Magna Carta Online: Security and Privacy in the Digital Age

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Speaking Points

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**History and Principles of the Magna Carta**

In this, the 800th year since the signing of the Magna Carta a vast array of commentary, reflection and debate has taken place about the significance of this document. While I will not rehearse that here, it is worth noting that many commentators agree that there is little in the original document that relates to modern forms of government in Great Britain or elsewhere. One clause is actually in force in New Zealand today. As the Attorney-General, Hon Chris Finlayson QC, recently said:[[1]](#footnote-1)

Simply looking at the document itself, it is difficult to make a strong case for the Magna Carta being the cornerstone of any nation’s constitution in the 21st century”

The document was written in Latin and its 63 clauses dealt with issues of the medieval day such as not being compelled to build bridges, the release of Welsh hostages and limiting the taking of property and wood without consent. “The Charter” was repudiated almost immediately, resulting in a civil war and the death of King John. The document was honoured more in the breach than substance and was repeatedly amended and only revived in the 16th century. Despite being misunderstood, the legacy of that moment on the banks of the river Thames endures and, as Rt Hon Dame Sian Elias recently put it, “tap into enduring values behind the politics and self interest of the moment in 1215, which remain”.[[2]](#footnote-2)

Those enduring values included: limiting the power of the King, freedom of movement, the rule of law, due process, forgiveness (pardons for people hurt and who held grudges that had a risen since the start of the dispute that led to the Magna Carta) and caring for the rights of widows (despite the fact women had no legal status at the time). The question is: do these values have some resonance to issues of security and privacy in the digital age?

**Security and Privacy In the Digital Age**

New Zealand was one of the first countries to establish a Privacy Commissioner by law, doing so in 1976. Those were pre-Internet days, the days of the Wanganui Computer Centre, and the newly established Commissioner was given jurisdiction over law enforcement data. This move evokes some of the legacy of the Magna Carta, for the regulator role was established to reassure the public about curbs against the excessive use of power by law enforcement agencies.

Nearly 40 years later, public concerns about security and privacy remain, albeit for different reasons. Revelations of data breaches, concerns about mass surveillance without due process, secret courts established to oversee secret processes for authorising access to information. It’s important we understand and help support how we in New Zealand will respond to the challenges faced by many countries in an uncertain geopolitical climate, with tremendous advances in technology and data collection.

The current Commissioner, John Edwards, advocates for privacy by design and for a proportional response to emerging threats. For example, we have urged resistance to “authentication inflation” to ensure that, to the greatest extent possible, we should be able to go about our business in the world and online anonymously if we wish, and that we should not arouse suspicion if we do. At the same time, we have supported initiatives like RealMe, the government identity service operated by New Zealand Post that can allow users to access a wide range of services, without tracking them across them. These values also echo the legacy of the Magna Carta: freedom of movement, due process and the rule of law.

**Context for a Magna Carta for the Internet?**

Tim Berners-Lee, inventor of the World Wide Web, has been supporting an initiative for a Magna Carta for the Internet. Working with civil society groups since 2012, the initiative aimed to reach across the divide of global north and south.

During 2013 and 2014 I represented the Association for Progressive Communications [www.apc.org](http://www.apc.org) on the global Advisory Group as we developed the Web We Want Initiative: <https://webwewant.org/>

Views about a Magna Carta for the Internet were mixed. Voices from the global south resisted the imposition of new legal norms from the global north, preferring to give their own expression to the norms, laws and principles which they considered best articulated the founding principles of the Internet. Voices from the global north saw significant issues in the strong disagreement among governments about laws and norms to apply to the Internet and were concerned about increasing divisions between governments starting to be reflected in and detrimentally affect relationships between civil society, technical and other groups.

Many pointed to the wide diversity of existing statements, declarations and agreements about internet rights, human rights online and expressly rejected the notion that any new Magna Carta was needed. Many referenced their own cultural rights related documents that pre-dated Magna Carta. Pointing to other much older written sources that addressed the question of people’s rights, duties and responsibilities such as the Hindu Vedas, the Babylonian Code of Hammurabi, the Bible, the Quran (Koran), and the Analects of Confucius (or even the Inca and Aztec codes of conduct and justice) many pointed out that the Magna Carta was a poor standard by comparison to other documents which existed elsewhere in the world at the time.

There was also resistance to the idea that such a Magna Carta could be negotiated at the global level and somehow passed down to regional and country level. Surely, it was said, the power of such a document, if there was any at all, was the processes by which it was developed: a document drafted by a few people, even with good intentions, and imposed on others, seemed the antithesis of what the initiative was trying to achieve.

Others took a different tack, suggesting rather than a single Magna Carta it would be better to “let a thousand flowers bloom”, considering that any core principles that might develop were more likely to be seen from a distance and against the landscape of many varieties.

In the end, The Web We Want settled on providing funding for campaigns at local level, aiming to foster debate and encourage engagement in internet-related policy, rather than to develop a Magna Carta to ‘rule them all.’ Since then, despite the calls, a single Magna Carta for the Internet has not yet emerged – but that does not mean that this will not happen, only that it hasn’t yet.

Reflecting on this now, in New Zealand, I see strong parallels between those discussions and our own consideration of the **Harmful Digital Communications Act.** The Act took several years to be developed and included several lengthy consultation processes and a spirited debate which echoed that about a modern day Magna Carta for the Internet. Were there already enough laws to protect rights and freedoms online, should the State stay out of the lives of citizens, was the Internet capable of content regulation and, if so, what might due process and the rule of law look like?

This recently enacted law provides a great example of how New Zealanders have negotiated new principles of security and privacy online. No doubt Martin from Net Safe will talk more about that.

The Privacy Commissioner has welcomed the new legislation which seeks to balance the rights of privacy, freedom of expression and security online. We especially welcome the use of a principles-based approach by which citizens can negotiate power and ensure reasonable limits on new forms of excesses of power.

In closing, I do see a parallel between modern privacy and the Magna Carta in that the Great Charter is about the importance of principles over power. Even though those principles now look, rightly, medieval and the document was annulled almost immediately, it is still a testament to the potency of the central idea of principles over power that the Magna Carta still holds such a place in our cultural and legal history.

Ends – Check against delivery

1. ‘What does the Magna Carta mean in 21st century New Zealand?’ *LawTalk* 867, 19 June 2015*,* 8. [↑](#footnote-ref-1)
2. Ibid, at 9. [↑](#footnote-ref-2)