IN A CONSTITUTIONAL STATE: 
MAGNA CARTA IN NEW ZEALAND 1840-2015

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Abstract

Magna Carta has survived 800 years because it changed and this paper considers its legal status in New Zealand and the ways it has been used in legal, political and educational debate. Formally only one section of Magna Carta 1297 remains part of the law of New Zealand but the document represents key constitutional values such as the rule of law, that the executive must obey that law, and as an icon of liberty. Politically it was used in the nineteenth century to press for representative government and was part of the legal and educational culture. Sometimes it acts as the foundation of a contemporary legal idea; sometimes it was simply irrelevant; and sometime it was invoked in uniquely New Zealand ways such as the reference to the Treaty of Waitangi and as Maori Magna Carta.

I. Introduction

The question I shall consider this paper is how is it that a classic English medieval document written in Latin, more often referred to than actually read, is now the subject of celebration and remembrance in a country then unknown in 13th century Europe.1 At first blush Magna Carta seemed doomed to have a short career since it was a document that survived a mere nine weeks before being annulled by the Pope on 24 August 12152, and in

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2 C R Cheney and W H Semple (eds) Selected Letters of Pope Innocent III concerning England (1198-1216) (Thomas Nelson and Sons, London, 1953) at 212-219. John apparently had the intention of asking the Pope to annul the Charter at the time he assented to it: C Warren Hollister “King John and the Historians” (1961) 1 Journal of British Studies 1, 15. It is accepted that John agreed under pressure and one New Zealand judge called the King’s agreement the result of extortion: R v Blazina [1925] NZLR 407, 413(CA)(Ostler J).
any case it confined itself to parochial medieval concerns. Even William Blackstone thought that its provisions were of a trifling concern by the time he wrote about them in 1769 and Churchill noted that a person taking up the Charter for the first time “will be strangely disappointed.” As we shall see, although the great charter is substantively irrelevant to the modern law, yet it remains after eight centuries of enormous symbolic importance. It is also clear that one may examine the history of the Charter in its medieval context, but that is a task I leave to medievalists. Magna Carta also had a history after 1215 down to our own time including in New Zealand. I shall focus on this history.

The short answer to my question lies not in what was said or done in June 1215, but what was made of the document by subsequent generations. Magna Carta was not the foundation of democratic government, or of human rights, as is sometimes supposed for two reasons. First, such notions did not exist in 1215. Neither King John nor his barons knew anything of the constitutional arrangements we now call the rule of law. They did not know of written constitutions, a bill of rights, the separation of powers and judicial independence, let alone universal suffrage and the secret ballot; elements in short of a constitutional state. These were all creations of later centuries and they form part of an inheritance to which New Zealanders have added. This was realized in Australia in 1952 when the Australian Prime Minister Robert

8 Margaret Thatcher claimed as much in her speech in Bruges (20 September 1988) <www.margaretthatcher.org>.
9 Thus counsel made this claim in Bujak v District Court at Christchurch and the Republic of Poland [2009] NZCA 257[29]. All unreported cases were found at <www.nzlii.org>.
10 The term “In a constitutional State” comes from a dispatch by the Colonial Secretary, the Duke of Buckingham and Chandos to Premier Stafford in 1867 as reprinted in the Taranaki Herald (New Zealand, 26 October 1867) at 3. All newspaper references are to the digital collection at the National Library of New Zealand: <paperspast.natlib.govt.nz>.
11 For example, the Māori Representation Act 1867, the Electoral Act 1893 s 6 that permitted women to vote in parliamentary elections. But compare s 9 that stated that women could not be parliamentary candidates nor could they be elected to parliament. That was changed by the Women’s Parliamentary Rights Act 1919 s 2; the Parliamentary Commissioner(Ombudsman) Act 1962; the New Zealand Bill of Rights Act 1990; Human Rights Act 1993.
Menzies, on the occasion of the arrival of a copy of the 1297 *Inspeximus* Magna Carta, explained that “The Barons knew nothing of democracy, and it is not supposed that they thought that they were establishing some form of democracy …”.11

Secondly, the claim, often encountered, that Magna Carta laid the foundations12 for these ideas is nonsense and involves a false analogy. When a builder lays the foundations of a house they know that these are foundations for they know what comes next when they follow the plan to complete a building, but the Barons did not know what came next and certainly did not envisage our current legal and political arrangements or anything like them. This sort of talk attributes to the actors of June 1215 either the gift of prophecy, or involves reading into the past present attitudes.13 Take chapter 1 of the Charter, that promised that the English church shall be free. This had nothing to do with freedom of religion in the modern sense, but was an assertion that the choice of bishops should be made by the English church not by the King.14

