RUNNYMEDE AND WAITANGI: BOOK REVIEW

Review of Stephen Walker and Chris Jones (eds) Magna Carta in New Zealand: History, Politics and Law in Aotearoa (Palgrave Macmillan/Springer Nature, Switzerland, 2017).

Reviewed by RP Boast*

This substantial book, edited by Stephen Winter of the University of Auckland and by Chris Jones of Canterbury University, is a collection of essays that together deal with every aspect of the legal, political and historical significance of Magna Carta in Aotearoa New Zealand. The editors and the contributors alike affiliate to a range of fields. Stephen Winter is a specialist in political theory and Chris Jones is a Medievalist who is interested in late-Medieval political thought and in the legacy of Medieval political ideas in modern political formations such as New Zealand. The contributors also come from a wide range of scholarly disciplines, including Medieval history (Lindsay Breach, Lindsay Diggelmann, Anna Milne-Tavendale); politics and the history of European political thought (Geoff Kemp and Andrew Sharp); law (David V Williams and Jeremy Finn); and Māori political, cultural and intellectual history (Te Maire Tau, Madi Williams, Laura Kamau). Not only do the essays come from a wide range of disciplines, the authors themselves all affiliate to a range of disciplinary fields (Andrew Sharp, for instance, being prominent in the fields of political studies and history, Te Maire Tau affiliating to Māori studies and to intellectual history generally, and Jeremy Finn and David Williams being prominent in the fields of law and history). The result is a collection of extraordinary richness and resonance, with many disciplines and subdisciplines in play. Yet all the contributors have been able to focus their attention on the central issue, that of Magna Carta itself and its contemporary relevance (or, perhaps, the lack thereof).

Such a work as this, given the book's bicultural positioning in both European and Māori intellectual history, could only have been assembled in Aotearoa-New Zealand. It is an exciting indication of the new traditions of political thought and intellectual history now beginning to flourish in our country. Where might this all lead?

As the editors put it, (at 3), the book "is not a book about concessions granted by an English king to his disgruntled barons" in the year 1215; rather, "it is a book about the role Magna Carta has played in Aotearoa New Zealand". It can be said that the book is about New Zealand public law, provided that this is understood in the widest possible sense, and understood biculturally.

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Some of the essays are oriented more to Magna Carta in its English and Medieval contexts; others focus principally on how the legacy of Magna Carta resonates – or fails to resonate – in New Zealand public law at the present day. Yet other essays consider the parallels, or alleged parallels, between the Great Charter and the Treaty of Waitangi (the latter, after all, has been called the "Māori Magna Carta" more than once). But these orientations are never absolute or clear-cut. Professor Williams, for example, while considering the Treaty as New Zealand's Magna Carta, writes also about Magna Carta in English history and English constitutional law, and considers also the Charter's significance in the political history of the English Revolution of the 17th century and in British North America.

On the whole, the essays are mildly revisionist in approach, seeking neither to diminish Magna Carta as an historical and constitutional turning-point, nor to exaggerate the document's significance in the present. As the editors put it (at 13):

> … the contributors to this collection are aware that it would be all too easy for historians, lawyers and political theorists to slip into their own version of a "whiggish" interpretation of history.

We are all disciples of Herbert Butterfield these days, and no one wants to be accused of Whiggish leanings. Whig history is now disavowed by all, but what non-Whiggish history might look like is famously elusive, either to define, or to write. If avoiding Whig history means that the pitfalls to be avoided are those of being naively teleological or naively celebratory, then these allegedly dangerous temptations have certainly been avoided by all the contributors. This so much the case that one almost longs for a radically Whiggish treatment of Magna Carta and the Old Constitution, which would certainly break the consensus, but of course no one writes the history of public law that way anymore. The essays are uniformly moderate and hesitant in their assessment of Magna Carta, where they do not actively seek to minimise its importance or significance.

