

**MAGNA CARTA IN ITS MEDIEVAL CONTEXT**

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For about a century after 1215, and about a century before 1689, the *Magna Carta* played a critical role in the constitutional development of England. Between those centuries, although sometimes invoked in statements of grievance or referred to as a touchstone of good governance, it played an ever-reducing role in political discourse. Shakespeare could write a play about King John without mentioning it. Victorian theatre proprietors often added a Runnymede scene, as something which Shakespeare had inadvertently overlooked.

In an address to a symposium commemorating the 800<sup>th</sup> anniversary, at Parliament House, Canberra later this year, I will consider the significance of *Magna Carta* in the century or so before 1689. That period remains the source of its relevance today. In this address I will focus on the medieval context of the *Charter*.

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. My favourite example of the importance of being aware of cultural differences in historical analysis is that given by Macaulay in his essay in defence of Machiavelli. He suggests that an audience in Florence during that era would have reacted to Shakespeare's play *Othello* by rejecting the title character as a love-struck buffoon, but they would have been moved to tears by the fate of the true tragic hero of the play, Iago<sup>1</sup>.

I will endeavour to avoid any such cultural misconception. My central theme, however, is one that Machiavelli himself would have accepted to be perpetual: the abuse of power.

### **The Evolution of the Text**

As is usually the case for any lecture on English legal history, it is best to commence with a quotation from Frederick Maitland. “It is never enough,” he said, “to refer to *Magna Carta* without saying which edition you mean”<sup>2</sup>.

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<sup>1</sup> Lord Macaulay *Critical and Historical Essays Contributed to the Edinburgh Review* London, Longman's Green, 1877 page 37.

<sup>2</sup> F. W. Maitland *the Constitutional History of England* Cambridge Uni Press, Cambridge 1908 page 15

There are four original versions of the *Magna Carta*: 1215, 1216, 1217 and 1225. Thereafter it was “confirmed” by Kings on about fifty occasions. The text of lasting significance is that of 1225, itself substantially based on that of 1217. The changes from the 1215 *Magna Carta*, whose 800<sup>th</sup> Anniversary we commemorate this year, were substantial. The 61 clauses, into which the continuous Latin text of 1215 was conveniently structured for purposes of comprehension by Blackstone, were reduced to 37 by 1225. It was that version which, as “confirmed” by Edward I in 1297, entered the statute book.

The *Magna Carta* was a development of a long established practice of royal promises of good governance, traditionally given in the form of a Coronation Oath. When the King on his succession was strong, the promise of good governance was short. When the King was weak, grievances of the day were addressed in detail. Never in more detail than in the *Magna Carta*.

William I, known as the Conqueror, to whom the French continue to refer by his parentage as Guillaume Le Bâtard, simply promised on his coronation to restore the laws of his legitimate predecessor, Edward the Confessor, pointedly delegitimising the rule of his own predecessor, Harold. Similarly, Henry II in his Coronation Oath, affirmed the “concessions and grants and liberties and free customs” which his grandfather, Henry I, had conceded, thus de-legitimising the

reign of his own predecessor, Steven. The *Coronation Charter* of 1100 by Henry I, however, had been different.

### **Henry I's Charter of Liberties**

Henry I was the youngest son of William I. His claim to the throne was tenuous and the *Coronation Charter* was a manifestation of weakness on his part.

William Rufus, his older brother and immediate predecessor, was mortally wounded by an arrow whilst hunting in the New Forest in a small party, which included Henry. No historian has ever been able to identify the sequence of events, nor establish any involvement by Henry in his brother's sudden demise.

Suffice it to say that Henry rushed to be crowned. His eldest brother, Robert, whom the Conqueror had made Duke of Normandy, thus dividing his inheritance between his two oldest sons, would soon return from a Crusade.

Robert's claim to the crown of England was, if anything, superior to that of Henry, the youngest brother. That, amongst other problems, was the source of Henry's anxiety on accession.

His weakness is shown in the opening words of his *Charter*. They state that he has been crowned "by the mercy of God and by the common counsel of the

barons”. The first phrase is reminiscent of what we would come to call “divine right”. The second reference, to consultation with the barons, suggests an entirely different basis for royal authority. The tension between these two principles of political legitimacy would take many centuries to resolve.

Henry I promised to reform some of his father's and brother's practices. Both the *Charter* of 1100 and the *Magna Carta* of 1215 were, to a substantial extent, concerned to remedy such abuses. Rejecting the “bad customs” of his immediate predecessor, Henry promised to restore the law of Edward the Confessor, except as it had been properly amended by William I, with the advice of the Council of the barons.

Henry I ignored the promises he had given in his *Charter*. Henry II would also ignore his grandfather's promises, which he had sworn to keep. Political promises are like that. However, when royal authority was weak, as it was at the time that King John accepted the *Magna Carta*, much more could be demanded and much more would be granted. That did not make it any more likely that the promises would be honoured.

In the years between the death of Henry I and the *Magna Carta*, under Stephen, Henry II, Richard I and the early years of John, there are no recorded politically

significant references to the *Coronation Charter* of Henry I. The fact that Henry I did not keep these promises did not detract from the creation of a myth of a golden past.

The list of promises that Henry I gave on his accession to the throne was the precedent expressly invoked by the rebel barons of 1215. They referred to this document as Henry's *Charter of Liberties*. Framing the political debate is always an important first step. “Liberties”, then, were what we would now call “privileges”, rather than “rights”. Nevertheless, they constituted a sphere of autonomous conduct, free from constraint from above and, in that sense, constituted “freedoms” in contemporary usage.

A comparison of the two *Charters* explains why the rebel barons, in 1215, commenced negotiations with a claim for the confirmation of this *Charter of Liberties*. The themes of the two documents are similar, albeit the scope, range and detail is considerably expanded in the *Magna Carta*.

