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WHY MAGNA CARTA STILL MATTERS

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1. In the context of human civilisation, 800 years is a long time. The 1215 world of kings and barons negotiating the terms of settlement of a brewing civil war in the meadow at Runnymede, near Windsor like the plays of Shakespeare 400 years later, strikes many chords, some discordant, some harmonious, with today's world.

2. Our social structure, language, apparel and physical environments are very different, yet, like Shakespeare's writings, the central themes are timeless. King John needed revenue to finance his proposed new crusade. The barons felt they had been overtaxed and that the king had governed in a manner that had whittled away their ancient rights and privileges. That scenario resonates today – we complain that we, too, are overtaxed and our rights are being taken away, not by monarchs, but by governments nonetheless. So, is there something to celebrate in this year of the 800th anniversary of *Magna Carta* or is it a case, to use modern expression of the evolved French language of the time of "plus ça change, plus c′est la même chose"?

3. Before attempting to answer that, it might help to give some perspective if I repeat a discussion that I had in Beijing last year with a judge of the Supreme People's Court of the People's Republic of China. We were talking about President Xi Jinping's determination to implement the rule of law in China. My Western-educated colleague told me that the President's vision for the rule of law was not what we would understand it to be. He said that in the last 20-30 years, well over 300 million people from rural areas had migrated to Chinese cities but they did not understand or obey the laws that governed life in those cities. Many of them did not obey the road rules,

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spat in the street, did not consider the impact of their behaviours on others around them and did not do what local authorities needed done to keep society orderly.

4. President Xi, he said, wanted these people to understand that the rule of law required that they obey the law, to benefit everyone. My judicial friend then made the telling point that after the United States had fought its Civil War in the 1860s to abolish slavery, it amended its Constitution to provide that all persons were entitled to the equal protection of the laws. But, in his words, it had taken another 90 years for the Supreme Court of the United States to decide in *Brown v Board of Education*[1] that black children were legally entitled to travel with and go to the same schools as white children. He concluded: "So you in the West cannot expect us to do everything in one generation."

The origins of *Magna Carta*

5. Indeed, what *Magna Carta* has symbolised for Western democracy, since no later than the time of its greatest propagandist, Sir Edward Coke, is a far cry from what history has revealed about its immediate effect in 1215. Pope Innocent III issued a papal bull, as King John always intended would happen, annulling *Magna Carta* less than 10 weeks after it had been granted on 15 June 1215. But, to appropriate a phrase of Winston Churchill, that was not the beginning of the end, but the end of the beginning. The whole story is beautifully told by the former Lord Chief Justice of England and Wales, Lord Igor Judge and Anthony Arlidge QC in their book published last year, *Magna Carta Uncovered*[2].

6. In essence, much, but not all of the 1215 Charter was used as the foundation for three subsequent charters issued in the nine years after King John's unlamented death from dysentery in October 1216. At that time, contrary to what we were taught at school, England had been invaded by Prince Louis of France, an ally of the rebellious barons, and together they controlled much of England. The King of Scotland also supported the rebels.

7. William Marshal, Earl of Pembroke, was appointed regent on the ascension of John's infant son, Henry III. In late November 1216, Marshal and the papal legate immediately reissued, in the new King's name, an amended *Magna Carta* in order to

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1 347 US 483 (1954)

2 (2014) Hart Publishing, Oxford and Portland

garner some support from the opposing forces. In May 1217, Marshal, who was then about 70 years old, led the royal forces against the rebels at the Battle of Lincoln. He had a decisive victory. Next, Louis abandoned his seize of Dover.

8. On 24 August 1217, the royal forces won a sea battle off Sandwich defeating a French fleet bringing reinforcements for Louis. Then, on 29 September 1217, the Treaty of Lambeth was signed and Louis abandoned his claim to the English Crown. Henry III, through Marshal as his regent, was then in full control of England, and was no longer facing civil war waged against him by the barons supported by Louis.

9. In early November 1217, after a meeting of the King's or Privy Council, two charters, that incorporated much of what had been in the 1215 and 1216 cognate charters, were issued under the name of the infant king but sealed by both Marshal and the papal legate. These were the *Charter of the Forests*, and a longer document that only after 1217 came to be called *Magna Carta*, as Coke put it "not in respect of the quantity, but of the weight"[3].

