the bold few who had come knew that the King would never forgive this humiliation. He would hunt them down when he could, and the laymen at least were staking their lives in the cause they served. They had arranged a little throne for the King and a tent. The handful of resolute men had drawn up, it seems, a short document on parchment. Their retainers and the groups and squadrons of horsemen in sullen steel kept at some distance and well in the background. For was not armed rebellion against the Crown the supreme feudal crime? Then events followed rapidly. A small cavalcade appeared from the direction of Windsor. Gradually men made out the faces of the King, the Papal Legate, the Archbishop of Canterbury, and several bishops. They dismounted without ceremony. Someone, probably the Archbishop, stated briefly the terms that were suggested. The King declared at once that he agreed. He said the details should be arranged immediately in his chancery. The original "Articles of the Barons" on which Magna Carta is based exist to-day in the British Museum. They were sealed in a quiet, short scene, which has become one of the most famous in our history, on June 15, 1215. Afterwards the King returned to Windsor. Four days later, probably, the Charter itself was engrossed. In future ages it was to be used as the foundation of principles and systems of government of which neither King John nor his nobles dreamed."

Second, in 1752, England switched from the Julian calendar to the Gregorian calendar, to bring the calendar back into synchronisation with the real world. Eleven days simply disappeared. So, while it is true that the Articles of the Barons, later called Magna Carta, was sealed on 15 June 1215, that day is 800 years ago minus 11 days. The date which is exactly 800 years after the signing of the Articles of the barons is actually 26 June this year; The date which is exactly 800 years after the signing of Magna Carta is probably 30 June this year.

But this does not matter: it is the symbolism of the thing that really counts, and I doubt that anyone will think about Magna Carta on 26 June this year. and on 30 June their minds will be focussed on taxes (as Magna Carta was) but they will probably not give Magna Carta a second's thought that day.

King John was the youngest of 5 sons of Henry II. His oldest brother, Richard, was king, but went off to fight the crusades, where he earned his nickname "Lionheart". John's elder brothers William, Henry and Geoffrey died young. Richard died in 1199, and John became king.

Richard and John both incurred huge expenses in war, especially in suppressing rebellion in their French domains in Normandy and Anjou. Both leaned on their nobles to support the expense. John, who had managed to make himself deeply unpopular, met resistance. John made increasing demands for taxes of various sorts, including scutage – money paid to avoid military service – and he sold wardships and heiresses for large sums. Henry II and Richard had done the same, but John's nobles resisted. By May 1215, the barons had occupied London and made a series of demands.

In June 1215, the barons met King John at Runnymede. The Archbishop of Canterbury, Stephen Langton, played an important role in mediating the dispute and eventually the Articles of the Barons were prepared and sealed.

Before it became known as Magna Carta, it was set aside. Two months after the Articles of the Barons were sealed King John, who was not a reliable person, prevailed on Pope Innocent III to declare the Deed invalid. The Pope said it was "not only shameful and base but illegal and unjust." He declared it null and void, and ordered King John not to observe it. This was in August 1215, just 10 weeks after the great symbolic meeting at Runnymede.

The barons were not happy.

John died in October 1216. His son Henry was only 9 years old. Henry's advisors saw that re-issuing the Charter in modified form would help keep the young king in power. So an amended version was issued in 1217, under the title Charter of Liberties. At the same time the Charter of the Forest was issued. The Charter of Liberties was the bigger of the two, and soon became known as the Great Charter: Magna Carta.

When he had come of age, Henry III swore his allegiance to a modified version of Magna Carta. This took place on 11 February 1225, so that is probably the most appropriate date to observe. The 1225 version of Magna Carta more closely resembles the document which has been so venerated for so long.

Perhaps people will celebrate the 800th anniversary of Magna Carta on 11 February 2025, or perhaps on 22 February 2025 to allow for the change in calendars. But probably not.

