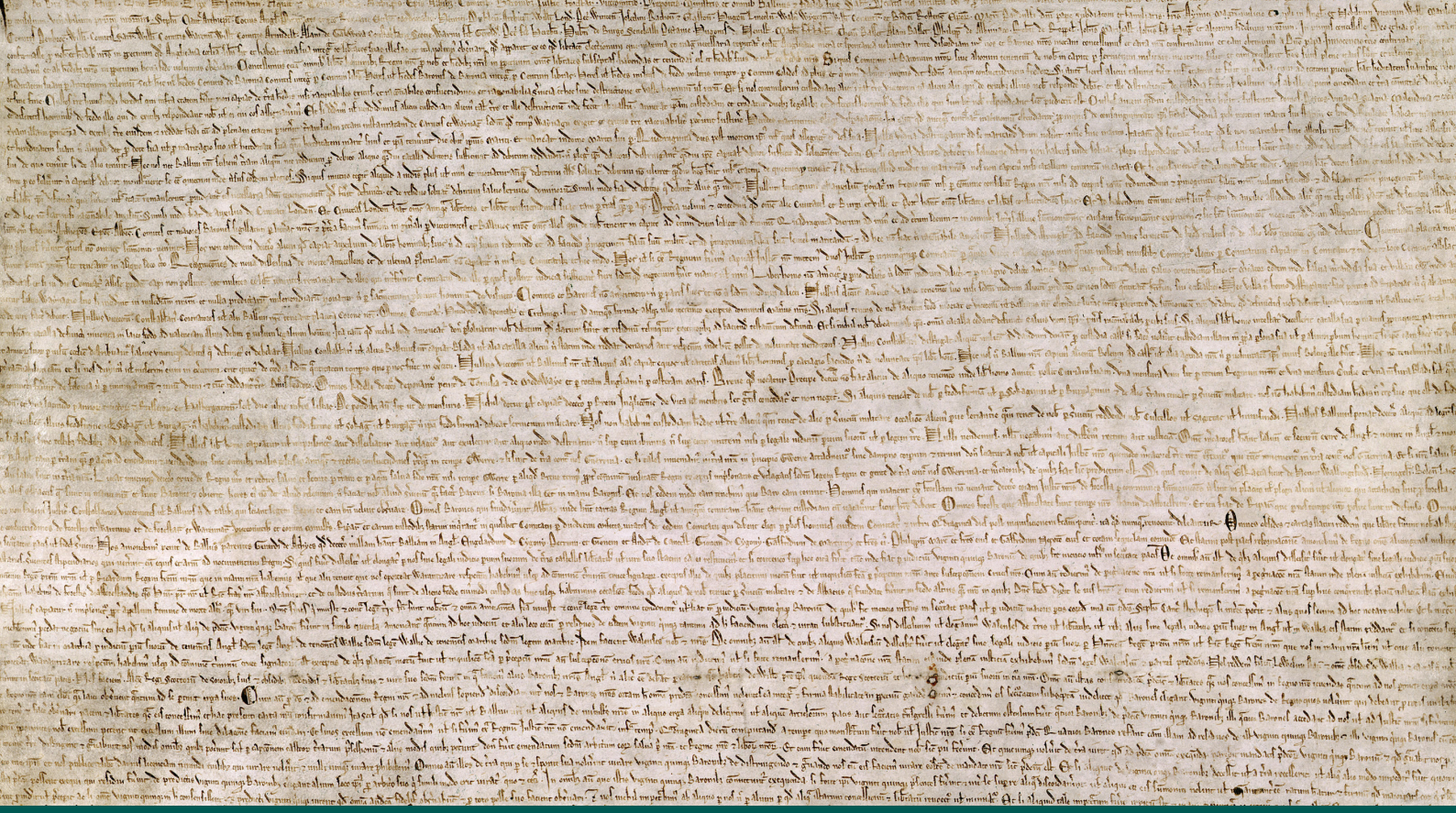

CIS EVENT **Monday, 15 June 2015**

Magna Carta: Celebrating 800 Years of Law and Liberty

THE CENTRE FOR INDEPENDENT STUDIES

James Spigelman and Christian Porter

Introduction

On June 15th, 2015 celebrations were held around the world to mark the 800th anniversary of one of history's most important documents. The Great Charter, witnessed and sealed in the meadows of Runnymede in 1215 by King John and his barons, offered a founding statement on the rights of the individual and is best known by its Latin name, *Magna Carta*, or, less commonly, *Magna Carta* Libertatum; the Great Charter of Liberties.

The Centre for Independent Studies was proud to be part of those celebrations with a special event on that date featuring addresses by ABC Chairman, former Chief Justice and former Lieutenant Governor of NSW, the Hon James Spigelman AC QC, and the Hon Christian Porter MP, Parliamentary Secretary to the Prime Minister and Member for Pearce, representing the Prime Minister on this occasion.

From a turbulent, bloody and double-crossed beginning to the most successful and influential system of liberty we have today, the *Magna Carta* represents the beginnings of modern liberal democracies and the rule of law. For those who deny its importance with the argument that it merely bolstered the rights of privileged barons against an unscrupulous and greedy monarch—with no thought for the rest of society—we offer a counter-argument from good CIS friend and Member of the European Parliament Dan Hannan MEP:

" …It had nothing to say to or for the vast majority of Englishmen, let alone Englishwomen, who remained serfs and vassals. In a literal sense, all this is true; and yet our later freedoms were gestating in the Charter. Establish the rule of law – the idea that the authorities can't make up the rules as they go along – and everything else will eventually follow: free contract, secure property, equality before courts, free elections, free speech, free association, free conscience and, in due course, religious pluralism, a universal franchise and equality between the sexes."

James Spigelman

The document to which King John affixed his seal on this day 800 years ago was intended to be a peace treaty to end a civil war. As such, it failed. Within two months, the King repudiated it and the Pope declared it void. The Civil War reignited. However, John died about a year later and an amended version of the Charter was issued as a coronation *Charter* in the name of his nine year old son, Henry III, on his accession in October 1216.