It is necessary, therefore, to distinguish between myth and substance and to notice that the attitudes of previous generations towards the agreement struck in June 1215 veered between adulation, sometimes amounting to outright fantasy, and dismissive irrelevance.15 One Tasmanian writer described the Charter as “a wilderness of arid phraseology relating apparently to a variety of local and temporary matters then in dispute between a grasping monarch and his indignant lords”.16 On the other hand, one New Zealand litigant actually thought that Magna Carta implemented the law of God was supreme law


14 W S McKechnie, above n 3, at 191-195; J C Holt, above n 3, at 245.

15 Justice Thomas referred to it as “that most venerated document” in *Willis v G Kline Ltd* (1995) 8 PRNZ 546, 549(HC).

overriding provisions in the Family Proceedings Act 1986. The survival of
the Charter arises chiefly because of its sentimental value and because it has
inspired litigants and sometimes judges to attribute to it all manner of legal
phenomena that are not warranted by the historical evidence.

II. As A Document

From the very beginning Magna Carta was not a static document and of
course it came to be transformed in the course of its long history as it was
put to new uses in later centuries, usually to justify changes not thought of
in the 13th century. That many of these arguments were strictly false and
involved historical falsification is to miss the point. The history of the Charter
after 1215 explains its survival and its ability to adapt to new circumstances.
Change became the secret to its survival and was a characteristic of Magna
Carta from the outset. There were six versions of Magna Carta in the 13th
century. The first four were charters and the last two were given status as
statutes. Even the name came later in 1218, as did the practice initiated by
Blackstone in 1759 of dividing the document into chapters.

Magna Carta 1215 only lasted until the Pope annulled it on 24 August
1215. It was later reissued in a shortened form after John's death by his
successor, the nine-year-old Henry III in 1216 and again a year later in 1217.
At the same time a version was created for Ireland. The contents of these
charters are different and it is possible to trace these differences thanks to
the work of two Australian scholars in 1984. None of these charters had
statutory status until Magna Carta was enacted in 1225. It was this version

17 Legal Aid Review Panel Decision No 007/07[2006] NZLARP 169[22]. The panel rejected
the argument citing Phillip Joseph, Constitutional and Administrative Law in New Zealand,
para 14.4.1. As did the ACC Appeals panel in Carter v Accident Compensation Corporation
[2015] NZACC 202[5] where the applicant asserted that due process harked back to “… the
‘biblically based common law of England’ and Magna Carta”.
18 This was a marked feature of legal and constitutional argument in the seventeenth century:
Maurice Ashley, Magna Carta in the Seventeenth Century (1965).
19 Albert White “Note on the Name Magna Carta” (1917) 32 English Historical Review at 554-
555.
20 William Blackstone “The Great Charter and the Charter of the Forest” (1759) in William
Blackstone, Law Tracts, Vol 2 (1762) at xxvi note. Until 1946 the Charter was spelled Magna
Charta: British Museum Act 1946(UK) s 1. Early New Zealand cases adopted the Charta
spelling: Crawford v Lecren [1868] 1 NZCA 117, 120. Russell v Minister of Lands (1898) 17
NZLR 241, 250(SC); Waipapakura v Hempton (1914) 33 NZLR 1065, 1072(SC). See also
‘Magna Charta or Carta?’ The Evening Post (New Zealand, 17 June 1939) at 8.
21 Cheney and Semple (eds), above n 2, at 212-219.
22 Magna Carta Hiberniae (12 November 1216) may be found at <ua_tuathal.tripod.com>.
23 Michael Evans and R Ian Jack (Eds) Sources of English Legal and Constitutional History (1984)
55-60.
24 9 Hen III c 1; 1 Statutes of the Realm 22-25.
that appears in the statute book and in 1297 it appeared there again. The enactment of 1297 is of particular importance for New Zealand as Chapter 29 has been retained, as we shall see later, as part of the inherited imperial law of the country.

Once the Charter was sealed on 15 June 1215 it was then ordered to be published on 20 June and, despite its vicissitudes, it survived in the early centuries by being enforced as well as being confirmed over 60 times between 1225 and 1422 by English acts of Parliament. It was also extended in three statutes in the 14th century when the famous phrase “due process of law” was added to the statute book.

III. Status as a Statute in New Zealand

It has been said that Magna Carta followed the flag as the British expanded their Imperial reach. Blackstone maintained that the law arrived with the British settlers but, in formal terms, the legal position was more complex than that. The New Zealand parliament moved early to pass a statute declaring that all British and English statutes existing on 14 January 1840 were automatically part of the law of New Zealand “so far as applicable to the circumstances of New Zealand”. This early statute was replaced, but the reception date principle was reaffirmed in 1908. There were difficulties with this approach. For one thing, it meant that ancient statutes passed in another country and to deal with other problems would have to fit new circumstances. Given that the British Parliament repealed most of Magna Carta 1297 between 1863