### **The 1215 Charter**

In 1215 King John was faced with rebellion, which he had not been able to suppress. In the previous year he, together with his European allies, had been

decisively defeated by King Phillip of France at the battle of Bouvines. John's loss of Normandy two years before, now became permanent. His foreign campaigns had necessitated the exploitation of every revenue-raising power to the maximum. The rebellion of the barons, particularly in the North, escalated. The city of London joined the rebellion. By mid 1215, the rival military forces entered a period of stalemate which led to negotiations. The *Charter* of 1215 was a peace treaty to end a civil war.

There is extant a document which constitutes the first list of demands that led to the *Magna Carta*. After its discovery in the French Archives, it has been widely referenced since the 1890's, but is still called the *Unknown Charter*. It repeated the *Charter of Liberties* of Henry I and added twelve clauses.

There is a further document, that came to be called the *Articles of the Barons*, which consists of some 49 clauses, many of which found their way into the *Magna Carta*. This was a further development of the *Unknown Charter* and appear to constitute the penultimate step in the lengthy negotiations between the King and the barons. The negotiations were sufficiently advanced by then for the King to affix his seal to this draft.

One provision of the 1215 *Magna Carta* was so irreconcilable with any conception of the authority of a monarch. John had reasons to break most of the promises contained in the document, but clause 61 – which came to be called the security clause – was completely intolerable.

Clause 61 had first appeared in the original list of demands set out in the *Articles of the Barons*. It established a committee of 25 barons, to enforce the promises given by the King in the *Charter*. It was the longest clause in the *Charter*.

The number 25 was of great significance in medieval numerology. As St Augustine had pointed out, the laws of Moses was contained in five books and therefore 25, represented five squared. It had other mystical connotations<sup>3</sup>. Indeed, in 1258 a Council of 25 was appointed to implement reforms imposed upon John's son, Henry III. In the fourteenth century, King Edward III created the Order of the Garter. It was limited to 25 knights in addition to the sovereign, and remains at that number to this day.

Clause 61 set out a detailed procedure by which this committee could remedy any breach of promise by the King. It authorised the committee to seize the

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<sup>3</sup> Nicholas Vincent *Magna Carta A Very Short Introduction* Oxford Uni. Press, Oxford, 2102 pages 67-68.



King's castles, lands and possessions and made a variety of provisions to prevent evasion. This could only be described as pre-authorized rebellion.

The committee of 25 had been given further extraordinary powers. It would settle any dispute about John's promise to restore any "lands, castles, liberties or rights", of which John had deprived anyone, "without lawful judgment of his peers", (clause 52). Similarly, the committee would resolve any disputes about John's promise to repay fines imposed "unjustly and contrary to the law of the land" and amercements – payments for the exercise of "mercy" - usually pardons for alleged offences, (clause 55). Detailed provision was made for this committee's procedure.

John agreed to the terms of the negotiated peace on 15 June 1215 and affixed his seal to the *Magna Carta* on 19 June. A transparently hostile monk would later record King John's response to having to agree to the *Charter* as: "... gnashing his teeth, scowling with his eyes and seizing sticks from the trees and .... gnawing them to break them"<sup>4</sup>. Whatever the truth of that, everyone would have known that John did not like what he was forced to concede.

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<sup>4</sup> Matthew Paris quoted in Anthony Arlidge and Igor Judge *Magna Carta Uncovered* Hart Publishing, Oxford, 2014 page 81.

The degree to which Clause 61 undermined royal authority was such that England could no longer have been regarded as a unified monarchy. They could not survive the restoration of John's political and military position.

Within a month, John wrote to the Pope asking him to annul the *Charter*. After years of disputation, John had formed a close alliance with Pope Innocent III. As one of many examples of a conflict between the Pope and lay rulers about the investiture of senior ecclesiastics, John had refused to accept Stephen Langton as the Archbishop of Canterbury. After a five-year interdict over the kingdom, John surrendered, but he went further. He paid homage to the Pope, acknowledging him as his feudal overlord, with all that that implied. In February 1215, as the rebellion against him intensified, John took the vow as a crusader to further extend papal protection.

On 24 August Pope Innocent, a particularly ambitious Pope and the first to describe himself as the "Vicar of Christ", strengthened John's political position. He declared the *Charter* void as "shameful, demeaning, unjust and obtained under duress". It had lasted barely nine weeks.

After the King repudiated the *Charter* the civil war re-ignited. The barons offered the throne of England to Prince Louis, heir to the French throne, and later King Louis VIII, who was crowned in Westminster Abbey.

### **The 1216 Charter**

Immediately after John's death in October 1216, his nine year old son Henry was hastily crowned at Gloucester Abbey. The rightful place for a coronation - Westminster Abbey - was controlled by the rebels and the French. Three weeks later, the *Magna Carta* was re- issued in amended form at Bristol, a stronghold of the royal forces in the west. It was sealed on the King's behalf by the Regent, William Marshall, Earl of Pembroke, one of the most admirable figures in English history, and by the new papal legate, (Innocent III had also died). The papal annulment of 1215 was superceded.

In the 1216 re-issue, the *Charter* was reduced from 63 to 40 clauses. Amongst the deleted clauses were those which significantly interfered with the authority of the monarch. Important aspects of royal taxation, which had been expressly covered in the 1215 version, were reserved for further deliberation by the King, with the advice of his Council. Perhaps most significantly, the enforcement

mechanisms, did not survive. Clause 61 was deleted in 1216 and never reappeared.

