

CRITIQUE AND COMMENT

**MAGNA CARTA, COMMON LAW VALUES
AND THE CONSTITUTION**

THE HON SUSAN CRENNAN AC*

This speech was delivered by the Honourable Justice Susan Crennan AC as the Victoria Law Foundation Law Oration 2014 on 21 May 2014 in the Banco Court of the Supreme Court of Victoria. Magna Carta can be considered one of the most significant documents ever drafted as it espouses many of the individual freedoms and constraints on the actions of the state that have formed the foundation of common law legal systems around the world. Nearly 800 years after it was accepted by King John of England, Magna Carta has had a striking influence on the development of shared constitutional traditions in the United Kingdom and Australia, and provides a historical basis to many of the common law values which have since been given force through legislation or case law. This speech examines some of the implications and interpretations of Magna Carta from throughout the ages, and considers its ongoing significance for Australian constitutional adjudication in providing a basis for some of the important unwritten assumptions underpinning the Constitution such as the spirit of legality and the rule of law.

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I INTRODUCTION

May I commence by thanking the Dean of the Law School of the University of Melbourne and the Chair of the Victoria Law Foundation and acknowledging the privilege and pleasure involved in giving tonight's annual Law Oration. As

* Former justice of the High Court of Australia (2004–2015). This speech was delivered in the Banco Court, Supreme Court of Victoria on 21 May 2014.

the title foreshadows, I will start tonight with *Magna Carta* and finish with the *Australian Constitution*.

The copy of *Magna Carta* displayed in the Members' Hall in Parliament House in Canberra is a tangible acknowledgement of the shared constitutional heritage of Australia and the United Kingdom. That heritage has inspired the question lying behind tonight's topic: are there echoes of *Magna Carta* in our *Constitution*, the system of government which it establishes, and the common law values which it assumes?

As a composer, Mozart was prodigiously ambitious. It is said that a first performance of one of his compositions, written when 16, before a royal court elicited the royal criticism that the music contained 'too many ideas'. Given 800 years of history and evolving legal culture in Australia and the United Kingdom, it is impossible not to fear, and indeed admit, that discussing tonight's topic will involve touching too lightly and too selectively on too many ideas.

One preliminary observation which needs to be made in that regard is that both *Magna Carta* and the protean conception of liberties commonly traced from it have commanded mature and detailed consideration, over a long period, by many historians and lawyers of great distinction. Still, it is possible and useful to advance a simple point: the invocation and reinterpretation (or reimagining) of *Magna Carta* during long constitutional developments account for abiding interest in it today, not only from lawyers, historians and politicians, but also in the community more generally. The idea that the liberties of the individual constrain relations between the state and the individual is central to the modern conception of democracy. The spread of democracy in many parts of the world and the indirect sharing in sovereign power which democracy entails have led to 'rising public expectations of the state'¹ — particularly in relation to a state's legitimate functions, including the securing of legal freedom through adherence to the rule of law.

The perceived benefits of our Australian democracy, governed by the *Constitution* — the diffusion of political power through separate arms of government (chs I, II and III), and the theoretical and indirect sharing of political power through the right to vote (ss 7 and 24) — resonate with contemporary shared legal values of equality before the law and freedom from

¹ Lord Sumption, 'The Limits of Law' (Speech delivered at the 27th Sultan Azlan Shah Lecture, Kuala Lumpur, 20 November 2013) 3.

arbitrary government, often secured by judicial review of executive or administrative decisions.

II DISCUSSION

Permit me, in honour of the impending 800th anniversary, to start with Sir Winston Churchill's *A History of the English-Speaking Peoples*, in which he wrote:

On a Monday morning in June, between Staines and Windsor, the barons and Churchmen began to collect on the great meadow at Runnymede. ... A small cavalcade appeared from the direction of Windsor. Gradually men made out the faces of the King, the Papal Legate, the Archbishop of Canterbury, and several bishops. They dismounted without ceremony. Someone, probably the Archbishop, stated briefly the terms that were suggested. The King declared at once that he agreed. ... The original 'Articles of the Barons' on which *Magna Carta* is based ... were sealed in a quiet, short scene, which has become one of the most famous in our history, on June 15, 1215.²

Notwithstanding significant changes since Churchill wrote,³ that strong perception of *Magna Carta*'s force in the intellectual history of the British nation continues unabated.⁴

For present purposes, let me confine myself to mentioning the chapters of *Magna Carta* which have endured. Rendered in modern English they provide:

- (1) ... To all free men of our kingdom we have ... granted, for us and our heirs for ever, all the liberties written out below, to have and to keep for them and their heirs, of us and our heirs: ...
- (39) No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.