25 Magna Carta 1297, 25 Edw I c 29; 1 Statutes of the Realm 114-119 or at <www.bailii.org>. For the text of the various versions including the articles of the Barons that preceded 1215 see Henry Rothwell (Ed) English Historical Documents 1189-1327 (1975) at 310-496.
28 28 Ed III c 3(1354), 1 Statutes of the Realm 345. These are enactments that are still part of the law of New Zealand: Imperial Laws Application Act 1988 (NZ).
30 English Laws Act 1858 s 1; King v Johnson (1859) 3 NZ Jurist Reports (NS) SC 95, 95(Johnson J) For a useful discussion see Peter Spiller, Jeremy Finn and Richard Boast, A New Zealand Legal History (2nd ed, Thomson Reuters, Wellington, 2001) at 76-77. Both the statutory versions of Magna Carta of 1225 and 1297 were included in lists of Imperial Acts in force in New Zealand: Butterworth’s Annotations of New Zealand Statutes, Vol II(Statutes) 1841-1928(1929) at Table 2.
and 1969\textsuperscript{33} because its terms were either obsolete as they dealt with medieval circumstances that had passed into history, or because some of the problems had been addressed in later statutes, the problem for New Zealand was whether the wholesale adoption approach remained useful.

A Law Commission report in 1987 recommended a special statute that identified particular Imperial enactments for retention and also identified the provisions of those acts that would remain part of New Zealand law. In the case of Magna Carta, the Commission noted\textsuperscript{34} that it was part of a body of legislation that documented “critical features of our history and contributed to our political and constitutional principles and systems”. The result was the Imperial Laws Application Act 1988(NZ), which, by s 3(1) and the First Schedule, retained chapter 29 of 1297 as part of the law of New Zealand.\textsuperscript{35} Unlike the Victorian Imperial Acts Application Act 1980(Vic), which also helpfully set out the text of the retained statutes, the New Zealand Act did not do this, but the New Zealand Statutes Database on NZLII does include the text in modern English of chapter 29 of Magna Carta 1297 and also the three 14th century statutes that extended it.\textsuperscript{36}

\section*{IV. Uses in the Courts}

\textit{A. As an irrelevant reference by self-represented litigants.}

Litigants have from time to time invoked Magna Carta for modern purposes by attributing to the Charter notions that were unknown in the

\textsuperscript{33} Magna Carta 1297, 25 Edw 1 c 9 as amended, available at \texttt{<www.bailii.org>}\ (this source details the repeal history between 1863 and 1969); \textit{Mayor, Commonality \\& Citizens of London v Samede} [2012] 2 All ER 1039, 1049(30)(CA). Only three substantive provisions remain as part of English Law. Chapter 1: that the English Church shall be free, Chapter 13 on the liberties of London and the famous Chapter 29 that combines the language of Chapters 39 and 40 of Magna Carta 1215. The vicissitudes of the legislation reflects the observation made of Magna Carta in \textit{Chester v Bateson} [1920] 1 KB 829, 832(KBD) by Darling J in an allusion to Daniel 6:15 that “It is not condemned to that immunity from development or improvement which was attributed to the laws of the Medes and the Persians”.

\textsuperscript{34} New Zealand, Law Commission, Report No 1, \textit{Imperial Legislation in Force in New Zealand} (1987) at 1 [5].


\textsuperscript{36} The provisions of 1297 in force in New Zealand are reprinted in 30 Revised Statutes of New Zealand (1994) Part II, 25-27, Criminal Justice Statute 1351(25 Edw 3, St 5, c 4); Criminal and Criminal Justice Statute 1354 (28 Edw 35, c 3); Observance of Due Process of Law Statute 1368 (42 Edw 3, c 3). Also listed in Imperial Laws Application Act 1988, First Schedule by reignal year only. The concept as it was understood in the 14th century is explained by Keith Jurow “Untimely Thoughts: A Reconsideration of the Origins of Due Process of Law” (1975) 19 \textit{American Journal of Legal History} 265, 265-279.
13th century. One applicant in a habeas corpus matter heard in Hamilton in 2013 claimed that children were taken from their parents in breach of Magna Carta.\(^{37}\) Katz J simply disregarded this argument as irrelevant to the modern New Zealand law. In another habeas corpus matter in the same year, the applicant invoked Chapter 29 of Magna Carta 1297 as part of the application with an equal lack of success.\(^{38}\) Although the linkage between habeas corpus and Magna Carta is often made,\(^{39}\) Magna Carta did not create habeas corpus, which is known to exist in 1206\(^{40}\) and 1214,\(^{41}\) for the history of the writ shows that it really expanded later in the 13th century and in its modern form as a writ of habeas corpus ad subjiciendum, especially from the 1580s onwards.\(^{42}\)

