

MAGNA CARTA AND THE NEW ZEALAND CONSTITUTION

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

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

...

There hath he lain for ages and will lie

...

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

The Kraken Wakes

Alfred, Lord Tennyson¹

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

Boumediene v Bush 12 June 2008

Kennedy J²

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

That was the future

Whimwham³

Preface

The Kraken of social discord presents risk to any society. It is kept asleep by the rule of law. That requires awareness and acceptance by members of the community of the basics of our constitutional law and conventions, including Magna Carta.

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¹ In Robert W Hill Jr (ed) *Tennyson's Poetry* (WW Norton & Company 1971) at 5-6.

² 553 US __ (2008) 12 June 2008 at 70.

³ Allen Curnow in Terry Sturm (ed) *The Best of Whim Wham* (Vintage 2005) at 244.

Yet Magna Carta is often seen as a dusty irrelevance of the past. As too, until the judgment of the Court of Appeal in the Maori Council case in 1987, was the Treaty of Waitangi.

We tend to be more interested in the present – such as the fact that this month the CERN Large Hadron Collider was activated in Geneva. It will throw protons together at such speed as is expected to reveal what the Nobel laureate Leon Lederman calls “the God particle”: the Higgs boson, or ultimate matter, predicted by a Scots physicist to open an entire new world.⁴ Why should we spend time today on a document signed on the other side of the world, when it was thought that the sun revolved around the earth and when it was very likely that New Zealand was uninhabited.⁵ Is it anything more than mere nostalgia?

The US Supreme Court has given a resounding yes. Only three days before its anniversary this year, the Magna Carta featured as the mainstay of an historic judgment which insisted on the right to habeas corpus for every inmate of Guantánamo Bay. In *Boumediene* Justice Kennedy traced the fundamental origins of habeas corpus back to the Magna Carta, citing Pollock and Maitland: “it means this, that the king is and shall be below the law.”⁶ In New Zealand, the anniversary of the execution of Magna Carta on 15 June 1215 was marked in more subdued style, by a radio interview, on the Kim Hill programme the previous day. Yet there escaped mention the fact that, in a volume which contains other expressions of our basic laws, the most notable Chapter of Magna Carta remains on the New Zealand statute book.⁷

⁴ “Dieu est-il une particule?” *Courrier International* 24 – 29 April 2008 p 22 (L’HEBDO (extraits) Lausanne) Elisabeth Gordon. Another view is of risk that particle accelerators will produce a strangelet which has the ability to convert whatever it encounters into a new form of matter. Sir Martin Rees, Professor of Physics at University of Cambridge in *Our Final Hour* (Basic Books 2003) said that, although extremely unlikely, a hypothetical strangelet disaster could transform the entire planet Earth into an inert hyperdense sphere about one hundred metres across. Richard Posner suggests that nations should be willing at least to ask whether the benefits of these justify incurring the risk and it is doubtful whether they do. (See Cass Sunstein *Worst Case Scenarios* (Harvard University Press 2007) at 214).

⁵ Janet M Wilmhurst et al “Dating the late prehistoric dispersal of Polynesians to New Zealand using the commensal Pacific rat” (2008) 105 PNAS 7676.

⁶ 1 F. Pollock & F. Maitland *History of English Law* (2 ed. 1909) 173 cited in *Boumediene* above n 2 at 10.

⁷ Reprinted Statutes of New Zealand, v 30 (which also contains the Petition of Right, the original Bill of Rights and the predecessors of the Habeas Corpus Act 2001).

Magna Carta

We learned as children that, even if he did found the Royal Navy, King John was not a good man.⁸ Stephen Langton, by contrast, was; despite being not only an Englishman, a scholar and divine but also a lawyer, who led the magnates and barons at Runnymede.