10. The historical significance of the 1217 charters is that, unlike those of the two previous years, these were issued without the king, or his regent, being under duress or threat. They, therefore, gave the King's promises and concessions freely. This occasion, and not that at Runnymede, perhaps, is the real genesis of our understanding of the rule of law. And then, when Henry III came of age in February 1225 he, as King in his own right under his seal, reissued *Magna Carta* "in perpetuity", specifically in exchange for an agreement to a tax on moveables in order to fund his campaign to defend Gascony.

11. How familiar to us, eight centuries later, is the concept that taxation is not a one way street, but comes at the price of concessions by government or, in modern concepts, Parliament?

12. After 1225, monarchs regularly confirmed *Magna Carta*. However, it was Edward I's confirmation in 1297, in exchange for another tax on moveables, that resulted in *Magna Carta* being entered on England's statute roll or book[4].

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3 8 Co Rep I at ix in his Prefact to that volume

4 The Report of the Law Reform Commission on the Application of Imperial Acts (**LRC 4**) of November 1967, that led to the enactment of the *Imperial Acts Application Act 1969* (NSW), at p 61 attributed the 1225 version as being "the first statute on the statute roll".

13. The most influential provisions of the 1215 charter, c 39 and 40, have survived as c 29 of the 1225 charter and its reissues. Only c 29 survives in the substantive statute law of four Australian State and Territory jurisdictions, and as the received law in the other three States and Territory[5]. As translated from the original Latin, c 29 reads[6]:

> "NO free man shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise 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."[7]

14. I will discuss c 29 in more detail later. There were some other significant provisions that have framed modern constitutional perspectives. *First*, the 1225 Charter was headed "*The Great Charter of the Liberties of England*", the original 1215 version being headed "*Carta Libertatum*" or "*The Charter of Liberties*". The 1225 version also provided that:

- the King had "granted to all free-men of our kingdom … for ever, all the liberties written out below …"[8]. This promise was incorporated into c 1 with the King's promise that the Church of England, then, of course, part of the Roman Catholic Church, should be free and "shall have all her whole Rights and Liberties inviolable";
- if a debtor had moveable goods sufficient to discharge a debt, bailiffs would not seize the debtor's lands or rents, and would not enforce against sureties

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5 *Imperial Acts Application Act 1969* (NSW) Sch 2 Pt 1; *Imperial Acts Application Act 1980* (Vic) Sch; *Imperial Acts Application Act 1984* (Qld) Sch 1; *Legislation Act 2001* (ACT) s 17(2) and Sch 1 Pt 1.1; D Clerk, "Magna Carta Unchained: The Great Charter in Modern Commonwealth Law" (p 257) Ch 10 in DB Magraw, A Martinez and RE Brownell (eds), *Magna Carta and the Rule of Law* (American Bar Association, 2014)

6 in the Statutes of England

7 The perhaps now forgotten concluding words, that are still part of the law of England, read:

> "We, Ratifying and approving these Gifts and Grants aforesaid, confirm and make strong all the same for Us and our Heirs perpetually, and by the Tenor of these Presents do renew the same: Willing and granting for Us and our Heirs, that **[**this Charter and**]** all and singular his Articles for ever shall be stedfastly, firmly, and inviolably observed; **[**and if**]** any Article in the same Charter contained yet hitherto peradventure hath not been kept **[**We will and by authority royal command from henceforth firmly they be observed**]**."

8 c 1; 1215 c 2

whilst the principal debtor were able to pay the debt[9] – sureties would no doubt lament to know that the law does not now offer them this protection;

- the hearing of common pleas would not follow the King, but be held in a fixed place[10] – being the creation of what became the Court of Common Pleas at Westminster Hall and the more itinerant Court of King's or Queen's Bench;
- the hearings of cases relating to disruptions to land ownership [novel disseisin] and to inheritance [mort d'ancestre] would occur at assizes in the relevant county, held by justices sent by the King or the chief justiciar[11] – the precursor of the institution of the modern assizes and the old *nisi prius* writs appointing justices of the Courts at Westminster Hall as Commissioners of oyer and terminer (to hear and determine) in the assize courts[12];
- a free man would not be amerced [i.e. given an arbitrary fine] for a trivial or grave offence except in accordance with its seriousness "yet saving his way of living", and "a merchant in the same way, saving his stock-in-trade; and a villain other than one of our own shall be amerced in the same way, saving his means of livelihood; if he has fallen into our mercy" and all of this could only occur by "oaths of good and law-worthy men of the neighbourhood". Earls and barons would only be amerced by their peers and, then, only in according to the degree of the offence"[13] – the precursor to punishments fitting the crime and being imposed by a judicial process;
- no bailiff would put anyone to trial upon his word alone without credible witnesses produced for that purpose[14];
- all merchants, unless publicly prohibited beforehand, could safely and securely enter, leave and travel through England by land and water to buy and sell, without any unjust exactions, except in time of war[15] – an early recognition of the importance of, relatively, free trade.

