

The Spirit of Magna Carta Continues to Resonate in Modern Law*

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The Legacy of Magna Carta: a Joint Commitment to the Rule of Law

For near on eight hundred years lawyers and parliamentarians have kept the spirit of Magna Carta alive. For their pains they have been accused of representing an essentially feudal Charter that was motivated by self-interest and the demands of political expediency, as a constitutional document of enduring significance. On this view, it is the glint of the sword, not the spirit of liberty, which best characterises Magna Carta. The principal offender is said to be Sir Edward Coke, himself both Judge and Parliamentarian.¹ In his *Second Institutes*, he wrote that the Charter derived its name from its ‘great importance, and the weightiness of the matter’.² He was wrong in this. It was so named to distinguish it from the separate and shorter Charter of the Forest.³ Coke also considered that the terms of Magna Carta were ‘for the most part declaratory of the principal grounds of the fundamental laws of England, and for the residue it is additional to supply some defects of the common law’⁴ Coke

* This paper is based on the inaugural Magna Carta Lecture, presented in the Great Hall of Parliament House, Canberra, on 14 October 2002.

¹ The most notorious and vociferous condemnation was that of Edward Jenks, ‘The Myth of Magna Carta’ *Independent Review*, no. 4 (1904), p. 260.

² *Institutes—Second Part*, vol. I (1642), *Proeme*.

³ A.B. White, ‘The Name Magna Carta’ *English Historical Review* (EHR) vol. 30, 1915, p. 472; vol. 32, 1917, p. 554. The terms of the Forest Charter were initially part of King John’s Charter of Liberties, but they were separated from it in 1217 when it was reissued by his successor Henry III.

⁴ Coke, *Proeme*, cited at note 2.

certainly went too far, although it can be said that Magna Carta has had effect both as a statute and through the common law. The real issue, however, is whether Coke was closer than his critics to an enduring truth.

Magna Carta was re-issued four times, with various amendments, and is now thought to have been confirmed by Parliament on almost fifty further occasions.⁵ The authoritative text, four chapters of which remain on the statute book in England,⁶ is Edward I's *inseximus* of 1297.⁷ A copy of this version, the only one outside the United Kingdom, is displayed in Australia's new Parliament House. By accompanying words of confirmation, also still on the statute book,⁸ it is said that the Charter of Liberties 'made by common assent of all the realm ... shall be kept in every point without breach';⁹ and that the Charter shall be taken to be the common law.¹⁰ In many respects Magna Carta has transcended the distinction between law and politics and its legacy represents a joint commitment by Monarchs, Parliamentarians and the Courts, to the rule of law.¹¹ This legacy forms a central part of the shared constitutional heritage of Britain and Australia. It is in recognition of this that the monument to Magna Carta, which I visited earlier today, has been established in the Parliamentary Zone of Australia's national capital, incorporating the British Government's contribution towards the celebrations of the Centenary of Australia's Federation last year.¹²

For some, Magna Carta today represents no more than a distant constitutional echo. My proposition, to the contrary, is that the spirit of Magna Carta continues to resonate in modern law. However, let me first reaffirm Magna Carta's constitutional significance and refute suggestions that it was no more than a narrow baronial pact.¹³

⁵ F. Thompson, *Magna Carta—Its Role in the Making of the English Constitution 1300–1629*, Octagon, New York, 1972, chapter 1.

⁶ *Halsbury's Statutes*, vol. 10, Part 1, Butterworths, London 2001, pp. 14–17; the chapters are: 1, 9, 29, 37.

⁷ 25 Edw 1

⁸ *Halsbury's Statutes*, p. 18.

⁹ These words of confirmation refer to Henry III's reissue, which is discussed below. This was the version on which Coke based his *Second Institutes*, since copies of Johns' Charter were unknown to him.

¹⁰ See Coke, *Proeme*, op. cit.

¹¹ It is important to recognise, as Coke himself emphasised, that Magna Carta also provided a measure against which the acts of Parliament were to be judged. Coke stated that it was a 'good caveat to parliaments to leave all causes to be measured by the golden and straight metwand of the law and not the uncertain and crooked cord of discretion' and castigated Parliamentary conduct that failed to observe the promises enshrined in Magna Carta (*Institutes—Fourth Part* (c.1669), 37, 41).

¹² Magna Carta Committee, Australia-Britain Society, *Magna Carta Place in Australia's National Capital: A Report on Its Naming and Development* (March, 2002).

¹³ Modern texts frequently give only passing reference to Magna Carta or even entirely omit mention of it: e.g. S. De Smith and R. Brazier, *Constitutional and Administrative Law*, 8th edition, Penguin, London, 1998; J. Jowell and D. Oliver (eds.), *The Changing Constitution*, 4th edition, OUP, Oxford, 2000; G. Williams, *Human Rights under the Australian Constitution*, OUP, Melbourne, 1999, pp. 2–3; O. Hood Phillips and P. Jackson, *Constitutional and Administrative Law*, 8th edition, Street & Maxwell, London, 2001, 2–007. Alternatively it is said to be a narrow document, the significance of which has been overestimated: e.g. J. Alder, *Constitutional and Administrative Law*, 2nd edition, Macmillan, Basingstoke, 1994, p. 39; D. Feldman, *Civil Liberties and Human Rights in England and Wales*, 2nd edition, OUP, Oxford, 2002, p. 71.

Magna Carta and the Emergence of the Rule of Law

The dramatic events surrounding King John's capitulation remain of central importance to understanding the constitutional significance and enduring message of Magna Carta. Indeed, the Australian monument to Magna Carta fittingly incorporates scenes from the period, which should continue to inspire generations of lawyers, laymen and parliamentarians alike.¹⁴

The story of Magna Carta is a chapter in the continuing history of the struggle between power and freedom. It is a chapter set in a time when ultimate power was concentrated in the hands of a single ruler. However, in a time before the principle of primogeniture had become established, the death of a King was usually followed by a contest for succession in which contestants relied both on might and right in enlisting the support of important magnates, the Church, and those in control of the treasury. It was at this stage that the privilege and power of Kings was most clearly limited. Before coronation by the Church, new Kings were required to make an Oath to observe justice and equity and to uphold the peace. Abuses of the previous reign were stipulated and forbidden for the future. Such were the terms of Henry I's Coronation Oath, sworn in 1100. Henry had rapidly seized the throne after his father died suddenly, if not a little suspiciously, while they were hunting; but his claim was weak and he had shaky baronial support. For these reasons he embodied his Oath in a Charter of Liberties, which was the crude precursor of Magna Carta.¹⁵ Nonetheless, once crowned, a Coronation Oath, even in the form of a Charter, was no restraint against a powerful King. Few expected such promises to be taken particularly seriously, and Henry broke every one of them.¹⁶

However, Magna Carta was not, as is often said, simply a reaction against the tyrannies and excesses of King John. Sir James Holt, the pre-eminent modern authority on Magna Carta, has argued that the predominant cause of the Charter was the manner in which the Angevin Kings exploited England in an attempt to expand and defend their continental empire.¹⁷ This process can be traced to the accession of Henry II in 1154 who, as Count of Anjou and Duke of Normandy, had dominions covering three-fifths of France. To sustain this empire Henry gave the administrative centres of England, the Curia Regis and the Exchequer, a new lease of life. He extended the jurisdiction of the King's Courts, and exploited the feudal obligations owed by his barons.¹⁸ The momentum was increased by Henry's successor, Richard I, and his Chief Justiciar, Hubert Walter, since it was necessary to pay for Richard's prolonged and expensive crusades.¹⁹ The Angevin Kings also eagerly seized new

¹⁴ Magna Carta Committee, 2002, op. cit., pp. 13–21, 33–34.

