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Magna Carta Uncovered

Migrants and the Courts: A Century of Trial and Error
In this Special Issue of the Commonwealth Judicial Journal (CJJ), marking the 800th anniversary of Magna Carta, we are pleased to bring together a series of contributions exploring the influence of Magna Carta principles on legal systems today.

The issue opens with an extract from the panels of the touring exhibition entitled “Magna Carta to Commonwealth Charter”, organised by the Commonwealth Magistrates’ and Judges’ Association (CMJA), together with the Commonwealth Lawyers Association (CLA) and the Commonwealth Legal Education Association (CLEA). The exhibition is scheduled to travel to Toronto (Osgoode Hall), Canada, Bridgetown (The Supreme Court), Barbados, Lilongwe, Malawi (Lilongwe), and Putrajaya, Kuala Lumpur and Penang, Malaysia before arriving in Wellington in time for the CMJA Conference (see the CMJA website for dates and venues). I take this opportunity to remind readers that the 17th Triennial CMJA Conference will take place on 13-18 September 2015 in Wellington, New Zealand. The theme for this conference is “Independent Judiciaries: Diverse Societies” and more details may be found on the CMJA website: www.cmja.org

In an article entitled ‘Some Thoughts on Magna Carta’, the Rt Hon the Lord Judge focuses on some of the most famous clauses of Magna Carta, the ones that have echoed down through the centuries and have spread round the world. He finds that Magna Carta has been the source and the inspiration for many of the legal principles that we take for granted today. This is followed by an article by Justice Sir David Baragwanath, entitled ‘Magna Carta and the New Zealand Constitution’, who examines the influence of Magna Carta in relation to the Constitution and law of New Zealand, in particular, the Treaty of Waitangi, which may be seen as a local expression of the Magna Carta’s principles.

In ‘The Influence of Magna Carta in Kenya’, Dr Scholastica Omondi then discusses the importance of Magna Carta in the protection of human rights, as well as its influence on the constitutional development and legal system in Kenya. Finally, Benjamin D’Alessio provides a brief sketch of Magna Carta and the United States of America.

The CJJ has once again collaborated with the Law Reports of the Commonwealth (LRC) to publish Karuhanga v Attorney General, which relates to a constitutional challenge concerning the re-appointment of a Chief Justice. In this respect, I wish to renew our thanks to Dr Peter E. Slinn both in his capacity as chairperson of the Editorial Board of this Journal and as general editor, together with Prof. James S. Read, of the LRC and also to Reed Elsevier (UK) Ltd, for allowing us to publish these law reports.

This Special Issue also features two book reviews undertaken by Gilles Renaud and Peter Slinn. Finally, I would like to express my appreciation to Dr Karen Brewer, Secretary General, for her ongoing support of the Journal.
The following are some of the tributes for current and former members of the CMJA Council who have passed away since the last issue.

**Mrs Nkiruka Franklin-Iguh**
Council Member for Nigeria and President of the Nigerian Magistrates Association.

Nkiruka was elected to the Nigerian Magistrates Association in 2012 and was also elected as as CMJA Council Member for Nigeria since September 2012. “During her short time as Council Member, she was a great supporter and promoter of the aims of the CMJA and she will be dearly missed by the CMJA staff and members” said Dr Karen Brewer, Secretary General.

**Sheriff Graham Cox**
Former Council Member for Scotland.

J. Douglas Allan wrote: *With Graham’s passing, the Commonwealth Magistrates’ and Judges’ Association has lost a very loyal and faithful servant of long-standing. He enthusiastically embraced and supported the aims of the Association and took every opportunity to promote its work.*

Keith Hollis wrote: *Graham Cox was hugely helpful to, and indeed patient with, me in the months leading up to the Edinburgh Triennial - in the millennium year- as I struggled to make something of the new role of Director of Studies (now Director of Programmes) and set up a cogent business programme for the Triennial. This was at a time when he and his splendid team in Edinburgh had so much else to deal with. His experience and wisdom both as a judge and as a longstanding council member were invaluable and always freely available.*

Tributes were also received from, *inter alia*, David Armati, Michael Lambert, David Hope and Clover Thompson-Gordon.

**Mr James Tweed OBE**
Former Council Member for Northern Ireland.

The following is an extract from the obituary prepared by his son:

Throughout his career James was renowned for his legal expertise, his wise counsel, his sense of justice and fairness, as well as his unfailing kindness and courtesy. Legal colleagues including fellow Magistrates and Judges have paid tribute to his generous help both personally and professionally and to all his efforts promoting the objectives and work of CMJA.

On his retirement in May 1997 James was Senior Resident Magistrate in Belfast. He was awarded an OBE by Her Majesty the Queen in the Queen’s Birthday Honours List in 1997 for his service to the judiciary.

Alongside his devotion to his career and family, James’ interests were many and varied. A committed Rotarian, James served as President of Larne Rotary Club and then as Secretary and District Governor of Rotary International in Ireland.

James and Audrey were devoted members of Cairncastle Presbyterian Church. James was ordained an elder in 1963, helped to lead the congregation as its Clerk of Session and gave considerable time serving the wider church.

James had a strong and secure faith which instilled in him the most wonderful generosity of spirit and gave him an authenticity and integrity evident to everyone he met. He was a true Christian gentleman.
Dr Clover Thompson Gordon  
Hon. Life President and Gender Section Chair.

She joined the Council in 1991 as Regional Council Member. In 1993 she was nominated by the CMJA to Commonwealth Foundation Fellowship Scheme to promote Commonwealth Understanding. She always valued the experience she gained on this Scheme and especially the opportunity to travel to other Commonwealth countries, especially in Africa.

Clover was elected Regional Vice President in 1994. She held this position until 2006. During her period as Regional Vice President of the CMJA, she galvanised individual membership of the CMJA in Jamaica and the Caribbean Region and promoted the CMJA’s activities to Chief Justices, judges and magistrates across the Commonwealth Caribbean.

She was appointed Chair of the Gender Section in 1999. She organised a number of regional conferences during her time as Regional Vice President: Turks and Caicos (1998), St Lucia (1999) which was a regional and gender section conference as was the conference in Bahamas in 2000. She also organised the Regional and Gender Section Conference in Barbados in 2001 and was involved in the organisation of the Regional and Gender Section Conference in Bermuda in 2007. She was made a Hon. Life Vice President of the CMJA in 2006 and continued in that position and as Chair of the Gender Section until her death. She was instrumental in ensuring that women’s rights were at the forefront of the CMJA’s work and produced the Gender e-Newsletter for the CMJA on a regular basis despite her illness. She took an interest in all the activities of the CMJA and continued to play an active part in the association’s work and activities.

She was the founding member of the Lay Magistrates Association of Jamaica and an active participant in its activities and remained Vice President of the Association until her death.

In her tribute, Norma Wade Miller held that:  
Clover had charm and a commanding presence without demanding attention. You knew when she was in a room: there would be a new energy, a new determination to get things done, and the decision she wanted would result.

Tributes were also received from, inter alia, John Z. Vertes, Richard Williams and Anita St John Gray.
An Introduction

Magna Carta is Latin for the Great Charter. It is both a document and a set of ideas. On the surface, Magna Carta is just a piece of paper - an 800 year old pact that sought to prevent war between King John (Bad King John as he is more commonly known – who reigned from 1167 to 1216) and twenty-five barons. King John sealed Magna Carta on the fields of Runnymede in 1215. As a means of preventing war, Magna Carta was a failure, rejected shortly after by King John and the Pope Innocent III, and was legally valid for no more than three months.

Yet the ideas embodied in Magna Carta endure. Magna Carta, and the conflict that surrounded it, limited the power of the King. It guaranteed the people certain rights, and bound the King to the rule of law. While the Barons involved were neither fighting for democracy nor the rights of the common people, their actions set in motion all further attempts by the many to constrain the power of the few. Winston Churchill described the Magna Carta as “the foundation of principles and systems of government of which neither King John or his nobles dreamed.”

Magna Carta established the rule of law, laid the foundation for personal liberty, and continued a century’s long journey to the freedoms we enjoy today. It acts as a set of principles and a reference point for our legal compass, and helps us align our values with those of previous generations. What would stop a police officer from seizing your goods if they were above the law? What redress would you have if they did so if you couldn’t challenge power? That is why Magna Carta is so vitally relevant today: all of these principles and elements of our daily life that we take for granted are rooted in our history and codified in Magna Carta.

Throughout the world Magna Carta has been invoked to protect economic rights, and is the foundation of the ideas of justice and good governance and the rule of law and has inspired the drafters of many of the modern documents. Mrs Eleanor Roosevelt, speaking at the Speaking at the UN General Assembly as she submitted the UN Declaration, argued that “we stand today at the threshold of a great event both in the life of the United Nations and in the life of mankind. This declaration may well become the international Magna Carta for all men everywhere”.

Panel 1

Magna Carta Libertatum
The Great Charter of Liberties
1215–1297
Article 29
(of the Statute adopted in 1297)

“No free-man shall be taken, or imprisoned, or dispossessed, of his free tenement, or liberties, or free customs, or be outlawed, or exiled, or in any way destroyed; nor will we condemn him, nor will we commit him to prison, excepting by the legal judgment of his peers, or by the laws of the land. To none will we sell, to none will we deny, to none will we delay right or justice.”

In the middle of June 1215 in a field called Runnymede, on the River Thames near Windsor, a Great Charter (or Magna Carta)
was sealed by King John in the presence of his own armed supporters and a much larger group of armed men who had been rebelling against his rule.

The sealing of the Great Charter was the culmination of a process that had started the previous November in the Temple Church in London, a process that took place with a background of civil war and which appears to have been largely guided by Stephen Langton, the Archbishop of Canterbury, and by William Marshall who is named in the Charter as the first of the King’s advisors.

That document was the first of four successive Charters which were sealed over the next 10 years. They differ in a number of respects but all seek to define the rights of the King’s subjects and to limit and control the King’s power. They followed a practice of English kings, going back before the Norman Conquest, of confirming to their subjects the rights and liberties which they would be allowed to enjoy.

On the death of King John in 1216, William Marshall was appointed Guardian of the Boy King Henry III and ensured that a form of the Charter was sealed in the new King’s name. The Charter was again confirmed by Henry III’s successor, Edward I, in 1297, when the Charter was entered as a Statute of England and Wales, and by subsequent monarchs up to the 14th Century.

As well as the fundamental provisions contained in Article 29 the Charters covered a huge and diverse range of issues from the extent of the Royal Forests to the rights of widows, from a limitation of what we would regard as taxes to sittings of the law courts, from the promotion of commerce to the dismissal of a number of named officers of the King.

Even at the time the potency of this document was understood and had an influence beyond England & Wales. Copies were distributed throughout England and Wales. Copies were translated and sent to Ireland. The extraordinary power of restraint on the monarch contained in clause 61 of the original text caused great alarm in Rome and the Courts of Europe, and indeed that clause was removed from subsequent versions.

However it wasn’t long before the rights in the Charter were being quoted in correspondence and in the law courts. Although subsequent monarchs could be to a greater or lesser extent absolutist, indeed tyrannical, in their government of the country the Great Charter represented the first great “check and balance” in our constitution, establishing the primacy of the law as opposed to arbitrary executive action.

Panel 2

**Petition Of Right**

**1628**

**Article III**

“And whereas also by the statute called ‘The Great Charter of the Liberties of England,’ it is declared and enacted, that no freeman may be taken or imprisoned or be disseized of his freehold or liberties, or be outlawed or exiled, or in any manner destroyed, but by the lawful judgment of his peers, or by the law of the land.”

**Habeas Corpus Amendment Act 1679**

**Article II**

“For the prevention whereof, and the more speedy relief of all persons imprisoned for any such criminal or supposed criminal matters;

That whenever any person or persons shall bring any habeas corpus directed unto any sheriff..., and the said writ shall be served upon the said officer, ...that the said officer or officers, ....shall within three days after the service ...upon...tender of the charges of bringing the said prisoner, to be ascertained by the judge or court that awarded the same, and endorsed upon the said writ, ...and bring or cause to be brought the body of the party so committed or restrained”

**English Bill Of Rights**

**1689**

“That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;”
The turbulent history of the common law world in seventeenth and eighteenth centuries was crucial to the survival of the Magna Carta tradition and the development of the rule of law.

Magna Carta became a weapon in the struggle of Parliament led by Sir Edward Coke and others against the attempts of the Stuart kings, believing in their divine right to rule, to establish an absolute monarchy in imitation of that of the French Bourbons. The Petition of Right of 1628 was ‘Magna Carta re-clothed for the seventeenth century’. During the Puritan Revolution, the Levellers and others claimed popular liberties which were snuffed out by Lord Protector Oliver Cromwell who scorned ‘your Magna Farta (SIC) cannot control actions taken for the safety of the Commonwealth’. By the end of the century, after the Glorious Revolution, the elements of the rule of law (‘imperfectly and incompletely’ in the words of Lord Bingham) were in place. Through the Bill of Rights 1689, the ideas for which Magna Carta was the inspiration had triumphed. The Bill (together with the Act of Settlement of 1701) constituted a Magna Carta for the age of limited government, binding monarch and subject, based on the limitation of royal power, independent parliamentary control of taxation and an independent judiciary.