Another instance of the irrelevance of the Charter despite its frequent invocation is in relation to the right to a trial by jury. The Court of Appeal has pointed out its irrelevance in a civil matter, noting that if Chapter 29 referred to jury trial at all, it only referred to criminal trials.\(^{43}\) The Supreme Court dismissed an appeal from this decision and added that, “Any operation Magna Carta may once have had in relation to civil proceedings has now been plainly displaced by s 19A”\(^{44}\)

B. As a foundational reference in an argument based on contemporary New Zealand Law.

One of the problems with a medieval law is that its terms referred to notions not in existence in New Zealand. The courts have responded to this by adapting the language of the Charter to modern New Zealand circumstances. Thus the term “peers” in Chapter 29 once referred to barons and, in England, special rules existed for the trial of peers by other peers until the abolition of such trials in 1948.\(^{45}\) Of course. New Zealand does not have a peerage and, in 2011, the Court of Appeal endorsed the idea put forward by the Law Commission that peers means a trial by one’s social equals.\(^{46}\) Despite this adaption, the case actually turned on the Juries Act 1981, which, of course,
supersedes anything said in Magna Carta. The court referred to remarks by Cooke P in an earlier case, where Magna Carta and other statutes were invoked in a jury question where he wrote: “Important though these certainly are … they do not seem to have much bearing on the present case”.

A distinctive feature of Magna Carta in New Zealand has been the frequent citations of the Charter in property cases. Thus the Charter has been invoked to resist the imposition of Customs dues and the confiscation of illegally imported motor vehicles. The argument raised by the importer that chapter 28 of Magna Carta 1215 provides for compensation for the taking of private property was rejected by the court. Since 1215 was not a statute, chapter 28 is not part of the law of New Zealand. The later 14th century statutes that extended Magna Carta and which are part of the inherited law of the country refer to legal processes according to the law of the land, that is, due process of law. Justice Baragwanath, in rejecting the chapter 28 argument, pointed out that the constitutional statutes operated in a quite different context and, while they came to be used over time to stand for a general constitutional principle, they could not displace valid legal processes in modern statutes. It is also worth noting that due process means processes now in existence in New Zealand law, not the processes of the 14th century. Similarly, the law of the land means the law of this land, that is, New Zealand, not 13th century England.


49 Mihos v Attorney-General [2007] NZHC 1802. See also Middleton v Timaru District Council [2012] NZHC 3471 where dogs were seized by the Council and the owner was obliged to pay fees to get them back. Magna Carta was cited but rejected by the court at [10], [12]-[13].

Chapter 28 was also cited in Waitakere City Council v Brunel [2008] NZHC 1406[18] where Baragwanath J noted that the implicit requirement of compensation was as old as “the repealed Chapter 28 of the Magna Carta”. Chapter 28 of Magna Carta 1215 reappeared as Chapter 19 of 1297 with slightly different wording, but was not incorporated into New Zealand law by the Imperial Laws Application Act 1988, which only retained Chapter 29 of 1297.

50 Mihos v Attorney-General [2007] NZHC 1802[28]-[36]. See also United States v Dot Com [2012] NZHC 2076[76] where a regular legal process was said to be as old as Magna Carta.

51 At [36] citing Priestley JA in Adler v District Court of New South Wales (1990) 48 A Crim R 420, 449(NSW CA). See also West v Martin [2001] NZAR 49(CA) where the appellant cited the due process statutes of the 14th century along with Magna Carta to no avail.

52 Westpac Banking Corporation & Ors [2001] WASC 365[60](Hasluck J).
Unlike other Bills of Rights, the New Zealand Bill of Rights Act 1990 does not specifically protect property and proposed amendments to the Act to include property were rejected by Parliament. As the Supreme Court pointed out in 2007, despite the reference to taking in Magna Carta, the law does not prevent the State from taking land for planning purposes, for example. Normally the law allows for compensation, and, if not, the presumption is that compensation will be paid, subject to exceptions in planning matters where the denial of development permission may result in reduced land values. But this has been taken to be regulation and not a taking. The case, of course, demonstrates how the law has developed since 1215 as well as the influence of a 13th century idea. The problem with Magna Carta is that it did not explain how compensation is to be calculated and this is a matter dealt with under contemporary legislation. The prohibition on taking means that normally expropriation of property by the State or its agencies must be authorized by law and in that sense the insistence on due legality is in keeping with the spirit if not the letter of Magna Carta. In short, Magna Carta was not, as one judge noted, an early public works compensation scheme.

C. As a failed argument to invalidate New Zealand Laws.

A surprising number of litigants have sought to advance the argument that Magna Carta has some elevated constitutional status, such that it may be employed by a New Zealand court to invalidate any New Zealand statute that conflicts with it. Thus parties have sought to challenge taxation statutes.

54 Waitakere City Council v Estate Homes Ltd [2007] 2 NZLR 149, 168[45](SC) (allowing the appeal from [2006] 2 NZLR 619(CA)); Cooper v Attorney-General [1996] 3 NZLR 480, 484(HC).


