

# Kluwer Mediation Blog

## Gratitude For The Law

Bill Marsh (Editor) (Bill Marsh Mediator) · Friday, April 3rd, 2015

✖ This year in the UK we are celebrating the 800th anniversary of the *Magna Carta*, or “Great Charter”. Signed in 1215, it remains one of the most famous documents in the world, and central to the British constitution. In mediator parlance, it is a “settlement agreement”. It came into being as a compromise between King John of England and the Barons who challenged his authority, and it established for the first time that everyone, including the king, was subject to the law\*.

Interestingly, and less well-known, this deal was mediated. Archbishop Stephen Langton stepped into the role, holding separate talks with each side to hear their grievances, and ultimately bringing them together at Runnymede on the River Thames, chairing the negotiations (to the extent you could with a king), brokering peace and diverting the country from its seemingly inevitable path to war (actually the peace didn't last, but that's another story).

For now, I want to reflect on the law. Proponents of mediation have sometimes been highly critical of lawyers, and even of the law. At one level this is understandable. Mediation represents an opportunity to move beyond the rigidity which the law can impose, and which can dominate some legal thinking. But I suggest that more caution is required. We should not throw out the baby with the bathwater.

The law is central to the proper functioning of society and indeed civilisation. Like so many things in life, we only see its value when it is gone. A brief glance at present-day Syria, Yemen or Iraq, where the rule of law barely exists, makes the point. The Roman orator and philosopher Cicero (also a lawyer, incidentally) referred to this when, reflecting on the chaos and anarchy of war, he famously wrote that “*In time of war, the law falls silent*”. I keep this saying above my desk (along with many others) as a salutary reminder.

The disputes which many of us mediate are often minor versions of war, where parties seek essentially to destroy each other – financially, commercially, reputationally, relationally. So we do well to remember how privileged many of us are to mediate in contexts where the law has **not** “fallen silent”. Indeed the courts in my country have gone to some lengths to recognise and protect mediation precisely so that it can work better. There are numerous court judgements encouraging parties to use mediation, imposing costs sanctions on those who “unreasonably” refuse to, endorsing the effectiveness and value of the mediation process, enforcing settlement agreements reached in mediation, and so on.

This proper legal framework for mediation is crucial. Effective access to justice reduces (though cannot wholly remove) the scope for power imbalances to distort the outcome of mediations.

Predictability of legal outcomes helps parties to make wiser and more informed settlement decisions. Clarity about the legal basis for mediation ensures a degree of protection for parties making confidential disclosures in mediation. And confidence in the process is greatly enhanced by the knowledge that agreed outcomes can be effectively enforced.

In the light of all this, we should not be surprised that mediation thrives in the context of effective access to justice. This needn't mean, as some would have it, that mediation is becoming "over-lawyered", although there is an important discussion to have about the proper focus of mediation and in particular the balance of influence on how mediations are conducted. My January blog – "[Who's Running The Show](#)" – sought to begin that discussion.

Rather, it simply means that in our enthusiasm for seeing disputes resolved through mediation we do well to remember how much mediators and parties actually rely on the law. It is a foundation stone for what we do. If you doubt that, reflect again on Cicero's famous words and then take a look at attempts to negotiate peace in Syria and Iraq.

Meanwhile, I shall go and read about Archbishop Stephen Langton, the only thirteenth century mediator I have so far come across.

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\* Most of the 63 clauses in the document dealt with specific grievances relating to King John's rule. However, buried within them were a number of fundamental values that both challenged the autocracy of the king and proved highly adaptable in future centuries. Most famously, the 39th clause gave all 'free men' the right to justice and a fair trial. Some of Magna Carta's core principles are echoed in the United States Bill of Rights (1791) and in many other constitutional documents around the world, as well as in the Universal Declaration of Human Rights (1948) and the European Convention on Human Rights (1950). ([Source British Library](#)).

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