

## **Magna Carta then and now**

### **Address to the Friends of the British Library**

#### **Lord Sumption**

**9 March 2015**

It is impossible to say anything new about Magna Carta, unless you say something mad. In fact, even if you say something mad, the likelihood is that it will have been said before, probably quite recently. So you must not expect any startling new line from me, least of all in a centenary year in which something portentous is said about Magna Carta every day.

Historically, there have been two schools of thought about Magna Carta. The first can conveniently be called the lawyer's view, although it is held by many people who are not lawyers. This holds the charter to be a major constitutional document, the foundation of the rule of law and the liberty of the subject in England. The other is the historian's view, which has tended to emphasise the self-interested motives of the barons and has generally been sceptical about the charter's constitutional significance.

There are obvious reasons why lawyers should have taken the lead in extolling Magna Carta. There have been periods in our history when law has acquired an intensely ideological flavour. One of them was the first half of the seventeenth century, when lawyers provided much of the leadership of the Parliamentary opposition to Charles I, and the law courts themselves became an important political battleground between absolute and limited monarchy. Another is our own age, in which government is once again held in low regard and law is invoked as a source of nobler, more liberal and more principled values than mere politics.

English law has a long, distinguished and comparatively unbroken history. Its practitioners have a natural tendency to legitimise their ideals by asserting their antiquity. But they have, on the whole, been bad historians. This is because with a few honourable exceptions they have treated the history of law as a self-contained and self-sufficient discipline based almost exclusively on the study of legal texts. They have been much less interested in the social and cultural context in which law is made. Yet, like any system of customary law, English law has adapted itself to reflect the values of each successive generation. Manifestly, the values of the early thirteenth century were not the same as our own.

The chief sinner, and by far the most influential, was Sir Edward Coke, one of the leading opponents of the early Stuart Kings and the man who more than any other individual was responsible for inventing the myth of Magna Carta. I shall return to this interesting and rebarbative figure later in this lecture. At this stage I simply draw attention to Coke's principal defect as a historian. He was only interested in legal sources: charters, statutes and the year-books which served as the law reports of the middle ages. He read them entirely without regard to their context, as if they had been addressed to seventeenth century gentlemen like himself. He did not think that there was any point in understanding the mentality of those who wrote them, which he assumed to be the same as his own. It never occurred to him that legal historians had anything to learn from the chronicles and records of the past. His advice to general historians was to keep out. "Let them meddle not with any point or secret of any art or science, especially with the laws of this realm," he wrote.

Historians were once content to adopt the myths of the lawyers. It suited the patriotic view of English exceptionalism, which was for many years the stuff of historical writing in England. It was not until the beginning of the twentieth century that historians dared to suggest a more sceptical view. In 1904 Edward Jenks, an Oxford academic lawyer, published a famous article entitled "The

myth of Magna Carta”. This was followed the next year by W.S. McKechnie’s *Magna Carta*. McKechnie was, like Jenks, an academic lawyer. He was a Scottish solicitor and a lecturer in constitutional law at Glasgow University. But Jenks and McKechnie were also formidable general historians. McKechnie in particular subjected the charter to a minute and immensely learned exegesis, for the first time putting each of its clauses into their historical context and in the process exposing a number of misconceptions. His theme was taken up by Maurice Powicke, the future Regius Professor of history at Oxford, in a distinguished contribution to a collection of essays published to mark the last centenary of Magna Carta in 1915.

There is no doubt that the lawyers have been more successful in propagating their views than the historians. Maitland, the great historian of English law, set the tone by declaring Magna Carta to be a “sacred text”. It was, he wrote, “the nearest approach to an unrepealable fundamental statute that England had ever had,” even though much of it had in fact already been repealed at the time he wrote these words. These sentiments persist into our own day, and have been uncritically adopted by politicians and journalists. In her famous, or if you prefer infamous speech at Bruges in 1988, Mrs Thatcher referred to the charter as the origin of representative government. The current prime minister, armed with a copy of an Edwardian illustrated text-book for children, has called it the document that paved the way for democracy, equality and the rule of law, the “foundation of all our laws and liberties”. Some of the more specific claims made for Magna Carta in the centenary year are even more extraordinary. In his column in the *Daily Telegraph*, Peter Osborne recently described the European Convention on Human Rights as a “document which entrenches the principles of Magna Carta in international law.” Others have come forward to suggest that the partial abrogation in 2014 of a legal aid system which was first created in 1949 was contrary to Magna Carta. Recently, a Global Law Summit in London, which was essentially an international marketing opportunity for British lawyers, described itself on its website as “grounding the legacy and values of Magna Carta in a firmly 21st Century context.”