This re-issue of the *Magna Carta*, was in a long line of promises of good governance, traditionally given by a king on his coronation. Historically, when the monarchy was strong, the Coronation oath was short and expressed in general terms. When the monarchy was weak, a more detailed list of promises was required and given.

The final re-issue by Henry III, in 1225, of the *Magna Carta*—about a third of the 1215 text had gone—and its companion, the *Forest Charter*, to the significance of which I will return, was not just a formal act. Nor was it simply a list of grievances to be remedied. By reason of their scope and detail, together with endorsement by the loyalist barons, the *Charters* constitute the first comprehensive statement in written form, formally promulgated to the whole English population, of the requirements of good governance and of the limits upon the exercise of political power.

I am asked to focus on the significance of the *Magna Carta* for the rule of law and liberty. My answer to the first is forthright. We can legitimately trace the strength of our tradition of the rule of law to this document. With respect to liberty, however, the position is equivocal. The *Charter* has often been deployed in support of the development of liberties, but that deployment was, at best, indirect. The liberties often associated with the *Magna Carta* were a product of the institutions of Parliament and the Courts, over the course of centuries. However, the development of those institutions was significantly influenced by the *Magna Carta.*

At the heart of English constitutional evolution - particularly in the six centuries between the Norman invasion of 1066 and the aftermath of the Dutch invasion of 1688 – was the tension between alternative bases for the legitimacy of the institutions of governance. On the one hand, was a top down model of legitimacy from a sovereign. On the other, was organic legitimacy from the emergence of institutions over the course of centuries.

The *Magna Carta* and the *Forest Charter*, stand in, and propagate, the tradition or organic legitimacy. They draw on, and purport to reassert, the customs of the past. However, the *Charters* also contain promises about future conduct which were reforms.

The *Magna Carta* of 1215 is expressed as a "grant" issued on the advice (in older translations by the "counsel") of eleven named ecclesiastics, sixteen named lay barons and an unknown number of unnamed "faithful subjects". The last inclusion is of significance. The first clause of the *Charter* states expressly that the promises in the subsequent clauses are "liberties" granted to "all of the free men of our realm", for the benefit of themselves and their heirs, binding King John and his heirs "forever".

This was a document for the entire political nation, not just for the secular and clerical magnates. Both the language of "grant" and the identification of the political nation are pregnant with future constitutional development. Was this list of political promises an act of benevolence on the part of the King, or was it an acknowledgement by the King of restraints on sovereignty arising from custom and law? Similarly, who is entitled to offer counsel to the King: the clerical and secular magnates alone, or a wider range of free men? These issues would not be resolved for centuries.

In the great tradition of the common law, the *Magna Carta* is an intensely practical document. There are few statements of high principle. Primarily, it consists of specific promises to restore compliance with proper conduct. One can, however, deduce certain themes which underlie the *Charter*.

First, the acts of the King are not simply personal acts. The King's acts have an official character and, accordingly, are to be exercised in accordance with certain processes.

Secondly, the *Charter* manifests the obligation of the King to consult the political nation on important issues.

Thirdly, the *Charter* restricts the exercise of the King's feudal powers – subsequently transmogrified into prerogative powers – in accordance with traditional limits and conceptions of propriety.

Fourthly, the King cannot act on the basis of mere whim. The King is subject to the law and also subject to custom which was, during that very period, in the process of being hardened into law.

Fifthly, the King had in fact acted contrary to established custom and, to some degree, contrary to the law.

Sixthly, the King must provide a judicial system for the administration of justice and all free men were entitled to due process of law.

The principles inherent in these themes were not established by the *Magna Carta.* However, they were affirmed by its content and context in a concrete form. It is these themes, as developed and applied in changing circumstances over the centuries that gave the *Charter* the significance we commemorate today.

The re-issues and confirmations of the *Charters* were distributed widely throughout the kingdom to sheriffs and cathedrals, with instructions that they be read, sometimes more than once a year, to the whole community. This happened not only in Latin, but French, the language of the upper classes, and there is some evidence that, on occasions, they were read in English. The *Charters* quickly penetrated the consciousness of the political nation.

Whatever their limitations and problems of enforcement, over the course of the first century, the *Magna Carta* and the companion *Forest Charter* acquired a totemic status as a statement of principles of good governance. The King was asked to confirm the *Charters* on numerous occasions, particularly when assent was sought for new taxation. Furthermore, grievances were generally expressed in terms of a failure to obey the *Charters*.

Rule of Law

From the point of view of the rule of law, nothing was more critical than the proposition that the King was subject to the law. This principle was not established by the *Charter,* but there was no previous written affirmation, let alone one publicly read many times throughout the nation. The most

important legal texts of the next two centuries asserted this proposition as fundamental to the polity, albeit without referring to the *Magna Carta*. These are the works known to lawyers as *Bracton* and *Fortescue*.

The *Magna Carta* was invoked when a king asserted that he was above the law. Richard II and the Stuarts did that. Shakespeare made it clear, in his *Richard II,* that this assertion was part of the King's downfall. He did not mention that Henry Bolingbroke invoked the *Magna Carta.* Indeed, Shakespeare could write *King John* without mentioning the *Charter.* Victorian theatre producers introduced a Runnymede scene, as something the bard had overlooked.

It was not a favourite text of either the Tudors or the Stuarts. After all, one of the few times it was invoked under the Tudors was when Thomas More pleaded clause 1, guaranteeing the liberties of the church, before Henry VIII.

It was Sir Edward Coke, in reaction to the Stuarts, who invested the *Magna Carta* with the mythological status which has been handed down to us today. There is, however, nothing mythical about the proposition that the *Magna Carta* reinforced, even if it did not establish, the fundamental principle that the King was subject to the law.

The largest number of clauses of the *Magna Carta*, in all versions, were those directed to preventing the King's abuse of incidents of feudal tenure and social structure to raise revenue. Of the 37 clauses of the 1225 version, which I use. All of these provisions either imposed, or to an unknown extent confirmed, restrictions on the exercise of powers that were a product of the complex of mutual rights and obligations attached to the possession of land – which was "held" from a superior, rather than owned.