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9 c 8; 1215 c 9

10 c 11; 1215 c 17

11 c 12; 1215 c 18

12 see Sir Frederick Pollock: *The Expansion of the Common Law* (1904: Little Brown & Co, Boston) pp 63, 65-66; *Ex parte Fernandez* (1861) 10 CB NS 3 at 30 -31 per Erle CJ, 42-43 per Willes J, 58 per Byles J

13 c 14; 1215 c 20, 21

14 c 28; 1215 c 38

15 c 30; 1215 c 41

15. One clause in the 1215 version that did not survive in 1216 or later was c 45, in which King John had promised not to make persons justiciaries, constables, sheriffs or bailiffs unless they "know the laws of the land, and are well disposed to observe them". However, a clause that was perpetuated provided that no man would be apprehended or imprisoned on the appeal (which was a form of private criminal process) of a woman for the death of anyone except her husband[16].

16. One can discern from these, and other continued provisions in the 1225 charter, important promises for the regulation of a feudal society that granted some rights according to a person's status as a noble, a free-man, a merchant and a vill or serf and other rights more generally. Nonetheless, the compromises of plenary Royal power, in a written series of ultimately freely given promises in the 1225 charter and later confirmations, resonate in our age as, recognisably, the rule of law.

17. Only the preamble, important concluding saving clause and three chapters being c 1, 9 and 29 survive on the English statute book to this day. Chapter 9[17] granted, *first*, the City of London all its old liberties and customs and, *secondly*, gave the same to all of the cities, boroughs, towns and the Barons of the Five [or Cinque] Ports.

18. The concluding saving clause of the 1225 charter was crucial. The 1215 version contained c 61 which created an enforcement mechanism that John knew the Pope would not accept. That mechanism provided that the barons could elect 25 of their number to determine whether the king had kept the promises and, if they decided that he was in breach and had not remedied the breach, it authorised the barons to "distress and harass us by all the ways in which they are able; that is to say by taking of our castles, lands and possessions" and on it went.

19. Now, John had procured the reversal of his excommunication in 1213, two years earlier, by acknowledging that the Pope was his spiritual and feudal lord and John surrendered his kingdom to the Pope only to receive it back as a fief of the Pope. As Arlidge and Judge put it "He is now the Pope's vassal" [18]. In other words, c 61 had the effect of replacing the Pope's position as the feudal authority over the King with the 25 barons. For the Pope, that was an intolerable usurpation of his feudal authority

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16 c 34; 1215 c 54

17 1215 c 13

18 op cit at xii

over John and, moreover, as everyone then knew, John had only sealed the 1215 charter under duress.

20. It is not unknown for political figures to threaten their opponents with death in order to force them to sign a deed or accept a situation not of their choosing. The law has long recognised that such duress vitiates the document or act. An example closer to our time occurred in 1966 and 1967 when Alexander Ewan Armstrong, an "honourable", but unelected, member of the New South Wales Legislative Council rang his erstwhile business colleague and co-public company director, Alexander Barton, and, in the course of a campaign of similar conduct, told him: "Unless you sign this document I will get you killed". Barton decided, with good reason, to sign. The majority of the Privy Council held that the duress rendered the deeds Barton had signed void[19]. Both Barton and Armstrong in later years continued to provide the High Court and others with material fit for not only drama series but legal texts[20].

