

Magna Carta: The Bible of the English Constitution or a disgrace to the English nation?

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Introductory

1. Magna Carta, or the Great Charter, is probably the most famous and celebrated legal document in the world. William Pitt described it as “the Bible of the English constitution”¹; Winston Churchill called it “the most famous milestone of our rights and freedoms”²; and Franklin Roosevelt said that “the democratic aspiration ... was written in Magna Charta”³. Probably no single document in the whole of history has been claimed to have had such a far-reaching effect. And scarcely any document can have had such an unpromising or unsuccessful birth.
2. Lawyers know that no word or sentence can be interpreted without knowing its context. And that is just as true of an historical event: to understand it, you have to appreciate its context. So let me start with the events leading up to the sealing of the Great Charter. I will next turn to Magna Carta’s influence and reputation over the following eight hundred years. I will then discuss its constitutional effect, and will end, appropriately for a judge, by discussing the role of the judiciary.

¹ Speech in the House of Lords (22 January, 1770)

² Winston Churchill, *History of the English Speaking Peoples*

³ F D Roosevelt *Third Presidential Inauguration Address*, 1941

Magna Carta up to 1215

3. Almost 150 years before it was sealed, on a date even better known to English schoolchildren, 1066, England was conquered by Duke William of Normandy. As King William I, he ruled England by right of conquest: he decided what lands should be awarded to each of his barons and knights, and they then held their lands pretty well at his pleasure. As a leading historian has put it⁴, “all land was held from the King”, and the only effective source of power in England apart from the King was the Church.

4. William I ran the country with an iron fist for 21 years and his and sons, William II and Henry I, kept close control over England for fifty years after his death. Of course, there was a bit of give and take between King and his Barons but there was not much, especially when the King enjoyed the support of the Pope, which he normally did. The next nineteen years involved a civil war between supporters of William’s famous feuding grandchildren Stephen and Matilda, but their quarrel ended with Stephen’s death and the accession of Matilda’s son, Henry II, in 1154. He is famously remembered as the founder of the common law, but, much like William I, he ran England as his own private property, and the only people who really challenged him at home during his 35-year reign were his famous Archbishop of Canterbury, Thomas a Becket, until he was murdered in his cathedral in Canterbury in 1170, and, a few years later, Henry’s own sons.

5. Although Henry I and Henry II each issued coronation charters in which they promised to obey “the laws and customs of England”, these were what my colleague Jonathan Sumption, has called “bids for their subjects’ support, without which a newly crowned

⁴ D Carpenter, *The Struggle for Mastery: Britain 1066-1284*, Penguin History of Britain, (2004), pp81-86

King could not govern”⁵. Further, at least when the King faced no effective opposition, he ruled as he pleased, and he taxed the people for as much as he could get. Actions are more important than words, and the King acted as if he was above the law and custom as long as he could get away with it – which was almost all the time. As Lord Sumption also said, “Custom is by definition uncertain, [and in any event] there was no institutional mechanism for enforcing the King’s obligations on him against his will”⁶.

6. As far as Henry II was concerned, the purpose of the law was to keep the peace, not for its own sake, but to keep him on the throne, and was good for his tax revenue. As another leading historian of the period has put it, under Henry II, “England was governed by a powerful dynasty... that treated the realm as its own private estate, to tax or trouble as family interest dictated”⁷.
7. Henry was succeeded by his son Richard, who spent most of his time abroad fighting, but who was otherwise a chip off the old block: he drained the kingdom of money to pay for his crusades in the Holy Land and wars in France – and to fund his ransom when he was captured. After an eleven year reign he was killed while besieging a castle in France.
8. Basically, if you view these early kings as Mafia dons, as the *capi di capi*, who ran a sort of an uber-protection racket and country-wide extortion-cum-terror organisation you would not be far wrong.

⁵ Lord Sumption, *Magna Carta Then and Now* Address to the Friends of the British Library, 9 March 2015

⁶ *ibid*

⁷ N Vincent, *Magna Carta, The Foundation of Freedom 1215-2015*, ed N Vincent (2014), p 49

9. Richard was succeeded by his brother John, a strong contender for the title of the worst-ever King of England (although he has some stiff competition). He was avaricious, disrespectful, untrustworthy, lecherous, murderous and incompetent. Some twenty years after his death, the famous chronicler Matthew Paris wrote that John was “the greatest tyrant born of woman”, and, more poetically, “Black as is hell, John’s presence there makes it blacker still”⁸.