² Winston S Churchill, *A History of the English-Speaking Peoples* (Cassell, 1956) vol 1, 199.

³ See, eg, *Secretary of State for the Home Department v AF [No 3]* [2010] 2 AC 269, 366 [98] (Lord Rodger): '*Argentoratium locutum, iudicium finitum* — Strasbourg has spoken, the case is closed'.

⁴ See, eg, Lord Judge, '*Magna Carta: Some Reflections*' (Speech delivered at the Sir Robert Rede's Lecture, University of Cambridge, 10 February 2014) 3.

(40) To no one will we sell, to no one deny or delay right or justice.⁵

Four short points should be made immediately. First, the numbering used above derives from a critical edition, prepared in 1759, by one of the great commentators on *Magna Carta*, Sir William Blackstone.⁶ Secondly, the version based on the Articles of the Barons to which the King's seal was attached at Runnymede in 1215 contains references to a number of grievances which were not repeated in subsequent confirmations or iterations.⁷ However, it is worth noting that a demand for 'common consent' to taxation, which was dropped from the original version, foreshadowed the allocation of the power to tax to Parliament as effected judiciously enough by King Edward I. He initiated a series of reforms culminating in a 'Model' Parliament of 1295, a body to which he turned for the raising of taxes. Thirdly, the authoritative constitutional document is taken to be the 1297 version,⁸ invoked by lawyers in the 17th century including Sir Edward Coke, as will be mentioned. Fourthly, in the 1297 version, chs 39 and 40 (set out above) have been rolled into one and renumbered as ch 29. I will refer to the provisions collectively as ch 29.

In Anglo-Australian legal and political culture, *Magna Carta* is, or seems, extremely familiar. Most school children, once anyway, would have heard of it. As the 800th anniversary of the meeting between King John and the barons approaches, contemporary celebration, debate and reassessment of *Magna Carta's* continuing significance is to be expected in the United Kingdom.

It has proved possible in the United Kingdom for some to see the law's current concern for human rights as part of a long tradition: from *Magna Carta*; through constitutional struggles of the 17th century between the Crown and Parliament culminating in the *Bill of Rights 1689* and the *Act of Settlement 1700*, Wm 3, c 2 ('*Act of Settlement 1700*'); iterated again in the *United States Constitution* and *Bill of Rights* in the 18th century; and reasserted in the 20th century in the *Universal Declaration of Human Rights*⁹ and the *European*

⁵ British Library, *English Translation of Magna Carta*, Magna Carta <<http://www.bl.uk/magna-carta/articles/magna-carta-english-translation>>.

⁶ Sir William Blackstone, *The Great Charter and Charter of the Forest* (Clarendon Press, 1759).

⁷ Michael Evans and R Ian Jack (eds), *Sources of English Legal and Constitutional History* (Butterworths, 1984) 55–60.

⁸ *Magna Carta 1297*, 25 Edw 1, c 9, reproduced in Statutes of The Realm vol 1, 117.

⁹ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).

Convention on Human Rights.¹⁰ A Victorian would add the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

That approach appears clearly in a decision of 2005 in the United Kingdom. In the course of describing freedom from arbitrary detention, Lord Bingham referred to

the long libertarian tradition of English law, dating back to chapter 39 of *Magna Carta 1215*, given effect in the ancient remedy of habeas corpus, declared in the *Petition of Right 1628* upheld in a series of landmark decisions down the centuries ...¹¹

now embodied in art 5 of the *European Convention on Human Rights*, being the article containing the necessary guarantee 'for securing the right of individuals in a democracy to be free from arbitrary detention at the hands of the authorities'.¹² More recently, Lord Judge described *Magna Carta* as 'the most important single document in the development of constitutional and legal freedom and adherence to the rule of law in the common law world'.¹³

Under our written *Constitution*, distinguished by its separation of judicial power from other functions of government and allocation of express legislative powers pursuant to the federal compact, the task of determining the limits of governmental, legislative and executive power has involved quite different judicial techniques, to which I will come.