The 1215 version of Magna Carta includes many provisions which are concerned with taxes. For example:

> (2) If any earl, baron, or other person that holds lands directly of the Crown, for military service, shall die, and at his death his heir shall be of full age and owe a `relief', the heir shall have his inheritance on payment of the ancient scale of `relief'.
>
> (12) No `scutage' or `aid' may be levied in our kingdom without its general consent, unless it is for the ransom of our person, to make our eldest son a knight, and (once) to marry our eldest daughter. For these purposes only a reasonable `aid' may be levied. `Aids' from the city of London are to be treated similarly.
>
> (15) In future we will allow no one to levy an `aid' from his free men, except to ransom his person, to make his eldest son a knight, and (once) to marry his eldest daughter. For these purposes only a reasonable `aid' may be levied.
>
> (27) If a free man dies intestate, his movable goods are to be distributed by his next-of-kin and friends, under the supervision of the Church. The rights of his debtors are to be preserved.
>
> (28) 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.
>
> (30) No sheriff, royal official, or other person shall take horses or carts for transport from any free man, without his consent.

And there are plenty of surprises:

(4) The guardian of the land of an heir who is under age shall take from it only reasonable revenues, customary dues, and feudal services. ...

(5) For so long as a guardian has guardianship of such land, he shall maintain the houses, parks, fish preserves, ponds, mills, and everything else pertaining to it, from the revenues of the land itself. When the heir comes of age, he shall restore the whole land to him, stocked with plough teams and such implements of husbandry as the season demands and the revenues from the land can reasonably bear.

(6) Heirs may be given in marriage, but not to someone of lower social standing. Before a marriage takes place, it shall be' made known to the heir's next-of-kin.

(10) If anyone who has borrowed a sum of money from Jews dies before the debt has been repaid, his heir shall pay no interest on the debt for so long as he remains under age, irrespective of whom he holds his lands. If such a debt falls into the hands of the Crown, it will take nothing except the principal sum specified in the bond.

(33) All fish-weirs shall be removed from the Thames, the Medway, and throughout the whole of England, except on the sea coast.

> (35) There shall be standard measures of wine, ale, and corn (the London quarter), throughout the kingdom. There shall also be a standard width of dyed cloth, russett, and haberject, namely two ells[1] within the selvedges. Weights are to be standardised similarly.

The only part of Magna Carta which is widely remembered (if that is the right word) is found in Articles 39 and 40. :

> (39) No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land.
>
> (40) To no one will we sell, to no one deny or delay right or justice.

Together, these became Article 29 of the 1225 version:

> (29) No free-man shall be taken, or imprisoned, or dispossessed, of his free tenement, or liberties, or free customs, or be outlawed, or exiled, or in any way destroyed; nor will we condemn him, nor will we commit him to prison, excepting by the legal judgment of his peers, or by the laws of the land. To none will we sell, to none will we deny, to none will we delay right or justice.

[1] An ancient unit of measure. The English ell = 45 in.; the Scotish ell = 37·2; the Flemish ell = 27 in.

Considering the mystic significance which is attached to Magna Carta these days (and especially this year) it is interesting to note that Shakespeare, in his play King John, does not mention it. He mentions Stephen Langton, the Archbishop of Canterbury who played a large part in compiling the document, just once, and in passing. He does not mention Runnymede.

So why do we honour it this year, or at all? The short answer is: Sir Edward Coke. And here we embark on a truly remarkable story of a new reality being formed as myth is piled on myth.

Sir Edward Coke entered the English parliament in 1589, during the reign of Queen Elizabeth I. In 1594, he became Attorney-General and still held that role when James VI of Scotland became James I of England in 1603.

Coke stood at the intersection of two great struggles which marked the 17th century in England: The Parliament against the King, and the Church of England against the Church of Rome.

Elizabeth's father, Henry VIII, had famously broken from the Church of Rome because he wanted a divorce. The formation of the Church of England led to increasing oppression of English Catholics. The oppression sharpened during the reign of Elizabeth. Elizabeth died without leaving an heir or any obvious successor. When James VI of Scotland was cautiously chosen as Elizabeth's successor, the oppressed Roman Catholics of England had hopes that James might treat them more leniently. After all, James was married to Anne of Denmark who, although a Protestant, converted to Catholicism.

But these hopes were dashed, and a group of well-educated, pious, Catholic nobles conceived a bold plan to resist the increasing oppression. The opening of James' first Parliament was delayed because the Plague had spread through London. For the opening of the Parliament, the Royal family, the Lords and the Commons would collect together in the great Hall at Westminster. Eventually the date for the opening of Parliament was set for 5 November 1605. But word of the conspiracy got out. The night before Parliament was due to open, the whole Parliament building was searched. In a room immediately below the great hall, a man called John Johnson was discovered. He had 36 barrels of gunpowder: enough to blow the whole place sky-high.