¹⁵ W. Stubbs, *The Constitutional History of England—In its Origin and Development*, vol. I, 4th edition, Clarendon, Oxford, 1883, pp. 328–330.

¹⁶ W.S. McKechnie, *Magna Carta—A Commentary on the Great Charter of King John*, Glasgow UP, Glasgow, 1905, p.118.

¹⁷ J.C. Holt, *Magna Carta*, 2nd edition, Cambridge UP, Cambridge, 1992, p. 24.

¹⁸ *ibid*, pp. 29–33.

¹⁹ Historians have recently revised views of Richard I's reign and administration, which were traditionally thought to have been retrogressive. See generally, J. Gillingham, *Richard Coeur De Lion—Kingship, Chivalry and War in the Twelfth Century*, Hambledon Press, London, 1994, pp. 95–118; M.T. Clanchy, *England and Its Rulers 1066-1272*, 2nd edition, Blackwell, Oxford, 1998, pp. 94-98.

opportunities to raise revenue that were not open to other feudal lords, notably the taxation of trade and the control of weights and measures. Faced with this centralised and ruthlessly efficient governmental apparatus, the King's subjects required assurances that good practices would be observed and their liberties preserved.

Even so, it was no accident that the revolt occurred in the reign of King John. He was a capricious and inconstant ruler. Moreover, he inflamed his barons by demanding enormous scutages and aids to finance his unsuccessful military expeditions. He lost Normandy to the French King and his nickname, "John Softsword", set him in unfavourable contrast with his lionhearted brother, Richard. A battle with Rome ended in his astute but ignominious offer of homage to the Pope.

When John determined on setting out across the Channel to stamp his authority on his lands in Poitou and Anjou and perhaps even re-take Normandy itself, he found many of his barons refusing to follow, in open defiance of their fealty. Instead John, with his mercenaries, set off northward to bring the most intransigent northern magnates to heel. Civil war was averted only by the bold intervention of Stephen Langton, the Archbishop of Canterbury, who persuaded John not to distrain his barons without lawful judgment of his court. Enraged, John had to settle for a fortnight's marching about his northern fiefdoms stamping his feet in frustration.²⁰ The following year in 1214 John renewed his assault on his enemies in France, but was this time deserted by his Poitevin barons. On his return to England his discontented English magnates seized their opportunity and John was confronted by open revolt. As John's biographer has put it: 'it may well have seemed to men already inflamed to the point of conspiracy, that John had been obliged to come to terms with the Church and with the French king and that the next item on the agenda, as it were, was that he should come to terms with them.'²¹

It was likely to have been Stephen Langton who produced Henry I's Charter as a way of focusing and legitimating the baronial grievances.²² While many of the barons, it is true, were principally activated by selfish desires for revenge and recompense, the Charter also appealed to moderates. It provided a point of compromise and a sure foundation for Magna Carta.²³ The terms of Magna Carta itself were hammered out during protracted negotiations in the meadow in Runnymede in 1215.²⁴ King John was undoubtedly trying to buy time and the country was still destined to descend into civil war. However, when the storm eventually subsided Magna Carta emerged as the rock upon which the constitution would gradually be built and the fulcrum upon which the constitutional balance would be struck.

²⁰ See W.L. Warren, *King John*, Yale UP, New Haven, 1997, p. 214.

²¹ *ibid*, p. 225.

²² Langton's role is celebrated by the Australian Magna Carta monument. Modern historians, however, disagree over precisely what role he had. Certainly Warren regards him as the only person who deserves to be singled out from among Magna Carta's framers (*ibid*, p. 213, cf. pp. 217, 232, 245). He also believes that Langton produced Henry I's charter, probably at the famous St Paul's meeting in 1213: *ibid*, pp. 226–228 also Clanchy, above note 19, p. 138. Holt, however, is more circumspect and argues that the meeting never took place: above note 17, pp. 219–220, 224–225, 269–270, 279–287.

²³ Warren, 1997, above note 20, p. 231; Holt, above note 17, p. 222.

²⁴ See Holt, above note 17, chapter 7.

The terms of John's Charter amplified and expanded Henry I's.²⁵ It was dominated by issues of contemporary importance as diverse as reliefs, widows, wardships and fishweirs. Scutage and aids were only to be levied by the Common Council of the Kingdom.²⁶ The City of London, which had played host to the rebel barons, was to have all its ancient liberties and free customs.²⁷ There were several concessions to merchants, and weights and measures were regularised. The most famous chapters,²⁸ which later became the venerated chapter 29, stated that no free man was to be arrested, imprisoned, disseised, outlawed or exiled or in any way destroyed, except by the lawful judgment of his peers or by the law of the land. To no one in his realm, the King swore, would he sell, refuse, or delay right or justice. It is stretching imagination to find here a protection of jury trial, but Magna Carta manifestly asserted the superiority of the ordinary law and of regular over arbitrary justice.²⁹

There is no reason to think, as is often suggested, that Stephen Langton was also solely responsible for the inclusion of 'free men' as addressees of the Charter. It was becoming clear to reflective Lords and Bishops that the Charter required a broader base than would be supplied by a simple baronial pact.³⁰ Coke later took the inclusion of "free men" to encompass the entire citizenry, but, while it was certainly used broadly, it excluded the villein who was protected only by local custom in his lord's court.³¹ Nonetheless, Sir James Holt has argued that the Charter was unique in accepting an exceptional degree of legal parity among free men, and also in its comprehensive application to a relatively cohesive community.³²

By chapter 61, if the King transgressed, he was at the mercy of the 'community of the whole realm'.³³ Moreover, some provisions applied universally, such as the promise not to sell, refuse or deny justice. The provision which might have had the greatest popular significance was chapter 20.³⁴ By this chapter no man was to be fined except

²⁵ Stubbs, above note 15, p. 572.

²⁶ Chapters 12 and 14, these provisions were altered in the 1217 charter (see McKechnie, above note 16, pp. 172–175) and were altogether excluded from later re-issues. Furthermore, this provision in no way limited the King's right to tallage London and other towns. It thus contained only the germ of the later principle that taxation was only to be levied by the consent of property owners, as represented in Parliament.

²⁷ Chapter 13, which later became chapter 9.

²⁸ Chapters 39 and 40.

²⁹ Other chapters likewise protected the citizenry's access to justice. Chapter 17 (which became chapter 11) stated that common pleas shall not follow the King's court but shall be heard in some fixed place; a provision that led to the separation of the Common Pleas and the King's Bench. Chapter 38 (which became chapter 28) provided that no man was to be put to wager his law except by the provision of an honest witness.

³⁰ Chapter 1; Holt, above note 17, pp. 269–270.

³¹ See J.H. Baker, *An Introduction to English Legal History*, 3rd edition, Butterworths, London, 1990, pp. 347–349, 531–540; McKechnie, above note 16, pp. 341–344, 448–449.

³² Holt, above note 17, pp. 276–280; cf. P. Vinogradoff, 'Magna Carta' *Law Quarterly Review*, vol. 21, 1905, pp. 250, 253.

³³ It was the King's inability to satisfy the barons in respect of the contentious issues relating to the retrospective correction of previous transgressions that essentially led to the civil war which followed the events in Runnymede: Holt, above note 17, chapter 10.