Langton had previously shown himself to be a serious constitutionalist.⁹ And perhaps for that reason, John dug his heels in when the Pope attempted to appoint Langton as Archbishop of Canterbury. Innocent III, one of the most powerful and influential popes of the Middle Ages, was the wrong man to cross.¹⁰ He declared John excommunicated and placed his kingdom under interdict – effectively calling for a general strike on all non-essential religious services. In the face of threat of invasion by Philip of France to whom John had lost Normandy,¹¹ John executed what has been variously seen either a humiliating abasement, or a brilliant piece of cutting edge diplomacy. He agreed both to appoint Langton as Archbishop; and to submit England to the ultimate sovereignty of the Pope.

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

- (1) Extorted money from Jews, removing one tooth a day until they paid;
- (2) Sold his first wife for 20,000 marks (£30,000);

⁸ AA Milne "Now We Are Six" (Methuen):
King John was not a good man
He had his little ways
And sometimes no-one spoke to him
For days and days and days.

A more balanced account is provided by C Warren Hollister "King John and the Historians" (1961) 1 The Journal of British Studies at 1.

⁹ Two years earlier he had proclaimed at Westminster a proposal for the preservation of English laws; at a council held at St Albans he produced for John to ratify a copy of the undertakings of his great grandfather Henry I, which John ignored.

¹⁰ His Albigensian Crusade in the Languedoc killed between 200,000 and 1million people. His Fourth Crusade, to Constantinople, is described as one of the most profitable and disgraceful sacks of a city in history.

¹¹ At the battle of Bouvines in 1214.

- (3) Expropriated forests;
- (4) Made cynical use of his ability to impose fines for minor or even imaginary misdemeanours (including stumbling or disorganised pleadings in court);
- (5) Expropriated the church property during the time of the interdict, then selling it back when the interdict was lifted (this included a cheeky tactic of taking hostage the concubines of supposedly celibate priests and demanding ransom);
- (6) Fatally, oppressed the barons by scutage, a tax paid to avoid military service, and took their children hostage for ransom.¹²

Because he could not be trusted, when he signed at Runnymede he was required by Chapter 61 to give authority, in the event of breach, to 25 barons:

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

Such great minds as Sir Edward Coke and Professor Dicey considered that Magna Carta was rather a record of the existence of rights than a statute which conferred them.¹³ But it was, and remains, an expression of fundamental law. Its most important Chapters – 39 and 40 – are combined in the Reprinted Statutes of New Zealand as Chapter 29:

29 Imprisonment, etc. contrary to law. Administration of Justice

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

¹² These and other facts are recounted by Peter Linebaugh *The Magna Carta Manifesto* (University of California Press 2008) and W L Warren *King John* (University of California Press 1978).

¹³ A V Dicey *The Law of the Constitution* (10ed 1959) at 207. Alec Samuels notes that this is in accordance with the mediaeval concept of a statute as essentially declaratory of the laws and customs of the realm rather than as an instrument for changing the laws: “Magna Carta as Living Law” (1960) NILQ 49 at 51.

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

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

Chapter 29 is brief but impressive. It includes:

- (1) Prohibition of detention otherwise than by law. According to Dick Howard's *The Road From Runnymede*¹⁴ it appears in 25 US state constitutions as well as the Federal Fifth Amendment;
- (2) The right that justice should not be barred by cost;
- (3) The right that justice should be prompt; breach of which right causes agony to litigants through uncertainty;
- (4) Protection of property; even though it omits the former Chapter 28 which prohibited the taking of corn without immediate payment. A facet of the property right was John's undertaking in Chapter 31 not to remove wood without the owner's consent.¹⁵

The measure of any right is whether it can be enforced. Of particular importance, whereas mediaeval political theory had offered no alternative to submission to wrongful exercise of power other than rebellion,¹⁶

[t]o the Anglo-Normans, whose point of view we have inherited, another method to enforce Magna Carta suggested itself: ... the victim of an infringement could in his own name frame an action in the King's Court based on the Charter... . Thus anyone who claimed that Magna Carta gave him a right had a simple and direct remedy... .

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

¹⁴ (University of Virginia Press 1968) at 479.