John Johnson was also known as Guy Fawkes.

King James personally authorised the torture of John Johnson, in an attempt to identify the other conspirators. Torture was unlawful then, as it is now. But King James considered that he ruled above the law. He adhered to the theory of the Divine Right of Kings. In this, we see the elemental force which was at play in the Constitutional struggles of the 17th Century. The key question was this: Does the King rule above the law, or is he subject to it?

The trial of the Gunpowder conspirators began on 26 January 1606. Sir Edward Coke, as Attorney-General, prosecuted the case. He won. He was a favourite of King James because, on many occasions, he had supported King James's view that the King ruled above the law. Later in 1606 he was rewarded for his loyalty and good service by being appointed Chief Justice of the Court of Common Pleas.

Coke was an interesting man and a brilliant legal mind. He was born in 1542 and die in 1634.

On the bench, Coke's view seems to have changed. This sometimes happens to judges, to the great irritation of governments. In a number of cases, Coke CJ insisted that the King ruled subject to law. It is a principle we take for granted these days, but in the early 17th century it was hotly contested. He rejected King James' interference with the operation of the Courts. In 1615, the King ordered his judges to take no action in a case "until the King's pleasure is known". Some judges bowed to this. Coke defied the King, saying he would do "what an honest and just judge should do".

The King dismissed him from office in 1616. He re-entered Parliament.

In 1627 (the second year of the reign of Charles I) the King ordered the arrest of Sir Thomas Darnel and four others who had refused to advance a compulsory "loan" to the King. They sought habeas corpus. The jailer answered the suit by saying the five were held "*per speciale mandatum Regis*" [by special order of the King].

Darnel's case in 1627 prompted Coke to draft for Parliament the Petition of Right (1628). The Petition raised, with exquisite politeness, various complaints about the King's conduct, including that:

- he had been ordering people, like Darnel, to be jailed for failing to lend him money;
- he had been billeting soldiers in private houses throughout the country against the wishes of the owners;
- he had circumvented the common law by appointing commissioners to enforce martial laws and those commissioners had been summarily trying and executing "such soldiers or

mariners or other desolate persons joining with them as should commit … (any) outrage or misdemeanour whatsoever …";

- he had been exempting some from the operation of the common law.

The Parliament prayed that the King "would be graciously pleased for the further comfort and safety of your people, to declare … that in the things aforesaid all your officers and ministers shall serve you according to the laws and statutes of this realm …".

The Petition of Right reflected Coke's distilled thoughts about English law and politics. In his most famous work, The "Institutes of the Lawes of England", Coke elevated Magna Carta to previously unrecognised significance. He claimed of it that it was the source of all English law, and in particular he claimed that it required that the King rule subject to law, not beyond it. He said that Magna Carta "is such a fellow that he will have no sovereign."

The Petition of Right was Coke's way of creating (he would have said "recognising") the essential features of the English Constitutional framework.

The Petition of Right was adopted by the Parliament but Charles I would not agree to it. Charles I, like John centuries earlier, wanted to continue raising taxes without the inconvenience of Parliament. Like King John, he did it by exacting large sums from his nobles, as he had done in Darnel's case. Again, the nobles were unhappy. The Civil War started in 1642. Charles lost the war and, in 1649, lost his head. Then came Cromwell, Charles II and James II.

James II was a Catholic and was deeply unpopular. His son-in-law, William of Orange, was persuaded to usurp the throne of England. In what became known as the "Glorious Revolution", on 5 November 1688, William landed at Brixham. That year, 5 November turned out worse for James II than it had in 1605 for James I. James was deposed and William and Mary became joint sovereigns in James's place.

But there was a catch. William had agreed in advance to accept the Petition of Right. So the parliament of 1689 adopted the petition of Right and it became the English Bill of Rights. By this path, Sir Edward Coke's views on Magna Carta gained an unassailable place in the fabric of English law.

In form, the Bill of Rights declares itself to be "An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown".