There was a wide range of such powers which were open to exploitation by the King. Abuse was inherent in a system that permitted when, and how much, the King could demand in payment for exercising, or not exercising, his feudal rights. I give only a few examples.

When a tenant in chief died the land reverted to the King. There was no formal limit on how long he could exploit the land before allowing an heir to inherit, nor on how much he could charge to permit him to do so. Similarly, with the amount payable to allow a widow or a ward to marry, or the amount payable to avoid the obligation to provide knights, or many other feudal payments that could be requested from time to time, in the discretion of the King.

In addition to these incidents of land holding, there were numerous other discretionary sources of revenue: fines for an offence, even payments for the King's mercy when there was no offence, and the assertion that circumstances had arisen when property could be forfeited. All of those powers were abused by King John. The same was true of the revenue raised from the extent of the royal forest and the restrictions on conduct within it – the subject of the *Forest Charter*. It would be accurate to describe the baronial rebellion against John, in large part, as a "tax revolt".

The provisions of both *Charters* restraining the abuse of the King's powers for the purpose of raising revenue manifest the proposition that the King was subject to the law. This was, and is, at the very core of the rule of law.

The majority of provisions of the *Magna Carta* require the King to cease or modify particular conduct. The most significant field in which the *Charter* requires the King to do more – rather than less - is in the provision of justice.

The *Magna Carta* contains a range of promises directed to preventing abuses and improving the institutions of the rule of law. Their very scope manifest an intention to benefit the whole community:

- Cases involving inter-personal disputes, known as, common pleas, would not follow the ambulatory royal court, but be fixed in a particular place, eventually Westminster (clause 11)2; (2 I refer to the clauses of the permanent 1225 *Charter*, not the 1215 *Charter*.)
- Disputes relating to the ownership of land would be heard in the counties in which the land was located and determined by visiting justices, sitting with local knights (clause 12);
- Royal justices would visit annually to hear the most common causes of action for recovery of land and inheritance (clause 12). (Reduced from quarterly visits in the 1215 version - clause 18);
- Fines for offences would be extracted only for serious offences, would vary with the gravity of the offence and would be imposed only on the oath of law-abiding locals (clause 14);
- Pleas of the crown, i.e. serious criminal charges, would not be heard by sheriffs, constables or coroners, but only by justices (clause 17);
- Constables and bailiffs would not take private property without full payment in cash (clause 19);
- Sheriffs and bailiffs or, for that matter, any other person, would not take horses or carts, save on payment of a prescribed amount, nor any timber, except by consent (clause 21);
- The writ of praecipe would no longer issue to remove to a Royal Court a cause of action, which was properly before the court of a Lord (clause 24);
- No bailiff would put anyone on trial upon his own word, without reliable witnesses (clause 28);
- The frequency of shire courts was regulated, as was the amount sheriffs could exact in the hundred courts from the system known as frankpledge. (clause 35)

Many of these provisions appear to be promises of reform, rather than assertions of past custom. However, writing them down made those which were customary more readily enforceable. These promises constituted a guarantee of the rule of law appropriate for that era. Collectively, they built on the foundation of the existing institutions of justice - particularly as created by Henry II, John's father - and established the basis for their future development. We can recognise this guarantee as our direct legacy.

The best known promise, and the one of abiding significance for the rule of law throughout the 800 years we commemorate today, is clause 29 of the 1225 *Charter*. It is an amalgamation of clauses 39 and 40 of the 1215 *Charter*. It states:

"No free man is to be taken or imprisoned or disseised of his free tenement or of his liberties or free customs, or outlawed or exiled or in any way be ruined, nor will we go or send against him, except by the lawful judgment of his peers or

by the law of the land. To no one will we sell, to no one will we deny or delay right or justice."

Like a number of other clauses, this provision is expressly addressed to all "free men" – not just to barons. It is wrong to say, as is sometimes said, that the *Magna Carta* was only designed to protect the barons.

Nevertheless, it is pertinent to note that only a minority of the population were then "free men". The bulk of the population was not free. Only clause 14 of the 1225 *Charter*, imposing restrictions on amercements, expressly extended to villeins. However, in the fourteenth century, the statutes of Edward III extended the protection in clause 29 to the whole population.

The better, albeit not unanimous view, is that the reference to judgment of "peers" was a reference to social equals, not just to barons. It was soon called in aid by mere knights. Furthermore, notwithstanding many statements to the contrary that can be traced back to Sir Edward Coke, clause 25 was not the basis for the development of the jury system. The event of 1215 that caused the investigating jury – or Grand Jury in modern parlance – to develop into the "petty", later the trial, jury, was the decision of the Lateran Council in Rome that very year to prohibit any priest being involved in trial by ordeal.

The implementation of the companion *Forest Charter* was of equal significance for the rule of law. The Royal Forest was not an area of minor significance. It is estimated that something between one quarter and one third of England was part of the Royal Forest. This "forest" was not simply woodland. It encompassed cultivated areas, even villages, which were privately held.

Forest law trumped common law. The draconian rules of the Forest, governing virtually anything that people could do in this substantial part of the nation - including on their own property - was administered in a tyrannical manner. It constituted an abuse of the royal prerogative in its most absolutist form. This is the background to the story of Robin Hood – still the only fictional character in the *Dictionary of National Biography.*

The *Forest Charter* did result in improvements in the administration of forest law. For example, the death penalty for taking deer was abolished, although deer hunting remained the exclusive preserve of the Kings. The promise to reduce the extent of the Royal Forest was continually delayed, until late in the reign of Edward I. It will no doubt come as a great shock to this audience to hear that in medieval times, political promises were not always kept. It took a century, but these promises were eventually honoured.

From the point of view of the majority of the population – not just free men – the *Forest Charter* was of greater practical significance than the *Magna Carta.* Much of the forest was a commons – including for timber, the essential fuel and building material – available even to peasants. The *Forest Charter* deserves to be more widely remembered for its significant contribution to the rule of law in England.

