

Magna Carta and Indigenous rights

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What relevance could a document signed 800 years ago, over 573 years before Australia was colonised, possibly have for Indigenous people today? Certainly the aristocrats who enforced their rights against the king didn't know there were Indigenous people in Australia—or that there was an Australia—and they weren't thinking beyond their own rights.

But the document would permeate an understanding within the British legal system and, as it would turn out, be transplanted into British Empire colonies around the globe. So what does it mean today in a modern context?

Perhaps more than might be thought if one looks at the way it has been a source of the evolution of human rights. Not surprisingly, it doesn't come up often. Not in specifics. But it was the way that this legal document would permeate more broadly, with the rights it contained filtering down to others.

As Chief Justice Brennan noted in 1997:

Above all, Magna Carta has lived in the hearts and minds of our people. It is an incantation of the spirit of liberty. Whatever its text or meaning, it has become the talisman of a society in which tolerance and democracy reside, a society in which each man and woman has and is accorded his or her unique dignity, a society in which power and privilege do not produce tyranny and oppression. It matters not that this is the myth of Magna Carta, for the myth is the reality that continues to infuse the deepest aspirations of the Australian people. Those aspirations are our surest guarantee of a free and confident society.¹

These comments were made five years after the Mabo case², in which Brennan delivered the leading judgment.

That case had overturned the doctrine of *terra nullius* and in so doing determined that what should have occurred during the colonisation of Australia was that the laws and customs of Indigenous people should have survived—and still do—to the extent that they have not been extinguished by deliberate acts of extinguishment. Aboriginal people were also supposed to be subject to the imposed British legal system—which should have extended all of the common law rights it contained to them.

Those rights were not recognised but Aboriginal people were active in seeking to have them better protected. In 1846, Aboriginal people from Tasmania petitioned Queen Victoria and in 1933, William Cooper sent a petition to King George V. Both petitions sought to have the sovereign intervene to protect the rights of Aboriginal people or hold them to their promises. They were never as successful as the aristocracy were in 1215 in seeking some form of rights recognition but it is evidence of a political and legal sophistication that appreciated that there were rights held inherently and that these should be enforced.

Magna Carta is still invoked in cases around a small number of Indigenous rights cases, but that does not diminish its importance, at least symbolically as a defence against arbitrary rule and as a provider of individual rights. It is not so much that there is a claim that those rights lie in that document but rather that they have evolved from it. In fact, it is—if not superseded—complemented or overshadowed by the emergence of an international human rights framework in the World War II era and the norms it sets. Similarly, it has only provided specific recognition of the rights of Indigenous people with the evolution of the Declaration on the Rights of Indigenous Peoples, adopted by the United Nations in 2007 and endorsed by Australia in 2009.

In Indigenous jurisprudence, Magna Carta is most commonly invoked in disputes concerning the right to fish (clause 33; clause 23, 1297 charter). Since the 1215 Magna Carta, there has been a common law right to fish in tidal waters. This right can only be abrogated by the enactment of legislation. In these instances, this document is generally referred to in an attempt to protect the public right of fishing against fishing rights that have been granted to particular Aboriginal groups.³ The question that is generally at the centre of judicial enquiry is whether a relevant statute that purports to regulate fishing rights, most commonly through a licence system, has impliedly or expressly displaced the public right to fish.

The existence of a public right to fish in tidal waters was accepted in *New South Wales v The Commonwealth (Seas and Submerged Lands Case)* (1975), where the court referred to Magna Carta's preservation of public rights of fishing in tidal waters by reference to English and Canadian case law.⁴

A later case, *Harper v Minister for Sea Fisheries* (1989)⁵, confirmed that the public right to fish, which originated in English common law, is part of Australian law. This case is considered to have authoritatively dealt with the nature of the public right to fish with respect to Magna Carta.⁶ However, the High Court noted that the public right to fish in tidal waters is capable of being abrogated by statute.⁷ *Harper* noted that the more comprehensive a statutory scheme becomes, the more unlikely it is to be classified as only regulatory in nature but in this case, the public right to fish abalone had not only been regulated, but was completely abrogated by the statute, and was replaced by a system of statutory rights with regards to fishing.