¹⁵ It was reinforced by the Charter of the Forest, originally part of Magna Carta and later confirmed by John's son Henry III.

¹⁶ Max Radin "The Myth of the Magna Carta" (1947) 60 Harv L R 1060 at 1067.

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

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

The legacy of Magna Carta

No other English enactment has enjoyed as long a life as the Magna Carta. There have been periods when Magna Carta has been discounted or fallen out of sight. After several centuries of relative obscurity, it was revived in the seventeenth century by Sir Edward Coke.¹⁷

But Coke’s enthusiasm provoked reaction. Lord Irvine of Lairg has recounted the criticism by Professor Jenks of Sir Edward Coke for “representing an essentially feudal Charter that was motivated by self-interest and the demands of political expediency, as a constitutional document”.¹⁸

¹⁷ He wrote of it:

As the gold-finer will not out of the dust, threds or shreds of gold, let passe the least crum, in respect of the excellency of the metall: so ought not the learned reader to let passe any syllable of this Law, in respect of the excellency of the matter.

Second Institute (1662 ed) 57 cited in J Holt *Magna Carta* (2ed Cambridge University Press 1992) at 3.

¹⁸ Irvine “The Spirit of Magna Carta Continues to Resonate in Modern Law” citing Edward Jenks “The Myth of Magna Carta” (1904) 4 *Independent Rev* 260.

In the twentieth century, Coke's approach was championed by the American jurist Professor Max Radin¹⁹ who challenged Jenks, in a meticulous analysis of the history.²⁰ He concluded:²¹

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

Radin noted that the relation of Magna Carta to other forms of law closely resembled the relation of the later Constitution of the United States to all other laws.²²

The New Zealand Constitution

As Mr Podsnap appreciated, a constitution need not be the lawyer's document of that name seen in the US and South African constitutions.²³ So far New Zealand has managed without such a thing, even though our unsystematic "constitution" includes a statute called the Constitution Act. Rather, our constitution is a collection of institutions, customs, statutes and precedents that express how society is constituted or organised, nationally and indeed internationally. Such elements as our Parliament, our Executive, our Judiciary, the Ombudsmen, the Privacy Commissioner, and many more, are elements of a structure that ultimately includes every member of society.

In New Zealand we must begin any discussion of our constitutional future with the Treaty of Waitangi. Those of us who are not Maori owe our right to be here to its Preamble as well as Article 2,²⁴ in Justice Durie's expression we are the tangata tiriti.

¹⁹ Polish emigré to the United States and intellectual polymath.

²⁰ Radin above n 16. Radin borrowed the title from Jenks' piece above n 18.

²¹ Radin above n 16 at 1065. He pointed out that: "Indeed, Henry III [had made] this very statement ...: 'neither we nor our heirs will determine anything by which the liberties contained in this charter be violated or weakened. And if anything is determined by anyone contrary to this, it shall be void and be held as null.' It is of like effect to Edward's confirmation of 1297 already cited.

²² Ibid at 1066.

²³ 'And Do You Find, Sir,' pursued Mr Podsnap, with dignity, 'Many Evidences that Strike You, of our British Constitution in the Streets of the World's Metropolis, London, Londres, London?' The foreign gentleman begged to be pardoned, but did not altogether understand ... 'It merely referred,' Mr Podsnap explained, with a sense of meritorious proprietorship, 'to our Constitution, Sir. We Englishmen are Very Proud of our Constitution, Sir. It was Bestowed Upon Us By Providence. No Other Country is so Favoured as This Country.' Charles Dickens *Our Mutual Friend* cited by Stephen Sedley in "No Ordinary Law" (2008) 30 London Review of Books 20 at 20.

²⁴ With the different formulations "rangitiratanga" and "sovereignty".

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

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

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

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

...