³⁴ Which became chapter 14.

in proportion to the degree of the offence; and his livelihood was to be at all times preserved. Merchants were not to be deprived of their goods nor villein tenants deprived of their ploughs. These protections against destitution were not, as such, binding against all the world, only against the King; but further protection against the abuses of feudal lords was embodied in chapter 60, according to which they were to observe the same good practices in respect of their men as promised by the King in respect of his.³⁵ This not only bestowed another dimension on chapter 20, but also extended the protections on such matters as wardships and marriage. The breadth of these protections is illustrated by the fact that in later times Magna Carta was most commonly relied upon in suits between private individuals.³⁶ This was, then, no mere private bargain between King and barons.

The great nineteenth century constitutional historian, Bishop Stubbs, went as far as to declare Magna Carta the first great act of a united nation.³⁷ It is apparent that there was much insight in this assessment. Magna Carta was certainly the product of a shift in the structure of society. The Angevin Kings, with their powerful central administration, had been forced to concede that governmental power should be exercised according to principle, custom and law.³⁸ Although the crisis in 1215 was immediately and in great part a tussle between King and barons, under this surface the first great step was taken towards a new political theory of the state. Executive power could no longer be employed simply in pursuit of the King's own private projects, nor was it only limited by the rights of a narrow baronial class. Henceforth, government not only had to be just, but also had to consider the good of the community.³⁹ Significantly, the terms of the settlement were distributed in sealed charters throughout the realm and sheriffs, foresters, and other bailiffs, were ordered to read them in public.⁴⁰ In a time when most law was orally proclaimed, Magna Carta not only became 'the great precedent for putting legislation into writing',⁴¹ but also an awesome record of the terms on which power was to be exercised; intended, as its terms read, to be observed 'in perpetuity'.⁴²

King John's death in 1216 brought the child King Henry III to the throne. During his minority the Charter was re-issued three times. This was at the behest of the King's advisors and supporters, out of recognition that the continued legitimacy of

³⁵ See Holt, above note 17, pp. 276–277, who points out that this was 'not simply laid down as an airy principle' but was backed-up by chapters 15 (no one shall levy an aid from his free men) and 16 (no one can be forced to perform more service for any tenement than is due therefrom). He concludes: 'When the framers of the Charter set out to protect the interests of under-tenants, they meant business.'

³⁶ Thompson, above note 5, chapter 2.

³⁷ Stubbs, above note 15, pp. 571 and 583.

³⁸ 'Magna Carta has thus been truly said to enunciate and inaugurate "the reign of law" or "the rule of law"' (McKechnie, above note 16, p. 148); '... the permanent regulations which the Charter was intended to establish were, taken as a whole, a remarkable statement of the rights of the governed and of the principle that the king should be ruled by law' (Holt, above note 16, p. 338).

³⁹ See in particular the analyses of Clanchy, above note 19, pp. 97–98, and Warren, above note 20, p. 240.

⁴⁰ M.T. Clanchy, *From Memory to Written Record—England 1066–1307*, Edward Arnold, London, 1979, pp. 211–212.

⁴¹ *ibid.*

⁴² Chapter 1.

government depended on the observance of certain principles of good administration, respect for the liberties of the subject, and adherence to the law. When Henry confirmed the Charter voluntarily and in full majority in 1237 its constitutional importance was secured. By 1300 copies of the Charter were being read and displayed in cathedrals and other public places across the land.⁴³

We can conclude from this examination of the terms and historical context of Magna Carta that in celebrating its role in our shared constitutional heritage we need not fear that we are viewing history through rose-tinted spectacles. Magna Carta is a defining document in the emergence of the rule of law and, however it came to acquire its name, certainly it is Great.

Magna Carta and the Conception of Modern Human Rights Documents

If we shift our gaze from the thirteenth century to modern law, we find the modern-day equivalents of Magna Carta in agreements to respect human rights. Unlike Magna Carta, the abuses which inspired these documents became the concern of the whole world and they were conceived on the international plane. After the Second World War, the international community resolved to spell out in writing the inalienable rights of individuals to ensure the future protection of, as the Preamble to the Universal Declaration of Human Rights puts it, “freedom, justice and peace in the world”. These principles increasingly flesh out the rule of law in modern democracies. However, the ancestral connection between Magna Carta and the modern human rights era, whilst there, must not be over-stated. Magna Carta was framed in a time when tests of legal right might still be by battle or ordeal⁴⁴ and even the most beneficent of childhood folk heroes, Robin Hood, was said to have paraded the mutilated head of Guy of Gisborne on the end of his bow.⁴⁵ This is a far cry from the respect for human dignity and the fundamental worth of human life which underpins modern human rights documents. Also, despite its universality, Magna Carta still rested upon a system of inequality and feudal hierarchy.⁴⁶

However, to reject Magna Carta’s relevance and contribution to the modern human rights era would be to adopt a far too simplistic analysis. We should recall that the United States Constitution was held for many years to licence racial segregation; that, like Magna Carta, the American Declaration of Independence of 1776 consisted largely of a list of alleged wrongs committed by the Crown,⁴⁷ and that it was proclaimed against a background of legalised slavery. The primary importance of Magna Carta is that it is a beacon of the rule of law. It proclaimed the fundamental nature of individual liberties, notwithstanding that many of the liberties it protected would not find direct counterparts in modern democratic states. That said, I shall

⁴³ Clanchy, above note 40, p. 213.

⁴⁴ Although ordeal was dying out, and from 1215 the clergy were forbidden from participating: Baker, above note 31, pp. 5–6.

⁴⁵ J.C. Holt, *Robin Hood*, revised edition, Thames and Hudson, London, 1989, pp. 10–11, 32–33.

⁴⁶ Reflecting what were regarded as the good Christian ethics of the time, chapters 10 and 11 of Magna Carta also explicitly discriminated against Jewish money lenders (one of the primary sources of credit at the time).

⁴⁷ ‘The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world. ...’ [they are then listed]

discuss later its provisions protecting access to justice and illustrate their continued vitality in modern law.

Magna Carta influenced human rights documents in several, connected, ways. The first was through its role in the development of theories of natural rights.⁴⁸ Second, these documents owe a large debt to the various constitutions of the American States and the United States Constitution itself. In their turn these owe much to the legacy of Magna Carta, and in particular the writings of Blackstone and Coke.⁴⁹ American constitutional documents effectively married this constitutional inheritance with the ideology of natural and inalienable rights, best represented by the writings of John Locke and Tom Paine. I do not intend to pursue these avenues;⁵⁰ but I will nevertheless show that the spirit of Magna Carta played an important role in the conception of modern human rights documents and continues to resonate through them.

