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The Rights We Won At Runnymede

An Argument for the Repeal of Magna Carta

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Abstract

Much has been written about Magna Carta, particularly given its recent 800th birthday. Yet few are prepared to speak against this ancient document for fear that the rule of law, liberty, and even democracy might crumble if Magna Carta no longer stands. This paper argues that Magna Carta should be repealed. First, by studying both Magna Carta's history and the relevant New Zealand case law, this paper establishes that Magna Carta no longer has any discernible practical use. Though it once represented rights against the monarch, it is now out of date, predominantly misused and is therefore obsolete. Building upon this conclusion the paper argues that little of what Magna Carta supposedly stands for can in fact be justified by legitimate statutory interpretation approaches. Even a generous, purposive approach is not enough to transform Magna Carta from a feudal document signed to end a civil war into a sure guarantee of rights and principles in modern New Zealand. Furthermore, Magna Carta does not live up to the rule of law it supposedly epitomises. It is an unnecessary, overly detailed and inaccessible piece of legislation. Finally, it is argued that New Zealand's constitutional framework would be better off without Magna Carta. New Zealand's ability to provide effective rights protection and adhere to the rule of law does not depend on the charter signed at Runnymede. Excessive reverence for the past robs New Zealanders of a constitutional framework that suits our unique nation. On this basis, the paper concludes that Magna Carta should be repealed.

Word Length

The text of this paper (excluding the abstract, table of contents, footnotes and bibliography) comprises approximately 12,988 words.

Subjects and Topics

Magna Carta; public law; rule of law; imperial statutes.

Contents

I Introduction

And still when mob or Monarch lays
Too rude a hand on English ways,
The whisper wakes, the shudder plays,
Across the reeds at Runnymede.
And Thames, that knows the moods of kings,
And crowds and priests and suchlike things,
Rolls deep and dreadful as he brings
Their warning down from Runnymede!
(Rudyard Kipling, 1911)[1]

For 800 years Magna Carta has warned monarchs against overstepping the line drawn at Runnymede. To Magna Carta democracy is attributed; from it the rule of law draws its beginnings; in it liberty finds its source. Or so myth would have it. As well as being formative in England's constitutional structure, Magna Carta inspired the American Declaration and has been referred to in many circumstances including King Charles I's trial, the Watergate scandal and Nelson Mandela's defence in court.[2] Yet it is more than a fondly remembered historical relic; it is a New Zealand statute.

Unfortunately, the glistening jewel of English legal history is not the heirloom it was once thought to be. For 800 years the ever-growing myth of Magna Carta has misled lawyers and judges. Just as a story handed down through generations grows in magnitude and grandeur but also further from the truth, over time Magna Carta has come to stand for more than it did in June of 1215. This is the myth of Magna Carta; the inappropriate attribution to that document of various values and rights. It is time it was removed from New Zealand's constitutional crown and room made for a more indigenous commitment to the rule of law. Magna Carta should be repealed and its ideas incorporated into another modern, New Zealand-made constitutional document.

Part II establishes a foundation for the rest of the paper. First, it provides a brief history of Magna Carta. Secondly, Magna Carta's use in New Zealand courts is analysed. The authority Magna Carta provides for a number of substantive rights is addressed followed by an exploration of its symbolic value. This part questions the authority that Magna Carta provides for certain principles, highlights textual ambiguities and uncertainties and determines its overlap with other legislation. It concludes that Magna Carta has been made irrelevant by modern statutes.

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1 Rudyard Kipling "What Say the Reeds at Runnymede?" (1911).

2 Dan Jones "How did a peace treaty from 1215 forge the freedoms of 2015?" BBC (online ed, United Kingdom, 2015); Bonnie Greer "Why Do Americans Think the Magna Carta is So Awesome?" BBC (online ed, United Kingdom, 2015).

The paper then moves into a normative critique of Magna Carta. Part III concerns how Magna Carta should be interpreted. It argues that the myth of Magna Carta cannot be justified through ordinary statutory interpretation techniques. Treating it as a constitutional document achieves better results, but for reasons discussed, this approach is still unsuitable. Part IV explores some of the characteristics imposed on statutes by the rule of law and whether Magna Carta possesses them. However Magna Carta's supposed legacy - the rule of law - proves too rigorous a standard for Magna Carta to meet.

Part V draws the preceding arguments together. Magna Carta does not have what it takes to be a quality constitutional component. New Zealanders are more likely to buy into a constitutional document that is made specifically for New Zealand. Furthermore it is preferable to base our rights protection on a statute designed to suit New Zealand values with unambiguous language. The reticence among the legal profession to relinquish historical foundations is also addressed. The relevant constitutional values will not be lost if Magna Carta is no longer a statute in New Zealand.

II Magna Carta: Modern New Zealand Usage

The fundamental test of a statute's relevancy is the way the courts deal with it. Some New Zealand cases still refer to Magna Carta. First, Section A provides an overview of Magna Carta's history and how it came to be part of New Zealand law. This Part then considers how Magna Carta is used as both law and as a symbol. Hence Section B looks at the substantive rights that form the law under Magna Carta. Section C looks at the principles derived from Magna Carta and whether such derivation is justified. Finally, Section D discusses a few overarching themes of Magna Carta's usage.

A Historical Background

It is important to understand the motivations of those responsible for Magna Carta and its post-enactment development in order to understand why it is used the way it is today. In 1215 King John was at war with the feudal barons.[3] Magna Carta, signed at Runnymede, was an attempt to end this war.[4] The barons had rebelled against the misgovernment and continued exploitation of their financial resources by the Norman and Angevin kings.[5] Prior to the Norman Conquest English customary law involved mutual rights and obligations between king and citizens; this was an early form of the predominance of the law. But the

3 William Sharp McKechnie *Magna Carta: A Commentary on the Great Charter of King John* (James Maclehose and Sons, Glasgow, 1914) at 51.

4 JC Holt *Magna Carta* (2nd ed, Cambridge University Press, Great Britain, 1992) at 26.

5 At 27.

Norman and Angevin kings increasingly ignored their obligations and abused their rights.[6] King John's increasingly severe actions brought the brewing rebellion to a head.[7] The barons aimed to reform English governance.[8] Their reform was modelled on the "good old law" from before the Norman Conquest.[9] Hence Magna Carta, reluctantly accepted by King John, reigned in his liberties and reasserted the law's predominance. After two months the Pope had it annulled for infringing John's "God-given rights as monarch".[10] After John's death in 1216 the barons exploited his heir's infancy to reissue the Charter.[11]

Subsequently Magna Carta has been reissued numerous times.[12] It has also been reinterpreted, modified and grown in status. Significant credit for Magna Carta's constitutional position can be attributed to Sir Edward Coke's writings.[13] He affirmed its "great weightiness" as a restatement of customary laws.[14] He also significantly reinterpreted it, asserting that it stood for property rights, due process, jury trials and no taxation without parliamentary consent.[15]

Magna Carta's reissue in 1297 was most likely the first time it was given statutory force.[16] Chapter 29 of that reissue was part of New Zealand law under the English Laws Act 1908 and before that the English Laws Act 1858.[17] It remains part of New Zealand law according to the Imperial Laws Application Act 1988 (ILAA).[18] It says:[19]

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6 At 27; Ivor Jennings *Magna Carta: And Its Influence in the World Today* (Her Majesty's Stationary Office, London, 1965) at 13.

7 Ralph V Turner *Magna Carta: Through the Ages* (Pearson Education, Great Britain, 2003) at 43 and 45–46; McKechnie, above n 3, at 49.

8 Turner, above n 7, at 52.

9 At 67; Holt *Magna Carta*, above n 4, at 297.

10 Turner, above n 7, at 77.

11 At 78.

12 JW Gough *Fundamental Law in English Constitutional History* (Oxford University Press, London, 1955) at 16.

13 Max Radin "The Myth of Magna Carta" (1947) 60 HLR 1060 at 1061.

14 Gough, above n 12, at 40.

15 Turner, above n 7, at 148–149.

16 JC Holt "Magna Carta: Law and Constitution" in JC Holt (ed) *Magna Carta and the Idea of Liberty* (John Wiley and Sons, United States of America, 1972) 49 at 53.

17 *Re Arnold and Others* [1977] 1 NZLR 327 (SC) at 334.

18 Imperial Laws Application Act 1988, s 3(1) and sch 1. Note that some sources refer to chapter 29 whilst others refer to chapter 39. They are both references to the same chapter. Magna Carta's clauses were not originally numbered and various reissues used different numbering. Since no other chapter is in force in New Zealand, this paper's arguments concern chapter 29 exclusively.

19 Magna Carta 1297 (Imp) 25 Edw I, c 29.

> NO freeman shall be taken or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any other wise destroyed; nor will we not pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land. We will sell to no man, we will not deny or defer to any man either justice or right.

The ILAA was passed in order to clarify how old English statutes should be used in New Zealand and to expressly retain any statutes deemed necessary.[20] There are several possible motivations behind including Magna Carta in the ILAA. It is likely that Parliament wanted to demonstrate a connection between New Zealand's constitutional structure and its English history as well as reaffirm New Zealand's adherence to the rule of law.[21] The legal profession seems to have a sentimental attachment to Magna Carta.[22] It was also likely that the legal profession desired its retention until some more comprehensive analysis of its usefulness could be undertaken.[23]

B Magna Carta as Law

Despite its age, Magna Carta is still cited by New Zealand litigants. Whether this indicates its continued relevance depends on the nature of that use.[24] Hence the following sections look extensively at how Magna Carta is used by the courts.[25]

This analysis has some limitations. First, the cases were not randomly selected; the databases usually present them in chronological order. This means the data favours more recent cases. However where all the search results were exhausted this limitation was eliminated. Secondly, some cases contain references to Magna Carta without listing it as cited legislation so would not be found by the search parameters. Thirdly, there are some cases where the judges' summary of excluded parties' arguments merely referred to "old statutes". This makes it difficult to know whether the parties referred to Magna Carta or not. Despite these limitations, this case analysis provides an informative overview of Magna Carta's use in New Zealand.

Before looking at the substantive rights, there are some general statistics regarding Magna Carta's use that are interesting. First, the most frequent type of case in which Magna Carta

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20 Jeremy Finn "The Imperial Laws Application Act 1988" (1989) 4 Canterbury L Rev 93 at 94.

21 David Clark "The Icon of Liberty: The Status and Role of Magna Carta in Australian and New Zealand Law" (2000) 24 MULR 866 at 870.

22 Finn, above n 20, at 97; Clark, above n 21, at 870.

23 *McVeagh v Attorney-General* [2001] 3 NZLR 566 (HC) at [22].

24 Clark, above n 21, at 868.

25 Eighty-five cases were found primarily by searching several legal databases with Magna Carta in the "legislation cited" field. Cases were also found because they were referred to in other cases or in journal articles.

was referred to was criminal or criminal procedure cases, followed by civil procedure, then administrative and constitutional law cases. Secondly, forty per cent of litigants relied on the New Zealand Bill of Rights Act 1990 (Bill of Rights Act) alongside Magna Carta. This was done most frequently regarding the rights to justice and minimum standards of criminal procedure.[26] Thirdly, even where judges admitted the constitutional value of Magna Carta, they did not rely on Magna Carta in order to reach their final conclusion.[27] Fourthly, in over three quarters of the cases where Magna Carta was referred to, the litigant relying on Magna Carta lost. Finally, self-representation rates are unusually high in Magna Carta cases. Roughly half of the cases that expressly indicate that the litigant raised Magna Carta involved self-representation. This is over five times the usual rate in New Zealand.[28]

One key way in which Magna Carta is used is as authority for substantive rights against the abuse of executive power. The approach of the courts to six commonly relied upon rights is now discussed.

First, many New Zealand litigants trace the right to due process back to Magna Carta's phrase *per legum terrae*.[29] It is alleged to cover areas such as the right to a hearing,[30] to be present during that hearing,[31] to call certain witnesses[32] and to be permitted to make particular arguments.[33] Unfortunately these cases do not discuss Magna Carta in much detail. This may be due to there being no breach or the argument concerning Magna Carta being irrelevant to the appeal.[34] For instance, in one High Court case the applicants claimed their common law right of access to justice could be traced back to Magna Carta.[35] The Judge said that the right's legal source was unimportant; it was enough that it was deeply embedded in

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26 New Zealand Bill of Rights Act 1990, ss 25 and 27.

