

The Liberties of the Church and the City of London in the Magna Carta

The text

The 1215 version of the Magna Carta¹ includes the following clauses:

1. FIRST, THAT WE HAVE GRANTED TO GOD, and by this present charter have confirmed for us and our heirs in perpetuity, that the English Church shall be free, and shall have its rights undiminished, and its liberties unimpaired, and

13. The city of London shall enjoy all its ancient liberties and free customs, both by land and by water. We also will and grant that all other cities, boroughs, towns, and ports shall enjoy all their liberties and free customs.

These are not the most well known clauses in the Charter.²

Liberties of the Church

The meaning of the first is clarified a little by the text that follows:

That we wish this so to be observed, appears from the fact that of our own free will, before the outbreak of the present dispute between us and our barons, we

¹ In a December 2002 address delivered at Parliament in Canberra, Lord Irvine of Lairg, the former Lord Chancellor of England observed that “Magna Carta was re-issued four times, with various amendments, and is now thought to have been confirmed by Parliament on almost fifty further occasions”

<[http://www.aph.gov.au/About Parliament/Senate/Research and Education/pops/pop39/lairg](http://www.aph.gov.au/About_Parliament/Senate/Research_and_Education/pops/pop39/lairg)> citing F. Thompson, *Magna Carta—Its Role in the Making of the English Constitution 1300–1629*, Octagon, New York, 1972, chapter 1.

² The first clause cited here which concerned the liberties of the church, is one of four (1, 9, 29 and 37) which remain on the English statute books (Lairg, above n1 citing Halsbury’s Statutes, vol. 10, Part 1, Butterworths, London 2001, pp. 14–17). Note that Lairg’s references are to the clause numbers in the 1225 version.

granted and confirmed by charter the freedom of the Church's elections - a right reckoned to be of the greatest necessity and importance to it - and caused this to be confirmed by Pope Innocent III. This freedom we shall observe ourselves, and desire to be observed in good faith by our heirs in perpetuity.³

“The freedom of church elections” is an oblique reference to a residue of the long running dispute between the Church in Europe and various Kings and Emperors on that continent known as the Investiture Contest. That contest was about who had ultimate authority to select those who would hold the highest ecclesiastical offices in a kingdom. In the spirit of the times, William the Conqueror had been in dispute with successive Popes for twenty years before he sailed for England and settled his dispute with Pope Alexander II with the help of Lanfranc, an Italian cleric ministering in Normandy,⁴ and whom he later appointed as his first Archbishop of Canterbury.⁵

The independence of the English Church asserted by The Conqueror with Lanfranc’s support did not endure. Pope Alexander II’s successor Pope Gregory VII deposed the Emperor Henry IV in 1080⁶ and with his successors

³ Note that King John renounced the Magna Carta as soon as the immediate threat of baronial force had passed, and despite his ongoing argument with Pope Innocent III, that Pope also renounced it as “an affront to the Church's authority over the King and the papal territories of England and Ireland and released John from his oath to obey it” < <http://www.historychannel.com.au/classroom/day-in-history/771/pope-declares-magna-carta-invalid>>. The Charter itself was created on 19 June 1215 and the Pope renounced it on 24 August 1215 (ibid). Other sources say that the King’s seal was affixed on 15 June 1215.

⁴ The Catholic Encyclopedia records that Pope Alexander II had been Lanfranc’s former student at Bec in Normandy in France <<http://www.newadvent.org/cathen/01286a.htm>>. His Chancellor, Hildebrand who became Pope Gregory VII, succeeded him in 1073.

⁵ Plucknett, TFT, *A Concise History of the Common Law*, 5th ed, London, Butterworths, 1956, 11.

⁶ Berman, HJ, *Law and Revolution*, Cambridge Massachusetts and London England, Harvard University Press, 1983, 87, 522.

gradually also asserted the “independence of the clergy from secular control”⁷ in England. However, the Church independence referred to in Magna Carta in England was not really complete until William’s great-grandson Henry II did public penance following his involvement in the martyrdom of Thomas Becket in 1170 “by walking barefoot to Canterbury”⁸ and by his submission in 1172 “to a papal legate on the heights of Avranches...[where] before its cathedral [he] publicly renounced those portions of his Constitutions of Clarendon what were ‘offensive’”.⁹

There are direct and oblique references to church privileges in 6 of the later clauses in the 1215 version of Magna Carta, but none of those suggest any specific local abuse beyond dabbling in church appointments and King John taking more tax or land than Edward the Confessor had done.¹⁰ There is no reference anywhere in the document or in anything I have read to suggest that King John had interfered with religious confession privilege, sanctuary or the practices

⁷ Ibid 87.

⁸ Ibid 256.