Two other clauses of the 1215 *Charter* were also regarded as incompatible with royal authority. Clause 12 of 1215 stated that no scutage or aid, with traditional exceptions, was to be levied except with the “counsel of the realm”. Scutage was a payment in commutation of the obligation of a tenant to provide armed knights to his Lord. Aids was a group of miscellaneous payments. Most significantly, clause 14 of the 1215 *Charter* had set out in some detail how it was that the “common counsel of the realm” would be given. It specified a process under which a summons would be issued to all tenants in chief, on at least 40 days notice and further procedural detail. Clauses 12 and 14 were omitted in 1216 and in all subsequent *Charters*.

### **The 1217 Charter**

In 1217 the barons and Prince Louis’ French army were defeated, and the French fleet bringing re-inforcements was sunk, by royalist forces. What a difference there would have been in world history if this long forgotten French invasion had not failed and the English and French crowns had been united in the first quarter of the 13th century!

After the victory, the *Magna Carta* was re-issued in November 1217, with some amendments, but basically in the terms of the 1216 version. Significantly, as I will discuss, four clauses of the 1215 *Charter*, referring to the Royal Forests, were replaced by an entirely new *Charter*, known as the *Forest Charter*, which regulated in detail the extent of, and the conduct of activity in, such forests. Because the *Forest Charter* would operate in parallel with the original *Charter*, the word “Great” was added to the original, which henceforth became known as the *Magna Carta*.

As one of the foremost historians of the *Magna Carta* put it:

“The *Charter* of 1215 was the work of King John's enemies. The re-issues of 1216 and 1217 were the work of his friends and supporters”.<sup>5</sup> The loyalists clearly believed that many of the provisions of 1215 set out long-standing customs, including limits on the exercise of royal power. This belief extended to most of the original provisions restraining the abuse of feudal powers. Other provisions, no doubt inserted at the insistence of the more radical barons, were deleted.

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<sup>5</sup> J. C. Holt, *Magna Carta* (Second Edition) Cambridge Uni Press, Cambridge 1992 page 378.

The re-issue of 1217 was not a concession given by a weak monarch. It constituted a statement of good governance by that part of the political nation that was loyal to the king and was promulgated on his behalf. Admittedly, the monarch himself was underage. However, William Marshall had displayed spectacular loyalty to the Crown throughout his career. He led a group of advisors who, in a Great Council, had advised the re-issue of the *Magna Carta* and the issue of the *Forest Charter*.

### **The 1225 Charter and Confirmations**

In 1225 the *Magna Carta* and the *Forest Charter* were re-issued for the final time. Although still not of full age, Henry III had assumed Regal powers by then. Unlike the 1216 and 1217 re-issues, the 1225 *Charters* were authenticated by the seal of Henry III himself, rather than by that of his Regent.

There were few changes to the 1217 version in 1225 although, by amalgamation and omission, the number of clauses was reduced from 40 to 37.

Certain provisions in the 1225 *Charter* did not exist in the 1215 version. They reflected common interests of the King and the magnates. Clause 32 prohibited any freeman disposing of his land insofar as it would restrict his ability to give

full service to his Lord. Clause 36 prohibited any person purporting to dedicate his land for religious purposes, on the condition that it was given back to him as a tenant. Any attempt to do so was punished by forfeiture of the land. This was a model for many schemes of tax avoidance in the future. And for the regulation of such avoidance.

About one third of the 1215 text had gone. Subsequently the two *Charters* were “confirmed”, as distinct from re-issued, by a number of kings. However, the *Charters* had now reached their final form.

Between 1225 and his death in 1277, after a reign of 56 years, Henry promised to uphold the *Charters* about a dozen times. He did this when he needed additional revenue and, on several occasions, after periods of significant unrest against his reign.

In 1237, Henry again confirmed the *Charters* and, having attained his majority some years before, did so in a way that would bind his successors.

It was during the early years of Henry’s personal rule that the great English legal text, attributed to Bracton, was compiled. Its central constitutional

proposition was that the King was subject to the law. As Maitland characterised the import of the *Magna Carta*:

“In brief it means this, that the King is and shall be below the law”<sup>6</sup>.

Notably, in 1234, Henry III had had to acknowledge that on a number of occasions he had unlawfully expropriated land in contravention of clause 29 (clause 39 of 1215) – the promise not to deprive anyone of property without “lawful judgment of his peers or by the law of the land”<sup>7</sup>. Nevertheless, throughout his reign, Henry’s failure to observe the *Charters* remained a focal point of political discourse and of periodic rebellion.

### **The Confirmations of 1297 and 1300**

Perhaps the most significant confirmations of the *Charters* were those of Edward I in 1297 and 1300. The 1297 version is the copy of the *Magna Carta* in Parliament House, Canberra.

In July 1297 disaffected barons had drawn up a list of the grievances in a document entitled *Remonstrances*. This list set out the complaints about the failure to enforce both the *Magna Carta* and the *Forest Charter*. In addition,

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<sup>6</sup> F. Pollock and F. W. Maitland, *The History of English Law* (Second Edition) 1911, London, pages i,173.

<sup>7</sup> D.A. Carpenter *The Reign of Henry III* Hambledon Press, London, 1996, pages 38-39



complaints were made about forms of taxation that did not exist at the time of the 1225 *Charters*. The skill of royal advisors in concocting new revenue devices would be a recurring trigger for constitutional development.

1297 was a time of national tension, in the immediate wake of the English military disaster in Scotland at the hands of William Wallace. There was a threat of further rebellion by English barons. Furthermore, Edward needed additional funds to conduct his military campaign in Flanders, directed at France.

The *Charters* that were confirmed by Edward in 1297 were the two *Charters* of 1225, issued by, and in the name of, his father, Henry. However, the covering document of 1297 - called the *Confirmation of the Charters* - made a number of promises in addition to those contained in the 1225 documents.