All the essays, as one would expect from such a pool of contributors, are well-written, richly-documented and conceptually sophisticated. The various chapters all reveal an indebtedness to British (and New Zealand-British) scholarship on Magna Carta, in notably the works of JC Holt, Richard Carpenter, Richard Helmholz, JGA Pocock and Lord Sumption. The Pocockian tone is certainly pronounced throughout, most especially, as may be guessed from its title, in Geoff Kemp's chapter on Magna Carta and the Ancient Constitution in New Zealand. As a general verdict, the promise offered by a mixing of the waters of British historiography and political thought, combined with New Zealand's own historiography and its bicultural traditions of political action and political thought has been triumphantly fulfilled in this unique and fascinating collection of essays.

Not all aspects of the issues raised by the essays can be considered in this brief review. Here I will focus in particular on those chapters that consider the Treaty of Waitangi as, in some manner, a counterpart to or an equivalent to Magna Carta. Most readers of this review will be aware, it seems safe to say, of Paul McHugh's *The Māori Magna Carta*,[1] where the Treaty and Magna Carta were, of course, treated analogically rather than counterparts of each other, except in the broadest sense that both were foundational. The Magna Carta/Treaty of Waitangi chapters are themselves very diverse and not easy to summarise briefly. To David Williams, a commentator of great standing and experience, characterising the Treaty of Waitangi as a counterpart to Magna Carta is a "myth". Williams insists, however, (invoking Roland Barthes, no less) that to simply say that is not of itself enough: if the Treaty-as-Magna-Carta is a "myth", what kind of a myth? The problem becomes one of distinguishing between "appealing and enabling myths and noxious ones" (at 59). This reviewer does not get the sense from his chapter that Professor Williams sees the Treaty/Magna Carta myth as particularly "noxious", but only that care has to be taken when linking the two. The perspective taken by Te Maire Tau and Madi Williams on the same question is rather different. They argue that "it would be wrong to equate Magna Carta with the Treaty" (at 133). But there is far more to their essay than that. These two prominent Māori scholars, relying on the work of Peter Munz and other philosophically-inclined historians, contend strenuously that New Zealand historiography, most especially its Pākehā dimension, must not lose sight of New Zealand society's deepest roots, culturally, intellectually and even theologically. They emphasise the cultural legacy of the Bible, classical culture and the heritage of the Enlightenment; for without that, New Zealanders will end up "performing their own frontal lobotomy" (at 134). If Pākehā academics, in a search for relevance and modernity in their own scholarship sometimes seem set on putting the deepest roots of their own culture to one side, Tau and Williams are clearly mystified as to why they should want to, and argue further that Māori themselves have no wish to follow suit and put the deepest foundations of their own intellectual culture aside. This reviewer can recall another conference presentation at which Professor Tau spoke, where he made a similar point in a different way by suggesting that anyone who wanted to gain a clear insight into Ngai Tahu's worldview might well begin with the Old Testament. There is more than a hint that it is Māori, rather than Pākehā, who have remained most closely linked to the deepest theological underpinnings of modern civilisation – something this reviewer has been reminded of, and often seen, on many occasions when seeing matters of importance debated on marae or before the Waitangi Tribunal. From this very deep perspective, Tau and Williams emphasise that "Maori are still waiting for a Magna Carta", and that "comparisons between the Treaty and Magna Carta serve merely to

1 Paul McHugh *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Oxford University Press, Auckland, 1991).

cloud our minds and remove other possibilities from our imagining". Amen (it might be said), to that.

In yet another perspective on what might be called the Māori dimension of Magna Carta, there is Laura Kamau's fascinating essay on Aperahama Taunui of Ngapuhi, a 19th-century intellectual and writer who devoted much thought to devising a constitutional structure for Aotearoa New Zealand. Taunui's ideas, as Kamau shows, were a reaction to, and an engagement with, other Māori constitutional programmes, most notably the Kingitanga movement and its various theorists. While the Kingitanga was built around the concept of a dual sovereignty, Taunui's starting-point was a concept of rangatiratanga that would bring Māori and Pākehā together under the single law of rangatiratanga, a law that would govern both. A part of Taunui's programme was a "Mekana Tata" (a transliteration of Magna Carta), as a fundamental constitutional statement. Here then, we have a 19th-century Māori theorist who had obviously pondered Magna Carta deeply and who was intrigued by the concept of fundamental positive law which limited the powers of the Crown. To this reviewer, Kamau's chapter demonstrates how important it is that the history of Māori political and constitutional thought be fully written and treated with the due respect and seriousness it deserves. Kamau demonstrates also just how rich and complex this history is. Perhaps one day students of political thought in New Zealand universities might read Wiremu Tamihana and Aperahama Taunui along with Hobbes, Harrington and Locke.