Now I have nothing against the liberty of the subject, the rule of law, the Human Rights Convention, legal aid, democracy, motherhood and apple pie or even international marketing opportunities for lawyers. But I do have a problem with the distortion of history to serve an essentially modern political agenda. Claims like those which I have just cited are high-minded tosh. They represent the worst kind of ahistorical Whiggism. They encapsulate the view mocked a generation ago in a famous essay by Herbert Butterfield, that the past can be viewed as an accident-prone but on the whole persistent march towards the manifest rightness of our own values.

The first thing that we need to do, if we are to appreciate the historical significance of Magna Carta, is to understand the world in which it was created. Contrary to common belief, the middle ages was not an age of absolute monarchy, either before or after Magna Carta. It never could have been. Medieval societies generated very small surpluses over and above the basic cost of subsistence. Governments had limited resources of money and manpower. They could not govern without the tacit support of their subjects, and the active support of at least the most powerful of them. Medieval governments depended for their survival on an unstable mixture of sentiment, legitimacy and bluff, in the same way that most governments did until comparatively modern times. This meant that kings could not afford to act in a way that defied the contemporary consensus about how a king should behave. One of the key elements of that consensus was that the King should act in accordance with law.

The great English political theorist of the generation before Magna Carta was John of Salisbury, who wrote his major work, the *Policraticus*, in the 1150s. He believed that the difference between a King and a tyrant was that a king ruled by law. Kings, he taught, were subject to legal constraints which protected the liberty of the individual from arbitrary government. These constraints the King could not simply change at will. By comparison a tyrant had no greater authority for his acts

than physical force. Now, I cite John of Salisbury not because his views were particularly original, but because they were entirely commonplace. He was the most articulate exponent in his time of the conventional view of the state. The barons at Runnymede had certainly not read the *Policraticus*. It is unlikely that they had even heard of it, although their spokesman Stephen Langton, the Archbishop of Canterbury probably had. But the middle ages was an intensely law-minded age, and the barons had a developed notion of fundamental law. They knew perfectly well that the King could not do as he liked, either in theory or in practice.

But where did this law come from? John of Salisbury answered that question by saying that it came from God. The baronage would have given a different answer. They would have said that it came from immemorial custom. In twelfth century England, people spoke of the laws of King Edward the Confessor. The exact content of the laws of Edward the Confessor was a matter of some doubt. Edward the Confessor is not known to have issued any code of laws, although various spurious codes bearing his name were written and circulated during the twelfth and thirteenth centuries. What people really meant by the laws of Edward the Confessor was not so much an ascertainable body of law as an ideal state of law belonging to an imagined golden age before the Norman conquest. Medieval men were deeply pessimistic about the capacity of mankind to improve itself. They did not expect a progressive amelioration of the human condition, as we do. They looked for their golden age in past, and saw history as a tale of the decline and corruption inseparable from human affairs. Medieval kings did not, as the Roman Emperors had done, make law in the plenitude of their power. With the aid of counsellors and wise men, they derived it from the revelation of existing law, whose authority came from its antiquity. The most that could be done was to define it, to express it in better words. Their view could not have been more different from our modern assumption that our destiny lies in our own hands and that the golden age lies ahead of us.

