

SIR EDWARD COKE AND THE SOVEREIGNTY OF THE LAW

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‘What Shakespeare has been to literature, what Bacon has been to philosophy, what the translators of the authorized version of the Bible have been to religion, Coke has been to the public and private laws of England.’

— Sir William Holdsworth, *Some Makers of English Law* (Cambridge University Press, 1938) 132.

Sir Edward Coke is one of the most celebrated English lawyers of all time. This article explains his ‘higher law’ jurisprudence and the undeniable impact of his writings and judicial rulings. Christian philosophy underpinned Coke’s influential rulings, and his influential writings revived the Magna Carta (as a fundamental charter of individual rights and liberties) from the obscurity into which it had fallen under the Tudors. Coke’s interpretation of the law became extremely influential not just in England but in all nations of the British Empire, including Australia. For his defence of the supremacy of the law, for his advocacy of individual rights and liberties, and for his bold assertion of judicial independence, ‘few figures have deserved more honour’¹ in the history of the common law.

I INTRODUCTION

Sir Edward Coke (1552–1634) is generally recognised as the most celebrated English jurist and interpreter of the common law. He is especially celebrated for his courageous defence of the supremacy of the law against the Stuarts’ claim of royal prerogative. First published in 1628, Coke’s *Institutes of the Laws of England* (*Institutes*) is considered the classical statement of English constitutional principles in the 17th century. For his defence of the supremacy of the law, for his advocacy of individual rights and liberties, and for his bold assertion of judicial independence, ‘few figures have deserved more honour’.²

This article explains how Coke resurrected the Magna Carta after centuries of political hibernation. His second volume of *Institutes* is credited with reviving the Great Charter from the obscurity into which the document had fallen under the Tudors. His commentary became deeply influential not just in England but also in North America, and later still, in all nations under the British Empire. Thanks to Coke’s legal writing and interpretation, the Magna Carta is still recognised as a powerful symbol of the struggle for freedom against political oppression and, indeed, a constant reminder of the basic rights of the individual against arbitrary power.³

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¹ Allen D Boyer, ‘Introduction’ in Allen D Boyer, *Law, Liberty and Parliament: Selected Essays on the Writings of Sir Edward Coke* (Liberty Fund, 2004) vii, xiv.

² Ibid.

³ Lord Denning described Magna Carta as ‘the greatest constitutional document of all times — the foundation of the freedom of the individual against the arbitrary authority of the despot’, quoted in Danny Danziger and John Gillingham, *1215: The Year of Magna Carta* (Simon and Schuster, 2003) 268.

II THE JURISPRUDENTIAL APPROACH OF SIR EDWARD COKE

Sir Edward Coke was a barrister, a judge and a politician. The son of a Norfolk barrister, he attended Cambridge and trained for the Bar himself. In 1593, sitting in his second Parliament, Coke was made a Speaker of the House of Commons. In the next year, Queen Elizabeth appointed him Attorney-General, a post he kept when James acceded to the throne in 1603.⁴ Three years later, the king appointed him as Chief Justice of the Court of Common Pleas. After six years in office, Coke displeased the king for his uncompromising commitment to the common law. He was transferred to the King's Bench in order to become its Chief Justice. In 1616, exasperated at his attempts to limit the royal power, James dismissed him from that judicial post.

Coke's writings on various cases in the early 1600s are the foundation stones of judicial review of legislation, anti-monopoly law, and freedom from arbitrary search or seizure of someone in their own home. '... [T]he house of every one is to him as his... castle and fortress, as well for his defence against injury and violence, as for his repose',⁵ he famously stated. For such remarkable contributions he is deservedly called the 'Oracle of the Common Law'⁶ and the 'Shakespeare of the Common Law';⁷ indeed, Coke is broadly regarded as one of the most celebrated English lawyers of all time. According to his main biographer, Allen D Boyer:

Wherever the common law has been applied, Coke's influence has been monumental ... He is the earliest judge whose decisions are still routinely cited by practicing lawyers, the jurist to whose writings one turns for a statement of what the common law held on any given topic.⁸

In late 1608 James I decided that Coke should not adjudicate rival contentions in a legal dispute involving the Court of High Commission (a prerogative court entrusted with supervision of ecclesiastical matters) or the common law courts, as James thought it would be appropriate for him to adjudicate this matter personally (seemingly at the instigation of Bancroft, the Archbishop of Canterbury). Since he believed that the Commission's alleged power to order arrests encroached on the jurisdiction of common law courts, Coke argued that such power to arbitrarily arrest should be resisted by the courts. He was convinced that Magna Carta prohibited arbitrary imprisonment without due process. When Archbishop Bancroft asserted that the monarch could judge whoever he wished and whatever case he pleased, Coke replied that the 'Word of God' actually requires that 'the laws even in heathen countries [must] be obeyed'.⁹ And so history tells us of that moment when Coke dared to inform an English monarch that even kings themselves ought to be 'under God and the law'.¹⁰ The argument was viewed as treasonable by a monarch who believed that he, as the king, personified the law. Coke remained resolute and he boldly appealed to Lord Bracton so as to remind James that 'the King shall not be under man, but under God and the Law'.¹¹

⁴ During his time as Attorney-General, Coke worked to protect the integrity of the law, gaining experience of the dangers of royal authority. He attempted to restrict the abuse of royal power using the common law as a system of limitation of government power that he would continue to advance towards on the bench. See David Chan Smith, *Sir Edward Coke and the Reformation of the Laws: Religion, Politics, and Jurisprudence, 1578–1616* (Cambridge University Press, 2014) 89.

⁵ *Semayne's Case* (1604) 5 Co Rep 91, 194, 195.

⁶ Hastings Lyon and Herman Block, *Edward Coke: Oracle of the Law*, (Houghton Mifflin, 1929).

⁷ Sir William Holdsworth, *Some Makers of English Law* (1938) 132.

⁸ Boyer, above n 1, xiii–xiv.

⁹ John Lord Campbell, *The Lives of the Chief Justices of England* (Blanchard and Lea, 1851) vol 1, 231.

¹⁰ *Ibid* 232.

¹¹ *Ibid*.

Written during the period of Magna Carta, Bracton's treatise *De Legibus et Consuetudinibus Angliae* amounts to the first ever systematic treatment of the common law. As such, no account of the history of the common law is complete without describing the contributions of this extraordinary 13th century jurist and churchman. His exceptional contributions to the common law even earned him the much deserved title of 'Father of the Common Law.'¹² Undoubtedly, the most influential proposition of Bracton's treatise is that the English king is also subject to the law.¹³ The emphasis here is not so much on government power or authority but rather on legal responsibility. This is how the role of the king is described: 'He is called *rex* not from reigning, but from ruling well, since he is a king as long as he rules well ... but a tyrant when he oppresses by violent domination the people entrusted to his care.'¹⁴ The immediate effect is to affirm the monarch's obligation to always be subject to God and the law. Undoubtedly, the book's most celebrated passage is the significant statement that the king himself ought to be 'under God and the law.' For 'the king himself', Bracton declared,

ought not to be under man but under God, and under the law, because the law makes the king ... [F]or there is no king where will, and not law, wields dominion. That as a vicar of God he ought to be under the law is clearly shown by the example of Jesus Christ ... [f]or although there lay open to God, for the salvation of the human race, many ways and means ... He used, not the force of his power, but the counsel of His justice. Thus He was willing to be under the Law, 'that He might redeem those who were under the Law.' For He was unwilling to use power, but judgment.¹⁵

These are arguably the most famous words ever pronounced in the entire history of the common law. These words were a powerful antidote against the State absolutism that the later Tudors and the Stuarts attempted.¹⁶ The idea entails the view that human power is derived from God so that it is ultimately limited by the law. According to the late Owen Hood Phillips:

Writing in the thirteenth century, Bracton adopted the theory generally held in the Middle Ages, that 'the King himself ought not be subject to man but subject to God and to the law, because the law makes him King'. The same view is also expressed in the Year Books of the fourteenth and fifteenth centuries. Such superior law governed kings as well as subjects and set limits to the prerogative.¹⁷

Coke restated Bracton's most celebrated assertion that the king ought to be subject to 'God and to the law'¹⁸ in his famous dispute with James I over the superiority of the common law. James asserted that as a monarch he represented the embodiment of the law. And yet, Coke was adamant and reminded him that, as Bracton stated, the king is 'under God and the law, for the law makes the king.'¹⁹ In reflecting on this extraordinary moment in English history, the famous twentieth-century English judge, Lord Denning, commented:

¹² Herbert W Titus, 'God's Revelation: Foundation for the Common Law' in H Wayne House (ed), *The Christian and American Law* (Kregel Publications, 1998) 13.