Irrespective of historical contests, and many differing opinions of the legal significance of *Magna Carta*,¹⁴ its continuing status as an unrivalled emblem or symbol of individual liberty and the supremacy of the law has been celebrated in a way which testifies to considerable cultural potency, not only for constitutions based on or derived from it, but also for contemporary conceptions of democratic civil society.

¹⁰ Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) ('*European Convention on Human Rights*').

¹¹ *A v Secretary of State for the Home Department* [2005] 2 AC 68, 107 [36].

¹² *Ibid*, citing *Kurt v Turkey* [1998] III Eur Court HR 1152, 1184–5 [122].

¹³ Judge, above n 4.

¹⁴ See, eg, Lord Irvine, 'The Spirit of *Magna Carta* Continues to Resonate in Modern Law' (2003) 119 *Law Quarterly Review* 227; David Clark, 'The Icon of Liberty: The Status and Role of *Magna Carta* in Australian and New Zealand Law' (2000) 24 *Melbourne University Law Review* 866; Tom Bingham, *The Rule of Law* (Allen Lane, 2010) 10–33.

To take just one example, Rudyard Kipling's poem 'The Reeds of Runnymede' contains the couplet:

At Runnymede, at Runnymede,
Your rights were won at Runnymede!¹⁵

The couplet depends on shared history and a certain mythopoetic acceptance of *Magna Carta* as a touchstone in a shared legal and political culture. Even if *Magna Carta* begged questions it singularly failed to resolve, its 'spirit' has been said to remain alive for just on 800 years. Why is that? What is the continuing importance of *Magna Carta*, if any, for us here in Australia in May 2014?

The distinguished medieval historian Sir James Holt described *Magna Carta* as 'an assertion of law originally conceived in aristocratic interests',¹⁶ but also said:

The history of *Magna Carta* is the history not only of a document but also of an argument. The history of the document is a history of repeated re-interpretation. But the history of the argument is a history of a continuous element of political thinking.¹⁷

The argument is about two matters: the rights of subjects against authority and the principle that even a sovereign authority is subject to the law.

To the extent that the argument may be stated simply and broadly in that way, it was the legal issue at stake in the quarrels between the barons and King John, between the House of Commons and Charles I, and between the American colonists and George III leading up to the *Declaration of Independence*.¹⁸ Further, when most provisions of *Magna Carta* were repealed in England in the 19th century, arguments over 'liberties' took a new form. *The People's Charter of 1838* expressed a novel iteration of liberties — it related to an argument between Parliament ('sovereign' since the *Act of Settlement 1700*)¹⁹ and the governed over the sharing of political power through wider representation. Sir William Holdsworth recognised that the sovereignty of

¹⁵ C R L Fletcher and Rudyard Kipling, *A History of England* (Clarendon Press, 1911) 75.

¹⁶ Sir J C Holt, *Magna Carta* (Cambridge University Press, 2nd ed, 1992) 18.

¹⁷ *Ibid.*

¹⁸ *Ibid.* 19.

¹⁹ Jeffrey Goldsworthy, *The Sovereignty of Parliament* (Clarendon Press, 1999) 159–220.

Parliament was the main security in England for asserting the supremacy of the law; that necessitated the rival conception of the supremacy of the Crown giving way.²⁰ In current times, controversies framed by reference to the rule of law continue to require courts to resolve tensions between maintaining civil order (a classic responsibility of governments) and individual freedoms.

Importantly, *Magna Carta* involved royal concessions. Its history as a constitutional document is a history of reinterpretation eliciting further concessions on a long journey towards constitutional democracy. The repeated concessions broadly give rise to the rule of law marked, as Dicey so famously said, by the spirit of legality.²¹

In his last book, entitled *The Rule of Law*, Lord Bingham essayed four reasons to explain the continuing significance of *Magna Carta*.²² First, unlike other European charters of the time, *Magna Carta* involved a grant of liberties to 'all free men throughout the realm'.²³ Of course, the political reality was that 'free men' meant something quite different in 1215. Diffusing sovereignty in the context of an oligarchy or aristocracy is obviously distinct from the indirect diffusion which characterises democracy. However, the semiotics of the stand-off between the barons and King John and the vocabulary of equality and community informing *Magna Carta* remain, even today, quite compelling.