The eighteenth century saw the rise of radical political philosophies embodied in Tom Paine’s treatise on the ‘Rights of Man’ and the French Revolutionary Declaration des Droits de L’Homme et Des Citoyens. Magna Carta inspired the American colonists to resist what they saw as despotical royal authority. As early as the 1630s, the Assembly of Maryland sought to adopt a Bill (to which Charles I refused assent) which would have recognised ‘the rights and liberties according to the Great Charter of England’ as part of the law of the colony. The declaration of Independence of 1776, various declarations of rights of the colonies and the Bill of Rights of 1789 were the first constitutional texts of modern times to express the idea that there existed fundamental rights which were superior to the law of the state and which the institutions of government existed to protect.

As other countries, whether as colonies or dominions, adopted the Common Law of England and Wales as the basis of their own laws, so too they adopted, and acknowledged, the centrality of provisions of the Great Charter to their constitutional arrangements.

In the nineteenth century, British and United States constitutional practice diverged. While the US constitution was based on enforceable rights of the citizen and on a formal separation of powers, the British constitutional order operated through the supremacy of Parliament on the basis of unwritten constitutional conventions.

The British Constitution was seen as deriving its strength from the common law tradition of the rule of law rather than from any charter of rights. As the greatest constitutional lawyer of the day (Dicey) declared: the Habeas Corpus Acts were ‘for practical purposes worth a hundred constitutional articles guaranteeing individual liberty’. As Sir Ivor Jennings later wrote, ‘in Britain we have no bill of rights; we merely have liberty according to law; and we think - truly I believe—that we do the job better
than any country which has a Bill of Rights or a Declaration of the Rights of Man’.

As principles of democracy and human rights grew and developed in the 19th century, and with the growth of independence movements in the British Empire and of social movements such as the Chartists in the UK, the Great Charter was frequently called upon in support of the arguments for self-rule and social justice, although the Chartist movement’s demands embodied in the ‘Six Points of the People’s Charter 1837’ ultimately came to nothing. The two nineteenth century “rights documents”, from what were to become parts of the British Empire, those of Malta and Tonga, were not products of the British constitutional tradition. Indeed, the remarkably complete Tonga Bill of Rights, the first in the Commonwealth, was said to be inspired by a visiting Methodist minister from the United States.

The adoption of bills of rights in their modern form in the Commonwealth was bound up with the process of decolonisation. The United Kingdom ratified the European Convention on Human Rights and Fundamental Freedoms in 1951 and extended its obligations under the Convention to 42 then dependent territories in 1953. The Indian Constitution of 1950 had contained a comprehensive set of fundamental rights but these were a home-made initiative after independence. However the European Convention model was adopted as part of the independence constitutions of many new Commonwealth members, beginning with Nigeria shortly before independence in 1960. Canada adopted an entrenched bill of rights in 1982 and the United Kingdom eventually incorporated the European Convention into UK law in 1998. Thus the rights tradition of which Magna Carta was an inspiration was eventually embodied in the constitutions of most Commonwealth countries with provisions reflecting the basic right to government under the law that had been confirmed in the field at Runnymede in 1215.

Panel 4

Commonwealth Singapore Declaration 1971
Article 6

“We believe in the liberty of the individual, in equal rights for all citizens regardless of race, colour, creed or political belief and in their inalienable right to participate by means of free and democratic political processes in framing the society in which they live. We therefore, strive to promote in each of our countries those representative institutions and guarantees for personal freedom under the law that are our common heritage.”

Article 1

“Each Commonwealth country’s Parliaments, Executives and judiciaries are the guarantors in their respective spheres of the rule of law, the promotion and protection of human rights and the entrenchment of good governance based on the highest standards of honesty, probity and accountability.”

The growing membership of the Commonwealth following the Declaration of London in 1949 (in which the members declared that they were ‘united as free and equal members of the Commonwealth of Nations, freely co-operating in the pursuit of peace, liberty and progress’) at first did not seek to reduce the common ideals of Commonwealth members to a series of principles commanding unqualified assent. Blatant violations of the rule of law were considered domestic matters for the country concerned in the light of, in the words of the 1960 communiqué, the traditional practice that Commonwealth conferences did not discuss the internal affairs of member countries.

However, in 1971, Heads of Government meeting in Singapore adopted a Declaration of Commonwealth Principles which referred to ‘liberty of the individual’, ‘equal rights for all citizens’ and ‘personal freedom under the law’. These principles were refined and developed in the Harare and subsequent Declarations to
embrace fundamental values of democracy, human rights and the rule of law within member countries. In 1995, the Millbrook Action on the Harare Declaration programme adopted at the Auckland Commonwealth Heads of Government Meeting established a Commonwealth Ministerial Action Group of eight foreign ministers in order to deal with serious or persistent violations of the Harare Principles by member states. It is perhaps not altogether fanciful to detect a faint echo of the original version of Magna Carta which contained the short-lived security clause giving twenty-five barons stringent powers to enforce royal compliance with the provisions of the Charter.


Panel 5

Trinidad And Tobago Affirmation Of Commonwealth Values And Principles 2009
Article 5

“We solemnly reiterate our commitment to the Commonwealth’s core values:

Human Rights: reaffirming our commitment to the Universal Declaration of Human Rights and human rights covenants and instruments; and recalling our belief that equality and respect for protection and promotion of civil, political, economic, social and cultural rights for all without discrimination on any grounds, including the right to development, are foundations of peaceful, just and stable societies, and that these rights are universal, indivisible, interdependent and interrelated and cannot be implemented selectively.”

The principles of Magna Carta are now enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms and in the Universal Declaration of Human Rights, described by Eleanor Roosevelt as a ‘Magna Carta for all mankind’.

In Commonwealth countries, Magna Carta is treated as a ‘statute of general application’ which has been incorporated in their legislation. Thus The Canadian Supreme Court in Calder v A-G of British Columbia in 1973 said that Magna Carta: ‘had 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.’

In the case of Antunovic v Dawson before the Supreme Court of Victoria (Australia) in 2010 the judge (Bell J) had this to say: ‘Protecting people, especially the vulnerable, from unlawful restraints on their personal liberty is a fundamental purpose of the common law going back to Magna Carta 1297, in force in Victoria by virtue of the Charter of Human Rights and Responsibilities Act 2006’.

In a landmark Privy Council appeal from the Bahamas on the mandatory death penalty, Bowe v R, Lord Bingham observed that ‘The principle that criminal penalties should be proportionate to the gravity of the offence committed can be traced back to the Magna Carta Ch 14 of which prohibited excessive amercements and, in the words of one commentator, ‘clearly stipulated as fundamental law a prohibition on excessiveness in punishments’.

Lord Woolf remarked in a lecture given on the 790th anniversary in 2005, ‘India’s very distinguished Supreme Court has the task of upholding the rule of law in the largest democracy in the world. It is no surprise to find that Court deciding that the right for a citizen to have a passport is based on Magna Carta.’

The place of Magna Carta in the constitution of the United States is well known. One of the strongest and most recent affirmations of the power and reach of Magna Carta was given by the US Supreme Court in its judgment in one of the Guantanamo Bay cases, Rasul v Bush: ‘Habeas corpus is ...a writ antecedent to statute, ...throwing its root deep into the genius of our common law ....[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest’
As Magna Carta is thus embodied in the jurisprudence of the common law world, so Commonwealth Principles embodied in the Charter and in earlier declarations are cited in courts across the Commonwealth. Thus, in the Supreme Court of Ghana in 2011, Dotse JSC cited the Latimer House Principles in support of his view that judges should avoid usurping the duties of Parliament (Johnson v Republic). In 2014, in the Supreme Court of Tonga (where, as we have heard, the first Bill of Rights in the Commonwealth was enacted), Chief Justice Tu’uholoaki cited the same Principles in asserting the importance of preserving the independence and impartiality of the judiciary (Tu’ifa v Public Services Tribunal).

Panel 6

Commonwealth Charter
2012
Article VI

“We recognise the importance of maintaining the integrity of the roles of the Legislature, Executive and Judiciary. These are the guarantors in their respective spheres of the rule of law, the promotion and protection of fundamental human rights and adherence to good governance.”

“We believe in the rule of law as an essential protection for the people of the Commonwealth and as an assurance of limited and accountable government, in particular we support an independent, impartial, honest and competent judiciary and recognise that an independent, effective and competent legal system is integral to upholding the rule of law, engendering public confidence and dispensing justice.”

The Great Charter was not a ringing statement of the Rights of Man. It was a more workaday affair - a political settlement dealing with essentially practical issues that concerned the immediate protagonists.

However it has become the most famous document of the Common Law and the most powerful symbol of our liberties, enshrining the basic principle of government by law, and of the rule of law.

It has rightly been described as a record of the existence of a right, a right threatened by King John, a tyrant which meant that there was a need to recite that right in the Great Charter. It is a right that has continued in our own times to be threatened by tyrants and overweening governments.

This threat has led to the development by the Commonwealth of fundamental values through successive declarations of Heads of Government. These culminated in the adoption in 2012, in the name of all of the people of the Commonwealth, of the Commonwealth Charter, a single document setting out its core values and the commitments of its members a document reflecting the concept of the rule of law which had long been nurtured by the tradition of Magna Carta. The Commonwealth Charter needs effective mechanisms for implementation so that it does not remain merely an aspirational document. Although the Charter refers to support for the role of the Commonwealth Ministerial Action Group ‘to address promptly and effectively all instances of serious or persistent violations of Commonwealth values without any fear or favour’, there is no independent mechanism for bringing governments to account. Governments do not like such supervisory mechanisms – no wonder the ‘security clause’- clause 61 - of the 1215 Charter proved so short-lived!

By the Commonwealth Charter the Heads of Government recite the right for every man, woman, and child, throughout the Commonwealth, to the “essential protection” of government by and under the law, whether or not they live in a country where the Common Law applies, and whatever their constitutional provisions provide.

Can we hope that in 800 years time the citizens of the countries that today form part of the Commonwealth will be able to point to the Commonwealth Charter as a clear statement and recital of their continuing right to live under a rule of law upheld by an “independent impartial honest and competent judiciary”? 
Abstract: There are many different facets to Magna Carta (or Great Charter). Not many appreciate that there were no less than four charters. This paper focuses on some of the most famous clauses of Magna Carta, the ones that have echoed down through the centuries and have spread round the world, in effect following the spread of the British Empire. Although the promises contained in Magna Carta were not unique to 13th century England, many of those promises (such as the coronation oaths) were made to God. What was unique about Magna Carta was that there was built into it an enforcement system here on earth. The paper reflects on the echoes of Magna Carta in the wording of the Constitution of the United States of America and other constitutions across the world, as well as international and regional instruments such as the 1948 Universal Declaration of Human Rights. The paper concludes that Magna Carta has been the source and the inspiration for many of the legal principles that we take for granted today.

Keywords: Magna Carta – empire – rule of law – taxation – Stamp Act 1765

If we think of imperialist powers now, we tend in the modern world to reflect on the British Empire, the French Empire and the Spanish Empire, although in the context of the 16th and 17th centuries let us not overlook the Portuguese Empire or the Dutch Empire. Then let us not overlook the recent Russian Empire. It is not that long since the Wall in Berlin came down and all those countries that were part of the USSR became independent lands, and we still see in the Ukraine some of the consequences of the breakdown of an empire. Do not forget Suleiman the Magnificent’s Turkish Empire; I do not forget the Mogul Empire. Empires have always been with us. There were empires long before those to which I have referred.

I choose the three most substantial European empires, which began their expansions in the 16th and 17th centuries, the British, the Spanish and the French, because I want to identify a significant difference of approach between them in the creation of their empires. For whatever reason, and no doubt, as in most human affairs, for a complexity of reasons, the early British Empire proceeded on the basis of the creation of colonies, that is places to which British – English to start with but British later – men and women and their families went in order to create a new life for themselves, largely in places where there was no or only a small native population. So the Pilgrim Fathers set off to live in what eventually became the United States of America.

Dealing with this complex situation very briefly, therefore, they were British people who lived abroad. The Spanish and French Empires at this stage in their histories did not normally create this type of colony. May I just illustrate my point. The Virginia Company, founded to explore, and exploit, the Eastern Seaboard, that became the United States, was provided with a constitution in 1618, described as the Great Charter, which vested all the rights to which English men were then entitled in each colonist. These, significantly, included the right to trial by jury.

The very words Great Charter speak for themselves. You translate them back into the original Latin and you end up with Magna Carta. It was a principle of English law which, basing itself on the decision of the Privy Council in 1722, the great Sir William Blackstone summarised as:

“If an uninhabited country be discovered and planted by English subjects, all English laws then in being, which are the birthright of every subject, are immediately then in force.”

On the other hand, where in those days the country was regarded as an inhabited country, local laws continued to apply. A very good example is the Cape Colony at the bottom end of Africa. There was there an existing Dutch
colony in which Roman-Dutch laws applied, where, despite the arrival of the British, they continued to be applied. To take another example, Malta – which became a British colony as my mother constantly reminded us not by any form of conquest, but at the request of the Maltese, who invited the King of England to become their king – the existing civil justice system continued, and it still does.

Not all these patterns were identical but that was the general approach. No doubt from time to time existing local laws were disregarded. No doubt from time to time the absence of what can be described as a native or local population only arose because the local population was driven out by the settlers. Australia is a very good example of a colony to which the principle identified by Blackstone applied, where it is only very recently that the presence and interests of native Australians have been recognised.