¹³ James Spigelman, 'Magna Carta in its Medieval Context' (Speech delivered at Banco Court, Supreme Court of New South Wales, Sydney, 22 April 2015) 16.

¹⁴ Titus, above n 12, fn 77.

¹⁵ *Ibid* 35.

¹⁶ Theodore F T Plucknett, *A Concise History of the Common Law* (Butterworth, 5th ed, 1956) 263. Plucknett (1897-1965) was a British legal historian who was the first ever Chair of Legal History at the London School of Economics.

¹⁷ Owen Hood Phillips and Paul Jackson, *Constitutional and Administrative Law* (Sweet & Maxwell, 7th ed, 1993) 33.

¹⁸ *Ibid*.

¹⁹ Sir Edward Coke, *Reports* (1602) vol 2 pt iv xix.

Those words of Bracton quoted by Coke, ‘The King is under God and the law’ epitomise in one sentence the great contribution made by the common lawyers to the Constitution of England. They [the common lawyers] insisted that the executive power in the law was under the law. In insisting upon this they were really insisting on the Christian principles [of the common law]. If we forget these principles, where shall we finish? You have only to look to the totalitarian systems of government to see what happens. The society is primary, not the person. The citizen exists for the State, not the State for the citizen. The rulers are not under God and the law. They are a law unto themselves. All law, all courts are simply part of the State machine. The freedom of the individual, as we know it, no longer exists. It is against that terrible despotism, that overwhelming domination of human life, that Christianity has protested with all the energy at its command.²⁰

In this sense, the same jurisprudential approach that appeared in Bracton’s seminal work in the 13th century was professed to govern the common law over 300 years later.²¹ This momentous encounter of the Chief Justice with his impetuous king left an indelible mark on the development of the common law. Anthony Arlidge and Igor Judge provide a colourful account of the interaction between James and his ‘in subordinate’ judicial officer:

The King told the Chief Justice that he ‘spoke foolishly’. While relying on his prerogative, the King would also ‘ever protect the common law’. Coke responded that the ‘common law protecteth the King’. The royal rejoinder was alarming. The King exploded, ‘Then I am to be under the law, which is treason to affirm’ – the King protected the law and not the law the King. This dangerous moment for Coke is vividly brought home by the report that the King shook his fist at him, and took great offence at the suggestion that he should be subject to the law. Coke quoted from Bracton, ‘*Quod rex non debet esse sub homine, sed sub Deo et Lege*’ (the King ought not to be subject to man, but subject to God and the Law).²²

Modern historians somehow tend to discount the influence of religious thinking on Coke’s jurisprudence.²³ In the context of 17th century England, however, ‘it is necessary to consider the intertwining of legal-constitutional and religious thinking to explain conflict between the crown and its subjects’.²⁴ As noted by Champion, Coke’s principal argument ‘was that law was immemorial, drawing from God’s reason, rather than the will of a monarchical legislator’.²⁵ He saw in God’s law the superior source of all good laws and constitutions, asserting that this law was incorporated into the country’s legal system. Thus, in *Third Reports* Coke famously stated:

For as in nature we see the infinite distinction of things proceed from some unity, as many flowers from one root, many rivers from one fountain, many arteries in the body of man from one heart, many veins from one liver, and many sinews from the brain: so without question *Lex orta est cum mente divina*, and this admirable unity and consent in such diversity of things proceeds only from God, the Fountain and Founder of all good laws and constitutions.²⁶

²⁰ Sir Alfred Denning, *The Changing Law* (Stevens & Sons, 1953) 118.

²¹ Jeffrey A Brauch, *Is Higher Law Common Law? Readings on the Influence of Christian Thought in Anglo-American Law* (Fred B Rothman, 1999) 34.

²² Anthony Arlidge and Igor Judge, *Magna Carta Uncovered* (Hart Publishing, 2014) 122. As Arlidge and Judge point out at 122, ‘Given the King’s assertion that Coke was speaking treason, this was a remarkable response. In some accounts, Coke fell flat on his knees, and the Lord Treasurer, Lord Cecil, intervened to pacify the situation’.

²³ David Adam Smith, *Violence and the Law: The Making of Sir Edward Coke’s Jurisprudence, 1578–1616* (Doctoral Thesis, Harvard University, 2007) 52.

²⁴ *Ibid* 53.

²⁵ Justin Champion, ‘From *Liber Homo* to “Free-born Englishman”: How Magna Carta Became a “Liberty Document”, 1508–1760s’ in Nicolas Vincent (ed), *Magna Carta: The Foundation of Freedom 1215–2015* (Third Millennium Publishing, 2nd ed, 2015), 103, 111. Professor Champion was Head of the Department of History at the University of London between 2005 and 2010.

²⁶ Sir Edward Coke, *Reports* (1602), vol 3, cii.

There is little doubt that Coke was a deeply religious person. He surrounded himself in the Inner Temple with Christian symbols and regalia that were reminders of biblical wisdom and morality.²⁷ Indeed, Coke invoked God's blessings in both the preface and epilogue of each volume of *Institutes*. More often than not he cited the authority of Scripture to justify his opinion and rulings, taking it for granted that divine authority is behind every true law. Thus, he referred to Moses as 'a Judge, and the first writer of the Law'.²⁸ Toward the end of his impressive career Coke reflected upon his spiritual struggle, asking God's protection upon him for 'A Saving Faithe and Patience together with a Testimonye of a good conscience to the End and in the End against the Temptations and Every dartes of the Enemy'.²⁹

Coke openly relied on biblical principles to both defend and legitimise the common law. He often cited the Bible in cases where he was directly involved as a judicial officer.³⁰ Coke believed that the rights and freedoms of the English people — in particular, the right of self-defence and impartial judgement — derive from immutable principles of natural law that no human law can ever repeal or abrogate. In *Calvin's Case* (1608), as Chief Justice of the Court of Common Pleas, Coke stated:

The Law of Nature is that which God at the time of creation of the nature of man infused into his heart, for his preservation and direction; and this is *Lex Aeterna*, the moral law, called also the Law of Nature ... and written with the finger of God in the heart of man.³¹

Coke assumed that the 'law of nature' reflected God's eternal law. He described such law as 'a testimony of [...] that conscience which God has engraved upon the minds of men'.³² The assumption is found in the Epistle to the Romans, where Paul states that although the gentiles (ie non-Jews) have not received the Ten Commandments, they can still do all things required by the law, 'because of the work of the law that is written in their hearts. Their conscience bear witness of this fact, with their thoughts accusing or else excusing them.'³³ According to the late English theologian, John Stott, what Paul is stating is:

that the same moral law, which God has revealed in Scripture, he has also stamped (even if not so legibly) on human nature. Since he has in fact written his law twice, internally as well as externally, it is not to be regarded as an alien system, which we impose on people arbitrarily, and which it is altogether unnatural to expect human beings to obey. On the contrary, there is a fundamental correspondence between the law in Scripture and the law in human nature. God's law fits us; it is the law of our own being. We are authentically human only when we obey it. When we disobey it, we are not only rebelling against God, we also contradict our true selves.³⁴

Coke was inspired by natural law theory to assert that this law has been written by God in the heart of every human being. Ultimately, the basic purpose of the law, according to Coke, is to reveal the universal moral order which is instilled by God into the human heart through the 'law of reason'. This law, rightly understood, works as a powerful weapon against political tyranny because it must be used to combat all forms of human iniquity. 'Law should enforce God's law and counter-act the wills of the devil',³⁵ Coke says. Later in life Coke argued that

²⁷ Ibid 54.

²⁸ James R Stoner, *Common Law and Liberal Theory: Coke, Hobbes, and the Origins of American Constitutionalism* (University Press of Kansas, 1992) 19.

²⁹ BL Additional MS 22591, f.289r. Quoted from Smith, above n 22, 55.

³⁰ Ibid.

³¹ 77 ER 377, 392.

³² John Calvin, *Institutes of the Christian Religion*, John T McNeill (ed); (Westminster John Knox Press, 1960) [trans of: *Institutio Christianae Religionis* (first published 1536)]. The Franco-Swiss lawyer John Calvin (1509–1564) stands alongside Luther as a great reformer of Christianity.

³³ Romans 2:15.

