

VICTORIA UNIVERSITY OF WELLINGTON PATRON'S LECTURE

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In thinking of the theme I might develop tonight, it was difficult to escape the anniversary that, for lawyers, dominates 2015: the 800th anniversary of the sealing of Magna Carta. Why should it matter to us what happened in a meadow in England between Staines and Windsor 800 years ago? The short answer is that Magna Carta, first sealed at Runnymede in 1215 is an important foundation of our constitution. In a country like ours with an unwritten constitution, the constitution needs to be talked about. Otherwise we lose it – and talking about the constitution, as Sir Geoffrey Palmer once emphasised to me, is an inescapable duty for a Chief Justice.

Before going back to 1215, it is right to acknowledge another anniversary that should be better observed this year. It is 175 years since the signing of the Treaty of Waitangi. The Treaty was the beginning of constitutional government in New Zealand. The matter of the Treaty and its place in our constitution remains a work in progress. But that is simply to illustrate that the principles we call constitutional are the work of centuries and why it is important to continue to examine the foundations of our legal order.

It was through the Treaty of Waitangi that the statutes and common law of England in effect in 1840 became part of our law, so far as appropriate to the circumstances of New Zealand. We are still working through what that means.

One of the enactments that undoubtedly became part of our law was so much of Magna Carta as was in force in England in 1840. I must admit that as a young lawyer I was never very sure of what parts of English law remained in effect. I once had the unnerving experience in the 1970s or early 1980s of being left as junior to make a reply in a case where senior counsel, the very learned David Baragwanath QC, had to leave for another case but had raised Magna Carta in his argument. On comparing notes with another junior barrister in our rooms, Robert Chambers, I found out he had had the same experience. Neither of us had a clue whether Magna Carta was an artefact of any relevance at all. My recollection is the Judge was similarly mystified and there was no mention of Magna Carta in the judgment. I think Magna Carta was thought in those days to be “fighting talk” to be avoided in polite submissions. But of course David Baragwanath QC was quite correct to treat articles 39 and 40 of the 1215 version of Magna Carta as part of the law of New Zealand.

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Today, doubts are dispelled by the Imperial Laws Application Act. In that Act, Magna Carta is classified with other enactments described as “constitutional”. Under it, only one clause remains in force in New Zealand. It is the celebrated provision prohibiting imprisonment of anyone without “lawful judgment of his Peers, or by the Law of the Land”. It provides the pledge for “administration of justice”: “We will sell to no man, we will not deny or defer to any man, either Justice or Right”. This is clause 29 of Magna Carta as entered on the parliamentary roll in its reissue by Edward I in 1297, but originally contained in articles 39 and 40 of the original in 1215. (William Maitland once said that in speaking of Magna Carta, it is important to be specific about which version is meant).

Because it is the 1297 reissue that was entered on the Parliamentary roll, Magna Carta takes second place in the schedule to the Imperial Laws Application Act because the Statute of Westminster the First of 1275 was enrolled earlier. These old statutes which our modern New Zealand statute recognises to be “constitutional” repay reading. The Statute of Westminster the First contains the promise of equality before the law that “the King willeth and commandeth ... that common right be done to all, as well poor as rich, without respect of persons”. I have never seen that provision invoked in a court case, as it deserves to be. But the idea of equality before the law that it expresses builds on the Great Charter of 1215. Magna Carta may come second in the list of constitutional statutes we have inherited, but there is no doubt of its pre-eminence.

I have to acknowledge that my perspective is what some commentators have dubbed “the lawyer’s view”. Oddly enough, you might think, the lawyers are said to be a romantic about Magna Carta. Perhaps less oddly they are said to be bad historians. It is not necessary to go quite as far as Lord Bingham in describing the Charter as the most influential secular document in the history of the world (although that argument can convincingly be made).² But the lawyer’s view of the Charter is that it establishes the ideal of the rule of law. The rule of law is identified in the statute of the New Zealand Supreme Court as one of the two principles on which our constitution rests, the other principle being the sovereignty of Parliament.³ Although that provision is about to disappear when the Judicature Modernisation Bill currently before Parliament is enacted (a dropping I think is regrettable), both principles remain fundamental to constitutional legitimacy.

The “lawyer’s view” is contrasted by Lord Sumption (a pretty good lawyer but also an impressive historian himself) with what is said to be “the historian’s view”.⁴ What he calls the “historian’s view” sees the Charter as the product of its time and shortlived at that. This view is sceptical of the Charter’s constitutional significance and its resonance today. It emphasises that the Charter was extracted for reasons of self-interest by a gang of disaffected barons from the north of England. Those who subscribe to it point out (quite

² Tom Bingham *Lives of the Law* (Oxford University Press, Oxford, 2011) at 3.