That is the background. It is sometimes suggested that the British Constitution is unwritten. It is true that our constitution is not incorporated into a single document. Single documents often contain very high-flown phrases which do not mean very much in practice. But the British Constitution is certainly a partly written constitution. The great documents which contribute to it are Magna Carta, the Petition of Right and the Bill of Rights. We are at 1215-ish – and I say “ish” for a reason to which I shall come – 1628 and 1689. We are coming to celebrate the 800th anniversary of Magna Carta.

There are many different facets to the Charter, each of them worth a lecture in itself. Not many appreciate that there were no less than four charters. There was the 1215 Charter, not signed by anybody, sealed by King John; the 1216 Charter, issued immediately on John’s death to try and bring peace about in a civil war; the 1217 Charter, issued after the French had been driven out of England, after the City of London opened its gates to the French invaders. There were 7,000 French troops in England and the rebel barons were determined that the new king would be Prince Louis of France. Then there was the 1225 Charter.

When we talk about Magna Carta we have to think about what the facts are and what we know. We know very little, I am afraid, of the facts. However, I want to focus for the moment on the most famous clauses, the ones that, without exaggeration, echo down to us through the centuries and have spread round the world, in effect following the spread of the British Empire. By Chapter 39 of the 1215 Charter – and I still like to read this out: it amazes me that here we are, 800 years later, and these words evoke a shiver.

“No free man shall be arrested or imprisoned or dispossessed or outlawed or exiled or in any way victimised, neither will we attack him or send anyone to attack him, except by the lawful judgment of his peers or by the law of the land.”

The next chapter, 40:

“To no one will we sell, to no one will we refuse or delay, right or justice.”

These promises were not unique to 13th century England. Charters were issued by kings during the Middle Ages in which the king promised to do justice. They are found all over Europe. There is one in Aragon; there is one in Hungary. Kings on their coronations accepted the responsibilities and promised to abide by their coronation oaths. There was lots and lots of, “We’ll do all right. We’ll look after everybody. We won’t be nasty. We’ll be fair, good, decent kings,” gratifying assurances, and I am sure they all went down a treat, but – and I am not making a cynical point, I am making a constitutional point – the promises of the coronation oaths and so on were made to God. The king accepted that if he did not abide by the oath he had given, well, account would have to be made by him to God when God came to judge his immortal soul. In 13th century Europe – it is hard for us to believe it now – where your soul went, what judgment God made of your soul, was of sublime importance, because eternity beckoned. What was unique about Magna Carta was that there was built into it an enforcement system here on earth. You did not have to wait until the king died and accounted to his God; here on earth you wanted results.

Chapter or clause 61 – it does not matter which you use – provided that if the king failed to abide by the terms of the charter and continued to do so when his transgressions were notified to him, effectively medieval obligations of
fealty and obedience to him for as long as the transgressions continued were waived, and a council of 25 of his barons was set up. They were justified in organising resistance to him until the transgressions were remedied. Note: this is not abdication, assassination or removal; it is, “We have notified you; you have failed to comply; therefore we now have power by your agreement to dismantle your castles – in effect to remove the signs of authority – and, most important, our obligation to obey you.”

This is a remarkable clause.

In many European countries King John was derided for allowing the creation of this body or group of over-kings, as they were described. You see immediately how significant this provision was. It meant that the king made himself subject to the law. The words “rule of law” do not appear anywhere in Magna Carta itself but it was agreed by the king that he was subject to the Charter which contained a series of legal provisions and obligations.

You could of course say, and you would be right to say, “That’s well and good in theory but in principle it meant that if the barons sought to enforce the charter against the king and he refused, the inevitable consequence would be a war between them”. But this is a significant moment in constitutional theory. The king is subject to the law. It became hugely important 400 years later, in the 17th century, when James I and Charles I arrived and insisted on the divine right of kings. This was what the dispute was about, as will be discussed below.

Crucial to our constitutional development there was also a practical method of enforcement that was built into the Charter and accepted very rapidly. In England, after the Charter, the king was unable to raise taxes without the consent of the body which, although given different names in the early days, we have come to know as Parliament. Specific provision was made in the Charter, chapters 12 and 14, for the payment of a particular tax called “scutage”. This required the consent of the council of the kingdom, which would be summoned to meet to consider whether scutage, or aid, would be imposed.

What was scutage? In feudal times, if you were a tenant, one of your obligations was to provide men who would fight ultimately for your liege lord. If you owned so much land, you had to turn up with three. If you owned a huge amount of land, you would turn up with 100. You turned up with your men to fight for your liege lord. Turning up with two or three yokels from, for instance, the remote parts of Warwickshire, armed with a billhook and a rake was not the best way to win a battle against anybody. Everybody realised that the better way to do it was to enable the king to employ mercenaries, to pay for professional soldiers, and so the scutage obligation turned into an obligation to provide whatever funds were decided to be the appropriate amount. For the sake of argument, instead of a man, it was £100/£1,000/£10,000, or whatever the currency was. That was scutage.

The Charter provided that that could not be raised without the consent of the council. The king was supposed to live on his own, off his own lands, his own affairs, and so the Charter provides this basic principle, which in 1225, when it was re-issued amounted to this. The new king, young Henry III, wanted to raise tax. He had ideas, as so many English kings did, of grand armies marching through France. “No,” said the council, “not until you have confirmed Magna Carta.” There we have it. The obligation to have consent to taxation continued as a principle in England for centuries, and still applies, and it was this provision that ensured that Parliament would be summoned.

The king was only obliged to summon Parliament when he needed money. It is not the current system, obviously, and there are huge differences, but as it developed over the centuries this power gave Parliament a measure of control. The king never quite became absolute. Do not let us overlook that Henry VIII, in breaking the bonds of the Church with Rome, achieved it with the consent of Parliament. The Act of Supremacy was an enactment and it was this principle that the king was not absolute that was the foundation of the contention advanced by the lawyers and the judges in the early 17th century, that the king did not rule by divine right and that he was subject to the law.

In the end, this resulted in a civil war, which culminated in the execution of the king. This was the end of the divine right of kings in England and, simultaneously, in effect,
following another king fleeing the country, the establishment of Parliamentary government and the Bill of Rights, of which the most important law was that no one should be able to spend or dispense with any law.

Now, 1689 was the Bill of Rights, and I draw your attention to the significance of that date in relation to the two other major empires that I referred to at the beginning. The Estates General in France, gone; the Cortez in Spain, gone. For effective purposes, these two bodies had disappeared from consideration as law-making bodies at much the time when our Parliament was becoming the ultimate repository of sovereignty in Britain. When Louis XIV said, “L’état c’est moi”, that was exactly what he meant. What is more, his claim was true.

Turning to the colonists, as the colonies in the East of what later became the United States increased in number, Magna Carta remained a document of fundamental importance to them. I have mentioned the Virginia Great Charter. Maryland, another colony, in 1638, wrote to Charles I saying that they intended to make Magna Carta an express part of the constitution. Each colony had its own constitution. It was a bad time to choose: it was 1638, the king had ruled without Parliament for eight years or maybe a bit more than that and even Charles I did not need the advice that it would be an unwise concession to make at a time when he was ruling, as he thought, through his divine right.

In 1641 in Massachusetts they agreed that a body of law should be framed “in resemblance to a Magna Carta which would be received for fundamental laws”. The infusion of the ideas behind Magna Carta was a commonplace feature of the foundation of each colony. This was the talk in England. This was the talk in the places where the colonists were coming from. By the time of the American Declaration of Independence our Bill of Rights had been enacted and Parliament, as I said, not the king, held the reins of power. Why is it that Magna Carta is celebrated with fantastic enthusiasm in the United States which had never existed before. Duties were paid on goods to and from the mother country to the colonies. Nobody objected to that – that was part of the deal – but there was no direct taxation on the colonies until the Stamp Act.

The Stamp Act meant that you paid a tax on just about any document you care to think of. Every bill, every receipt, everything you had to pay, you put a stamp on. This too was fundamental: if you were alleged to have committed a criminal offence by failing to put a stamp on, you lost trial by jury. In modern language, the Stamp Act was a double-whammy. If you look at it – and I pay great respect to Lord Goodlad, who was a Member of the House of Commons at one time – it is nearly as badly drafted legislation as most modern legislation. It is a dreadful Act of Parliament. If you read it, you might find that you lull yourself to sleep very rapidly.

Let us pause and reflect on this. We are now a good few hundred years from Magna Carta. The deal was, “If you want your taxes, Mr King, we have our rights.” Many of the colonists had been educated in England. Several of those who signed the Declaration of Independence trained at the Middle Temple. So did many of those who signed the Constitution. When we pause to think about them, we know the result of what they did, and they won, but there was no law that said they would win. Anybody looking at the realities in 1776 would have said that the colonists did not have a chance against a professional army which had already beaten the French in the Seven Years War. It was the best army – in our part of the world, at any rate – and their chances were not good. The probability was that most of these people would have ended up being hanged. Let us pay respect to them not because they had the foresight to do this but because they also had the courage to do it. The ancient principle was no taxation without representation. That was the battleground.

The author, and certainly the individual for promulgating this important theory of our Constitution which goes back to Magna Carta, was a man called John Dickinson, a barrister from the Middle Temple. Parliament got rid of the Stamp Act but, really foolishly, particularly in the light of the advice of Edmund Burke at the time, they decided that they would issue a
Declaration Act, a Declaratory Act, and this time it said, “Okay, we’ll get rid of the Stamp Act but just you colonists bear this in mind: we here in London will decide everything that affects you over on the other side of the Atlantic.”

There is a great American historian called Barbara Tuchman who wrote a wonderful book called *The March of Folly*, in which the thesis is that, ignoring dictators and mad men, who are in charge on their own, you could identify through history a whole series of events which demonstrate the proposition that there is a human condition called the march of folly, where people do things which are clearly contrary to their own interests because they are too stupid to realise what they are doing, even though at the time – and this is an important part of it – people are warning them against it. The first example is the Trojan Horse. Who could possibly have believed that this great wooden edifice was a gift of the Gods? But the Trojan War had gone on for ten years. What did they want? Peace. They vested this Trojan Horse with deity. And there is poor old Cassandra saying, “But it isn’t. Just open inside. You’ll see a whole lot of armed Greeks there.” It is the march of folly.

Another of Tuchman’s examples is the way the Reformation popes did not face up to the legitimate complaints made by people across Christendom about corruption. I am afraid she chooses the way the British Parliament responded to the requests of the colonists, who did not want independence to start with, by ignoring them and saying, “We’ll show them.”

And so the colonists won the war. After resort to arms and much to everybody’s surprise the new United States of America came into existence and, as a product of empire, as part of their constitutional arrangements, they had a Bill of Rights. Where is the echo? It is clear: 1689 and 1780 or 1781 – it does not matter. The new Constitution made this provision:

“No person shall be deprived of life, liberty or property without due process of law. The accused shall enjoy right to a speedy and public trial by an impartial jury.”

The echoes of Magna Carta are obvious and the wording reflects some 550 years of legal development since the days when it was first sealed by King John; in other words in 1776 this was a modern document, updating the common law and the constitutional arrangements for a new world.

You will find these principles all over the world. I cannot choose every country, but you will find them in Canada, in Australia, in New Zealand, in India. For instance, article 21 of the Constitution of India provides:

“No person shall be deprived of his life or personal liberty except according to procedure established by law.”

In passing, we should perhaps note that it is no accident that Nelson Mandela, facing capital punishment, in his trial in 1964 at Rivonia spoke movingly of how – and I quote the great man’s words:

“Magna Carta, the Petition of Rights, the Bill of Rights are documents which are held in veneration by democrats throughout the world.”

In the European Convention we see that everyone has the right to liberty and security of person. No one shall be deprived of his liberty, save in accordance with the procedure prescribed by law. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

These are common law principles and, whatever else may be said about the British approach to the Convention – which is the subject of another paper – no one can deny that, in the drafting of the Convention itself, the influence of British lawyers and the common law was huge, as this document was created for a war-torn Europe in which concentration camps had sadly thrived.

Perhaps the greatest compliment paid to Magna Carta in recent times was when the Universal Declaration of Human Rights was made in December 1948. Eleanor Roosevelt, who had taken a very great personal part and contributed to the creation of this Declaration, referred to it as the “international Magna Carta for all mankind”.

Admittedly, Magna Carta does not include words like “trial by jury” or “rule of law” or “due process” or “democracy” and so people
have been inclined – and no doubt they will be heard now – to deride it, saying, “Well, it’s all a fiction.” But it is not. One of the things that influences all of us in everything we do is our perception of things. Our perception in many ways is more important than the facts themselves. What do we think? How do we react? In Magna Carta we can trace the history.

I can tell you that the first time “rule of law” was referred to was in 1610, the Commons Protest. “Due process” earlier, when the Archbishop of Canterbury was on trial for treason. “Democracy” goes back to Ancient Greece, but they had a whole society built on the work of slaves. Magna Carta has been the source and the inspiration for these ideas that we take for granted. Its provisions were sufficiently elastic, the times over the centuries were sufficiently broad, for these principles gradually to emerge and to take hold and come to be firmly established. The principles that we believe in are principles which would occur to us whether they were in a document or not. We like to think that we should be free to speak, we know perfectly well that nobody can stop us thinking whatever we like, but it was in Magna Carta that the principle was first established that everybody, every single person in the community, is subject to the law. The universal ancient principles are as modern as they are today.
MAGNA CARTA AND THE NEW ZEALAND CONSTITUTION

Justice Sir David Baragwanath, KNZM, QC, president of the United Nations Special Tribunal for Lebanon.
This article is based on an address to English Speaking Union in June 2008.