³⁴ John Stott, *The Message of Romans: God's Good News for the World* (Inter-Varsity Press, 1994) 89.

³⁵ Smith, above n 23, 55

'[t]he highest reason is that which works for religion, and which is not any less dignified than law; give honours and glory to the one God'.³⁶

In *First Institutes*, Coke cites the Latin maxim '*Lex est sanctio justa, jubens honesta, et prohibens contraria*' [law is a just sanction, commanding what is right, and prohibiting the contrary].³⁷ Typical of such citation is the assumption that 'law is concerned first of all with right and wrong, not simply with policy, as we tend to assume today'.³⁸ The argument bears a visible connection with the traditional understanding of jurisprudence as encompassing the 'science' of the right and the wrong, and of justice as a concept derived from God's wisdom and revelation. As Coke himself stated: 'Justice did not know a father, mother, or brother, and did not take on a personality; but it imitates God'.³⁹

Coke speaks of crime mainly in terms of moral wrongs. He stresses 'the importance of preventing crime as well as punishing it', so that 'convict felons get what they deserve'.⁴⁰ His approach to the judicial ruling is premised on a comprehension of the institution's antiquity and its responsibility in upholding the supremacy of the law.⁴¹ Perhaps one of the most significant aspects of Coke's jurisprudential thinking is the constant insistence upon the equation of law and reason. Reason is not a mere discretion or logic devoid of empirical experience. Rather, reason is training in a way of thinking that is non-arbitrary and non-apodictic. Thus, Coke argues that judges do not create laws; they simply declare or enunciate the existing ones insofar as any existing law might be 'hidden' and so waiting to be discovered.

What Coke meant by 'artificial reason' is basically the delicate combination between natural reason (which is naturally inherent in the law) and the sort of reasoning learned lawyers acquire by means of their systematic analysis of the law.⁴² This implies that laws must be endowed with internal logic, coherence, structure and proper functioning. This also implies that adjudication is primarily about the discovery of the law, not the making of law, so that there is no judicial purpose apart from discovering, revealing, and clarifying the law. This assumption is clearly expressed in Coke's well-known statement that 'New adjudication does not make new law, but makes plain the old; adjudication is the dictum of law, and by adjudication law which was before hidden is newly revealed'.⁴³

III HISTORY OF MAGNA CARTA AS A FUNDAMENTAL LAW

The 12th century marked a significant outburst of literature, art and culture in England. This outburst accompanied further developments of Christian ideals infusing the law and government. By the close of that century, certain legal tendencies were deeply ingrained in England, including those centred on the creation of laws containing features of modern written constitutions. These laws dealt with matters considered to be fundamental to the functioning of a community, providing legal rights and protections to every individual, both

³⁶ 'Summa ratio est que pro religione facit, qua non lex dignior ulla est; soli deo honor et gloria,' quoted from Smith, above n 23, 55.

³⁷ Sir Edward Coke, *Institutes* (1628) 394–5.

³⁸ Stoner, above n 28, 19.

³⁹ 'Justitia non novit Patrem, Matrem, neque Fratrem; personam non accepit, sed Deum imitatur' quoted in Smith, above n 23, 55.

⁴⁰ Stoner, above n 28, 19.

⁴¹ Thomas G Barnes, 'Introduction to Coke's "Commentary on Littleton" in Boyer, above n 1, 12.

⁴² Harold J Berman, *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition* (Harvard University Press, 2006) 260.

⁴³ (1612) 10 Co Rep 42, quoted in Thomas G Barnes, *Shaping the Common Law: From Glanvill to Hale, 1188–1688* (Stanford University Press, 2008) 122.

male and female.⁴⁴ These laws had the primary objective of discouraging immoral behaviour and facilitating the Christian ideal of government under the law.

All these characteristics of the legal system in medieval England found their fullest expression in the agreement imposed on the monarch, John Lackland, in June 1215. King John's grant of Magna Carta in 1215 is a perfect example of the central role Christianity played in developing the common law. Constituting a major shift in the mentality of the English people, Magna Carta was a significant advancement of the law; in that the provisions found in the Charter (and its many subsequent revisions) were concerned primarily with recognising and endowing political and juridical rights. More importantly, the document was a concession from the king that he too was bound by the law, thus establishing a clear formal recognition of the rule of law.

King John desired to rule arbitrarily after inheriting the throne following King Richard's death in 1199. His ability to rule arbitrarily was soon called into question, especially when a number of failed military conflicts abroad (namely, losses to the French), combined with constant increases in taxes to fuel such conflicts, provoked a great deal of discontent amongst his subjects (most notably, the nobles and barons). Growing discontent with King John heightened after a dispute with Pope Innocent III over the appointment of the See of Canterbury.

The principles governing the election of bishops in Western Christendom were laid down at the third Lateran Council in 1179. And yet, John desired the English church to be entirely subservient to the crown. He wanted to make sure these bishops were men he knew and could trust. In 1205 two candidates disputed the election of the See of Canterbury. However, Pope Innocent III, who wished to make sure the person appointed would be faithful to Catholic dogmas and tradition, rejected both contenders and appointed instead Stephen Langton, his own candidate. For his part, John expelled the monks from Canterbury and refused an entry permit into England to the new appointee.⁴⁵ But Pope Innocent III would never tolerate the overturn of a perfectly valid canonical procedure in order to suit the whim of a 'mere king'. So the Great Interdict followed on 24 March 1208, to which John replied by confiscating church property. This led Rome to submit him to severe punishments, including excommunication in November 1209.

Excommunication meant the king's absolute exclusion from the consolation and fellowship of the church in this world, and the threat of eternal damnation in the world to come. In the context of medieval England, this was a tragic situation because people believed that there was allegiance to something higher than their allegiance to a personal king. Above all, the interdict released all the barons from their oaths of allegiance to the monarch, requiring them to declare war on the king until he submitted.⁴⁶ In the event of an interdict the barons, while mindful of their loyalty to the monarch, had to first consider their higher loyalty to God and beg the sovereign to reconcile with the Holy Church. As noted by Geoffrey Hindley,

[w]hile kings and emperors claimed to be vicars of Christ upon earth, they were also thought to hold their kingdoms from him just as men below the king held their tenure from him. Christ was the ultimate liege lord and, as such, in the last resort could demand service against the king. During the years of interdict and royal excommunication Englishmen had been reminded of this more forcibly than most people in Christendom. And, if it came to that, by John's own act of some two years back ... [they] quite literally

⁴⁴ Andrew Blick, *Beyond Magna Carta: A Constitution for the United Kingdom* (Hart Publishing, 2015) 36.

⁴⁵ *Ibid.*

⁴⁶ 'Seven bishops went into voluntary exile: to remain might suggest complicity in the king's defiance. Winchester was the only see with a resident bishop — Peter des Roches, who remained true to his royal patron': Geoffrey Hindley, *A Brief History of Magna Carta: The Origins of Liberty, From Runnymede to Washington* (Robinson, 2015) 76.

acknowledged that their king had a feudal superior, namely the see of St Peter as embodied in the person of Pope Innocent III.⁴⁷

In November 1208, Pope Innocent III wrote to the barons to remind them of their primary responsibilities in the event of an interdict being promulgated.⁴⁸ More specifically, the Pope instructed the English barons to urge their king to immediately abandon his hostility to ‘our venerable brother Stephen.’⁴⁹ On papal orders, all the clergymen were expressly instructed to interrupt the normal ministrations of sacraments so that people were denied all the benefits of religion. The clergymen were prohibited to carry out any religious service except the baptism of infants and the administration of confession to the dying.⁵⁰ The idea behind these manifestly harsh measures, as Hindley pointed out:

[w]as that John’s subjects, dismayed at being cut off from the benefits of religion, would urge him to refrain from ‘walking in the counsel of the ungodly’ and return to his senses, confident that not only would he consider them good friends for their pains but that he would also rectify his conduct and so enable the kingdom to return to the body of the church. But of course, so long as the king persisted in his stubbornness many good men and women would suffer. Year in, year out, men and women lived without the blessing of Holy Communion. They married without the full benefits of the rites of the church, and were buried in un-consecrated ground. No doubt this was felt as the most serious deprivation. There are reports of bodies left unburied in churchyards; some parishes opened new burial grounds where the dead would have to lie unsanctified until the interdict was lifted and the ground could be consecrated.⁵¹

In 1212, the Pope authorised King Philip Augustus’s French invasion of the English kingdom. At the same time Stephen Langton was commissioned for England with papal letters which declared King John formally deposed.⁵² Under the serious threat of French invasion, John finally succumbed to the Pope’s demands in 1214. He resigned both the crowns of England and Ireland, receiving them back as the Pope’s feudatory. He also accepted Langton’s appointment as Archbishop to subject the kingdom to the Pope’s lordship.⁵³

These sources of discontent ultimately led the English barons to march into London in 1215, to force King John to sign the articles of demand encompassed in Magna Carta.⁵⁴ By that time Langton had become a leading figure in the struggle of the barons against the king. In those days, the influence of the church on political matters was quite significant. The clergy were responsible for holding the king to account. Thus, Langton spoke against royal injustice and about the right of bishops to reprimand the king if he violated the law. In holding the monarch to account there was no place for timidity and Langton was quite willing to take all the risks, even the death penalty if necessary.