The key to unlocking this thing is not with settlers, governments or the state. It is with us. And, of course, there is no way to guarantee success. But failure is inevitable if we do not begin to imagine, and in imagining, take ownership of a future that is different from our past.²⁵

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

(1) Magna Carta as Law

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

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

²⁵ *Confessions of a Native Judge* Address to Native Title Conference Perth 4 June 2008.

- In England we have recently seen the House of Lords declare that a law that would imprison non-citizens suspected of terrorism in circumstances in which citizens went unpunished was incompatible with the rights to liberty and freedom from discrimination.²⁶
- In New Zealand the Supreme Court granted Mr Zaoui bail on the basis that the High Court had an “ancient common law jurisdiction” to grant bail to someone detained.²⁷ The Court of Appeal is currently considering whether an overstayer who refuses to sign a passport application to assist his deportation may be imprisoned indefinitely.²⁸
- The Supreme Court of Canada last month employed habeas corpus to confirm to Canadian citizens interned at Guantánamo Bay and interrogated by Canadian officials rights to due process conferred not only by its Charter of Rights but by international law.²⁹
- Four years ago the US Supreme Court held that Magna Carta is a bar to “extraordinary rendition”;³⁰ its judgment seventeen days ago, closely similar in approach to that of the Canadian court, held that legislation enacted to avoid the operation of habeas corpus is ineffective.³¹

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

(2) The right to accessible justice:

- The New Zealand Court of Appeal recently held that police officers when interviewing suspects must inform them of their right to free

²⁶ *A v Home Secretary* [2005] 2 AC 68.

²⁷ *Zaoui v Attorney-General* [2005] 1 NZLR 577, [34]. at

²⁸ *Chief Executive of the Department of Labour v Yadegary* CA199/07 argued 19 March 2008, High Court judgment reported at [2007] NZAR 436.

²⁹ *Canada (Justice) v Khadr* 2008 SCC 28 at [25].

³⁰ *Rasul v Bush* 542 US 466 (2004).

³¹ *Boumediene* n 2 above.

³² The judgments of three of the four senior judges of the High Court of Australia in *Al-Kateb v Godwin* (2004) 219 CLR 562 are to similar effect.

legal advice if it appears that the suspect might not know about it, and might need it,³³

- The English Divisional Court in *R v Lord Chancellor, ex p Witham*³⁴ struck down as an impediment to justice excessive filing fees fixed by the four most senior Judges in England.³⁵

(3) The right to prompt justice, now confirmed by s 23(2) of the New Zealand Bill of Rights Act 1990;³⁶

(4) The protection of property:³⁷ art 2 of the Treaty of Waitangi with its reference to forests; the Court of Appeal's decision in *Maori Council No 2*³⁸ recognising the Crown's obligations to Māori in relation to their forest assets; and the great Treelord settlement at present in course of resolution³⁹ may all be seen as expressions of this strand of Magna Carta.

³³ *R v Alo* [2008] 1 NZLR 168.

³⁴ [1998] QB 575.

³⁵ Laws J at 581 analysed the constitutional position:

In the unwritten legal order of the British state, at a time when the common law continues to accord a legislative supremacy to Parliament, the notion of a constitutional right can in my judgment inhere only in this proposition, that the right in question cannot be abrogated by the state save by specific provision in an Act of Parliament And any such rights will be creatures of the common law, since their existence would not be the consequence of the democratic political process but would be logically prior to it.

³⁶ *Martin v Tauranga District Court* [1995] 2 NZLR 419 (CA). There may be contrasted with *Boumediene* the judgments of the High Court of Australia in *Jago v District Court* (1989) 168 CLR 23 and of the English Court of Appeal in *Attorney-General's Reference (No 1 of 1990)* [1992] 1 QB 630 that Magna Carta gives no right to prompt trial. Each overlooks the principle expressed in s 6 of the Interpretation Act 1999 "An enactment applies to circumstances as they arise" (elsewhere, more quaintly, "a statute is always speaking") and is therefore not to be treated as fossilised: *Burrows Statute Law in New Zealand* (3rd ed 2003) 273.