Abstract: No other English enactment has enjoyed as long a life as the Magna Carta. This paper examines the influence of Magna Carta in relation to the Constitution and law of New Zealand, in particular, the Treaty of Waitangi, which may be seen as a local expression of the Magna Carta’s principles. The paper proceeds to provide some reflections on the future of the Constitution in New Zealand. The author considers that Magna Carta’s virtues must not be permitted to distract attention from the fact that it is nearly eight centuries out of date. To do no more than keep the government out of the hair of the citizen is to ignore the fact that since 1215, the critical need for positive protection of the dignity and security of the disadvantaged has been emphasised.

Keywords: Magna Carta – New Zealand – constitutional law – Treaty of Waitangi – human rights

I begin with English, American and New Zealand aspects of today’s theme:

Below the thunders of the upper deep,
Far far beneath in the abysmal sea,
His ancient, dreamless, uninvaded sleep
The Kraken sleepeth: faintest sunlights flee
About his shadowy sides:

…

There hath he lain for ages and will lie

…

Until the latter fire shall heat the deep;
Then once by men and angels to be seen, In roaring he shall rise...

The Kraken Wakes
Alfred, Lord Tennyson

The laws and Constitution are designed to survive, and remain in force, in extraordinary times.

Kennedy J

That leaves the future! It’s a Kind
Of occupation for the Mind,
A field for Prophesies, Conjectures,
Reports, Books, Articles, and Lectures.
The Futures of the Past are Piles
Of vatic Volumes, dusty files…

That was the future
Whimwham

Preface

The Kraken of social discord presents risk to any society. It is kept asleep by the rule of law. That requires awareness and acceptance by members of the community of the basics of our constitutional law and conventions, including Magna Carta. Yet Magna Carta is often seen as a dusty irrelevance of the past. As too, until the judgment of the Court of Appeal in the Maori Council case in 1987, was the Treaty of Waitangi.

We tend to be more interested in the present. Why should we spend time today on a document signed at a time when it was thought that the sun revolved around the earth? Is it anything more than mere nostalgia?

The US Supreme Court has given a resounding yes. In 2008, the Magna Carta featured as the mainstay of an historic judgment which insisted on the right to habeas corpus for every inmate of Guantánamo Bay. In Boumediene Justice Kennedy traced the fundamental origins of habeas corpus back to the Magna Carta, citing Pollock and Maitland: “it means this, that the king is and shall be below the law.” In New Zealand, the anniversary of the execution of Magna Carta on 15 June 1215 was marked in more subdued style, by a radio interview, on the Kim Hill programme. Yet there escaped mention the fact that, in a volume which contains other expressions of our basic laws, the most notable Chapter of Magna Carta remains on the New Zealand statute book.
Magna Carta

We learned as children that, even if he did found the Royal Navy, King John was not a good man. Stephen Langton, by contrast, was; despite being not only an Englishman, a scholar and divine but also a lawyer, who led the magnates and barons at Runnymede.

Langton had previously shown himself to be a serious constitutionalist. And perhaps for that reason, John dug his heels in when the Pope attempted to appoint Langton as Archbishop of Canterbury. Innocent III, one of the most powerful and influential popes of the Middle Ages, was the wrong man to cross. He declared John excommunicated and placed his kingdom under interdict – effectively calling for a general strike on all non-essential religious services. In the face of threat of invasion by Philip of France to whom John had lost Normandy, John executed what has been variously seen either a humiliating abasement, or a brilliant piece of cutting edge diplomacy. He agreed both to appoint Langton as Archbishop; and to submit England to the ultimate sovereignty of the Pope.

King John’s wars against the French kingdoms and a couple of farcical forays into Ireland had been expensive and the changing economy was cutting the Crown out of England’s growing wealth. In his attempt to recoup, John made himself widely unpopular. Legend has it that he:

1. Extorted money from Jews, removing one tooth a day until they paid;
2. Sold his first wife for 20,000 marks (£30,000);
3. Expropriated forests;
4. Made cynical use of his ability to impose fines for minor or even imaginary misdemeanours (including stumbling or disorganised pleadings in court);
5. Expropriated the church property during the time of the interdict, then selling it back when the interdict was lifted (this included a cheeky tactic of taking hostage the concubines of supposedly celibate priests and demanding ransom);
6. Fatally, oppressed the barons by scutage, a tax paid to avoid military service, and took their children hostage for ransom.

(These and other facts are recounted by Peter Linebaugh The Magna Carta Manifesto (University of California Press 2008) and W L Warren King John (University of California Press 1978)).

Because he could not be trusted, King John was required by Chapter 61 to give authority, in the event of breach, to 25 barons:

Who may distrain upon and assail us in every way possible, with the support of the whole community of the land, by seizing our castles, lands, possessions, or anything else saving only our queen and our children, until they have secured such redress as they have determined upon.

Such great minds as Sir Edward Coke and Professor Dicey considered that Magna Carta was rather a record of the existence of rights than a statute which conferred them. But it was, and remains, an expression of fundamental law. Its most important Chapters – 39 and 40 – are combined in the Reprinted Statutes of New Zealand as Chapter 29:

29 Imprisonment, etc. contrary to law.

Administration of Justice

No freeman shall be taken or imprisoned, or be disseised of his freehold or liberties or free customs, or be outlawed or exiled, or any otherwise destroyed; nor will we not pass upon him nor condemn him but by lawful judgment of his peers or by the law of the land. We will sell to no man, we will not deny or defer to any man, either justice or right.

Also printed directly following is Edward’s Confirmation of the Charters 1297:

And we will that, if any judgment be given from henceforth contrary to the points of the charters aforesaid by the Justices, or by any other our ministers that hold plea before them against the points of the charters, it shall be undone and holden for nought.

Chapter 29 is brief but impressive. It includes:

1. Prohibition of detention otherwise than by law. According to Dick Howard’s The Road From Runnymede it appears in 25 US state constitutions as well as the Federal Fifth Amendment;
(2) The right that justice should not be barred by cost;

(3) The right that justice should be prompt; breach of which right causes agony to litigants through uncertainty;

(4) Protection of property; even though it omits the former Chapter 28 which prohibited the taking of corn without immediate payment. A facet of the property right was John’s undertaking in Chapter 31 not to remove wood without the owner’s consent.

The measure of any right is whether it can be enforced. Of particular importance, whereas mediaeval political theory had offered no alternative to submission to wrongful exercise of power other than rebellion,

[to the Anglo-Normans, whose point of view we have inherited, another method to enforce Magna Carta suggested itself: ... the victim of an infringement could in his own name frame an action in the King’s Court based on the Charter... . Thus anyone who claimed that Magna Carta gave him a right had a simple and direct remedy... .

But such a simple approach would take time to bring change, and for John to abide by his undertakings would have been out of character. The more so because of the principle they reflected: that no one however important and no institution is above the law.

John was resistant to this idea. Unsurprisingly, he applied to Innocent to absolve him from the Runnymede agreement. The Pope now sided with John in defence of a common and contrary principle – the infallibility of authority. Innocent commanded Langton to denounce publicly the barons and all other so-called “disturbers” who had wrested the Charter from King John. Langton refused; he and all the barons were excommunicated. They were saved from the joint wrath of the Pope and the King only when both died in 1216.

There are two points. The first is the specific legal rights confirmed by Magna Carta. The second is that beyond the specific legal rights exacted there extend the overarching themes: the tension between the efforts of those in power to retain it; the cost to those who seek reform; and the vital need to subject all members of the community, including the Sovereign, to the rule of law. Both are important to discussion of the New Zealand constitution: (1) Magna Carta as law; (2) Magna Carta as principle.

The legacy of Magna Carta

No other English enactment has enjoyed as long a life as the Magna Carta. There have been periods when Magna Carta has been discounted or fallen out of sight. After several centuries of relative obscurity, it was revived in the seventeenth century by Sir Edward Coke.

But Coke’s enthusiasm provoked reaction. Lord Irvine of Lairg has recounted the criticism by Professor Jenks of Sir Edward Coke for “representing an essentially feudal Charter that was motivated by self-interest and the demands of political expediency, as a constitutional document”.

In the twentieth century, Coke’s approach was championed by the American jurist Professor Max Radin who challenged Jenks, in a meticulous analysis of the history. He concluded:

... there can be no reasonable doubt that [until the 31st statutory confirmation of Magna Carta (by Henry VI) in 1429], Magna Carta was thought of as something more than the most venerable of the statutes, that it was taken as something fundamental, something that went into the form of the social order and was not to be disturbed.

Radin noted that the relation of Magna Carta to other forms of law closely resembled the relation of the later Constitution of the United States to all other laws.

The New Zealand Constitution

As Mr Podsnap appreciated, a constitution need not be the lawyer’s document of that name seen in the US and South African constitutions. So far New Zealand has managed without
such a thing, even though our unsystematic “constitution” includes a statute called the Constitution Act. Rather, our constitution is a collection of institutions, customs, statutes and precedents that express how society is constituted or organised, nationally and indeed internationally. Such elements as our Parliament, our Executive, our Judiciary, the Ombudsmen, the Privacy Commissioner, and many more, are elements of a structure that ultimately includes every member of society.

In New Zealand we must begin any discussion of our constitutional future with the Treaty of Waitangi. Those of us who are not Māori owe our right to be here to its Preamble as well as Article 2; in Justice Durie’s expression we are the tangata tiriti.

All of us, Māori and non-Māori are entitled to the Article 3 rights – as British, now New Zealand subjects. We owe to the Crown the obligation of fealty expressed in Article 1. And we look to Article 2 as a specific expression of the Māori entitlement to the general rights of Article 3.

Before venturing further constitutionally we must put our own house in order. I borrow from a recent address by Chief Judge Joe Williams:

> Without at least incremental shifts in resources and decision-making power to indigenous peoples over time, the whole question of the moral and political legitimacy of the current legal order remains a stone in the shoe of the state.

> This suggests something that indigenous peoples often forget. The gift of legitimacy to the state is a powerful moral and political card. Just as the position of the West in the globalisation debate is undermined if its effect will be to entrench geographic disparity, so it is that nations with dispossessed indigenous minorities remain deeply uncomfortable about the taint of an immoral past and its living consequences. The gift of legitimacy must not be given lightly.

> The key to unlocking this thing is not with settlers, governments or the state. It is with us. And, of course, there is no way to guarantee success. But failure is inevitable if we do not begin to imagine, and in imagining, take ownership of a future that is different from our past.

(Confessions of a Native Judge Address to Native Title Conference Perth 4 June 2008).

The Treaty has present relevance as embracing two aspects of Magna Carta: Magna Carta as law and Magna Carta as principle. I discuss these before returning to the Treaty.

1) Magna Carta as Law

Each of the topics earlier listed remains at the heart of our otherwise largely unwritten constitutional law.

1) The prohibition of detention otherwise than by law remains, as it has always been, central to the tension between government power and individual freedom. The substantive right conferred by Magna Carta is given its remedy by habeas corpus as well as by Magna Carta’s promise of ready access to the courts:

- In England we have seen the House of Lords declare that a law that would imprison non-citizens suspected of terrorism in circumstances in which citizens went unpunished was incompatible with the rights to liberty and freedom from discrimination (A v Home Secretary [2005] 2 AC 68).

- In New Zealand the Supreme Court granted Mr Zaoui bail on the basis that the High Court had an “ancient common law jurisdiction” to grant bail to someone detained (Zaoui v Attorney-General [2005] 1 NZLR 577, [34]). The Court of Appeal has also considered whether an overstayer who refuses to sign a passport application to assist his deportation may be imprisoned indefinitely (Chief Executive of the Department of Labour v Yadegary CA199/07 argued 19 March 2008, High Court judgment reported at [2007] NZAR 436 [subsequent Court of Appeal decision reported at [2009] 2 NZLR 495; the answer of the majority was no]).
• The Supreme Court of Canada employed *habeas corpus* to confirm to Canadian citizens interned at Guantánamo Bay and interrogated by Canadian officials rights to due process conferred not only by its Charter of Rights but by international law (*Canada (Justice) v Khadr* 2008 SCC 28 at [25]).

• The US Supreme Court had held that Magna Carta is a bar to “extraordinary rendition”(*Rasul v Bush* 542 US 466 (2004)); its judgment, closely similar in approach to that of the Canadian court, held that legislation enacted to avoid the operation of *habeas corpus* is ineffective (*Boumediene*).

The broad commonalty of the approach of the final courts of the four jurisdictions, all legatees of Magna Carta and the rule of law, is striking.32

(2) The right to accessible justice:

The New Zealand Court of Appeal held that police officers when interviewing suspects must inform them of their right to free legal advice if it appears that the suspect might not know about it, and might need it (*R v Alo* [2008] 1 NZLR 168);

• The English Divisional Court in *R v Lord Chancellor, ex p Witham* ([1998] QB 575) struck down as an impediment to justice excessive filing fees fixed by the four most senior Judges in England.

(3) The right to prompt justice, now confirmed by s 23(2) of the New Zealand Bill of Rights Act 1990;

(4) The protection of property: art 2 of the Treaty of Waitangi with its reference to forests; the Court of Appeal’s decision in Maori Council No 238 recognising the Crown’s obligations to Māori in relation to their forest assets; and the great Treelord settlement at present in course of resolution (See the Central North Island Forests Land Collective Settlement Bill introduced 18 June 2008) may all be seen as expressions of this strand of Magna Carta.