Clergymen like Langton were the guardians of lawful government in medieval England. They provided the legal and theological expertise that was so vital to the demanding task of drafting legislation. Such religious officials could in turn heavily influence the application of the law, invariably infusing the system with biblical principles and the privileges of the church.⁵⁵ Their influence was crucial in facilitating the peace negotiations that brought together the two sides of the conflict in 1215. There was a remarkable degree of authority

⁴⁷ Ibid.

⁴⁸ Ibid 72.

⁴⁹ Ibid.

⁵⁰ Ibid 73.

⁵¹ Ibid 74–7.

⁵² Ibid 76.

⁵³ John W Baldwin, ‘Due Process in Magna Carta: Its Sources in English Law, Canon Law and Stephen Langton’ in Robin Griffith-Jones and Mark Hill (eds), *Magna Carta, Religion and the Rule of Law* (Cambridge University Press, 2015) 31.

⁵⁴ See Magna Carta arts 39 and 40.

⁵⁵ Blick, above n 44, 36.

drawn on the charisma of ecclesiastical positions. Among the 27 barons who put their names to the Magna Carta, eleven were clerics who justified their action as permissible under God and the church. Archbishop Langton and Robert Fitzwalter led them, with Fitzwalter declaring himself the 'Marshal of the army of God and Holy Church.'⁵⁶

Although Magna Carta signalled a significant advancement in English law, on its face it appears to be religiously motivated. First, the document was granted 'for the honour of God and the exaltation of the Holy Church.' Second, acting on the advice of two archbishops and nine bishops, the king sealed the famous document 'from reverence for God and for salvation of our soul and of all our ancestors and heirs.' Hence, thirteen original copies of the Charter were distributed among the bishops who then placed them in their respective cathedrals. These copies were written not by royal scribes working in the king's Chancery, but by the scribes who served the English bishops. Since King John obviously did not desire it to be widely publicised, the clergy took for itself the important task of proclaiming, distributing and preserving the Charter.

So it is now easy to understand why the very first clause of Magna Carta protects the church against state encroachments.⁵⁷ It follows that personal freedom and due process are explicit in provisions such as Clause 39 ('No freeman shall be taken or imprisoned or disseised [dispossessed] or outlawed or exiled or in any way ruined ... except by the lawful judgement of his peers or by the law of the land'); Clause 40 ('To no one will we sell, to no one will we deny or delay right or justice'); and Clause 52 ('If anyone has been disseised or deprived by us without lawful judgement or his peers of lands, castles, liberties, or his rights, we will restore them to him at once').

Other religious influences are found in Clause 8, ensuring that widows would not be compelled to marry against their will. This is a principle of freedom for marital choice. The clause was limited to the protection of widows and it is best explained by the clergy's influence. Clause 42 provides for the right to leave the realm and return without sanction. The Constitution of Clarendon confirmed this tradition so that it was not unlawful, for instance, for bishops to depart from the country without explicit permission of the king. There is also Clause 57, which deals with the restoration of land that had been taken arbitrarily by the monarch, although it also authorised delay of judicial proceedings for crusaders upon return from the Holy Land. The church wished to protect the privileges of religious institutions, including for the crusaders.

Another relevant provision is Clause 12, which provides that the king would take no taxation without the consent of those who were to be taxed. In 1215, the king was to take council with the barons and archbishops before making any such decision. The notion that a ruler should take council before making an important deliberation was a deeply held tradition. This referred to a process rather than an institution and the underlying principle was that the royal power was not absolute. This was a significant aspect of canon law, and Clause 12 makes specific use of religious language that would be familiar to any monk or bishop. This was not a coincidence. Some protection to what today can be described as 'human rights' is basically what inspired most of the principles of canon law. Roman law and canon law were the sort of thinking which dominated legal education and this particular clause functions as a principle of justice that was generally accepted as the 'common law' of Europe. There was a substantial though incomplete overlap between *Corpus Juris Civilis* and the Magna Carta so that many of the principles that can be found in the latter are derived from the former.

⁵⁶ William Sharp McKechnie, *Magna Carta: A Commentary on the Great Charter of King John* (James MacLehose & Sons, 1914) 5.

⁵⁷ In some ways, however, the provision was a failure because it was largely displaced by the popes and by the king securing the election of clergymen approved by him.

Another relevant provision of Magna Carta is found in Clause 61. It says that ‘the barons shall choose any twenty-five barons of the realm as they wish, who with all their might are to observe, maintain and cause to be observed the peace and liberties which we have granted.’ Any infringement of the Charter’s terms by the king or his officials would be communicated to any four members on the committee. If within forty days no remedy or redress were offered, then the king would have to empower the full committee to ‘distain and distress us in every way they can, namely by seizing castles, lands and possessions’ until he made amends. The king could be penalised for the breach of the Charter and also for any arbitrary behaviour that might place him at fault towards someone else. Procedures were laid down in great detail and there was no room to loophole for compromise or adjustment.⁵⁸ Clause 61 was therefore more radical than any other provision in the Charter. It expressly commanded the king to subject himself to a political body whose power (given the extent of what was specified in the clause) was higher than the king’s. Thus, the council aimed at taking out of the king’s hands what had so far been his royal prerogative. It sought to add an ecclesiastical voice to the process and established the right of the archbishop to take part in the process if he so desired.

At this point one might ask why, in Clause 61, the barons chose the number 25 to comprise their committee. Twenty-five is a highly symbolic number in the Bible. Twenty-five was the age in which the Levites were consecrated to God’s service. Likewise, that was the age from which many Hebrew kings had come to the throne. Further, the number 25 corresponds to ‘the law squared’ because the Pentateuch, the Bible’s first books, comprises five books. Finally, in the New Testament Christ is reported to have used five loaves to feed *five* thousand men plus all their wives and children.⁵⁹ These legitimising links from the Holy Scripture asserted that the Charter was created fundamentally for the sake of glorifying God.

From 1225, subsequent versions of the Great Charter ‘were reinforced by sentences of excommunication against infringers.’⁶⁰ Bishops pronounced the sentence of excommunication in an expression of dramatic religious ritual that was pivotal to enforcing the medieval document. Although in today’s society this seems a rather strange form of punishment, it was quite effective in those days. For instance, it was for the breaking of his oath (after 1135) that King Stephen became stigmatised as a tyrant and usurper. In an age without judicial review of constitutionally invalid legislation, oath-taking was taken very seriously and ‘the consequences of oath-breaking could prove disastrous for individuals as for nations.’⁶¹ Holt described the penalties for the breach of medieval charters were to:

[r]einforce the charters by the threat of excommunication; promulgate the penalty in the most solemn assemblies of king, bishops, and nobles, as in 1237 and 1253; reinforce the threat by papal confirmation, as in 1245 and 1256; have both charters and sentence published in Latin, French, and English as in 1253, or read twice a year in cathedral churches as in 1297; display the Charter of Liberties in church, renewing it annually at Easter, as Archbishop Pecham laid down in 1279; embrace the king himself within the sentence of excommunication, as Archbishop Boniface did by implication in 1234.

To modern eyes it is all repetitive and futile. In reality it was a prolonged attempt to bring the enforcement of the Charter within the range of canon law, to attach the ecclesiastical penalties for breach of faith to infringements of promises made “for reverence for God”, as the Charter put it, promises repeatedly reinforced by the most solemn oaths to observe and execute the Charter’s terms. This was perhaps the best the thirteenth century could do to introduce some countervailing force to royal authority.⁶²

⁵⁸ Hindley, above n 46, 241.

⁵⁹ Magna Carta Trust, *The 25 Barons of Magna Carta* <<http://magnacarta800th.com/schools/biographies/the-25-barons-of-magna-carta/>>.