21. Seven and a half centuries earlier, the barons at Runnymede had stronger forces and the whip hand. John really had no choice but to grant their demands. But, he knew that by doing so, the Pope would annul the 1215 charter because it undermined the Pope's authority over John and that the King had not granted the charter of his own free will. The Pope's bull made his position clear, saying[21]:

> "… we refuse to ignore such shameless presumption, for thereby the Apostolic See would be dishonoured, the king's rights injured, the English nation shamed, and the whole plan for a Crusade seriously endangered; and as this danger would be imminent if concessions, **thus extorted** from a great prince who has taken the cross, were not cancelled by our authority even though he himself should prefer them to be upheld, on behalf of Almighty God … we order that the king should not dare to observe it … the charter … we declare to be null, and void of all validity for ever." (emphasis added)

22. So, that was it, the 1215 charter was no more. The 1216 and 1217 versions had no enforcement mechanism, but the concluding saving clause of the 1225 version did and it was this: "[A]nd if anything be procured by any person contrary to the premises, it shall be had of no force or effect". Thus, the King himself ensured, that by his own promise he would obey the law, and that is the genesis of the rule of law.

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19 *Barton v Armstrong* [1976] AC 104: see at 115D, 120F-G

20 see *R v Watson; Ex parte Armstong* (1976) 136 CLR 248; *Barton v The Queen* (1980) 147 CLR 75

21 Magraw et al op cit p 403

23. Of course, at this time there was no-one, except the King, who could decide authoritatively whether some conduct or action was of no force or effect. The continuing confirmations of the 1225 Charter occurred generally in exchange for the raising of new taxes. This created a convention that related the obedience of the governed with the king's preparedness to acknowledge the fundamental importance to them of the promises in *Magna Carta*.

24. By the mid-fourteenth century, England had a Parliament that enacted statutes. In 1351, that Parliament enacted the first of three statutes providing for due process. Their surviving provisions were classed by the New South Wales Law Reform Commission together with c 29 of *Magna Carta*, as "constitutional enactments"[22]. The 1351 statute provided[23]:

> Whereas **it is contained in the Great Charter of the Franchises of England**, that none shall be imprisoned nor put out of his Freehold, nor of his Franchises nor free Custom, **unless it be by the Law of the Land**; It is accorded assented, and stablished, That from henceforth **none shall be taken by Petition or Suggestion** made to our Lord the King, or to his Council, **unless it be by Indictment or Presentment of good and lawful People of the same neighbourhood where such Deeds be done**, in due Manner, **or by Process made by Writ original at the Common Law**; nor that none be out of his Franchises, nor of his Freeholds, unless he be duly brought into answer, and forejudged of the same by the Course of the Law; **and if any thing be done against the same, it shall be redresseed and holden for none.** (emphasis added)

25. This built incrementally on the foundation of *Magna Carta*. It was a technique that the common law itself has used to develop new principles out of analogous circumstances. The King had already promised all these things, but now the law makers could, and do, reinforce them as substantive law, no doubt in exchange for tax revenues. Whatever else was occurring in England at this time, Parliament was seeking to establish the importance of the monarch following procedures in the law when a person's freedom or property were at risk. The other two "constitutional" statutes of this era were passed in 1354 and 1368, and all three of these form part of the statute or received law of the Australian States and Territories. The *Liberty of Subject* Act of 1354 provided[24]:

> no Man of what Estate or Condition that he be, shall be put out of Land or Tenement, nor taken, nor imprisoned, nor disinherited, nor put to Death,

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22 LRC 4 at p 59

23 *Statute The Fifth* 1351 Ch 4 25 Edw 3 Stat 5

24 28 Edw III c 3

> **without being brought in Answer by due Process of the Law**. (emphasis added)

26. The significance of this Act cannot be gainsaid. It applied to everyone in the land, not just the nobility or free-men, and required the due process of the law to be followed before a person could be punished or lose property. It is the progenitor of the Fourteenth Amendment of the Constitution of the United States of America passed in 1868, but it was rooted, itself, in the concluding saving clause of the 1225 *Magna Carta*.

27. Finally, the 1368 statute *Observance of due Process of Law*[25] provided:

> At the Request of the Commons by their Petitions put forth in this Parliament, to eschew the Mischiefs and Damages done to divers of his Commons by false Accusers, which oftentimes have made their Accusations more for Revenge and singular Benefit, than for the Profit of the King, or of his People, which accused Persons, some have been taken, and sometime caused to come before the King's Council by Writ, and otherwise upon grievous Pain against the Law: **It is assented and accorded, for the good Governance of the Commons, that no Man be put to answer without Presentment before Justices, or Matter of Record, or by due Process and Writ original, according to the old Law of the Land: And if any Thing from henceforth be done to the contrary, it shall be void in the Law, and holden for Error.** (emphasis added)

28. The Parliamentary recital of abuses of power in this Act explained its provenance and shows why the right to due process of the law mattered 650 years ago, reflecting values that enure to this day.