At the time of his coronation in 1100 Henry I swore an oath to observe the laws and customs of England. He defined what was meant by this in a famous charter in which he undertook to abstain from various illegal acts which had been practised by his predecessor William Rufus. Rufus's practices, Henry said, had not been law. On the contrary, they had "unjustly oppressed the law of England", and he (Henry) would correct this by restoring the laws of Edward the Confessor. Henry's successors also issued coronation charters, which were either directly modelled on Henry I's or else simply confirmed it. These charters were in reality bids for their subjects' support, without which a newly crowned King could not govern. There is plenty of evidence in the records and chronicles of the period that people knew about these promises and sometimes justified resistance to the King's demands by reference to them. They regarded them as law. Henry I's charter was produced by Stephen Langton during the negotiations for Magna Carta, and the drafting of the final version of the charter was based in part upon it.

So, it is true that Magna Carta stands for the rule of law. But it is not true that Magna Carta was the origin of the principle. The English Kings had doubtless broken the law quite frequently before Magna Carta, and they continued to break it afterwards. But the idea that the King was subject to law had for a very long time been part of the orthodoxy of medieval constitutional thought both in England and elsewhere. The barons did not invent it at Runnymede. Their object was to define what the law was. No one doubted that whatever it was, the King was subject to it.

This, however, does not mean that twelfth century Englishmen were constitutionalists before their time. The law which governed the King's relations with his lay subjects was of a very limited kind. It was closer in spirit to a private contract than a constitution. It was concerned almost entirely with the King's feudal rights and obligations. These rights and obligations related to the terms governing the holding of land, at a time when land was the main source of wealth and the sole source of status apart from royal or ecclesiastical office. By virtue of his ultimate dominion over

land, the King had an obligation to administer justice to his direct tenants (usually called “tenants-in-chief”). He had a right to require them to serve in his courts and councils, and within limits to serve him in war. He had rights, for example to take control of the lands of those who could not perform military service because they were minors or women. He was entitled to levy premiums known as “fines” when heirs entered into their inheritance. He could levy a tax known as scutage in lieu of the vassal’s obligations of military service. He could charge fees for litigation in his courts, which was the only way of establishing a contested title to land. These rights were matters of great moment to baronial families as well as to their own vassals who had a similar relationship with them. They critically affected the finances of landowners and their standing in society. But they had nothing to do with the machinery of government and were hardly the stuff of what we would call constitutional law.

There was another problem about regarding the various charters regulating feudal rights as a kind of precocious constitutionalism. There was no institutional mechanism for enforcing the King’s obligations on him against his will. Magna Carta certainly did not provide one. The King’s judges were the King’s, in fact as well as in name. It would be several centuries before any recognisable concept of judicial independence emerged. And, although there was a general convention that the King should take the advice of his leading subjects, nothing recognisable as a representative Parliament existed before the second half of the thirteenth century. The only remedy against abuse was defiance, a technical term for the formal renunciation of the feudal bond which was the sole source of the King’s authority. Defiance released both parties from their obligations, and legitimised rebellion. The outcome then became a matter of force, not law.

This is what happened in 1215. The essential problem of the Angevin Kings of England was that there was no system of national taxation. Henry II, Richard and John, all fought expensive wars against domestic rebels, mainly in their French domains. So they took advantage of the indefinite

character of their feudal rights to extort money to fund the cost of warfare. For example, they disposed of wardships and heiresses, not for conventional sums but for whatever the market would bear, which was often a great deal. The husbands whom they found for them were likely to be rich, but were not always quite the lady's cup of tea. They imposed heavy scutages in lieu of military service. They took advantage of their vassals' delinquencies to dispossess them. They withheld justice from those whom they regarded as having placed themselves beyond the law. John was no different in these respects from his brother and father. But his financial needs were greater, for he faced not just rebellion in his French dominions but a full scale invasion of his French domains by Philip August King of France. He therefore pressed his rights further than they had. A large faction within the baronage, mainly from the north of England, responded by defying him, and waging war against him. They captured London and forced him to submit to their demands at Runnymede.

The framers of Magna Carta would be surprised to learn of their posthumous fame. Its famous title, the "Great Charter", was only acquired later in the thirteenth century. Even then the title was not intended to refer to the greatness of its contents, but only to distinguish it from the smaller charter of the forest issued two years afterwards. Magna Carta, properly so-called, was a deeply conservative document. It sought to enforce on the King conventions which were profoundly traditional, and obligations which he and his predecessors had acknowledged for more than a century. There are no high-flown declarations of principle. No truths are held to be self-evident. Indeed, there are hardly any provisions that can be called constitutional at all.