Secondly, even though *Magna Carta* was a response to a political crisis, one dimension of which involved the King's power to tax, the language drew heavily on earlier models of royal promises for the granting of liberties, going back some 114 years.²⁴ Therefore *Magna Carta* represented, as historians might well say, some degree of 'continuity' rather than an absolute 'rupture' from the preceding feudal system.

Thirdly, *Magna Carta* showed a clear rejection of arbitrary or untrammelled royal power and an acceptance of certain lawful limits on power.²⁵

²⁰ Justice Owen Dixon, 'The Law and the Constitution' (1935) 24 *Law Quarterly Review* 590, 592.

²¹ A V Dicey, *Introduction to the Study of the Law of the Constitution* (MacMillan, 9th ed, 1939) 188.

²² Bingham, above n 14, 11–13.

²³ *Ibid* 11.

²⁴ *Ibid* 11–12, citing King Henry I's *Charter of Liberties 1100*, and the extant *Coronation Oath Act 1688*, 1 Wm & M, c 6.

²⁵ *Ibid* 12.

Fourthly, the significance of *Magna Carta* can be seen as lying today in its symbolic or mythic status.²⁶

Magna Carta can be, and has been, invoked repeatedly as a thread in the historical development of the common law values captured in phrases like ‘fundamental rights’, and more specifically in expressions such as ‘the right to a fair trial’ (and all that that expression entails) and ‘due process’. *Magna Carta* has been described justly as a ‘defining document’ in what a former Chief Justice of Australia, Murray Gleeson, has called a ‘long history’ of ‘legal constraint upon law-making capacity’.²⁷

Because the anniversary of *Magna Carta* looms next year I want to touch briefly on some interesting aspects: its language and political context; the common law values often said to have sprung from it; and the assumption made in respect of the rule of law by the framers of our *Constitution*.

The catalyst for King John’s historic acceptance of the limits on monarchical power is popularly attributed to his personal tyrannies and blunders. However, it has been contended persuasively by William McKechnie, another of the well-known commentators on *Magna Carta*, that *Magna Carta* is better viewed as an attempt to resolve a broader, long-standing political tension between order and freedom that is inevitable in the ‘history of every nation, and in every age’.²⁸ He has said that the origin of *Magna Carta* lies ‘too deep to be determined by any purely contingent phenomena’.²⁹

Plainly enough, in 1215, *Magna Carta* was not a conscious attempt to write a constitutional document of wide application. In its own terms, the *Magna Carta* of 1215 was a political failure because King John promptly persuaded the Pope to annul it. *Magna Carta* was reissued on King John’s death in 1216, reissued again in 1217, and reissued again in 1225 on the coming of age of King Henry III.³⁰ As the ‘Great Charter of the Liberties’ (as it was referred to

²⁶ Ibid 12–13.

²⁷ Chief Justice Murray Gleeson, ‘Legality — Spirit and Principle’ (Speech delivered at the Second *Magna Carta* Lecture, New South Wales Parliament House, 20 November 2003).

²⁸ William Sharp McKechnie, *Magna Carta: A Commentary on the Great Charter of King John* (James Maclehose and Sons, 2nd ed, 1914) 4. McKechnie views the signing of *Magna Carta* as consistent with broader political developments tending to the establishment of a strong monarch with certain limits on power going back to the reign of William I.

²⁹ Ibid 3.

³⁰ Holt, above n 16, 1.

by King Edward I), it was absorbed into statute law during his reign in 1297.³¹ As mentioned earlier, the version of 1297 is the 'authoritative text' for constitutional purposes.³²

It has been contended that the decisive periods in which *Magna Carta* was endowed with liberal and constitutional qualities — unintended in 1215 — were the 14th and 17th centuries.³³

Interpretations of *Magna Carta* enacted by Parliament in the 14th century were particularly crucial to the development of ch 29 of the 1297 version. There were six key statutes passed between 1331 and 1368 which are seen collectively as expanding the limited application of *Magna Carta* into a statutory guarantee of 'due process', protective of what today we would call 'fundamental rights'.