The 1297 text of the *Magna Carta* became the definitive version in England and was entered as the first item in the official Chancery “Statute Roll”, even though it contained a mistake due to a transcription error<sup>8</sup>. However, the *Charter* remained a series of political promises. The problem was enforcement.

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<sup>8</sup> Nicholas Vincent *Magna Carta: The Foundation of Freedom 1215-2015* Third Millenium Publishing, London, 2015, page 84

Within a year, complaints about Edward's failure to uphold the *Charters* re-emerged. The principal focus of complaint was about his failure to enforce the *Forest Charter*. Hostility became intense when Edward purported to re-issue that *Charter* with deletions and subject to a new qualification.

The 1297 *Charters* had been sealed on the king's behalf - he was on campaign in Flanders. However, he had conveyed his agreement under seal. In 1300, Edward was forced to re-issue the *Charters*, this time authenticated under his own great seal. The political nation extracted a further series of commitments with a view to future enforcement of these political promises. The commitments were contained in a covering document, referred to as the *Articles upon the Charters*. These *Articles* imposed a range of restrictions on royal administration, from revenue-raising measures to interference with judicial processes and, in considerable detail, created a mechanism to enforce the *Charters*, particularly the *Forest Charter*.

Eventually, Edward obtained absolution from a compliant pope of his promises in the *Confirmation* and *Articles*. However, some of the specific provisions had already been replicated in other legislation. The 1225 *Magna Carta* remained part of political discourse, albeit of diminishing salience.

## The Political Nation

The *Magna Carta* is not the only formal grant of liberties by a European medieval monarch. It is, however, the most detailed and the most long-lasting of all such documents. As finalised in 1225, the *Magna Carta* and *Forest Charter* are not simply a list of grievances to be remedied. By reason of their scope and detail they constitute the first comprehensive statement in written form, formally promulgated to the whole English population, of the requirements of good governance and of the limits upon the exercise of political power.

One of the most distinctive characteristics of the *Magna Carta*, and of the *Forest Charter*, in contrast with equivalent *Charters* conferring liberties on barons or cities elsewhere in Europe, was that the sole purpose of the English *Charters* was not to confer autonomy, indeed a high level of independence, on these separate fiefdoms. To some degree they did so. A central purpose of those who put their faith in the political promises contained in the English *Charters* was, as one scholar has put it, to affirm: “a share in an already well-established, centralised and monarchical system of government”<sup>9</sup>.

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<sup>9</sup> Martin Loughlin *The British Constitution* Oxford Uni Press, Oxford, 2012 page 45.

That was why the loyalist magnates deleted provisions, such as those giving powers to the Committee of 25 in the 1215 version, from the re-issues of the *Charter*.

The import of the two *Charters* is constitutional, to use contemporary terminology. It is not a “Constitution” in the sense of setting out a structure of government and a statement of powers and principles for the future exercise of authority. Such a document is only required for an age of political, social and economic change. The 13<sup>th</sup> Century was not such an age. The *Charters* were restorative and demonstrative, not constitutive.

Several themes, each derived from custom and tradition and each recognisably of constitutional significance, underlie the *Charters*.

First, the acts of the King are not simply personal acts. The King’s acts have an official character and, accordingly, are to be exercised in accordance with certain processes.

Secondly, the *Charters* affirm, by their very nature and circumstances of their issue and confirmation, the obligation of the King to consult the political nation on important issues.

Thirdly, the *Charters* restrict the exercise of the King's feudal powers – subsequently transmogrified into prerogative powers – in accordance with traditional limits and conceptions of propriety.

Fourthly, the King cannot act on the basis of mere whim. The King is subject to the law and also subject to custom which was, during that very period, in the process of being hardened into law.

Fifthly, underlying both *Charters*, is the proposition that the King had in fact acted contrary to established custom and, to some degree, contrary to the law.

Sixthly, the King must provide a judicial system for the administration of justice and all free men were entitled to due process of law.

The treatment of the two *Charters* over the course of their first century, reinforced these themes, without stating them explicitly. There was no need to do so. The only thing that was required was to identify the matters necessary to restore compliance with proper conduct in a polity with a well understood and broadly accepted structure.

At the heart of English constitutional evolution - particularly in the six centuries between the Norman invasion of 1066 and the aftermath of the Dutch invasion of 1688 – was the tension between alternative bases for the legitimacy of the institutions of governance. On the one hand, was a top down model of legitimacy from a sovereign. On the other, was organic legitimacy from the emergence of institutions over the course of centuries.

The *Magna Carta* and the *Forest Charter*, stand in, and propagate, the tradition of organic legitimacy. They draw on, and purport to reassert, the customs of the past.

The *Magna Carta* of 1215 is expressed as a “grant” issued on the advice (in older translations by the “counsel”) of eleven named ecclesiastics, sixteen named lay barons and an unknown number of unnamed “faithful subjects”. The last inclusion is of some significance. This was a document for the entire political nation, not just for the secular and clerical magnates. Both the language of “grant” and the identification of the political nation are pregnant with future constitutional development.

The first clause of the 1215 *Charter* states expressly, that it was a document for the entire political nation. After promising the freedom of the Church, the

second sentence of clause 1 states that the promises in the subsequent 62 clauses are “liberties” granted to “all of the free men of our realm”, for the benefit of themselves and their heirs, binding King John and his heirs “forever”.

It is sometimes overlooked that the *Magna Carta* did not simply provide benefits to the great secular and clerical magnates of the realm. A number of provisions make express reference to benefits conferred on all free men<sup>10</sup>.

Furthermore, all the provisions of the *Charter* were expressly extended, by clause 60 of the 1215 version, as repeated in the concluding passage of the 1225 version, to every level of the feudal hierarchy. The promise was that “the customs and liberties which we have granted to be observed ... towards our men, all of our kingdom ... shall observe as far as it pertains to them toward their men”. The beneficiaries of the *Charters* were all the free men of the realm. Henry III and Edward I often called on the barons to observe the *Magna Carta*<sup>11</sup>.