³ Supreme Court Act 2003, s 3.

⁴ See Lord Sumption “Magna Carta then and now” (Address to the Friends of the British Library, 9 March 2015, London).

rightly) that the ideas we see in Magna Carta in the context of the 21st century would have mystified those who had a hand in its creation. Those who take this view of Magna Carta say that it dropped from view until revived by Lord Coke in the clashes between Parliament and the King in the 17th century and that Coke himself invented the lawyer's romantic view of the Charter.

There is much that is valid in the view that the Charter must be seen in its own light and that it cannot carry too much baggage. The history of the Charter (in all its versions) is exciting enough to repay study in its own terms and in its own times. But it is interesting that modern historical scholarship, aided by modern methods of research, has turned up much more information about the circumstances of the obtaining of the Charter and its contemporary effect. I think the views expressed by detractors in part represent outdated understandings that are being exposed under modern scholarship with the advantages of modern digital research.

It is true that the Charter extracted from King John in such dramatic circumstances was repudiated almost immediately by the King. The Pope annulled it as extracted by duress. But, as a panel of Judges of which I was part recently held in a mock trial of the barons for treason, the Pope was ill-informed and the law of the early Middle Ages allowed renunciation of fealty from a King who was in breach of duty, without treason. More importantly, the essential promises of the Charter were reissued by successive kings and confirmed some 30 times through the Middle Ages. Scholars have recently identified some 58 times in which the Charter was invoked in legal proceedings in the century following its grant.⁵ The Charter was widely disseminated and read aloud throughout the land. Even today scholars are still turning up copies, misfiled for centuries. The articles became the root from which further protections of freedom grew. Retention in their original form may have become unnecessary, but that is not to diminish or detract from what Magna Carta accomplished or the esteem in which it continued to be held.

The Charter has always had its detractors. Cromwell jeered coarsely at it. (But then he was levying taxes without Parliamentary authority). Legal philosophers in the nineteenth century thought its exaltation by its partisans, such as Lord Coke, was romantic antiquarianism or special pleading, which ignored the self-interest at work in its creation and invested it with modern values undreamed of by the magnates who obtained it. It is said to have been misunderstood in its own terms.

It is true that the terms of Magna Carta are often misunderstood. Inevitably, myths have grown up around it. Detractors have pointed out that there is little in Magna Carta that was truly new. Similar promises of good government had long been made by Anglo-Saxon and Norman Kings. Contrary to folk-lore Magna Carta did not establish habeas corpus or trial by

⁵ Anthony Arlidge and Igor Judge *Magna Carta Uncovered* (Hart Publishing, Oxford, 2014) at 103.

jury. Nor did it establish parliamentary control of taxation. Although it treats taxation by the King without the council of the land as contrary to law and custom, the council had not yet developed into anything like even the rudimentary Parliament of the time of Edward I. But in article 14 (which provides for the summoning of the barons and the bishops to advise the King) there are indications of a felt need for wider and more systematic representation in the council advising the King, as Sir William Holdsworth suggests.⁶ Magna Carta does not point to the repositioning of the sovereign power to make law in the King-in-Parliament. Still less does it say anything about democratic government. Nor does it protect the independence of the judges, which was not secured until the Act of Settlement in 1701. All these things lay in the future in 1215 and their achievement was by no means made inevitable by the Charter.

None of this diminishes Magna Carta. The folk memories of the importance of “The Great Charter of the Liberties of England” (as it was called in the Petition of Right of 1628) and their persistence in popular estimation tap into enduring values despite the politics and self-interest of the moment in 1215. Such culture is important. Any understanding of law must take into account that enacted or decided law is only part of the picture. Law is also the behaviour people adopt, not simply to keep out of trouble, but because they believe it right to do so. There is, as Sir John Baker has emphasised “a whole world of law which never sees a courtroom”.⁷ The rule of law ultimately depends on a culture of law-mindedness. So popular understanding of the Charter is not to be disparaged.

Nevertheless, the clauses of the Charter repay reading, especially in the more accessible translations produced for this anniversary. They indicate a seed bed for the development of law and protections of liberty, realised in succeeding centuries.

The clauses of the Charter protest against arbitrary deprivation of liberty and property and look to proper legal process. If the term “due process of law” is not used in Magna Carta, due process of law is the effect of the promises. The provisions of Magna Carta are concerned that justice is not corrupt and not delayed. It is to be provided by royal justices who know the law and are committed to fulfilling it.