10. After alienating most of his Barons by his extortionate taxes, by his vicious behaviour, and by losing enormous chunks of France he had inherited from his parents, John lost all credibility in 1214 when he and his allies were comprehensively defeated by the French at Bouvines, a little remembered but very significant battle. If I may put it this way on the 200th anniversary of Wellington’s victory over Napoleon, at Bouvines King John’s expansionist hopes met their Waterloo.

11. The Barons could stand no more and they plotted to depose, or even murder, the King. They chased him out of London, and the scene look set for civil war. Magna Carta was conceived of as the basis of a temporary truce between the bad King and his revolting Barons, to head off this disaster. It was probably largely negotiated by Stephen Langton, the Archbishop of Canterbury.

12. When they entered into what was no more than a patched up temporary peace agreement at Runnymede near the Thames in June 1215, neither the dishonest and inept King and his cringing supporters, nor the overbearing and rebellious Barons had much intention to stand by what they had agreed. And they did not. Within three months, the King had not

⁸ Matthew Paris *Chronica Majora* (c 1240)

only wilfully broken many of his obligations, but he had persuaded Pope Innocent III to annul the Charter altogether. Partly because it provided for a committee of 25 barons to supervise the King, and therefore was seen as a usurpation of Royal supremacy, the Pope condemned Magna Carta. He described it as “an insult to the Holy See” and “a disgrace to the English nation”, and he forbade the King or the barons to keep to it “on pain of excommunication”⁹.

13. As for the Barons, they were no better. They resumed their rebellious plans, and formally invited Prince Louis of France to replace John as King. And, by trying to be a peacemaker, the wretched Archbishop had lost the trust of both sides and soon had to fly the country, thereby providing an early example of the truth of the adage that no good deed goes unpunished. By the end of 1215, Prince Louis and his French and Flemish army had occupied London and the civil war was continuing savagely. The Charter sealed six months earlier appeared to be as dead as the proverbial dodo, or, to Monty Python devotees, as dead as a certain 20th century Norwegian blue parrot.

Magna Carta after 1215

14. If at the end of the 1215, you had told King John or the Barons, that, in 800 years' time, their contemptuously spurned peace treaty would be revered as “the most famous milestone of our rights and freedoms”¹⁰ or “the greatest constitutional document of all times”, they would probably have suggested that you apply for the job of court jester.

⁹ Papal Bull condemning Magna Carta 24 August 1215

¹⁰ Lord Denning's purple prose

15. Yet, against all the odds, Magna Carta was magnificently reborn about a year after it had been apparently consigned to the dustbin of history. That was because King John did one of the few decent things he had ever done in his dishonest, inept, feckless life: he died. His death changed the political landscape, as it replaced the distrusted and hated King with his nine-year old son, Henry. To rally wavering and rebellious Barons to Henry III's cause, the new King's chief minister, the great William Marshal, formally reissued the Magna Carta.
16. This subsequent version of Magna Carta was not a discredited peace treaty, but a royal acknowledgment of the peoples' rights, a rallying call, which not merely could, but did, reignite confidence in and support for the legitimate King of England. As a result of this reissue, Prince Louis and his soldiers were sent packing, and Magna Carta was centre stage.
17. And the great Charter remained centre stage in England for the next century or so. In 1225, when Henry III came of age, he formally reissued the Great Charter, in order to help raise money from the Barons. Throughout the remainder of Henry's long, often turbulent, 56-year reign, Magna Carta was frequently reissued or confirmed by the King in order to retain or win back the people's confidence and financial assistance. Indeed, the Great Charter was reissued in 1265, at the height of another Barons' rebellion, under Simon de Montfort, which famously led to the first Parliament.
18. Magna Carta was then confirmed on several occasions by Henry III's successors at least thirty times, the last one being in 1455, just before the start of the Wars of the Roses. Well before then, however, Magna Carta had rather faded into the landscape. Many of its provisions were referred to in legislation, but only for the purpose of repealing them, and

there is precious little reference to it in any legal writings between 1400 and 1600¹¹, even though some important English legal texts were produced in that time. So the Wars of the Roses, the Battle of Bosworth, the Dissolution of the Monasteries, the Reformation, and the Spanish Armada all came and went without Magna Carta being much in evidence. Shakespeare makes no mention of Magna Carta in his *King John* which was written around 1595¹², even though, unsurprisingly, the play concentrates on John's tyrannical and homicidal nature.