Hamlet considered it important enough to warrant attention in his tirade against the evils of the world:

For who would bear the whips and scorns of time,
Th' oppressor's wrong, the proud man's contumely,
The pang of despis'd love, the law's delay,
The insolence of office, and the spurns
That patient merit of th' unworthy takes;
When he himself might his Quietus make
With a bare bodkin? ...

³⁷ See *Cooper v Attorney-General* [1996] 3 NZLR 480.

³⁸ [1989] 2 NZLR 142.

³⁹ See the Central North Island Forests Land Collective Settlement Bill introduced 18 June 2008. Our senior politicians of both major parties have facilitated this and other settlements of historic claims and the editorials of major newspapers have welcomed them (for example *Dominion Post* 18 June 2008 and *New Zealand Herald* 26 June 2008). This is heartening evidence that New Zealand has come a fair distance towards appreciating that the rule of law means protecting minorities as well.

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

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

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

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

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

After some four decades on the edge of law and its reform I am increasingly of the opinion the Queen expressed to Alice:⁴⁰

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

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

The law and the constitution are the right not of lawyers and judges but of the whole community, whose lives are not static but dynamic; not simple but complex; and not identical but various. The constitution comprises our basic laws. How is it to cater

⁴⁰ Lewis Carroll *Through the Looking Glass* Chapter 2.

for New Zealanders who are Catholic, Protestant, Jewish, Muslim, Hindu, Sikh, Somali; for atheists;⁴¹ for young, old; rich, poor; well educated and not; and all the other infinite variations?

That question takes me to:

The future of the constitution.

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

For example, a recent dissertation establishes beyond doubt that the great virtues of the Enlightenment, seen by self-styled liberal males as an answer to all conceivable problems, contain a great gulf where women are concerned.⁴²

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

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

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

⁴¹ See for example Richard Dawkins’ provocative “The God Illusion” (Black Swan 2007).

⁴² Catherine Fleming “The Liberal Veil: Imagining Women and the State in Refugee Discourse” (unpublished 2008).

But judges must speak and act with caution. The development of democracy since 1215 gives our elected representatives a legitimacy which judges cannot claim, derived from the choice of the community. At least so long as there is no departure from Magna Carta's basic principle that no-one must suffer gross injustice, Judges must defer to that choice.⁴³ The alternative would be to bring the institutions of justice into disrepute, by infringing the separation of powers doctrine.

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

First, the debate at a two day constitutional seminar in the Legislative Council Chamber in 1989 exposed a reality echoed in a recent review of Brazier's essay on the British Constitution:⁴⁴ there is risk when tinkering with a constitution of creating disharmony rather than achieving improvement. Any constitution, formal or not, must serve the purpose of creating harmony within the community. It is easy for the black letter of legal words to serve as ammunition for disputes. There is real risk that attempts to force a written code may be counter-productive. The proposal in the White Paper preceding the 1990 Bill of Rights, that the Treaty be legislated, was in my view rightly not proceeded with. The Treaty's role as icon is in my view its proper status. That means it can never be demeaned by subjection to direct legal dispute.

Moreover, as was discovered in Communist Russia; in Nazi Germany; and, for that matter, in Fiji, the most thoughtfully crafted written constitutions cannot alone protect the community. There is potential volatility in any society.⁴⁵ All too frequently recourse is needed to force – as by the police and, on occasion by the army.

⁴³ Lord Cooke and the Chief Justice have written of what might be the position if there were legislative departure from that basic principle. In *Cooper* above n 37 I was able to note that, on the whole, the point remained theoretical. My hope is that care be taken that it remain so.

⁴⁴ In Vernon Bogdanor "The British Constitution in the 20th Century" (Oxford University Press 2002) (reviewed by Ferdinand Mount in the Times Literary Supplement). Stephen Sedley (above n 23) makes the same point.