It recites and responds to the vices of James II. Its Preamble starts this way:

> "Whereas the Lords Spiritual and Temporal and Commons assembled at Westminster, lawfully, fully and freely representing all the estates of the people of this realm, did upon the thirteenth day of February in the year of our Lord one thousand six hundred eighty-eight present unto their Majesties, then called and known by the names and style of William and Mary, Prince and Princess of Orange, being present in their proper persons, a certain declaration in writing made by the said Lords and Commons in the words following, viz.:

> Whereas the late King James the Second, by the assistance of divers evil counsellors, judges and ministers employed by him, did endeavour to subvert and extirpate the Protestant religion and the laws and liberties of this kingdom ...

And it then declares certain "ancient rights and liberties". The English Bill of Rights does, in some ways, reflect Magna Carta. So:

> Magna Carta (1215) Article 12: No `scutage' or `aid' may be levied in our kingdom without its general consent, unless it is for the ransom of our person, to make our eldest son a knight, and (once) to marry our eldest daughter. For these purposes only a reasonable `aid' may be levied. `Aids' from the city of London are to be treated similarly
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> Bill of Rights, clause 4: That levying money for or to the use of the Crown by pretence of prerogative, without grant of Parliament, for longer time, or in other manner than the same is or shall be granted, is illegal;

And the ideas underlying Article 20 of Magna Carta and clause 10 of the Bill of Rights are similar:

> Magna Carta (1215) Article 20: For a trivial offence, a free man shall be fined only in proportion to the degree of his offence, and for a serious offence correspondingly, but not so heavily as to deprive him of his livelihood. In the same way, a merchant shall be spared his merchandise, and a husbandman the implements of his husbandry, if they fall upon the mercy of a royal court. None of these fines shall be imposed except by the assessment on oath of reputable men of the neighbourhood.

> Bill of Rights, clause 10: That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;

Beyond this, other parallels can be found but it takes the ingenuity of Sir Edward Coke to make them sound persuasive. For example, Article 61 of Magna Carta of 1215 (which was not repeated in the 1225 version adopted by Henry III) provides for a council of 25 barons to hold the KIng to his promises, and clause 13 of the Bill of Rights requires Parliaments to be held frequently.

But Coke had persuaded a generation of lawyers and historians that the liberties in the Petition of Right, and thus in the Bill of Rights, were recognised in Magna Carta. So the importance of Magna Carta was picked up and sustained by the Bill of Rights.

We do not think about the English Bill of Rights much these days. When we hear about "The Bill of Rights" these days, we automatically think of the United States of America. It is not an accident. The American colonies had been established by the English when they settled Jamestown in 1607. By 1773, things were not going well. The Boston Tea Party took place on 16 December 1773, in protest against having to pay taxes to a distant government in which they had no representative. In 1776 the colonists decided to sever their ties with Britain and on 4 July 1776 they sealed the Declaration of Independence.

In 1789 a Constitution was proposed for the newly independent United States of America. It was a bold, and unprecedented, venture. The idea of a federation of states with local as well as a central government was a novelty back then. The thirteen colonies, anxious about the possible tyranny of a Federal government, put forward 10 amendments to the Constitution. Those amendments are known, in America and across the English-speaking world, as the Bill of Rights. They closely reflected the English Bill of Rights of 1689.

Although it is sometimes thought the US Bill of Rights is a human rights document, it is no such thing. It is no less than a reflection of what is now called the Rule of Law.

The parallels between the English Bill of Rights and the US Bill of Rights are very clear:

English Bill of Rights (1689)	**US Bill of Rights (1791)**
Preamble: By raising and keeping a standing army within this kingdom in time of peace without consent of Parliament, and **quartering soldiers contrary to law**	3 - **No Soldier shall, in time of peace be quartered in any house**, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.
3 - That the commission for **erecting the late Court of Commissioners for Ecclesiastical Causes**, and all other commissions and courts of like nature, are illegal	1 - **No law respecting an establishment of religion, or prohibiting the free exercise thereof**; or abridging the freedom of speech, or of the press; or the

and pernicious;	right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
4 - That **levying money for or to the use of the Crown by pretence of prerogative**, without grant of Parliament, for longer time, or in other manner than the same is or shall be granted, is illegal;	See US constitution Article 1, Section 9 "...**No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law**; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time...."
7 - That the subjects which are Protestants **may have arms for their defence** suitable to their conditions and as allowed by law;	2 - A well regulated Militia, being necessary to the security of a free State, **the right of the people to keep and bear Arms, shall not be infringed**.
10 - That **excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments** inflicted;	8 - **Excessive bail shall not be required**, **nor excessive fines imposed, nor cruel and unusual punishments inflicted**
5 - That **it is the right of the subjects to petition the king**, and	1 - No law respecting an establishment of religion, or

all commitments and prosecutions for such petitioning are illegal;	prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and **to petition the Government for a redress of grievances**.