The combined effect of the restraint on the ability of the King to extract revenue by abuse of feudal incidents, and by the enforcement of the *Forest Charter*, resulted in a major curtailment of royal revenue. The development of Parliament, out of the feudal assemblies which were called to agree to periodic royal taxation, was a direct result of this curtailment. Whenever assent was given by the political nation to new taxation in the first century after the *Charter*, Henry III and Edward I – John's son and grandson – confirmed the two *Charters* as part of an express exchange for a new tax.

Liberties

The *Magna Carta* is often referred to as a *Charter of Liberties*. The Latin word usually translated as "Liberties" appears on a number of occasions in the *Charter*. However, the word "Liberties" was not then understood in the sense that we use the word "rights". It was closest to what we would call "privileges and immunities". Nevertheless, these medieval "liberties" constituted a sphere of autonomous conduct, free from constraint by government and, in that sense, constituted "freedoms", close to contemporary usage.

The *Charters* contained a list of restraints on executive power, addressing the abuses of the day. What came down over the centuries, was the general idea that the powers of the sovereign were restricted. It is anachronistic to characterise these restrictions as a recognition of the "rights" of subjects.

However, over the course of centuries, these "liberties" have transmogrified into "rights".

As the Lancastrian warrior turned Chief Justice, Sir John Fortescue, put it in the late fifteenth century: in France the King was "regal", but in England, the King was both "regal" and "political".

It is possible to eke out of particular provisions of the *Charter* an underlying principle, which could be stated at a higher level of generality than the time bound grievances expressly addressed. For example, protection of the right to property can be deduced from the provisions which restricted the King's revenue generating powers. Many clauses impose controls on such powers, usually in general terms, but sometimes in detail – with amounts stipulated, circumstances of imposition excluded or a standard of reasonableness, or of custom, expressed.

Further, the principle of no expropriation without compensation can be inferred from specific restraints on sheriffs and bailiffs from taking property with compensation and, in the case of horse carts, stipulating a particular rate. The companion *Forest Charter*, similarly, removed some restrictions on what people could do on their own land.

Other traditional liberties are more difficult to identify in the *Charter*. One must not overlook those parts of the *Magna Carta* that are inconsistent with liberty. For example, one provision expressly forbids a woman to give evidence in any case against a person for murder, unless the deceased happens to be her husband when, presumably, even a woman could be believed.

The 1215 *Charter* prohibited the payment of interest on debts owed to Jews in certain circumstances. This clause was not repeated in the 1225 *Charter*, but that did nothing about existing discrimination, derived from the combined effect of usury restrictions on Christians lending money and the restrictions on Jews engaging in other economic activity, e.g. the prohibition on any Jew owning land.

Jews were protected by the King as a source of feudal revenue. For example, when a Jewish lender died, the King expropriated his rights as creditor. Indeed, when Edward I, to popular acclaim, ordered the expulsion of all Jews, he

was expressly compensated for his loss of revenue by an additional tax.

It is also necessary to remember the restrictions on liberty about which the *Charter* offered no amelioration. A substantial proportion of the population was held in a condition of slavery and remained so. People were still executed for heresy for some three centuries and the executive continued to detain subjects at will and to deploy torture in interrogations for four centuries. It was also four centuries before any intrusion was made into the restrictions on freedom of religion and freedom of expression, and it was well into the 19th century before Roman Catholics and Jews had equal civil rights. Homosexuals had to wait for another century. In the actual control of the exercise of executive power, the courts were constrained until the *Act of Settlement*, 1701 took away the power of the King to remove a judge from office at will – as James I removed Coke as Chief Justice.

With respect to human rights, the *Magna Carta* was not much of a start. But by entrenching the rule of law and promoting the expansion of royal courts, it created the institutional basis for the future expansion of personal liberties by Parliament and the Courts.

Although the constitutional impact of the *Magna Carta* was greatest in its first century and in the 17th century, it was of more consistent significance for the legal system. The *Charters* were referred to in legal proceedings on a minimum of fifty eight occasions in their first century. Furthermore, in an era when the quantum of litigation increased dramatically, the *Magna Carta* became a basic tool of the legal profession. It was no doubt, in large measure, its concreteness as a text that facilitated reference to its provisions for purposes of litigation. The *Charters* acquired the status of a statute and, at the end of the century, the *Magna Carta* became the first statute in the official Roll of Statutes.

A good representation of the use of the *Charter* by lawyers is found in the 1330 printed compilation of 20 statutes, commencing with the *Magna Carta* and the *Forest Charter,* presently on display at the State Library of New South Wales. This antiquarian volume, in its original binding, was probably the property of a practising lawyer, for use when on circuit throughout England and Wales. This is a physical embodiment of the rule of law at work in the technology of the era.

The version in the statute book was the 1297 confirmation by Edward I of the 1225 *Magna Carta.* The copy in our Parliament House is one of only four surviving copies of that 1297 confirmation. Because that is the version which acquired the formal status of a statute, it has been of greater practical importance than the 1215 *Charter*.

It is appropriate to note what a good investment the Menzies government made when it bought our copy for £12,500 in 1951. In 2007, the only copy of the 1297 confirmation in private hands sold at auction for US$21.3 million.

Abiding Relevance

A classic example of the significance of the *Magna Carta* was its deployment in the conflict between the Stuarts and Parliament arising from the historic *Five Knights* case, culminating in the Petition of Right of 1628. After failing to obtain additional taxation from his first Parliament in 1626, Charles I dissolved Parliament and proceeded to raise funds without Parliamentary approval by way of a forced loan.

A number of subjects refused to advance the funds demanded by this executive measure and were imprisoned without charge by the Privy Council, acting as a prerogative court. They were refused bail on the basis of an assertion on the part of the prosecution that the King had an absolute right, as a matter of state necessity, to keep anyone in prison without giving reasons. Some of the accused wanted to force the prosecution to state that the only reason was their refusal to pay the loan.

Almost without precedent, five of them applied to a common law court by *habeas corpus* to challenge the order of the Privy Council. In an interlocutory hearing for release on *habeas corpus*, a weak-kneed court appeared to give credence to the power to imprison without stated cause. The case turned on this crucial issue of personal liberty and on the principle of legality.