⁹ Ibid. Note that Sir John Baker QC considers that the references to the liberties of the church in the first chapter of Magna Carta would have been understood by all those who learned their law in the Inns of Court as confirming “the freedom of the clergy from capital punishment for murder and felony” (Baker, Sir J QC, “Magna Carta and Personal Liberty” in *Magna Carta, Religion and the Rule of Law*, Griffin-Jones R and Hill M, eds., Cambridge University Press, 2015, 86).

¹⁰ Helmholz RH, “Magna Carta and the Law of Nations” in *Magna Carta, Religion and the Rule of Law*, Griffin-Jones R and Hill M, eds., Cambridge University Press, 2015, 78. Helmholz says that Magna Carta “established and fortified special privileges of Church and Clergy” in Chapters 14, 22, 27, 55, 60 and 61. Chapter 14 provided that the King had to give the high clergy (archbishops, bishops and abbots) an individual summons if he wanted to claim scutage (tax) from them. Chapter 22 provided that fines levied on ecclesiastical clerks would ignore their ecclesiastical income (benefices). Church jurisdiction in estate distribution was acknowledged in Chapter 27, and the Archbishop of Canterbury, Stephen Langton, was included in the committee of Barons that would review cases where it was alleged King John had previously taken fines unjustly (to determine whether they should be remitted) in Chapter 55 and to recover them by distraint if necessary in chapter 61. Chapter 60 appropriately held that all the free men of the kingdom (including the clergy) would reciprocally observe the same principles in their dealings with others.

which later became well-known as ‘benefit of clergy’ and which last somewhat fictional ‘privilege’ is said to have been winked at because it ameliorated the harshness of the criminal law and more particularly the frequency with which death sentences were passed upon people who could not prove ‘their clergy’.¹¹ Sealed religious confession was well established in the UK by about the 11th century AD¹² even though it was not made binding upon the whole of the church until the Fourth Lateran Council which gathered at Rome’s Lateran Palace on November 11, 1215, 5 months after Magna Carta had been signed by King John and already revoked by Pope Innocent III. Abuses of both religious confession privilege and sanctuary were addressed in the Statute *Articuli Cleri* of 1315 exactly a century later, but neither seemed to have been making waves during the reign of King John.

Magna Carta was not the first English charter in which the liberties of the Church were asserted and confirmed. When Henry I¹³ took the throne in 1100 AD, he had issued a Charter which confirmed the law as it had stood in the time of Edward the Confessor (reigned between 1042-1066) and which confirmed church proprietary autonomy in these words:

because the kingdom had been oppressed by unjust exactions, I, through fear of god and the love which I have toward you all, in the first place make the holy church of God free, so that I will neither sell nor put to farm, nor on the death of archbishop or bishop or abbot will I take anything from the church's demesne or from its men until the successor shall enter it. And I

¹¹ See for example, the Law Dictionary <<http://thelawdictionary.org/benefit-of-clergy/>>.

¹² *Religious Confession Privilege at Common Law*, Thompson AK, Brill, Leiden, 2011, 64-65.

¹³ Henry I was the fourth son of William the Conqueror.

take away all the bad customs by which the kingdom of England was unjustly oppressed¹⁴

Although William the Conqueror had been able to make ecclesiastical appointments through the assistance of Lanfranc while Alexander II was Pope, the political strength of subsequent popes saw the church establish control of its appointments and property by the end of the 12th century. At Runnymede¹⁵ in 1215, what the Church wanted was an assurance that King John's new intrusions into its affairs should stop. The Church looked back to promises that had been made by John's predecessors and extracted the promise that there would be no future interference with its internal election procedures. Just as King Henry I had provided the Church with written assurances in 1100 that its property would be sacrosanct, so the Church sought assurances from John that its autonomy when making ecclesiastical appointments would be respected. Henry I referred to Edward the Confessor's respect for church autonomy that predated his father's conquest and alliance with Lanfranc. John's was therefore probably referring to the same promises but his commitment in Magna Carta is not as clear, and perhaps purposely so.

Ancient liberties of the City of London

The City of London's charterial history is of similar vintage. William the Conqueror issued the City of London with its first charter in 1066, the year of his conquest. But the City of London had already established its identity and autonomy though there is no record of a charter earlier than that issued by William. Towns and cities in Europe before the 11th century, had been administrative centres,¹⁶ left over

¹⁴ <<http://www.nhinet.org/ccs/docs/char-lib.htm>> clause 1.

¹⁵ Runnymede is a water-meadow alongside the River Thames in the English county of Surrey, and just over 20 miles west of central London.