On January 1st, 1942, the Allied powers included in their War aims the preservation of human rights and justice, in their own lands as well as in those lands in which human rights had been denied. From this point the Second World War can be seen as, in part, a crusade for what Winston Churchill termed, in an address to the World Jewish Congress that year, ‘the enthronement of human rights’.⁵¹ The United Nations Charter, signed after the conclusion of the War, included central commitments to human rights.⁵² In 1948 the United Nations General Assembly adopted the Universal Declaration of Human Rights.⁵³

Surprisingly perhaps, the most prominent voice demanding that the War be fought for human rights was that of the author, H.G. Wells, who had visited Canberra in the

⁴⁸ It must be admitted that this was not always a positive contribution. Tom Paine was less than effusive about Magna Carta in *Rights of Man* where he distinguished it from the French Declaration, arguing that it was not a founding constitutional instrument: B. Kuklick (ed.), *Thomas Paine Political Writings*, Cambridge Texts in the History of Political Thought, Cambridge UP, Cambridge, 1997, p. 191. However, in *Common Sense* he had earlier called for an American Continental Charter of the United Colonies ‘answering to what is called the Magna Charter of England’ (ibid, at pp. 28–29). The Levellers generally admired Magna Carta and it was prominent in their thought and demands. A few, however, particularly William Walwyn, dismissed it. For example, Overton and Walwyn described Magna Carta as ‘a beggarly thing containing many marks of intolerable bondage ...’ (‘A Remonstrance of many thousand citizens ...’, 1646, in A. Sharp (ed.), *The English Levellers*, Cambridge UP, Cambridge, 1998, 33 at pp. 46–47). See generally on Magna Carta and Leveller thought, A. Pallister, *Magna Carta—The Heritage of Liberty*, Clarendon, Oxford, 1971, pp. 13–22.

⁴⁹ A.E.D. Howard, *The Road from Runnymede—Magna Carta and Constitutionalism in America*, Virginia UP, Charlottesville, 1968. For a short account see D.V. Stivison, ‘Magna Carta in American Law’, in *Magna Carta in America*, Gateway Press, Baltimore, 1993.

⁵⁰ An account of the United Kingdom’s contribution to human rights was given by Professor Palley as the 42nd Hamlyn Lecture Series, *The United Kingdom and Human Rights*, Street & Maxwell, London, 1991.

⁵¹ *The Times*, 29 October 1942, 30 October 1942 (cited in H. Lauterpacht, *An International Bill of the Rights of Man*, Columbia UP, New York, 1945, p. 86).

⁵² Preamble and Articles 55 and 56. See Lord Irvine of Lairg, ‘The Development of Human Rights in Britain’, *Public Law*, Summer 1998, pp. 221–224.

⁵³ General Assembly Resolution 217 (III), 10 December 1948.

1930s.⁵⁴ Wells sparked public debate in two letters to *The Times* in 1939. In the second he included a ‘trial statement of the Rights of Man brought up to date’.⁵⁵ He introduced his declaration with the proposition that at various moments of crisis in history, beginning with Magna Carta and going through various bills of rights, it has been our custom to produce a specific declaration of the broad principles on which our public and social life is based (perhaps better, on which our public and social life *should* be based).⁵⁶ The debate was conducted in the pages of the *Daily Herald*, and a drafting committee was established to refine the proposed declaration. It was nominally under the chairmanship of the former Lord Chancellor, Lord Sankey, whose name the declaration eventually bore. Wells produced a mass of material in this cause, and much was translated and published across the world. Some was even dropped by aircraft over the European Continent. His book, *The Rights of Man—Or What are We Fighting For?* is steeped in references to Magna Carta. He admits to having deliberately woven its terms into the provisions of the declaration itself, so that, he wrote, ‘not only the spirit but some of the very words of that precursor live in this, its latest offspring’.⁵⁷

The extent to which the enterprise of Wells and his colleagues influenced Anglo-American policy, or the framers of the United Nations Charter and the Universal Declaration of Human Rights, has not been conclusively established.⁵⁸ President F.D. Roosevelt, who was on good terms with Wells, commented upon his draft declaration in 1939.⁵⁹ In 1940 Wells conducted a lecture tour in the United States. Introducing the Universal Declaration to the General Assembly, the Lebanese delegate mentioned the contribution of six individuals. H.G. Wells was one, a second was Professor Hersch

⁵⁴ For accounts of Wells’ role see D.C. Smith, *H. G. Wells—Desperately Mortal—a Biography*, Yale UP, New Haven, 1986, chapter 17; J.H. Burgers, ‘The Road to San Francisco: The Revival of the Human Rights Idea in the Twentieth Century’, *Human Rights Quarterly*, vol. 14, no. 4, 1992, pp. 447, 464–468. (1992); and A.W.B. Simpson, *Human Rights and the End of Empire—Britain and the Genesis of the European Convention*, OUP, Oxford, 2001, pp. 161–167, 204.

⁵⁵ 23 October 1939.

⁵⁶ In *The Rights of Man—Or what are we fighting for?* Penguin, Harmondsworth, Eng, 1940, Wells wrote: ‘the first ... [necessity] is to do again what it has been the practice of the Parliamentary peoples to do whenever they come to a revolutionary turning-point of their histories, which is to make a declaration of the fundamental principles upon which the new phase is to be organised. This was done to check the encroachments of the Crown in Magna Carta. The Petition of Right made in 1628 repeated this expedient. It was done again in the Declaration of Right and the Bill of Rights which ended the “Leviathan” and the Divine Right of Kings. Magna Carta and the Bill of Rights are an integral part of American law. The American Declaration of Independence was another such statement of a people’s will, and the French Declaration of the Rights of Man derived its inspiration directly from that document.’ (pp. 28–29).

⁵⁷ *ibid*, p. 75.

⁵⁸ Wells’ biographer, D.C. Smith, (op. cit.) argues that Wells and the debate influenced the Atlantic Charter drawn up by Churchill and Roosevelt on 14 August 1941 (which was the sapling that later blossomed into the UN Charter) and Roosevelt’s Four Freedoms. He also states that Wells’ views were introduced by Eleanor Roosevelt to the UN and even that ‘final form’ of the *Rights of Man* was the UDHR itself (*The Correspondence of H. G. Wells*, D.C. Smith (ed.), vol. 1880–1903, xli–xlii.). For criticism of these latter assertions see Simpson, above note 54, p. 166. However, Simpson notes that some of Wells’ views were directly introduced to the San Francisco conference in another form (p. 204).

⁵⁹ Burgers, above note 54, p. 465.

Lauterpacht, to whom we will return, and a third was President Roosevelt.⁶⁰ It is rightly considered to be Roosevelt's famous 'Four Freedoms' address on the State of Union delivered in January 1941⁶¹ that is the most direct ancestor of the United Nations Charter and the Universal Declaration of Human Rights, as well as the International Covenants that followed.⁶² But if the spirit of Magna Carta was alive in the popular imagination in this period, so it was in political rhetoric. President Roosevelt himself appealed to Magna Carta and the heritage of freedom in his addresses to the American nation.⁶³ Similarly, in a broadcast to the United States after the conclusion of the war, Winston Churchill spoke of the 'great principles of freedom and the rights of man which are the joint inheritance of the English-speaking world and which through Magna Carta, the Bill of Rights, the Habeas Corpus, trial by jury, and the English common law find their most famous expression in the American Declaration of Independence'.⁶⁴

Popular oratory of this sort would, of course, have had no direct effect on the jurisprudential developments of the time. Nonetheless, the spirit of Magna Carta was alive and well. It was in the minds of those who made the great political moves of the time and in the ears of those who had to put those moves into practice. After the Lincoln Cathedral copy of Magna Carta was transported to the United States Library of Congress for safekeeping in 1939,⁶⁵ an astonishing fourteen million people queued to see it for themselves.⁶⁶ At a ceremony returning the Charter in 1946 the Minister representing the United Kingdom traced a lineage that he said was 'without equal in

⁶⁰ *Official Records of the Third Session of the General Assembly, Part 1, Plenary Meetings of the General Assembly, 21 September–12 December 1948*, 180th, 857–858 (Mr. Charles Malik).