The provisions of Magna Carta are concerned to ensure that justice is not corrupt and is not delayed. They look to the provision of justice increasingly by the king’s judges. A complaint of the barons was that the king’s judges were not accessible enough. The Charter fixes the place of justice in Westminster and provides for regular assizes by judges sent on circuit to the counties. It promises that those appointed will know the law and be committed to fulfilling the obligations of the Charter.

⁶ William Holdsworth *A History of English Law* (7th ed, Sweet and Maxwell, London, 1956) vol 1 at 55.

⁷ JH Baker “Why the History of English Law has not been Finished” [2000] CLJ 62 at 78.

The Charter looks to common laws and common measures and weights. It is concerned to protect trade and the free movement of merchants. In this it indicates a society in change.

The “quarrel” which gave rise to the events of Runnymede arose from John’s abuse of his feudal privileges, and there is much in the Charter about redress and correction for them. But it is clear from the text of the Charter that, as Ferdinand Mount puts it, “the middle classes were on their way” and fifty years later knights and burgesses as well as barons were summoned to the Parliament of Simon de Montfort.⁸

The king had to act within the law in dealing with free men, even if they owed him fealty. The unfree may be subject to arbitrary government by those in authority over them. But a free man is protected against arbitrary interference. Magna Carta makes it clear that wherever power is organised and not arbitrary, it is subject to law. That includes the power of the ultimate temporal lord, the king. Magna Carta made it clear that the king is made by the law and is subject to law, as Glanvill and Bracton insisted, and as Lord Coke was later to remind the Stuart Kings.

Even though the direct obligations provided by Magna Carta are for the benefit of the tenants in chief of the king, they also look to a trickle-down effect because lords are required to observe like obligations in their dealings with their own tenants. Some clauses in the Charter refer to all men, pointing to an extension that was made in succeeding legislation in part because of the difficulties in determination of who was free and who was villein.

Wales, Scotland and the law of the Marches are all recognised in the Charter, indicating a plurality in the realm that simmers on today in the United Kingdom. Widows are protected in their dowers and their husband’s houses (for forty days) and in the freedom not to marry if they do not wish to and there is anxiety to ensure that fines are proportionate to the gravity of the offence and do not destroy the livelihood of the merchant or freeman. Clause 20 of the Charter of 1215 provides:

20. A free man shall not be amerced for a trivial offence, except in accordance with the degree of the offence; and for a serious offence he shall be amerced according to its gravity, saving his livelihood; and a merchant likewise, saving his merchandise; in the same way a villein shall be amerced saving his wainage; if they fall into our mercy. And none of the aforesaid ameracements shall be imposed except by the testimony of reputable men of the neighbourhood.

Those of you who know your Misleading Cases will know Mr Justice Lugg at least was not greatly impressed by the invocation of this clause by Mr Albert Haddock.⁹ Haddock had appealed a fine of £2 together with costs for

⁸ Ferdinand Mount “Back to Runnymede” (2005) 37 *London Review of Books* 15.

⁹ AP Herbert *Uncommon Law: Being Sixty-Six Misleading Cases Revised and Collected in One Volume, Including Ten Cases Not Published Before* (6th ed, Methuen, London, 1948).

obstructing the highway and a further £1 for conducting his defence in rhymed couplets. His argument that the fine was “excessive and not ‘after the manner of the fault’”¹⁰ and was contrary to clause 20 of Magna Carta (which he was obviously reading in a different translation to the one I have given you).

Mr Justice Lugg took a dim view of Magna Carta more generally, which he said he had read for the first time that morning in bed. He expressed some distaste about the custom of speaking “loosely of Magna Carta as the enduring foundation of what are known as the liberties of the subject”.¹¹ He pointed out that even article 29’s strictures about not selling, denying, or delaying justice or right were overblown: “We in this Court”, he said, “are well aware that these undertakings have very little relation to the harsh facts of experience”.¹²

All that can be said is that much justice is sold at quite reasonable prices, and that there are still many citizens who can afford to buy the more expensive brands. If a man has no money at all he can get justice for nothing [I interpolate that Mr Justice Lugg may not have anticipated more recent reforms of legal aid]; but if he has any money he will have to buy justice, and even then may have to go without right (for the two expressions are not always synonymous). Indeed, there is something to be said for selling, denying and delaying some sorts of justice.

Mr Justice Lugg concluded that he was compelled to reveal the truth, although with “some reluctance”, that Magna Carta was “no longer law”¹³ – and Mr Haddock lost his appeal. But I believe Mr Justice Lugg is an outlier on the Charter. In any event, in New Zealand, the Imperial Laws Application Act means that his conclusion that Magna Carta is “not law” is wrong in relation to article 29.