56 Waitakere City Council v Estate Homes Ltd [2007] 2 NZLR 149, 168 [45]-[46](SC).


58 In Robertson v Auckland Council [2014] NZHC 765[32] Fogarty J noted that the provision of compensation for the public taking of private property was well established and that “This heritage can be traced to Chapter 29 of the Magna Carta”.

59 Waitakere City Council v Estates Homes Ltd [2007] 2 NZLR 149,168[45](SC) followed in Riddiford v Attorney-General [2009] NZCA 603[26] where the limitations of Magna Carta are pointed out by Chambers J for the court.

60 See Russell v Minister of Lands (1898) 17 NZLR 241, 250 where the court noted that compensation for land taken was governed by the Public Works Act 1894 and the court rejected an argument to award a lesser amount than the act required because “To do so would be to violate the fundamental provision of Magna Charta”. See now the Public Works Act 1981 Pt 5.

61 Westco Lagan Ltd v Attorney-General [2001] 1 NZLR 40, 52[43](HC).

62 Kaibau v Inland Revenue Department [1999] 3 NZLR 344, 345-346(HC); Shaw v Commissioner of Inland Revenue [1999] 3 NZLR 154[14](CA).
pension legislation, criminal provisions in building legislation, bankruptcy legislation, fire service statutes, a decision in relation to the Christchurch earthquake recovery and legislation on dogs by using this argument. In all cases the argument has failed and the matter was clearly settled by the Court of Appeal in Shaw v Commissioner of Inland Revenue in 1999. In that case a taxpayer objected to his assessment for a superannuation surcharge, arguing that it was contrary to Magna Carta and that Magna Carta over-ruled the Income Tax Act 1976. The court unanimously held that, while Magna Carta, along with other inherited imperial statutes, was part of the law of New Zealand, they do not constitute supreme law in the sense of a limit on the New Zealand Parliament’s sovereignty. Magna Carta along with other inherited Imperial Acts were described as constitutional enactments in the Imperial Laws Application Act 1988. But such enactments are subject to section 15 of the Constitution Act 1986 that provides that the Parliament of New Zealand continues to have full power to make laws, which means that Magna Carta may be superseded by subsequent New Zealand legislation. As a judge pointed out in 1951, Chapter 29 of 1297 only imposes limits on the executive and “does not purport to deal with what may be done by parliament”.

D. As a symbol of values.

The rule of law is a complex made up of values, doctrine and institutional arrangements. One of the fundamental notions of the rule of law is that the executive is limited by, and must adhere to, the law of the land. This tradition was said to have begun with Magna Carta, though it took many centuries to accomplish and subsequent measures such as the Bill of Rights 1689 (Eng) also played a part in this tradition, as Wild CJ made clear in the famous case

63 Malster v Chief Executive of the Ministry of Social Development [2014] NZHC 1368[6], [12]-[13], [34].
67 Minister for Canterbury Earthquake Recovery v Ace Developments Ltd [2015] NZHC 1027[96]. Osbourne J pointed out that the argument relying on Magna Carta “… cannot prevail where Parliament enacts clear laws.”
70 At 154, 155[5].
71 At 157[14].
72 At 157[14]. This case has been followed and applied in later cases. See West v Martin [2001] NZAR 49[26](CA); Ellis v R [2011] NZCA 90[70]; Matahaere v Police [2012] NZHC 2436 [13]; Malster v Chief Executive of the Ministry of Social Development [2014] NZHC 1368 [36].
73 Murphy v Gardiner [1951] NZLR 549, 551(SC) (Hutchinson J).
74 Waitakere City Council v Lovelock [1997] 2 NZLR 385, 416(CA) (Thomas J).
75 Marsh v Attorney-General [2010] 2 NZLR 683, 695[56].
of Fitzgerald v Muldoon. There was no mention of Magna Carta in that case, where the Chief Justice held that the Bill of Rights 1689 was part of the law of New Zealand and that section 1 of the Act prohibited the executive (in this case the Prime Minister) from suspending superannuation legislation without the assent of Parliament. Other major additions to the rule of law have been the New Zealand Bill of Rights Act 1990, which, of course, is part of a longer New Zealand tradition of rights protection and, as such, can be argued to have been inspired by the Magna Carta tradition as it emerged in the centuries after 1215. It is significant that one of the purposes of the Habeas Corpus Act 2001 was to “reaffirm the historic and constitutional purpose of the writ of habeas corpus as a vital means of safeguarding individual liberty”.