Much future constitutional conflict is implicit in the language of “grant” in the 1215 *Charter*. Indeed, the tension emerged quickly. In 1225, the permanent

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<sup>10</sup> See clauses 15, 20, 27, 30, 39 and 40 of 1215.

<sup>11</sup> See e.g. D. A. Carpenter *The Reign of Henry III* op cit pages 86-87.

form of the *Magna Carta*, referred to the liberties, not merely as having been “granted”, but as “given and granted”. The additional word “given” re-inforces the suggestion of irrevocability.

Nevertheless, conundrums remained. Was this list of political promises an act of benevolence on the part of the King, or was it an acknowledgement by the King of restraints on sovereignty arising from custom and law? Similarly, who is entitled to offer counsel to the King: the clerical and secular magnates alone, or a wider range of free men? These issues would not be resolved for centuries.

### **Restraint on Exactions**

A fundamental aspect of the *Magna Carta* was to impose, perhaps to affirm, restrictions on the exercise of rights that were a product of the complex of mutual rights and obligations attached to the possession of land – which was “held” from a superior, rather than owned. These feudal incidents existed and, therefore, were open to abuse at all levels of the feudal hierarchy, not just between the King and his tenants in chief.

On the limited evidence that exists, the abuse of these exactions by the King, at the pinnacle, were not generally replicated lower in the hierarchy of feudal land



ownership<sup>12</sup>. This was so not least because sub-tenants had access to the Royal Courts which the tenants-in-chief did not. To the degree that they were replicated, however, the restrictions in the *Magna Carta* applied throughout the hierarchy.

The largest number of clauses of the *Magna Carta*, in all versions, were those directed to preventing the King's abuse of incidents of feudal tenure and social structure to raise revenue<sup>13</sup>. There was a wide range of such powers which were open to exploitation by the King. Abuse was inherent in a system that permitted when and how much could be imposed, to be decided in the discretion of the person entitled to the payment or benefit.

These feudal incidents included:

- Whenever a tenant in chief died, his land reverted to the King. There was no formal limit on how long the King could exploit the land before allowing a successor to inherit, or how much he could charge to permit him to do so.

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<sup>12</sup> See Susan Reynolds, *Fiefs and Vassals: The Medieval Evidence Reinterpreted* Oxford Uni Press, Oxford, 1994 pages 361-368.

<sup>13</sup> Of the 37 clauses of the 1225 version, which I use hereafter, unless otherwise stated, because of its permanence, 20 were concerned with such abuses: clauses 2, 3, 4, 5, 6, 7, 8, 10, 15, 16, 18, 19, 20, 21, 22, 24, 27, 31, 33 and 37.

- The obligation of a tenant to provide armed knights could be commuted for payment of a fee – scutage – the amount and frequency of which, was in the discretion of the King.
- The amounts payable to wed a widow or heiress or a ward and the amount payable by a widow in order not to be forced to marry, were also at large.
- Numerous payments, called reliefs, could be imposed on various events in the feudal calendar.
- Other payments called aids were imposed, not only for long established purposes – to marry a daughter, to knight a son or to pay for the ransom of the lord – but for purposes limited only by the imagination of the lord.
- Payments for the King’s mercy, fines for an offence, and even payments to appease the King’s anger were imposed whenever and in whatever amount the King demanded. There are payments recorded for matters like “the King’s benevolence” or his “peace” or his “favour” or that the King’s anger may be “allayed” or “abated” or be “put aside”.
- The profits of justice were also considerable.
- Property was forfeited on conviction, or even allegations, of treason and other offences.
- Payments were made for writs and court fees.
- Payments were made to accelerate or delay legal proceedings.

- Payments were made to permit plaintiffs to demand trial by assize, rather than by ordeal.

Few of these payments were subject to any rules, let alone controls, as to how much could be charged, or when, or for how long. Hence, they were open to abuse.

The provisions of the *Charters* restricting the king's revenue generating powers were designed to impose controls, usually in general terms, but sometimes in detail - with amounts stipulated, circumstances of imposition excluded or a standard of reasonableness, or of custom, expressed. For example, by clause 37 of 1225, scutage could only be levied as it had been at the time of Henry I.

Not all these promises were honoured, but there is little doubt that, cumulatively, they represented a significant constraint on the revenues of the King.

### **The Forest Charter**

There were four clauses about the Royal Forests in the 1215 *Charter*. This minimalist provision was completely transformed in the detailed, separate

*Forest Charter* of 1217, as settled in 1225. These provisions, the product of the royalist political nation, tend to be overlooked in the recognition of the *Magna Carta* as the foundation of the English Constitution. They should not be. Royal conduct in the forests was an important sphere in which the prerogative had been exercised to the detriment of every level of society. These abuses constituted a major source of royal revenue.

The Royal Forests were created by William I. The Normans were hunters and William reserved significant parts of the country for that purpose. He did so irrespective of prior rights in the land. When he created the New Forest in Hampshire, numerous villages were uprooted and the inhabitants expelled. As one 12<sup>th</sup> century chronicler put it: the forests were “the safe dwelling place of wild “beasts” and “the sanctuaries of kings”<sup>14</sup>.

In his *Charter of Liberties*, Henry I stated that he would keep the forests as they were held by his father. However, it was William I who began the significant extension of the area enclosed by the Royal Forest and introduced the draconian forest laws which were, even by 1100, regarded as oppressive. Henry only promised to remedy any extension that had occurred under William Rufus.

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<sup>14</sup> Quoted in Arlidge and Judge op cit page 89.