⁶¹ S.I. Rosenman (ed.), *The Public Papers and Addresses of Franklin D. Roosevelt, 1940 Volume—War and Aid to Democracies*, Macmillan & Co., London, 1941, p. 663. See also his State of the Union Address of 11 January 1944, in S.I. Rosenman (ed.), *The Public Papers and Addresses of Franklin D. Roosevelt, 1944–5 Volume—Victory and the Threshold of Peace*, Harper & Bros. Publishing, New York, 1950, p. 32.

⁶² The direct influence can be seen from the preamble to those documents. The inspiration derived from Roosevelt's speech was repeatedly stressed in the General Assembly, see above note 60. For an excellent brief history see L.B. Sohn, 'Human Rights Movement: From Roosevelt's Four Freedoms to the Interdependence of Peace, Development and Human Rights', Harvard Law School, 1995.

⁶³ See 'The Third Inaugural Address', 20 January 1941, S.I. Rosenman (ed.), *The Public Papers and Addresses of Franklin D. Roosevelt, 1941 Volume—The Call to Battle Stations*, Harper & Bros. Publishing, New York, 1950, 3 at 5; and 'A Radio Address Announcing the Proclamation of an Unlimited National Emergency', 27 May 1941, 181 at 193.

⁶⁴ M. Gilbert, *Winston S. Churchill 1874–1965, volume VIII 1945–1965—Never Despair*, Heinemann, London, 1988, p. 200. Further eloquent testimony to Churchill's veneration for Magna Carta can be found in his *A History of the English-Speaking Peoples, Volume I—The Birth of Britain*, Cassell, London, 2002, chapter VII ('Magna Carta').

⁶⁵ The Charter's evacuation was approved by Neville Chamberlain. It is an interesting aside to note that Churchill would not have allowed its removal and instructed that all national treasures, rather than be displaced from their homeland, be buried or hidden in caves: M. Gilbert, *Winston S. Churchill 1874–1965, volume VI 1939–1941—Finest Hour*, Heinemann, London, 1987, p. 449.

⁶⁶ Sir Thomas Bingham MR (as he then was), discussing the long queue of pilgrims to the US Constitution that accumulates each day outside the National Archives in Washington, considered that '[t]he nearest we come, perhaps, is the Great Charter of 1215, an instrument of which the significance is, interestingly, much more generally appreciated in the United States than here' ('The Courts and the Constitution', *King's College Law Journal*, vol. 7, no. 12 (1996–1997) p. 12.

human history’ and considered that the preamble to the United Nations Charter was the most recent of Magna Carta’s ‘authentic offspring’.⁶⁷

In academic, but not physical, terms a far more weighty contribution than that of H.G. Wells to the development of modern human rights was Professor Lauterpacht’s work, *An International Bill of the Rights of Man*, published in 1945.⁶⁸ Like Wells, Lauterpacht sought to emphasise the continuum between Magna Carta and his own enterprise, and to affirm its continued relevance to the modern world. He extolled the significance of the Charter in initiating the English constitutional practice of safeguarding the rights of subjects by way of general statutory enactment,⁶⁹ and even went as far as to declare that, ‘in the history of fundamental rights no event ranks higher than that charter of the concessions which the nobles wrested from King John.’⁷⁰

The United Nations itself has suggested that the roots of the human rights movement can be traced to John’s Charter of 1215.⁷¹ And Eleanor Roosevelt, who chaired the Human Rights Commission responsible for drawing up the Universal Declaration,⁷² proclaimed that it was a declaration of the basic principles to serve as a common standard for all nations and thus it ‘might well become a Magna Carta of all mankind’.⁷³ If there was much in Stubbs’ comment that Magna Carta was the first great act of a united nation, then there is also much to be said for the Universal Declaration of Human Rights as the first great act of a united world. Dr H.V. Evatt, the Australian President of the General Assembly, saw the Declaration as ‘a step forward in a great evolutionary process ... the first occasion on which the organised community of nations had made a declaration of human rights and fundamental freedoms.’⁷⁴

The Universal Declaration, whilst not as ‘universal’ as we might today wish, triumphed in uniting the common values and traditions of many seemingly disparate nations. The Commission contained representatives from eighteen nations and republics. The Anglo-American legal tradition was a major element in its conception,⁷⁵ although the Chinese, French, Lebanese and Soviet Union

⁶⁷ John Balfour, *New York Times*, 11 January 1946 (cited in Thompson, above note 5, p. v).

⁶⁸ Above note 51. The book was reprinted as part of H. Lauterpacht, *International Law and Human Rights*, Stevens & Sons Ltd., London, 1950.

⁶⁹ Above note 51, p. 55 and generally chapter V.

⁷⁰ Above note 51, p. 56.

⁷¹ *The United Nations and Human Rights*, Office of Public Information, New York, 1978, p. 1.

⁷² For the influence of Eleanor Roosevelt on the UDHR see M.G. Johnson, ‘The Contributions of Eleanor and Franklin Roosevelt to the Development of International Protection for Human Rights’ *Human Rights Quarterly*, vol. 9, 1987, pp. 19, 27–48.

⁷³ Above note 60, p. 862. However, Lauterpacht, criticising the Universal Declaration, rejected parallels with Magna Carta and other later declarations because, at least initially, it was primarily aspirational: see ‘The Universal Declaration of Human Rights’ *British Yearbook of International Law*, vol. 25, 1948, pp. 354, 371–372.

⁷⁴ Above note 60, 183rd, p. 934.

⁷⁵ For an unrivalled account of the English role, and the origins of modern Human Rights documents generally, see Simpson, above note 54.

representatives exerted influence.⁷⁶ Nonetheless, although the precise terms of Magna Carta found no place in the final document, we can see in the guarantee that ‘no one shall be subjected to arbitrary arrest, detention or exile’⁷⁷ clear similarities with Chapter 29 of Magna Carta.

The fact that the spirit of Magna Carta continues to resonate through modern human rights documents is reason enough for sparing it from that dusty cupboard of constitutional relics that have outlived their significance. There is, however, a further dimension to the relationship between Magna Carta and modern protections of human rights. This relates to the translation of international human rights guarantees into domestic law.

Reinvigorating the Rule of Law: Guaranteeing Human Rights in Domestic Law

The Universal Declaration is not directly binding on States, although it has largely become part of customary international law⁷⁸ and can be considered by domestic courts.⁷⁹ However, two years ago this month, the United Kingdom brought into effect the Human Rights Act, 1998, which enables individuals to raise allegations of violations of the European Convention on Human Rights before domestic courts. The present Government’s White Paper preceding the Bill stated an intention to ‘bring rights home’⁸⁰ and records comments made by Sir Edward Gardner MP during an earlier attempt to incorporate the European Convention. He noted that the Convention’s language ‘echoes down the corridors of history. It goes deep into our history and as far back as Magna Carta.’⁸¹ Individual rights and freedoms are believed, rightly, to be held of birthright in our countries. The Government recognised in the UK context that the common law alone could not meet the demands of the modern age, and in particular the demands of our international obligations in Europe. The UK was persistently found wanting by the European Court of Human Rights and our own courts had no powers to make comparable findings. Since it is the joint responsibility of Parliament and the courts to protect the birthright of our citizens it was entirely fitting, and in accord with our constitutional heritage from Magna Carta through to the Petition of Right 1672, the *Habeas Corpus Act 1679* and the Bill of Rights, for Parliament to set out new terms on which power is to be exercised; and so reinvigorate the rule of law in the UK.