E. As a value now embodied in contemporary law.

The law’s delay has been the subject of complaint at least since Magna Carta 1215 and, of course, was satirized by Charles Dickens in Bleak House in the famous case of Jarndyce v Jarndyce. It also remains a problem, despite legal obligations to guarantee a trial without undue delay. The central difficulty with this or any other legal standard expressed in very general terms is how to implement it. This was, of course, a feature of Chapter 40 of Magna Carta 1215 and its statutory successors in Chapter 29 in 1225 and 1297, for the promise not to delay justice did not explain what delay meant nor did it indicate how this was to be measured or enforced. New Zealand courts have referred to the idea and have commented that the right to a trial without delay is to be found in chapter 29 of Magna Carta 1297. Despite this, it is clear that the court cannot direct when a case must be commenced and the actual problems of delay are to be dealt with under contemporary statutes.

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76 Fitzgerald v Muldoon [1976] 2 NZLR 615.
77 The act is dated 1688 in the Imperial Laws Application Act 1988 but in fact the Bill of Rights was assented to as legislation on 16 December 1689: 14 Lords Journal 373 (16 December 1689); 10 Commons Journal 310 (16 December 1689).
78 Other examples are legion and include the Native Rights Act 1865; Women’s Parliamentary Rights Act 1919, and the Habeas Corpus Act 2001.
79 Section 5(a). See also the statement on the importance of preserving liberty that cited Magna Carta in Chief Executive of Department of Labour v Yadegary [2009] 2 NZLR 495, 517 (CA) (Baragwanath J).
80 Magna Carta 1215, Chapter 40 translated in J C Holt, above n 3, Appendix 6 at 389; Magna Carta 1297, c 9, 25 Edw 1, c 29.
81 That was of course a civil case involving a will immersed in Chancery for generations, and possibly based on real cases, one of which was thought to have lasted a stunning 117 years. <www.freewebs.com>. The world record for delay is an Indian case that commenced in 1836: The New Indian Express (India, 24 February 2014) <newindianexpress.com>.
82 New Zealand Bill of Rights Act 1990 s 25(b), the right to be tried without undue delay. In R v Harris [2008] NZCA 298[50] the court noted that this provision echoed chapter 29. For a detailed analysis see Andrew Butler and Petra Butler The New Zealand Bill of Rights: A Commentary (LexisNexis Butterworths, Wellington, 2005) at 809-825.
83 Re Arnold [1977] 1 NZLR 327, 334 (HC)(Somers J). Institutional factors such as the lack of sufficient judges may explain delay: Marlborough Express (New Zealand, 5 February 1890) at 2.
and rules of court. One feature of delay is a delay in the court or tribunal making a decision. This is not covered in s 25 of the New Zealand Bill of Rights Act 1990, but section 27 of that Act does require the observance of the principles of natural justice and this has been held to require decisions with “reasonable promptitude”.84 This principle was applied to a decision by the Māori Land Court where the court still had not made a decision three years following a hearing that lasted only one day. Asher J held this to be entirely unreasonable and thought that six weeks would have been sufficient.85

Now, while Magna Carta is usually cited in delay matters, the court actually examines contemporary circumstances in order to make a decision. In practice, then, while the courts might make the almost obligatory reference to Magna Carta on delay,86 they have crafted principles on basis of the test in section 25(b) New Zealand Bill of Rights Act 1990.87 Starting with the guidance offered by the Supreme Court of Canada in R v Morin,88 the courts have both enunciated the tests for determining if undue delay has occurred and developed remedies for the same problem.89 In short, the courts have both acknowledged Magna Carta and dealt with its obvious limitations: the lack of effective remedies90 and its vague language to establish principles that fit contemporary circumstances.

84 Ngunguru Coastal Investments Ltd v Māori Land Court [2011] NZAR 354[23] (HC) where chapter 29 of Magna Carta was cited in this connection. See also Vea v Minister of Immigration [2002] NZAR 171,182(HC).
85 At [35].
87 Paul Rishworth et al New Zealand Bill of Rights (2003); Andrew Butler and Petra Butler, above n 81.
88 R v Morin [1992] 1 SCR 771(SCC). A case not to be copied but the principles have been followed: Martin v Tauranga District Court [1995] 2 NZLR 419, 422(CA)(Cooke P). Morin has been cited, as have other Canadian cases on delay, in later New Zealand cases: Lim v R [2004] NZCA 257[17]; R v Williams [2009] 2 NZLR 750, 758[11](SC); Fincham v The District Court at Lower Hutt [2009] NZHC 786[10],[18]-[21].
89 For a recent statement of the applicable principles see CT v R [2014] NZSC 155.
90 Magna Carta 1215 Chapter 63 provided for a committee of barons to oversee the Charter but that was removed in 1216: Michael Evans and R Ian Jack Sources of English Legal and Constitutional History (Butterworths, Sydney, 1984) at 60. The statutory versions of 1225 and 1297 had no enforcement mechanism: David Carpenter, above n 6, at 424; Rahey v R [1987] 1 SCR 588, 634(SCC), though the charter was reinforced through inquiries in the following centuries: Calendar of Patent Rolls, Edward IV, Edward IV, Richard III, 1476–1485 (1901) 23.
V. Uses in New Zealand History