The prosecution wanted to avoid an express statement that imprisonment was based on a demand for money that had no lawful basis. Submissions for the knights expressly invoked the *Magna Carta*, namely, the general words of clause 29 preventing imprisonment other than in accordance with the law. The great lawyer, John Selden, submitted that "the law of the land" in clause 29 must mean due process as understood by the common law.

In response to the failure of the Court to act, the House of Commons drafted what became the Petition of Right of 1628. Drawing on the *Magna Carta*, together with its elaboration in statutes of Edward III, the House demanded that the King acknowledge that no person could be imprisoned without cause shown.

In the course of the interchange between the House of Commons and the House of Lords, the latter appeared to support the King's position by inserting a qualification in the draft: adding the words "saving the Kings sovereign power". In his vehement reply, Sir Edward Coke, declaimed: "Sovereign power is no Parliamentary word… in my opinion it weakens the *Magna Carta*… *Magna Carta* is such a fellow, that he will have no sovereign". As Coke often had to do, he offered a weak explanation of why he had not always applied these principles when he was a judge, let alone when he was the Crown's chief prosecutor as Attorney General.

After much prevarication, the King accepted the Petition and the ability of the executive to deprive citizens of liberty without cause, henceforth, became illegal. Acceptance of the Petition, which encompassed some other rights, was celebrated throughout the nation, with bonfires and the like. It was a constitutional moment, although there was still much work for the judiciary to do in developing the writ of *habeas corpus*.

This is only one, albeit dramatic, example of how the general words and underlying themes of the *Magna Carta* were given content over the course of the centuries. The *Charter* became a "myth", in the sense that it has been invested with a scope and with purposes that none of its progenitors could ever have envisaged. It was a myth of great historical significance.

As one of the greatest common law judges of our time, the late Tom Bingham, the former Senior Law Lord, put it:

"The significance of *Magna Carta* lay not only in what it actually said but, perhaps to an even greater extent, in what later generations claimed and believed it had said. Sometimes the myth is more important than the actuality".

The principle of the rule of law and of due process inherent in clause 29 of the *Magna Carta* was developed by incremental steps. What we came to know as civil liberties or, in earlier centuries as the "rights of Englishmen", were the practical manifestations of experience of the law over the centuries as manifest in judicial decisions and in legislation.

There is virtually no aspect of the trial process that does not manifest these considerations. Equally important for the protection of liberty are the principles of statutory interpretation. There is a strong presumption that Parliament does not intend to abrogate basic rights, freedoms or immunities. A statute will only be found to do so if the language is unambiguous. A few years ago I compiled a list of specific circumstances where this presumption has been applied. In my opinion, this list constitutes a "Common Law Bill of Rights".

With some support from Parliament these protections emerged from a process of induction, based on experience, rather than deduction from an abstract level of language. This was judicial creativity, before it came to be derided as "activism". This characteristic English approach to the development of the law was frequently in tension with, and often in competition with, an approach based on natural law. However many lawyers, including Coke and Blackstone, invoked both.

The 17th century revival of the *Magna Carta*, led by Coke, deployed it as a text which reflected what he asserted was an ancient constitutionalism of custom extant in England from time immemorial. This, like most of Coke's antiquarianism – for example, his espousal of the myth that King Arthur's ancestors came from Troy – was and is nonsense. Nevertheless, the *Magna Carta* stands in the organic tradition of the common law. The contemporary human rights movement is based on the alternative jurisprudential tradition of natural law.

The utility of the *Charter* is not only historical. The proclivity of the executive branch to manifest intolerance of anything that frustrates its will was never limited to the Stuarts – either before or since. An over-weening confidence in the purity of their motives appears to be an occupational hazard of executive power.

Indeed, Oliver Cromwell rejected constraints on his authority, dismissing the *Magna Carta* contemptuously as "*Magna Farta*". No doubt even stronger language was used in the White House about litigation over Guantanamo Bay. Strong language on such issues it appears is not unknown in the deliberations or our own Cabinet!

This will not, regrettably, be the last time that it is appropriate to celebrate the anniversary of the *Magna Carta*.

Hon James Spigelman AC QC, ABC Chairman, former Chief Justice and former Lieutenant Governor of NSW.

Christian Porter

United States Supreme Court Justice Scalia said of the *Magna Carta* "it is with us every day".[1] In its 800th Anniversary Year it is hard to deny this observation. Indeed, a recent New Yorker article detailed an entire industry that has developed in the lead up to the 800th anniversary.[2] *Magna Carta* now has a Twitter username[3] and exhibitions proliferate; "[t]he Library of Congress sells a *Magna Carta* mug; the National Archives stocks a *Magna Carta* kids' book".[4] On my own recent trip to the British Library, the gift shop was selling *Magna Carta* T-shirts and tea towels, inkwells, quills, and even King John pillows (as a member of the executive government, I can attest that the pillow does not aid restful sleep). Jay Z, the world's biggest rap singer, has entitled his latest album '*Magna Carta* Holy Grail'. Tours of Runnymede are now are roaring trade.

Whether true or merely apocryphilic anecdote, a story does the rounds:

A guide at a recent tour who asked for questions and an American tourist asked when the document was signed. The guide said 12.15, upon which the wife of the tourist turned to him and said, "*see, I told you we shouldn't have stopped for lunch. We just missed it*".

In the actual year 1215, the practical purpose of *Magna Carta* was that it should operate as a political settlement or, as some have described, as a peace treaty by stipulating essential rules for the future conduct of relations between the King and his barons. In this important sense, the document sought to bind the future to the past. Given this essential feature it is perhaps not unsurprising that in its 800th anniversary many questions have been posed along the lines of, 'how much the document still actually does, or should, bind the present?'.

A recent essay by Justin Champion quoted John Gray, the liberal philosopher whom I was fortunate enough to have had as a lecturer at the London School of Economics. In Gray's estimate, the history of ideas obeys only one law, that of irony: "ideas have consequences, but rarely those their authors expect, and never only those. Quite often they are the opposite".[5]

The essentially harmless commercialisation of the *Magna Carta* is one intriguing example of how the past has affected the present 800 years on in a way none of the originators would have conceived. Imagine what King John and his Barons would make of a child in 2015, sucking on an '*ORIGINAL 1215 Magna Carta British Library Baby Pacifier*'; a plastic dummy with all thirty five hundred words of Latin text.