27 Similarly, in Joshua Rozenberg "Magna Carta in the modern age" British Library <www.bl.uk>, Rozenberg said that he has "not found a single modern English case that was decided on the strength of Magna Carta alone".

28 Melissa Smith, Esther Banbury and Su-Wuen Ong *Self-Represented Litigants: An Exploratory Study of Litigants in Person in the New Zealand Criminal Summary and Family Jurisdictions* (Ministry of Justice, July 2009) at 10. Interestingly, sixteen per cent of these cases were represented by one particular counsel, T Ellis.

29 "by the law of the land"; Clark, above n 21, at 884; see *N v R* (1999) 16 CRNZ 415 (CA) at [24].

30 *Police v Casino Bar (No 3) Ltd* [2013] NZHC 44, [2013] NZAR 267 at [68]; *T v Police* HC Wellington CRI-2007-485-37, 14 June 2010.

31 *West v Martin* [2001] NZAR 49 (CA) at [5] and [13]; New Zealand Bill of Rights Act, s 27(1).

32 *R v Waetford* CA406/99, 2 December 1999 at [3].

33 *R v Dekker* CA482/96, 20 February 1997 at 3; for other due process Magna Carta cases see *Matahaere v New Zealand Police* [2012] NZHC 2436; *R v D* [2003] 1 NZLR 41 (CA); *Re Rupa* HC Auckland CIV-2002-404-1191, 8 April 2004.

34 *West v Martin*, above n 31, at [18]–[19]; *R v Waetford*, above n 32, at [5]; *R v Dekker*, above n 33, at 3.

35 *Independent Fisheries Ltd v Minister for Canterbury Earthquake Recovery* [2012] NZHC 1810 at [153].

New Zealand's law.[36] The lack of discussion of Magna Carta may also be due to the extensive due process rights laid out in the Bill of Rights Act and other statutes.[37] Courts find it unnecessary to venture beyond the modern statutory framework back to Magna Carta.

It is not clear that Magna Carta is a legitimate source for this right. It does not contain the words "due process" and according to Professor Edward Jenks, *per legum terrae* meant something quite different from due process.[38] A connection did not emerge until the fourteenth century and was affirmed by Coke in the seventeenth century, in what is widely considered a distortion.[39] Whether Magna Carta is good authority for this right depends on whether or not one relies on an incorrect but widespread interpretation or directly on the text. This issue will be discussed in a later Part.

Secondly, the phrase, "lawful judgment of his peers" is thought to give rise to the right to a jury trial. Yet according to the High Court, Magna Carta does not refer to the right to trial by jury.[40] More recent courts acknowledge the jury's Magna Carta heritage but still defer to contemporary statutory regimes.[41] The Court of Appeal has held that "peers" refers to trial by one's social equals not jurors exclusively from the appellant's community.[42] It has also restricted the applicability of Magna Carta's right to jury trials to criminal proceedings.[43]

Juries in 1215 were very different from today. The Court of Appeal has noted that juries in 1215 were neither impartial nor independent given that "jurors were more akin to witnesses than triers of fact".[44] Others say that they were a panel of social equals meeting to settle disputes with one another.[45] Magna Carta was relied upon in 1302 by a knight who protested that his jurors were not knights and therefore not his peers.[46] Contemporary parliamentarians

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36 At [162].

37 New Zealand Bill of Rights Act, ss 24, 25, 26 and 27.

38 Radin, above n 13, at 1060–1061. This specific phrase is discussed further in Section D of this Part.

39 Clark, above n 21, at 884; B Abbott Goldberg "'Interpretation' of 'Due Process of Law' - A Study in Irrelevance of Legislative History" (1981) 12 Pac LJ 621 at 627; Ian McDonald "Is Magna Carta More Honoured in the Breach?" (2015) 3 BBKLR 173 at 173; see also *Jago v District Court (NSW)* [1989] HCA 46, 168 CLR 23 at 67 per Toohey J.

40 *Dreliozis v Wellington District Court* [1994] 2 NZLR 198 (HC) at 199–200.

41 *McKee v R* [2013] NZCA 387 at [17] and [19]; *Ellis v R* [2011] NZCA 90 at [15].

42 *Ellis v R*, above n 41, at [34] and [69].

43 *Gregory v Gollan* [2008] NZCA 568, (2008) 19 PRNZ 450 at [23].

44 *Ellis v R*, above n 41, at [34]; Clark, above n 21, at 882.

45 Turner, above n 7, at 72.

46 At 109.

relied on Magna Carta to ensure they were tried before fellow parliamentarians.[47] It is thus historically inaccurate to rely on Magna Carta for the right to a jury trial.[48]

The Bill of Rights Act gives the right to a jury trial and to a fair and public hearing by an independent and impartial court.[49] The Juries Act 1981 adds a comprehensive statutory framework. Consequently it is unnecessary to rely on Magna Carta.

Thirdly, multiple litigants have relied on Magna Carta's phrase: "we will not deny or defer to any man either justice or right".[50] In one such case the Court of Appeal said the potential delay would deny access to justice and conflict with the Bill of Rights Act which echoes Magna Carta.[51] Similar cases likewise confirm Magna Carta's relationship with the right to prompt justice but do so with minimal justification.[52] In *Unitec Institute of Technology v Attorney-General* the High Court said that whether Magna Carta provided an independent jurisdiction for this right was irrelevant to the outcome.[53] However the issue is "of real significance" and should be considered more fully in a case where it does affect the outcome.[54]

Given the Bill of Rights Act's right against delayed justice, reliance on Magna Carta is unnecessary.[55] It is also unjustifiable. In *Jago v District Court (NSW)* (*Jago*) the High Court of Australia said there is no common law right to a speedy trial derived from Magna Carta.[56]

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47 At 127.

48 See Clark, above n 21, at 882.

49 New Zealand Bill of Rights Act, ss 24(e) and 25(a).

50 Magna Carta, c 29; Clark, above n 21, at 880; see *Bage Investments Ltd v Commissioner of Inland Revenue* (1999) 19 NZTC 15,531 (HC); *Mann v Alpine Wear (New Zealand) Ltd* [1996] 1 ERNZ 248 (EmpC); *Nielsen v Body Corporate No 199348* [2010] NZCA 101; *R v ETE* (1990) 6 CRNZ 176 (HC); *R v Harris* [2008] NZCA 298; *Siemer v Fardell* HC Auckland CIV-2003-404-5782, 21 June 2010; *Wells v Lewis* (1990) 3 PRNZ 454 (HC).

51 *R v Harris*, above n 50, at [43] per Harrison J and [50] per Baragwanath J.

52 *Martin v District Court at Tauranga* [1995] 2 NZLR 419 at 429; *Ngati Maru Ki Hauraki Inc v Kruithof* [2005] NZRMA 1 (HC) at [53]; *Ngunguru Coastal Investment Ltd v Maori Land Court* [2011] NZAR 354 (HC) at [23]; *Nielsen v Body Corporate No 199348*, above n 50, at [10]; *Rio Beverages Ltd v New Zealand Apple & Pear Marketing Board* HC Auckland CL81/93, 25 November 1994 at 7; *Watson v Clarke* [1990] 1 NZLR 715 (HC) at 722–723; *Wells v Lewis*, above n 50, at 458.

53 *Unitec Institute of Technology v Attorney-General* [2006] 1 NZLR 65 (HC) at [132].

54 At [132].

55 New Zealand Bill of Rights Act, s 25(b).

56 *Jago v District Court (NSW)*, above n 39, at 34; Clark, above n 21, at 881. Case law did not support the right's existence and such a right would be inconsistent with the common law rule "that time did not run against the king" (*Jago v District Court (NSW)*, above n 39, at 41 and 63-64). Whilst courts should avoid unnecessary delays, the prevention of delay is not an independent legal right (at 42 and 45).

This is persuasive authority against reliance on Magna Carta for a right against delayed justice.[57]

Fourthly, Magna Carta supposedly provides property rights.[58] A wide variety of cases provide the backdrop for this assertion including bankruptcy,[59] public taking of land,[60] fishing quotas,[61] superannuation entitlements,[62] unlawful entry into a residence[63] and forfeiture of goods.[64] In fact, the Supreme Court has said that, given property rights' absence from the Bill of Rights Act, the "principal general measure of constitutional protection is under Magna Carta".[65] Accordingly, property expropriation must be statutorily authorised.[66]

This decision should be read in light of Baragwanath J's decision in *Cooper v Attorney-General*. Baragwanath J affirmed the constitutional protection of property rights arising from Magna Carta.[67] He also affirmed parliamentary sovereignty and judges' inability to challenge legislation.[68] Thus judicial references to constitutional property rights are not suggestions that Parliament's sovereignty is restricted. McGechan J also provides useful insights.[69] He said "disseised of his freehold" refers to land interests and cannot necessarily be extended to general property rights.[70] He cautioned against relying on Magna Carta's

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57 This is especially so because of the comprehensive historical analysis undertaken by the High Court, absent in comparable New Zealand cases. Although there is no right against delayed justice in Australia's constitution, this does not distinguish the case since in New Zealand Magna Carta is referred to alongside the Bill of Rights Act. Neither the historical analysis of Magna Carta, Coke's writings, nor the common law rule relied upon in *Jago v District Court (NSW)* are specific to Australia.

58 Clark, above n 21, at 887.

59 *West v Official Assignee* [2007] NZCA 523; *West v Martin*, above n 31.

60 *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112, [2007] 2 NZLR 149; *Riddiford v Attorney-General* [2009] NZCA 603.

61 *Cooper v Attorney-General* [1996] 3 NZLR 480 (HC).

62 *Malster v Chief Executive of the Ministry of Social Development* [2014] NZHC 1368.

63 *Easton v Governor-General* [2012] NZHC 206; see also *West v New Zealand Fire Service Commission* HC Hamilton CIV-2007-419-1531, 16 November 2007.

64 *Mihos v Attorney-General* [2008] NZAR 177 (HC) at [23].

65 *Waitakere City Council v Estate Homes Ltd*, above n 60, at [45].

66 At [45]. These statements are obiter because there had been no taking (at [46] and [54]). However, the Court of Appeal has since relied on this judgment regarding constitutional protection of property rights: *Riddiford v Attorney-General*, above n 60, at [26].

67 *Cooper v Attorney-General*, above n 61, at 483.

68 At 483–484.

69 *Westco-Lagan Ltd v Attorney-General* [2011] 1 NZLR 40 (HC) at [42].

70 At [42].

reinterpretations instead of its text.[71] It is believed that Coke convinced others that Magna Carta secured private property rights.[72]

There is no right to private property in the Bill of Rights Act. Consequently many people use this aspect of Magna Carta to justify its retention.[73] However there are various statutes and common law rules which comprehensively govern property issues rendering Magna Carta unnecessary.[74]

Fifthly, Magna Carta is famous for "depriving the executive of the power of arbitrary taxation".[75] In several cases, courts have rejected extraordinary taxation arguments on the basis of parliamentary sovereignty.[76] Besides parliamentary sovereignty there are several other barriers to deriving tax rights from Magna Carta. One is that arbitrary taxation is prohibited by chapter 12 of Magna Carta which is not included by the ILAA into New Zealand law.[77] Another is that the representation supposedly required before taxation referred to consulting a feudal assembly composed of freemen, not parliamentary consent.[78] This was a very limited representation. The taxation referred to payments by the king's tenants-in-chief; not by the general population.[79] Equating the feudal assembly with Parliament is another of Coke's creative reinterpretations.[80] It is a stretch of Magna Carta's text and context to rely on it for such a proposition. Note that there is no right relating to tax in the Bill of Rights Act, instead there is a comprehensive statutory regime.

Sixthly, Magna Carta prohibited arbitrary detention or punishment except by the lawful judgment of peers or by the law of the land. A number of cases in this category use the habeas corpus writ, which is described as the "machinery to deliver on the right conferred by the Magna Carta".[81]

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71 At [42].