A. As a fulcrum for a political critique

From an early date the Charter was invoked in political and constitutional arguments. In the mid to late 1840s the population both criticized the colonial office, attacked specific measures by the colonial executive, and used the charter to argue for greater self-government. British constitutional measures were described as arbitrary and unequal and a denial of the rights of free subjects, rights guaranteed to them by Magna Charta amongst other things. A letter from an Auckland correspondent to the Colonial Secretary, Earl Grey, in 1847 severely criticized the draft constitutional arrangements for New Zealand describing it as utterly worthless and noted that:

We are, my Lord, the free and equal citizens of England and have not in any respect alienated our rights; therefore, according to Magna Charta, and to natural justice, we are entitled to frame the laws we are bound to abbey, without the interference of anyone.

By the 19th century, Magna Carta had ceased to be a medieval document and had come to stand for several political ideals, including the right to self-government, a general right to freedom and the notion that the executive was bound by the law. None of these ideals are expressed as such in Magna Carta 1215, but the argument here is that Magna Carta survived because it was transformed and put to new uses not in contemplation in the 13th century. Departures from the regular course of the law were often attacked as contrary to Magna Carta, whether this was at the time of emergency laws in the 1860s or in the aftermath of the unrest in New Zealand administered Western Samoa in 1929, as it was then called.

B. As an element in Legal, School Education and Public Discourse.

The study of constitutional history was a standard part of the education system in 19th century New Zealand for students and would be lawyers. In 1875 the Chief Justice, James Prendergast, set out the material that barristers had to study for admission to the profession. Apart from the fact that the list included Latin and Greek classics, as well as algebra and geometry, classics of English constitutional law and history were also included, such as Hallam's

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91 Nelson Examiner and New Zealand Chronicle (New Zealand, 22 March 1845) at 12.
92 New Zealander (New Zealand, 1 May 1847) at 3. See also the letter by A Briton in the Daily Southern Cross (New Zealand, 26 February 1848) at 3 who claimed that the lack of a representative government had rendered Magna Charta a tabula rasa. For the background see J Hight and H D Bamford, The Constitutional History and Law of New Zealand (1914) 195-203. Phillip A Joseph, above n 1, at ch 4.
93 See “Justice for Samoa” The Evening Post (New Zealand, 23 January 1929) at 8.
Constitutional History, Hallam’s Middle Ages, Broom’s Constitutional law and, of course, Blackstone’s Commentaries. In all of these works Magna Carta was discussed though often in the 19th century manner of great reverence towards the accomplishments of English constitutional progress.

In the schools, English constitutional history was taught as late as the 1960s. In an article written by the headmaster of Waitaki Boys’ High School in 1931 entitled “School and Empire: Education for Imperial Citizenship” the writer stressed the importance of:


School students wrote essays, some of which were published in the press, that showed, not only that they were familiar with Magna Carta, but that they were able to extend the term to the Treaty of Waitangi, which one student described as “this Magna Carta of the Māori race”.

Whether what was taught was historically accurate is another matter. Certainly, press coverage of the Charter often referred to the idea that King John signed the charter in 1215. John probably could not write, but the evidence examined in 1924 of the four surviving 1215 charters show that three had a seal attached while the fourth had an incision in the vellum where a seal attached to a ribbon would have gone. In 1913 a number of school errors, called howlers in the press, were spoken of at a teachers’ conference. One was that “Magna Carta said that no freeman should be diseased without the consent of Parliament”.

95 Criticised in Herbert Butterfield, The Whig Interpretation of History (G Bell, London, 1931).
96 My upper sixth form history class at the Otago Boys’ High School in 1968 consisted of lectures on Tudor and Stuart history with an emphasis on constitutional developments.
97 The Press (Christchurch, 5 December 1931) at 8. Similar lists appeared at an early date and are evidence of the intellectual inheritance of New Zealanders: The Nelson Examiner (New Zealand, 12 March 1842) at 2 has a long article on the subject. A sample question paper on English History that mentions Magna Charta is reproduced in The Colonist (Nelson, 5 December 1873) at 3.
98 Margaret Harvey (aged 17) “Six Milestones in History” The New Zealand Herald (Auckland, 8 July 1933) at 4.
99 Waiau Times (New Zealand, 29 August 1913) at 5; The Press (Christchurch, 15 June 1928) at 11; Auckland Star (Auckland, 15 June 1928) at 6; The Evening Post (New Zealand, 15 June 1939) at 11; Jeremy Finn, “The English Heritage” in Peter Spiller, Jeremy Finn & Richard Boast (eds) above n 31 at 35.
100 John C Fox “The Originals of the Great Charter of 1215” (1924) 39 English Historical Review at 321-336. See also “King John and the Magna Carta” The Evening Post (New Zealand, 25 November 1939) at 20 reporting an American historian who refuted the misconception that John signed the Charter.
101 Dominion, (New Zealand, 9 September 1913) at 4. See also The Evening Post (New Zealand, 25 February 1911) at 11: “Magna Carta said that the king had no right to bring soldiers in the lady’s house, and tell her to mind them”.