⁶⁰ J C Holt, ‘The Ancient Constitution in Medieval England’ in Ellis Sandoz (ed), *The Roots of Liberty: Magna Carta, Ancient Constitution, and the Anglo-American Tradition of Rule of Law* (Liberty Fund, 1993) 32, 40.

⁶¹ Nicholas Vincent, *Magna Carta: A Very Short Introduction* (Oxford University Press, 2014) 12.

⁶² *Ibid* 41.

IV COKE AND THE REVIVAL OF MAGNA CARTA IN THE 17TH CENTURY

After serving Parliament, Coke, aged 76, went into retirement to complete his *Institutes*, which is now widely recognised as a foundational document of the common law.⁶³ The second volume of Coke's *Institutes* covers thirty nine statutes of significance. It is broadly recognised as the classical statement of English constitutional principles in the seventeenth century. It soon became uniquely influential not only in England but also in North America, and later still, in all the other nations across the British Empire.⁶⁴ As noted by Champion:

Coke's commentary in the second part of the *Institutes* is the first comprehensive account contextualising Magna Carta with a variety of relevant and legal materials. Although modern historians might charge Coke with anachronism in his integration of seventeenth-century ambitions into the medieval document, his work was the starting point for regarding the Charter as laying the foundations of fundamental law (and for establishing how the judiciary and Parliament had adapted its principles to circumstances).⁶⁵

Magna Carta was a medieval document forced upon a king by his rebellious barons in 13th century England. And yet, the document has acquired a much deeper symbolic meaning. Curiously, for more than a century the Magna Carta was ignored, if not considerably forgotten. In the mid-1590s Shakespeare wrote *King John*, and there is not a single mention in it of the Magna Carta. It was not until the 17th century that the document returned to prominence in England. This is only so because the parliamentary forces that opposed King Charles started searching for any historical precedent through which they could state their case against his arbitrary rule.⁶⁶ It is in this historical context that Magna Carta became a perfect example of legal resistance against the king. Under the early Stuarts, 'the great charter designed to restrain the Plantagenets was reborn. It was taken cheerfully out of its historical context and held up as an "original" constitution — proof that Charles was betraying not only his own people but English history at large'.⁶⁷ Since its purpose was to set limits on the royal power by having the courts enforce the law of the land — which can hardly be enforced against a civil ruler unless the law is defined in writing — the Great Charter became 'a sacred text, the nearest approach to an irrevocable "fundamental statute" that England has ever had... For in brief it means ... that the king is and shall be below the law.'⁶⁸

The revival of Magna Carta in the 17th century, as well as the mythical status it acquired, was in great part a direct result of Coke's work.⁶⁹ In 1619, while condemning the abuses of the royal power, he informed the House of Commons that the Charter earned its name 'not for the largeness but for the weight'.⁷⁰ He argued that no monarch is allowed to tax the people without their previous consent, and that the legal basis for such opposition was found in the Great Charter. Coke's dominance of parliamentary debates and his authoritative application of the Charter transformed the medieval document into the legal forms of constitutional government that were 'mobilized to the defence of the property and liberty of free-born Englishmen'.⁷¹ In both 1621 and 1624, Stephen D White explains,

⁶³ Stoner, above n 28, 15–16.

⁶⁴ See H D Hazeltine, 'The Influence of Magna Carta on American Constitutional Development' (1917) XVII *Columbia Law Review* 1.

⁶⁵ Champion, above n 25, 106.

⁶⁶ Dan Jones, *Magna Carta: The Making and Legacy of the Great Charter* (Head of Zeus, 2015) 108.

⁶⁷ *Ibid.*

⁶⁸ Sir Frederick Pollock and Frederic William Maitland, *The History of English Law Before the Time of Edward I, Volume 1* (1898) (Liberty Fund, 2010) 184.

⁶⁹ Jones, above n 66, 110.

⁷⁰ Dan Jones, above n 66, 110.

⁷¹ Champion, above n 25, 112–3.

Coke played an extraordinarily prominent role in Parliament's proceedings. In terms of sheer activity, he must be reckoned the leading member of the lower house in these years, because he delivered more speeches and committee reports in both years than any other member and ranked first in 1621 and second in 1624, in the number of committees on which he served. He was not, however, merely an active member of these parliaments. He was also a highly influential leader who proposed many remedies for the Commonwealth's grievances and who frequently bore the main burden of justifying or legitimating the commons' actions.⁷²

When Coke was elected for a second time to Parliament in 1628, he played a pivotal role in the drafting of the Petition of Right. For that effort he was sent to prison at the Tower of London.⁷³ Passed by both Houses of Parliament, the Petition was an attempt to prevent the king from collecting forced loans and arbitrarily imprisoning his political enemies. In other words, this was a declaration by Parliament, in the run-up to the English Civil War, that dealt primarily with the grievances of arbitrary taxation and arbitrary imprisonment. The Petition provided '[t]hat no man hereafter be compelled to make or yield any gift, loan, benevolence, tax, or such-like charge, without common consent by Act of Parliament'; and '[t]hat no free man be detained in prison without cause shown'. All of these 'rights and liberties' were to be enforced 'according to the laws and statutes of this realm', without 'prejudice' to the people or to the Parliament.⁷⁴

Above all, the Petition of Right was an attempt to bind the monarch to principles of constitutional government, 'in precisely the same way that John had been bound by the barons in 1215'.⁷⁵ King Charles apparently accepted all the terms of the Petition but soon later dismissed Parliament and did not call another one for eleven years, setting both on a collision course that ended in civil war, his execution, and a short-lived republic. Charles fought hard to retain his power of imprisonment without showing cause. The middle party in the House of Lords tried to help him by proposing the addition of a saving clause to legislation, which the House of Commons ultimately rejected.⁷⁶ Coke led the Commons in rejecting such a compromise, arguing that it was not possible to reconcile such a saving clause with the ordinary application of Magna Carta. This saving clause was *magnum in parvo* ('great in little') because it would 'weaken the foundation of law'⁷⁷ on which the Charter is founded, Coke said. As he pointed out,

[i]t is a matter of great weight, and, to speak plainly, will overthrow all our Petition. It trenches to all parts of it; it flies at loans, and at the oath, and at imprisonment, and at billeting of soldiers; this turns all about again. Look into all the petitions of former times: they never petitioned wherein there was a saving of the King's sovereignty. I know that prerogative is part of the law, but 'sovereign power' is no parliamentary word. In my opinion it weakens Magna Carta and all our statutes, for they are absolute, without any saving of 'sovereign power'; and shall we now add to it, we shall weaken the foundation of law, and then the building must need fall. Take heed what we yield unto: Magna Carta is such a fellow that he will take no 'sovereign'.⁷⁸

⁷² Stephen D White, *Sir Edward Coke and the Grievances of the Commonwealth* (Manchester University Press, 1979) 27.

⁷³ Berman, above n 42, 246.

⁷⁴ John Witte Jr, 'Towards a New Magna Carta for Early Modern England', in Robin Griffith-Jones and Mark Hill (eds), *Magna Carta, Religion and the Rule of Law* (Cambridge University Press, 2015), 109, 113–14.

⁷⁵ Jones, above n 66, 110.

⁷⁶ J R Tanner, *English Constitutional Conflicts of the Seventeenth Century 1603–1689* (Cambridge University Press, 1960) 63.

⁷⁷ Coke, *First Institutes*, 81 b. Quoted in William E Conklin, *In Defence of Fundamental Rights* (Sijthoff & Noordhoff, 1979) 50.

⁷⁸ John Rushworth, *Historical Collections* (1682) 562, quoted in Tanner, above n 76, 63.