Two important provisions of the US Bill of Rights reflect Articles 39 and 40 of the 1215 Magna Carta (Article 29 of the 1225 re-issue).

Articles 39 and 40 of the 1215 Magna Carta:

> "(39) No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land
>
> (40) To no one will we sell, to no one will we refuse or delay right or justice."

> (1225 version, Art (29): No free-man shall be taken, or imprisoned, or dispossessed, of his free tenement, or liberties, or free customs, or be outlawed, or exiled, or in any way destroyed; nor will we condemn him, nor will we commit him to prison, excepting by the legal judgment of his peers, or by the laws of the land. To none will we sell, to none will we deny, to none will we delay right or justice."

US Bill of Rights

> "6 - In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ... and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; ... and to have the Assistance of Counsel for his defence.
>
> 7 - ...the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court"

Articles 39 and 40 of Magna Carta are sufficient justification for the document's fame. They have since been taken to stand for the proposition that punishment can only be imposed by a court, that laws apply to all equally according to its terms, and that all people are entitled to have their legal rights judged and declared by a Court. This is more grandly expressed as the Principle of Legality or the Rule of Law.

In Australia, we did not adopt a Bill of Rights in our Federal Constitution, and our Constitutional fathers did not have the same reasons to be anxious about a Federal government as the American colonists had a century earlier. But the High Court of Australia has found in the structure of our Constitution a Principle of Legality which reflects the spirit of Magna Carta as interpreted by Coke.

The Australian Constitution is divided into chapters. The first three chapters create the Parliament, the Executive Government and the Courts respectively. The High Court very early on decided that this gives each arm of government exclusive rights within its own domain. So, for example, only the parliament can exercise legislative power, and only the courts can exercise the judicial power. For present purposes, that means that courts can impose punishment, but the Parliament and the Executive cannot. Parliament can pass a law which says "Doing x is illegal; penalty 5 years jail" but only a court can find that a person has done x, and impose the available punishment.

At least according to Coke, this echoes the provision in Article 39 of Magna Carta that "No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals..."

It seems odd, and not a little ironic that, in the year of the 800th anniversary of Magna Carta, we are confronted with a government which is seriously challenging the Rule of Law.

A measure introduced in 2015 authorises detention centre guards to treat detainees, including children, with such force as they think is reasonably necessary. As a retired Victorian Court of Appeal judge said to a Parliamentary enquiry, this would, in theory, allow a guard to beat a detainee to death without the risk of any civil or criminal sanction.

The *Social Services Legislation Amendment Bill* removes financial support for patients with a mental illness if they are charged with an offence which could carry a sentence of 7 years or more. This automatically puts a defendant at a disadvantage when facing a serious charge, and they suffer that disadvantage regardless whether they are innocent or guilty. Punishment without trial.

In late 2015 the Australian Parliament passed legislation which provides that any Australian who goes to fight with the Islamic State should be automatically stripped of their citizenship. The Immigration Minister - a member of the Executive government – has the power to prevent the person's citizenship being forfeited. This inverted measure replaced an earlier proposal that the Minister would have the discretionary power to cancel a person's citizenship. But having a person's citizenship cancelled automatically, without a hearing, and subject to the Minister's unfettered discretion, looks almost the same.

Having your citizenship cancelled looks very much like a punishment: but the Abbott government wants to be able to do it without troubling a Court to see if the relevant facts are proved and the punishment is required by law. And, archaic as it seems, letting the Minister take away a person's citizenship looks very much like outlawing or exiling the person without the judgment of his equals. Punishment without trial.

This is not a political argument: it is an argument about the rule of law and is as serious and important as it was 800 years ago.

It is too late to deny that Magna Carta has developed a level of significance which its authors may not have noticed or intended. If we are true to the spirit which Sir Edward Coke found in it; if we are true to the same spirit which informed the petition of Right and the English Bill of Rights and the American Bill of Rights then we owe it to the past and to the future to resist any attempt by this or any government to punish or outlaw or exile any person, except by the judgment of his equals.