19. But within a few years, in a second, albeit more delayed and more long-lasting, leap from obscurity, the Great Charter was rescued by a combination of a cack-handed attempt at Royal absolutism and a ruthless and clever lawyer. Queen Elizabeth I, who had been on the throne when Shakespeare had written *King John*, died in 1603, and the Crown passed to King James VI of Scotland, who united the two kingdoms by becoming James I of England.

20. England under the Welsh Tudors, who reigned for around 120 years, including the whole of the 16th century, was a relatively steady, if at times somewhat frightening, country to live in. The most significant influence in many ways was religion. Perhaps that was a reason why Magna Carta did not play a big part. By contrast, England, under the Scottish Stuarts, who reigned for most of the 17th century, went through a much more turbulent political time.

¹¹ As Sumption (*loc cit*) mentions, neither Fortescue's seminal work on the English constitution in the 1460s nor Smith's *Commonwealth of England* a century later make any significant reference to Magna Carta

¹² Stanley Wells, *William Shakespeare: a textual companion* Ed Wells, Taylor, Jowett and Montgomery (1987), pp 101-119

21. James I and his son, Charles I, had two conflicting characteristics: they believed passionately in the divine right of kings to rule as they saw fit, and they were chronically short of money. So they believed that they could make laws without consulting their subjects, while needing to raise lots of money from their subjects. The scene was set for the seventeenth century showdown between what, at the risk of caricature, may be described as the divine right of kings and arbitrary government in one corner, and representative government and the rule of law in the other.
22. One of the first champions of democracy and the rule of law was Sir Edward Coke. He started his career as an aggressively successful lawyer, and became a successfully aggressive Attorney General. Reading his cross-examination of Walter Raleigh, whom he prosecuted for treason in the early 1600s, makes you realise that it was not just in Stalin's Soviet Union that there were show trials. In due course Coke became Chief Justice. And, after being stood down from that job for challenging royal supremacy, he showed himself to be a reliable propagandist, if not perhaps such a reliable historian.
23. During the 1620s, seeking to support the rule of law and to challenge royal absolutism, Coke rescued Magna Carta from its past two centuries of obscurity, once famously declaring that "Magna Charta is such a fellow that he will have no Sovereign"¹³. He suggested in his writings that it was the origin of not merely liberty of the subject, but, rather optimistically, trial by jury, *habeas corpus*, and parliamentary sovereignty¹⁴. The initial attempts of Charles I, to raise money without parliament's consent were challenged in the courts in 1627¹⁵, unsuccessfully despite the citation of the Great Charter. However, the

¹³ E Coke, debate in House of Commons, 17 May 1628

¹⁴ E Coke *Institutes of the Laws of England* (1628-1642) *passim*

¹⁵ *Five Knights' case*, also called *Darnell's case* (1627) 3 How. St. Tr. 1, State Trials iii, 114

following year, Coke successfully invoked it to support the Petition of Right, which effectively confirmed the Great Charter, and was reluctantly approved by Charles I. The ensuing decade saw Charles's attempt to rule on his own, which ended in failure when he recalled Parliament in 1640.

24. It is no coincidence, I think, that the notorious court of the Star Chamber, a sort of royal kangaroo court, which employed torture, was first conceived in 1487¹⁶, when Magna Carta was dormant, and that it was shut down by statute in 1641¹⁷, once Magna Carta and what it stood for had been identified by Coke. And it's not for nothing that it was in 1640 that *habeas corpus* first came into our law – which basically meant that nobody can be imprisoned without a court order: up to then the fiat of the King was enough.