¹⁶ Berman, above n 6, 357. Berman observes that while the cities of ancient Greece "had been self-contained, independent city-states", the Roman Empire's

from Roman times and many did not survive. But the revival of commerce and the needs of the merchant classes spawned new centres¹⁷ which took advantage of unhappy groups in the countryside looking for the opportunity to “climb from one class to another”.¹⁸ London survived as a “trading settlement” with fortified commercial quarters.¹⁹ Other cities which operated similarly included Naples, Salerno, Bari, Syracuse, Palermo, Venice, Durazzo, Cologne and Milan.

The change and growth in London was typical and was the result of a combination of economic, social, political, religious and legal factors. Surplus artisans and craftsmen congregated in the developing towns to provide services to the merchants. The merchants traded with farmers for surplus food and raw materials which resulted from the “rapid increase in agricultural productivity in the eleventh century”.²⁰ Serfs, free peasants and apprentices who had become masters and successful craftsmen in their own right followed the yellow brick road to class mobility and fortune.²¹ And Emperors, kings, dukes, lesser (seigniorial) rulers as well as popes and bishops “were often able to increase both their military protection and their wealth by chartering towns which”²² were then “open[ed] to immigrants from the countryside – principally peasants and lesser nobility”.²³

“thousands of cities...had served chiefly as centers for administrative control...and had been governed by imperial officers” (ibid).

¹⁷ Berman observes that most of Roman cities were gone by the ninth century (ibid 357) but some of the Roman cities survived particularly in southern Italy because of Byzantine and Arab commercial influence (ibid).

¹⁸ Ibid 360.

¹⁹ Ibid 357-358.

²⁰ Ibid 359.

²¹ Ibid 360.

²² Ibid.

²³ Ibid.

Not all “[f]eudal lords, including bishops and abbots”²⁴ were excited to lose their peasants. To alleviate further risk of loss, those chartering the new cities would “insert...clauses in th[eir]...charters [to] secure...continued control over the citizens”.²⁵ Control became problematic because these newly independent folk had also obtained and exercised “the right and duty to bear arms”²⁶ so that they could defend their new cities. While this city based military service was voluntary in the sense that it was not paid and now extended to the peasants,²⁷ it was made obligatory as part of the set of covenantal obligations which all new arrivals in the towns had to assume before they were residentially secure in their new places.

Berman explains the religious and legal contribution to the rise and independence of the new European towns and cities in the eleventh and twelfth centuries including London:

[They] were religious associations in the sense that each was held together by religious values and rituals, including religious oaths. Many of them were sworn communes (*conjurations*, “conspiracies”), and of these a considerable number had been founded by insurrectionary organizations. Those that were formed by merchants were often governed by a merchant guild, which was itself a religious association, dedicated to charitable and other religious works as well as to the regulation of business activities. Those that were established by imperial, royal, ducal, or episcopal (or other ecclesiastical) initiative were also

²⁴ Ibid 361.

²⁵ Ibid 361.

²⁶ Ibid 360.

²⁷ Ibid. Peasants “had no such right military right or duty” in the countryside though they could be called upon in special circumstances. Knights conversely had to be paid.

conceived as brotherhoods and were held together by oaths.

To stress the religious character of the cities and towns is not to say that they were ecclesiastical associations. They were wholly separate from the church, and in that sense were the first secular states of Europe. Nevertheless, they derived much of their spirit and character from the church. Indeed it would have been astonishing if it had been otherwise, since they emerged during the era of the Papal Revolution.²⁸

The new eleventh and twelfth century towns and cities were also legal associations since they were either formed or legitimized by the “granting of a charter”.²⁹ Though London was not originally founded by charter in the same way as some of the new European towns, William’s London charter did confirm “the ‘basic liberties’ of [her] citizens...including substantial rights of self-government”.³⁰ In this respect, the new European towns stood in contrast with the developing cities of “the contemporary Islamic civilization of the Middle East”.³¹ The Islamic cities lacked corporate unity, were never sworn communes or religious guilds or brotherhoods and were never incorporated or given charters setting out the rights and liberties of the residents.³²

The charters of Christian towns and cities were read aloud regularly and the people who came to live in them became subject to covenant to adhere to the charter.³³ These commitments had more in common with the feudal contract of vassalage than any modern sense of a bargained

²⁸ Ibid 362.

²⁹ Ibid.

³⁰ Ibid.

³¹ Ibid.

³² Ibid 362-363.

³³ Ibid 393.

exchange.³⁴ Still, when a peasant or a craftsman came to reside in a town or city, he obtained a new status and became subject to the small patrician group that ruled the place.³⁵ The relationship was covenantal and almost sacramental.³⁶ To breach one's covenants and renounce one's civic obligations, would be to declare oneself an outlaw and beyond the protection of the local city authorities, exposed once again perhaps to one's former and unhappy feudal Lord.

