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Adapted by Nicholas Simoes da Silva

Edited by Katarzyna Williams



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The Australian National University Centre for European Studies (ANUCES)

1 Liversidge Street, Building #67C
Canberra ACT 2601, Australia

T +61 2 6125 9896

E europe@anu.edu.au

W <http://ces.anu.edu.au>

The Magna Carta at 800

Professor Paul Pickering, Director of the ANU Research School of Humanities and the Arts, and Dr Tanya Colwell, Visiting Fellow at the ANU School of History, in a discussion moderated by Mr Paul Barclay, ABC Big Ideas, and adapted and edited by Nicholas Simoes da Silva and Dr Katarzyna Williams, ANU Centre for European Studies

On 15 June 1215, the Magna Carta, Latin for Great Charter, was sealed. It established that the King would be subject to the law rather than above it. This medieval document established common law for all men, kings and commoners alike. Right up to this day, the Magna Carta is cited whenever basic freedoms come under threat. Its symbolic status is beyond doubt. But was this really the seminal enshrinement of liberty and the rule of law that we have come to know? What does it stand for legally and constitutionally today? Why should we continue to care about it? Is historic heritage all that is left of this medieval document?

This briefing paper examines the Magna Carta's impact on legislation and constitutions around the world, and the role this iconic document still plays. It is drawn from a panel discussion presented by the ANU Centre for European Studies and the ABC Radio National's Big Ideas program. The discussion aired on 15 June 2015.

A full recording of the discussion can be found at:

<http://www.abc.net.au/radionational/programs/bigideas/features/big-ideas-from-europe/magna-carta/6443146>.

The Journey to Magna Carta

Dr Colwell opened the discussion by providing the context to the Magna Carta and observing that the thirteenth century was a turbulent period for England. By 1215, England had been experiencing over a decade of civil conflict. This was primarily due to the tyrannical reign of John, King of England. Having come to power in 1199, he oversaw significant setbacks, losing the Duchy of Normandy to France just five years later. This loss was embarrassing in several ways. The Duchy had become part of English lands with the arrival of William the Conqueror in 1066 and thus had about 150 years of association with the English Crown. Besides, this situation was compounded by John's personal history. John was the youngest son of Henry the Second and Eleanor of Aquitaine. As the youngest male child he missed out when Henry distributed lands and titles amongst his children. Consequently, his contemporaries called him John Lackland. The loss of Normandy in 1204 thus exacerbated John's significant inferiority complex regarding his ability to gain and hold territory.

After the loss of Normandy, John spent the next ten years trying to raise funds for campaigns to recover the Duchy. This was both unpopular and expensive. It was unpopular with his Barons because most of them did not want to provide military service away from their homelands. Whilst in 1066 William the Conqueror's men had significant territory in France, by 1200 most Barons held their lands in England. They thus were not interested in going and fighting in France for John. Moreover, war was expensive, and the Barons resisted efforts to finance the war in France. As a result, John resorted to exploiting his feudal privileges over the Barons, which he held by being their landlord, to finance his campaigns. Examples of his measures included imposing extortionate inheritance fees on nobles, forcing baronial widows to marry his own allies so he could control their resources, and the compulsory requisitioning of goods and foodstuff across the country without compensation. He also committed officials such as the sheriffs to extort taxes by force.

It was in the area of the administration of justice that John was particularly brutal and arbitrary. For example, in 1210, when one of John's former favourites, a man named William de Breyos, refused to pay John an alleged debt, John took William's wife and their young son hostage as security and, eventually they starved to death as this captives. This was not an isolated incident in John's rule. By 1215, the Barons were fed up with John's oppressive behaviour and, after he had lost another significant battle in France, in 1214, the Barons renounced their fealty to the King. This meant that they could actively rebel against him and would not be considered traitors. They marched across England and, after taking London in May 1215, encountered royalist forces to the west of London, south of Windsor. They embarked on peace negotiations with these royalist forces at Runnymede in June. The product of these negotiations was the Great Charter of the Liberties (*Magna Carta Libertatum*), which was in essence a peace treaty. It outlined the relationship between the King and the Barons in a way to resolve this civil conflict.