72 Turner, above n 7, at 148.

73 See *West v Martin*, above n 31, at [24].

74 Insolvency Act 2006, pt 3; Public Works Act 1981, pt 2; Local Government Act 2002, ss 189 and 190.

75 Radin, above n 13, at 1072–1073; Turner, above n 7, at 74.

76 *Shaw v Commissioner of Inland Revenue* [1999] 3 NZLR 154 (CA) at [1], [10] and [14]; *Kaihau v Inland Revenue Department* [1990] 3 NZLR 344 (HC) at 345–346.

77 See *Shaw v Commissioner of Inland Revenue* [1997] 3 NZLR 611 (HC) at 613–614.

78 *Shaw v Commissioner of Inland Revenue* [1997], above n 77, at 614; see also Radin, above n 13, at 1072–1073; Turner, above n 7, at 74.

79 Turner, above n 7, at 74.

80 At 148–149.

81 *T v Jones* [2007] 2 NZLR 192 (CA) at [59]; see also *Kim v Prison Manager, Mount Eden Corrections Facility* [2012] NZHC 2417, [2012] NZAR 990 at [5].

In one case, a "constitutional principle in favour of preserving liberty" based on Magna Carta was used as an interpretative tool by Baragwanath J to support the release of the respondent pending his deportation.[82] In another the appellant argued for it to be used similarly but it was not, since there was no ambiguity in the statute and it was unclear anyway how a strict interpretation would enhance liberty.[83] Of all the rights claimed to derive from Magna Carta, this one is the most validly derived. Nonetheless there is still some uncertainty. It is unclear how Magna Carta's specific words: imprisoning, outlawing, exiling, destroying, and condemning except by law should be interpreted today. There have been two cases that each raised issues regarding "outlawed" and "exiled" respectively.[84] In both cases the appeals were dismissed on other grounds so the modern meaning of these words under Magna Carta was not discussed.[85]

The Bill of Rights Act provides a number of rights relevant to this aspect of Magna Carta.[86] For example, in *Young v Attorney-General* the appellant alleged a breach of Magna Carta and the Bill of Rights Act regarding his revoked bail but conceded that the former statute fell within the latter.[87] It is unnecessary to rely on Magna Carta.

Finally, there are some more obscure rights that litigants claim under Magna Carta. For example excessive capitalisation that breaches "ancient freely held custom of spelling his name in the ordinary style" or the unconstitutionality of photographic driver licences.[88] These cases usually fail because of parliamentary sovereignty though sometimes judges also point out that Magna Carta does not support such rights.

In summary, for all six of Magna Carta's well-known rights discussed above there is considerable uncertainty regarding both whether Magna Carta is an accurate historical source for them and how they should be interpreted today. All except for property and taxation are secured by the Bill of Rights Act. But all the Magna Carta cases concerning property and taxation have been governed by properly enacted, statutory regimes. Magna Carta is not relied on by courts as a basis for any of these rights. It merely provides a backdrop to claims based more securely in the Bill of Rights Act. There is sufficient statutory protection of rights in New Zealand such that Magna Carta is obsolete.

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82 *Chief Executive of the Department of Labour v Yadegary* [2008] NZCA 295, [2009] 2 NZLR 495 at [3] and [75]; Immigration Act 1987, s 60.

83 *Bujak v District Court of Christchurch* [2009] NZCA 257 at [28]–[29] and [30–[31].

84 *R v Creser* CA38/98, 21 May 1998 at 2; *Murphy v Gardiner* [1951] NZLR 549 (SC) at 551.

85 *R v Creser*, above n 84, at 2–3; *Murphy v Gardiner*, above n 84, at 553.

86 New Zealand Bill of Rights Act, ss 9, 18 and 22.

87 *Young v Attorney-General* [2003] NZAR 627 (HC) at [10] and [44].

88 *Carter v Police* HC Wellington CIV-2005-485-2143, 5 February 2008 at [5]; *Wishart v Police* HC Auckland A185/01, 27 March 2002 at [3].

C Magna Carta as a Symbol

More abstractly, Magna Carta is said to symbolise both the rule of law and liberty.[89] The rule of law requires that "all power [comes] from the law and that no man, be he king or minister or private person, is above the law".[90] The barons forced King John to follow England's laws in an attempt to end the arbitrary arrests and property confiscations that had characterised his reign. Magna Carta did not proclaim rule of law in as many words; rather each clause restricted an aspect of King John's power.[91] Nonetheless its connection with the rule of law has been affirmed many times including by numerous prominent members of the New Zealand legal profession.[92] Furthermore, in *Unitec Institute of Technology v Attorney-General* the High Court referred to Magna Carta as of "enduring symbolic value" due to being a foundation for the rule of law.[93] Some cases also refer to the rule of law as being given effect to through the substantive rights discussed above.[94]

Magna Carta also speaks to people's liberty.[95] This is a liberty under law; to have a law to live by, not liberty to act however one wants.[96] For example, in *Chief Executive of the Department of Labour v Yadegary* the Court of Appeal said that Magna Carta was the source of a "constitutional principle in favour of preserving liberty" given effect through a common law presumption in favour of liberty.[97] This liberty is increasingly expressed through human rights.[98] Over time it was realised that liberty required popular participation in law-making and so Magna Carta became linked to democracy too.[99]

Magna Carta's liberal use as an original authority for these values is unjustified. Lord Sumption labelled this attribution a "distortion of history to serve an essentially modern political agenda" or a "lawyer's view".[100] Neither of the above principles originated in

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89 Geoffrey Palmer and others "What does Magna Carta mean in 21st century New Zealand?" (2015) 867 Law Talk 6 at 15.

90 Jennings, above n 6, at 9.

91 Lord Neuberger, President of the United Kingdom Supreme Court "Magna Carta: The Bible of the English Constitution or a disgrace to the English nation?" (Speech at Guildford Cathedral, 18 June 2015) at [42].

92 Palmer and others, above n 89, at 8, 10 and 11.

93 *Unitec Institute of Technology v Attorney-General*, above n 53, at [131].

94 In *Ngunguru Coastal Investment Ltd v Maori Land Court*, above n 52, at [23], the High Court said that delayed justice "erodes the rule of law".

95 Jennings, above n 6, at 15; Clark, above n 21, at 890.

96 Jennings, above n 6, at 21.

97 *Chief Executive of the Department of Labour v Yadegary*, above n 82, at [75].

98 Clark, above n 21, at 889–890.

99 Turner, above n 7, at 4 and 5.

100 Lord Sumption, Justice of the United Kingdom Supreme Court "Magna Carta then and now" (Address to the Friends of the British Library, 9 March 2015) at 1 and 4.

Magna Carta.[101] It was not the beginning of the rule of law; that concept had existed in England long before 1215, nor was it defined until Dicey.[102] Likewise habeas corpus, liberty's remedy, existed irrespective of Magna Carta but was not confirmed in statute until 1640.[103] The liberty supposedly rooted in Magna Carta is argued by Jenks to not mean liberty for the whole population.[104] Rather it meant the *barons'* liberty from King John's control accompanied by their own ability to oppress those beneath them.[105] Again Coke's interpretative influence is at play; he interpreted "liberties" which referred to privileges and immunities as meaning the personal liberty of the king's subjects.[106] Ivor Jennings has suggested that where a state has a bill of rights protecting personal liberty, "the fact that one or two provisions derive from Magna Carta is interesting but irrelevant".[107]

One should think twice then about giving Magna Carta so much credit. Magna Carta's effect in 1215 may resemble what would now be called the rule of law in action. This does not render Magna Carta the source of or best authority for the rule of law. That is a Whiggish distortion of history which should be carefully avoided.[108] Such interpretations view history as a deliberate marching towards present ideals whether or not that was the direction historical actors were facing.[109] It is unlikely that historians and lawyers will ever agree on whether Magna Carta truly propagates the values it is claimed to. However, there is sufficient uncertainty to cast doubt on the unequivocal glorification of Magna Carta.

D Overarching Themes

So far some specific uses of Magna Carta have been discussed. This Section looks at more overarching usage patterns. Magna Carta is regularly used to challenge parliamentary sovereignty and is often misquoted. Effective legal systems should strive to minimise this sort of misuse of legislation by removing or repairing the statutes responsible.

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101 At 6 and 10; see Jennings, above n 6, at 13.

102 Sumption, above n 100, at 4 and 6; Jennings, above n 6, at 13; Philip A Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Brookers, Wellington, 2007) at [6.1].

103 Clark, above n 21, at 885.

104 Radin, above n 13, at 1061.

105 At 1061.

106 Sumption, above n 100, at 15.

107 Jennings, above n 6, at 42.

108 Sumption, above n 100, at 4.

109 Turner, above n 7, at 6–7.

1 Challenging parliamentary sovereignty

Roughly a third of litigants referring to Magna Carta directly challenge parliamentary sovereignty. Its "fundamental constitutional character" supposedly renders conflicting legislation invalid and allows courts to "overrule, repeal, revoke, amend or not apply provisions" contravening Magna Carta.[110] These claims inevitably fail; the phrase "unless by the law of the land" allows the government plenty of room to act. Courts have consistently affirmed parliamentary sovereignty and denied their ability to overrule or disregard legislation.[111] Magna Carta is not "supreme law in the sense of a limit on the New Zealand Parliament's sovereignty".[112] The Bill of Rights Act does not provide for judicial challenge of legislation.[113] Given its proximity to the ILAA, it is unlikely that Parliament intended courts to be able to strike down legislation that contradicts Magna Carta.[114]

Many cases challenge a specific statute, however in some cases Magna Carta is used to challenge sovereignty more generally. For instance, one appellant argued he was neither under the Queen's sovereignty, the New Zealand government's jurisdiction nor subject to legislation.[115] This litigation pattern reveals a fundamental misunderstanding about Magna Carta's role and Parliament's supremacy. Magna Carta forbids certain actions *unless* authorised by Parliament; it restrains executive power.[116] In 18th century England, as power shifted from the monarchy to Parliament an expectation grew that just as Magna Carta had

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110 Clark, above n 21, at 875–876; *McKee v R*, above n 41, at [14]. Legislation challenged by litigants includes Customs and Excise Act 1996 (*Mihos v Attorney-General*, above n 64, at [23]); Dog Control Act 1996 (*Middleton v Timaru District Court* [2012] NZHC 3471 at [3]); Fisheries Amendment Act (No 3) 1992 (*Cooper v Attorney-General*, above n 61, at 483); Income Tax Act 1976 (*Shaw v Commissioner of Inland Revenue* [1999], above n 76, at [1]; *Kaihau v Inland Revenue Department*, above n 76); Land Transport Act 1998 (*Wishart v Police*, above n 88, at [1]); Misuse of Drugs Act 1975 (*R v Creser*, above n 84, at 1; *R v Knowles* CA146/98, 12 October 1998 at 1; *Phillips v R* [2011] NZCA 225 at [1]; *Bouavong v R* HC Auckland CRI-2011-404-47, 4 April 2011 at [1]; *McKee v R*, above n 41; *Van Resseghem v Police* CA98/86, 17 June 1986); Social Security Act 1964 (*Malster v Chief Executive of the Ministry of Social Development*, above n 62, at [13]).

111 Constitution Act 1986, s 15. Cases relying on *Shaw v Commissioner of Inland Revenue* [1999], above n 76, include: *Matahaere v New Zealand Police*, above n 33, at [15]; *West v Martin*, above n 31, at [26]; *West v New Zealand Fire Service Commission*, above n 63, at [26]; *Westco-Lagan Ltd v Attorney-General*, above n 69, at [41].

112 *Shaw v Commissioner of Inland Revenue* [1999], above n 76, at [14].

113 At [14].

114 At [14].

115 *Matahaere v New Zealand Police*, above n 33, at [3] and [15]. Another group submitted they held prerogative power as tangata whenua and were neither subject to statutes enacted by Parliament nor the District Court's jurisdiction (*Phillips v R*, above n 110, at [7]). Still another presented a document entitled "Declaration of the Independence of Te Hapu One One Society" which was used in conjunction with Magna Carta to challenge the High Court's jurisdiction (*Bouavong v R*, above n 110, at [3], [4] and [7]).