29. By the beginning of the seventeenth century, the Scottish Stuart kings had succeeded to the English throne. Their forebears had sided with the rebellious barons in 1215 and both James I and his son, Charles I, were believers, like King John and Pope Innocent III, in the divine right of kings. During this period, Sir Edward Coke held, and lost, office as Lord Chief Justice at the King's pleasure. He survived as Chief Justice until 1613. In *Prohibitions del Roy*[26], Coke asserted that in 1607, he had told James I that[27]:

> "true it was, that God had endowed His Majesty with excellent science, and great endowments of nature; but His Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an act which requires long study and experience, before that a man can attain to the cognizance of it and:

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25 42 Edw III c 3

26 (1607) 12 Co Rep 63; 77 ER 1342

27 12 Co Rep at 65; 75 ER at 1343

> that the law was the golden met-wand and measure to try the causes of the subjects; and which protected his Majesty in safety and peace: with which the King was greatly offended, and said, that then he should be under the law, which was treason to affirm, as he said ; to which I said, that Bracton saith, *quod Rex non debet esse sub homine, sed sub Deo et lege.*"[28]

30. After his dismissal, Coke returned to Parliament and there led the debates that produced *The Petition of Right* in 1627[29]. The Petition recited that in the *Due Process Act* of 1351[30]:

> it is declared and enacted that no man should be forejudged of life or limbe against the forme of the Great Charter and the Lawe of the Land, And by the said Great Charter, and other the Lawes and Statutes of this your Realme no man ought to be adjudged to death but by the Lawes established in this your Realme, either by the customes of the same Realme or by Acts of Parliament.

31. The Petition complained that people had been put to death under marital law and others had been forced to pay or "lend" money to the King, purportedly pursuant to commissions he had issued or authorised, or been imprisoned or "molested" for failing to do so[31]. The Petition prayed that[32]:

> no man hereafter be compelled to make or yeild any Guift Loane Benevolence Taxe or such like Charge without comon consent by Acte of Parliament, And that none be called to make aunswere or take such Oath or to give attendance or be confined or otherwise molested or disquieted concerning the same or for refusall thereof . . .
>
> All which they most humblie pray of your most Excellent Majestie as their Rightes and Liberties according to the Lawes and Statutes of this Realme …

32. The King petulantly wrote on the Petition, by way of assent, "Soit droit fait come est desire" – let right be done as is desired.

33. The Parliamentarians had used *Magna Carta* in their struggle to contain the Stuart King's disregard of both due process, in institutions like the infamous Star Chamber, and in raising revenue without parliamentary sanction. The interregnum of the Commonwealth and the conflicts between the Stuarts and Parliament that lasted for almost the whole seventeenth century ultimately resulted in, *first*, the firm establishment of a system of Parliamentary sovereignty in which the government of

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28 namely: The King is under no man, but under God and the law
29 3 Car 1 c 1
30 25 Edw III St 5 c 4
31 see pars II and VII
32 see par VIII

King's ministers had to obtain supply by legislation, *secondly*, the *Habeus Corpus Act 1679*[33] and, *thirdly*, the *Bill of Rights 1689*, that, again, bound the crown to obeying the law – this time for good – and also guaranteed judicial security of tenure by fixing salaries and requiring an address by both Houses of Parliament in order to remove a judge.

34. In the meantime, the early American colonists took these concepts of English law to the New World. They regarded *Magna Carta* and the statutory rights that existed at the time of their settlement as received laws that had travelled with them, as Englishmen.

35. The profound influence of *Magna Carta* can be seen in crucial provisions of the *Bill of Rights* that comprised the first ten amendments to the Constitution of the United States. These were adopted on 15 December 1791, about two and a half years after that constitution took effect. Article VI reflected c 29 of *Magna Carta* by requiring, among other matters, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury". Article VIII reflected c 14, and the *Habeus Corpus Act*, in providing that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted". Later, as I have noted, the fourteenth amendment reflected the concluding saving clause of *Magna Carta* and the three 14th century *Due Process Acts*.

