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## **Judgment<sup>1</sup> delivered by Hon Justice Stephen Breyer Magna Carta Mock Trial, Westminster Hall, 31 July 2015**

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I agree with my colleague [Chief Justice Elias] and I will limit what I have to say to just one part of the treason charge; what was at the heart of what they were saying, charging the barons with treason in forcing King John to sign [sic] Magna Carta. I will assume it was forced. This is a criminal case and we therefore have to be clear whether or not in forcing him to sign it, they were committing treason.

I think the governing law, which is important to keep in mind, is something which Bracton said about English law in 1230 or 1240 – right around this time – famous because Edward Coke quoted it to James I many years later. Bracton says: “The king must not be under man, but under God and the law, for the law makes him king therefore the king attributes to the law what the law attributes to him, namely domination and power; for he is not king where the will controls and not the laws.” At a later time it became famous to quote in school examinations King Bomba of Naples and say: “I am the king and I will have dumplings”. Now that is an instance of will, not an instance of law, and there is no obligation to support the king in such a matter.

Now let us go back and see what the charter actually holds. Well there are many things in it. But the part that has become famous, and we consider to be at the heart of this, is the sentence in clause 39 – “No free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will we proceed against him or prosecute against him, except by the lawful judgment of his peers or by the law of the land.” Thereby making the king say ‘I’ll follow the law’. Bracton says, insofar as he does the contrary, he is not king. So there can be no treason there.

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<sup>1</sup> This is a verbatim transcript of the comments made by Justice Breyer at the end of the mock trial event, more details about which can be found at <https://www.supremecourt.uk/news/magna-carta-barons-found-not-guilty-of-treason-against-king-john.html>. It is not an official judgment of a court of law.

Nor can there be treason, in fact, in saying ‘King, you cannot force us to pay for your wars in France – wars to try and retain territories your family once obtained as a vassal of the King of France, not as King of England. So we are not, in refusing to help you there, committing treason against you as King of England; and look through these other clauses, for the most part they are simply promises that the king cannot get his will – I do not find it too difficult to say that treason is *not* clearly made out, as it must be to prove a criminal case.

But there is a more difficult part – clause 61, which sets up a commission of 25 barons who are going to decide when, and when not, the king follows this. Today have we solved this problem? No. The problem of kings or governments who do not follow the law, having promised to do so. What can we do about it and when are we justified in doing something about it? A big problem philosophically at least for Britain, the Commonwealth, the United States, New Zealand... many countries where the rule of law is paramount.

There are three possible positions that have been taken over the course of time. The first position is, if the king is bad enough then you have a right to rebel and that was even said by John Locke much later, and it ends up in our constitution. You do have a right to rebel, but the word John Locke uses is *systematic* – a *systematic* refusal to carry out the law – when is it systematic? Read the Declaration of Independence (of which by chance I have a copy with me) – you will see a long document, because they were of course seeking to prove that King George III had systematically refused to follow the law in respect to the colonies; and therefore that they are justified in breaking the bonds that ally them with Britain. A difficult word, ‘systematic’.

Well there is another one – you could try to structure the government of the country so that you have balances between executive power, legislative power, and judicial power – in the US that sounds familiar. No one gets too much power; the States have some, the Federal Government, you weaken all by giving checks and balances and the judicial branch even gets in on the act by sometimes having the last word. [This system] is a recipe for trying to prevent destruction of the rule of law. The price you pay for the recipe? You can’t get anything done! (But nonetheless, you see the point.)

Now there is a third and final and important way to preserve the rule of law, reaffirmed in Magna Carta. It is a boring word but it cannot be more important to me, and you – and that is

‘education’. It’s about passing on what we’ve learned over our lives, from the lives of others that have gone before us in this area, and the need for a government that follows law, to our children and our grandchildren. For if you do not, you can destroy in [800] minutes what it took [800] years in this Hall to build – and so that is the best possible answer to the dilemma that clause 61 of Magna Carta raises.

That education goes on continuously. And I am so pleased to be a part of it. Because what happened today *is* a part of it. By participating, we are telling others, and you are telling others (and perhaps your children and grandchildren might even see some of it on television) about the history that has brought them to, at least to date, a reasonable answer to providing the continuation of the rule of law.

I thank you for the privilege of being here.