⁴⁵ A Moscow paper has complimented President Putin for resigning his office rather than overriding the Russian Constitution and extending his term to life or assuming the title of tsar: "Hors du Parti, point de salut!" *Courrier International*.

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

Two America scholars have recently observed in an analysis of the current presidential race:⁴⁶

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

That process has been seen, in New Zealand as in comparable states, in the human rights conventions reacting to the totalitarian abuses before and during the Second World War and the rise of a rights jurisprudence.⁴⁷ That jurisprudence has as one intellectual foundation the principle of Magna Carta that those who hold public office are not the masters of the community but its servants; and that they are given special rights not in their own interest but in the interests of those whom it is their obligation to serve. Expressed at this level of generality, it is not fanciful but realistic to see the constraints on John as analogous to the principles of legality and judicial review of our modern democracy.

The intellectual foundation of that aspect of democracy is expressed in Adam Smith’s classic *Wealth of Nations*:⁴⁸ the virtue of capitalism and free trade, which with the invention of the limited liability company has done so much to develop economies world wide.

⁴⁶ Gerrin & Yesnowitz “L’audacieux pari de Barack Obama” *Le Monde diplomatique* (April 2008) 1 at 12.

⁴⁷ Lord Irvine refers to the human rights advocacy of HG Wells; of Professor Hersch Lauterpacht; and of President Roosevelt, linking Magna Carta with what became the Universal Declaration of Human Rights: above n 18 at 152-3

⁴⁸ (Everyman’s Library).

But Magna Carta's virtues must not be permitted to distract attention from the fact that it is nearly eight centuries out of date. Its concerns are for the "hands off" rights of *Wealth of Nations* and ignore Smith's less well known work *The Theory of Moral Sentiments*,⁴⁹ which showed that crucial to his free market is the autonomy of the participants, not in a merely formal sense but as members of society and accepted and respected by it.

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

David Dyzenhaus has described the gradual emergence across the whole of the common law world of "a common public law" which rejects the artificial divide between legal and political spheres of decision-making. By contrast with the earlier private common law tradition, notionally based on the creative expression of preordained common law values, the new public law, which traverses administrative law, constitutional law and international law, seeks to prospectively update and reshape public law values by viewing them through the lens of international human rights norms.⁵⁰

In a perceptive recent book Lee Palmer argues:⁵¹

The HRA requires the judicial importation of democratic standards and values enshrined in the ECHR into UK public authority decision-making. However, by contrast the countries with modern constitutions, such as South Africa and Canada, have designed their constitutional settlements often after lengthy consultation and debate, there is little guidance in the HRA in the direction that democracy should take in the United Kingdom. For example ... how far can an old-fashioned treaty such as the ECHR – which on the one hand says very little directly about the protection of human rights and the socio-economic sphere, which on the other hand has enshrined the quality and respect for human dignity and psychological integrity of every person – allow for

⁴⁹ (Cambridge 2002).

⁵⁰ Lee Palmer *Judicial Review, Socio-Economic Rights and the Human Rights Act* (Hart Publishing 2007) at 190.

⁵¹ *Ibid* at 189.

the development by UK courts of a contemporary concept of democracy that provides at least a minimum level of social protection. It notes that in interpreting the scope of ECHR rights, senior courts in the UK have turned to pronouncements of other common law constitutional courts, including the South African Court and the Canadian Supreme Court, which have adopted similarly “open-textured” constitutions in the last two decades or so.

The description as “old-fashioned” of the European Convention of Human Rights strikes rather a wry note in a country like ours where the modest New Zealand Bill of Rights Act provides no means of redressing breaches of fundamental rights which in European states and in the United Kingdom have the force of law. In *R (Limbuela) v Home Secretary*⁵² the House of Lords held that the withdrawal of support to destitute asylum seekers constituted breach of art 3 of the European Convention which required the courts to intervene to protect them. Lord Bingham cited from *Sir Thomas More* by Shakespeare a phrase which followed this passage:

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

Lord Bingham’s citation was devastating:

...this your mountainous inhumanity

In *Reys v R*⁵³ the same Judge recalled the speech of Chaskalson P in the Constitutional Court of South Africa:⁵⁴

The very reason for establishing the new legal order and for investing the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and weakest among us that all of us can be secure that our own rights will be protected.