116 William Blackstone *Commentaries on the Laws of England* (Oxford, 1765–1769) vol 1 at 137 as cited in *Murphy v Gardiner*, above n 84, at 553.

limited the monarchy's authority, perhaps it could limit Parliament's untrammelled power.[117] Yet, Parliament, in its sovereignty, disregarded and repealed most of the Charter.[118] Many litigants today, in their reliance on Magna Carta, are claiming their sphere of liberty against the government as the rule of law entitles them to do.[119] The problem is it is often Parliament who they feel has encroached upon that sphere and Magna Carta is no good against the might of Parliament's sovereignty.

There is harm in this. Magna Carta is a statute supposedly symbolising the rule of law but which ordinary New Zealanders consistently misunderstand. Already disenfranchised citizens use it, expecting protection against what they perceive as unjust use of state power, only to be disappointed. This propensity to be misunderstood creates false hope. For the rule of law to pervade society, ordinary people must trust the law to rule them.[120] People do not trust a law that creates false hope then disappoints. Though this false hope is a misinterpretation, it speaks to Magna Carta's lack of clarity, something that also breaches the rule of law. This confusion may be partly due to Magna Carta being listed as a constitutional enactment and to general, widespread ignorance about New Zealand's constitution.[121] Its continuance as a statute despite being essentially unenforceable may also contribute.

2 Misused phrases

Many phrases in Magna Carta are ambiguous. In fact, it never had any precise meaning.[122] This is in large part due to difficulties in translating the original Latin text into English.[123] Consequently modern applications of Magna Carta are disjointed from the meanings of the text within its original context. Magna Carta is regularly misquoted by New Zealand courts. Words used interchangeably include "disseised" and "dispossessed",[124] "freehold or liberties

117 Turner, above n 7, at 5.

118 At 5.

119 Joseph, above n 102, at [6.1].

120 Brian Tamanaha "A Concise Guide to the Rule of Law" in Gianluigi Palombella and Neil Walker (eds) *Relocating the Rule of Law* (Hart Publishing, United States of America, 2009) 3 at 11.

121 Imperial Laws Application Act, sch 1; see *Shaw v Commissioner of Inland Revenue* [1999], above n 76, at [14]. The recent Constitutional Conversation highlighted the lack of knowledge and education about how New Zealand's constitutional framework works. For instance many people were unaware that Parliament can legislate inconsistently with the Bill of Rights Act and the Treaty of Waitangi (Constitutional Advisory Panel *New Zealand Constitution: A Report on a Conversation* (November 2013) at 13).

122 Holt *Magna Carta*, above n 4, at 6.

123 Turner, above n 7, at 72.

124 *T v Jones*, above n 81, at [59]; *Gregory v Gollan*, above n 43, at [8]; *Westco-Lagan Ltd v Attorney-General*, above n 69, at [34]; *Riddiford v Attorney-General* [2009], above n 60, at [26]; *Waitakere City Council v Estate Homes Ltd*, above n 60, at [45].

or free customs" and "tennement",[125] and "but by the law of the land", "except by" and "save by".[126] Whilst these alternatives are largely synonymous, courts use these in direct statutory quotations. They should not have to undertake any interpretation from Latin, because there is a traditionally accepted translation used both in the United Kingdom and in New Zealand.[127] Such misquoting is thus bad practice and indicative of uncertainty surrounding Magna Carta's text as well as its meaning.

There is also uncertainty regarding the meaning of some of the phrases in Magna Carta which inform the whole chapter. Whilst "by the law of the land" is often read to mean due process, several New Zealand cases read it as according to statute made by Parliament.[128] Whether reliance on a statutory framework indeed falls within either due process or "law of the land" is unclear. "[L]aw of the land" was never a precise term.[129] For instance there is some historical uncertainty as to whether it is equivalent to "lawful judgments of his peers" or refers to a distinct procedure.[130] King John and the barons likely had divergent understandings of it.[131] Both Sir Thomas Littleton and Coke interpreted "law of the land" to mean common law procedures.[132] Magna Carta was after all said to be declaratory of existing fundamental laws in England.[133] It is thus unclear whether "law of the land" can be automatically used as a reference to statutory frameworks.

There is similar uncertainty regarding "freemen". Magna Carta's reference to "freemen" did not include all the population.[134] In 1215 "freemen" meant knights as well as some smaller landholders.[135] It excluded unfree peasants and serfs.[136] Five rights were given to five-sixths of the population and twenty-seven rights to the remaining wealthy, ruling, "free"

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125 *Gregory v Gollan*, above n 43, at [8]; *Westco-Lagan Ltd v Attorney-General*, above n 69, at [34]; *Robertson v Auckland Council* [2014] NZHC 765 at [32]; *Cooper v Attorney-General*, above n 61, at 483; *Russell v Minister of Lands* (1898) 17 NZLR 241 (SC) at 250.

126 Note that the first phrase of each set is the correct one. *Gregory v Gollan*, above n 43, at [8]; *Westco-Lagan Ltd v Attorney-General*, above n 69, at [34]; *Russell v Minister of Lands*, above n 125, at 250; *T v Jones*, above n 81, at [59]; *Kim v Prison Manager, Mount Eden Corrections Facility*, above n 81, at [5].

127 "Magna Carta 1297" Legislation.gov.uk <www.legislation.gov.uk> at comment X1.

128 *Cooper v Attorney-General*, above n 61, at 483; *Shaw v Commissioner of Inland Revenue* [1999], above n 76, at [18]; *Waitakere City Council v Estate Homes Ltd*, above n 60, at [45]; see also *Riddiford v Attorney-General* [2009], above n 60, at [26]; *Murphy v Gardiner*, above n 84, at 553.

129 Turner, above n 7, at 72.

130 At 72.

131 At 72.

132 At 131 and 148–149.

133 Gough, above n 12, at 40.

134 Turner, above n 7, at 71.

135 At 71.

136 At 71.

minority.[137] The rights that did apply generally were of no use to the peasantry.[138] So Magna Carta's restraining of the king exclusively benefitted the wealthy upper class. This is at odds with public sentiments that Magna Carta is the foundation of democracy, ensuring nobody is above the law.[139] Rather, it emphasised class distinctions and selectively, rather than universally, distributed rights. However, Magna Carta's rights were broader than those of contemporary, comparable, continental charters.[140] Though meagre in hindsight, perhaps Magna Carta was a decent attempt, for its time, to secure rights for everyone against the monarchy.[141] The Bill of Rights Act requires legislation to be interpreted consistently with human rights, suggesting perhaps courts should give "freemen" a broad meaning.[142] Nonetheless, it is uncertain whether Magna Carta was intended to stand for a principle of equality before the law as is so often claimed.

E Summary

This Part has shown that Magna Carta is unclear, uncertain, misused and thus obsolete. As law, it no longer contributes anything unique to the law. Its frequent misinterpretation renders it impossible to have any certainty regarding its true meaning. As principle, it is not a basis for what it is claimed to be. Nor, as will be further discussed later in the paper, do those principles depend on Magna Carta in order to be influential. Magna Carta falls well short of expectations and in fact breeds distrust in and misunderstanding of New Zealand's constitutional structure. If there were no alternative, perhaps reliance on Magna Carta might be justified despite all these flaws. However given that there are alternatives such as the Bill of Rights Act, continued reliance on Magna Carta is unnecessary and it should be replaced. These conclusions of this section are used to support the arguments made in the remainder of the paper.

III Magna Carta: Interpretation

The previous section looked at how Magna Carta *is* interpreted. It is interpreted to have a very broad and symbolic meaning. This is the myth of Magna Carta and where its value supposedly lies. This section looks at whether this is a reasonable way to interpret Magna Carta. It concludes that there is no acceptable or appropriate legal interpretation method which when applied to Magna Carta can produce that myth. The first possible method is to

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137 E Jenks "The Myth of Magna Carta" in JC Holt (ed) *Magna Carta and the Idea of Liberty* (John Wiley and Sons, United States of America, 1972) 25 at 31–32.

138 At 31.

139 "The Magna Carta Timeline" (2015) Magna Carta 800th <magnacarta800th.com>.

140 Turner, above n 7, at 71.

141 W Stubbs *Constitutional History of England* (Clarendon Press, Oxford, 1897) vol 1 at 579 as cited in Holt *Magna Carta*, above n 4, at 267.

142 Rozenberg, above n 27.

treat Magna Carta as if it were an ordinary statute. But the myth cannot be obtained through this method. An alternative method is to acknowledge Magna Carta's constitutionality and interpret it accordingly. Two examples of constitutional interpretation methods are the approaches applied to the Bill of Rights Act and the Treaty of Waitangi. However these approaches are either insufficient or inappropriate. Since there is no valid method of obtaining the myth, the myth cannot be supported. Without that myth, Magna Carta's continued statutory existence is both unnecessary and unhelpful.

A Interpreting Magna Carta as an Ordinary Statute

The popular interpretations and applications of Magna Carta are disconnected from its text. This goes against the mandated approach to statutory interpretation by which a statute's ordinary meaning should "be ascertained from its text and in the light of its purpose".[143] Adherence to Magna Carta's text is not advocated for here out of excessive reverence for the past or a belief that the barons were better law-makers than current parliamentarians and judges.[144] Rather fidelity to Magna Carta's text and its framers' intentions is here motivated by its statutory nature. Adherence to the text better upholds the intent of the accepted legislator, Parliament.[145] Hence the text should have priority over more extensive judicial discretion.[146] As well as deferring to Parliament, this also enhances the ordinary person's capacity to determine how they should act from reading the statute.[147]

Significant uncertainty regarding Magna Carta's ordinary meaning makes it difficult to find and follow that meaning. It requires in-depth analysis to identify what is historical distortion whilst acknowledging that Magna Carta was itself a distortion.[148] But it seems interpreters have willingly strayed from Magna Carta's text. McGechan J, in *Westco-Lagan v Attorney-General*, was concerned about the "danger of treating as real what it is thought to have said, rather than concentrating upon its actual provisions".[149] Magna Carta's distorted misinterpretations, such as the claimed due process and property rights, have widespread support and their own considerable history. Yet, interpretation must look at the text and purpose, not at myth.

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143 Interpretation Act 1999, s 5(1).

144 Richard A Posner "Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship" (2006) 67 U Chi L Rev 573 at 591.

145 Francis Bennion *Bennion on Statutory Interpretation* (5th ed, LexisNexis, London, 2008) at 193 and 441; see Posner, above n 144, at 591.

146 See Posner, above n 144, at 591; Matthew J Festa "Applying a Useable Past: The Use of History in Law" (2008) 38 Seton Hall L Rev 479 at 489.

147 Bennion, above n 145, at 803; see generally John F Burrows "Statutes and the Ordinary Person" (2002) 11 Waikato L Rev 1 at 5.

148 Holt *Magna Carta*, above n 4, at 21.

149 *Westco-Lagan v Attorney-General*, above n 69, at [42].

At the same time legislation must be "flexible enough to properly address foreseeable developments in technology or society generally".[150] It is often argued that if Magna Carta is interpreted in the light of subsequent legal developments then it can be given a much broader meaning, irrespective of its text.[151] An updating construction acknowledges that statutes are always speaking and allows for words to gradually gain different meanings.[152] However modern issues are "very remote from the concerns of those who prepared" Magna Carta "and from its meaning and purpose in its historical context".[153] One cannot merely assume Magna Carta's modern relevance; its language should be evaluated to determine modern usefulness.[154] "[L]aw of the land" may now mean something wider than the "good, old law" and "all freemen" may now include everyone when given a human rights friendly interpretation.

Nonetheless a distinction should be made between flexibility and ambiguity.[155] Any updating must be limited by the statute's text and purpose.[156] In *McVeagh v Attorney-General* O'Regan J warned that too extensive an updating of the Habeas Corpus Act 1640 "would require the reading into the section of words which are plainly not there, and an interpretation which is plainly inconsistent with the statutory scheme" of the Act.[157] It would be inconsistent for the courts to read in words plainly absent from Magna Carta after having refused to do exactly that with regard to an analogous ancient statute. Updating constructions are generally used in situations such as including computer programs within "documents" and same-sex relationships within "family".[158] Yet here it is the whole of Magna Carta which

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150 Legislation Advisory Committee *Guidelines on Process and Content of Legislation* (October 2014) at 47; see Interpretation Act, s 6.