On the contrary, its contents are rather mundane. There are clauses to protect the interests of the barons and their chief allies, the Church and the city of London. These are followed by a large number of highly technical provisions about the feudal incidents of land tenure. They are essentially about money. The charter is a long catalogue of the ways in which John and his brother

and father had abused their rights as feudal superiors in order to extract money from their subjects. There was nothing new about any of this, except that the more indefinite obligations of the King were defined more exactly, for example by putting figures on what the King could charge by way of entry fines. The charter was a classic appeal to legal tradition, combined with an attempt at definition which was all that contemporary sentiment expected of legislation.

This is especially true of what is undoubtedly the most famous of Magna Carta's clauses, Articles 39 and 40:

“No free man shall be arrested or imprisoned, or dispossessed, or outlawed or exiled, or otherwise destroyed, nor will we proceed against him, or send others to do so, except by the lawful judgment of his peers or by the law of the land. To no one will we sell, or deny, or delay justice or right.”

This was directed to a specific grievance of the barons against King John. It is a technical subject on which scholars are not agreed. In summary, since the 1160s, the King's justices had enjoyed exclusive jurisdiction over all disputes between free men about title to freehold land. But in the case of disputes between the King's tenants-in-chief, essentially the baronage and the richer knights, the King enjoyed a personal judicial competence which was inherent in his position as their immediate feudal superior. John had been in the habit of giving judgment personally in such cases, with only his lowly household knights and officers present instead of the great men who could ordinarily have expected to attend on such occasions. There was a large political element in many of his decisions. He had unquestionably sold justice, by demanding large sums, known as “proffers” in return for access to his court. And on occasions he had denied justice. The baronage therefore found themselves squeezed. Their own tenants had unrestricted access to the King's justices for their claims, but they themselves were dependent on the vagaries of the King's will for their claims against each other. This was what Articles 39 and 40 were about. They imposed on

the King himself the same standards of justice as were already required of his professional judges. Certainly, Articles 39 and 40 were nothing to do with trial by jury. In 1215, juries had been used for certain special purposes for about half a century, but criminal trials were decided by ordeal or battle, not by the verdict of a jury. Juries only gradually came in in the course of the thirteenth century, as a result of the prohibition by the Church on the clergy participating in the more primitive methods of finding facts. Nor were Articles 39 and 40 the origin of *habeas corpus*. This was developed by the King's courts long after Magna Carta, although writs to much the same effect had sometimes been issued under Henry II, half a century before. Article 39 prevented the arrest of a subject without legal authority, a swipe against King John's use of the machinery of the law to destroy his enemies, like the former royal favourite William de Braose. But this part of Article 39 was a weak reed, for it did not say what constituted legal authority. Every medieval and every Tudor King exercised a right of arrest, either personally or through his ministers, generally in order to incarcerate people for reasons of state. The King's warrant was regarded by the courts as a sufficient answer to a writ of *habeas corpus* until the seventeenth century.

So why do we single out Magna Carta as the origin of the rule of law? We might equally have celebrated the 800<sup>th</sup> anniversary of the coronation charters of Henry I, King Stephen or Henry II, if we had thought of it in time. The answer is that what was special about it was not the ideas which it embodied, which were perfectly conventional, but the dramatic circumstances in which it came into existence. Custom in by definition uncertain. It is only when the existence of a customary obligation is challenged, so that it can really be tested. John's challenged his barons' view of the law and failed. His obligations were enforced against him. Moreover, they were enforced with a fanfare of spectacle and drama that could never be matched by a coronation charter or a legal treatise.