After the considerable extension of the size of the forest under Henry II, it is estimated that somewhere between one quarter and two thirds of England was incorporated in the Royal Forest. This included most of Essex, large parts of Berkshire, Hampshire, Wiltshire, as well as other counties<sup>15</sup>.

The Royal Forests were a place where the King's will operated without restraint. Forest law overrode the common law. By 1215, complaints about the severity of the forest law and the abuse of power by Royal officials in the forest had been escalating for over a century. As a chronicler of the time of Henry II put it:

“The worst abuse in the Kingdom of England under which the country groaned, was the tyranny of the foresters. For them violence took the place of war, extortion was praiseworthy, justice was an abomination and innocence a crime. No rank or profession, indeed, in short, no one but the King himself, was secure from their barbarity or free from the interference of their tyrannical authority”<sup>16</sup>.

These forests were not merely woodland or wilderness. They encompassed arable land, including cultivated areas, as well as homesteads, villages and even

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<sup>15</sup> See map in W.L. Warren, *Henry II*, Eyre Methuen, London 1973 page 390.

<sup>16</sup> Quoted in Warren, *ibid* page 392.

townships. Major parts of the Royal Forest were land held by others, including by barons, abbeys, bishops, knights and free men. Such land could not be used for productive purposes without the license of the king.

The woods, until appropriated by the King, had often been a commons, available to all. As such, they were an important part of the moral economy. It is difficult to understate the contemporary economic significance of wood. It was not only a fuel, but the transport, building and furniture material of all but the very wealthy. The extent of, and regulation in, the forest was of interest to everyone, not just free men. This is the context of the legend of Robin Hood – still the only fictional character in the *Dictionary of National Biography*.

The scope of the restrictions on what could be done in these forests was wide-ranging. No one was allowed to hunt for beasts of the chase, including deer and wild boar. They could be taken only by the King. The forests were a royal larder. Other prey, like rabbits, foxes, wolves and badgers, could only be taken with royal license. Similarly, licenses were required to cut down trees, clear land, graze pigs or keep hunting birds. Dogs could only be brought in if they were physically disabled. Licenses were required to create hedges or dig ditches. These are only a few of a long list of prohibitions that could be lifted for a fee.

Further, breach of the detailed regulation of conduct in the forest was punishable by fines, the size of which was in the absolute discretion of the King and his officials. The regime constituted the operation of the royal prerogative in its most absolutist form. Charges for the grant of licenses and fines for breach of forest law constituted a significant source of royal revenue. In substance, this was an arbitrary form of taxation, administered in a tyrannical way. It was a burden on all sections of English society.

There were two kinds of grievances with respect to the Royal Forest. First, the extent of the forest had been increased by each Norman and Angevin King without consent. Secondly, the abuse of power involved in the administration of forest law was intolerable.

In the 1215 *Charter*, John had promised to de-forest any land which had been added to the Royal Forest during his reign (clause 47). He resisted the demand in the *Unknown Charter* to de-forest all additions since the accession of Henry II. He simply promised that, after he returned from Crusade, he would “do full justice” to those who had complaints about the additions to the forest that had occurred in the time of Henry II and Richard I, (clause 57). John also promised that 12 knights of each county would conduct an investigation into the “evil

customs” of foresters, and other royal servants, and to abolish such “customs” within 40 days, (clause 48).

In the 1216 re- issue of the *Magna Carta*, the forest issues were among a number of matters which were reserved for further determination by a royal Council. That consideration led to the detailed, separate *Forest Charter* of 1217, which was re-issued with minor amendments in 1225.

With respect to the extent of the Royal Forest, the 1225 *Forest Charter* promised to return all land that had been included in the Royal Forest since the coronation of Henry II, (clauses 1, 2, 3, 4, 5). As to the abuses of forest law, the procedures of forest justice were regulated in detail, (clauses 2, 5, 6, 7, 8, 16). The death penalty for taking deer was abolished, (clause 10). The price of certain licenses was also regulated, (clause 14). New provisions expanded what people could do in the forest, particularly upon their own land, e.g., cutting down trees, hunting, clearing land and deploying hunting birds or dogs, (clauses 9, 10, 11, 12, 13).

Henry III did not keep all these promises, especially with respect to deforestation. The results of the investigations – called perambulations – to be conducted by local knights and free tenants to determine the improper



extensions of the forest, proved unacceptable to the King. They would have required a major reduction in the size of the forest. His rejection of most of the findings was unacceptable to the communities<sup>17</sup>. Some areas were deforested but disputes were frequent<sup>18</sup>.

The *Remonstrance* served on Edward I in 1297, focused on his father's, and his own, failure to observe the promises of the *Forest Charter*. When Edward confirmed both *Charters* in November 1297, he re-iterated the promise made by his father to remove all land that had become forest since Henry II's coronation, and to conduct further perambulations to identify that land.

Within a year complaints re-emerged that Edward had not honoured his promises. Indeed, in 1299, Edward had re-issued the *Forest Charter* but omitted the first five clauses of the 1225 version. This caused outrage. By June he had to promise a further perambulation of the forest to reduce its extent<sup>19</sup>.

When the *Charters* were again confirmed in 1300, the accompanying *Articles upon the Charters* set out in some detail the procedure for determining what

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<sup>17</sup> See e.g. D.A. Carpenter *The Minority of Henry III*, Methuen, London 1990 pages 168-9, 180-182, 276-278 384-5.

<sup>18</sup> *Ibid* pages 391-393.

<sup>19</sup> See Marc Morris *A Great and Terrible King* Windmill, London 2008 pages 317-8

land had been improperly declared to be Royal Forest since the coronation of Henry II. The *Articles* created a new enforcement system, appointing local representatives in each county to investigate and determine the facts.