This evening I simply wanted to offer an observation about this notion that the *Magna Carta* is with us every day, by a consideration of both the trivial and the more foundational ways in which this is true.

Clearly, the Charter is around us every day in a trivial sense through its relentless appropriation for modern causes. The tea towels, the kids' toys, and the dummies are one form of this appropriation; all for commercial purposes. To anticipate a conclusion to this speech I might state here that Jay Z's album, *Magna Carta*, interestingly, does not fall neatly into this crass commercial appropriation category, but this is something I will return to shortly.

In any event, in my observation, this commercialisation is perhaps largely benign. However, there is another 'academic' way in which the *Magna Carta* is appropriated, which is worthy of a little more scrutiny.

There is a vast continuum of political ideas in whose service the *Magna Carta* has been appropriated. It seems to start at the very broadest level; whereby the *Magna Carta* has been appropriated to advocate on a society-wide scale for whole ideologies and for entire classes of peoples. At this grand level, the coarsest of summary might be to note that the Charter has been adopted by both conservatives and radicals. The petitions provision at 61 has been argued as a basis for legitimising resistance to the status quo and encouraging protest to authority, for groups as disparate as the American Tea Party movement to the anarchists of the Occupy London movement.

Alternatively, conservatives have tended to perceive the document as support for the maintenance of stable known structures and procedures of liberal democracy; as supporting an institutional status quo. This divergent ideological use is perhaps not unsurprising because, in some sense at least, for the barons, their support for the Charter was both dissent against the unskilled and calamitous exercise authority of King John, and so was in this sense radical protestation. But also, it was in part an attempt to put things back to where they had been, or at least where the barons perceived them to have been. A place where previous coronation charters had established what were viewed as orderly process-driven relations between the Monarch and the Baronetcy.

This type of grand ideological appropriation is of genuine academic interest, at least in a historical sense, but also in understanding evolutions in the history of ideas. However, beneath the ideological appropriation has been the sectorial appropriation leading right down to the trend of arguing the Charter as the basis for instituting quite specific changes in niche areas of public policy. For present purposes I will simply call this 'advocacy appropriation'.

As the historian Paul Johnson noted, "[t]o appeal to *Magna Carta* became the one, great, unanswerable argument which any and every section of society could employ".[6] And so, as Johnson goes on to describe, Archbishops have flourished it against the King in the defence of the rights of the Church; Edward I flourished it against the Pope in defence of the rights of the State; Parliament cited it against the Crown and the Crown against Parliament; unlettered peasants used it against their masters, masters against townsfolk, townsfolk against rural lords'.[7]

The modern habit of arguing that the *Magna Carta* supports the desirability of quite specific changes in niche areas of public policy has gone into a sort of hyper drive in the document's 800th anniversary. One recent example of advocacy appropriation to support a specific and

1 Court Justice Antonin Scalia opened the 2014 National Lawyers Convention on November 13 at the Mayflower Hotel in Washington, DC. Justice Scalia with a discussion of the importance of *Magna Carta*.
2 Jill Lepore, 'The Rule of History: *Magna Carta*, the Bill of Rights, and the hold of time', *The New Yorker* (New York City), 20 April 2015.
3 @MagnaCarta800th.
4 Jill Lepore, 'The Rule of History: *Magna Carta*, the Bill of Rights, and the hold of time', *The New Yorker* (New York City), 20 April 2015.
5 John Gray, 'The Original Modernizers', *Gray's Anatomy* (2009), 263-274, 263.
6 Paul Johnson, *The Offshore Islanders: A History of the English People* (Phoenix, 1st ed, 1995) 122.
7 Ibid.

niche public policy outcome has been with respect to judicial appointment. In what could be fairly described as a call for radical reform of common law judiciaries, a Member of the English Court of Appeal, Lady Justice Arden, stated a strong preference for a judiciary, "which is more diverse in terms of gender, ethnicity and sexual orientation".[8]

The link between the desired policy outcome and the *Magna Carta* was the direct title of the paper itself; "*Magna Carta and the Judges – Realising the Vision*". Selection of judges, it was argued, should be informed by what are described as the 'traditions of the *Magna Carta*'; to directly address under-representations in the modern judiciary. Section 45, stating that justices should be appointed, "that know the law of the realm and are minded to keep it well" was particularly said to require change to be consistent with the vision of the *Magna Carta*. And the change is, in turn, expressed as the need, "to keep the qualities required of judges under review and up to date"[9] with the new necessary qualities described as "the need for social awareness and the need for knowledge of the case law of courts outside the UK".[10]

This is part of an important debate about limits to the role of judges which was highlighted with brilliance by Lord Sumption in his essay 'The Limits of the Law'.[11] Lord Sumption recognises both an inevitably that judges, to some extent, necessarily make law in performing their interpretative duty. But equally that this process should be rationally limited to avoid what he described as a democratic deficit.[12] He outlined a process where the ever increasing creativity of some courts in the interpretation of written instruments has had the effect of seeing a greater tendency for judicial decisions on what are fundamentally, or at least have traditionally been, economic, social or political questions.[13]

Lord Sumption characterises the Strasburg Court as having become "the international flag bearer for judge made fundamental law extending well beyond the text which it is charged with applying".[14] He takes the view that political or economic questions are not changed into legal questions by their being decided by courts and that something is lost when they are moved from the political to the judicial realm.

Those that ascribe to the view alternative to Lord Sumption's; which prefer that courts, through more activist interpretative methods, have a greater role in determining the best outcome in political, economic or social problems, naturally will also argue for selection of will judges with more 'social awareness'.

Maybe more 'socially aware' judges should increasingly treat written parliamentary instruments as 'living trees' and should make more socially expansive decisions stretching the traditional meanings of the words of the particular living tree they are applying. I must say I doubt the wisdom of this point of view, but it is an important and meaningful debate, and there are persuasive points of view on both sides.