These cases occurred before the *Mabo* decision and it is not surprising that the issue of fishing rights and how native title related to them would come to be considered.



Aboriginal fish traps made from rocks, Darling River, NSW, silver gelatin photograph, 1938

State Library of Victoria, image no. H20918/50

In *Commonwealth v Yarmirr* (2001)⁸, the High Court denied the existence of exclusive native title rights offshore, largely due to their inconsistency with the ancient public right to fish. This case established the requirement that non-exclusive native title rights to offshore areas must be consistent with this public right. At the time the judgment was released, commentators observed that the case had the potential to create the ability to take legal action against the actions of native title holders, where those acts purportedly interfered with the public right to fish.⁹ The case indicated that the public right to fish continues to endure, despite exclusive Indigenous ownership rights where those rights have been provided under legislative land grants.

In *Lardil Peoples v Queensland* [2004]¹⁰, the Federal Court referred to Magna Carta in its exploration of the nature of the right to fish and navigate. This judgment was essentially a straightforward application of previous decisions, most notably *Yarmirr*. The court rejected

an argument that exclusive offshore native title rights can exist subject to the public rights to fish and navigate, as these claimed exclusive rights did not find such qualification under traditional law. The only native title rights in the area in question were non-exclusive in nature. Native title claimants therefore have no right to exclude others from also using the area for commercial fishing and shipping, even if those other individuals are not exercising the public right of fishing or navigation. Native title rights that controlled access to the waters would be inconsistent with the common law public right to fish and navigate. Although offshore native title holders may conduct activities, such as traditional ceremonies, on significant areas, these activities cannot be done in a manner that precludes others from the site.¹¹

In *Northern Territory of Australia v Arnhem Land Aboriginal Land Trust* (2008)¹², the court had to determine whether the public right to fish, against the legislative background of the *Fisheries Act 1988* (NT), was still able to provide recreational and commercial fishermen with access to a zone covered by the *Aboriginal Land Rights (Northern Territory Act) 1976* (Cth). The Northern Territory government contended that the public right to fish, as provided by Magna Carta survives and that the Fisheries Act failed to remove this right. However, this argument was rejected by the High Court, which concluded that this legislation abrogated the public right to fish. The High Court justices explained that the extensive provisions made by this statute that regulate fishing activities removed any existing public right to fish in tidal waters. They noted that, the ‘statutory abrogation of a public right may appear not only from express words but by necessary implication from the text and structure of the statute’.¹³

Magna Carta is still invoked by modern-day litigants not necessarily to ground specific rights, but to invoke foundational principles regarding the manner in which governments should interact with its people.

Walker, an Aboriginal man from Stradbroke Island, appealed a conviction on various grounds including the basis that the trial was not conducted in accordance with the law laid down in the 1215 Magna Carta as per clause 39 (clause 29, 1297 charter): ‘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’. Walker argued that he was entitled to receive a trial by a jury of his ‘peers’ and as such should have had members of his own nation, the Nunukul people, on the jury. Juries did not exist in 1215 but the origin of the idea is often attributed to Magna Carta. The appeal was dismissed partly because the court argued that all individuals are considered to be equal before the law, irrespective of their ethnicity. In addition to that, the court found that the provision had been displaced by local statutes, namely, the Jury Act.¹⁴

This case highlights what courts have repeatedly emphasised, namely, that under the doctrine of parliamentary sovereignty, the legislature is able to pass legislation that is inconsistent with Magna Carta and as a result Magna Carta will no longer be law. Accordingly, Magna Carta cannot be considered an unalterable source of rights.

And for Indigenous Australians, perhaps the legacy of Magna Carta these eight centuries later is this. It is the concept that subjects have rights against the sovereign evolving into the idea that citizens have rights against the state. And this has a particular resonance in Australia, a country where there is no bill of rights or other formal rights structures that create a culture of rights. Public debates about the protection of Indigenous rights often start with discussions about why rights are important or assertions that the protections of the rights of a minority take something away from the rights of the majority rather than seeing rights as something everybody has against the government or the state in the way that Magna Carta first started to imagine it. And it is this spirit that we could still use more of.