36. Writing in the middle of the eighteenth century, Sir William Blackstone, in his *Commentaries on the Laws of England* described c 29 as "the foundation of the liberty of Englishmen" [34]. He said that "the great charter of liberties … was obtained, sword in hand from king John"[35] and noted that, as Coke had observed, it "contained very few new grants; but … was for the most part declaratory of the principal grounds of the fundamental laws of England".

37. And at the turn of the twentieth century, Sir Frederick Pollock wrote that "the text of the charter shows clearly that the king's justice is no longer a matter of favour"[36]. Later Pollock & Maitland wrote in *The History of English Law*[37] that "Every one of [*Magna Carta*'s] brief sentences is aimed at some different object and is full of future

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33 31 Car II c 2

34 14th ed, 1803; Book IV p 424 (note 3)

35 14th ed, 1803; Book II p 127

36 Pollock: op cit p 63

37 1898: Cambridge University Press (2nd ed) Vol 1 pp 171, 173

law" and that it was "the nearest approach to an irrepealable fundamental statute that England has ever had". They concluded that "in brief it means this, that the king is and shall be below the law". Perhaps this is the same concept as Coke's assertion of what he claimed to have told James I in *Prohibitions del Roy*[38].

The position today

38. So, does *Magna Carta* matter today? On 10 December 1948, after the horrors of two world wars and tyrannical regimes that, then, recently had blighted human freedom, the General Assembly of the United Nations adopted the *Universal Declaration of Human Rights*. That was that body's first step in the formulation of an international bill of human rights. The Declaration included provisions that reflected what had been promised over 700 years earlier in *Magna Carta*, such as the rights not to be subjected to cruel, inhuman or degrading treatment or punishment, arbitrary arrest, detention or deprivation of one's property, the rights to equal recognition before, and protection of, the law, and a fair and public hearing by an impartial tribunal in civil and criminal matters, and freedom of movement[39].

39. In Australia, soon after the Declaration was adopted by the United Nations, Dixon J made a celebrated remark in *Australian Communist Party v Commonwealth*[40]. He said that the government of the Commonwealth was carried on under the *Constitution*, adding:

> "… that is an instrument framed in accordance with many traditional conceptions, to some of which it gives effect, as, for example, in separating the judicial power from other functions of government, others of which are simply assumed. Among these I think that it may fairly be said **that the rule of law forms an assumption**." (emphasis added)

40. Indeed, the purpose of s 75(v) of the *Constitution* is to ensure that actions or inactions of officers of the Commonwealth are always amenable to judicial review, if nowhere else, in the original jurisdiction of the High Court. That is achieved through the entrenched availability of the constitutional writs of mandamus, prohibition and injunction. These writs are available to ensure that officers of the Commonwealth can

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38 12 Co Rep 63

39 Arts 5, 6, 9, 10, 13 and 17

40 (1951) 83 CLR 1 at 193

act only within their lawful power and do not exceed or ignore any jurisdiction that the law or *Constitution* confer on them[41].

The influence of c 29 on our law

41. Chapter 29 is credited with being a guarantee of trial by jury because it referred to "lawful judgment of his peers" as a condition of prejudicing a free man in his person or property. However, as Arlidge and Judge noted[42], in 1215 and 1225 that was not then a known mode of trial. Rather, trials were conducted then by ordeal or battle following an appeal from a victim (referred to in c 45[43]) or presentment by a jury. They explained that a presenting jury originated in Anglo Saxon England. It consisted of local people who swore on oath that they believed that the accused was guilty of a crime. This was the presentment, the correctness of which was then tested in a trial, usually by ordeal or battle. This process was formalised in 1166 by Henry II in a statute known as the *Assize of Clarendon*. This mandated that the presentment be made to the justices or sheriffs by:

> "twelve most lawful men of the hundred and by the four most lawful men of every vill upon oath … whether in their hundred or vill there by any man who is accused or believed to be a robber, murderer, thief or receiver of robbers or thiefs."