The life of the original Magna Carta was extremely brief. Within ten weeks, the Pope, Innocent III, denounced it as “not only shameful and base but illegal and unjust.” He declared it to be null and void, and forbade the King to observe it on pain of excommunication. John died in October 1216 and was succeeded by his nine year-old son Henry III. Nothing could be permanently settled while he was a minor, and it was not until 1225 that the status of Magna Carta was finally resolved. In that year, Henry reissued the charter in a revised form. The new text left out a number of the provisions which imposed constitutional limitations of the King’s power to govern. It left out Article 61 of the original text, which created a permanent council of twenty-five barons to enforce the charter on the King. It left out the provisions of Articles 12 and 14 which prevented the King from levying taxation unless by the “common counsel of the realm”. In other words it left out anything which might have created an alternative source of constitutional authority, able to challenge the King.

According the Barnwell chronicle, the King conceded the revised Magna Carta “benigne et hilariter”, graciously and cheerfully. In return, the baronage consented to a heavy new tax. Taxpayers were told that unless they paid they would not enjoy the liberties which the King had conceded. Copies were distributed throughout England, to the counties and the larger towns. When, later in the thirteenth century, the Charter was formally confirmed by Henry III and his son Edward I, it was the text of 1225 which they confirmed, and it was this text that was recorded on the statute rolls as the authentic instrument, not the earlier versions.

Between 1258 and 1265, there was a prolonged baronial rebellion against King Henry III. The barons justified this step by reference to Magna Carta. They claimed that Henry III had acted against the terms of the charter by oppressing the Church, despoiling heirs and disparaging heiresses, and so on. In particular he had exploited the feudal rights of the Crown, to raise money without consent. In other words, their basic grievances were the same as they had been under King

John. They were complaining about the abuse of the King's feudal rights for financial purposes. Their problem was that there was no way of making him observe the charter in these respects without imposing some kind of permanent control over his government. The Provisions of Oxford, which were imposed on King Henry III in 1258, therefore took the government of the kingdom out of his hands by imposing on him a council drawn from the ranks of the baronage, on whose advice he was bound to act. They did this in the name of the rule of law. The *Song of Lewes*, the famous latin poem of 1264 which expressed the rebels ideas, put it very pithily. "Lex stat, rex cadit". "Let the law stand, though the king falls". The baronial rebellion against Henry III exposed the weakness of Magna Carta, which was that it was not a constitutional document but merely a code of feudal law.

The fundamental problem was that far from being a blueprint for future constitutional development, Magna Carta was really the last gasp of the old order that was passing away. In the three centuries which followed the scene at Runnymede, changes occurred in English society which made the sort of issues that the charter dealt with less important.

In the first place, Magna Carta had been directed mainly to protecting the financial interests of tenants-in-chief, a very small group of perhaps 150 to 180 men. It provided for tenants-in-chief to make the same rights available to their own feudal subordinates. Only the unfree, the tied peasants who constituted perhaps half the population of England, were left out. But with the prolonged agricultural boom of the thirteenth century, the rapid increase of England's population, the expansion of the cash economy, and the growing turnover of land, these categories became increasingly meaningless. The traditional feudal hierarchy no longer provided a mechanism for the exercise of power.

Secondly, lawyers invented ways of evading the more burdensome obligations associated with feudal tenure. This applied particularly to the rights of the Crown which arose on the transmission

of property to a man's heirs, which had been at the heart of the disputes between King John and the barons. The lawyers' most fertile invention was the "use", or trust, which was devised by lawyers at the end of the thirteenth century and became extremely popular with landowners over the next two hundred years. The use worked by vesting the property in a continuing body of trustees, so that the landowner never died. As a result, the landowner never died.

Thirdly, the Kings no longer depended on feudal obligation to recruit their armies. The last English King to make extensive use of the feudal military obligation was Edward I, who died in 1307. The last summons of feudal host was in 1327. From the middle of the fourteenth century, the wars of the Kings of England were fought by volunteers who served for honour and wages. Their obligations were based on contract and on money payment, and not on the tenure of land. Increasingly soldiering became a professional career, whose connections with the structure of English society were casual and accidental.