In 1301, Edward, who was usually at war, needed money again. Parliament reconvened for the purpose of a further grant. That Parliament also received the results of the perambulations. After a century of delay, the results were almost universally against the Crown. About half of the Royal Forest was declared to have been unjustifiably added to that which existed under Henry I. Thousands of acres were returned to their communities<sup>20</sup>.

Edward was justifiably sceptical about the whole process. Local juries determined the extent of the Royal Forest, as it had existed one and a half centuries before. Needless to say, local folklore did not underestimate the rights of local landholders and communities. It is not surprising that they found in favour of local interests, at the expense of the Crown. Edward said that he would never forget how “the stress of great necessity” had led him to “the surrender of his hereditary right”<sup>21</sup>. He was right to be sceptical.

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<sup>20</sup> See Morris Ibid pages 328-330.

<sup>21</sup> Morris Ibid page 330.

The restraints on the Crown carried into affect by the *Forest Charter*, when it was finally enforced, probably represented the most significant single restraint on the exercise of the royal prerogative in the medieval era. It would not be surpassed in that respect until the demise of the Stuart Kings. The *Forest Charter* deserves to be as well remembered as the *Magna Carta*.

### **Consultative Process**

The evolution of the Parliamentary system was derived to a significant degree from the need of Kings to obtain consent to additional taxation. Such consent would not have been necessary, or at least not necessary as often, if the *Magna Carta* had not restricted the abuse of the King's feudal rights to generate revenue and the *Forest Charter* had not restricted the ability to raise revenue, or save costs, from the vast tracks of England categorised as Royal Forest. In my opinion, this effect was probably the major constitutional contribution of the 13<sup>th</sup> Century *Charters*. Nevertheless, several centuries of dispute about the use and abuse of prerogative powers lay ahead.

The calling of an assembly for purposes of consultation between the King and the political nation finds its origin in the Anglo-Saxon tradition of a

*Witanagemot*. The Normans adopted this practice in the form of a *Magnum Consilium* (Great Council).

One could not describe the process of consultation, either in the Anglo-Saxon or Norman -Angevin tradition, as constituting a request for approval. What was sought was assent, rather than consent. Nevertheless, the necessity to obtain assent to taxation, leading eventually to Parliamentary control of the executive, can be traced to the Anglo- Saxon practice of consultative assemblies.

Parliament's role on taxation would remain at the centre of constitutional controversy for centuries. The gradual development of the principle of parliamentary assent, during the 13<sup>th</sup> and 14<sup>th</sup> centuries, was closely related to the affirmation of the *Charters*.

Between 1216 and 1225 during Henry III's minority, some 25 Great Councils were held. The 1217 and 1225 *Charters* were expressly re-issued in exchange for a tax, in the latter case 1/15 of all movables, as assented to by the Great Council of that year. The tax was needed for Henry to defend Gascony from the French, in the event, successfully, so that the province remained in English hands until 1453. The further confirmation in 1237 was also issued in exchange for a grant of taxation.

The tradition of requiring consultation before additional forms of taxation were introduced, was affirmed in the express statements, in the 1217 and 1225 reissues of the *Charters*, as repeated in subsequent confirmations, that the liberties granted or continued were by way of exchange for such taxation from the political nation. The deletion, in 1216 and thereafter, of Clause 14 of the 1215 version – which made detailed provision for the “consent of the realm” – meant that the obligation to obtain consent was not an express promise. It was what we would now call a constitutional convention. Perhaps, the first, and most important, convention.

The Council of 1225 was clearly a feudal assembly. Over the course of the reign of Henry III, the Councils were supplemented by the calling of a “parliament” – a place where people came to talk, from the French “parler”. In 1297 when Edward I requested an additional tax on moveable property, the relevant assembly giving assent was a parliament, rather than a feudal body representing only the barons. His parliaments included knights and burgesses. However, the “parliament” was still an event. The Parliament did not emerge as an institution until later in the 14<sup>th</sup> century.

Edward I's *Confirmation* of 1297 did not describe the *Charters* as having been "granted" by Henry III. More consistent with the evolution of consultative mechanisms, the *Confirmation* states: "The *Great Charter of Liberties* and the *Charter of the Forest*, which were made by common consent of all the realm, in the time of King Henry our father, shall be kept in every point without breach". (Emphasis added)

Of future significance was clause 6 of this *Confirmation*, which expressly stated that certain forms of taxation, including "aids", would not be imposed unless there was "common consent of all the realm and for the common profit thereof". This last phrase was a strikingly novel entry of the concept of public benefit into the quasi legislative process of re-issue and confirmation of the *Charters*.

The obligation to consult was now express. It was no longer a constitutional convention.

### **Good Governance**

Underlying many provisions of the *Magna Carta* are principles of good governance. Some examples are the provisions which promoted trade. These clauses were clearly of interest to merchants, particularly those of London, a

centre of the rebel opposition. Executive powers could be exercised to impose exactions on trade. The restriction of the royal prerogative in such respects would remain contentious in the future.

In addition to a provision guaranteeing the liberties hitherto granted to the city of London and other cities, notably the Cinque Ports (clause 9), there were clauses for clearing fish weirs – which inhibited freedom of movement on the rivers ( clause 23); for establishing a national system of weights and measures (confirming regulations originally introduced by Richard I), (clause 25); for guaranteeing freedom of movement to merchants within England and offering protection to foreign merchants on the basis of reciprocity, (clause 30). Such provisions, enacted in the public interest, go well beyond simply restricting the exercise of executive power.

The close relationship between provisions designed to remedy abuse of power and provisions promoting good governance is particularly strong in the complex of provisions relating to the provision of justice. Unlike most of the clauses, these are not, in general, designed to lessen the activity of the King, but to increase it. Establishing the King's peace was a primary duty of a feudal monarch.