Changes in the perception of *Magna Carta* — from a simple compact between monarch and barons to 'an affirmation of fundamental law and the liberty of the subject'³⁴ — gathered pace in the 17th century. This is commonly attributed to the contested 'gloss' upon *Magna Carta* of Sir Edward Coke. He expanded the idea of 'liberties' referred to in *Magna Carta*, especially ch 29, to a conception of individual liberties perceived to be in recurrent tension with the royal prerogative.³⁵

Coke's general argument, to be found in his *Second Institutes*, asserted that *Magna Carta* 'was for the most part declaratory of the principal grounds of the fundamental laws of England'³⁶ — in essence that *Magna Carta* restated common law principles that preceded it. That idea had been advanced not only by Coke but also Sir John Selden and others in the context of seeking the King's agreement to the proposition that there were limits on the King's prerogative powers, especially when it came to the raising of taxes. Historiographical debate about Coke's theories has not unnaturally been considerable,

³¹ *Magna Carta 1297*, 25 Edw 1, c 9.

³² Irvine, above n 14, 227.

³³ Holt, above n 16, 9.

³⁴ *Ibid* 4.

³⁵ *Ibid* 12.

³⁶ Edward Coke, *The Second Part of the Institutes of the Laws of England* (W Clarke and Sons, 1817) Proeme ('*Second Institutes*').

and it is often said that he went too far and was historically inaccurate, particularly when compared with the scholarly Selden.³⁷

Perhaps it is enough for present purposes to proceed on the basis that the development of constitutional theories and practice over the centuries since *Magna Carta* — expressed by reference to the doctrine of parliamentary sovereignty (applicable in the United Kingdom, but not here), the rule of law and the independence of judges — is well understood.

Given that, and taking heed of Maitland's advice that there is some antithesis between historical scholarship and the practical endeavour of applying laws, all I want to say before turning to the constitutional position in Australia is that the language in the *Petition of Right 1627*, 3 Car 1, c 1 (with which Coke is associated), the *Habeas Corpus Act 1679*, 31 Car 2, c 2 (and its precursors), the *Bill of Rights 1689* and the *Act of Settlement 1700* repays close attention because it so strongly and emphatically reiterates complaints about royal derogations from the benefits of the laws for the liberty of the subject.³⁸

III MAGNA CARTA AND AUSTRALIA

I turn now to Australia. The *Constitution*, a law of the Imperial Parliament, was not drafted in the context of any rupture, war or revolt against the supremacy of Westminster. It contains no bill of rights which prevents the legislature from passing laws that infringe such rights. It is readily distinguishable from the *United States Constitution*, not least because it contains nothing equivalent to the guarantees of due process to be found in the 5th and 14th amendments. The distinct features of the *Australian Constitution* blend three aspects of political and constitutional theory: responsible government derived from the British constitutional tradition; the separation of powers

³⁷ Compare the Proem to Coke's *Second Institutes* with John Selden's argument in *Darnel's Case* (1627) 3 St Tr 1, 16–19 ('*Five Knights' Case*'). See also Irving, above n 14, 227; Holt, above n 16, 20; J G A Pocock, *The Ancient Constitution and the Feudal Law* (Cambridge University Press, 2nd ed, 1987); Richard Tuck, *Philosophy and Government 1572–1651* (Cambridge University Press, 1993) ch 6; Harold J Berman, 'The Origins of Historical Jurisprudence: Coke, Selden, Hale' (1994) 103 *Yale Law Journal* 1651; Paul Christianson, *Discourse on History, Law, and Governance in the Public Career of John Selden, 1610–1635* (University of Toronto Press, 1996); Johann P Sommerville, 'English and European Political Ideas in the Early Seventeenth Century: Revisionism and the Case of Absolutism' (1996) 35 *Journal of British Studies* 168.

³⁸ Evans and Jack, above n 7, 55–60.

derived from the *United States Constitution*; and our own local, colonial understandings of democratic theory and principles.

It was obvious from the start that, although the *Constitution* contains no specific provisions for judicial review ensuring the constitutional validity of laws, the framers plainly intended that the High Court should, as Alfred Deakin put it, decide ‘the orbit and boundary of every power’.³⁹ The High Court’s adjudication of the validity of Commonwealth and state legislation, and government action, often occurs in the original jurisdiction in matters specified in s 75 of the *Constitution* — s 75(v) being of particular importance.