1215 AD: The Charter as a Peace Treaty

Professor Pickering argued that because the Magna Carta was locked in such specific circumstances, it had relatively limited effect on resolving the overall issues between the King and the Barons. The Pope, who in this period was supporting John, disavowed the Magna Carta within ten weeks and the Barons themselves effectively abandoned it about a year later, when they offered the throne to Louis of France. So whilst the Magna Carta set in train a number of provisions to restrict John's abuses, over the next century or so it was often honoured in the breach.

Indeed, Dr Colwell argued that the Magna Carta aroused significant opposition from the Church. Pope Innocent III had spent several years in conflict with John over appointments to the Catholic Church and the independence of the Church in making its own appointments. John had resisted Pope Innocent III's appointment, or ratification, of Stephen Langton as the Archbishop of Canterbury. As a result, Innocent had placed England under interdict whereby church services were not held. This was a significant decision in a period when religion structured people's lives. It took several years of diplomacy for Innocent and John to resolve the tensions between them. Eventually, in 1213, John formally acknowledged the Pope as his overlord. Therefore, when the Great Charter imposed restrictions on King John and his exercise of power in 1215, Innocent rejected this because he felt that it infringed on his own

right to exercise power over the King. In Innocent's view, it was he who had the right to control the King's exercise of power and authority, not the Barons.

Professor Pickering suggested that the Pope's intervention demonstrated that the Charter had less to do with principle than real politick. It is the basis, at least in part, for John's reputation as a Machiavellian character. He had been in dispute with the Pope for a number of years, but decided that it would be good politics to make peace with the Church by bowing down to the Pope's authority, thus acquiring an advantage in his struggle with the Barons. When John began to lose that struggle, Runnymede was a way of buying time, and, in fact, John never intended to honour the Charter for long. He immediately tried to get it annulled. The Barons themselves were involved in shifting alliances. The more you dig into the history of the Magna Carta itself, and the circumstances that produced it, the less attractive it seems. In lots of way, it was a petty, grasping deal between religious zealots and homicidal maniacs.

The Charter and the Rights of Kings

The Magna Carta is commonly thought to be the early idea of the rule of law, whereby no one is above the law. However, Dr Colwell argued that whilst the subjection of the King to the law was a lasting principle that was subsequently adapted, the Barons were really more concerned with protecting their own lands and families, and asserting their own influence on the King. Most of the Charter actually deals with very context specific concerns. For instance, a number of the earlier clauses dealt with the safeguarding of baronial property rights and the regulation of their financial obligations to the King. The Charter also protected baronial widows from forced remarriages, and John was forced to free hostages and remove some excessive fines, in addition to being required to launch commissions of investigation to examine the extent of corruption in the counties. These administrative, land and family oriented clauses were critical for the Barons because of their significant short-term value.

The more lasting clauses were those which, for instance, restricted the King's arbitrary use of authority. For example, clause 39 of the Charter states that no free man would be imprisoned or have his property confiscated without undergoing judgement by his peers or being examined in accordance with the law. The notion of 'no free man' omitted a great number of the peasant population who were legally unfree. Nonetheless, Dr Colwell concluded that this did establish the principle that people could expect to be dealt with according to the law. At the time, the Barons were concerned about themselves, with respect to this particular clause, rather than the notion of extending it to the entire polity. But this is one of the clauses that proved long-lasting and important.

With respect to limiting the King's exercise of power, there are a couple of clauses in the Magna Carta which do this. They state that the King cannot levy taxes for war without summoning and gaining the assent of what was called the Council of the Realm. This council initially referred to the nobles and senior clerics, and it was not intended as a widespread representative council. Yet it set in writing the concept that the King was answerable to at least some of his people before he could impose obligations on them.