Each of these specific rights is a facet of a greater theme:

(2) *Magna Carta as principle*: all are protected by the rule that no one, however important, and no institution is above the law.

Like the Treaty of Waitangi, which may be seen as a local expression of its principles, Magna Carta has an iconic status. That means it is sometimes used ignorantly and carelessly, as by those who have demeaned the Treaty (and more often its principles) by invoking it where common sense says it is irrelevant.

There is sometimes evident Mr Podsnap’s smugness; we have our British constitution, with Magna Carta at its base: what more could be required?

When the Law Commission was asked to investigate another constitutional fundamental, the jury system, it paused before undertaking a close analysis. But the Commission decided that, despite that system’s similar iconic status, its role was so important that the risk had to be taken that it would be shown up as unsound. The result was Dr Young’s report which, in probing the reality both demonstrated the high value of confiding the most important court decisions to lay judgment yet showed the vital need for change if it was to work properly and avoid injustice. Other facets of our constitution may warrant similar treatment.

After some four decades on the edge of law and its reform I am increasingly of the opinion the Queen expressed to Alice:

“*Well, in our country*, said Alice still panting a little, “*you would generally get to somewhere else if you ran very fast for a long time, as we’ve been doing.*”

“A slow sort of country!” said the Queen. “*Now, here, you see, it takes all the running you can do, to keep in the same place. If you want to get somewhere else you must run at least twice as fast as that!*”

The law and the constitution are the right not of lawyers and judges but of the whole community, whose lives are not static but dynamic; not simple but complex; and not identical but various. The constitution comprises our basic laws. How is it to cater for New Zealanders who are Catholic, Protestant, Jewish, Muslim, Hindu, Sikh, Somali; for atheists; for young,
That question takes me to:

The Future of the Constitution

This requires the most careful consideration. There are some very real problems with the narrow vision which has been our general pattern to date.

For example, a dissertation establishes beyond doubt that the great virtues of the Enlightenment, seen by self-styled liberal males as an answer to all conceivable problems, contain a great gulf where women are concerned (Catherine Fleming “The Liberal Veil: Imagining Women and the State in Refugee Discourse” (unpublished 2008)).

We have experienced a similar problem with the rights of children; and my Court has heard argument concerning the statutory mental health regimes which until 1992 failed dismally to recognise the dignity of those within them.

We need a new perspective. At this point I enter a disclaimer.

Judges are not nodding automatons. They see at close quarters how the legal system is operating and, like the Sovereign and her Representative, may give warning of what they see. Injury to the dignity and security of any person in our community will infringe the modern rule of law. It is within convention to tell you that the Auckland Judges heard a series of four lectures by undisputed experts who spoke under Chatham House rules of mounting social problems in certain parts of our community. They included reference to the “P” epidemic, which led to the public statement by the Chief High Court Judge, Justice Randerson as to the pressures on the High Court, and which is evidence of a sense of hopelessness which there is urgent need to change.

But judges must speak and act with caution. The development of democracy since 1215 gives our elected representatives a legitimacy which judges cannot claim, derived from the choice of the community. At least so long as there is no departure from Magna Carta’s basic principle that no-one must suffer gross injustice, Judges must defer to that choice. The alternative would be to bring the institutions of justice into disrepute, by infringing the separation of powers doctrine.

So the role of a judge does not normally extend to offering specific prescriptions for his or her society. I limit my comment to some generalities.

First, the debate at a two day constitutional seminar in the Legislative Council Chamber in 1989 exposed a reality echoed in a recent review of Brazier’s essay on the British Constitution: there is risk when tinkering with a constitution of creating disharmony rather than achieving improvement. Any constitution, formal or not, must serve the purpose of creating harmony within the community. It is easy for the black letter of legal words to serve as ammunition for disputes. There is real risk that attempts to force a written code may be counter-productive. The proposal in the White Paper preceding the 1990 Bill of Rights, that the Treaty be legislated, was in my view rightly not proceeded with. The Treaty’s role as icon is in my view its proper status. That means it can never be demeaned by subjection to direct legal dispute.

Moreover, as was discovered in Communist Russia; in Nazi Germany; and, for that matter, in Fiji, the most thoughtfully crafted written constitutions cannot alone protect the community. There is potential volatility in any society. All too frequently recourse is needed to force – as by the police and, on occasion by the army.

But the fact that constitutional arrangements cannot do everything does not mean that they can do nothing. The power of ideas expressed in constitutions, whatever their format, can and must be used to help right the rights which continued experience and analysis bring to light. What matters is to identify the great themes that acknowledge the worth and dignity of each member and give them opportunity to realise their potential.

Two America scholars have observed in an analysis of the 2008 presidential race:

During the 20th century the [Democratic] party has moved from a philosophy of “government by the majority” to another
which rather emphasises “minority rights”.

(Gerrin & Yesnowitz “L’audacieux pari de Barack Obama” Le Monde diplomatique (April 2008) 1 at 12)

That process has been seen, in New Zealand as in comparable states, in the human rights conventions reacting to the totalitarian abuses before and during the Second World War and the rise of a rights jurisprudence. That jurisprudence has as one intellectual foundation the principle of Magna Carta that those who hold public office are not the masters of the community but its servants; and that they are given special rights not in their own interest but in the interests of those whom it is their obligation to serve. Expressed at this level of generality, it is not fanciful but realistic to see the constraints on John as analogous to the principles of legality and judicial review of our modern democracy.

The intellectual foundation of that aspect of democracy is expressed in Adam Smith’s classic Wealth of Nations: the virtue of capitalism and free trade, which with the invention of the limited liability company has done so much to develop economies worldwide.

But Magna Carta’s virtues must not be permitted to distract attention from the fact that it is nearly eight centuries out of date. Its concerns are for the “hands off” rights of Wealth of Nations and ignore Smith’s less well known work The Theory of Moral Sentiments, which showed that crucial to his free market is the autonomy of the participants, not in a merely formal sense but as members of society and accepted and respected by it.

To do no more than keep the government out of the hair of the citizen, as some would still argue, is to ignore the fact that since 1215, Kant, de Gaulle, President Roosevelt, the states parties to the International Conventions on Human Rights and many others have discerned the critical need for positive protection of the dignity and security of the disadvantaged.

David Dyzenhaus (Cambridge 2002) has described the gradual emergence across the whole of the common law world of “a common public law” which rejects the artificial divide between legal and political spheres of decision-making. By contrast with the earlier private common law tradition, notionally based on the creative expression of preordained common law values, the new public law, which traverses administrative law, constitutional law and international law, seeks to prospectively update and reshape public law values by viewing them through the lens of international human rights norms.


The HRA requires the judicial importation of democratic standards and values enshrined in the ECHR into UK public authority decision-making. However, by contrast the countries with modern constitutions, such as South Africa and Canada, have designed their constitutional settlements often after lengthy consultation and debate, there is little guidance in the HRA in the direction that democracy should take in the United Kingdom. For example … how far can an old-fashioned treaty such as the ECHR – which on the one hand says very little directly about the protection of human rights and the socio-economic sphere, which on the other hand has enshrined the quality and respect for human dignity and psychological integrity of every person – allow for the development by UK courts of a contemporary concept of democracy that provides at least a minimum level of social protection. It notes that in interpreting the scope of ECHR rights, senior courts in the UK have turned to pronouncements of other common law constitutional courts, including the South African Court and the Canadian Supreme Court, which have adopted similarly “open- textured” constitutions in the last two decades or so.

The description as “old-fashioned” of the European Convention of Human Rights strikes rather a wry note in a country like ours where the modest New Zealand Bill of Rights Act provides no means of redressing breaches of fundamental rights which in European states and in the United Kingdom have the force of
law. In R (Limbuela) v Home Secretary, the House of Lords held that the withdrawal of support to destitute asylum seekers constituted breach of art 3 of the European Convention which required the courts to intervene to protect them. Lord Bingham cited from Sir Thomas More by Shakespeare a phrase which followed this passage:

Imagine that you see the wretched strangers
Their babies at their backs, with their poor luggage
Plodding to th’ ports and coasts for transportation
And that you sit as kings in your desires

Lord Bingham’s citation was devastating:
...this your mountainous inhumanity

In Reyes v R the same Judge recalled the speech of Chaskalson P in the Constitutional Court of South Africa:

The very reason for establishing the new legal order and for investing the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society.

Chaskelson P continued:

It is only if there is a willingness to protect the worst and weakest among us that all of us can be secure that our own rights will be protected.

Palmer states:

During the past decade in common law jurisdictions, commentators and practitioners have increasingly take up the idea of a shared public law discourse that is concerned with the identification of fundamental values and constitutional, public and international human rights law – a discourse that seems to prevent vulnerable, marginalised and dispossessed individuals being placed beyond protection of the rule of law. Although this discourse has gained much greater momentum in other common law jurisdictions the influence of the United Kingdom is reflected in the work of leading constitutional and public law theorists and ... its presence can be detected, albeit in a small number of outstanding decisions, in the House of Lords.

Increasingly in constitutional adjudication in other states there has emerged the concept of equality in conjunction with that of a respect for human dignity. Where should we be heading?

Professor Michael Taggart has faced the problems experienced by public lawyers in common law jurisdictions when human rights instruments such as the HRA have been injected into a long established legal system. He says as to New Zealand that it is necessary not only to determine how a rights-based form of adjudication can be fitted into the constitutional parameters of our administrative law, but to identify the points at which established rules of principles of administrative rules should give way to what he has called “the bigger guns of constitutional or international law” (“The Tub of Public Law” in Dyzenhaus (ed ) The Unity of Public Law (Hart 2004)).

So Taggart bridges what until recently has been an anachronistic gap. While we have much to do at home, the reality is that New Zealand real boundaries no longer conform even with the 200 mile Exclusive Economic Zone, let alone the three-mile cannon shot of the classic Treaty of Westphalia that defined the nation state. Sir Kenneth Keith has pointed out that our statute book contains several hundred Acts of Parliament that give expression to international obligations. The fact that we earn more of our income by tourism than any other source; that much of it derives from sale of commodities overseas; that our major banks and insurers are based out of New Zealand; that our economy depends on foreign events: all these and more mean that New Zealanders are members of a global society whose constitution is a critical to our future as anything we can do here. There, in my view, a particular effort is needed.

Care is of course needed to ensure that in responding to international initiatives we preserve the essentials of our constitution:
the primacy of Parliament and the separation of powers. But inertia is not an option. For example, the House of Lords in its judicial capacity recognised that, because of the value and importance of family life, the right to family recognised by Art 8 of the European Human Rights Convention extends beyond any single individual. As standards of what is decent are lifted in the states with which we compare ourselves, each limb of government must play its part to ensure that we do not fall behind.

We should in fact be taking a lead. As our history records, New Zealand has taken important initiatives since adopted internationally, of which votes for women and family group conferences are two instances among many. We have the capacity to do better.

The peace of New Zealand, which in the period after the Musket Wars was the raison d’être of the Treaty of Waitangi, depends on the peace of our region and of the world. For a nation whose trade routes must be kept clear, that can be achieved only by promotion of the rule of law not only domestically but regionally and internationally.

While New Zealand is numerically small, in the area of law we have strength beyond our size. In several South Pacific state New Zealand jurisprudence and constitutional conventions mix with indigenous culture and values to contribute to public confidence in the rule of law. There and elsewhere we can and should add to the sterling work performed by New Zealand public servants our skills in law drafting; access to our sophisticated legal database; capacity building, and much more.

There are heartening signs of what can be done. Our armed forces, a disproportionate number of them Māori, have assumed peace-keeping responsibilities around the globe. Don McKinnon as Commonwealth Secretary-General and Colin Keating at the United Nations, our diplomats, academics, business and sporting personnel, our tourists – all take the New Zealand brand and its standards of essential decency world-wide. But as international pressures grow, our contribution must increase. While I am most familiar with the law, it is evident that there are also great opportunities for us to contribute to the world the work not only of our farmers and agricultural experts and other traditional exporters but our scientists, our teachers, our entire community: to see ourselves as able to contribute to a wider good. As the High Commissioner knows at first hand, one answer to terrorism is to get to know as friends the people whose fears mirror ours and who ultimately seek the same decencies as we do.

We can also do much within New Zealand by improving our systems of government. We could, for instance, emulate the Australian Federal Parliament’s Main Committee, which Westminster has adopted, providing for a concurrent parallel sitting of Parliament to deal with the detail of law reform that, while less politically prominent than other topics, contributes to its quality and thus to the very essence of the rule of law – public confidence in our institutions. A further option to consider is an Attorney-General’s Department, to systematise the invaluable work and lift the vision of such bodies as the Legislation Advisory Committee, the Law Commission and the law reform element of the Ministry of Justice, to consider not only what we can do for ourselves but what, with the guidance of MFAT, we can do for others. We can also enter the choppy waters of devising a written constitution.

These are big challenges. The means to meet them will be the subject of legitimate differences of opinion. I am inclined to share Lord Justice Sedley’s view that within New Zealand:

*It may be that the answer is neither an entrenched law of rights and responsibilities nor a grand constitutional measure, but some principled alterations in constitutional practice, a thought-out enlargement of the socially calibrated rights vouchsafed by the European Convention, and a not too ambitious statement of responsibilities, duties and values.*

We might even generalise the right to proportionate treatment which appeared in Chapter 20 of Magna Carta and under European law has become a general test for conformity with human rights standards.
However our primary constitutional need is not, I suggest, for another piece of paper with lawyers’ words on it, but an acceptance by New Zealanders that each of us must contribute to the well-being of all in our society and of the world community; and the starting point is to understand the basic constitutional tools.