Coke's famous assertion that 'Magna Carta is such a fellow that he will take no sovereign' reflects the opinion that this document is actually the 'Great Charter of the Liberties of England'. The Charter epitomises 'the principal ground of the fundamental laws of England'.⁷⁹ This goes in line with the argument that Magna Carta reflects the immutable principles of divine moral law. Indeed, Coke shared with his contemporaries the belief that God's moral law operates in as fixed a manner as the physical laws of nature. This rests on the premise that the world is governed by invariable laws of nature that determine how societies ought to be governed and structured. According to Harold Berman, such a holistic approach must be regarded as an integral part of a broader legal tradition which embraces not only a legal philosophy (in the narrow sense of the word) but which also embraces a 'religious philosophy' as well as a 'philosophy of the natural sciences'.⁸⁰

In the *Second Institutes* Coke seeks to provide an account of four centuries of English statutes and cases that were built on the foundations of Magna Carta. There he states that its provisions are 'for the most part declaratory of the principal grounds of the fundamental laws of England, and for the residue it is additional to supply some defects of the common law'.⁸¹ Coke holds the Great Charter second to none. To its 29th clause he provides a particularly broad meaning: that the rights declared in such clause extend to all free men and women; that it guarantees due process in all criminal proceedings — including the right to indictment by grand jury instead of accusation by information; the right to trial by jury; the right to answer one's accusers, and the privilege of *habeas corpus*; it even forbids royal grants of monopoly, for 'generally all monopolies are against this great Charter, because they are against the liberty and freedom of the Subject, and against the Law of the Land'.⁸² In Coke's terminology 'liberties' refer not only to freedom from external interference, but they also encompass the fundamental law of the realm, meaning that Magna Carta is declared as 'the Great Charter of the Liberties of England, so called of the effect, because they make men free'.⁸³

V COKE AND MAGNA CARTA IN COLONIAL AMERICA

A few years ago, political theorists from the University of Houston and Louisiana State University carried out comprehensive research to identify the American Founders' most quoted sources. After a decade of research, and more than 15,000 writings from the founding era, 3,154 citations were counted.⁸⁴ Lord Coke's *Second Reports* were a major reference during the revolutionary period, especially his celebrated remarks on Magna Carta.⁸⁵ It soon became incredibly influential in America. Due in great part to Coke's writings, the Magna Carta was adopted as the basis for the first legal documents taken across the Atlantic with the first English colonists. Copies of the Great Charter were published in the American colonies as early as 1687. It was to the Magna Carta that the settlers turned for their inspiration when revolution swept through North America. No taxation without consent and no imprisonment without due process were the issues that lay beneath the 1776 Declaration of Independence as the American colonies wrenched themselves from British rule. As Dan Jones puts it, '[t]he colonists saw themselves as English freemen, whose rights were to be afforded precisely the same protection as those in the old country'.⁸⁶

⁷⁹ S Sheppard (ed), *The Selected Writings of Sir Edward Coke* (Liberty Fund, 2003) vol III.

⁸⁰ Berman, above n 42, 263.

⁸¹ Ibid.

⁸² Sir Edward Coke, *Institutes* (1642) vol II, 47.

⁸³ 8 Reports (1611), Pref.

⁸⁴ H Wayne House (ed), *The Christian and American Law* (Kregel Publications, 1998) 85.

⁸⁵ Ibid.

⁸⁶ Jones, above n 66, 111.

Curiously, Coke was directly engaged in setting legal and commercial frameworks for the ventures in North America.⁸⁷ He played an essential role in the draft of the first charter of the Virginia Company in 1606. The document stated that the English settlers in North America had a fundamental right to enjoy 'all liberties, franchises, and immunities ... as if they had been abiding and born within this our realm of England'.⁸⁸ The liberties of Englishmen were further legally assured in the colonial charters of Massachusetts (1629), Maryland (1632), Connecticut (1662), Rhode Island and Carolina (both 1663), and Georgia (1732).

Lord Coke argued that Magna Carta 'was for the most part declaratory of the principal grounds of the fundamental laws of England, and for the residue it is additional to supply some defects of the common law'; again, that 'this statute of Magna Carta is but a confirmation or restitution of the Common Law'; and again, in Clause 29, that 'this chapter is but declaratory of the old law of England'. This view served as an inspiration for the American Bill of Rights and all its colonial predecessors.⁸⁹ Influenced by Coke's interpretation, the Great Charter became the fundamental statement of English liberties, a symbol and reminder of fundamental principles binding on government action.⁹⁰ As noted by Joyce Lee Malcolm,

Americans ... remained wedded to Sir Edward Coke's assurance that a royal command or parliamentary statute that violated a right was void. No one need, or ought to obey it. This view was especially compelling for Americans, since they opposed those parliamentary statutes infringing on promised rights and resented having no representation in that body. The American mindset, therefore, remained fixed on early seventeenth-century ideas that fundamental liberties embedded in Magna Carta and in common law needed to be jealously guarded and the appropriate means to protect them. These means included individual challenges and civil disobedience; the refusal of officials to carry out acts repugnant to rights; judges ready to declare any violation of a right against law; and finally nullification by juries.⁹¹

The influence of Coke's jurisprudence was at its height in England during the period when the American colonies were being most actively settled. The presence of Coke's doctrine led to repeated efforts by the colonial legislatures to secure for their constituencies all the benefits of the Great Charter, in particular Clause 29 which guaranteed due process and trial by jury. According to Edward S Corwin, Coke's interpretation of Magna Carta inspired the colonists to approach the 'law of the land' provision of Clause 29 as an affirmation not only of

⁸⁷ See Hazeltine, above n 64, xvii.

⁸⁸ Vincent, above n 61, 93.

⁸⁹ Paul O Carrese, *The Cloaking of Power: Montesquieu, Blackstone, and the Rise of Judicial Activism* (University of Chicago Press, 2003) 185.

⁹⁰ Edward S Corwin, *The Higher Law Background of American Constitutional Law* (Liberty Fund, first published 1928, 2008 ed) 69.

⁹¹ Joyce Lee Malcolm, 'Magna Carta in America: Entrenched' in Nicholas Vincent (ed), *Magna Carta: The Foundation of Freedom 1215–2015* (Third Millennium Publishing, 2nd ed, 2015) 130. Joyce Lee Malcolm is the Patrick Henry Professor of Constitutional Law at George Mason University Law School. She is a historian and constitutional scholar specialising in British and Colonial American History. She focuses on the development of individual rights and has written extensively on the subject.

legislative supremacy but also of individual rights and liberties.⁹² Further, the constant evocation of Magna Carta during the American colonial period (as a basic provider of political autonomy and the basic rights of the individual) ‘served to fix terminology for the future moulding of thought.’⁹³ Since the English colonies in North America were far from the seat of justice at Westminster and the Inns of Court, American lawyers relied on printed law books and the various abridgements that summarised the most important cases. These legal texts were primarily the works of Coke supplemented by the *Commentaries* of Blackstone.⁹⁴ The drafter of the Declaration of Independence, Thomas Jefferson, regarded Coke’s *Institutes* as ‘the universal book of law students, and a sounder Whig never wrote, nor of profounder learning in the orthodox doctrines of the British Constitution, or in what were called British liberties’.⁹⁵ Jefferson stated about the *Institutes*: ‘This work is executed with so much learning and judgement, that I do not recollect that a single position in it has ever been judicially denied. And ... it may still [1814] be considered as the fundamental code of English law’.⁹⁶

Based on Coke’s writings, the Massachusetts colonial Legislative Assembly declared, ‘upon further consideration and the many arguments used in the publick prints to support the doctrine’,⁹⁷ that the Stamp Act (a tax introduced by an Act of the British Parliament on 22 March 1765) was ‘against Magna Charta and the natural rights of Englishmen, and therefore according to Lord Coke null and void’.⁹⁸ In other words, the colonial assembly relied on Coke’s interpretation of Magna Carta to declare that Americans were entitled to the same legal rights as Englishmen.

The American colonial judiciary often cited Coke as the primary source of authority for their interpretation of the common law. In *Trevett v Weeden* (1786),⁹⁹ for example, the Superior Court of Rhode Island was asked to consider the constitutionality of an Act of the local legislature that imposed penalties on anyone who refused to take the state’s paper money at its face value. The legislation empowered the Superior Court or the Court of Common Pleas to try offenders without trial by jury. Four judges, including the Chief Justice, held the Act unconstitutional while only one judge doubted the court’s jurisdiction. The majority held the law void on the grounds of the plaintiff’s argument that ‘that great oracle of the law, Lord Coke’ taught that legislative acts that are ‘repugnant and impossible’ must be declared ‘null and void’, including any statute requiring judges to proceed ‘without jury ... according to the law of the land’.¹⁰⁰

⁹² Corwin, above n 90, 69. Edward S Corwin (1878–1963) was the third McCormick Professor of Jurisprudence and first chairman of the Department of Politics at Princeton University. He was also the President of the prestigious American Political Science Association and considered the leading expositor of the intent and meaning of the US Constitution. According to Corwin, Coke interpreted ‘by the law of the land [per legen terrae]’ to mean ‘by the Common Law, Statute Law, or Custom of England’. Such interpretation was given on the basis of ‘due process of law’, a term which appears for the first time in Statute 37 of Edward III, in 1344, when the English Parliament compelled the King to consent to a statute law curbing his royal prerogative. The section is worth reproducing: ‘No man of what estate or condition that he be, shall be put out of law or tenement, nor taken nor imprisoned, nor disinherited nor put to death without being brought in answer by due process of law.’ The same expression, ‘due process’, would be enshrined in the Fifth Amendment to the US Constitution, which declares that no-one ‘shall be deprived of life, liberty, or property without a due process of law’. A similar provision is later found in the Fourteenth Amendment, which was enacted after the American Civil War, in 1868. This Amendment forbids any state-member of the American Federation to ‘deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws’.