William's charter to the City of London in 1066 was very short. Like the Coronation Charter given England by his fourth son Henry I, 34 years later, it identifies the laws and practices of Edward the Confessor as the gold standard. It says:

William the King friendly salutes William the Bishop, and Godfrey the portreve,³⁷ and all the burgesses within London, both French and English. And I declare, that I grant you to be all law-worthy, as you were in the days of King Edward; and I grant that every child shall be his father's heir, after his father's days; and I will not suffer any person to do you wrong. God keep you.³⁸

³⁴ Ibid.

³⁵ Ibid.

³⁶ Ibid.

³⁷ The name for the office which preceded that of Mayor and eventually Lord Mayor (McBain GS, "Liberties and Customs of London – Are there any left?", International Law Research, Vol 1, No 2, 2013, 5 < <http://www.ccsenet.org/journal/index.php/ilr/article/download/28685/17142>>).

³⁸ < <http://www.elfinspell.com/PrimarySource1066.html>>. McBain says that the consequence of this charter was "that all the citizens of London were freemen" and were assured that their legal rights in the courts were preserved according to law existing before the conquest (above n34, 5).

The City of London claims that it is “the oldest continuous municipal democracy in the world”³⁹ and traces its “ancient rights and privileges” to the time of Edward the Confessor as acknowledged in the words of William’s 1066 Charter.⁴⁰ The city’s website also infers the reason for William’s acknowledgement of London’s rights was tied up in the fact that the City of London “was the major source of financial loans to Monarchs, who sought funds to support their policies at home and abroad”⁴¹ from “medieval to Stuart times”.⁴²

Financial practicality probably also explains why London and Winchester were exempted from William’s Domesday book tax survey in 1086.⁴³ William had made a collective agreement with London and was happy with the taxation arrangements that flowed. The nature of those arrangements is not set out in text of the 1066 charter, but their existence is obvious in Henry I’s expanded version of the charter in 1129.⁴⁴ Berman says that “the rights of London citizens and of London as a city expanded dramatically”⁴⁵ in the two generations after 1066. “[T]he two ruling ‘reeves’ (sheriffs), previously appointed by the king, were elected from among the citizens, and this right of election was granted in perpetuity by”⁴⁶ Henry I’s 1129 version of London’s charter. “The city exercised its jurisdiction through a folkmoot of the entire citizenry meeting three times a year and through a smaller court called a husting”.⁴⁷ But in his new version of the City of

³⁹ < <http://www.cityoflondon.gov.uk/about-the-city/history-and-heritage/mansion-house/Pages/History-of-the-Government-of-the-City-of-London.aspx>>.

⁴⁰ Ibid.

⁴¹ Ibid. See also McBain GS, above n37, 1.

⁴² Ibid.

⁴³ Berman, above n6, 381.

⁴⁴ McBain (above n37) says this charter was issued by Henry I in 1132.

⁴⁵ Berman, above n6, 381.

⁴⁶ Ibid, 382.

⁴⁷ Ibid.

London's charter, Henry I also agreed "to lower the annual tax to be paid by the city (called the 'ferm' or 'farm') from five hundred to three hundred pounds".⁴⁸ While the city's twenty-four alderman managed the city's affairs independently, Henry I's version of the charter makes it clear that they did so under the auspices of the king as the source of and the authority behind their charter. That is, they ruled the City of London with the king's blessing "by the law of the lord king which belongs to them in the city of London, saving the liberty of the city".⁴⁹

Though the King's law applied in the City of London, the 1129 charter confirms that by that date, the citizens could choose their own judges and those judges alone and none others outside the city, would determine cases involving London citizens.⁵⁰

Though there are suggestions that King Stephen (1134-1155) revoked the earlier City of London charters, that possibility is immaterial when interpreting the meaning of Magna Carta since King John had reissued the City of London's charter on 5 July 1199 and confirmed the annual payment to him at three hundred pounds.⁵¹

Religious freedom in the Magna Carta?

The religious freedom that was promised by King John and those who subsequently reissued the Magna Carta was what we might now describe as 'religious autonomy'. For while the Magna Carta is often vaunted as 'an original charter of human rights', save perhaps for the highest nobles, Englishmen and other Europeans in the thirteenth century did not conceive of individual rights in any sense that moderns would recognize. Indeed, the suggestion that

⁴⁸ Ibid.

⁴⁹ Ibid quoting from the text of the 1129 charter.

⁵⁰ Ibid.

⁵¹ McBain above n 37, 7. See also Berman, above n6, 383.