Finally, and perhaps most important of all, the creation of representative Parliaments in the second half of the thirteenth century put the dealings between the King and his subjects onto a different footing. Parliament represented a wider spectrum of the population than those whose interests had been protected by Magna Carta. It provided a much more effective way of ventilating grievances against the King's government. Above all, it brought into existence a precocious system of national taxation on moveable property, which did not depend on feudal obligation but on the consent of the Parliamentary Commons.

Future constitutional struggles, under Edward II and Richard II were not about feudal incidents. They were about mechanisms for making the King responsible to the wider community. Under Edward II and again under Richard II and Henry VI, the great issue was control over the

membership and powers of the royal council, which emerged in the late middle ages as the nerve centre of the King's government. These were things about which Magna Carta had nothing to say.

Gradually, the English forgot about Magna Carta. Citations of the charter in the Year Books become progressively more infrequent. Parliamentary petitions for the charter to be confirmed, which had once been routine, disappear after 1416. Sir John Fortescue, a former Chief Justice of King's Bench, wrote the first general account of the English constitution in the 1460s. But although he was a firm believer in limited monarchy and the rule of law, he derived it from Aristotle and Aquinas, not from Magna Carta. Tudor England cared even less for Magna Carta than the late middle ages. The period witnessed a considerable expansion of the King's prerogative power and the growing use of special conciliar courts like Star Chamber which declined to be bound by the common law. Much of this was politically controversial. But Magna Carta was rarely mentioned. Sir Thomas Smith, whose book *The Commonwealth of England*, was written in the 1560s, does not mention it. It does not feature in Shakespeare's *King John*.

On the rare occasions that it was invoked, it was usually in the context of disputes about the Crown's control over the church. It is one of the ironies of the period that catholic traditionalists of the 1530s and the Puritan opponents of the religious policies of Queen Elizabeth both appealed to the 1<sup>st</sup> article of Magna Carta, which protected the liberties of the Church, although the Church was by now a nationalised industry of which the monarch was the non-executive chairman. "Where is now become the Great Charter of England, obtained by so many difficulties?", asked the Puritan lawyer James Morice in the Parliament of 1593. It was a good question.

Magna Carta as we know it was reinvented in the early seventeenth century, largely by one man, the judge and politician Sir Edward Coke. A man of prodigious learning and bilious disposition, Coke rose to become Chief Justice of King's Bench. He fell out with King James I as a result of James's interference in the working of the courts. Coke objected to this, as a result of which he

was dismissed in November 1616. For the remaining eighteen years of his life, he was to be a determined opponent of the pretensions of the Stuart monarchy.

Coke transformed Magna Carta from a somewhat technical catalogue of feudal regulations, into the foundation document of the English constitution, a status which it has enjoyed ever since among the large community of commentators who have never actually read it. In their final form, Coke's views about Magna Carta were embodied in the second book of his *Institutes of the Laws of England* most of which was written between the Parliament of 1628 and his death in 1634. In this remarkable treatise, Coke read almost the whole common law of England into the text of Magna Carta. Coke described Articles 39 and 40 as pure gold, every syllable of which was to be studied. He regarded it as the origin of the writ of habeas corpus and of trial by jury. More generally, Coke took the provisions of the charter which protected a man's "liberties", which actually meant his privileges and immunities, and treated them as referring to the liberty of the subject. This meant, according to him, that all invasions of personal liberty by the Crown were unlawful. He even suggested that Magna Carta was the origin of Parliamentary sovereignty, although no Parliament existed for half a century after it was sealed. He asserted that it prevented the exaction of money by the Crown without consent, although the only clauses dealing with taxation in the charter of 1215 had in fact been removed in subsequent reissues. In short, said Coke in the debates which preceded its passage of the Petition of Right through the House of Commons, Magna Carta was a charter for limited monarchy. "Magna Carta", he famously declared, "is such a fellow that he will have no sovereign."