42. Blackstone explained that an appeal, which was still available when he wrote, was not the process of seeking, in a higher court, correction of error in a lower one[44]. Rather, an appeal instituted a private process for the punishment of public crimes. Originally, an appeal entitled the prosecutor to claim monetary compensation for mayhem and the felonies of larceny, rape, arson, murder and manslaughter. The victim or widow or other entitled surviving relative could bring the appeal before the accused was indicted and if he or she were acquitted in the appeal, no indictment could be laid subsequently. Trial by battle, duel or single combat appeared to have been a form of contesting an appeal[45].

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41 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 513-514 [104] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ

42 op cit p 63

43 1215, c 54

44 op cit Vol 4 at 312-315

45 Blackstone op cit p 314-315, 346-347

43. Trial by ordeal was another ancient species of trial. Blackstone[46] said that persons of higher rank were tried by "fire ordeal" and those of lower rank by "water ordeal". Chapter 2 of the *Assize of Clarendon* also required the accused to swear that he or she was "not a robber or murderer" … etc. The high rank accused either had to hold in his or her hand a piece of red hot iron weighing 1, 2 or 3 pounds[47] without being burned, or walk blindfolded over nine red hot plowshares laid lengthwise at unequal distances. If you escaped unhurt, you were innocent. The lesser ranks were innocent if they were either uninjured after their bare arm had been plunged up to the elbow in boiling water, or sank after being cast into a river or pond of cold water. Even here, the odds were weighted against the lesser ranks who had to drown to prove their innocence.

44. Professor Holt, in his work *Magna Carta*[48], attributed the expression "lawful judgment of his peers" to a ruse of King John during negotiations earlier in 1215. Professor Holt explained that the Pope had written to John, instructing him that his quarrel with the barons should be determined in his court by their peers in accordance with the custom and law of the realm. Implementing that instruction, John issued letters patent on 10 May 1215 stating his terms to the barons as including, "We shall not go against them except by the law of our realm or by the judgment of their peers **in our court**".

45. The last three words, "in our court" are not in any version of the charter. The inclusion of those words would have favoured the King. The original c 39, which became c 29 in the 1225 charter, left ambiguous where and how a judgment of the "free-man's" peers would be given. And that ambiguity is the basis through which successive generations in England evolved the institution of trial by jury. One thing c 29 did immediately ensure, was that execution or punishment could only occur after some trial process involving a judgment by men, or by God, in the case of a trial by a battle or ordeal.

46. However, by Coke's time, the institution of trial by jury was regarded by him and others as older than the Norman Conquest. In his foreword to the eighth volume of

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46 op cit Vol 4 at 342-343

47 450 gm, 900 gm or 1.35 kg

48 (2nd ed) 1992 Cambridge University Press pp 327-330, 492-493

his reports he asserted that trial by a jury of 12 in England antedated the Conquest[49] and was "one of the invincible arguments of the antiquity of the common laws".

47. The other aspect of c 29, the original 1215 c 40, was the promise that justice would not be sold, deferred: i.e. delayed or denied. This spawned our concepts of, *first*, judicial impartiality and incorruptibility, *secondly*, the right of everyone to justice according to law, and, *thirdly*, the more controversial, right to that justice without delay.

48. We take for granted that justice is not for sale. However, that belief is again under challenge by economists, including the Productivity Commission in its recent inquiry report, *Access to Justice Arrangements*[50]. I have criticised that concept publicly already[51]. Suffice to say that equality before the law is not capable of reflection in a system of user, or even rich user, pays. There is not one law for the rich, or privileged, and another for the poor.

49. The second aspect of the promise not to deny justice is a vindication of the universal application of the law to all in our society. It reinforces the role of the Courts as one of the three arms of government as an aspect of the rule of law. In this way, the State, through its impartial courts, authoritatively resolves public and private controversies according to law. Instead of individuals, or government officials or bodies, taking the law into their own hands, they accept that there is an impartial governmental institution, being the Courts, that can decide who is guilty or innocent, what punishment to impose, or who has or does not have an enforceable civil claim or right in respect of a matter of dispute between citizens or persons present in the jurisdiction. By applying the law to the facts of each case, courts and juries decide a controversy once for all, but perhaps subject to appeal to a higher court, so that not just the people involved, but because of the doctrine of precedent, society generally, have an authoritative, final and enforceable answer to the previously uncertain issue.