151 For example *West v Official Assignee*, above n 59, at [39]; *Gregory v Gollan*, above n 43, at [23]. This was argued with respect to the Habeas Corpus Act 1640 in *McVeagh v Attorney-General* (HC), above n 23, at [18] and [26]. In this case the appellant sought damages under the Habeas Corpus Act 1640 (at [2]). It still applied because of the timing of the writ application even though it had been replaced with the Habeas Corpus Act 2001 (at [9]). Whilst the specific reasons for the outcome in this case are not relevant here, the general reasoning of both the High Court and the Court of Appeal is a good example of how advantageous it can be to replace ancient documents with modern alternatives and is useful for rebutting arguments often made in support of Magna Carta.

152 Bennion, above n 145, at 702; Cathy Nijman "Ascertaining the Meaning of Legislation - A Question of Context" (2007) 38 VUWLR 629 at 645.

153 *McVeagh v Attorney-General* [2002] 1 NZLR 808 (CA) at [22].

154 *Westco-Lagan v Attorney-General*, above n 69 at [42].

155 See Lon L Fuller *The Morality of Law* (Yale University Press, New Haven, 1969) at 64.

156 Nijman, above n 152, at 646; Susan Glazebrook "Filling the Gaps" (Speech in Auckland, May 2003) at 18.

157 *McVeagh v Attorney-General* (HC), above n 23, at [26] and [30]. The arguments relating to the Habeas Corpus Act 1640 can be transferred to Magna Carta. Both documents evolved from historic contexts far removed from present-day New Zealand but are similarly included in New Zealand law and concern fundamental rights. Habeas corpus is the remedy to Magna Carta's right to not be arbitrarily detained or punished except in accordance with the law (see Joseph, above n 102, at [26.2.4]; *T v Jones*, above n 81, at [59]).

158 Nijman, above n 152, at 645; see Glazebrook, above n 156, at 18.

needs adjusting to modern circumstances. Such a complete update should not be done under the guise of interpretation.[159] There is no rational basis for such an interpretation.

On the other hand, legislation's text must be interpreted in light of its purpose. Too literal an approach to interpreting Magna Carta could restrict the baron's reform ambitions as well as the very general principles Magna Carta has come to stand for. One must look at the "social, economic or other end[s]"[160] Magna Carta's framers hoped to achieve whilst still focussing on the statute's purpose not "the underlying subjective intentions of the framers".[161] Yet the idea that there is always a clear, identifiable purpose is a legal fiction.[162] Magna Carta does not have a purpose provision like modern statutes. King John and the barons were not necessarily "reasonable persons pursuing reasonable purposes reasonably".[163] Finding the purpose is especially difficult here because Magna Carta was not drafted by one unified body such as the Queen in Parliament or, as in medieval times, solely by the monarch.[164] It has been suggested that Magna Carta was drafted by several people and represented a compromise between two parties at conflict.[165]

It helps to ask what necessitated the creation of this document. Magna Carta was a set of specific remedies against the King, in very particular circumstances.[166] It was also an attempt to permanently reform both the King's relationship with the barons and the general governance structure.[167] The barons aimed to restrict the King's power whereas the King aimed to control the rebellion.[168] From this arises the idea that Magna Carta stands for the rule of law. However, merely appearing to modern eyes to represent the rule of law is insufficient. Cathy Nijman says:[169]

> The purposive approach … cannot be used to change the plain meaning of words used. A judge cannot use the purposive approach to justify rewriting a statute as she or he would have written it, nor does it justify attributing a meaning to words

159 See *McVeagh v Attorney-General* (HC), above n 23, at [30].

160 Nijman, above n 152, at 637.

161 Glazebrook, above n 156, at 6.

162 Brian Tamanaha *Law as a Means to an End* (Cambridge University Press, New York, 2006) at 230–231.

163 At 230–231.

164 Bennion, above n 145, at 470 and 916.

165 At 412.

166 Turner, above n 7, at 1 and 67.

167 At 67 and 72–73.

168 Larry May "Magna Carta, the Interstices of Procedure, and Guantanamo" (2009) 49 Case W Res J International Law 91 at 97.

169 Nijman, above n 152, at 637–638.

> arrived at by working backward from an assumed purpose, nor, it is submitted, a meaning arrived at by working backward from a perceived desirable result.

Attributing the rule of law to Magna Carta and extending it to a vast array of modern circumstances is doing exactly that - working backwards from a perceived desirable result. The purpose behind Magna Carta's creation was not to establish the rule of law. As discussed in Part II, its purpose was to avert war and protect the interests of the framers, not the wider population.

This begs the question: how malleable should the law be in the hands of its interpreters?[170] Manipulating legal texts to advance the rights and principles currently prevalent in society is symptomatic of an extremely instrumentalist view of the law.[171] Non-instrumentalism or formalism pays greater deference to the binding nature of legal rules.[172] Brian Tamanaha says that:[173]

> If achieving a purpose or end is allowed to prevail over a rule, the rule is relegated to a "mere rule of thumb, defeasible when the purposes behind the rule would not be served." A rule of thumb is not a binding rule.

Whilst some balance between purposes and binding rules is needed, the predominant approach to interpreting Magna Carta strays too far into a purely instrumentalist view of the law. That is inconsistent with the rule of law which requires rules to be fixed beforehand so that the government's response to its citizens' behaviour is entirely predictable.[174]

Aside from any of its more elaborate meanings, the principle of the rule of law stands for exactly that - the rule of *law*, not of any man or woman. Geoffrey Palmer recently remarked that "[t]he details are perhaps less important than the symbol Magna Carta later became in the hands of lawyers like Sir Edward Coke and Sir William Blackstone."[175] But it is the very antithesis of the rule of law that it is the interpreter that matters, not the rule. Aristotle himself said that "the rule of law is preferable to that of any individual".[176] Citizens cannot plan their behaviour on the basis of a rule that's meaning is more than the sum of its parts.[177] It becomes impossible for a citizen to read a statute and understand from it his or her rights

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170 See Tamanaha *Law as a Means to an End*, above n 162, at 1.

171 At 1.

172 At 1.

173 At 229 (footnotes omitted).

174 At 227.

175 Palmer and others, above n 89, at 12.

176 Joseph, above n 102, at [6.2.2].

177 But see Palmer and others, above n 89, at 15.

and obligations.[178] Moreover when an Act's meaning is detached from the original intentions of its legislative drafters, this impacts parliamentary sovereignty.[179] Statutory interpretation must be done with a full understanding that the statute "is an expression of the will of the accepted legislator"; interpretation must always seek to convey legislative intention.[180]

Reinterpreting Magna Carta to resolve ambiguities, making it applicable to modern circumstances and applying its purpose can only go so far. Arbitrarily misquoting it crosses that line, as does knowingly relying on erroneous interpretations for instance regarding due process or arbitrary taxation. So long as Magna Carta remains a statute it must be interpreted accurately and lawfully. If such an interpretation is undesirable, the response should not be to forsake legally accepted approaches to legislation, but rather to repeal it. Magna Carta is so entirely ambiguous, out of date and disconnected with modern conceptions of rights and constitutional principles that creative interpretations cannot restore it. It would be more effective, efficient and conducive to certainty to replace it.

An updating construction and purposive approach might give Magna Carta a wider meaning than its text. But the need to start with and remain faithful to the text restricts this approach. Consequently it is not possible, using ordinary statutory interpretation techniques, to derive from Magna Carta the broad rights and principles usually attributed to it. Magna Carta is an ancient historical document that would require almost universal updating along with comprehensive gap-filling.

B Interpreting Magna Carta as a Constitutional Statute

Magna Carta is no ordinary statute. It is a constitutional statute concerning human rights and liberties. Thus, interpreting it as a mere ordinary statute is not the only - or best - approach.[181] This section looks at how interpretation methods used for constitutional statutes could be applied to Magna Carta and the suitability of doing that. Specifically it looks at the Bill of Rights Act and the Treaty of Waitangi.

When interpreting Magna Carta as an ordinary statute, care had to be taken to not work backwards to giving it a rule of law purpose it did not in fact have. In contrast, applying the interpretative techniques used for the Bill of Rights Act would allow more reliance on such a purpose and would be less constrained by the specific wording. The focus should be on the

178 Burrows, above n 147, at 1.

179 At 10.

180 Bennion, above n 145, at 193, 441 and 469.

181 See *Matadeen v Pointu* [1999] 1 AC 98 (PC) at 108.

objective of the provision, not the objective of the framers.[182] Language, other provisions and the historical, social and legal context all help determine purpose.[183]

Constitutional rights should be given a generous interpretation.[184] Still, "generosity is subordinate to purpose, [and] is no excuse for overshooting the target".[185] In *S v Zuma* the South African Constitutional Court said that "the Constitution does not mean whatever we might wish it to mean".[186] The Court went on to say that "[i]f the language used by the lawgiver is ignored in favour of a general resort to "values" the result is not interpretation but divination."[187] The Privy Council, making use of *S v Zuma*, has similarly said that:[188]

> It is however a mistake to suppose that these considerations release judges from the task of interpreting the statutory language and enable them to give free rein to whatever they consider should have been the moral and political views of the framers of the constitution.

The interpretation of ordinary statutes and constitutional statutes has a common concern with "the meaning of the language which has been used".[189]

Given that there was obviously no Parliament in 1215 we must look at the intentions of both the barons and the King which have already been established as conflicting and narrow. This approach places more emphasis on Magna Carta's purpose and less on its text. The barons' overall intention to restrain the King within the law matters more than the specific third century remedies they extracted. The generosity due constitutional statutes means that more technical issues such as those raised above regarding "freemen" and "law of the land" should not overcome the general rights protection represented by Magna Carta. Magna Carta's rights should have a generous scope.

Generosity towards Magna Carta can only go so far. The extreme specificity of Magna Carta's other provisions and their connectedness to their era impairs chapter 29's timelessness. Similarly, the historical, social and legal context goes against the idea that the barons intended to create a document that would found all democracies or invent the rule of

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182 *R v Te Kira* [1993] 3 NZLR 257 (CA) at 271, per Richardson J.

183 Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis NZ, Wellington, 2005) at 75.

184 *Minister of Home Affairs v Fisher* [1980] AC 319 (PC) at 328.

185 Butler and Butler, above n 183, at 76.

186 *S v Zuma* 1995 (4) BCLR 401 (SACC) at [17]. In *Matadeen v Pointu*, above n 181, at 108 the Privy Council affirmed this aspect of the South African Constitutional Court's judgment.

187 At [18].

188 See *Matadeen v Pointu*, above n 181, at 108.

189 At 108.

law. They were largely self-interested, backward-looking elitists who wanted to govern their own land safe from the King's whims. Furthermore, whilst some historians say it was more generous than its continental counterparts,[190] others question why Magna Carta became so significant given its similarity to contemporary documents.[191] These factors restrict the purpose from being given too generous an interpretation.

After all, though constitutional, Magna Carta is ultimately still a legal instrument, the language of which must be respected. Ignoring its text in favour of symbolic values is divination not interpretation. Yet it is these values that underlie most arguments for retaining Magna Carta. It is telling that recently the New Zealand Parliament described Magna Carta's value as "the vibe of the thing",[192] a quote usually derided as the antithesis of good legal reasoning. Deriving the rule of law from Magna Carta is not a purposive and generous interpretation of a justiciable right. It is the divination of a value and a disregarding of statutory language.

The purposive interpretation techniques used for the Bill of Rights Act come closer to reaching the myths Magna Carta stands for than treating it as an ordinary statute. However, the factors used to determine purpose and caution against divining values are still too restrictive to justify the broad, myth-based approach to Magna Carta.

The interpretation techniques used for the Treaty are another alternative. Both are significant documents in New Zealand's constitutional framework and both are historical documents whose historical context is pivotal to their interpretation.[193] Additionally, both documents are subject to ongoing disagreements regarding their textual ambiguity caused by multiple translations, uncertain intentions and subsequent misinterpretations.[194]

Similar to the Bill of Rights Act, when interpreting the Treaty of Waitangi, courts use a purposive approach without "the austerity of tabulated legalism".[195] Matthew Palmer says of the Treaty, that:[196]

> Its history, its form and its place in our social order clearly require a broad interpretation and one which recognises that the Treaty must be capable of adaptation to new and changing circumstances as they arise.

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190 Turner, above n 7, at 71.

191 Holt *Magna Carta*, above n 4, at 21 and 26.

192 (16 June 2015) 706 NZPD 4386.