If the Charter represented in its day in large part claims for restitution of freedoms and liberties long-known or was preoccupied with aspects of feudal tenure, it also represents a departure. Demands for the laws of Edward the Confessor were no longer made after Magna Carta. Instead, the focus changed to confirmation of the Charter and the better securing of its promises. Subsequent reforms invoked the Charter. The Charter was widely known. Encroachments on freedom were resisted in its name, both in the remainder of the 13th century and later in the times of growing absolutism under the Tudors and Stuarts and the dictatorship of Cromwell. It was cited in opposition to arbitrary power to imprison or take property, taxation without parliamentary consent, and development of Crown prerogative powers. The Charter was critical in the battle of ideas which led eventually to parliamentary government.

¹⁰ At 54.

¹¹ At 54.

¹² At 55.

¹³ At 58.

It is not fanciful to see in the terms of the Charter ideas central to the rule of law and which have influenced modern statements of rights. Magna Carta has been cited in court cases from the 13th century down and in all jurisdictions which have inherited it. It continues to be cited and was for example an important plank in the reasoning of the United States Supreme Court in *Rasul v Bush* 542 US 466 (2004) which held against executive imprisonment.

The best evidence of the importance of Magna Carta in our legal history is, as Sir William Holdsworth suggested “[t]he history of our public law from the time of the granting of the Charter”.¹⁴

The Charter was constantly appealed to all through the mediaeval period, and during the constitutional conflicts of the seventeenth century; and, after those conflicts had been settled, its observance came to be regarded both by lawyers and politicians as a synonym for constitutional government.

While some of the claims that have been made for the Charter were not wholly correct as a matter of history, Sir John Baker says “that made no difference”: “Magna Carta, though not in any sense a written constitution, was morally entrenched”. Chapter 29, in particular, “was the chief legal weapon deployed against growing absolutism”.¹⁵

“Moral” entrenchment is not, of course, the same as legal right. In our legal system moral or political claims are a twilight world. Magna Carta and the legislation and law to which it has given rise is at least acknowledged to support claims of right, recognisable as law in the courts. But entrenched rights they cannot be in a system of parliamentary supremacy, which is why Baker accurately identifies them as “morally entrenched” only.

How secure is moral entrenchment? It would be nice to think that it is as secure as formal entrenchment. But that can only be if there is widespread understanding and willingness to work harder at maintaining what is essential in our mostly unwritten constitution in which the rule of law shadows but is unequally matched to the legislative supremacy of Parliament.

Magna Carta lays the foundations for the rule of law and parliamentary sovereignty, the twin elements of the New Zealand constitution today. The 800th anniversary of Magna Carta may be a good time to take stock of how well they are serving our society. It is puzzling that the constitutional conversation we have had to date seems largely hung up on the identity of the head of state, an element of the constitution that seems to work well. It seems reluctant to engage with bigger ideas, such as the fulfilment of the ideas set loose at Runnymede in the circumstances of today.

¹⁴ William Holdsworth *A History of English Law* (4th ed, Sweet and Maxwell, London, 1936) vol 2 at 215–216.

¹⁵ John Baker “Human Rights and the Rules of Law in Renaissance England” (2004) 2 *NW J Intl Hum Rts* at [15].

Magna Carta confronted the arbitrary power of the Crown. Over the following centuries the ideas it launched brought the Crown under the law, as Bracton and Coke insisted it was. The king they said is made by the law. Is Parliament itself made by the law? If so, is it subject to law, as James I had wit enough to see was the implication of being made by the law? Is arbitrary power acceptable today if exercised by a Parliament democratically elected? These are big questions. Lord Hailsham, then the once and future Lord Chancellor of England, was raising such questions in connection with the constitution of the United Kingdom in his Dimbleby lecture, provocatively entitled “Elective Dictatorship”, forty years ago.¹⁶ His paper is worth revisiting. It accurately identifies some of the strains now evident in the constitution of the United Kingdom today.

In recent years there has been much change in New Zealand that is properly characterised as “constitutional” – New Zealand Bill of Rights Act, the change to the system of electoral representation, and the Official Information Act in particular have been transformative. They may be sufficient change for now. Our adaptable and pragmatic constitution may suit New Zealand society and indeed has some considerable virtues. It would however be foolish to think constitutional evolution is at an end in New Zealand. Even if change in our institutional arrangements is not in prospect, a largely unwritten constitution needs to work and constitutional values may provide political limits, at least if they are talked about and understood. One thing we can be sure of is that in the necessary discussions we will continue to have on constitutional directions, the ideas of Magna Carta will continue to be drawn on, as they have been for the past 800 years.

¹⁶ Lord Hailsham “Elective Dictatorship” (The Richard Dimbleby Lecture, 14 October 1976).