Recently, in the Boyer Lectures, Chief Justice Murray Gleeson stated that ‘human rights discourse is entering a new phase’ in Australia and described how the question

⁷⁶ M.G. Johnson and J. Symonides, *The Universal Declaration of Human Rights: a History of its Creation and Implementation, 1948–1998*, UNESCO, 1998.

⁷⁷ UDHR Article 9.

⁷⁸ Johnson and Symonides, above note 76, pp. 67–68

⁷⁹ See e.g. *Hunter v. Canary Wharf Ltd.* [1997] AC 655, 714 (Lord Cooke).

⁸⁰ The White Paper, *Rights Brought Home: the Human Rights Bill*, Cm 3782.

⁸¹ *ibid.*, 1.5 (*Hansard* H.C., 6 February 1987, col.1224).

whether to enact a bill of rights is ‘a controversial issue in current political debate’.⁸² It is an issue which is obviously for Australians to decide. Since 1991 Australia has extended to individuals the protection of the International Covenant on Civil and Political Rights by allowing those claiming to be the victims of violations of protected rights to submit a communication to the Human Rights Committee. However, Australia has so far kept this protection beyond the jurisdiction of its own courts. We must not, however, underestimate the extent to which the Australian Constitution and the Australian Courts already protect individual rights. Nonetheless, if the number of adverse opinions of the Human Rights Committee increases then Australians may find, as was our experience in the UK, that pressure continues to grow for a new settlement of individual rights.⁸³ Moreover, it occurs to me, as we celebrate today the bond between our two nations, that, but for the generally amicable manner in which Australia became an independent nation, it might, like other successor nations to dependent territories, already have a bill of rights.⁸⁴

The Continuing Relevance of Magna Carta in Australian and United Kingdom Law

The process of Federation meant that Magna Carta was given concrete legal effect in Australian jurisdictions in a complex way. Jurisdictions with Imperial Acts (the Australian Capital Territory, New South Wales, Queensland and Victoria) all chose to enact chapter 29. This was not, primarily, for its potentially salutary legal effects, but rather to recognise Magna Carta’s pivotal role in the constitutional legacy that these jurisdictions had inherited.⁸⁵ By contrast, in the Northern Territory, South Australia, Tasmania and Western Australia, Magna Carta was received by Imperial law reception statutes.⁸⁶ These jurisdictions find themselves in the surprising position of having almost all the provisions of Magna Carta theoretically still in force. I say surprising because, as I mentioned at the start of this lecture, only four chapters still remain on the statute book in the UK, but Magna Carta was largely received in these jurisdictions before this process of repeal began.⁸⁷ The position is also theoretical because the chapters of Magna Carta would have to be suitable to modern conditions there, and many clearly would no longer be.

⁸² *The Rule of Law and the Constitution*, ABC Books, Sydney, 2000. A study published by the University of Wollongong has described this as a ‘Millennium Dilemma’ for Australia: J. Innes, *Millennium Dilemma, Constitutional Change in Australia*, Wollongong University, 1998. The literature on this dilemma is voluminous, but for one comprehensive study which pays particular attention to the British heritage (considering Magna Carta a ‘landmark document’) see the Queensland Electoral and Administrative Review Commission, Issue Paper No. 20, *Review of the Preservation and Enhancement of Individual Rights and Freedoms*, Brisbane, June 1992, especially pp. 43–46.

⁸³ Cf. Joint Committee on Foreign Affairs, Defence and Trade, *A Review of Australia’s Efforts to Promote and Protect Human Rights*, Australian Government Publishing Service, Canberra, December 1992, which concluded that there are gaps in Australia’s protection of human rights.

⁸⁴ For a brief account of the process of separation see G. Sawyer, ‘Government and Law’ in J.D.B. Miller (ed.), *Australians & British—Social and Political Connections*, Methuen, North Ryde NSW, 1987.

⁸⁵ David Clark, ‘The Icon of Liberty: the Status and Role of *Magna Carta* in Australian and New Zealand Law’ *Melbourne University Law Review*, vol. 24, 2000, pp. 866–891; A.C. Castles, ‘Australian Meditations on Magna Carta’, *Australian Law Journal*, vol. 63, 1989, pp. 122, 124.

⁸⁶ Clark, *ibid.*, pp. 870–872.

⁸⁷ For an account of the process of repeal see Pallister, above note 48, chapter 7.

The legacy of Magna Carta has also been inherited by Australia through the common law. Today, it can be seen to resonate most clearly through the fundamental common law doctrine of legality and the right of access to justice. We shall see, however, that the High Court of Australia in *Jago v. District Court*⁸⁸ limited the extent of Magna Carta's contribution to the right of access to justice, at least in Australian law. Nonetheless, Isaacs J, speaking in the High Court of Australia in 1925, was speaking truly when he proclaimed Magna Carta to be 'the groundwork of all our Constitutions'.⁸⁹

I will return to the common law doctrine of legality shortly, but first let me address the right of access to justice. English courts attach considerable importance to the individual's right of access to justice; and now speak of it as a constitutional right.⁹⁰ The wellspring of the modern case law is the case of *Chester v. Bateson*.⁹¹ Regulations enacted during the First World War for the defence of the realm prevented certain landowners from recovering possession of their property from munition workers without the consent of the Minister of Munitions. This provision was held to deprive the subject "of his ordinary right to seek justice in the Courts of law",⁹² and was consequently declared to be invalid. As a matter of 'constitutional law' Avory J was prepared to hold that the regulations were in direct contravention of chapter 29 of Magna Carta.⁹³ Darling J, however, recognised that, had the regulations been made within the authority of the parent statute, Magna Carta would have been of no assistance, since it cannot stand in the face of the doctrine of Parliamentary sovereignty. However, he declared that the blanket sweep of the regulations, coupled with their draconian penalties, was unnecessary and represented an unjustified interference with individual rights.⁹⁴ The case foreshadowed the development of a common law method of constitutional interpretation, now routinely adopted by the English courts,⁹⁵ which demands that public officials justify their actions by reference to the principles of necessity and proportionality when they interfere with individual rights. Darling J's judgment, in particular, also illustrates the way that Magna Carta has effect not only as a statute, but also resonates through the common law principles

⁸⁸ (1989) 168 CLR 23.

⁸⁹ *Ex parte Walsh and Johnson* (1925) 37 CLR 36, 79; he continued: '[Chap. 29] recognizes three basic principles, namely, (1) primarily every free man has an inherent individual right to his life, liberty, property and citizenship; (2) his individual rights must always yield to the necessities of the general welfare at the will of the State; (3) the law of the land is the only mode by which the State can so declare its will.'

⁹⁰ *Raymond v. Honey* [1983] 1 AC 1; *R v. Secretary of State for the Home Department, ex parte Leech (No 2)* [1994] QB 198; *R v. Lord Chancellor, ex parte Witham* [1998] QB 575; *R v. Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115. See my 'Activism and Restraint: Human Rights and the Interpretive Process', *European Human Rights Law Review*, 1999, pp. 350, 369-70.

⁹¹ [1920] 1 KB 829.

⁹² *ibid.*, p. 834 (Darling J).

⁹³ *ibid.*, p. 836.

⁹⁴ *ibid.*, pp. 832-833.