25. The recall of Parliament did not put an end to its dispute with the King, and the Civil War broke out in 1642. As every school child knows, or perhaps I ought to say as every school child used to know, the Civil War ended with Charles I's defeat and execution. This was followed by the Commonwealth – eleven years without a monarch, and instead a so-called Lord Protector, Oliver Cromwell. He did not have much time for Magna Carta, famously dismissing it as “Magna Farta”¹⁸. After his death, Britain reverted to being a monarchy, with the coronation of Charles I's elder son as Charles II in 1660.

26. Since then, the sealing of Magna Carta has consistently been treated as a significant and important event. For instance, it played a prominent part in the lead-up to Britain's Glorious Revolution in 1688, when religious and political forces combined to push the

¹⁶ The so-called Star Chamber Act 1487, which first identified the Star Chamber as a separate court

¹⁷ Habeas Corpus Act 1640

¹⁸ See eg Roger Coke *Detection of the Court and State of England* (1694)

Roman Catholic, absolutist James II (Charles II's younger brother) from the Throne. The new King, William III, from Holland, accepted the Bill of Rights of 1689. In the following century, the Great Charter featured large in the writings during the Age of Reason. And it was regarded as fundamental by the American colonists when forming states constitutions and in justifying no taxation without representation, and by the founding fathers when framing the constitution of the United States of America. Magna Carta was constantly invoked by constitutionalists, historians and politicians in the UK, the British Empire and the US in the 19th century, and it has been seen internationally in the 20th century as the great forerunner of human rights. Thus, in 1948, when launching the United Nations Universal Declaration of Human Rights in a speech to the General Assembly, Eleanor Roosevelt said that she hoped that the Declaration would “become the international Magna Carta for all men everywhere”¹⁹.

The Constitutional Legacy of Magna Carta

27. Contemporary historians and lawyers hotly debate the importance of Magna Carta both when it was first sealed and in terms of its subsequent importance. Sceptics see it as a dramatic confrontation between a bad King and his over-mighty Barons, which achieved nothing at the time, and then fortuitously captured the national imagination, largely thanks to Edward Coke's propagandist abilities. Enthusiasts contend that it deserves all the praise which has been heaped on it, because, more than any other document or event, Magna Carta contained the fundamental seeds from which a modern civilised society could grow.

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<http://www.kentlaw.edu/faculty/bbrown/classes/HumanRightsSP10/CourseDocs/2EleanorRoosevelt.pdf>

28. I doubt that anyone can say with justified certainty which view is correct, and I suspect that, as usual, the truth probably lies between the two extremes. In any event, as Lord Bingham wrote:

“The significance of Magna Carta lay not only in what it actually said but, perhaps to an even greater extent, in what later generations claimed and believed it had said. Sometimes the myth is more important than the actuality.”²⁰

29. You can detect in Magna Carta the green shoots of the four fundamental pillars on which a modern, civilised society rests. Those pillars are a democratic government, the rule of law, freedom of expression and economic prosperity. Without democratic government, without the rule of law, without freedom of expression and without economic success, any society will founder.

30. Democratic government involves a country being governed by laws made by legislatures (parliament and local authorities), which are regularly and fairly elected by all citizens. The rule of law involves just and accessible laws which are administered by an independent and competent judiciary, and are properly enforced. The great 18th century Scottish economist, Adam Smith, pointed out that a society must have an effective and fair legislature, and a proper and reliable system of justice, if it is to enjoy economic prosperity²¹. But, economic prosperity is, I think, actually a third necessary ingredient of a civilised society. In the absence of economic success, it is likely that there will be unrest or worse, and that is why I think it should be included. Freedom of expression, is arguably

²⁰ Tom Bingham *The Rule of Law* (2011)

²¹ Adam Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations* (Book IV, *Of Systems of Political Economy*), which refers to the need for “some notion of the regular government”, a “system of laws which supports it”, and “a regular administration of justice”

not a separate feature but is part of the rule of law, but whether it is or not, it is undoubtedly a necessary feature of a civilised society.

31. Let me deal with economic prosperity and freedom of expression fairly quickly, and spend a little more time on democracy and the rule of law.