⁵² [2006] 1 AC 396.

⁵³ [2002] 2 AC at 235

⁵⁴ *State v Makwanyane* [1995] 1 LCR 369, 311 cited by Lord Bingham in *Reys v R* [2002] 2 AC 235.

Palmer states:⁵⁵

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

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

Professor Michael Taggart⁵⁶ has faced the problems experienced by public lawyers in common law jurisdictions when human rights instruments such as the HRA have been injected into a long established legal system. He says as to New Zealand that it is necessary not only to determine how a rights-based form of adjudication can be fitted into the constitutional parameters of our administrative law, but to identify the points at which established rules of principles of administrative rules should give way to what he has called “the bigger guns of constitutional or international law”.⁵⁷

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

⁵⁵ Palmer above n 50 at 90.

⁵⁶ Alexander Turner Professor at the University of Auckland with an international reputation.

⁵⁷ “The Tub of Public Law” in Dyzenhaus (ed) *The Unity of Public Law* (Hart 2004) 456 at 466 cited by Palmer at 195.

that New Zealanders are members of a global society whose constitution is a critical to our future as anything we can do here.⁵⁸ There, in my view, a particular effort is needed.

Care is of course needed to ensure that in responding to international initiatives we preserve the essentials of our constitution: the primacy of Parliament and the separation of powers.⁵⁹ But inertia is not an option.⁶⁰ For example, four days ago the House of Lords in its judicial capacity recognised that, because of the value and importance of family life, the right to family recognised by Art 8 of the European Human Rights Convention extends beyond any single individual.⁶¹ As standards of what is decent are lifted in the states with which we compare ourselves, each limb of government must play its part to ensure that we do not fall behind.

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

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

While New Zealand is numerically small, in the area of law we have strength beyond our size.⁶² In several South Pacific state New Zealand jurisprudence and constitutional conventions mix with indigenous culture and values to contribute to

⁵⁸ Within the burgeoning literature may be mentioned Martti Koskenniemi *From Apology to Utopia* (Cambridge 2005), Costas Douzinas *The End of Human Rights* (Hart Publishing reprinted 2007), HL Pohlman *Terrorism and the Constitution* (Rowman and Littlefield 2008), Philip Bobbitt *Terror and Consent* (Allen Lane 2008).

⁵⁹ See Philip Sales QC and Joanne Clement “International Law in Domestic Courts: the Developing Framework” (2008) 124 LQR 388 at 389ff.

⁶⁰ See Treasa Dunworth “The Rising Tide of International Law: Will New Zealand Sink or Swim?” (2004) 15 Public Law Review 36, cited by Sales and Clement, *ibid*.

⁶¹ *Beoku-Betts v Home Secretary* [2008] UKHL 39 25 June 2008.

⁶² As witness the New Zealand presence among academic leaders, for example in England Donald Harris and Janet McLean, in the USA Benedict Kingsbury and Jeremy Waldron, in Canada Roger Clark, Peter Hogg and Michael Trebilcock, as well as in Australia.

public confidence in the rule of law. There and elsewhere we can and should add to the sterling work performed by New Zealand public servants our skills in law drafting; access to our sophisticated legal database; capacity building, and much more.

There are heartening signs of what can be done. Our armed forces, a disproportionate number of them Māori, have assumed peace-keeping responsibilities around the globe. Don McKinnon as Commonwealth Secretary-General and Colin Keating at the United Nations, our diplomats, academics, business and sporting personnel, our tourists – all take the New Zealand brand and its standards of essential decency worldwide. But as international pressures grow, our contribution must increase. While I am most familiar with the law,⁶³ it is evident that there are also great opportunities for us to contribute to the world the work not only of our farmers and agricultural experts and other traditional exporters but our scientists, our teachers, our entire community: to see ourselves as able to contribute to a wider good. As the High Commissioner knows at first hand, one answer to terrorism is to get to know as friends the people whose fears mirror ours and who ultimately seek the same decencies as we do.