⁹³ Corwin, above n 90, 69.

⁹⁴ Stoner, above n 28, 13.

⁹⁵ Andrew Lipscomb (ed), *The Writings of Thomas Jefferson* (Thomas Jefferson Memorial Association, 1903) xii.

⁹⁶ Samuel E Thorne, *Sir Edward Coke, 1552–1952* (Bernard Quaritch, 1957) 3.

⁹⁷ Quoted in Theodore F T Plucknett, ‘Bonham’s Case and Judicial Review’, in Boyer, above n 1, 179.

⁹⁸ *Ibid.*

⁹⁹ (Rhode Island 1786).

¹⁰⁰ *Ibid* 182.

In the case of *Robin et al v Hardaway* (1772),¹⁰¹ the Superior Court of Virginia was called to decide on the fate of several persons of Indian descent who attempted to vindicate their freedom in spite of a statute of 1682 (and others) that reduced them to slavery. Although it was found that the infamous statute had been repealed in 1705, the court provided arguments that ‘throw considerable light upon the legal thought of the period’.¹⁰² These arguments reveal the profound impact of Coke’s interpretation of the common law in colonial America. Both the court and the plaintiffs relied on Coke’s reasoning in *Bonham’s Case* and *Calvin’s Case* to argue for the invalidity of an Act of Parliament:

All acts of legislature apparently contrary to right and justice are, in our laws, and must be in the nature of things, considered as void. The laws of nature are the laws of God, whose authority can be superseded by no power on earth. A legislature must not obstruct our obedience to Him from Whose punishments they cannot protect us. All human constitutions which contradict His laws, we are in conscience bound to disobey. Such have been the adjudications of our courts of justice ...¹⁰³

In October 1774, the delegates to the first Continental Congress of the thirteen discontented colonies justified their gathering to express grievances on the grounds that the colonies were acting ‘as Englishmen, their ancestors in like cases have usually done’.¹⁰⁴ When John Adams asserted that Parliament had no authority over the colonies, and that each comprised a separate power with its own independent legislature, he quoted verbatim from Coke’s *Institutes*. His fellow Bostonian James Otis had already done so, arguing against writs of assistance via raising a case based on Coke’s assertion in *Bonham’s Case* that the courts would control certain Acts of Parliament even to the extent of voiding them.¹⁰⁵ Otis relied particularly on Coke’s writings to claim that no British policy could deprive the American people of their fundamental rights derived from Magna Carta.

Ratified in 1791 the American Bill of Rights — the first ten amendments to the US Constitution — echoes Coke’s interpretation of Magna Carta in several places. According to the Fifth Amendment to the American Constitution, ‘no person shall ... be deprived of life, liberty, or property, without due process of law’. This is a reformulation of Clause 39 of the Magna Carta, which states: ‘No free man is to be arrested, or imprisoned, or disseized, or outlawed, or exiled, or in any other way ruined, nor will we go or send against him, except by the legal judgment of his peers or by the law of the land’.

The Fifth Amendment determines that no person must be ‘deprived of life, liberty, or property ... nor shall private property be taken for public use, without just compensation’. Compare this with the second half of Clause 30 of Magna Carta: ‘No sheriff or bailiff of ours, or anyone else may take any free man’s horses or carts for transporting things, except with the free man’s agreement’. This is also true about the Sixth Amendment of the Constitution: ‘In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury’. Compare this with Clause 40 of Magna Carta 1215 — ‘To no one will we sell, to no one will we deny or delay, right or justice’. The similarities are quite striking. It is perhaps no surprise that since the earliest years of the United States’ existence, its citizens have looked upon Magna Carta with an almost ‘Cokean enthusiasm’.¹⁰⁶

¹⁰¹ 1 Jefferson 109, 114, 1 Va Reports Ann, 58, 61 (1772)

¹⁰² Ibid 181.

¹⁰³ Ibid 179.

¹⁰⁴ Jones, above n 66, 111.

¹⁰⁵ Barnes, above n 41, 25.

¹⁰⁶ Jones, above n 66, 112.

VI ENDURING IMPACT OF MAGNA CARTA

When issued in 1215, Magna Carta was first and foremost a peace treaty between the king and barons. By the 1230s its defence became the main rallying point for the subjects against the arbitrary authority of the crown. The Charter initiated a series of legislative Acts such as the Provisions of Merton of 1236. In the 1620s the Charter was revived in the form of a political manifesto cited by parliamentarians as a check upon the Stuarts and their royal claim to 'absolute power'.¹⁰⁷ Yet the greatest significance of Magna Carta is found not so much in its formal provisions, but on the use made of the medieval document in subsequent history. Although its original version had a short life (King John soon obtained a papal Bill annulling it) the Charter was nonetheless confirmed on many occasions throughout the Middle Ages. According to Sir John Baker QC:

The transition to constitutional monarchy was not instantaneous. It was felt necessary to have the Charter confirmed over and over again, because its ties on the king were personal, political and moral before they were in a practical sense legal ... By the fourteenth century, at any rate, there was no room for doubt that England was a constitutional monarchy. The king could not change the law or break it. Everyone, including the king, was subject to the law; and the law could only be changed with the advice and consent of Parliament. The kings' judges were professional lawyers and their professional compass was one of independence. By the end of the fifteenth century, men trained in the common law permeated the machinery of government and were heavily represented in the House of Commons. Their cast of mind influenced the exercise of power at every level.¹⁰⁸

Interestingly enough, the Great Charter does not possess in England the status of supreme law in the sense of limiting the sovereignty of Parliament. The Parliament is still apparently competent to override any law, even the Magna Carta. As a matter of fact, since the 1980s all but four of the Charter's original sixty clauses have been declared obsolete. What remains is the clause granting freedom to the church (clause 1); the clause guaranteeing the customs and liberties of the city of London (clause 13); and the general prohibitions disclaiming the monarch's power to order arbitrary arrest, forbidding the sale of justice, and guaranteeing judgement by a person's 'peers' (that is, the person's equals) — in other words, what we would call today 'the right to trial by jury' (clauses 39 and 40).

But the relevance of Magna Carta ought to be measured by the standards of legality provided. As time passes, the Charter continues to be held in the highest esteem by those who interpret it, providing a symbolic opposition to arbitrary government and an instrument of appeal by those who argue against the extension of royal powers. For those who adhered to the King-in-Parliament theory in the 17th century, the Charter reflected the great legacy of Archbishop Langton, Henry de Bracton, and all the first common lawyers who boldly proclaimed the

¹⁰⁷ Vincent, above n 61, 4, 11: 'Rather than charging a swingeing fine (known as a "relief") from his barons to inherit their fathers' lands, the king would restrict himself to a legitimate and just relief. Widows would be allowed the lands set aside from them by their husbands or their families (their "dower", and "marriage portion"). They would not be forced by the king to remarry against their consent. Those fearing death should be allowed to make wills disposing of personal property. The goods of those who died interstate should be distributed by their families rather than by the king. Those who offended the king should be fined according to the gravity of their offence, rather than risk confiscation of their entire estate. In the case of certain specified royal prerogatives (the king's right to take particular taxes, his collection of debts owed to previous kings, his control over the minting of coin, his right to set aside land as "forest" or hunting reserves in which neither the animals nor their habitat could be disturbed on pain of drastic punishment), Henry I pledged himself to a degree of moderation. Finally, he agreed to confirm the law of Edward the Confessor (the "lagen Edwardi regis") and to abandon anything seized unjustly since King Edward's time, in effect establishing a mythological golden age of justice before 1066 to which the fallen standards of present times might be restored'.