Magna Carta also appeared in popular culture in the early 20th century. The Blenheim Harmonic Society put on a production of Henry Coward’s historical cantata “Magna Carta” in 1909. The celebration of the Charter had an international dimension as well when, in the 1920s, New Zealand joined Australia in celebrating Magna Carta Day, an idea first launched in Minnesota. Despite the celebrations and general knowledge of Magna Carta, historical research by the 1920s had severely undermined many of the myths surrounding the Charter. Common errors were refuted, as were other errors, such as when the Charter was invoked as a bulwark of liberties, as in claims about the Treaty of Peace in Paris in 1919. In 1929, a writer in the New Zealand Herald attacked the idea that Magna Carta was the origin of “our great democratic liberties” and a correspondent in 1939 denounced the usual mythology as “hysterical bunk.” In an important lecture by Professor James Rutherford of the Auckland University College to the Empire Society in 1934, many of these myths were refuted, including the persistent notion that Magna Carta 1215 was the foundation stone of English liberties.

C. As a term referring to a foundational document: The Treaty.

The most frequent use of Magna Carta to refer to a New Zealand foundational document is in the numerous references to the Treaty of Waitangi as the Māori Magna Carta. This was, of course, the title of a book by Paul McHugh published in 1991, but the term appeared in the press on many occasions between 1845 and 1940. Despite the reverence accorded to the Treaty, its political and emotional importance, and its legal status since the Treaty of Waitangi Act 1975, attempts have been made to invoke Magna Carta to either enforce the treaty or to establish Māori Sovereignty. The latter argument is that Māori did not surrender sovereignty in 1840.

102 Marlborough Express (New Zealand, 26 October 1909) at 8.
103 The New Zealand Herald (Auckland, 15 June 1929) at 10.
104 Ernest Scott’s article “The Myth of Magna Carta” first published in The Argus (Melbourne, 27 November 1920) at 6 was reprinted in The Dominion (New Zealand, 14 December 1920) at 7. See also “Magna Carta A Myth” The New Zealand Herald (Auckland, 6 August 1927) at 1.
106 The New Zealand Herald above n 102, at 10. In a similar vein see “Magna Carta and All That” The Evening Post (New Zealand, 21 November 1936) at 8.
107 Auckland Star (Auckland, 23 February 1939) at 23.
108 The New Zealand Herald (Auckland, 16 November 1934) at 13. For Rutherford see the entry in <www.teara.govt.nz>.
110 Daily Southern Cross (New Zealand, 5 April 1845) at 3; Nelson Examiner and New Zealand Chronicle (Nelson, 3 May 1845) at 35; The New Zealand Herald (New Zealand, 11 March 1933) at 1; (6 February 1934) at 11 and (22 January 1940) at 24; The Evening Post, (New Zealand, 5 February 1934) at 8.
VI. Conclusion

A legal or constitutional instrument may remain an animating presence and a source of inspiration long after the particular details of the document have either been removed from the law or have faded with the change of historical circumstances. In the case of Magna Carta our interest lies in what was made of the document in later centuries and its relationship to a wider constitutional tradition that has grown up since 1215. Most of the elements of the rule of law, itself a combination of law, constitutional practice and political ideas, simply did not exist in the 13th century, but we are heirs to that tradition and are also its beneficiaries. It represents an historic achievement that was hard won and, though not now a rarity, it is an achievement that New Zealand may claim to have both added to and to have improved upon. In the course of the last eight centuries Magna Carta was transformed from a medieval document into a set of malleable ideas whose very flexibility enabled it to survive to become part of our political and constitutional arrangements. Although it has been shown that several of the notions about the Charter are myths, myths serve useful purposes, for a tradition is not static and can be transformed and renewed. This is why people and lawyers continue to refer to it 800 years after it was concluded in a meadow called Runnymede, at a time when the countries to which it spread were then unknown in Europe. In a world where there are peoples and states that have not mastered the arts of civil peace, as we have, it is fitting to reflect on the past and to appreciate in a clear-eyed way the results of the eight centuries of constitutional and political struggles since 1215.


112 Kohu v Police (1989) 5 CRNZ 194, 196-197(HC) (a case of criminal trespass); Berckett v Tauranga District Court [1992] 3 NZLR 206, 214(HC) (case involving assault, unlawful assembly and interference with property); R v Takao [2005] NZCA 279[9] (kidnapping charges under the criminal law applied to a Māori accused); Matahaere v Police [2012] NZHC 2436[7]-[13] (criminal law applied to a Māori convicted of obstructing the police).