⁹⁵ See *R (Daly) v. Secretary of State for the Home Department* [2001] 2 AC 532; *Ex parte Simms* [2000] 2 AC 115.

of interpretation developed to safeguard the liberties of the individual from the exercise of governmental power.⁹⁶

Lord Scarman, a champion of human rights and an early and strong advocate of a Bill of Rights for the UK,⁹⁷ suggested judicially in 1975 that Magna Carta had been “reinforced” by the European Convention.⁹⁸ Certainly it is now Article 6 of the Convention, which concerns the right to a fair trial, and its developing jurisprudence that will provide most assistance to UK courts in interpreting the right of access to justice. However, it is interesting to reflect on the fact that Article 6 itself makes no mention of any right of access to a court. This right has been read into its terms by the European Court. The Court argued that the ‘principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally ‘recognised’ fundamental principles of law.’⁹⁹ In its turn, this fundamental principle found one of its first and most important expressions in Magna Carta.¹⁰⁰

In Australia there has been some judicial disagreement about whether Magna Carta’s promise not to delay or defer¹⁰¹ right or justice supports a right to a speedy trial, or at least a right not to have one’s trial unreasonably delayed.¹⁰² In *Jago v. District Court* the High Court was faced with a claim for a permanent stay of criminal proceedings that were scheduled to be held over five and a half years after the accused had been charged. Refusing the stay, it held that no such right existed separate from either the

⁹⁶ In *Ex parte Walsh and Johnson* (1925) 37 CLR 36, 79-80 Isaacs J stated: ‘... the Courts have evolved two great working corollaries in harmony with the main principles [of chapter 29], and without which these would soon pass into merely pious aspirations. *The first corollary* is that there is always an initial presumption in favour of liberty, so that whoever claims to imprison or deport another has cast upon him the obligation of justifying his claim by reference to the law. *The second corollary* is that the Courts themselves see that this obligation is strictly and completely fulfilled before they hold that liberty is lawfully restrained. The second is often in actual practice and concrete result the more important of the two to keep steadily in view ... it will be seen that the principles themselves and the corollaries are far more than mere academic interest. They materially help to solve disputed points ...’.

⁹⁷ 26th Hamlyn Lecture Series, *English Law—The New Dimension*, Stevens & Sons, London, 1974; 7th Lord Fletcher Lecture, 1985, ‘Human Rights in the UK—Time for Change’.

⁹⁸ *R v. Secretary of State for the Home Department, ex parte Phansopkar* [1976] QB 606, 626.

⁹⁹ *Golder v. United Kingdom* (1975) 1 EHRR 524, para 35.

¹⁰⁰ Lord Donaldson MR, speaking before important developments in the jurisprudence on Article 6, declared the common law, Magna Carta and Article 6 to be consistent: *R v. Home Secretary, ex parte Wynne* [1992] 1 QB 407, 418. See also *AB v. John Wyeth & Bros. Ltd.* (1992) 12 BMLR 50. For a survey of the developments of the law on Article 6 since *Golder’s case* see *Matthews v Ministry of Defence* [2002] EWCA Civ 773.

¹⁰¹ This is the term adopted in the 1297 version.

¹⁰² Relying on Magna Carta, McHugh JA (as he then was) powerfully argued that the common law recognised such a right: *Herron v. McGregor* (1986) 6 NSWLR 246, 252; *Aboud v. Attorney-General for New South Wales* (1987) 10 NSWLR 671, 691-692; *Jago v. District Court of New South Wales* (1988) 12 NSWLR 558, 583-585; *Brisbane South Regional Health Authority v. Taylor* (1996) 186 CLR 541, 552. In this latter case McHugh J expressed apparently slightly modified views in stating that chapter 29 of Magna Carta was protected by the power ‘to stay proceedings as abuses of process if they are satisfied that, by reason of delay or other matter, the commencement or continuation of the proceedings would involve injustice or unfairness to one of the parties.’ I will not discuss here Magna Carta’s rather indirect contribution to the notion of ‘due process of law’, which has also been considered by Australian courts (see *Alder v. District Court of New South Wales* (1990) 19 NSWLR 317) as well as by the Privy Council (*Thomas v. Baptiste* [2000] 2 AC 1).

court's duty to prevent injustice or from the accused's right to fair trial.¹⁰³ This view was subsequently adopted by the English Court of Appeal.¹⁰⁴ I agree that Magna Carta should not be read to require a stay of proceedings, or the quashing of a conviction, unless there has been an abuse of process or an unfair trial. However, it seems to me inescapable that there is, enshrined in Magna Carta, a right not to have justice delayed.¹⁰⁵ Deane J in *Jago*, differing slightly from the rest of the court, accepted that such a right exists. He pointed out that it was ordinarily vindicated through the ability of the accused to apply to the court for an appropriate order, and that it would only result in a permanent stay or quashing of a conviction in the circumstances envisaged by the whole court.¹⁰⁶ Michael Kirby in *Jago*, as President of the New South Wales Supreme Court, considered that Magna Carta was sufficiently secured in Australian law,¹⁰⁷ but, in comments that have recently been reiterated by the High Court,¹⁰⁸ said that a more relevant source of guidance in interpreting the law was modern statements of human rights.¹⁰⁹ In the UK context the European Convention and the Human Rights Act have, indeed, fortified and reinvigorated the right, enshrined in Magna Carta, not to have justice delayed. Article 6 of the Convention confers a right to a hearing

¹⁰³ (1989) 168 CLR 23; subsequently followed and affirmed in respect of new arguments in *Alder v. District Court of New South Wales* (1990) 19 NSWLR 317. The case led K.C. Gould to remark that 'the Charter's place in the sun, if anywhere, rests largely on the towel of sentimentality' ('Australian Meditations on Magna Carta—A Postscript', *Australian Law Journal*, vol. 64, 1990, p. 376.)

¹⁰⁴ *Attorney-General's Reference (No 1 of 1990)* [1992] 1 QB 630.

¹⁰⁵ For a discussion of the delay or denial of justice in the context of civil proceedings see *Allen v. Sir Alfred McAlpine & Sons Ltd.* [1968] 2 QB 229, 245 (Lord Denning MR).

¹⁰⁶ (1989) 168 CLR 23, 59.

¹⁰⁷ However, he did not recognise a separate right to a speedy trial. Nonetheless, by contrast, none of the other justices in either the High Court or the New South Wales Supreme Court (other than McHugh JA, on whose views see above note 102) acknowledged that Magna Carta made any normative contribution to modern law. Brennan J considered that Coke's views on access to justice were merely aspirational (*ibid.*, p. 42), and agreed with Toohey J. Toohey J, *ibid.*, pp. 66–67, himself following Samuels JA in the court below ((1988) 12 NSWLR 558, 473–575), criticised Coke's interpretation of the Charter and argued that chapter 29 was primarily intended to correct the worst abuses of royal justice while at the same time securing its pre-eminence. However, these provisions of Magna Carta can be regarded as reflecting an emerging view that justice was a community right and not simply a baronial privilege. It should also be recalled that by virtue of Chapter 60 of Magna Carta lords at each rung of the feudal ladder were expected to abide by the good principles of the Charter. Cf. Holt, above note 17, pp. 279, 285–286, 327.

¹⁰⁸ *Azzopardi v. The Queen* (2001) 205 CLR 50, 65 (Gaudron, Gummow, Kirby and Hayne JJ). Cf. M. Kirby, 'The Australian Use of International Human rights Norms: From Bangalore to Balliol—A View from the Antipodes', *University of New South Wales Law Journal*, vol. 16, no. 2, 1993, p. 363. For a discussion of the protection of human rights in Australian domestic law: J. Doyle and B. Wells, 'How Far Can The Common Law Go Towards Protecting Human Rights?' in P. Alston, *Promoting Human Rights Through Bills of Rights: Comparative Perspectives*, Oxford UP, Oxford, 1999.