193 See Matthew SR Palmer *The Treaty of Waitangi In New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008) at 31.

194 At 62 and 85.

195 At 122 and 126; *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (HC & CA) at 655.

196 Palmer *The Treaty of Waitangi In New Zealand's Law and Constitution*, above n 193, at 126.

There is significant dispute as to whether the Māori or English Treaty text is authoritative. Yet an "unquibbling" approach sets aside textual differences and invokes the Treaty's underlying principles.[197] Palmer summarises as follows:[198]

> The "principles" are the underlying mutual obligations and responsibilities which the Treaty places on the parties. They reflect the intent of the Treaty as a whole and include, but are not confined to, the express terms of the Treaty. With the passage of time, the "principles" which underlie the Treaty have become much more important than its precise terms.

This approach aligns with most lawyers' approach to Magna Carta. Uncertainty over the precise meaning of Magna Carta's words should not restrict the modern application of its underlying principles. The principles are clear - the citizens will not rebel and the executive will act within the boundaries of the law. Thus the rule of law is not restricted by whether or not "law of the land" equates to due process. Over 800 years it has become much more important than the specific remedies and rights Magna Carta granted to the barons of 1215. Using a principles approach to interpret Magna Carta could therefore support the myths it is argued to stand for.

There are some distinctions between the Treaty and Magna Carta that may reduce the suitability of this approach. The Treaty is far less specific than Magna Carta which makes its relevance more perpetual. Additionally, it may well be valid to take a generous, principles approach to the interpretation of an international treaty informing the constitution. But it does not necessarily follow that such an interpretation is valid for a constitutional statute. A more significant issue arises from criticisms of the principles approach. It is not necessarily an ideal method for interpreting the Treaty. The approach disregards the Māori text and its meaning.[199] The differences in the words and the spirit of the two texts are trivialised by reducing the Treaty to a mere source of principles rather than an authoritative treaty that defines the division of power in New Zealand.[200] It removes it from its historical context and its culture so that it can apply to modern situations without challenging the Crown's sovereignty. But as a historical document intersecting two cultures, it cannot be so removed without undermining its integrity.

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197 At 126; see *New Zealand Māori Council v Attorney-General*, above n 195, at 661; see also Joseph, above n 102, at [3.9.2(3)(c)].

198 Palmer *The Treaty of Waitangi In New Zealand's Law and Constitution*, above n 193, at 126.

199 Ani Mikaere *Colonising Myths - Maori Realities: He Rukuruku Whakaaro* (Huia, Wellington, 2011) at 124–125, 139–141 and 145; see *New Zealand Maori Council v Attorney-General*, above n 195, at 663 and 667 per Cooke P.

200 *New Zealand Maori Council v Attorney-General*, above n 195, at 663 per Cooke P; see generally Joseph, above n 102, at [3.9.2(3)(c)].

This lessens the appeal of this approach. Applying a statute's principles rather than its text in order to avoid realities that grate with current ideals is a dangerous way to approach statutory interpretation. It puts too much power in judges' hands to find desirable principles from unwelcome provisions. It also reduces the authority of the principles claimed. Are the Treaty's principles those enunciated by a Westminster style court 147 years after it was signed or are they the understandings of the Māori chiefs and people in 1840? To rely on a later interpretation, that potentially denies the realities of Magna Carta's historical origins does injustice to its framers' intentions.

The above limitations of these constitutional interpretation approaches impair their suitability as techniques for interpreting Magna Carta. If the realities of Magna Carta's text are undesirable then it should be repealed. If there is unwillingness to repeal it, then it should be applied true to its text. This, combined with the distinctions between Magna Carta and the Treaty, makes the principles approach inappropriate for interpreting Magna Carta.

C Summary

The common approach to Magna Carta takes its text, applies some process and ends up with a myth of constitutional principles. Neither of the approaches used for ordinary statutes nor the Bill of Rights Act allow for sufficient abstractness to reach that mythical result. The Treaty's principles approach could achieve such an outcome. However, limitations in that process and distinctions between the two documents render that approach unsuitable. There is thus no valid, already accepted method by which Magna Carta could be interpreted to give it the mythical value it is claimed to have. Magna Carta's value is based on an interpretation that cannot be justified by accepted interpretation methods. Therefore keeping it on the basis of that value is unreasonable. Magna Carta should be replaced.

IV Magna Carta: A Broken Emblem

This part questions whether the emblem of the rule of law complies with the rule of law. Aspects of this have already arisen in this paper. For instance Part III discussed the reliance on the discretion of interpreters from Coke through to the modern judiciary, as opposed to the text of Magna Carta which goes against its certainty as a rule of law. Also Part II's discussion of how Magna Carta is used to challenge parliamentary sovereignty raised the issue of distrust in the law arising from disappointed expectations. Other aspects of the rule of law are addressed here. The rule of law requires that all law be clear, accessible and apply equally.[201] However, disagreement over its precise boundaries means there are numerous frameworks that could be used to evaluate Magna Carta. A mixture of theoretical models and

[201] Joseph, above n 102, at [6.1].

practical frameworks underlie the following evaluation of Magna Carta's rule of law compliance.[202]

A Content of the Law

The law should be necessary. Laws exist to effect change in society;[203] if they no longer have any effect, then their raison d'être has waned. Statutory "dead wood" should be cleared away or at the very least modernised even if it is historically significant.[204] It brings the law into disrepute as well as wasting time and money to retain legislation that has no legal effect and is unenforceable.[205] The question then, is does Magna Carta cause change in modern New Zealand society or is it merely dead wood?

Part II established that Magna Carta is obsolete in New Zealand. This conclusion was not merely based on infrequent use but because Magna Carta has no discernible practical use.[206] While it is still referred to by litigants, it has had minimal impact on litigation.[207] There is no right in Magna Carta that is not sufficiently protected elsewhere.[208] The deliberate decision by Parliament to exclude certain rights from the Bill of Rights Act should not be undermined by relying on Magna Carta instead. It has been duplicated, to the extent desired by modern society, in a more understandable and appropriate format and is thus unnecessary. Furthermore, Magna Carta is often misused to challenge other existing laws though these arguments never succeed. Yet the fact that they are repeatedly made demonstrates that

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202 Lord Bingham's eight principles of the rule of law are one such framework that would require balancing the need to protect human rights against the need for the law to be accessible and free from excessive discretion (Tom Bingham "About the Bingham Centre" Bingham Centre for the Rule of Law <binghamcentre.biicl.org>). Another framework is Lon Fuller's eight routes of failure for any legal system which require, among other things, the avoidance of law that is obscure, unclear or impossible to understand (Fuller, above n 155, at 39). Closer to home, Joseph describes the rule of law as requiring legal norms to be general, accessible, neutral, stable and predictable (Joseph, above n 102, at [6.1]). See also Richard Heaton, Permanent Secretary and First Parliamentary Counsel (United Kingdom) "Making the law easier for users: the role of statutes" (Institute of Advanced Legal Studies, United Kingdom, 14 October 2013).

203 Geoffrey Palmer "Law-Making in New Zealand: Is There a Better Way?" (2014) 22 Waikato L Rev 1 at 29.

204 Law Commission and Parliamentary Counsel Office *Presentation of New Zealand Statute Law* (NZLC R104, 2008) at [3.36]–[3.37]; see also Finn, above n 20, at 100. Some Australian Law Commissions have similarly concluded that Acts with no practical use should not be retained just because they are historically significant (*McVeagh v Attorney-General* (HC), above n 23, at [11]).

205 Legislation Advisory Committee, above n 150, at 4.

206 See Clark, above n 21, at 867 and 869. The 1988 retention of Magna Carta was not because Magna Carta was considered necessary. It was most likely for sentimental reasons or excessive caution "pending [a] more complete study of the law" (*McVeagh v Attorney-General* (HC), above n 23, at [22]).

207 Similar arguments were made regarding the Habeas Corpus Act 1640 in *McVeagh v Attorney-General* (CA), above n 153, at [24].

208 Magna Carta has considerable overlap with the Bill of Rights Act and the areas without overlap are governed by comprehensive statutory regimes.

Magna Carta facilitates the disrespecting and disregarding of other, properly enacted statutes. This undermines the coherency of the statute book and brings the law into disrepute.

However it can be argued that whilst legally obsolete Magna Carta is of enduring symbolic value; it is the cornerstone of a historic building rather than a replaceable fixture. It was a document in need, but also capable of, maturing into constitutional significance.[209] Broad in its reforms, its framers intended it to be perpetual.[210] It introduced principles, which through refinement, have since come to found democracies. But even historic buildings need earthquake strengthening; a building, however beautiful and symbolic, is useless if unusable by modern standards. The symbolic value of Magna Carta is so deeply embedded in detailed remedies that it is not the most effective protection possible for the rule of law.

Statutes, as an alternative to common law, are about putting the law in one place, in general terms, rather than having to extract those rules from specific fact situations, case by case.[211] If statutes set out only general principles then someone, often judges, must fill in the gaps. On the other hand, if a statute encapsulates all the details then it has "frozen the development of the law in a particular time and place".[212] Some balance between those two extremes must be struck. Magna Carta falls at both ends of the spectrum without achieving a compromising middle ground. Magna Carta's text is so detailed that it is indeed frozen in 1215. If Magna Carta's lasting value is as authority for the rule of law then chapter 29's detailed rights are unnecessary. On the other hand, Magna Carta as a symbol for the rule of law is so general that it leaves too much to the courts.

Many argue that Magna Carta "must have a function in the modern world" or it would not have been included in the ILAA.[213] They thus seem to believe that removing Magna Carta will significantly affect New Zealand's constitution. The replacement of the Habeas Corpus Act 1640 was "characterised as 'removing the obsolete' and it is clear that the repeal of the provision was not seen as having any constitutional significance at all".[214] The same is true of Magna Carta. The rule of law does not need Magna Carta. Nor do important rights such as the right against arbitrary imprisonment or delayed justice need Magna Carta. Replacing it would not change the bounds of the rule of law but merely make it "a procedure based on

209 Turner, above n 7, at 66.

210 At 67.

211 Heaton, above n 202.

212 Heaton, above n 202.

213 *McVeagh v Attorney-General* (HC), above n 23, at [18]; see also Palmer and others, above n 89, at 13.

214 *McVeagh v Attorney-General* (HC), above n 23, at [22].

New Zealand practice and appropriate to New Zealand conditions".[215] Old principles can be retained if formatted appropriately to New Zealand conditions.[216]

Redundant statutes remaining in force clutters the law.[217] Redundancy is not a badge of failure for a statute; but it is an inevitability in any legal system that keeps up with its ever-changing society. "Time and events render most statutes obsolete in the end."[218] A mature legal system must be able to recognise and deal with redundant statutes.[219] Unfortunately "[i]n a small country with easy resort to legislation we tend to reorganise ourselves continuously and rather incoherently."[220] Our statute book should not resemble a renovated house with extra wings and ensuites, the new carpet laid over the old.

Unfortunately, a lack of post-enactment scrutiny of the ongoing necessity of legislation has made this the reality.[221] Yet adherence to the rule of law requires evaluating how well legislation works in practice.[222] If the last time a statute is measured against the rule of law is at a Select Committee or in a Section 7 Report then the rule of law is not providing the protection it is meant to. Hindsight can reveal ambiguity, inaccessibility, incoherency, irrelevancy and inefficiency that were not previously apparent. Hindsight has done exactly that for Magna Carta.

Since the specifics of chapter 29 are conceded to be of no use, they should be removed in favour of a clear, understandable, concise commitment to the rule of law. A phrase, outlining New Zealand's commitment to the rule of law, perhaps akin to s 3(2) of the Supreme Court Act 2003, would suffice. Since s 3(2) is in fact being removed, a similar phrase included in a preamble to the Constitution Act 1986 would be another option. There is no need to put Magna Carta's rights somewhere else since the Bill of Rights Act already exists. Fear of loopholes should not cause an over complication of the law that makes it unusable for ordinary people.[223] New Zealand should not transform its statute books into an antique shop of inspiring but redundant documents. Magna Carta is more suitable as a historical document than as a statute.

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215 Law Commission *Habeas Corpus Procedure* (NZLC R44, 1997) at [6].