Magna Carta in 1215 introduced a modern 'freedom of conscience' or confirmed it, is grossly anachronistic.⁵² To suggest that it was acceptable for anyone who qualified as a 'free man' under Magna Carta could go and worship in some other non-kosher way would have been to endorse heresy which was a crime as grievous as treason against the person of the King.⁵³ Jews and Moslems were not so much exempt as irrelevant.⁵⁴ They did not count as 'free men' to merit legal recognition at all though they were very much recognized in commercial practice.⁵⁵

⁵² Baker Sir J QC, "Magna Carta and Personal Liberty" in *Magna Carta, Religion and the Rule of Law*, Griffin-Jones R and Hill M, eds., Cambridge University Press, 2015, 81, 86. Robin Griffith-Jones and Mark Hill QC make a similar point in their opening chapter of the same book (ibid, "The Relevance and Resonance of the Great Charter" 3) when they say at page 11 that

the most glaring omission was freedom of religion, the freedom to believe what one believed. That was permitted only to Jews and infidels. Magna Carta, at the very beginning, confirmed the liberties of the Church, and those included its jurisdiction; and the Church at the time at least, was not tolerant of independent thought by Christians. Quite what the Church meant by belief is difficult now to grasp, but it did not include an unbound exercise of since intellectual judgment; that was forbidden on pain of death.

⁵³ See <

http://www.mq.edu.au/about_us/faculties_and_departments/faculty_of_arts/mhpir/staff/staff-politics_and_international_relations/john_kilcullen/the_medieval_concept_of_heresy/> where Saint Thomas Aquinas (1225-1274AD) is cited as authority for the death penalty for heretics since corrupting faith is worse than many other crimes which merit the death penalty.

⁵⁴ Griffin-Jones and Hill, above n52.

⁵⁵ Note that though William the Conqueror valued 'his Jews' when he brought them with him from Normandy in 1066, he and later kings treated them like chattels and could 'mortgage them'. Note too that 12th and 13th century English mortgages followed Jewish forms ("The Story of the Mortgage Retold", Rabinowitz JJ, *University of Pennsylvania Law Review* 94 (1945) 94; see also online at <http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=9196&context=penn_law_review>) and that since Jews could not own property, when land was eventually forfeit in consequence of an unpaid mortgage (the processes for such forfeiture were drawn out and complicated), it was forfeit to the King who was thus joined at the hip with his Jews and had an incentive to protect them. This generalized understanding goes some way towards explaining 'the anti-Semitic chapters' in Magna Carta (chapters 9, 10 and 11 of the original 1215 version)

To the extent that thirteenth century Englishmen had modern rights at all, they enjoyed their rights in communities and classes. Their rights were the product of shared responsibility and the collective discharge of communal obligations. Because the Church and the City of London were collectively strong enough to withstand the prerogative demands of the King, they could bargain with him on terms approaching equality. But individually no church officer no matter how high, nor any baron or city official would dare to resist a request or personal demand from the King. Their strength lay in their covenant solidarity and they knew it.⁵⁶ Their opportunity to bargain with the King was seeded by an idea or meme-complex⁵⁷ in the mind of the monk named Hildebrand who became Pope Gregory VII as Pope Alexander II's successor. Berman says that Hildebrand's "new religious and legal concepts and institutions and practices"⁵⁸ enabled urbanization and represent the watershed from which the whole Western legal tradition has flowed.⁵⁹ In time these "new religious passions and acts",⁶⁰ the idea of "communes, fraternal associations, collective oaths, corporate personality [and]

which were an important part of what the Barons did insist on extracting from the King, and which the ancient Church did not appear interested in moderating.

⁵⁶ Robin Griffith-Jones and Mark Hill QC discuss the extent to which Magna Carta was the realization of Archbishop Stephen Langton's vision of "a biblical, covenantal kingship in England" and how he had invited the barons to St Paul's Cathedral and produced the Coronation Charter of Henry I in August 1213 (in *Magna Carta, Religion and the Rule of Law*, Griffin-Jones R and Hill M, eds., Cambridge University Press, 2015, 5-7).

⁵⁷ Richard Dawkins entitles a chapter in his book *The Selfish Gene*, "Memes: the new replicators" and observes that ideas which can leap from one human brain to another are durable "living structures". He continues that "the meme-complexes of Socrates, Leonardo, Copernicus and Marconi are still going strong". He might usefully have added the name of Hildebrand to his list (*The Selfish Gene*, Oxford University Press, 1989, 192 and 199).

⁵⁸ Berman, above n6, 363.

⁵⁹ Ibid.