We have to date in New Zealand enjoyed the advantage of our small and relatively cohesive society; that neither Parliament, Executive nor Judiciary have attempted to challenge seriously the constitutional conventions that keep each from trespassing on the territory of the others.

Our constitutional conventions require judges to defer to the expressed will of Parliament. They must exhibit patience and, as far as possible, restraint, trusting the good sense of the elected representatives and those who elect them. It was no doubt for similar reasons that the US Supreme Court did not rush to judgment but waited on the events in Guantánamo Bay for six years before their recent decision.

That does however absolve the judges from their role to be vigilant on behalf of the community they serve. Judges, who see any breach of convention at close quarters, must not flinch from recording and responding to it if that occurs. Where there is real risk of infringement a Quilter declaration, of the risk and where necessary the fact of breach, may be made.

Ultimately, in the twenty-first century just as at Runnymede, all depends on the people involved and the strength of the conventions of their society. The roles of Langton, John, Innocent, Philip and their Muslim contemporaries in the thirteenth century have resonance in today’s world. Given modern weapons and means of communication, Magna Carta’s principles of the rule of law and legality and their relevance on the international plain are even more important now than in 1215. So too are the elements of the Treaty of Waitangi, with its recognition again of the rule of law but with the modern elements of an equal place for all and acknowledgement of the virtues of difference.

In the presence of the US Ambassador it may be mentioned that New Zealanders have not forgotten our debt to the US naval aviators at the Battle of the Coral Sea and Midway who at an early point in my life saved New Zealand from invasion. The jurisprudence of that great nation has now once more given a lead to the international legal community as to how the very greatest issues are to be handled. Indeed the high regard of that community for the institutions of the USA had led to a prediction that the result of Boumediene would follow inevitably from the Supreme Court’s settled jurisprudence.

To us in New Zealand, the case provides a double lesson. To Parliament and the Executive, of the need to avoid departures from convention and the unsettling effect of their exposure to judicial process, however pressing the justification. To the judiciary, as to our academic thinkers, of the need for vigilance and preparedness on their part to give early warning which may avoid the risk of litigating exceptional cases and their terrible dilemma: either of acquiescing in injustice; or, as Lord Cooke warned, of an exceptional response from the courts, with the high risks of that course.

It is to be hoped that the guidance of Magna Carta may encourage all of us to keep the Kraken of constitutional discord asleep. An important contribution to that result is to awaken public knowledge of and sensitivity to our constitution.
Abstract: As a former British colony, Kenya inherited the legal system which was introduced by the British administration upon its colonization. The development of the Magna Carta has therefore influenced the development of Kenya’s legal system in many ways. This paper discusses the importance of the Magna Carta in the protection of human rights, the influence of the Charter on the constitutional development and legal system in Kenya, the influence of the Charter on the court decisions in Kenya and concludes that the protection of human rights in Kenya today by the law and the courts is strongly influenced by the Magna Carta.

Keywords: Magna Carta – Kenya – constitutional law – human rights

Introduction
Magna Carta is Latin for Great Paper or Charter. It is an important charter in the history of the development of the protection of citizen’s rights. It dates back to the reign of King John of England during the 11th century. Prior to the sealing of the Magna Carta, the King in England ruled as a monarch who wielded a lot of power, sometimes leading to oppressive regime. A series of social, economic and political dissatisfaction by the citizens finally led to piecemeal negotiations and agreements which culminated into what is today known as the Great Charter or Magna Carta. Although the King’s subjects had for a long time been unhappy with the authoritarian regime of King John, the turning point of the citizens’ dissatisfaction was the imposition of oppressive and unreasonable taxes on land owners. This was worsened by the absolute authority wielded by the king without any checks and balances. As a result, many citizens felt oppressed but had no recourse to redress. This led to the English Barons opposing the manner in which the King related to the citizens. The king was therefore forced into an agreement on a governance structure and system that recognized some basic fundamental freedoms to the citizens. This was the first time in the history of the English legal system that citizens became entitled to freedoms and rights which the king was obligated to observe.

Despite the signing of the Magna Carta, the various freedoms and rights were not totally and adequately honoured by King John and his successors. The struggle to ensure that the King honoured and respected the freedoms and rights continued taking the shape of several amendments. The various amendments today form what is known as the Magna Carta. The Magna Carta was sealed by King John in 1215. The Great Charter thus became the first original document in the history of the English legal system that listed the various fundamental freedoms and rights that a citizen is entitled to.

The effect of the Magna Carta was an obligation on the part of the King to observe, protect and honour the rights of citizens. Any aggrieved citizen therefore could refer to this document in terms of protection of fundamental freedoms and rights. As the British government colonized various parts of the world, the legal regimes in the various colonies imported and applied the laws from England to protect them in the administration of the various colonies. The provisions of the Magna Carta were therefore imported into the various colonies and influenced the development of the legal system in such colonies.

Kenya is a former British colony. The British rule was established in 1897 through the Imperial British East Africa Company. The British settlers in Kenya used the provisions of the Magna Carta to ensure their freedom and protection of their property by the colonial administration. When Kenya became independent in 1963, the various English laws imported into the country which included provisions of the Magna Carta continued to influence the development of the legal system.
This paper therefore looks into the importance of the Magna Carta in the protection of the rights of citizens in Kenya and the obligation of the Kenyan government to observe and honour the same. The paper is divided into five parts. Part I discusses the importance of the Magna Carta and the protection of human rights. Part II analyses the influence of the Magna Carta on the 1963 Constitution. Part III discusses the 2010 Constitution of Kenya and the Magna Carta. Part IV is an assessment of the influence of the Magna Carta on court decisions in Kenya. The discussion ends with a conclusion on the influence and continued importance of the Magna Carta in the protection of fundamental freedoms and human rights in Kenya as a young democracy.

The Importance of the Magna Carta and the Protection of Human Rights

The Magna Carta is indeed a great document since it embodies various fundamental rights and freedoms, entitlements, which today are variously known as human rights and protected universally. The Charter has therefore shaped the development of human rights protection today. The Universal Declaration of Human Rights (UDHR) which dates back to 1948 borrows heavily from the provisions of the Magna Carta. The various international conventions namely the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the United Nations Convention on the Rights of the Child (UNCRC) amongst others also have provisions which are derived from the UDHR, originating from the Magna Carta.

At the regional level, various charters and declarations echo the provisions of the Magna Carta in ensuring good governance and protection of the citizens. Such declarations and charters include the African Charter on the Rights and Welfare of the Child, the African Charter on Human and Peoples Rights, the American Convention on Human Rights and the European Convention on Human Rights among others.

At the national level, the Magna Carta has influenced several constitutions world over. The fundamental provisions in many constitutions include: the rights of citizens and their property to be protected by the state, the due process of law, the rule of law, supremacy of the law and the right to a fair trial. Apart from the constitutions, various relevant laws like the criminal procedure laws, evidence laws and criminal law all reflect the influence of the Magna Carta in the process of arbitration of disputes between the state and the citizens. The aim is to ensure that the state does not use its power arbitrarily against citizens.

The importance of the Magna Carta in shaping up the legal systems of the Commonwealth countries cannot be understated. The Magna Carta has lived to be a powerful document which has and continues to protect the rights of citizens from bad governance. The influence of the Charter ensures that states honour their obligation to protect the lives and property of their citizens. In this respect, the Magna Carta has contributed to the development of strong democracies such as the United States of America. Kenya’s young democratic ideals are anchored in and strongly influenced by the need to observe the rule of law amongst many other provisions of the Magna Carta.

Although the Magna Carta had several clauses, the ones that feature prominently in most legal systems including Kenya are: the protection of the citizens from unlawful government prosecution, the prohibition of any denial or delay of justice to any individual, protection of the basic human rights and freedoms from government control, unlawful taxation, protection of individuals by the law, freedom of religion and the fact that the due process of law must be followed before any person’s rights are curtailed. The above provisions of the Magna Carta are reflected in several judgments of the Kenyan courts as discussed in part IV of this paper. In the next section the paper discusses the influence of the Magna Carta on the 1963 Kenyan Constitution.

The Influence of the Magna Carta on the 1963 Constitution in Kenya

The First Lancaster House Conference in 1960 was a forum where African leaders demanded the release of all political leaders held by the British regime. In addition, the gathering demanded an opening up of the democratic
process to Africans as well as negotiations for involvement of African leaders in government. Following the First Lancaster Conference, the Secretary of State for colonies, Ian Macleod, was forced by the African leaders to develop what came to be known as the Macleod Constitution. The first documented influence of the Magna Carta on the development of the Constitution in Kenya is therefore found in the Macleod Constitution of 1961. The Macleod Constitution came about as a result of African political leaders’ complaints about the oppressive colonial rule and demand for democratic space in the governance system. This situation was similar to the complaints and demands by the English citizens which led to the original Magna Carta of 1215 being concluded between the barons and King John. For the first time in Kenya’s history, the Macleod constitution provided a justiciable Bill of Rights which ensured the right to personal liberty, private family, right to life and property, freedom of conscience, expression and assembly.

The First Lancaster House Conference did not completely resolve the concerns of the African political leaders. Subsequently, the Second Lancaster House Conference aimed at a negotiation for a constitution for internal self-government by the Africans. The result of the deliberations was the internal self-government Constitution of 1963. As a result, part of the executive powers of the colonial government was ceded to the African leaders in preparation for self-rule and self-governance. This was done through a structure where the colonial government was represented through a governor, but the Africans participated in the governance through the post of the Prime Minister and the Cabinet. Of importance is the fact that the 1963 constitution provided for a government that is popularly elected to protect the rights of the citizens. Subsequently, Kenyans were able to conduct elections and elect their own leaders under this constitution. This was an important step in ensuring democracy and people’s participation in electing their own leaders through democratic process of election. The effect was to diminish the authoritarian governance structure of the colonial rule.

The Independence Constitution, also known as the 1963 Constitution had several prominent features which ensured the protection of the rights of citizens. The first feature was the entrenchment of the concept of legal sanctity also known as the supremacy of the constitution. The constitution clearly stated that it is the supreme law of the land that superseded any other law. Its provisions were therefore important in the protection of the rights of citizens. The state, in its governance system and structure was obligated to abide by the constitution. Parliament, in enacting any laws was obligated to ensure that the laws are consistent with the constitution or risk being declared invalid to the extent of the inconsistency. Everything the state did in its governance and relationship with the citizens must therefore be consistent with the constitution.

The second feature of the 1963 constitution was a Bill of Rights which provided for and protected all individuals while outlawing discrimination. The Bill of Rights also protected life and property. The constitution provided for several freedoms and rights which included the right to life, liberty, security of the person and the right to protection of life. It also provided for freedom of conscience, expression, assembly and association. The constitution further provided for the protection of all individuals for the privacy of their homes and property and protection from deprivation of property without compensation. In addition, the constitution protected individuals from slavery and forced labour, inhuman treatment and arbitrary search and entry into their premises by the state.

The independence constitution also created the judiciary whose fundamental aim is to interpret the law and ensure that any dispute between the state and the citizens is resolved through the due process of law. Of importance was the regulation and prevention of any possible arbitrary use of power by the state. In this respect, all the three arms of government, were to act as checks and balances on each other so as to protect the individuals’ rights and fundamental freedoms from arbitrary abuse by the executive.
The constitution provided that all indigenous communities within the former British Protectorate now known as Kenya, automatically became Kenyan citizens with enforceable rights. The above rights and freedoms could however be limited by the state on grounds of prejudice to the rights of others or in the public interest. While the independence constitution was not a perfect document, it had incorporated several provisions of the Magna Carta which, to a great extent, protected the rights of the citizens against possible bad governance and authoritarian rule by the state. There still remained, however, several loopholes which could be used to limit the rights of citizens. In the next section, the paper discusses the influence of the Magna Carta on the 2010 Constitution.

The Constitution of Kenya 2010 and the Magna Carta

Kenya faced several challenges in implementing the 1963 constitution to protect citizens. As a result, there were incidences of arbitrary use of power by the state, hence the need to undertake a review of the constitution to ensure that the constitution protects the rights of Kenyans to a greater extent. In this respect, Kenyans promulgated the new constitution on 27th August 2010. This constitution has been lauded as one of the best in Africa in terms of citizens' freedoms and rights protection. Amongst the highlights of this constitution are:

Article 40 of the Constitution of Kenya 2010 provides for the protection of every individual’s right to property. The article prohibits any attempt to deprive one of property without compensation. This is an important provision that echoes the spirit of the Magna Carta in terms of protection of an individual’s right to property. In addition, the provision obligates the state to protect citizen’s property. Although the right to property was contained in the 1963 constitution, the 2010 Kenyan Constitution is more elaborate and specific as regards the role of the state.

Article 47 provides for procedural justice and fairness. The article obligates all persons and arms of the state in any administrative action to ensure fairness, efficiency and reasonableness, while dealing with citizens. This article echoes the concern of the Magna Carta that

necessitated the checking of arbitrary use of the state power over its citizens. In particular, it is concerned with disputes concerning citizens being resolved without delay.

Article 48 provides for access to justice by all persons. This article obligates the state to ensure that everyone can access justice irrespective of their status or position in society, for justice is a key concept in the Magna Carta.