Professor Pickering sought to offer context to these developments, observing that they were seen in many important respects as reaffirming ancient rights, from a time when the King ruled with the consent of the people. Lots of nineteenth century radicals, who were invoking

the Magna Carta, referred back to ancient gatherings where the people had endorsed the rule of the King. So the Magna Carta can not only be seen as a break of the arbitrary power of the monarch, but also a reaffirmation of these earlier, largely mythical notions of a golden age of democracy that had existed many centuries before. In this sense, the significance of the document was in many ways symbolic, in that it actually put down in writing an affirmation of those rights, signed by the monarch. The ultimate tangible product was a piece of paper with limitations on the King's power that had a royal seal on it.

1225 AD: The Reissuing of the Charter

Dr Colwell led the discussion here, arguing that the reissuing of the Charter in 1225 had both short and longer term consequences. During the reign of the young King Henry III, his advisors twice reissued the Magna Carta in 1216 and 1217. The first time was an attempt to halt the ongoing civil war and the second time was a way of affirming the restoration of peace. However, in each case the document was issued when Henry was still technically under age. He came to the throne at the age of nine, and the second issuing took place when he was ten. As a result, these documents do not have his own seal on them, but the seal of a clerical and noble advisor. In 1225 Henry reached the age of 18 and could rule for himself. He embarked on a lifelong campaign against France to recover territories his father had lost. In order to gain finance for those expeditions, he reissued the Magna Carta but with the explicit concession that the liberties granted to the church and nobles would be freely given by him in exchange for 1/15th part of their movable assets. This codified a contractual understanding between the ruler and some parts of the state that the imposition of taxes for war was based on a King's commitment to uphold the liberties that were set out in the Charter. The long-term significance of this was that it was the 1225 text which Edward I enrolled on the statute books in 1297 and which subsequently became the legal statutory source of the principles of limited government and personal freedoms before the law.

The Longevity of the Magna Carta

Professor Pickering suggested a simple answer to why the Charter lasted so long: the ideas simply caught hold. Over time, it gained wider currency and began to be applied to broader issues. It spiralled out of the control of those who initiated it and was reissued 38 times, becoming a common source of reference for rights. The famous chapters, 9 and 40, are very clearly the base of the rule of law.

Dr Colwell, in explaining the longevity of the Charter, emphasised the importance of those who benefitted from it. The Charter quickly became a touchstone for the nobles, not just for limiting royal authority, but also for asserting their own rights. In fact, the English kings continued to exploit their royal prerogative regardless of the clauses in the Charter, and so continued to exploit their lands and people well into the Stuart period, if not beyond. Accordingly, the Charter was found to be of use for certain influential groups of people. In addition to being enrolled in the statute books in 1297, in 1300 the Charter was proclaimed across the counties in English. Previously, when the Charter was reaffirmed by the King and his council, it was distributed and proclaimed in its original Latin. It was also proclaimed in French as this was the language of the King and his nobles at the time. Yet, once the Charter

was proclaimed in English, a much wider range of people were able to access the substance of the Charter. There is evidence of peasants in Essex in the early 1300s actually citing the Magna Carta in a grievance petition in a local court, against the local barons who were said to be exploiting their liberties which are provided for in the Charter. A particularly important development came in 1354, when the provision stating that no free man would have his liberty of person or property infringed upon without judgement by peers and the law was extended to include all men. This meant that the legally unfree as well as the free were included, and all males were able to claim the Charter in defence of what they perceived to be their own legal and property rights. Women remained excluded.

The Magna Carta and the British Constitution

The Magna Carta would go on to lay the basis for several of the principles reflected in the unwritten British Constitution. Professor Pickering noted that monarchs continued to behave in arbitrary ways well into the 1600s. There was a constant struggle about how to restrict monarchical power, which continued up to the execution of a Stuart king in the Glorious Revolution during the 1640s, and then again in 1688, when the Stuarts were overthrown in favour of William of Orange. The Bill of Rights was introduced based on the notions that emerged from the Magna Carta. By this period, the detail of the original document that applied to specific circumstances had become more broadly understood to provide some rights. Three of these rights remain on the British statute book today. The first one states: no taxation without representation. This is an idea that resonated in the American Revolution, in the Eureka stockade. It is the notion that if you are going to be taxed you have a right to a say in the way in which that happens. The second one focuses on the idea of the rule of law, which means that the monarch is subject to the law and that their power is restricted by law. The third one states that individuals have a right to justice, to not be subject to arbitrary power and to have their claims openly and fairly judged within the state. Professor Pickering observed that while many British people would at the time have argued that the Magna Carta was reaffirming rights that had existed in the distant past, England became a different place after the Magna Carta. It was a pivotal moment for the country.