The best-known, and most enduring, provision is clause 29 of 1225, which is an amalgamation of clauses 39 and 40 in the 1215 *Charter*. It is notable that the promise not to impose sanctions “except by the lawful judgment of his peers or by the law of the land” is granted to all free men. Similarly, the second promise, not to “refuse or delay right or justice”, is granted to everyone.

The better, albeit not unanimous view, is that the reference to judgment of “peers” was a reference to social equals, not just to barons. Furthermore, notwithstanding many statements to the contrary, clauses 39 and 40 were not the basis for the development of the jury system. The event of 1215 that caused the investigating jury – or Grand Jury in modern parlance – to develop into the “petty”, later the trial, jury, was the decision of the Lateran Council in Rome that very year to prohibit any priest being involved in trial by ordeal.

The *Magna Carta* contains numerous other promises directed to preventing abuses and improving the institutions of the rule of law. The scope, of itself, manifests an intention to benefit the whole community:

- common pleas would not follow the ambulatory royal court, but be fixed in a particular place, eventually Westminster (clause 11);



- disputes relating to the ownership of land would be heard in the counties in which the land was located and determined by visiting justices, sitting with local knights (clause 12);
- Royal justices would visit annually to hear the most common causes of action for recovery of land and inheritance (clause 12),(reduced from quarterly visits in the 1215 version - clause 18);
- fines for offences, called amercements, would be extracted only for serious offences, would vary with the gravity of the offence and would be imposed only on the oath of law-abiding locals (clause 14);
- pleas of the crown, i.e. serious criminal charges, would not be heard by sheriffs, constables or coroners, but only by justices (clause 17);
- constables and bailiffs would not take private property without full payment in cash (clause 19);
- sheriffs and bailiffs or, for that matter, any other person, would not take horses or carts, save on payment of a prescribed amount, nor any timber, except by consent (clause 21);
- the writ of praecipe would no longer issue to remove to the Royal Court a cause of action, which was properly before the court of a Lord (clause 24);
- no bailiff would put anyone on trial upon his own word, without reliable witnesses (clause 28).

- the frequency of shire courts was regulated, as was the amount sheriffs could exact in the hundred courts from the system known as frankpledge. (clause 35)

Finally, for a sexist age, clause 34 expressly provided that no one should be arrested or imprisoned upon the complaint of a woman for the death of anyone except her husband when, apparently, she might be believed.

Notably, clause 45 of 1215, by which John promised not to appoint justices constables, sheriffs or bailiffs who did not know the law or who did not intend to observe it, was dropped in 1225. There was an element of impracticality in this promise. However, in 1218 salaries were introduced for senior justices for the first time, no doubt as an anticorruption measure, but also as some guarantee of quality. This was the beginning of a salaried professional judiciary.

These numerous provisions, constituted a guarantee of the rule of law appropriate for that era. They went well beyond the general statement of principle in clause 29 which we remember day. Collectively, they built on the foundation for the institutions of justice that already existed and established the basis for their future development. We can recognise this as our direct legacy.

In this respect, perhaps more than any other, the *Magna Carta*, together with the

elimination of abuse under forest law by the *Forest Charter*, are particularly worthy of commemoration.

### **The Australian Charter**

In this 800th anniversary year, pride of place in Australia's commemoration must go to the copy of the *Magna Carta* on display in the Commonwealth Parliament. There are only 24 original *Magna Cartas* issued between 1215 and 1300 in existence, one of which was only discovered last year in the records of the Sandwich City Council.

Australia's copy is one of only four copies of the 1297 version. It was sold by the Kings School Bruton, located in the West Country. This small private school had no record of how it had acquired this single sheet of writing on sheep skin when, in 1951, the headmistress brought it to the British Library for identification.

On the advice of Sothebys, the King's School valued the *Charter* for the then princely sum of £10,000. The British Library, which did not have a copy of the 1297 *Charter*, was only prepared to pay £2000. After a process of inter-departmental disputation, and some astute publicity on the part of the Menzies

Government, the *Magna Carta* was allowed to be sold to Australia at the valuation.

With Captain Cook's Endeavour Diaries and Blue Poles, this is one of the best investments the Commonwealth has ever made. In 2007 the only 1297 *Charter* in private hands sold at auction for US\$21.3 million.

In the Sotheby's catalogue for the 2007 sale, Professor Nicholas Vincent, one of the foremost contemporary scholars of the *Magna Carta*, set out the provenance of the Australian *Magna Carta*. He had inspected unsorted deeds in the British Library, most of which had never been catalogued. He discovered an original 1297 copy of the *Forest Charter* issued to the County of Surrey. This was the companion of the Australian *Charter*, which had also been sent to that county. His investigation revealed that the British Library's *Forest Charter* was a gift to the Library in 1905. That gift had been delivered by a firm of London solicitors. They were also the solicitors for the King's School in Bruton.

Professor Vincent concludes that this *Charter* was only available for sale because of a clerical error made in the firm of solicitors. They had put the *Magna Carta* in the wrong envelope and sent it to the school, rather than

include it, as he inferred the previous owner intended, in the 1905 bequest of both *Charters* to the British Library<sup>22</sup>.

If the British ever return the Elgin Marbles, we can expect a claim for the Australian *Magna Carta*.

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<sup>22</sup> See “How *Magna Carta* Comes to Australia 1952-3” in *The Magna Carta*, Sotheby's, New York, 2007 pages 93 ff; also Nicholas Vincent "*Magna Carta: What more is there to say?*" National Archives, Audio Podcast Series 13 July 2012. See [www.media.nationalarchives.gov.uk/index.php/magna-carta-what-more-is-there-to-say/](http://www.media.nationalarchives.gov.uk/index.php/magna-carta-what-more-is-there-to-say/)