If the argument that more socially aware judges making broader social decisions is worth serious debate, I must confess that the idea that the *Magna Carta* somehow suggest, supports or should inspire one particular outcome is a considerably more trivial notion. At worst, it has a slightly comic quality, reminiscent of mediaeval monks pouring over obscure scripture trying to discern the truth of transubstantiation, and so solve by creative interpretation of age old scriptures whether the sacrament is actually Christ's blood or merely metaphor.

And I am not alone in perceiving a kind of near meaningless interpretive stretch in this type of linking of specific provisions of the *Magna Carta* to the specifics of presently desired niche policy outcomes. An excellent recent essay by historian Nicholas Vincent notes the problem with this interpretative stretch of broad historical words to support specific modern outcomes, is that it cuts both ways. He described that:

"Lady Justice Arden's call, meanwhile, for a judiciary no longer drawn from the 'establishment' but from the liberal majority, seems to me directly to echo demands in the seventeenth century, that judges all be good Protestants, or in the eighteenth, that judges not only hate the Pope but serve the King. In all such instances, what is being demanded, surreptitiously or openly, is discrimination by the executive intended to interfere with the independence of the judiciary".[15]

Perhaps the real difficulty with all the shallow commercial and intellectual appropriation is that it tends to detract attention from the simpler, more foundational, importance of the *Magna Carta* and so obscures what useful modern lessons might be drawn from it. And as a means of illustrating the foundational point it is helpful to return to the rap star Jay Z. His is an appropriation that looks more trivial than it actually is.

Jay Z announced the title and release date of his 12th solo album—*Magna Carta* / Holy Grail—during Game 5 of the NBA Finals and, as part of the promotion deal, Samsung agreed to buy 1 million copies of the album that fans would receive for free via the *Magna Carta* app.

A twittersphere debate emerged as to why the album and app were called '*Magna Carta*'. The early preponderance of opinion was that in an industry of rampant egotism this was simply the next step in the ego wars; that Jay Z was saying he was bigger than the two biggest things in history. However, this is a misunderstanding. The music itself reveals a deep interest in the rules governing the relationship between state and citizen.

Indeed, an American law lecturer has designed an entire lecture series around the second verse of his song '99 Problems'. I am not going to rap but it goes:

"The year is '94 and in my trunk is raw …

And I heard 'Son do you know what I'm stopping you for?'

'Cause I'm young and I'm black and my hat's real low?

Do I look like a mind reader sir, I don't know

Am I under arrest or should I guess some mo?"

8 The Right Honorable Lady Justice Arden DBE, '*Magna Carta* and the Judges - Realising the Vision' page 16, available at: https://www.royalholloway.ac.uk/aboutus/documents/pdf/magnacarta/magnacarta8711.pdf.
9 Ibid, page 26.
Ibid.
11 Lord Sumption 'The Limits of Law' available at https://www.supremecourt.uk/docs/speech-131120.pdf.
12 Ibid, page 9.
13 Ibid, pages 7-8.
14 Ibid, page 7.
15 Nicholas Vincent, 'Comment on Justin Champion' available at: http://oll.libertyfund.org/pages/libertymatters-mc.

I understand that 'my trunk is raw' means there were drugs in the trunk. The New Jersey State Police at the time had an active 'drug courier profiling' program. Here was a sharp criticism upon the validity of that profiling as a basis for a vehicular stop and its legitimacy as a contributing factor to probable cause (or in our jurisdiction, the reasonable suspicion) required to justify a subsequent search.

The musical digression demonstrates that this is a man with an acute interest in the interface between state and citizen. Rather than ego mania, the better explanation for the name of the album is provided by this blogging response:

"It means: To rewrite the rules.

Label's [sic] have forever taken liberties over artists and their dealings with releasing works. The Magna Carta (as you hopefully know) was a rewrite of the rules. Jay took this idea, and implemented it within his entire roster of artists, hence the internet release, the Samsung hype etc." [16]

So, Jay Z saw his album as rewriting the commercial rules between labour and capital in the music industry.

For all the advocacy appropriations pretending to enlighten us about the importance of the document which are mostly just pushing a cause, a blog about a rap artist, in my observation, cuts right to the heart of what is fundamental about the *Magna Carta* and what underpins the profound source of its ability to reach 800 years beyond its own grave to be all around us today.

Magna Carta was not the first but, likely, it is the most historically important re-writing of the rules.

Previous charters had been designed to deal with the question of what to do when, in practice, a King was inadequate or downright hopeless, which in a shockingly violent time was usually revealed by military ineptitude – as was the case with King John. Two hundred years earlier King Ethelred was only permitted to return to England on the condition that he signed a document promising substantial reforms in his methods of governance.

So, while not the first contract, its historical importance likely turns on the fact that prior to the *Magna Carta*, a theory of sovereign infallibility likely dominated the substantive practice of politics.

In a pre *Magna Carta* essay Henry II's Treasurer wrote:

"Though abundant riches may often come to Kings, not by some well attested rights … [but] even by arbitrary decisions made at their pleasure, yet their deeds must not be discussed or condemned by their inferiors".[17]

Arguably, *Magna Carta* is the pivot point at which the contract theory of the state ends the dominance of this type of thinking and becomes a replacement paradigm for society's conception of its relationship with sovereign power. The process and outcome of the events in Runnymede uncannily mirror three central elements of what political philosophers now would call the contract theory of the state:

the relationship between citizen and state should be conducted according to known and knowable rules to which everyone is subject;

the rules are a form of fundamental bargain or contract between the citizens and the state to whom citizens cede the monopoly power of compulsion (which was in the first instance their own); and

the rules can and are to be rewritten from time to time and from issue to issue, with the critical proviso that rewriting must only be the product of agreement in what becomes a never ending process of negotiation, compromise and bargain.

The most important point is not whether the outcome of negotiation produced a sound blue print for the good governance of the England in 1215. Least of all is the point whether the negotiation produced words that can now provide guidance or clues or inspiration for how we solve specific modern controversies around the evolving relationship between state and citizen in 2015. The power of the *Magna Carta* to effect and inform the modern is not in the result of the 1215 negotiation, but in the fact of the negotiation itself.