Dr Colwell agreed with Professor Pickering, arguing that the ideas seeded by Magna Carta have been adapted and elaborated on over the past 800 years. Yet, she stressed it is important to remember that the people who were shaping the Magna Carta in 1215 and again in 1225 certainly were not thinking about notions of democracy and human rights as we would understand them. For example, the Charter introduced the notion of limited government, a very important feature of Westminster political systems today, through the notion of the Baronial Council of senior clerics and nobles, and so there was certainly no thought that the right to advise the King would be opened by an extension of the franchise to a wider body. In 1215, 75% of the population were peasants and half of that population were legally unfree, so clearly the Magna Carta was quite limited in its ideas of personal freedom and human rights. In exchange for living and working on small plots of land, these peasants were obliged to perform a range of labour services for their landlords. They had to seek permission to marry, to move house and were subject to a whole range of other social controls. It was only 140 years later that the protection of personal liberty was extended to all men, not just all free men. There was no sense at the time that the barons and the senior clerics, as the King's

advisors, were offering a range of broad rights. We need to be wary of seeing our political structure as a natural development of what was going on in that period. Instead, we have got to really look at the development of our institutions over time to see how they evolved.

The Magna Carta outside England

Professor Pickering suggested that the Magna Carta has different degrees of relevance outside Britain. In the US Supreme Court, the Magna Carta has been cited in cases almost every year since the nineteenth century. There is a legal basis through to today for citing the Magna Carta. There is a constitutional legacy, as the principles of the Magna Carta certainly still resonate as a notion of the rights of man and citizens. There is also a documentary legacy with historians examining the text itself and the relative clauses, such as the related Charter of the Forests agreed at Runnymede, which is an ecological solution to environmental problems. There is also a cultural legacy, which is a whole range of different references to the Magna Carta which actually have very little to do with the text itself. Former Australian Prime Minister Robert Menzies embraced this notion of the Magna Carta as having a relevance in Canberra. His Government purchased the Magna Carta copy for Parliament House and it was under his prime ministership that the road next to the Treasury Building was named Lankton Crescent, which is the name of the Archbishop who was among those who forced King John to sign the Magna Carta. Throughout our infrastructure and society, there are these residual references to the Magna Carta which were certainly never envisaged by the Barons or King John.

Dr Colwell suggested that Magna Carta still plays a strong symbolic role in contemporary Australian politics. For instance, Magna Carta is referred to frequently in parliamentary debates with respect to civil liberties. It comes up in opposition to national security legislation and it is often cited by conservatives in support of property rights. Parliamentarians David Leyonhjelm and Bob Katter are quite frequent users of the Magna Carta in support of their causes. Such uses of the Charter are fairly opportunistic and they are a good way of creating a sound bite. Yet, they illustrate the continuing perceptions of the Charter as representing core values that at least some people can turn to support their own cause. More broadly, the notion of the Magna Carta and its principle of limited government and accountable executive is still a key part of how we think about our political system today. There is a sense that if a government is not seen to be ruling well, or in accordance with what the people voted them in for, the people via their representatives can resist the government through such measures as refusing the supply bills. So the Magna Carta is seen to live on in personal and property freedoms and the notion of a responsible government. They are still very important symbols denoting how we think about our political system today, perhaps more so than the Charter's legal significance. However, aspects of the Magna Carta are embedded in ACT law and the Australian constitution with respect to the ability for all people to have legal representation and access to justice in a timely manner.