That the federal compact involved express allocation of heads of legislative power and the separation of the arms of government inevitably established the same relationship between the judiciary and other arms of government as was explained in respect of the *United States Constitution* in *Marbury v Madison*.⁴⁰

During the course of argument in the High Court at a time when framers of the *Constitution* were still alive, Sir Robert Garran, then Solicitor-General of the Commonwealth, submitted that the validity of detention under a law of the Commonwealth depended on the validity of the law itself — that is, determining whether the law was ultra vires.⁴¹ In his reasons for judgment in the same case, Isaacs J referred to ‘fundamental principles’. He said that, although these could not be found in the express terms of the *Constitution*, such principles could be traced back to ch 29 of *Magna Carta*.⁴² This led him to draw what he called ‘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’.⁴³

In *Australian Communist Party v Commonwealth* (‘*Communist Party Case*’),⁴⁴ Dixon J observed that some features of government to which express effect is given under the *Constitution* — for example, the separation of powers (particularly judicial power) — operate alongside other unexpressed assumed aspects of government, which he said included ‘the rule of law’.⁴⁵ His Honour

³⁹ Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 1902, 10 966–7 (Alfred Deakin, Attorney-General).

⁴⁰ 5 US 137 (1803).

⁴¹ *Ex parte Walsh; Re Yates* (1925) 37 CLR 36, 42 (R Garran) (during argument).

⁴² *Ibid* 79.

⁴³ *Ibid*.

⁴⁴ (1951) 83 CLR 1.

⁴⁵ *Ibid* 193.

had earlier observed that the supremacy of the law, including over the legislature, is the very foundation of federation:

Under that [federal] system, men quickly depart from the tacit assumption to which a unitary system is apt to lead that an Act of Parliament is from its very nature conclusive. They become accustomed to question the existence of power and to examine the legality of its exercise.⁴⁶

While ch 29 of *Magna Carta* has been invoked by Australian litigants from time to time as some support for a common law right to a speedy trial, a trial by jury and ‘due process’,⁴⁷ the High Court has generally eschewed identifying such rights by reference to considerations which might involve some historical obscurities.

Notwithstanding that caution, judicial consideration of aspects of the common law which predate the *Constitution* has occasionally involved some consideration of historical developments — particularly as they bear on fundamental aspects of a fair trial in the administration of criminal justice and associated common law privileges and immunities. It is of more than passing interest that authorities, including recent authorities concerning the scope of the privilege against self-incrimination (or, more precisely, legislation directed to its abrogation), have included some reference to Coke’s invocations of *Magna Carta* in a distinct 17th century quarrel over the taking of an oath *ex officio* in ecclesiastical courts.⁴⁸ (It was called *ex officio* because ecclesiastical authorities proceeded *ex officio mero*, on grounds of suspicion and rumour, rather than upon specific charges.)⁴⁹

There are other echoes of *Magna Carta* which I do no more than mention in passing. For example, the interpretation of judicial power turning on the separation of judicial power from other government powers has, on occasions, included a consideration of the 17th century rejection of the sovereign’s

⁴⁶ Dixon, above n 20, 604.

⁴⁷ See, eg, *Jago v District Court of New South Wales* (1989) 168 CLR 23.

⁴⁸ *X7 v Australian Crime Commission* (2013) 248 CLR 92, 113–14 [32] (French CJ and Crennan J), citing John Wigmore, *Wigmore on Evidence* (Little Brown, 8th revised ed, 1961) 250 n 55.

⁴⁹ Christopher Hill, *Society and Puritanism in Pre-revolutionary England* (Secker & Warburg, 1964) 405.

attempts to suspend the laws.⁵⁰ As to habeas corpus, always regarded in Britain as part of the same constitutional tradition as *Magna Carta*, it is important to recognise distinct Australian developments and the centrality of the task of constitutional adjudication undertaken by the High Court.⁵¹

The two aspects of Australia's legal and constitutional developments which most immediately bring to mind *Magna Carta* are: the spirit (or principle) of legality, as applied to both judicial review and the interpretation of legislation;⁵² and the development of doctrines relating to the federal judiciary and judicial power.