⁶⁰ Ibid.

charters of liberty”⁶¹ would seed demands for “rational and objective judicial procedures, equality of rights, participation in lawmaking, representative government and statehood itself.”⁶² Though Magna Carta is popularly represented as an extraction wrought by noble standover tactics, a more complete understanding of the context recognizes that the barons, the Church and the City of London institutionally made an informal religious covenant that they would stand collectively and hold this unruly, turbulent and meddlesome King accountable to grand principles already well founded in custom. Magna Carta was new in England because of the number of classes it drew together onto the face of one document. That was also the reason it was the “great” charter. But it was no novelty. Concords and treaties and charters had been used to resolve similar and larger differences, normally seated in religious discord, on the European continent for more than a hundred years⁶³ and William was well familiar with the concept as an expedient way to manage large towns and cities when he came to England in 1066. That is why he set out the heads of his agreement with the alderman of the established City of London in documentary form in that first year.

⁶¹ Ibid.

⁶² Ibid.

⁶³ Berman has written that

In 1075, after some twenty-five years of agitation and propaganda by the papal party, Pope Gregory VII declared the political and legal supremacy of the papacy over the entire church and the independence of the clergy from secular control. Gregory also asserted the ultimate supremacy of the pope in secular matters, including the authority to depose emperors and kings. The emperor – Henry IV of Saxony – responded with military action. Civil war between the papal and imperial parties raged sporadically through Europe until 1122, when a final compromise was reached by a concordat signed in the German city of Worms. In England and Normandy, the Concordat of Bec in 1107 had provided a temporary respite, but the matter was not finally resolved there until the martyrdom of Archbishop Thomas Becket in 1170 (Berman, above n5, 87).

So Hildebrand's meme-complex,⁶⁴ took root in England and spawned our modern political institutions and power-sharing ideas. It is not my purpose to tease out the length and breadth of that complex or the expanse of its legacy and influence, but to observe that it was seated in the simple idea of church autonomy - the proposition that church and state lived best together when they were autonomous and respected the integrity of the other and negotiated on terms of relative equality when they had differences.

These ideas remain controversial. They were fought as the Investiture Contest of the twelfth century and they are now fought as the Culture Wars of the twenty-first. John Rawls and Martha Nussbaum have both agreed that this enduring controversy can only be resolved if it is accepted as a 'fixed star' in jurisprudence that the state does not impose 'orthodoxy' in matters of religion.⁶⁵ Nussbaum suggests we need to relearn this solution anew in every succeeding generation.⁶⁶

I would like to conclude with some eclectic observations that pick up on the enduring symbolism of the idea of a Charter, a Concordat, a Treaty or a Constitution as opposed to a mere Contract.

Other charter applications

Before there was any concept of commercial legal entity groups of individuals could not associate together for any reason including trade without royal sanction.⁶⁷ Without commercial legitimacy, traders could not collect debts or

⁶⁴ Above n57.

⁶⁵ Rawls J, *A Theory of Justice*, Harvard University Press, 1971, 181; Nussbaum M, *Liberty of Conscience*, Basic Books, New York, 2008, 3-4, 213, both referring to the judgment of Justice Robert Jackson in *West Virginia Board of Education v Barnette* 319 US 624 (1942) at 638.

⁶⁶ Nussbaum, above n65, 359-360.

⁶⁷ Griffiths P, *A Licence to Trade, A History of the English Chartered Companies*, Ernest Benn Limited, London and Tonbridge, 1974, x.

enforce the promises people had made when receiving goods for which they could not pay immediately. Since the Crown was always interested in controlling the economy,⁶⁸ the issue of Charters on terms including payment, was a mutually beneficial exercise. The export of wool to the low countries, began well before the Norman Conquest.⁶⁹ Statutes and Charters were issued to protect foreign merchants and would exempt them from some local tolls in exchange for payment of higher customs dues than were imposed on English merchants.⁷⁰ As a tool which provided the Crown with a stream of revenue and a measure of control over the economy whilst also providing various collectives with autonomy and profit opportunity, the uses of the charter proliferated. The new English colonies on the American continent were also authorized and controlled by royal charter. While it is not clear that the King was entirely aware of the non-conforming mission of the first inhabitants of New England, Charles I granted the New England Company a charter in March of 1628 which provided the new settlement with the legitimacy that enabled their support of continued and increasing Puritan emigration.⁷¹ That charter remained in force for 55 years until Charles II revoked it in 1684.⁷² Because its terms did not follow the custom and require its board sit in England, the New England company had a practical independence which enabled them to retain their Puritan covenant practices with very little royal oversight.⁷³

Virginia's charter was granted earlier on April 10, 1606.⁷⁴ Eight named individuals were authorized to "make

⁶⁸ Ibid ix.

⁶⁹ Ibid 5.

⁷⁰ Ibid 6.

⁷¹ MacDonald W, *Documentary Source of American History 1606-1898*, The MacMillan Company, New York, 1908, 22.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ < <http://www.bartleby.com/43/5.html>>.