Many people who revere Magna Carta have never heard of Sir Edward Coke. Yet he has had an extraordinary influence over our perceptions of the charter. Coke's *Institutes* were regarded as a work of high authority until the 19<sup>th</sup> century. His analysis of Magna Carta was swallowed wholesale by the early American colonists. The framers of the US Constitution and the federal and state Bills

of Rights, deployed Magna Carta against the government of George III, just as Coke had deployed it against Charles I. The due process clause of the fifth and fourteenth Amendments, is based on Article 39 as interpreted by Coke. In 1991, it was calculated that Magna Carta had been cited in more than 900 decision of state and federal courts to date, generally in support of propositions that would not have been recognised by the barons at Runnymede. It had been relied upon in more than sixty Supreme Court decisions in the previous half-century. ‘The safeguards of due process of law and the equal protection of the laws,’ wrote Justice Frankfurter in his judgment in *Malinké v New York* 324 US 401, 413 (1945), ‘summarise the history of the freedom of English-speaking peoples running back to Magna Carta and reflected in the constitutional development of our people.’ As recently as 2004, Justice Stephens, delivering the judgment of the majority of the Supreme Court in *Rasul v Bush* 542 US 466 (2004) which allowed *habeas corpus* to prisoners in Guantanamo Bay, cited Article 39 of Magna Carta in support of his conclusion.

Ironically, Magna Carta has not fared as well in the courts of the country in which it was born. Currently only three clauses of Magna Carta remain on the statute book. Even they have a certain archaic ring. They are the clause protecting the privileges of the Church, the clause protecting the privileges of the City of London and the 29<sup>th</sup> clause of the 1225 charter, which reproduces Articles 39 and 40 of the 1215 document. Magna Carta has been cited in nearly 170 judgments of the superior courts in England since 1900. In almost every case, the reference has been to Article 39 of the 1225 Charter. In almost every case, it has been largely rhetorical. On the rare occasions when the courts have been presented with a case in which it might actually make a difference, the judges have shied away.

Quite recently, a case was decided in the Appellate Committee of the House of Lords in which it might have been decisive. The case was *R v Secretary of State for the Foreign and Commonwealth Office ex parte Bancoult* [2009] 1 AC 453. The facts were that the Crown had a prerogative power to make

laws for British colonies. It exercised this power 1971 by making an ordinance expelling the entire population of the British island of Diego Garcia in the Indian Ocean so that it could become a US military base. Colonial laws were valid only so far as consistent with English law. So the issue was whether the ordinance was consistent with the 29<sup>th</sup> clause of the 1225 version of Magna Carta. The House of Lords held the ordinance to be valid. Lord Hoffmann, speaking for the majority of the committee, acknowledged that Magna Carta forbade exile unless authorised by law. But, he said, it did not curtail the power of the lawmaker to make whatever laws it saw fit. In his view the right which it created was not so fundamental that the Crown could not take it away in the exercise of its prerogative power to make law. Sir Edward Coke would be turning in his grave. But Lord Hoffmann was actually right. Magna Carta guarantees very little.

Yet Magna Carta matters, if not for the reasons commonly put forward. Some documents are less important for what they say than for what people wrongly think that they say. Some legislation has a symbolic significance quite distinct from any principle which it actually enacts. Thus it is with Magna Carta. It has become part of the rhetoric of a libertarian tradition based on the rule of law, that represents a precocious and distinctively English contribution to western political theory. The point is that we have to stop thinking about it just as a medieval document. It is really a chapter in the constitutional history of seventeenth century England and eighteenth century America.

Ultimately, one's attitude to political myths of this kind depends on where one situates one's golden age. Those who created the myths that surround Magna Carta located their golden age in the past. Their ideal was the recapture of an imagined paradise lost. To Coke and his generation it really mattered that the common law as they understood it in the seventeenth century should have existed in much the same form since the days of King Alfred or the legendary Brutus the Trojan. It really mattered that it should have been encapsulated in Magna Carta. The authority of their legal programme depended in large measure on its supposed antiquity. Otherwise, they would have

been mere revolutionaries and not the respectable English gentlemen that they believed themselves to be. Today, the pendulum has swung the other way. “Medieval” has become a synonym for barbarous. We are frighteningly ignorant of the past, in large measure because we no longer look to it as a source of inspiration. We are all revolutionaries now, controlling our own fate. So when we commemorate Magna Carta, perhaps the first question that we should ask ourselves is this: 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.