The spirit (or principle) of legality as it informs the task of statutory interpretation can be traced back in Australian case law to 1908.⁵³ It is clearly settled that statutory provisions are 'not to be construed as abrogating important or fundamental common law rights, privileges and immunities in the absence of clear words or a necessary implication to that effect'.⁵⁴ Moreover, it has been recognised that, in the course of statutory interpretation, judicial findings about legislative intention (itself a metaphor) are an 'expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws'.⁵⁵ Lady Justice Arden has recognised a similar constraint in the United Kingdom effected by the *Human Rights Act 1998* (UK).⁵⁶

Next, what is encompassed by the expression 'due process' in the Australian constitutional context is not necessarily to be equated with concepts captured by the expression elsewhere.⁵⁷

As mentioned, the *Constitution* does not contain a bill of rights or any express reference to guarantees, for example, of due process or of personal

⁵⁰ See, eg, *Port of Portland Pty Ltd v Victoria* (2010) 242 CLR 348, 358–360 [9]–[13] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

⁵¹ See, eg, *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531.

⁵² Gleeson, above n 27.

⁵³ *Potter v Minahan* (1908) 7 CLR 277, 304.

⁵⁴ *X7 v Australian Crime Commission* (2013) 248 CLR 92, 108 [21] (French CJ and Crennan JJ) and cases cited therein.

⁵⁵ *Zheng v Cai* (2009) 239 CLR 446, 455–6 [28] (French CJ, Gummow, Crennan, Kiefel and Bell JJ).

⁵⁶ Lady Justice Arden, 'The Changing Judicial Role: Human Rights, Community Law and the Intention of Parliament' (2008) 67 *Cambridge Law Journal* 487, 497.

⁵⁷ See, eg, *Thomas v Mowbray* (2007) 233 CLR 307.

liberty, which might have placed limitations on legislatures and might be thought to present an apparent problem with the implication of such guarantees.⁵⁸ However, the link made by Dixon J in the *Communist Party Case* between ch III and the unexpressed assumption of the rule of law has been taken up in different contexts.⁵⁹

Speaking generally, in the context of the judicial power of the Commonwealth, the separation of judicial power from other government functions has been described as advancing ‘two constitutional objectives: the guarantee of liberty and, to that end, the independence of Ch III judges’.⁶⁰ It has sometimes been said these developments ‘constitutionalise’ principles of common law predating the *Constitution*.

One of the most easily recognisable aspects of these developments is the emergence and development of the ‘*Kable* principle’. Chapter III of the *Constitution* assumes that there are both Commonwealth and state sources of judicial power. In *Kable v Director of Public Prosecutions (NSW)*,⁶¹ limitations on the powers of state legislatures were identified by reference to the establishment in the *Constitution* of an integrated Australian court system, which contemplates the exercise of federal jurisdiction by state courts and has, at its apex, the High Court exercising the judicial power of the Commonwealth. Thus, there is a limit on the powers of state legislatures, derived from ch III of the *Constitution*. Some might say that development has occurred because there is no federal bill of rights in Australia.

IV CONCLUSION

Let me conclude with a cautious ‘yes’ in answer to my initial question. Thinking about *Magna Carta* brings to mind an observation made by Sir Robert Menzies and repeated on more than one occasion. He said that constitutional law combines history, statutory interpretation and political

⁵⁸ See, eg, *South Australia v Totani* (2010) 242 CLR 1, 155–6 [423] (Crennan and Bell JJ); *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248.

⁵⁹ See, eg, *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 [31] (Gleeson CJ), 513 [103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

⁶⁰ *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 11 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

⁶¹ (1996) 189 CLR 51.

philosophy, to which can be added political reality.⁶² There are palpable echoes of *Magna Carta* in our *Constitution* and in the system of government which it establishes. The echoes are also to be found in common law values informing the Australian criminal justice system; in the imperfectly attained notion that access to justice is an important aspect of the rule of law, in the spirit (or principle) of legality as it affects both judicial review and statutory interpretation, and in the constitutional developments concerning ch III, the federal judiciary and judicial power.

The resolution of any tension between civil order and good government on the one hand, and individual freedoms on the other, for which *Magna Carta* has become a symbol, depends for us on the methods of determining the constitutionality of legislation, both Commonwealth and state, and the limits on government action and power. These methods are to be found in, or derived from, the *Constitution*. They arise from the system of government established by the *Constitution* and the rule of law, being an aspect of good government assumed when the *Constitution* was framed.

⁶² Robert Menzies, *Afternoon Light* (Cassell Australia, 1967) 320.