Habitation, Plantation and to deduce a Colony of sundry of our people into that part of America, commonly called Virginia, and other Parts or Territories in America, either appertaining unto us, or which are not now actually possessed by and Christian prince or people”.⁷⁵ The grant included a recommendation that they “propagate [the]...Christian religion”⁷⁶ among such people as they encountered who lived “in Darkness and miserable ignorance of the True Knowledge and Worship of God”⁷⁷ as infidels and savages.⁷⁸ This charter was also described as “letters patents”.⁷⁹ When I worked as International Legal Counsel for the LDS Church in the Pacific, one task assigned to me was the modernization of the legal entities we used to hold church property and transact church business in Australia. The Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints had been the legal entity of choice since it was created as a Corporation Sole in Utah in 1916 under the direction of the First LDS Church General Counsel, Franklin S. Richards. But an earlier entity in Australia named the Queensland Conference of the Church of Jesus Christ of Latter-day Saints had been created by letters patent issued pursuant to the Religious Educational and Charitable Institutions Acts 1861 to 1959 (Queensland) on 8 December 1904.⁸⁰

The history of the LDS Church in North America also includes a famous charter. The Mormon people had been persecuted from the State of New York to Ohio, to Missouri and then to Illinois. In Illinois they were initially received as

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ The Queensland Conference was established as a Body Corporate on 8 December 1904 by letters patent (No.10 page 127) issued pursuant to the Religious Educational and Charitable Institutions Acts 1861 to 1959 (Queensland).

refugees from religious persecution at a malaria-infested swamp town called Commerce on the banks of the Mississippi river. But they were industrious and the town grew and was renamed Nauvoo. While the people of Illinois were still sympathetic and the town was prospering, the Latter-day Saints sought and obtained a charter from the legislature of Illinois that had City of London spiritual genealogy. It was intended to enable local independent city government and to protect the religious freedom of its citizens. William E. Berrett has written that Nauvoo's charter

provided for broad legislative power resting in a city council consisting of a mayor, four aldermen, and nine councilors elected by the qualified voters of the city.

It provided for a municipal court, independent of any but the Supreme Court of the State and the Federal Courts.

It provided for a city militia to be known as the Nauvoo Legion, to be equipped by the State and officered by citizens of Nauvoo.⁸¹

Like the City of London, within its city limits, "the city was independent of all other agencies in the state. Only the repeal of the charter by the state legislature could curtail these powers."⁸² Berrett continues that "[n]o other municipality in America before or since has enjoyed such complete control of its own affairs".⁸³ The Nauvoo Charter protected its citizens from the Missouri mobs who still hounded the latter-day saints even though they had departed at gunpoint in accordance with the extermination order of Lieutenant-Governor, Lilburn W. Boggs in late

⁸¹ Berrett WE, *The Restored Church*, 15th ed., Deseret Book Company, Salt Lake City, Utah, 1973, 158.

⁸² Ibid.

⁸³ Ibid.

1838.⁸⁴ Under the charter, Nauvoo citizens could apply by writs of habeas corpus for independent review of proceedings brought against their citizens in other jurisdictions and this power protected Joseph Smith from many attempts to extradite him back to Missouri. For though he had been released from one of their gaols when it became obvious that there was insufficient evidence to convict him on any criminal charge, it took many years for Missourian anti-Mormon hatred to abate.

Because of the generosity which the latter-day saints were received by the State of Illinois in Nauvoo, they renounced the isolation they had adopted to survive in Missouri. The First Presidency of the Church in Nauvoo proclaimed that “fellow citizens of every denomination” were welcome as this place was intended as a haven for people of good will from anywhere.⁸⁵ One of the first ordinances passed by the city council protected people of all faiths in their undisturbed enjoyment of religious freedom, but another prohibited the sale of hard liquor, making Nauvoo effectively, an early prohibition town.⁸⁶

Though Nauvoo experienced huge growth (though it never became as large as Chicago as some reports have suggested),⁸⁷ the Nauvoo experiment did not last. As in Missouri, the growing size of Nauvoo, threatened the previous political power of non-LDS communities in Warsaw and Carthage. Those towns also resented the autonomy which the Nauvoo charter provided to its citizens and

⁸⁴ Ibid 141. The ‘extermination order’ (Missouri Executive Order 44) was not formally revoked until 2004 < http://articles.chicagotribune.com/2004-04-07/news/0404070268_1_mormons-armand-mauss-latter-day-saints>.

⁸⁵ Ibid 159.

⁸⁶ Ibid.