Article 49 provides several rights of arrested persons to ensure that anyone who is arrested and has to be prosecuted by the state is nevertheless protected by the law. The state must therefore follow the laid down procedure and observe and protect the fundamental rights of arrested persons as provided in this article. This provision is important in checking the possible arbitrary use of state power. The rights that are protected under this article include: the right to be informed of the reason for the arrest, to remain silent, the right to communicate with an advocate and other persons whose assistance is necessary, the right to be informed of the protection against any forced confession or admission and the right to be held separate from those who are already convicted and serving sentence. Of significance is the right to appear before a court as soon as reasonably possible within twenty four hours of being arrested. In addition, at the first appearance in court, the arrested person has a right to be charged or to be informed of the reason for the detention. If not, he or she should be released. This article makes it constitutional for an arrested person to be released on bail or bond on reasonable conditions pending the trial or a charge, unless there exists compelling reasons not to be so released. This article addresses possible arbitrary use of state power in detentions without trial and holding people unnecessarily in police stations thereby curtailing their liberty and freedom of movement. Article 49 is therefore an important reflection of the influence of the principles of the Magna Carta on the Kenyan legal system.

Article 50 provides for the right to a fair hearing which includes the right to be presumed innocent until the contrary is proved, to be informed of the charge, with sufficient detail to answer it, to have adequate time and facilities
to prepare a defence, to a public trial before a competent court, to an efficient trial without undue delay, to be present at one’s trial unless the conduct of the accused person makes it impossible for the trial to proceed, the right to choose and be represented by legal counsel and to be informed of this right promptly before the proceedings begin. Where it is necessary that the accused person be represented and where lack of legal representation may result into substantial injustice, then the accused person has a right to a legal counsel paid by the state. In addition, the accused person has a right to be informed of this right before the trial begins. The accused person also has a right to remain silent and is protected against self-incrimination. The article also obligates the prosecution to inform the accused person in advance of the evidence that the prosecution intends to rely on. In addition, the accused person has a right to have reasonable access to that evidence so as to prepare for his trial.

The accused person also has a right to adduce and challenge evidence given against him/her. Where the accused person does not understand the language of trial, he or she has a right to the services of an interpreter at the expense of the state. An accused person cannot be convicted for an act or omission that was not an offence in Kenya or a crime under international law at the time when it was alleged to have been committed or omitted. The accused person is protected from double jeopardy. In cases where the prescribed punishment for an offence has been changed between the time that the offence was committed and the time of sentencing, then the accused person has a right to the benefit of the least of the severe punishment. If convicted, the accused person has a right to appeal or apply for review by a higher court. Any evidence intended for use by the prosecution that is obtained in a manner that violates the fundamental freedoms in the Bill of Rights is inadmissible as it would render the trial unfair. The accused person has a right to the record of the proceedings.

Article 50 further protects a person who is convicted of a criminal offence. The convict of a criminal offence may ask for a new trial if new and compelling evidence has become available. Where it is in the interest of justice, an intermediary may be allowed by the court to assist an accused person to communicate with the court. Where it is necessary to exclude the press from the court proceedings, then the court may do so. Article 50 of the Constitution elaborates on the provisions which capture the spirit within which the Magna Carta was developed. It variously provides protection for the trial process by the state, and spells out specific rights which an accused person is entitled to. It is important to note that, although most constitutions provide for fair trial rights in their criminal procedures, the Constitution of Kenya 2010 has entrenched the fair trial rights under the constitution and further provided under Article 25(c) that fair trial rights are non-derogable. Therefore, none of the rights discussed under Article 50 in this paper can be limited under any circumstances. The drafters of the constitution must have seen it necessary to limit the arbitrary use of state power by specifically providing for the non-limitation of fair trial rights under the constitution. Any law that attempts to limit any of the fair trial rights is therefore unconstitutional.

Article 51 goes further to provide that once an individual has been arrested and detained or held in custody, or imprisoned under the law, he or she retains all the rights and fundamental freedoms in the Bill of Rights, except to the extent that any particular right or freedom is incompatible with the detention, being in custody or imprisonment. This is a further strong influence of the principles of the Magna Carta on the Constitution of Kenya 2010.

Article 51 further provides that a person who is detained or held in custody is entitled to petition the court for an order of *habeas corpus*. This is an order provided for by the Magna Carta as a way of forcing the state to produce the body of the detained person whether alive or dead.

Apart from the above provisions of the Magna Carta’s influence on the Kenyan constitution, the 2010 Constitution is one of the most comprehensive constitutions in the world in terms of human rights’ protection. It provides citizens with the power to choose their own government. Moreover, the citizens reserve the power to hold their leaders accountable. The accountability power therefore serves as
a check on the possible arbitrary use of power by leaders. In this respect, the Magna Carta has had a strong influence on the development of the Kenyan legal system as reflected in the court decisions. The next section discusses various court decisions which have upheld the principles enshrined in the Magna Carta therefore further entrenching the influence of the Great Charter on the Kenyan legal system.

The Influence of the Magna Carta on Court Decisions in Kenya

This section discusses a number of court decisions in Kenya that have been influenced by the principles enshrined in the Magna Carta.

In *Kenya Anti-Corruption Commission vs. Deepak Chamanlal Kamani and 4 Others*, the court was required to determine whether the objectives of the Anti-Corruption and Economic Crimes Act were in the public interest to warrant limitation of rights and fundamental freedoms of an individual. In making its determination, the court made reference to the Magna Carta in its affirmation that the right to liberty is among the most fundamental of human rights. The court observed that even though the Magna Carta only guaranteed rights to a limited group of people, it nevertheless required that arrest or detention be lawful, and the individual be protected against arbitrary use of power by his or her ruler.

In *Hassan Nyanje Charo vs. Khatib Mwashetani and 3 Others*, one of the issues that the court addressed was on access to justice. The court was required to exercise its power to determine whether it could allow an extension of the time allowed to file an application. In allowing the application, the court observed that the delay was not occasioned in any way by the applicant, but that it was occasioned by the court processes. As such, denying the applicant leave to file the application would be tantamount to limiting his access to justice which would be a contravention of the Constitution of Kenya.

In *Severine Luyali vs. Ministry of Foreign Affairs and International Trade and 3 Others*, the issue concerned the termination of the of petitioner’s employment by the first respondent. The Court agreed with the petitioner that the first respondent did not follow due process in terminating her employment. The court held that the first respondent violated Article 47 of the Constitution of Kenya 2010 which provides for fair administrative action. The court observed that while the first respondents had the power to transfer the petitioner, such power must not be exercised arbitrarily. The court’s finding echoes the provisions of those Magna Carta which sought to curtail the arbitrary use of power.

In *George Taitumu vs. Chief Magistrates’ Court, Kibera and 2 others*, the court addressed the issue of fair trial rights as enumerated in Article 50 of the Constitution of Kenya 2010. While the court appreciated the fact that fair trial rights are available to an accused person, it however sought to explain the instances in which an accused person could benefit from the right not to be tried for an offence which he has been previously tried of and either acquitted or convicted. It held that as the petitioner had neither been acquitted nor convicted, he could not place reliance on this right to make his case.

In *Evelyn College of Design Ltd v Director of Children’s Department & another*, the matter concerned the protection of property rights under Article 40 of the Constitution. Specifically, the court had to determine whether after the state has issued a title, it can assert a right that is inconsistent with the title without following due process. The respondent’s contention was that the property had been illegally acquired. The court held that due process must always be followed in the dispossession of any property, irrespective of the manner of acquisition. The court emphasized the fact that power cannot be exercised arbitrarily even where previous actions leading to a problem were tainted with illegality.

In *Cereal Growers Association and another vs. County Government of Narok and ten Others*, the issue concerned the imposition of a form of tax (cess) on agricultural produce. The Petitioners contended that the respondents had imposed the tax despite the absence of a legal framework on which the imposition of the tax was anchored. The court held that to impose
a tax without supporting legislation was tantamount to violating Articles 209 and 210 of the Constitution of Kenya 2010. This case is illustrative of how the Magna Carta dealt with the issue of taxation. Just like the King was forbidden from imposing unreasonable taxes as he desired, so does the Constitution of Kenya 2010 bar authorities from imposing unreasonable taxes in Kenya.

The case of Coalition for Reform and Democracy (CORD) and another vs. Republic of Kenya and another (2015) is illustrative of the system of checks and balances envisaged by the Magna Carta. The case involved a determination of the constitutionality or otherwise of the Security Laws Amendment Act 2014 which had been passed by the National Assembly and assented to by the President who is part of the Executive arm of government. While the court did not address the constitutionality question and instead forwarded the case the Chief Justice to appoint a three judge bench to address this question, it nevertheless granted conservatory orders with respect to eight clauses of the Act. This had the effect of suspending the coming into force of the eight provisions until the matter was conclusively heard and determined by the bench to be constituted by the Chief Justice. In other words, the Judiciary exercised its power to check the other arms of government. Such a system of checks and balances is important if efforts to curtail arbitrary use of power by any of the three arms of government are to succeed.

Thus, in conclusion, as has been discussed above, the Magna Carta has continued to strongly influence the protection of the freedoms and fundamental rights, and to shape the development of democracy and the legal system, in Kenya today.

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MAGNA CARTA AND THE UNITED STATES OF AMERICA: A BRIEF SKETCH

Benjamin D’Alessio, CAPA intern with the CMJA from September to December 2012.

Abstract: This paper provides a brief sketch of the impact of the Magna Carta on the legal system of the United States.

Keywords: Magna Carta – bill of rights – constitution – United States

Although the United States severed its membership in the Commonwealth after that Revolution, the impact that the Magna Carta had on fundamental American documents and typical political American thought cannot be emphasized enough.

In 1687 William Penn published The Excellent Privilege of Liberty and Property Being the Birth-Right of the Free-Born Subjects of England. It contained the first copy of the Magna Carta printed on American soil. Penn believed that the Magna Carta was fundamental law. Precisely 100 years after the publication of The Excellent Privilege, the Americans based the most important document in their country’s history on the principles of Habeas Corpus and trial by jury. The men who drafted the U.S. Constitution used vitally regarded concepts of Enlightenment philosophers to guide them with their creation: Locke on the consent of the people, Montesquieu for the division of powers, and Coke for the importance of civil liberties. When the Constitution needed amending to further uphold the liberties of Americans, ideals of the Magna Carta influenced the amendment process which created the Bill of Rights. The heart of the Magna Carta can clearly be seen in the Fifth Amendment: “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury...nor be deprived of life, liberty, property, without due process of law”.

The United States’ legal system is derived from the Common Law system created in Britain, and even today, Massachusetts, Kentucky, Pennsylvania, and Virginia refer to themselves as “Commonwealths” instead of “States” to signify the importance of the res publica principle of American government. It is a commonly held misconception in the United States that when the colonists fought against the British they were fighting for new freedoms. What the colonists took up arms to preserve were the liberties and rights that they believed were consecrated in the Magna Carta and therefore, were being encroached upon by the Monarchy of England. In an ironic sort of way, it was the American colonists who fought for what they believed to be inherit rights given to them by the creation of the Magna Carta in England, and it was the English who had been led astray.

The Magna Carta was the seed planted by a handful of displeased barons on the banks of the Thames River at Runnymede that sprouted into the catalyst for liberty that is now found on every continent, and without it, the concept of the “Free-World” may have a drastically different meaning than it has today.
On 23 June 2013 the Chief Justice of Uganda (‘O’) retired from the judiciary at the age of 70, as required by art 144(1)(a) of the Constitution of the Republic of Uganda 1995. Prior to O’s retirement, the Chairperson of the Judicial Service Commission (‘JSC’) wrote to the President of Uganda with their suggested replacement for the role. The respondent, the Attorney General, advised the President that he could appoint a new Chief Justice or re-appoint O under arts 142(1) and 253 of the Constitution. The President communicated to the JSC his ‘decision’ to re-appoint O as Chief Justice for two years. In his response, the Chairperson raised reservations, which had previously been communicated to the President, about O’s re-appointment based on the fact that the office of Chief Justice was a substantive appointment. The letter ended ‘I trust the Hon. Attorney General will guide you further on this’. The Attorney General’s advice was, inter alia, that the ‘appointment of the Chief Justice was the preserve of the President’. Despite the subsequent advice of the Chair of the JSC that their ‘reservations’ were rooted in the ‘absence of Constitutional authority to re-appoint, let alone appoint, a Chief Justice who has attained the age of 70 years’, the President appointed O as Chief Justice on a two-year contract and forwarded his name for parliamentary approval. The petitioner, who was a Member of Parliament and a lawyer, challenged the constitutionality of the re-appointment. At the hearing of the constitutional petition, the petitioner raised objections about the composition of the coram of the court on the grounds that questions of alleged bias had been raised against two of the justices on the coram in another case and remained unresolved pending an appeal to the Supreme Court. The court adjourned to enable the petitioner to appeal to the Supreme Court. At the next hearing the coram had changed and the two justices were no longer present. The petitioner objected to the proceedings, contending that his petition should be stayed until the disposal of his appeal to the Supreme Court. The court ruled that the hearing would continue whereupon the petitioner and his counsel walked out of court. The court decided to proceed with the hearing in the petitioner’s absence on the grounds that the appointment of the Chief Justice—who was head of one of the three organs of government, namely the judiciary—was of great constitutional importance and the hearing could be delayed no longer, no order for a stay of proceedings had been sought or granted and the coram to which the petitioner had originally objected had changed. In determining whether the decision of the President in re-appointing O as Chief Justice was inconsistent with and/or in contravention of the Constitution, the following issues arose for consideration: (i) whether arts 142 (concerning the appointment of judicial officers), 143 (dealing with qualifications for the appointment of judicial officers), 144 (on the tenure of office of judicial officers) and 253 (reappointment of persons who had vacated office) of the Constitution supported the re-appointment of a Chief Justice who had vacated office upon retirement, (ii) whether the President could initiate the process of appointing a judicial officer and (iii) whether the JSC could delegate its advisory role to the executive arm of the government.