Professor Pickering argued that almost all Westminster style governments have the Magna Carta at their basis: the US Constitution's Fifth and Fourteenth Amendments actually use the language of the Magna Carta, and that is true in Canada, New Zealand. There is a certain comfort in that the people's rights are enshrined in the past rather than being precarious and recent. So even the Americans, who have secured their freedom by force from the British,

continue to want the comfort of notions that are seen as embedded in the distant past. Mr Barclay agreed here, observing that the intrinsic adaptability rather than the actual content of the Magna Carta has allowed successive generations to reinterpret its core meaning. Indeed, Dr Colwell observed that many of the issues specific to the medieval context were removed from the UK statute books during the nineteenth and twentieth centuries. However, the broad principles of due process, access to the law and that sense of having a certain personal liberties have ongoing appeal and validity. She also pointed to the way in which the principles and the broad ideas of the Charter have been used in gendered sense.

Women have used the Magna Carta to support their own pleas for rights, such as in the early 1900s when the British suffragette Helen Normanton, who was one of the earliest female barristers in the UK, set up the Magna Carta Society in 1915. She went back to the Latin Charter to argue that the term *homo*, in the clause referring to ‘no free men should be imprisoned without access to the law,’ should be understood as human, meaning that no member of humankind should be denied justice. Normanton thus argued that women in the UK should have equal legal and political rights to men in the early twentieth century. It was only after 1918 that women over the age of 30 were granted right to vote in the UK. In 1928, the age limit was dropped to 21. Whether the Magna Carta had an impact on those developments is open to discussion. More recently, the Magna Carta has become a symbol in a non-Anglophone country, the Philippines. In 2010, the Philippines government promulgated legislation that was formally titled Magna Carta of Women. This was a piece of anti-discrimination legislation, and it held that victims of violations of the legislation are victims of human rights abuses and that such cases would be dealt with by the Philippines Commission of Human Rights. These cases demonstrate how women have taken on the principle of freedom enshrined in the Charter and applied it to their own situation, not just in Britain, where the Charter came about, but also on the other side of the world – in the Philippines.

Magna Carta, Rights and Democracy

Professor Pickering observed that the concept of a Parliament emerged from the belief that the King could only levy taxation with the agreement of a group of Barons and religious figures who were summoned on a regular basis. The House of Lords reflected the idea that a very small number of privileged people could sit in judgement of the King’s request for additional funds. Indeed, at the time of Henry III, there was a massive decline in royal revenue as a result of the Magna Carta. It went from around £22,000 a year to £4,000 a year, imposing a significant limit on the King’s access to funds. At this stage, the King still held executive power, but that became moderated by Parliament. Today, and for many centuries, executive power resides with the Parliament and not with the King. The Magna Carta was the seedbed of that idea, but it was followed by numerous further developments which produced the notion of a representative government.

Yet, Dr Colwell suggested that the rights reflected in the Charter are increasingly being challenged. There are certain areas where we can see the principles of due process and timely justice, which are outlined in the original Charter, being infringed. Professor Gillian Triggs, the President of the Human Rights Commission, in her examination of Australia’s policies towards asylum seekers and migrants, often identifies what she considers to be infringements

of due process and notions of timely justice, and cites the Magna Carta to argue that we should be applying timeless principles to the way Australia treats asylum seekers. For instance, provisions allowing for mandatory and indefinite detention deny many migrants rights set out in Magna Carta. Recently, Professor Triggs praised a High Court decision that stated that the Australian Government does not have the right to arbitrarily detain asylum seekers. In the US, in particular, the Clause 39 of the 1215 Charter, or the Clause 289 of the 1225 Charter, concerning personal liberties, is often referred to as the presumption of innocence clause. This clause has beenKrasnaleK123alled to attention by public intellectuals in response to what it says is the US Government's use of so called 'preventative measures.' These include Guantanamo Bay and the use of drones in the Middle East. Intellectuals such as Noam Chomsky have argued that the use of such tools fails to offer the protection of due process or the presumption of innocence to either the intended or collateral victims of these 'preventative measures'. In light of this, Dr Colwell concluded that the Magna Carta, as an expression of legal rights and justice, has more than symbolic value.