216 See *McVeagh v Attorney-General* (CA), above n 153, at [22]; Law Commission *Habeas Corpus Procedure*, above n 215, at [6].

217 Law Commission and Parliamentary Counsel Office, above n 204, at [3.36].

218 Palmer "Law-Making in New Zealand: Is There a Better Way?", above n 203, at 3.

219 At 33. The Legislation Act 2012 provides for exactly this sort of revision.

220 At 3.

221 At 5. Regarding Magna Carta there are some obvious reasons for this, including insufficient public interest, little political incentive and the cost and complexity of reform (at 29–30).

222 At 32.

223 Sue Cameron "The laws of the land aren't fit for purpose" *Telegraph* (online ed, United Kingdom, 22 May 2013).

B Language and Style of the Law

Evaluating language and style requires determining Magna Carta's likely readership because statutory language must suit the reader. Few New Zealanders know of Magna Carta, let alone read it which suggests a readership restricted to legal professionals. But this is inconsistent with the high proportion of self-represented litigants referring to Magna Carta. Whilst Magna Carta is not often read by the majority of the population, a significant proportion of those who do read it are non-lawyers. This means that its language must be accessible and clear to ordinary people.[224]

John Burrows defines an ordinary person reading a statute as someone who "is not a lawyer; is of reasonable intelligence and education; is not a practised reader of statutes; and has a real interest in knowing what a particular statute says".[225] Scholars differ on whether all ordinary people should be able to read all law.[226] However there is some consensus that there are some statutes, such as food safety or employment statutes, which ordinary people must be able to understand.[227] It is imperative that constitutional statutes are included in this category. Although they deal with grand concepts, they provide the governing framework for society. They also frequently arise in relation to criminal law issues where issues such as due process, freedom from unreasonable search and seizure, the presumption of innocence and jury trials are especially important. Ordinary people must be able to access these documents so that they can know how to rely on the protections they are entitled to.

New Zealand's constitution, including Magna Carta needs to be more accessible and easy to understand.[228] Accessibility requires that every reader, including non-lawyers, can understand from the statute the "full extent of his or her rights and obligations".[229] In order to effectively hold the executive to account, the public must be able to understand, access and use the appropriate constitutional tools. Older acts can be particularly hard to understand.[230] Indeed, clarity is not Magna Carta's strong suit; it "was not an exact statement of law, ... but a political document produced in a crisis".[231] Its provisions are imprecise and situated in a

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224 See Constitutional Advisory Panel, above n 121, at 95.

225 Burrows, above n 147, at 1.

226 Some say that it is a defeatist assumption to "assume that law must always require an intermediary" (Heaton, above n 202). On the other hand, Bennion thinks it an "impossible dream" that everyone affected by the law should be able to understand what it requires (Bennion, above n 145, at 804). Burrows acknowledges that there will always be some statutes which are just too complex for non-lawyers to read, such as taxation statutes (Burrows, above n 147, at 2).

227 Burrows, above n 147, at 2; Bennion, above n 145, at 806.

228 Constitutional Advisory Panel, above n 121, at 95.

229 Law Commission and Parliamentary Counsel Office, above n 204, at [1.8], [1.11] and [1.15].

230 At [3.24].

231 Holt *Magna Carta*, above n 4, at 6.

society 800 years removed from New Zealand.[232] Moreover, its terms, such as *per legum terrae* and exiled, are too ambiguous for the courts to apply them.[233]

Magna Carta's language is thus insufficiently clear for it to be properly accessible to non-lawyers. Consequently Magna Carta is frequently used incorrectly by self-representing litigants who do not understand New Zealand's constitutional framework. This is detrimental to these litigants who make impossible arguments on the basis of a "fundamental" document that in fact offers no protection. The general population must trust the law in order to accept being ruled by it.[234] Such trust does not come easily when there is a statute which on its face allocates rights but when raised in court is an embarrassingly ignorant argument. False hope and disappointment do not breed trust in the law.

Some argue that the next victory Magna Carta must win for society is greater access to justice.[235] Usually it is high court and legal costs that render justice inaccessible.[236] What is not so readily admitted as a cause of inaccessibility is law's incomprehensibility to most non-lawyers. Unnecessarily complex or obscure law impairs an individual's capacity to know how to act in conformity with their rights and obligations.[237] This goes against the rule of law's predictability requirement and impairs ordinary people's ability to access justice.[238] If the law itself was clear and plain then those who cannot afford lawyers would not be so adversely affected by that fact. It is the legal profession's responsibility to work towards such accessibility,[239] yet it is most commonly the legal profession that refuses to relinquish Magna Carta to the depths of history. Magna Carta's continued presence detriments the clarity of the law. If New Zealand is to get serious about accessibility to justice then it needs to remedy this.

On the one hand judges laud Magna Carta's power, yet over and over again their judgments contain fleeting dismissals of it as they "prefer more contemporary statutes and conventions".[240] Lawyers' minimal use of Magna Carta compared with lay people indicates an inverse correlation between comprehension of New Zealand's constitutional structure and a belief in Magna Carta's usefulness. Rather than being used to stay executive power, it is

232 At 6.

233 Rozenberg, above n 27.

234 Tamanaha "A Concise Guide to the Rule of Law", above n 120, at 11.

235 Palmer and others, above n 89, at 18.

236 Smith, Banbury and Ong, above n 28, at 11.

237 Law Commission and Parliamentary Counsel Office, above n 204, at [1.8].

238 Joseph, above n 102, at [6.1]; Bennion, above n 145, at 801–802.

239 Tamanaha "A Concise Guide to the Rule of Law", above n 120, at 12.

240 Binoy Kampmark "Eight Hundred Years of Forgetting: The Magna Carta" *Scoop* (online ed, New Zealand, 16 June 2015).

used to challenge Parliament's sovereignty, appeal drug convictions and avoid paying tax. People are free to use constitutional documents as they wish and of course the most well drafted statute can be misunderstood and misused by anyone sufficiently ignorant. However, constitutional documents, if they are used correctly and effectively, have the potential to inspire confidence in ordinary New Zealanders regarding the protections they have against executive powers. For such potential to be lost due to ambiguity and uncertainty causing frequent misuse is disappointing and destructive. Promoting confidence in New Zealand's unwritten constitution requires that any propensity for misunderstanding should be minimised.

Additionally, Magna Carta's continued statutory presence wastes judges' time because they have to respond to highly misinformed and hopeless arguments. This wastes both public funds and the private funds of litigants forced to defend Magna Carta claims. This is particularly the case where there are numerous appeals on the same set of facts.[241]

C Summary

Magna Carta's content is unnecessary and its language and style is unclear and inaccessible for the ordinary New Zealander. The tendency to prioritise wide interpretations over allegiance to its text disrupts the rule of law. The reluctance to replace redundant legislation should be overcome regarding Magna Carta. Ultimately, it does not reach the standard required by the rule of law which it is supposed to represent. This adds to the weight of previous arguments for Magna Carta's replacement.

V A Long, Long Way From Runnymede

Magna Carta is commonly referred to as one statute among many that forms New Zealand's unwritten constitution.[242] It contains multiple fundamental human rights which make it constitutional.[243] It also is argued to stand for values which are pivotal in New Zealand's constitutional framework. The following arguments regarding Magna Carta's suitability as a constitutional document apply to both these aspects of its constitutionality. Section A evaluates Magna Carta against the characteristics New Zealanders desire in a constitution. Section B discusses the reluctance to relinquish Magna Carta. Even if Magna Carta does stand for all it is claimed to, its contribution to New Zealand's constitution does not necessitate that it remain a statute. Ultimately it is concluded that Magna Carta should be

241 See *Siemer v Fardell*, above n 50; *Siemer v New Zealand Court of Appeal* [2013] NZHC 3344; *Riddiford v Attorney-General* [2009], above n 60; *Riddiford v Attorney-General* [2010] NZCA 539; *West v Martin*, above n 31; *West v New Zealand Fire Service Commission*, above n 63; *West v Official Assignee*, above n 59.

242 Joseph, above n 102, at [1.6.1].

243 At [1.6.2].

repealed and a reference to its values should be introduced as a preamble to the Constitution Act 1986.

A A Best Possible Constitution

Constitutional statutes should meet additional criteria above and beyond those of ordinary statutes. The 2013 Constitutional Conversation undertook to raise awareness and provoke discussion on New Zealand's constitution. It found that "[p]articipants' aspirations for the constitution were fairly consistent: to provide for stable, adaptable, legitimate, representative, responsive, principled, considered, accountable, transparent and inclusive government that aspires to ensure people's well-being."[244] Key themes that emerged from the conversation included New Zealand's unique history and values, balancing diversity with a sense of belonging, justice and fairness, having a voice and appropriate checks on power.[245] Recalling the analysis contained in Part II, this Section argues that Magna Carta does not measure up well against these values and themes.

On its face, reliance on an 800 year old statute enhances stability.[246] But if that statute's effect is contingent on the changing interpretations of lawyers, historians and judges across the centuries, then that stability is a fallacy.[247] It is in tension with the same scholars' arguments that Magna Carta is a living document, the myth of which is more important than the text itself. There is no stability in myths, which, by very definition, lack a discernible basis in fact. Magna Carta's alleged modern applicability is not because its text is adaptable, but rather because its text has been disregarded in favour of its underlying principles.

Magna Carta's origins are so far removed from modern New Zealanders by time, distance, culture and societal values that it can hardly be said to be legitimate and representative of New Zealand. To most people Magna Carta is simply a foreign relic and an irrelevant document. But New Zealanders prefer New Zealand-made solutions to constitutional issues.[248] Choosing to retain Magna Carta in 1988 out of fear it may have some as yet unknown use is very different from choosing to enact from scratch something that has "negligible practical use".[249] Given a blank slate, it is unlikely that New Zealanders would choose Magna Carta as their authority for the rule of law.

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244 Constitutional Advisory Panel, above n 121, at 11.

245 At 11–13.

246 See generally Joseph, above n 102, at [1.1].

247 Tamanaha *Law as a Means to an End*, above n 162, at 236.

248 Constitutional Advisory Panel, above n 121, at 11 and 12: New Zealanders "want to feel they have a stake in the running of the country and genuinely influence what happens in New Zealand".

249 Clark, above n 21, at 869; see *Unitec Institute of Technology v Attorney-General*, above n 53, at [132].

Constitutional legitimacy depends on the extent to which the general population considers the constitution reflects its values.[250] Constitutions are not wholly substitutable from one nation to the next.[251] Whilst Magna Carta has gained rhetorical force and become a focal point for liberty and rule of law advocates, it does not generally reflect New Zealand values. After all, it is not the public law scholars whom a constitution should inspire, but the ordinary New Zealanders running dairy farms and software start-ups. They want a constitution that conveys both diversity and belonging.[252] But Magna Carta was a peace treaty born out of the violence and disunity of a foreign civil war. It was not a considered, well-thought through document. It was a compromise; compiled at speed to avert impending civil war.

Magna Carta's highly specific text restricts its general applicability yet the principles it stands for, such as the rule of law, are enduringly applicable. However, as discussed above, these principles cannot be obtained from Magna Carta by any legitimate interpretative process. A better constitutional document would waive the unnecessary details and contain express references to the principles it embodies rather than having them embedded in intricate historical text. Such a pivotal principle as the rule of law should not be expressed through a document most people cannot understand on its face, let alone in its context.

Furthermore, the need for Magna Carta's constitutional rights protection has waned with the passage of the Bill of Rights Act. The latter is preferable because it is a modern piece of legislation, formulated with clear wording. It is understandable and therefore accessible, unlike Magna Carta.

Given the above evaluation it should be clear that New Zealand can do better than Magna Carta. A New Zealand-made equivalent would have a greater chance of defeating New Zealanders' apathy towards constitutional matters than the ancient and foreign Magna Carta. New Zealand's commitment to the rule of law would be better codified by a preamble to the Constitution Act 1986.[253] The Constitution Act describes the three branches of government and their respective roles and powers.[254] Such a preamble could affirm principles such as the rule of law, liberty, fairness and equality. New Zealand should aspire to a constitution formed of documents crafted by New Zealanders, for New Zealanders.