HELD: (Aweri Opio JA dissenting) Petition allowed.

(1) Per Tibatemwa, Kasule, Mwangusya and Balungi Bossa JJA (Aweri Opio JA dissenting). A Chief Justice who had vacated office as a consequence of attaining the mandatory age of retirement could not be reappointed to that role. Article 142 of the Constitution explicitly referred to posts of justices of the Supreme Court, the Court of Appeal and the High Court as posts which could be held in an
acting capacity after an individual had vacated office as a result of the mandatory age limit. The provision was, however, silent on the office of the Chief Justice and therefore that role had been singled out—deliberately and plainly. Had the framers of the Constitution contemplated that a retired Chief Justice could be re-appointed in an acting capacity, the provision would have, as it did with the other posts, explicitly said so, since it was unlikely that the office of the Head of the Judiciary would be relegated to a general provision. The omission of the office of the Chief Justice in art 142 and the existence of art 133(4), which specifically provided that the Deputy Chief Justice would take up the mantle until a person had been appointed to and had assumed the functions of that office, was clear evidence that the enactors of the Constitution had restricted the possibility of extension of tenure to judicial functions but not to administrative functions. Those two provisions read together culminated in a strong message that the office of Chief Justice was not one which was to be held by an individual who had vacated office as a result of the mandatory age limit. Consequently, the power to extend the tenure of a judicial officer, where granted to the appointing authority, had to be circumscribed carefully to the express terms of the constitutional authorisation and not through the general provisions, such as art 253. Furthermore, art 253 did not limit the conditions for its application to vacation of office and qualification for the office as the only prerequisites for its application; it also required that an appointment there under be made ‘in accordance with the provisions of this Constitution’. In regard to the office of the Chief Justice, the relevant constitutional provisions, which had to be read and applied together, were arts 142–144 and art 142(2) left out the said office. Consequently, one of the parameters which had to be fulfilled for art 253 to come into play was missing.

Per Mwangusya JA/JCC. Under art 253 a person could only be re-appointed if that person qualified to be so appointed. As a person who attained the age of 70 was mandatorily commanded by the Constitution to vacate the office of Chief Justice under art 144(1)(a), he could not qualify to be re-appointed under art 253.

Per Balungi Bossa JA. Furthermore, the term ‘qualify’ was, in the context of art 253, used in a broader context than paper qualifications or experience envisaged under art 143. Whilst art 143 stipulated the qualifications, ie skills and experience required, the duration for the office was laid down in art 144. The word ‘qualify’ was defined in The 21st Century English Dictionary to mean ‘to meet or fulfill the required conditions or guidelines (in order to receive an award or privilege etc)’. The article was only applicable if the nominee fulfilled the other requirements that appeared in the Constitution, including age. In that context, therefore, age was part of the requisite qualifications.

Per Aweri Opio JA (dissenting). A retired Chief Justice was eligible for reappointment to that role. Article 142 of the Constitution was intended for the appointment of judicial officers in substantive and acting capacities, but it did not provide for the reappointment of judicial officers upon retirement and vacating their substantive offices. Such appointments would only be made under art 253, which applied to all public officers. There was a clear distinction between arts 133(2), 136(2), 141(2) and 142(2) of the Constitution. The difference was that whereas there existed a hierarchy of filling temporary/casual vacancies in the office of the Chief Justice, Deputy Chief Justice and the Principal Judge as provided under arts 133(2), 136(2) and 141(2), the same did not exist in respect of those temporary vacancies in the offices of the justice or judge of the High Court or where the state of business demanded under art 142(2) of the Constitution. In effect therefore, arts 133(2), 136(2), 141(2) and 142(2) of the Constitution had nothing to do with the reappointment of a Chief Justice or justices or judges of the courts of judicature. Accordingly having vacated their offices upon attaining mandatory retirement ages, substantive vacancies were created to be filled under art 142(1), not art 142(2), because they did not leave temporary vacancies. As a matter of emphasis once a judicial officer retired upon attaining the retirement age, the door to judicial appointment was closed, pursuant to art 144(1)(a) of the Constitution, which was manifestly clear. In relation to the position of a Chief Justice, qualification for the role was contained in art 143. Having already served as a Chief Justice, a retired Chief Justice automatically qualified for reappointment. Reaching the mandatory retirement was not a bar to appointment. Article 143 did not specify the age brackets upon which a person would qualify for appointment as a Chief
Justice. Furthermore, the mandatory age of retirement provided under art 144(1)(a) was about tenure of office and not qualification to access the office. Therefore, after attaining the mandatory retirement age, the Chief Justice could be reappointed at the discretion of art 253 of the Constitution. The difference there was that art 142 provided for the appointment of a substantive Chief Justice while art 253 provided for reappointment of a retired substantive Chief Justice. The framers of the Constitution had not confined the application of art 142(2) to judicial officers, leaving art 253 to non-judicial officers. There was accordingly no contravention of the articles of the Convention in respect of the reappointment of a retired Chief Justice upon reaching the age of 70.

(2) Per Tibatemwa, Kasule, Mwangusya and Balungi Bossa JJA. A democratic society called for a strong and independent judiciary. More importantly still, it had to be underpinned by a commitment by the state to the rule of law. The Constitution established the JSC and demarcated specific roles for it. The JSC initiated the process for appointment by composing a list of nominees and submitting the list to the President (the executive). The President then made an appointment from that list and the legislature approved the appointment. By providing for a tripartite process in the appointing of the Chief Justice and indeed other judicial officers on the Higher Bench, there was a constitutional distinction between the roles of the JSC, the executive and the legislature. It was through that separation of powers that society held state institutions accountable. That tripartite process was also meant to safeguard the independence of the judiciary. It followed that the President could only appoint a judicial officer from a list the JSC provided; he could not initiate the process of appointing any particular individual to judicial office. Moreover, where the advice of the JSC was in regard to issues of legality/illegality and matters of constitutional imperatives, the President was not at liberty to disregard such advice. It also followed that the JSC could not delegate or legally surrender to the Attorney General—a member of the executive—its power to advise the President. That would be tantamount to abdication of the JSC's constitutional duty.

Per Mwangusya JA. There was no doubt that the final authority in the appointment of Chief Justice was the President. The President and even Parliament might not be bound by the advice of the JSC on the suitability of a particular candidate but where, as in the present case, the JSC advised against the appointment of a particular candidate on account of the fact that it was in breach of the Constitution, that advice should have been heeded.

Per Kasule JA. Advice by the JSC to the President not to appoint a particular person to any one of the judicial offices specified in art 147(3) could not, whatever the circumstances, be transformed by any other authority into an advice to appoint such a person to such a judicial office.

Per curiam. Per Kasule and Balungi Bossa JJA. The court took exception to the conduct of a party and his lawyers who walked out of court just because they did not agree with the order made by that court in the course of a trial of a cause. A court of law had inherent powers to conduct a trial in the best manner and would ensure, in the judgment of that court guided by the basic principles of presiding over a trial, that justice was done in the cause before it. The court must not conduct its business of adjudicating a cause by making orders that only pleased and were acceptable to the parties and their lawyers before it. Furthermore, being an officer of court imposed obligations on an advocate who appeared before the court, one of which was that a lawyer representing a client had to exhibit all due courtesy and respect to that court. The lawyer was in a way a minister of justice whose role was to assist the court in arriving at the truth in the matter that was the subject of adjudication. It was thus the duty of a lawyer to be present throughout the hearing of a cause in which he was instructed so that the court, with his assistance, could arrive at a just resolution of the cause before it. The act of walking away from court, because of disagreement with the decision judiciously made by the court, was an act most disrespectful of the court. Therefore there would be no award of costs.

Per curiam. Per Kasule JA. Should practising counsel not heed this warning that a party and his lawyers should not walk out of court because they disagree with an order made by the court, then the courts will be called upon to severely deal with such offending advocates pursuant to s 17 of the Advocates Act.
Magna Carta Uncovered

*Anthony Arlidge and Igor Judge*

*Hart Publishing, 2014*

The 800th anniversary of the grant at Runnymede of Magna Carta will be celebrated in 2015 and this work seeks to acknowledge this event by assisting us in understanding fully how Magna Carta came into being – and although Rumpole may lampoon it on occasion as the foundation for the right to a cheroot or other such nonsense, the fact remains that “its impact on individual rights and constitutional developments has more twists and turns than any work of historical fiction”, as noted on the flyleaf and as demonstrated throughout this superb text. Stated simply, it is the story of Magna Carta that is on offer, the account of a talismanic document that symbolizes our liberties and contemporary constitutional principles, and I found it a delightful read.

The co-authors possess signal qualifications to write such an interesting and thought-provoking text – the first took silk over thirty years ago and has published extensively whilst the second was Lord Chief Justice of England and Wales. In fact, Arlidge sought (without success) to invoke the Great Charter before Lord Justice Judge in a matter involving delayed justice in 1990.

The initial chapter is a valuable timeline setting out the historical background to Magna Carta and what follows are a number of thematic chapters, answering such questions as “Who Made Magna Carta?” and “What Was Magna Carta” to the document’s impact on law and order, trial by peers and the rule of law and due process. Readers will learn a great about the integration of justice throughout the common law world as it then existed, Robin Hood and that perennial thorn in our lives, taxation. That the Charter survived is astonishing, and felicitous, and this excellent book explains its creation, apparent rescission, later resurrection of sorts and ultimate flowering in vivid detail and with a view to always making plain how it contributes to our liberties today, though only a few clauses are “legally relevant” to our contemporary legal situation.

Readers of this journal, however, will profit greatly by the many and varied references in the text to the development of professional judging, and to the absolute need for judicial independence. The many battles, and lesser confrontations, between Royalty and the judges over the centuries are described in great detail and it is always felicitous to read of the courage of the members of the Judiciary who braved imprisonment and the loss of life rather than compromising their oaths of office.

*Magna Carta Uncovered* explains a great deal about the development of justice, the legal profession, and English history, and is quite simply, a very interesting book that lawyers and lay persons will find enjoyable.

Gilles Renaud

*Judge, Ontario Court of Justice*

Migrants and the Courts: A Century of Trial and Error

*Geoffrey Care*

*Ashgate, 2013*

One of the most prominent issues in the 2015 British General Election was the control of immigration. Geoffrey Care provides an invaluable account and analysis of the evolution of immigration and asylum law and practice in the United Kingdom (with chapters written with the assistance of others providing an invaluable comparative insight into the systems employed in Belgium, North Africa, South Africa, Sweden and Canada). The book will enrich the understanding of lawyers and all those concerned with immigration matters as to how the United Kingdom’s modern asylum and immigration system functions in the context of historical developments since 1905, when the first statutory control on immigration was introduced. When your reviewer practised in the field of immigration law in the 1970s, the courts had little role to play, applications were dealt with administratively through the
relevant government departments and few lawyers had any knowledge of the subject. Since then, as Sir Stephen Sedley notes in his Foreword, there has been ‘a steady climb, enforced by the higher courts, out of the slough of dependency and into the daylight of reasoned and independent adjudication’. Sir Stephen goes on to observe that Geoffrey Care’s chronicle of this process in the asylum and immigration system, culminating in its incorporation into a new statutory structure as a judicial tribunal under the presidency of a High Court Judge, ‘is a significant part of the history of modern administrative law’. Thus no modern judge or practitioner can afford to be without some acquaintanceship with the role of immigration and asylum issues in the expansion and development of administrative law today.

Care writes from the perspective of a highly experienced immigration judge, with long service as the United Kingdom’s Deputy Chief Adjudicator. Moreover, in 1995, he became the first president of the International Association of Refugee Law Judges, which has since provided an important forum for interaction between judges concerned in their own jurisdictions with the application of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol. From this perspective, Care provides a trenchant critique of the United Kingdom system. Criticising proposals for changes in the appellate system mooted by government in 2004, Care writes (at p. 78) that ‘whoever conceived and suggested these measures and whatever motivated those behind the scenes to put them forward should be a warning to all that the battle for independence of the judiciary must be fought, and won, every day’. On the sensitive issue of state security, Care criticises the rules governing the operation of the Special Immigration Appeals Commission (SIAC) as ‘effectively preventing SIAC from doing justice’. In his ‘Afterward’, Care is critical of lack of both efficiency and transparency in case management, concluding that ‘Ideally, perhaps, we should put the whole of the current system in the bin and start again, with a totally new, streamlined department using experienced personnel’.

Care has some interesting insights into the particular difficulties which may confront an immigration judge. Thus, where one party is unrepresented, judges may have to intervene more than was formerly thought to be proper, for example, to probe evidence which is in issue before them. One might observe that, given the increasing numbers of litigants in person generated by cuts in legal aid, judges other than those trying immigration cases may be called upon to play this more activist role.

Peter Slinn

Vice-President of the Commonwealth Legal Education Association and Chairperson of the Editorial Board of the CJJ
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