32. At the time of Magna Carta, England had no democracy or freedom of expression, and barely a glimmer of the rule of law. However, economic prosperity would have been understood by the Barons, not least as they had been groaning under taxes raised to assist John's ill-fated attempts to recapture his French lands. One of the four provisions of Magna Carta which is still part of our law is clause 13, by which King John agreed to respect and preserve the "ancient liberties and free customs" of the City of London. That strikes a real chord today, when the importance of the City as a financial centre for the prosperity of the United Kingdom is widely accepted. And there are other clauses of the Great Charter which were aimed at promoting commerce. Such as the seemingly odd clause 33, which required the removal of all fish-weirs on the Thames and the Medway, were directly concerned with removing barriers to successful trade and commerce – in that case by enabling goods to be transported by water. And there are other clauses which would ring a bell today: clause 28 provided that no official was to take "any man's corn or chattels" unless he paid cash²², and clause 35 stipulated that there was to be a single measure of ale²³ "throughout the realm".

33. As for freedom of expression, it was not a concept known in 13th century England.

Heresy, witchcraft, subversive and treasonous statements could and frequently did result

²² Although there was provision for agreed credit

²³ And of corn and of cloth "whether dyed, russet or halberjet"

in a death sentence. Like so many rights and freedoms which we now take for granted, such as freedom from torture, freedom to marry, freedom from discrimination, the right to privacy, and the right not to be imprisoned without a court order, the notion of freedom of expression was unknown in 13th century England. It makes one wonder what will be thought about our current standards and principles in 800, or even 200, years' time. Such rights and freedoms are currently often seen as aspects of the rule of law, and, as the rule of law developed, so did the notion of fundamental rights, including freedom of expression.

34. Turning to democratic government, which we now take for granted, it was inconceivable in the England of 1215. The King ran an administration which, as I have mentioned, involved him doing virtually what he wanted. However, no doubt unintended by anyone involved in its drafting, the 1215 Magna Carta can fairly be said to represent an almost undetectable first step towards a democracy. That is partly because of the very existence of the Great Charter. The King had been forced formally to negotiate about the laws of the kingdom with at least some of his people. That of itself is significant.

35. However, if one drills down into many of the archaic-seeming provisions, it is clear that many of them were included to reflect the wishes, and many may think, the rights of the King's richer, more powerful subjects. Some of those provisions were very specific and personal – like clause 50, under which John agreed to dismiss certain unpopular governors. And then there was the almost incomprehensible clause 61, which so offended the Pope. It set up a committee of twenty-five Barons to supervise and enforce compliance by the King and his officers with the terms of Magna Carta. Although it never happened and was dropped from subsequent versions of the Charter, the clause could, I

think, be said to have represented the first occasion since the Norman Conquest on which the King had acknowledged some sort of mini-parliament.

36. Magna Carta's contribution to democratic rule was advanced ten years later in 1225, when, as I have mentioned, Henry III reissued it, partly to persuade the Barons to provide him with much needed funds. The notion of no taxation without representation could be said to have started then. And in 1265, not only was the Great Charter confirmed, but, no doubt partly inspired by it, the first ever representative Parliament was summoned. So fifty years on from Magna Carta, England had its first Parliament. Although a very unrepresentative, rudimentary and weak Parliament by modern standards, it was a first step along the road to universal suffrage, which eventually reached the UK's statute book in 1928²⁴.

37. And now in the 21st century, at least in some parts of the world, democracy has almost replaced previously established faiths as the main religion. We expect every country to have a legislature which is subject to regular and fair elections, at which virtually everyone is free to vote.

38. However, a democratically elected legislature on its own is not a reliable safeguard of good government. In the last century, both Hitler and Mussolini came to power through a perfectly respectable democratic process. And in this century, we have seen that democratically elected government is not enough in Egypt and Thailand, where such governments behaved in a high-handed and unfair way, and were brought down as a

²⁴ The Representation of the People (Equal Franchise) Act 1928

result. A democratically elected legislature must be bound by the rule of law if it is to provide acceptable government.