As is well-known, the New Zealand Imperial Laws Application Act 1988 preserves ch 29 of Magna Carta, seen as a protection of freehold property rights and a guarantee against arbitrary government, especially in its authoritative formulation by Coke CJ in the 17th century. In their concluding chapter, the editors propose that ch 29 of Magna Carta should be repealed for the purposes of New Zealand law. In so arguing, they rely extensively on a conference presentation by Johanna McDavitt, who claimed that the contemporary "challenge" for Magna Carta is for it to be made more relevant for those who are not white "in a society that privileges whiteness" and that ways need to be found to make Magna Carta speak up for "our prisoners" and "our beneficiaries" (cited at 255). There are perhaps some analogies between this viewpoint and Anna Milne-Tavendale's essay on "Magna Carta and the Righteous Underdog", where she draws in turn on Andrew Lynch's interpretation of Magna Carta as a people's charter, that can be adapted to the present but which has also had a well-established position in English radical culture, from the Levellers to the Chartists. (This English Radical tradition, this reviewer would add, is not without its significance in the history of New Zealand, as Rollo Arnold and other historians have shown). ("Settlers" were not necessarily royalist and conservative, but could just as easily be radical and republican).

In their various ways, McDavitt, Milne-Tavendale and Andrew Lynch are insisting not that Magna Carta is irrelevant, but rather that it should be made

more relevant. The editors, however, as seen, propose that ch 29 be repealed. Why so? The editors insist that ch 29 "encourages plaintiffs to rely on it in legal proceedings", while, in reality, "it offers them no succour" (at 259). Is that really the case? We are told also that another benefit of repeal is that, with ch 29 gone from the statute-book, this "would allow the Charter to complete its apotheosis and enter wholly into the realms of myth". "The continued existence of Magna Carta as impuissant (meaning, in effect, 'feeble') positive law is not conducive to Magna Carta's continued authority as a mythic legal foundation" (at 259).

One can disagree. The opposite may be just as (or even more) true: that Magna Carta's continued status as positive law, however "impuissant" (a fine Medieval term), in fact strengthens the Great Charter's symbolic value and might be said to anchor it. Nor are the editors' comparisons between Magna Carta and religious authority, made at this point, convincing, at least not to this reviewer. They suggest that, as there is no established Church in the United States, therefore, as has often been observed, religion is especially powerful there, in precisely the same way a disestablished Magna Carta might grow in stature and prestige. Maybe so, but in any event, this reviewer is unsure whether the analogy is exact. The point is less one of establishment, in whatever sense, but the relationship between positive law and general cultural and constitutional prestige. After all, religious authority, especially in the Christian, Judaic and Islamic worlds, is strongly embedded in texts, significant parts of which are comprised of positivist legal commands, which might indeed be impuissant to some (but not others). Is not American religiosity founded on a powerfully positivistic text, a text which includes at least some authoritative (for many people) commands. Undoubtedly the Bible is famously puissant in much of the United States, as everyone knows. Moreover, might the symbolic value of Magna Carta, which the editors clearly value, be weakened or lost by repealing ch 29 rather than the reverse? Is the statutory underpinning of ch 29 really so very harmful? What harms might ensue from its repeal? If having ch 29 on the statute book provides a reassuring sense of historical continuity, is that either delusive or harmful?

This reviewer, at least, and I suspect, many readers of a book on Magna Carta in New Zealand, would be reluctant to see New Zealand develop a reputation as a constitutional innovator by taking ch 29 out of its statutory law. At least, if there is something innovative that might be done with Magna Carta in Aotearoa New Zealand, then perhaps that something might be something else. Repeal might be an example of that very cultural "frontal lobotomy" that Tau and Williams caution us against.

This reviewer hopes, then, that the editors of this fine collection will not mind this friendly disagreement. This volume is an outstanding achievement and offers a richly rewarding experience for those who choose to read it through, or to dip into its component essays.