¹⁰⁸ Sir John Baker, 'Magna Carta and Personal Liberty' in Robin Griffith-Jones and Mark Hill, *Magna Carta, Religion and the Rule of Law* (Cambridge University Press, 2015) 85.

principle of government under the law.¹⁰⁹ Therefore, ‘this essentially medieval document, which has survived for nearly eight centuries, provides a linkage to the past, constitutes a legitimating myth to support several fundamental legal principles and acts as a foundation document in legal tradition’.¹¹⁰

Although only a few clauses of Magna Carta remain in force, the document preserved its undeniable significance as the inspirational document for the opposition to despotic power. The Great Charter continues to provide a significant source for the recognition of fundamental rights and liberties. Indeed, this document symbolises a legal tradition of protection for fundamental rights that serves as an effective check on arbitrary government. Within its famous clauses it is generally accepted that the first germs of western constitutionalism resonate even to the present day – the most notable of these principles being the right to a fair trial by an independent jury through due process of law, the prohibition against cruel and unusual punishment and the right to remain silent.¹¹¹

As can be seen, Magna Carta surpassed its original historical role. By the 14th century every English lawyer of standing – whether judge, magistrate or attorney – had full access to the Charter in his copy of the *Antiqua Statuta*.¹¹² The Great Charter was evoked against royal despotism in the 17th century and it justified the opposition of American colonists to parliamentary power in the following century.¹¹³ By laying down legal procedures and establishing points of law which the courts are obliged to follow and enforce, ‘the Charter became more and more a myth, but nevertheless a very powerful one, and in the seventeenth century all the forces of liberalism rallied around it’.¹¹⁴

David Clark has argued that ‘it may be said that the emergence and persistence of Magna Carta through the nearly eight centuries since 1215 has been the story of the transformation of a feudal document into a tradition that was once called civil liberty and is now called human rights’.¹¹⁵ Accordingly, Coke’s celebrated statement that Magna Carta is for the most part declaratory of the principal grounds of the fundamental law of England was received with great enthusiasm by the British settlers who colonised foreign lands, in particular in North America, Australia and New Zealand.¹¹⁶ The Charter continues to be cited in English, Australian and American law courts.¹¹⁷ Lord Irvine explains how the provisions of Magna Carta remain valid law in all these common law jurisdictions, albeit in a ‘complex way’:

The process of Federation meant that Magna Carta was given concrete legal effect in Australian jurisdictions ... Jurisdictions with Imperial Acts (the Australian Capital Territory, New South Wales, Queensland and Victoria) all chose to enact chapter 29. This was not, primarily, for its potentially salutary legal effects, but rather to recognise Magna Carta’s pivotal role in the constitutional legacy that these jurisdictions had inherited. By contrast, in the Northern Territory, South Australia, Tasmania and Western Australia, Magna Carta was received by Imperial law reception statutes. These jurisdictions find themselves in the surprising position of having almost all the provisions of Magna Carta theoretically still in force. I say surprising because ... only four chapters still remain on the statute book in the UK, but Magna Carta was largely received in these jurisdictions before this process of repeal began. The position is also theoretical because the chapters of

¹⁰⁹ Arlidge and Judge, above n 22, 117.

¹¹⁰ David Clark, ‘The Icon of Liberty: The Status and Role of Magna Carta in Australian and New Zealand Law’ (2000) 24 *Melbourne University Law Review* 866, 869.

¹¹¹ Arlidge and Judge, above n 22, 1.

¹¹² Holt, above n 60, 55.

¹¹³ Arlidge and Judge, above n 22, 3.

¹¹⁴ Plucknett, above n 16, 25.

¹¹⁵ Clark, above n 111, 889.

¹¹⁶ *Ibid* 872.

¹¹⁷ Vincent, above n 61, 2.

Magna Carta would have to be suitable to modern conditions there, and many clearly would no longer be.¹¹⁸

An observation of court cases indicate that judges and litigants still rely on the principles of Magna Carta in Australia. Clark attributes such remarkable reliance due to four interrelated reasons: First, the retention of the 1297 version in local statutes; second, the willingness of litigants to rely on it; third, the capacity of judges to adapt it to local circumstances; and, fourth, its function in representing key values in the legal system. Thus Clark concludes:

[T]he range of matters in which Magna Carta has been referred to [in Australian courts] is testament to the continuing high regard in which the Great Charter is held, rather than to its merely being a set of practical legal principles capable of being applied in modern situations. Thus, the Charter has been invoked on the question of whether a non-lawyer might be appointed as Attorney-General, on the principles of sentencing, on the right to a trial according to law, on the prohibition of arbitrary detention, on the rights of foreign merchants, on the initial basis for the separation of the power of the judiciary from those of the other branches of government, as one basis for lawful taxation of citizens, on the rights of a shoplifter detained in a department store by private persons, and as the foundation for the prohibition of cruel and unusual punishments. While many of the propositions, such as the last, are nonsense in historical terms, the key point is that many judges have viewed the Magna Carta as a fundamental document in the history of many contemporary common law institutions and doctrines. This continued recurrence of the image of the Charter as a founding document has done much to keep it alive in legal discourse.¹¹⁹

Even if some of these claims rely on assertions that historical evidence might not support, it is nonetheless quite fascinating to note the continuing appeal to a medieval document in our modern society. The rewriting of doctrine to update the law is a widely accepted interpretative legal method. Throughout the history of the common law this has served to establish an important link between the past and the present, so that ancient instruments can be acknowledged (even if not necessarily comprising a direct source of validity) by the modern law. Above all, this method of interpretation is responsible for the continuing application of long-enduring principles of the common law as well as their application to contemporary circumstances,¹²⁰ which also implies that public officials must justify their actions according to an approach that safeguards basic rights and liberties.¹²¹ As noted by Lord Irvine,

The fact that the provisions of Magna Carta rarely break the surface or provide explicit contributions to the outcome of modern cases should not obscure its contemporary importance. ... [I]n celebrating the legacy of Magna Carta in the UK and Australia we are not clinging to a constitutional relic ... without modern significance. The opposite is in fact true. Magna Carta can be truly appreciated as the foundation stone of the rule of law. Its terms continue to underpin key constitutional doctrines; its flame continues to burn in the torches of modern human rights instruments; and its spirit continues to resonate throughout the law.¹²²

¹¹⁸ Lord Irvine of Lairg, 'The Spirit of Magna Carta Continues to Resonate in Modern Law' (Papers based on the inaugural Magna Carta Lecture, presented at the Great Hall of Parliament House, Canberra, 14 October 2002) 13.

¹¹⁹ Clark, above n 111, 875.

¹²⁰ *Ibid* 891.

¹²¹ Irvine, above n 119, 15.

¹²² *Ibid* 18.

VII FINAL CONSIDERATIONS

Whether one agrees or not, William Shakespeare is widely regarded as the greatest writer the English language has ever produced. Likewise, Sir Edward Coke (1552–1643) is broadly recognised as the most celebrated English jurist and interpreter of the common law of all times. Coke is particularly celebrated for his important defence of the supremacy of the law against the Stuarts' claim of royal prerogative. For his defence of the supremacy of the rule of law against the Stuarts' claim of royal prerogative, for his advocacy of basic rights and freedom, for his bold assertion of judicial independence, 'few figures have deserved more honour'.¹²³

First published in 1628, Coke's *Institutes of the Laws of England* is broadly recognised as the classical statement of English constitutional principles in the seventeenth-century. Coke interpreted Magna Carta as a fundamental charter of individual rights and liberties. He held that document to be the basic guarantor of the right to trial by jury and the writ of *habeas corpus*. Inspired by Coke's vision of the Great Charter, the American colonists saw the English struggle against the Stuarts as part of their own history, thus embracing Magna Carta as part of their own constitutional legacy that provided the same protections enjoyed by their cousins in the mother country.¹²⁴

Furthermore, Coke's writings are directly responsible for the language and the spirit of both the American Declaration of Independence and the Bill of Rights. His interpretation of the common law continues to be applied by judges and lawyers across the globe, including Australia and the United States. For this and other reasons, Sir William Holdsworth was certainly not overstating when he famously declared that '[w]hat Shakespeare has been to literature, what Bacon has been to philosophy, what the translators of the Authorized Version of the Bible have been to religion, Coke has been to the public and private laws of England'.¹²⁵

¹²³ Boyer, above n 1, xiii–xiv.

¹²⁴ Ralph V Turner, 'The Meaning of Magna Carta since 1215' (2003) 53(9) *History Today* <<http://www.historytoday.com/ralph-v-turner/meaning-magna-carta-1215>>.

¹²⁵ Holdsworth, above n 7, 132.