39. As I have mentioned, the rule of law has two components. First, it involves a society which is subject to rules which are accessible, clear and proportionate, which recognise contemporarily accepted fundamental rights, and which apply equally to all. Secondly, it requires all members of society to have access to independent and effective courts so that they can enforce their rights and protect themselves.
40. By the time of Magna Carta, there was a glimmer of the rule of law, not least because the notion of justice is, I would suggest, even more fundamental than democracy in the human mind – one of the earliest complaints anyone makes is the childish one of “It isn’t fair”. A feeling for justice has somehow always been lurking in mankind’s DNA. More particularly, the notion of “laws and customs” had been acknowledged by successive Kings – at least in words if not deeds. King John’s father Henry II started sending his Judges round the country to try cases, which gave them a degree of de facto independence. And just 20 years before Magna Carta, King John’s brother and predecessor Richard I had appointed local knights to maintain the peace in the more unruly parts of England²⁵: these “keepers of the peace” were the ancestors of the Justices of the Peace, who got that formal role and title in the 14th century²⁶.
41. And local government, which can also be seen as reflecting the rule of law as it devolved a degree of power away from the King, existed in a protean form in 1215. Although local

²⁵ C A Beard. *The Office of Justice of the Peace in England in Its Origin and Development* (1967); G Slapper and D Kelly, *The English Legal System 2011-2012*, (2012), p 237

²⁶ Justices of the Peace Act 1361, which followed an Act of 1327 which had referred to “good and lawful men” to be appointed to “guard the peace”.

power largely lay with the Barons, who were under the control of the King (when they were not rebelling), the remnants of the Anglo-Saxon shire system had just about survived the Norman conquest, and was beginning to assert itself. Each shire (called a county by the Normans) had its own High Sheriff appointed by the King as its top law officer. And Henry I and Henry II had given nearly 200 towns (called boroughs) charters which provided for their own mayor and aldermen²⁷.

42. The rule of law can be said to permeate the whole of the Great Charter, in that each clause is a provision which limits the power of the King or controls the actions of the powerful. There are a number of provisions which we would recognise as limiting the enforcement of the King's powers, but by far the most famous provisions of the Great Charter are Clauses 39 and 40, two of its four provisions which are still part of our law. With their promises not to punish any free man without "the lawful judgment of his peers or according to law" and not to deny, delay or sell justice to anyone, these two clause are far more often quoted than any provision of Magna Carta – and rightly so.

43. Other provisions recognised individual rights of property - like clauses 2 to 8, which prevented the King, and indeed some of his Barons, from abusing or interfering with inheritances and widows' rights, and clause 9 to 11 which concerned debts. And there were many clauses apart from 39 and 40, purporting to ensure fair and proportionate justice in the courts²⁸, including clause 45, where the King agreed not to appoint people as judges "who do not know the law of the realm". And there were many clauses protecting rights of property²⁹.

²⁷ A Ballard *British Borough Charters 1042-1216* (1913, repr 2010)

²⁸ For instance, clauses 17-21, 32, 34, 36-40, 44-45, and 54

²⁹ For instance, clauses 25-27, 29, 31, 52-53 and 55-58

44. I have suggested that the rule of law is in many ways even more fundamentally important than democratic government, and I would like to refer to what John Thornhill wrote in the *Financial Times* a few months ago:

“The late, great historian of the Communist party of the Soviet Union, Leonard Schapiro, used to argue that of all the factors distinguishing democracies from autocracies, the most important was the rule of law. The right to vote a self-serving government out of office was a wonderful privilege. Free speech, free markets and a free press were all to be cherished. But the ability of an individual to defend his or her rights in a court of law – even against the predations of a government or ruling party — was the most precious freedom of all.”

45. Ultimately, of course, it is unhelpful to get into an argument whether democracy or the rule of law is more important. There is no doubt that the rule of law has a longer pedigree, but that cannot of course be conclusive. The truth is that, at least to modern, European and American eyes, each of them is, as I have said, essential. Indeed, democracy and the rule of law are mutually complementary, but there is potential for tension between these two fundamental features, and I would like to end this talk by briefly exploring this point through the eyes of the judiciary.

The Judiciary

46. In 1215 the Judges were simply Royal servants serving as long as they pleased the King. They were court officials; indeed, it is no coincidence that, even today, a judge administers justice in a court: historically, the judicial court was an extension of the King’s court. The notion that judges were simply the King’s administrators doing his will continued for a long time after Magna Carta.