If the Charter's fundamental importance is in constituting a pivot point in the history of ideas, this means there is perhaps more to be learned by consideration of how the document came to be than by what was in it. And so, a few observations about the negotiation process.

The actual 5 days at Runnymede are rather unclear. In fact, the one historical point that is perhaps now clear is how unclear it must have been to the many participants as to what precisely was going on. There were:

barons for and against the King - each with intermediaries lay and clerical;

landowners for and against the King;

Church parties for and against the King; and

the Pope, represented by his legate, sought to influence all those present - both those for and against.

Things of great importance to the parties went in, things of equal importance got left out.

The whole point for the Northern barons (after John's disastrous continental forays) was a 'limitation on overseas service clause'.[18] Conceded in a preliminary draft, this was left out of the final document and many barons left in disgust before the document was even signed.

Perhaps the overwhelming identifying feature of the process that led to the *Magna Carta* was that it was a colossal mess.

In 2013 a new word entered the Oxford English Dictionary. This word gained popularity in political circles to describe the general process of modern government in formulating policy. The word was *'Omnishambles'*. It took 800 years to invent the perfect word to describe what happens in the democratic negotiation processes designed to produce workable compromise in public policy outcomes - but this is it.

To give you some modern perspective – likely, the process at Runnymede was so messy it may have even made Kevin Rudd's 2020 summit look well organised. Believe me, I experienced two days of the Wayne Swan tax summit - two days of my life I will never get back.

16 Available at: https://answers.yahoo.com/question/index?qid=20130702070656AA5Xiim.

17 Quoted in Paul Johnson, *The Offshore Islanders: A History of the English People* (Phoenix, 1st ed, 1995) page 118.

18 Ibid, page 121.

The historian Paul Johnson argues that so eclectic and failed a compromise was the document itself that had John not got in first to repudiate it, likely the barons would have denounced it in their turn. He described the result as:

"a spatchcocked compromise which did not represent the attitudes of any of the parties – or rather represented, bits of all of them - and was therefore unworkable as apolitical settlement.. The story of the *Magna Carta*, in fact, is not of a negotiation which succeeded but one that failed".[19]

We know the King repudiates the document a month after Runnymede when he realises the Barons mean to enforce the 'security clause'.

As an aside, in modern politics we hear a lot of claims of sovereign risk. King John's repudiation of the fundamental contract of governance negotiated only a month before always reminds me of Paul Hogan's great line, "that's not a knife, this is a knife". I like to think of King John lying his head on his King John pillow thinking before repudiation, "that's not sovereign risk, this is sovereign risk".

So, *Magna Carta* may have been a negotiation that failed to provide a governance blueprint for immediate use in 1215. But, the negotiation has been an amazing success in providing a blueprint for how to create governance blueprints.

If Runnymede was a bit of an omnishambles, the mess is nevertheless marked by two serious virtues that made it historically significant. First, (unlike the Rudd 2020 summit) it actually produces a result; something tangible, readable and knowable – if not always clear. And second, it produces a result capable of evolution by further negotiation; the rules get rewritten and reissued multiple times by the next generation of sovereign by variants on the same messy process.

So finally and by way of conclusion, there is another feature of the negotiation process that has implications for modern governance. As well as being shambolic, the process produces a document which in many respects is quite vague – mostly about the important stuff.

If we were still bartering for haberject, then the *Magna Carta*'s feudal fastidiousness in standardising measures for this hemp-like substance would see us knowing exactly what to do in 2015 in the haberject market. But if we are looking to the *Magna Carta* for guidance as to the appropriateness of offender profiling as a basis for vehicular searches or the optimal role for judges and the optimal method for selecting the judiciary, then the charter is much less clear.

Recourse to phrases such as that imprisonment will require "lawful judgment of his Peers or by the Law of the land",[20] or that Justices should be appointed who "know the law of the realm and are minded to keep it",[21] in truth, are not terribly helpful in determining what specific rules are agreeably consistent with the concepts of fair conduct in the justice system in 2015.

The messy process of contractual governance leads to government practices and governance documents that tend to be better at getting consensus around specifics for weights and measures than consensus around specifics for really important issues.

Contractual government seems to be like a good academic: finding it much easier to get more and more specific about less and less.

But this is so only because modern governance reflects the features of people governed. It reflects that the contract of governance is a messy compromise required to build a political consensus between different interests with different views – where everyone ends up dissatisfied to some extent with the end result.

A great lesson, as true today as it was 800 years ago, is that a primary feature of contractual government is that we can all agree with a fairly high level of consensus on the little things like weights and measures but equally rational people will often fail to agree with detail and precision on big things. So, foundational documentary agreement occurs at the level of greatest generality and the details of general principle are the subject of ongoing negotiations and determinations.

Issues like judicial roles and selection and offender profiling are contestable and the way in which we resolve these contested issues will not likely be aided much, if at all, by recourse to the words of the *Magna Carta*. But they can be resolved by recourse to and an understanding of the processes that underpinned the *Magna Carta*.

A government could certainly choose now to stand for policies that are at least arguably clear in the words of the *Magna Carta*:

special legal protection for the Catholic Church and the aristocracy;

tax breaks for the wealthiest;

freeing capital cities from regulatory oversight;

total freedom of elite immigration; and

placing the burden of infrastructure maintenance on local communities instead of government.

However, such a party would be taking what Sir Humphrey would describe as a courageous decision.

But, if as John Gray argues – ideas have consequences that rarely reflect what their authors expect – perhaps one exception is in the *Magna Carta*. This is because, in one sense, its legacy is exactly what was expected by the Barons in 1215 - that contentious issues can be resolved - but only after the thrashing out, the debating, the subjecting to argument and re-litigation and revision, and even then imperfectly, in the messy real world process of politics.

- Ends -

19 Paul Johnson, *The Offshore Islanders: A History of the English People* (Phoenix, 1st ed, 1995) page 121.

20 *Magna Carta* http://www.bl.uk/magna-carta/articles/magna-carta-english-translation.

21 Ibid.

The Hon Christian Porter MP, Parliamentary Secretary to the Prime Minister and Member for Pearce.