

ADDRESS GIVEN TO THE UNIVERSITY OF AUCKLAND

**Magna Carta 800th New Zealand Commemoration Committee
Owen G Glenn Building, University of Auckland**

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**An Auckland University Panel Discussion on
*Magna Carta in the Kiwi Constitution***

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Why should it matter to us what happened in a meadow between Staines and Windsor 800 years ago? The short answer I would give is that the Magna Carta first adopted at Runnymede in 1215 is an important part of our constitution and it is about the Charter and the Constitution that I want to speak tonight. In a country like ours with an unwritten constitution, a constitution needs to be talked about. Otherwise we lose it. So the 800th anniversary of Magna Carta provides a welcome opportunity to do just that.

I have to acknowledge that my perspective is what some commentators have dubbed “the lawyers 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). 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. 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”. What he calls the “historian’s view” sees the Charter as the product of its time and short-lived at that. This view is sceptical of the Charter’s constitutional significance and its resonance today. I am not sure to what extent the proper historian on the panel tonight agrees with this view. 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 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 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

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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.

There is a third view perhaps of the Charter, which grows out of the influence of the Charter on the great constitutional battles of the 17th century. It might be called the political scientist's view of the Charter. That it is a critical step in the shift of power from the King to the King in parliament. This is slightly romantic thinking too, which is not surprising since the parliamentary party of the 17th century included notable lawyers. So I am pleased that on this panel there is a lawyer-politician who can speak to the influence of Magna Carta on our parliamentary tradition.

Magna Carta in New Zealand

To some it may seem odd to speak of a tradition of law formed over many centuries, when our nation was founded only 175 years ago. John Beaglehole gave one answer to such thinking when in "The New Zealand Scholar" in 1954 he rejected what he called the "parrot cry" that we are only a young nation.¹ We are, he said, as old as civilisation. But there is a more direct answer in the case of New Zealand law. I do not speak tonight of the indigenous traditions of New Zealand law (that is a topic that the Attorney-General may develop in his talk on Magna Carta and the Treaty of Waitangi). But through the Treaty of Waitangi and the system of government it enabled, we imported into New Zealand the statutes and common law of England in effect in 1840, including the provisions of Magna Carta still in effect. So in law in New Zealand we are as old as the inherited common law and its rich history and the early Charters which drew on the older common law and which galvanised the common law in its turn.

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 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.

¹ See JC Beaglehole "The New Zealand Scholar" in Peter Munz (ed) *The Feel of Truth: Essays in New Zealand and Pacific History* (A H and A W Reed, Wellington, 1969) at 244.

In 1988 that was made clear by the Imperial Laws Application Act, which lists the legislation of England still in force in New Zealand. Although they are listed in order of seniority, Magna Carta appears after the Statute of Westminster the First of Edward I, but that is because the version of Magna Carta which is enacted for New Zealand is that entered on the parliamentary roll in its reissue by Edward I in 1297.

The only clause of Magna Carta preserved is the celebrated provision prohibiting imprisonment without “lawful judgment of his peers or by the law of the land” and providing 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 as entered on the parliamentary roll in its reissue by Edward I in 1297 but as originally contained in articles 39 and 40 of the original in 1215. The Edward I version is almost identical to the reissue by Henry III, when he gained his majority. It remains law in New Zealand by virtue of the Imperial Laws Application Act, in which it is positioned in the schedule with other enactments which are described as “constitutional”.

The Statute of Westminster the First of 1275 which appears first in the list of imperial legislation still in force in New Zealand in fact builds on the liberties under the Great Charter of 1215 the promise of equality before the law “as well poor as rich, without respect to persons”. Magna Carta may appear second in the schedule to the New Zealand Act, but there is no doubt of its pre-eminence. The schedule to the Imperial Laws Application Act recites Edward I’s command that “the Charter of Liberties shall be kept in every point without breach”. It was described as “the common law”, with any judgment contrary to the Charter to be “undone and holden for nought”.

So Magna Carta came to New Zealand and remains a provision recognised by legislation as constitutional.

The significance of the Charter

The Charter has 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. It is true that 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 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.² 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. More importantly, 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.

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 provide 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.

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 magnates cannot do without the towns and the merchants, both specifically mentioned. 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.³

² Sir William Holdsworth *A History of English Law* (7th ed, Sweet and Maxwell, London, 1956) vol 1 at 55.

³ Ferdinand Mount “Back to Runnymede” (2005) 37 *London Review of Books* 15.

If the direct obligations are for the benefit of free-men and 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. 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.

The effect of the charter

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.

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 “the history of our public law from the time of the granting of the charter”.⁴

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 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.”⁵

Future directions

“Moral” claims are 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.

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

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

⁵ Sir John Baker *Collected Papers on English Legal History* (Cambridge University Press, Cambridge, 2013) vol 2 at 936.

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. 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.