47. Almost exactly 400 years after Magna Carta, in 1616, the judges were ordered to appear before the King James I's Council to say if they would dismiss a claim if the King ordered them to do so. All but one of them said that they would do so³⁰. The exception was our old friend Chief Justice Coke, although even he ducked the issue saying "he would do that should be fit for a judge to do"³¹ – and was dismissed for his pains a few months later. The next twenty-five years, leading up to the Civil War, were not the judiciary's proudest hour. Thus, in the 1620s and 1630s, under Charles I, the courts rather cravenly upheld the King's power to levy taxes without the approval of parliament³². And those Judges, like Coke, who showed signs of independence were removed from office.

48. As a result, people had started to appreciate that an independent judiciary was fundamental to the rule of law, and that could only be achieved if a judge could not be removed from office – unless he misbehaved himself. So in 1642, just before the Civil War started, Charles I agreed that all judicial appointments would be "during good behaviour".

49. Thirty years later, however, his son, Charles II, reverted to appointing Judges "during pleasure", removing Judges he did not like for political reasons and replacing them with court favourites. He sacked his Chief Justice replaced with the dissolute court favourite Scroggs, who then not only presided over the trial and unjustified conviction of those involved in the fictitious Popish Plot, but taunted them when sentencing them to death³³. Charles later replaced him with the notorious Judge Jeffreys. It is a close call between the

³⁰ *Acts of the Privy Council 1615-1616* (1925), page 607

³¹ *ibid*

³² *Five Knights' case*, also called *Darnell's case* (1627) 3 How. St. Tr. 1, State Trials iii, 114; *R v Hampden (The Ship Money case)* (1637) 3 Howell State Trials, 825

³³ Kenyon, J.P. *The Popish Plot* 2nd ed (2000) London

ghastly Jeffreys and disgraceful Scroggs as to which of them was the worst Lord Chief Justice ever³⁴. And, in his brief reign, Charles's brother, James II, removed twelve judges in less than four years.

50. The Glorious Revolution of 1688, which deposed James II and produced the Bill of Rights, was, at least in part, the consequence of this sort of high-handed royal behaviour. Judicial security of tenure was finally enshrined in law in the Act of Settlement in 1701³⁵. By that time, Parliament had become sufficiently powerful and confident to recognise the fundamental importance of the point that a judge cannot be removed at the government's will.

51. A few decades later, a Frenchman, Baron de Montesquieu, explained the importance of the so-called separation of powers, based on the British system of government. His notion was that government consists of (i) the legislature, Parliament, which makes the laws, (ii) the executive, ministers and civil servants, which puts the laws into effect, and (iii) the judiciary, the courts, which interpret and enforce the law. And, he said, these three branches of government should be fully independent of each other and fully respectful of each other's functions. The Founding Fathers embraced Montesquieu's theory, and the US Constitution fully respects the separation of powers, whereas, with Government Ministers sitting in Parliament, ours does not, although the independence of the judiciary is largely recognised in our system.

³⁴ However, Lord Devlin wrote in *Easing the Passing: the Trial of Dr John Bodkin Adams* (1985) that Lord Hewart, Lord Chief Justice from 1922 to 1940 "has been called the worst Chief Justice since Scroggs and Jeffreys in the 17th century. I do not think that this is quite fair. When one considers the enormous improvement in judicial standards between the 17th and 20th centuries, I should say that, comparatively speaking, he was the worst Chief Justice ever."

³⁵ The Act of Settlement 1701. Judges only had a compulsory retirement age from 1959 – see section 12 of the Judicial Pensions Act 1959

52. Montesquieu's theory is consistent with the rule of law, and, provided that the legislature is elected periodically by universal suffrage, it is also consistent with democracy. It is unsurprising that, while they are complementary, in some important ways, democracy and the rule of law are in tension. Democratic government is loosely based on the notion that the majority should prevail over the minority and should be able to decide on the laws of the land. Whereas much of the rule of law is concerned with protecting minorities and, in particular the individual against the state. The tension between the rule of law and democracy is reflected in the potential for conflict between the courts and the legislature.
53. In the UK, which enjoys parliamentary sovereignty, a democratically elected Parliament can overrule a decision of any court, whereas no court can ever reverse or overrule a statute enacted by Parliament. By contrast, in a country with a formal constitution, such as the USA, it is by no means unusual for the unelected Supreme Court to overrule a statute enacted by democratically elected Congress, because it does not comply with the Constitution. In that sense, our system is more democratic, while the US system is more committed to the rule of law. So UK Supreme Court judges are less powerful and less political than their US counterparts.
54. But there has been a significant shift in practice, if not in theory, in the UK over the past fifty years, so that judges have, I think, become more influential. This is for a number of reasons.
55. First, the increasing powers of the executive in many areas over the past sixty years mean that there has been a much greater call for judicial scrutiny of administrative decisions. Judges have no more important function than to protect individuals against arbitrary, unfair unlawful acts of the executive arm of government. And, as those powers have

increased substantially over the past sixty years, there is greater call than ever for judges to perform this vital function.