⁸⁷ Arrington LJ and Bitton D, *The Mormon Experience: A History of the Latter-day Saints* (2 ed.), Urbana, Illinois: University of Illinois Press, 1972, 69. In June of 1844, the Church Historian Franklin D. Richards “placed the population at 14,000” (Berrett, above n72, 160).

particularly, the Mormon leader, Joseph Smith. After Smith's assassination on June 27, 1844, the Nauvoo charter was revoked by the legislature on January 29, 1845 and soon thereafter, when it became clear that no peace was possible between the LDS church members and other locals, the Church leaders negotiated a truce with other locals so that they could prepare for yet another exodus, this time to the Salt Lake Valley in what is now the State of Utah.⁸⁸

What future for Charters as instruments of religious autonomy and freedom?

The City of London's original charters saw aldermen, merchants, craftsmen and other service providers make covenants together about peace and protection that were sourced in mutual religious understanding. Though they were separate from the church, they drew their understanding and values from the church and in many eleventh and twelfth century European towns and cities, these covenant obligations were confirmed with oaths of loyalty and obedience to law. Covenant solidarity secured citizens against military and other action by other powers. In August 1213, Archbishop Stephen Langton envisioned "a biblical, covenantal kingship in England"⁸⁹ when he invited the Barons to St Paul's Cathedral and unfolded the terms of Henry I's coronial charter of 1100 to them anew.

The new world citizens of Virginia and Boston, also secured their safety and their religious freedom through the autonomy enabled by charters issued by English Kings. The City of Nauvoo in nineteenth century Illinois secured its autonomy and religious freedom through a charter issued by the State.

⁸⁸ Like Missouri which repealed its infamous 'extermination order' in 2004, the Illinois legislature issued a statement of regret (Resolution 627) to the Church of Jesus Christ of Latter-day Saints in April 2004 (above n73).

⁸⁹ Griffin-Jones and Hill, above n56, 5-7.

Nowadays, when we speak of Charters, we intend more aspirational documents. Formal legal protection is more often provided by statutes, but it was not always so. The Magna Carta is the most famous example of an instrument with a well established precedential history which was intended to confirm and secure autonomy for various groups against excessive government intervention in their affairs.

Most western democracies now protect similar aspirational values with Bills of Rights and Constitutions. But charters have their place. Consider Australia where there is no national bill of rights but where the State of Victoria and the Australian Capital Territory have passed Charters of Rights to remedy a perceived lacuna in the protection of civil liberties. The South African Constitution also anticipates the issue of further charters to more fully protect citizen rights and freedoms including, religious freedom.⁹⁰

Human rights instruments have proliferated around the world since the end of WWII and the Universal Declaration of Human Rights set out aspirational standards intended to avoid further world wars. But at the same time as countries have aspired to prevent war with Magna Carta-like written instruments, the world has been balkanizing in consequence of imperial decolonization and as groups of people within nations have sought autonomies different from those they inherited as their political birthright.⁹¹ Some countries resist

⁹⁰ Section 234 of the Constitution of the Republic of South Africa 1996 provides:
In order to deepen the culture of democracy established by the Constitution, Parliament may adopt Charters of Rights consistent with this Constitution.

⁹¹ The number of countries in the world in 1946 was 74 but that number has now increased to somewhere between 195 and 200 depending on whether you count Taiwan (for reasons respectful of China's claims to sovereignty over the island of Formosa), the most recent countries (East Timor, Montenegro, Kosovo and South Sudan) and other geographies that have acquired a "monopoly on the

any suggestion of such autonomy with violence.⁹² Others find democratic solutions.⁹³ William the Conqueror's London Charter in 1066 balanced his economic interests against the desires of the people of that city for limited autonomy. Later sovereigns have also used charters and charter-like agreements to balance economic and political interests in the interests of peaceful co-existence.

Magna Carta created a meme-complex that shows know signs of burning out. The question that Alvin Toffler would ask is where will Magna Carta's legacy take the world in the future? Will there be homelands for the Armenians and the Kurds? Will more Eastern European nations join the European Union and will the United Kingdom leave the after its 40+ year experiment? Or will the European Union be fractured by debt?

My sense is that different questions with a similar meme-source will arise in the future. London, the early American colonies and Nauvoo were granted more political autonomy than was customary because of their economic leverage. In the future, such leverage may justify or enable the creation of new City States within unexpected geographies. Perhaps chartered solutions will ultimately enable the sculptured separation of Quebec and Scotland, and it is conceivable that large islands of faith based believers may separate themselves from mighty modern secular states on negotiated but acceptable economic premises.

Thank you.

legitimate use of violence" (Somaliland and Western Sahara) <<http://www.travelindependent.info/countries-howmany.htm>> quoting Max Weber's definition of statehood.

⁹² For example, Chinese resistance to the religion of the Dalai Lama and Falun Gong suggest Chinese Communist Party concern with any organizational authority that could challenge the party's legitimacy however benign.

⁹³ For example, the secession referenda in Western Australia (1933), Quebec (1995), Wales (1979, 1997 and 2011) and Scotland (2014).