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250 Hanna Lerner *Making Constitutions in Deeply Divided Societies* (Cambridge University Press, United States of America, 2011) at 18; Rachel Jones "The Problem of Constitutional Law Reform in New Zealand: A Comparative Analysis" (LLB (Hons), University of Otago, 2013) at 38, 40 and 43.

251 Kenneth Keith "On the Constitution of New Zealand: An Introduction to the Foundations of the Current Form of Government" in Cabinet Office *Cabinet Manual 2008* at 1; see Tamanaha "A Concise Guide to the Rule of Law", above n 120, at 9.

252 Constitutional Advisory Panel, above n 121, at 11–13.

253 At 25.

254 At 23.

B Fondness for the Past

History and law go together.[255] History is essential to interpretation and precedent as well as adding picturesqueness to the law.[256] History is also central to constitutional development and legitimacy; it shapes the relations between the Crown, Parliament and the courts.[257] New Zealand's constitution was evolved by English history and then adapted to serve New Zealand's interests.[258] Despite its usefulness, history can be distorted both unknowingly and deliberately - many "[l]awyers want a past that suits their particular purpose at the time they look back."[259]

The tradition of revering Magna Carta is the unspoken but underlying reason it has been kept so long. The legal profession is reluctant to relinquish ancient statutes to be only history and no longer law. Elaborating on this, Matthew Festa wrote that legal citation of historical documents:[260]

> … conveys a sense of authority and legitimacy; it grounds arguments in continuity with tradition and precedent; and, not least, because the law is in large part about the reconstructions of past events.

In Magna Carta's case, all this has been taken to the extreme. Many lawyers would have one believe that the principle that characterises our legal system as fair and equal hinges upon a myth of a statute that neither mentions that principle nor was the principle's origin.

Rhetorical use of history strives to add legitimacy to the decisions of unelected judges by connecting those decisions to historic statutes.[261] Much of the judge-initiated use of Magna Carta in New Zealand is of this form - a fleeting reference to add legitimacy. But the rule of law's legitimacy does not need Magna Carta. Tamanaha argues that for the rule of law to exist it must be taken "for granted as a necessary, proper and existing part of [the] political-legal system"; a pervasive cultural belief.[262] The rule of law indeed has "powerful rhetorical force".[263] The principle seemingly stands alone; it does not need Magna Carta to remain

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255 Festa, above n 146, at 484.

256 At 484; Finn, above n 20, at 100.

257 Joseph, above n 102, at [1.1].

258 At [1.2].

259 Michael Taggart "Prolegomenon to an Intellectual History of Administrative Law in the Twentieth Century: The Case of John Willis and Canadian Administrative Law" (2005) 43 Osgoode Hall LJ 223 at 231–232.

260 Festa, above n 146, at 481.

261 Posner, above n 144, at 581.

262 Tamanaha "A Concise Guide to the Rule of Law", above n 120, at 10–11.

263 Joseph, above n 102, at [6.2.2].

influential in New Zealand.[264] Magna Carta embodied certain pre-existing values such as liberty and the rule of law in specific, tangible rights. But it is neither the source of those values nor their complete representation.

The government is currently removing the legislative reference to the rule of law at the protest of many.[265] It seems that they think the rule of law is fundamentally ingrained in New Zealand culture such that legislative reference to it is unnecessary and its removal will not hinder the effect of the rule of law in New Zealand. Such reasoning, if true, can be extended to Magna Carta. Magna Carta contains no explicit reference to the rule of law and is more out of date, ambiguous and hard to interpret than the Judicature Act 1908 ever was. If a 100 year old statute that expressly refers to the rule of law can be repealed because it is out of date, then an 800 year old one with no reference to it should not be retained.

The senior judiciary argues that it is unwise to assume that those values go without saying given the general population's ignorance and misunderstanding of them.[266] Indeed, whilst the rule of law can stand on its own, its statutory embodiment is advised in the interests of clarity and accessibility. Ensuring that the rule of law is included in a different New Zealand statute also mitigates any potentially adverse effects arising from the process of repealing Magna Carta. If, as suggested above, a statement affirming the rule of law is incorporated into the Constitution Act, then there should be no scope for misinterpreting Magna Carta's repeal as a derision of the rule of law. The repeal will be seen for what it is - a solidifying of New Zealand's commitment to the rule of law by expressing such commitment in a modern, accessible form.

When it comes down to it, there needs to be a distinction drawn between the role of statutes and the role of history in judicial decision-making. Law students are taught repealed statutes and overturned cases in order to gain greater understanding of the context, heritage and development of the law. Rhetorical use of historical references to add legitimacy does not require the historical reference to still be in force as a statute. It is the idea's ancient pedigree that adds legitimacy, not the antiquity of the statute it is expressed in. The repeal of the Habeas Corpus Act 1640 does not merely provide analogous arguments for Magna Carta; it speaks specifically to the absence of any modern need for ancient protections. Whilst those old Acts are constitutionally significant and symbolise victories against ruthless monarchs, those Acts themselves are not necessary. Their content and safeguards can be rewritten into modern legislation to ensure the continuity of those ideas without requiring the continuity of

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264 See Constitutional Advisory Panel, above n 121, at 23. In the Constitutional Conversation the rule of law was referred to as part of the constitution, but they did not refer to Magna Carta.

265 Palmer and others, above n 89, at 14.

266 Supreme Court, Court of Appeal and High Court "Submission on the Judicature Modernisation Bill 2013" at [3].

the statutes. Our legal system can celebrate the rule of law's continuity, without requiring the continued presence of one statute that utilised it.

Another reason behind the legal profession's propensity to retain ancient statutes is their belief in the past's normative value. This belief itself is ancient. The barons who framed Magna Carta sought to recreate an idealised past.[267] Similarly it was important to Coke and his contemporaries that the law they asserted was long-standing and unchanged from what was ancient history to them.[268] As Lord Sumption said, "[t]he authority of their legal programme depended in large measure on its supposed antiquity."[269] New Zealand's Chief Justice has conceded that the "best evidence of the importance of Magna Carta" is its 800 year old lineage.[270] Yet while New Zealanders want our history to be acknowledged they do not want it to control us.[271] Posner rejects the suggestion that history necessarily has any normative advantage over the present.[272] JC Holt says "[i]ndividual freedom can be justified by many methods. There is no logical reason for including Magna Carta among them."[273] In another publication he says "it is by no means obvious why men should continue to look back to an antiquated feudal document as a justification for legal and political arguments".[274] It is unnecessary to seek legitimacy in the past.

Seeking too much legitimacy in the past belittles the ability of modern lawyers, politicians, judges and legislation drafters to make progress in the articulation of constitutional values and frameworks.[275] Such self-deprecation is both unhelpful and misguided. There is no justification for the excessive deference in favour of drafters and judges of eras gone by.[276] Whether or not today's drafters are the betters of King John and the feudal barons, it should be clear that they are not ours. New Zealand is capable of drafting its own constitutional statutes. We know our people, we know our culture, we know our laws.[277]

People forget that Magna Carta restated law that already existed. It is claimed that Magna Carta's retention is evidence of law's continuous development because Magna Carta's

267 Sumption, above n 100, at 17.

268 At 17–18.

269 At 17.

270 Palmer and others, above n 89, at 10.

271 At 95.

272 Posner, above n 144, at 588–592; see also Festa, above n 146, at 499.

273 Holt *Magna Carta*, above n 4, at 2.

274 JC Holt "Introduction" in JC Holt (ed) *Magna Carta and the Idea of Liberty* (John Wiley and Sons, United States of America, 1972) 1 at 3.

275 See Posner, above n 144, at 576.

276 At 576.

277 At 590–591.

meaning has morphed and grown. Yet the exact opposite is true. The barons brought the old law forward into their context by restating it in Magna Carta. We of the twenty-first century cling to Magna Carta as though it were the ultimate and complete expression of our constitutional principles. But there is nothing about Magna Carta that makes it the ideal expression of the rule of law. We have lost what it means to be constantly developing, updating and restating the law.[278] There is a specific harm in retaining Magna Carta - the misuse of it by self-representing litigants in a way that breeds distrust in the law and undermines its coherency. However there is a wider harm at stake. The retention of Magna Carta is symbolic of the legal system's fondness for the archaic and inaccessible in the name of tradition and at the expense of the ordinary person. New Zealand needs a legal profession that is more pragmatic than sentimental and which prioritises accessibility over tradition.

Undue reverence for history makes people suspicious of innovation.[279] Posner says that "[t]hese ingrained attitudes are obstacles to anyone who wants to reorient law in a more pragmatic direction."[280] Rather than stating the law anew to match today's new problems, lawyers tend to "find the already existing solution to the new … problem[s] in authoritative decisions made centuries ago".[281] This is exactly the case regarding Magna Carta. A clearer, more understandable, more relevant expression of the rule of law is more likely to gain the general population's support than Magna Carta is. Yet reverence for the latter has clouded the legal profession's vision so that they reject such a pragmatic evolution of New Zealand's constitutional framework.[282]

The legal profession's fondness for Magna Carta is unjustifiable given that the rule of law could very easily be incorporated into another, more suitable constitutional document. We, like the barons, can look to history for our inspiration. But let us follow further in their footsteps and bring the old law into our context by restating it in terms that are relevant today.

C Summary

Magna Carta does not meet the standards expected of constitutional documents in New Zealand. Furthermore, contrary to the beliefs of most lawyers, its age is a factor against its retention, not for it. New Zealand deserves and is capable of producing a constitutional document that reverberates not through the epochs of history, but within the bounds of our own culture, values and identity.

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278 At 576.

279 At 573.

280 At 573.

281 At 580–581.

282 See Joseph, above n 102, at [5.5.4].

VI Conclusion

Magna Carta was annulled two months after its signing because King John only signed it to end the rebellion - he had no intention of having his governance reformed or his power restricted. Its first reissue was made possible by John's early death and his son's young age. It is to this document that history has attributed the rule of law, equality before the law and a vast array of rights. But Magna Carta is simply no longer necessary.

Part II's exploration of case law illustrates Magna Carta's redundancy and frequent misuse. Words are attributed new meanings, rights are expanded far beyond the text and significant principles result from widespread reliance on misinterpretations rather than the text. It was also shown that retaining Magna Carta, as a back-up for rights, is unnecessary, since a suitable, comprehensive, and New Zealand-specific replacement has emerged.

Part III determined that interpreting Magna Carta as an ordinary statute could not justify the myths about its meaning and significance that have become so widespread. Those myths are too dependent on the interpreter's discretion rather than a clear legal rule. Though its constitutionality may suggest an alternative approach, focusing only on Magna Carta's principles is unsuitable. Since the interpretation of Magna Carta that produces these myths is insupportable, those myths are also insupportable. They should no longer be believed or relied on.

Magna Carta is claimed to stand for the rule of law yet Part IV showed that Magna Carta itself does not comply with the rule of law. Building on Part III, this Part showed how Magna Carta is unnecessary, overly detailed and inaccessible because of its language. Magna Carta and New Zealand's living constitution are separated by both time and distance. Part V then measured Magna Carta against New Zealanders' desires for a constitution and found it wanting. This part also critiqued the tendency of the legal profession to defer to the past instead of deriving new, unique solutions to unique, modern New Zealand situations.

In a nation with a strong democracy, a bill of rights and strong egalitarian values Magna Carta's value has paled. Judges are bereft of any need to use it. Moreover its frequent misuse means that its continued presence is not harmless. It symbolises the inaccessibility of the law to the ordinary New Zealander and facilitates misunderstandings and hopeless arguments in court. To better ensure ongoing respect for the law, Magna Carta should be repealed. New Zealand has better statutes, better processes and better assurances of equality than England did in 1215. New Zealanders should have confidence in our own constitutional structures. The legal profession fears that Magna Carta's removal would convey a disregarding of the rule of law. The reality is that Magna Carta's repeal and the rule of law's incorporation into a modern New Zealand statute would better promote the rule of law's

importance than Magna Carta's continuance. It is appropriate to close with Lord Sumption's closing remarks from his Magna Carta address:[283]

> … do we really need the force of myth to sustain our belief in democracy? Do we need to derive our belief in democracy and the rule of law from a group of muscular conservative millionaires from the north of England, who thought in French, knew no Latin or English, and died more than three quarters of a millennium ago? I rather hope not.

283 Sumption, above n 100, at 18.

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