56. Secondly, EU law requires judges for the first time in the UK to overrule primary legislation if it does not comply with EU law. This requirement has been imposed by the UK Parliament³⁶, and therefore it does not conflict with our established constitutional conventions, but it indicates a new mindset.
57. Thirdly, as I mentioned earlier, we do not have proper separation of powers between the legislature and the executive in the UK, and this means that Parliament can often be, at least to a significant degree, controlled by a Prime Minister with a decent majority. As a result, for much of the past few decades, parliamentary power has, I think, waned, and judges may have unconsciously filled the vacuum, and in that they have perhaps been joined by the press.
58. Fourthly, the Human Rights Act of 1998 has for the first time given UK judges a quasi-constitutional function, as the Human Rights Convention is a sort of European mini-constitution. For the first time, we judges have a specific duty to ensure that any aspect of the law which arises in a case, whether the law is made by Parliament, the executive or the courts, does not infringe the fundamental rights of individuals as set out in the Convention.
59. Fifthly, with increased devolution to the governments of Scotland, Wales and Northern Ireland, the courts, and particularly the UK Supreme Court, are called upon to decide

³⁶ In the European Communities Act 1972

issues such as precisely what law-making and other powers have been allocated by the UK Parliament to the three devolved governments.

60. Sixthly, yesterday's judges came of age in the respectful and conventional forties and fifties, whereas today's judges grew up in the questioning and disrespectful sixties and seventies, and that affects the judicial outlook quite a bit. In that, judges are not wrongly indulging in their private opinions, but rightly reflecting the general fundamental values and assumptions of contemporary society. It would have been absurd for judges at the time of Magna Carta to take into account rights which we take for granted today, and by the same token judges today should take such rights into account. That is not to say that judges should take every modern fad into account; on the contrary, they have a duty to be a steadying influence.

61. Seventhly, the legislature is sometimes too divided or too uncertain to take difficult or unpopular decisions and the courts therefore may be tempted to feel that they ought to step in. So, on some controversial issues where something needs to be done, it may be that legislative indecision is starting to become a reason for increased judicial activism. A recent example is the law relating to assisting a suicide, which is currently criminalised in all circumstances, but is often not enforced. This law is seen in many quarters to be unsatisfactory, but Parliament has difficulty in dealing with it – unsurprisingly, because it is highly controversial, involving very strong, moral and religious feelings both ways. While there were – unsurprisingly - differences of opinion between the judges, the Supreme Court's general message was that Parliament should properly face up to this issue, and, if it did not, the courts might have to step in.

62. Now, in case I appear to be suggesting and supporting judicial aggrandisement – or judicial activism as it is sometimes called – let me emphasise that I am not. I am trying to describe, not to praise, what has been happening. Furthermore, while judges have a vital duty to ensure the rule of law and to protect fundamental rights, we must not be eager to expand our powers. On the contrary, we must always remember that Parliament has democratic legitimacy – but that has disadvantages as well as advantages. The need to offer oneself for re-election sometimes makes it hard to make unpopular, but correct, decisions. At times it can be an advantage to have an independent body of people who do not have to worry about short term popularity. And, of course, if the unelected judges reach a decision which the elected MPs do not like, they can overrule it by statute.

Conclusion

63. So my answer to the question raised by the title of this talk is that Magna Carta can claim to be the Bible of our constitution, even if its Biblical role is as much based on myth as it is on reality. I would also say that, far from being a disgrace to the nation, it represents the United Kingdom's greatest contribution to the world – the rule of law and democratic government. Both these fundamental features of a modern civilised society can be traced back to a shoddy ineffective compromise in a boggy field between a horrible King and his revolting Barons eight centuries ago.

64. Thank you very much.