Mr Barclay brought attention to the dilution of many of the core principles of the Magna Carta in the age of national security. Dr Colwell pointed to 'present necessity' as a common justification for this dilution of rights, which has been seen in recent decades in the US, UK and Australia. There are always loopholes permitting governments to override provisions concerning due process, including the period a person can be detained. The question is how we enforce the provisions concerning these basic liberties and access to justice. Professor Pickering suggested that this is quite ironic, because governments are the representative bodies that are elected and make decisions on the basis of a mandate which is also derived from the Magna Carta. The people are entitled to a say in the way in which laws are made to govern them, and so it raises the question of whether a government can, on behalf of the people, vote away rights that are enshrined in the law. So a government can legitimately say that it has a mandate in relation to some of the actions it takes which actually limit the rights of people who voted for them.

Nevertheless, Professor Pickering argued that people remain comforted by the notion that their rights are enshrined in a historical document. There was a public opinion poll in the UK several years ago which asked people what they thought was the most appropriate national day, and people said the Magna Carta day. The vast majority of people, if asked what the Magna Carta represents, would have only a very rudimentary understanding of the rights it confers. Still, it is a document that is important and comforting for people's relationship to their government, and, as Dr Colwell agreed, it has remained significant in society's consciousness. A lot of people today probably are not familiar with the specifics of the Charter, but understand its broad connection with liberties and freedoms. To some extent this is thanks to the connection between King John and the Robin Hood legend, which continues to resonate with people concerned with corrupt administration and the exercise of arbitrary justice.

Focusing on the Magna Carta's journey over the past 800 years, Dr Colwell observed that while a lot of the clauses were context specific, the Charter from both 1215 and 1225 did provide a source, if not the source, for outlining notions of limited and accountable government and liberties according to the law. Although some of these ideas were based on the existing myth of ancient rights preceding the Magna Carta, the document provided a touchstone for people to hark back to. It has a heritage and 800 years of history bolstering its

authority, and so it has great symbolic value and ongoing credit. Professor Pickering commented that it is interesting that the Magna Carta resonated in 2016 in a way that it had not in 1997, when Australia planned to celebrate the 700th anniversary of the 1297 issue of the Magna Carta. Australia has a copy of that version and the British government gave Australia A\$400,000 to build Magna Carta Place in Canberra. Yet, the anniversary had failed to capture the public imagination in a way the 800th anniversary of the original Magna Carta did. Arguably, the 1297 version is more important in the legal history of Britain and subsequently the Westminster style of government, as it formed a part of British statute law.

The Magna Carta reborn?

Mr Barclay pointed to recent calls for a new Magna Carta, fit for the twenty-first century. For example, British labour MP Graham Allen called for a new document to set out the rules of the political game and the framework for the exercise of power in a modern democracy. Yet, Professor Pickering observed that such calls are a familiar refrain. The great People's Charter of the nineteenth century, which was one of the key turning points in the campaign for democracy, sought to invoke the Magna Carta. Similarly, during the suffrage movement, there was an attempt to underpin the campaign for rights with the idea of a Charter. Calling for a new Charter is something that happens quite regularly in campaigns for either extension of rights or reaffirmation of rights. Dr Colwell suggested that discussion of a new Magna Carta was useful in terms of thinking about the opportunities for rethinking Australia's Constitution, and perhaps the introduction of a bill of rights. Extending the application of the Australian Constitution's rights to include all citizens of the country and not just selected members would be an important way of adapting, revising and improving a constitution or the Magna Carta for the future in Australia.

Professor Pickering agreed that these discussions are useful for thinking about how Australia can extend and secure the rights of First Australians under the Australian Constitution. The Magna Carta is an evolving document and remains a good reminder that Australia's Constitution needs to have the capacity to change and update, even though the founding fathers of Australia envisioned the Australian Constitution as difficult to change. The organic nature of the Magna Carta, in a sense the British Constitution, presents an example of how we should be thinking about the Australian Constitution. Indeed, the Australian Constitution – a deal between powerful states over taxation and other matters – is very much like Runnymede, which was a deal between the King and the Barons. Expanding it is always going to be a contentious notion, but, as Professor Pickering concluded, the example of the Magna Carta can help. Dr Colwell, agreed and concluded that making or codifying a set of rights is going to be time specific, much like the Magna Carta was, but it is the broader, less specific principles encoded in the Magna Carta that have gone on to have an impact across the centuries.