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

⁶³ The numbers of academic writers alone are such it would be invidious to attempt a list.

These are big challenges. The means to meet them will be the subject of legitimate differences of opinion. I am inclined to share Lord Justice Sedley's view that within New Zealand:⁶⁴

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

We might even generalise the right to proportionate treatment which appeared in Chapter 20 of Magna Carta⁶⁵ and under European law has become a general test for conformity with human rights standards.⁶⁶

However our primary constitutional need is not, I suggest, for another piece of paper with lawyers' words on it, but an acceptance by New Zealanders that each of us must contribute to the well-being of all in our society and of the world community; and the starting point is to understand the basic constitutional tools.

We have to date in New Zealand enjoyed the advantage of our small and relatively cohesive society; that neither Parliament, Executive nor Judiciary have attempted to challenge seriously the constitutional conventions that keep each from trespassing on the territory of the others.⁶⁷

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

That does not however absolve the judges from their role to be vigilant on behalf of the community they serve. Judges, who see any breach of convention at close quarters, must not flinch from recording and responding to it if that occurs. Where

⁶⁴ Sedley above n 23 at 23.

⁶⁵ "For a trivial offence, a free man shall be fined only in proportion to the degree of his offence, and for a serious offence correspondingly, but not so heavily as to deprive him of his livelihood."

⁶⁶ See *Mihos v Attorney-General* [2008] NZAR 177.

⁶⁷ *Cooper v Attorney-General* above n 37.

there is real risk of infringement a *Quilter* declaration,⁶⁸ of the risk and where necessary the fact of breach, may be made.

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

In the presence of the Ambassador it may be mentioned that New Zealanders have not forgotten our debt to the US naval aviators at the Battle of the Coral Sea and Midway who at an early point in my life saved New Zealand from invasion. The jurisprudence of that great nation has now once more given a lead to the international legal community as to how the very greatest issues are to be handled. Indeed the high regard of that community for the institutions of the USA had led to predictions that the result of *Boumediene* would follow inevitably from the Supreme Court's settled jurisprudence.⁶⁹

To us in New Zealand, the case provides a double lesson. To Parliament and the Executive, of the need to avoid departures from convention and the unsettling effect of their exposure to judicial process, however pressing the justification. To the judiciary, as to our academic thinkers, of the need for vigilance and preparedness on their part to give early warning which may avoid the risk of litigating exceptional

⁶⁸ *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA).

⁶⁹ In a paper delivered at the University of Auckland two years ago it was ventured:

The US Supreme Court has already overruled decisions of lower courts that they lacked jurisdiction to review events at Guantánamo Bay. I am confident that the Court that decided *Marbury v Madison* (1803) 5 US 137, striking down even statutes that infringe the US Constitution, will endorse the simple precept now adopted by the common law – that, wherever executive authority is exercised, even the formerly unassailable Royal prerogatives, there the writ of the courts will run to review its legality.

Baragwanath "Liberty and Justice in the Face of Terrorist Threats to Society" address to Alumni University of Auckland 3 March 2006.

cases and their terrible dilemma: either of acquiescing in injustice; or, as Lord Cooke warned, of an exceptional response from the courts, with the high risks of that course.

It is to be hoped that the guidance of Magna Carta may encourage all of us to keep the Kraken of constitutional discord asleep. An important contribution to that result is to awaken public knowledge of and sensitivity to our constitution. For their part in that exercise the organisers of this conference are to be congratulated.⁷⁰

⁷⁰ I express my thanks to Professors Don Harris QC and Dick Howard for early guidance, to Professors Michael Taggart and Philip Joseph and to my colleagues for discussions, and to Catherine Fleming for invaluable research and ideas.