50. The final promise in c 29 is that justice will not be "deferred". In *In re Nathan*[52], Bowen LJ said that, "By Magna Charta the Crown is bound neither to deny justice to anybody, nor to delay anybody in obtaining justice". One way in which the common law gives effect to this is when a person is arrested. The right to personal liberty is

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49 8 Co Rep xii-xiii

50 Inquiry Report No 72, 5 September 2014; released publicly on 3 December 2014

51 see SD Rares: *Is Access to Justice a Right or a Service?* (2015) 89 ALJ 1

52 (1884) 12 QBD 461 at 478

the most elementary and important of all common law rights[53]. That right cannot be impaired or taken away without lawful authority, and then only to the extent, and for the time, that the law permits. Thus, a person arrested by a constable exercising a common law power to arrest without warrant on suspicion of felony, can only be kept in custody "till he can be brought before a justice of the peace"[54] or a court to be dealt with according to law. No further delay, for example to collect further evidence, is permissible[55].

51. As Gibbs CJ said in *Williams v The Queen*[56], at common law a person making an arrest must "bring the arrested person before a justice in as short a time as is reasonably practicable"[57]. The writ of *habeus corpus*, and its attendant processes, reinforce the necessity of those exercising powers of detention to justify their use of those powers in a court timeously.

52. In *Jago v District Court of New South Wales*[58] the High Court held that c 29 did not create a right to a speedy trial in Australia. The Court was not referred to and did not consider the *Due Process Acts*. It held that the accused's only remedy for delay once a prosecution had been commenced was to apply for a permanent stay, on the ground that he or she had suffered such prejudice by reason of the delay that the continuation of the prosecution would amount to an abuse of process that could not remedied, by e.g. directions given by the trial judge to the jury.

53. Subsequently, in *Adler v District Court of New South Wales*[59], Priestley JA said that the *Due Process Acts* were designed to ensure that persons would be tried for crimes only in the courts of common law and only by recognised procedures. His view was referred to with apparent approval by Mason CJ and McHugh J as well as Dawson J in *Dietrich v The Queen*[60]. Those judges did not consider that the way in which the

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53 *Trobridge v Hardy* (1955) 94 CLR 147 at 152 per Fullagar J applied by Mason and Brennan JJ in *Williams v The Queen* (1986) 161 CLR 278 at 292

54 *Williams v The Queen* (1986) 161 CLR 278 at 293 per Mason and Brennan JJ; citing *Comyns' Digest,* vol IV, "Imprisonment"

55 *Williams* 161 CLR at 283, per Gibbs CJ; 292-293, 297 per Mason and Brennan JJ; 305-306 per Wilson and Dawson JJ

56 161 CLR 278 at 283

57 see too *John Lewis & Co Ltd v Tims* [1952] AC 676 at 691 per Lord Porter

58 (1989) 168 CLR 23

59 (1990) 19 NSWLR 317 at 351C-D. On 30 May 1990: Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ refused special leave to argue those grounds

60 (1992) 177 CLR 292 at 307, 346-347

right to due process had developed in the United States jurisprudence reflected the meaning of its English progenitors here.

Conclusion

54. To return to where I started: the realisation of the promises first given by King John at Runnymede, took centuries and battles, both armed and oratorical, to achieve. So too, as my Chinese interlocutor pointed out, did the period until recognition by order of the Supreme Court in *Brown v Board of Education*[61] that none of the United States could deny, as the fourteenth amendment promised, "to any person within its jurisdiction the equal protection of the laws". Australian law has developed on its own journey of due process separate to that in the New World.

55. Australia is the only Western democracy without a constitutional or legislated bill of rights. The rule of law is a powerful assumption. It is the heritage we owe to some rebellious, perhaps heretical, barons 800 years ago. One thing history should teach us is that it is better to have rights written down as promises. That is because, as events after the short lived 1215 charter showed, they develop a life of their own. Written rights are unlike politicians' mouthings. The latter have the same status as is encapsulated in the movie mogul Sam Goldwyn's aphorism, that, "an oral contract is not worth the paper it's written on".

56. The rule of law that we enjoy today derives from a failed peace made with a dishonest king who could not keep his word. But how differently the 1215 *Carta Libertatum* has turned out from King Lear's prognostication that "Nothing will come of nothing"[62]. Even a void charter of liberties lit the torch for the universal recognition of fundamental human rights.

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61 347 US 483

62 King Lear, Act 1, scene 1, line 90