¹⁰⁹ (1988) 12 NSWLR 558, 569.

‘within a reasonable time’.¹¹⁰ The Court of Appeal has recently held that a stay of proceedings or the quashing of a conviction will, as before, only be appropriate where there is an abuse of process or an unfair trial. However, in the event of an unreasonable delay the court can now mark a contravention of Article 6 and this can be taken into account when sentencing. Also, where appropriate, for example where there is a subsequent acquittal, UK courts can now make an enforceable award of damages to remedy such a violation.¹¹¹ This seems to me to be an example of a specific instance of the continuum between Magna Carta and the modern protection of human rights.

Finally, I promised that I would return to the doctrine of legality. The doctrine of legality mandates that government action cannot proceed arbitrarily and without lawful authority. It represents the kernel of the rule of law. A recent case has vividly illustrated how Magna Carta continues to underpin this doctrine in important respects.

Bancoult was an Illois, an indigenous inhabitant of the Chagos archipelago in the middle of the Indian Ocean. The Islands were divided from the British colony of Mauritius in 1965, creating the British Indian Ocean Territory. Today these Islands house a United States defence facility; but its establishment was at the expense of the Islands’ indigenous population, thought to have numbered around four hundred people. This population was, in all relevant respects, exiled by an Immigration Ordinance in 1971. Aware that if the inhabitants of the Chagos Islands were recognised as indigenous their actions would be in violation of the UN Charter, successive British governments maintained that the inhabitants were only contract workers. Belatedly, almost thirty years later, the Divisional Court ruled that the actions of the British government in 1971 had been unlawful.¹¹²

Relying on Magna Carta, it was argued that Bancoult had a statutory right not to be exiled unless it was by the law of the land. However, Laws LJ held that direct reliance on Magna Carta could not assist Bancoult’s case for two reasons. First, to find that the terms of Magna Carta had been breached the court would have to be satisfied that the Ordinance had been made without lawful authority. If there was no such authority the government’s actions would be *ultra vires* in any event, although admittedly they would violate Magna Carta into the bargain.¹¹³ Second, and more fundamentally,

¹¹⁰ Kirby P in the Supreme Court of New South Wales in *Jago* ((1988) 12 NSWLR 558, 570) addressed Article 14.3 ICCPR, which states: ‘In the determination of any criminal charge against him, every one shall be entitled to the following minimum guarantees (c) to be tried without undue delay.’ He concluded that this did not protect an independent right to a speedy trial and, like chapter 29 of Magna Carta, the provision was ‘sufficiently secured’ by the principles relating to unfair trials and abuse of process. Samuels JA adopted a wider interpretation of the ICCPR, suggesting it did protect an independent right to a speedy trial, but took a narrower view about the value of international legal instruments regarding ‘the normative traditions of the common law as a surer foundation for development’ (pp. 580 and 582).

¹¹¹ *Attorney-General’s Reference (No 2 of 2001)* [2001] 1 WLR 1869; *R v. Massey* [2001] EWCA Crim 2850. Damages may be awardable by virtue of section 8 HRA, which confers a broad remedial discretion on courts when a violation of the Convention has been found.

¹¹² [2001] QB 1067.

¹¹³ Magna Carta often emerges behind the doctrine of legality in this manner: e.g. *Holden v. Chief Constable of Lancashire* [1987] 1 QB 380; *Re B (Child Abduction: Wardship: Power to Detain)* [1994] Fam 607; *In re S-C (Mental Patient: Habeas Corpus)* [1996] QB 599; *R v. Commissioners of Customs and Excise, ex parte a Company*, 15 October 1996.

Magna Carta, as a statute, was held not to apply to the British Indian Ocean Territory (BIOT) because it was a ceded colony to which the benefit of UK statutes had to be expressly extended.¹¹⁴ But this was not the end of the matter. Laws LJ stated that the ‘enduring significance’ of Magna Carta was that it was a ‘proclamation of the rule of law’ and in this guise it followed the English flag even to the Chagos archipelago.¹¹⁵ Although Magna Carta did not provide the answer to this case, what did was that the ‘wholesale removal of a people from the land where they belong’ could not reasonably be said to conduce to the territory’s peace, order and good government. The Ordinance of 1971, therefore, violated the fundamental doctrine of legality and flouted the rule of law.¹¹⁶

The Continuing Relevance of Magna Carta in Modern Law

Let me sum up this discussion briefly. The constitutions of the UK and Australia are distinct, but they share the same roots and Magna Carta and its legacy represent the sturdiest and the oldest. The fact that the provisions of Magna Carta rarely break the surface or provide explicit contributions to the outcome of modern cases should not obscure its contemporary importance.¹¹⁷ I hope I have shown that in celebrating the legacy of Magna Carta in the UK and Australia we are not clinging to a constitutional relic, vastly overestimated by generations and without modern significance. The opposite is in fact true. Magna Carta can be truly appreciated as the foundation stone of the rule of law. Its terms continue to underpin key constitutional doctrines; its flame continues to burn in the torches of modern human rights instruments; and its spirit continues to resonate throughout the law.

¹¹⁴ For a discussion of Magna Carta’s extension to the Commonwealth see Sir I. Jennings ‘Magna Carta and Constitutionalism in the Commonwealth’ in S.E. Thorne, W.H. Dunham Jr, P.B. Kurland and I. Jennings, *The Great Charter—Four Essays on Magna Carta and the History of Our Liberty*, Pantheon, New York, 1965.

¹¹⁵ [2001] QB 1067, para 36. This phrase was coined by the Canadian Supreme Court, which stated in *Calder v. Attorney-General of British Columbia* (1973) 34 DLR (3d.) 145, 203 that ‘Magna Carta has always been considered to be the law throughout the Empire. It was a law which followed the flag as England assumed jurisdiction over newly-discovered or acquired lands or territories.’

¹¹⁶ *ibid*, para 57 and para 71 (Gibbs J). Despite the fact that the actions of the British Government infringed fundamental rights, Laws LJ felt that comments made in the Privy Council case *Liyana v. The Queen* [1967] 1 AC 259 precluded him from adopting a more rigorous constitutional standard of scrutiny of the legality of the ordinance (although he was not strictly bound by the decision). He made no mention of whether he would have felt so compelled if Magna Carta had extended to the BIOT. Gibbs LJ, however, felt that if Magna Carta had applied to the BIOT ‘I might have found assistance in the provisions of Chapter 29 in interpreting the legality of the Ordinance, at least in the resolution of any doubts on the point’ (para 68). Laws LJ has since suggested that Magna Carta might be one of a small number of fundamental statutes that the common law insulates from all but expressly stated repeal: *Thorburn v. Sunderland City Council* [2002] 3 WLR 247, para 62. However, the High Court of Australia has stated that Magna Carta does not ‘legally bind the legislatures of this country or, for that matter, the United Kingdom. Nor ... [does it] limit the powers of the legislatures of Australia or the United Kingdom’ (*Essenberg v. The Queen*, 22 June 2000) and it is treated like any other statute.

¹¹⁷ Concluding a comprehensive study of the continuing role of Magna Carta in Australian and New Zealand law, Dr David Clark states, ‘...the myth of *Magna Carta* has proved legally, and above all, constitutionally, useful to subsequent generations. While, as we have seen, it is of little practical use in actual cases, it remains an animating idea and one important basis upon which judges continue to found the legitimacy of the rule of law and constitutionalism generally (above note 85, p. 891).