

# Magna Carta and the Holy Grail

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1. We all know that words and concepts are slippery things, and especially so if we are lawyers. A phrase, an idea, even a fact, can have a very different meaning or significance to different people, even a very different meaning or significance to the same person in different contexts. When Lewis Carroll's Humpty Dumpty famously said "When I use a word ... it means just what I choose it to mean"<sup>1</sup>, he was reflecting the reality of our experience of ourselves and of others. The notion that there is very often no single right answer to an issue, whether it is an issue of interpretation, of causation, or even of principle, is difficult for some people to accept, whether in everyday life, politics, academia, commerce or law. Indeed, the possibility that there is more than one defensible view is regarded by almost everyone at least in some circumstances as evil or morally wrong.
2. If there is room for different perceptions and opinions between different people in the 21<sup>st</sup> century United Kingdom, it is perhaps not surprising that virtually every fundamental belief which most mainstream, moderate people would take for granted today would have been rejected by most mainstream moderate people in the not-so-distant past. Consider the fundamental freedoms accorded by international instruments and treaties such as the UN's International Bill of Human Rights<sup>2</sup> and the European Convention on Human Rights, as well as the constitutions of many countries;<sup>3</sup> rights to

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<sup>1</sup> Lewis Carroll, *Through the Looking-Glass* (1872)

<sup>2</sup> Consisting of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, hailed as "A Magna Carta for all humanity"

<sup>3</sup> For example, the Canadian Charter of Rights and Freedoms

life, to liberty, and to a fair trial, freedoms from torture, forced labour, and discrimination, and freedoms of religion, expression, and association. The great majority of educated, so-called right-thinking people today would take all these freedoms for granted. But you don't have to go back very far in the history of this country to find a time when every one of these freedoms, utterly basic as they seem today, simply did not exist or, in a few cases, could be said to exist but in an almost unrecognisably restrictive form. Indeed, if we were to go back eight hundred years to Runnymede in 1215, we would have to accept that the great majority of English people had virtually none of these freedoms in any recognisable form.

3. People were being executed for heresy in the 16<sup>th</sup> century, and freedom of expression and of religion only really started to raise their heads in the 17<sup>th</sup> century; indeed, it was well into the 19<sup>th</sup> century before Roman Catholics and Jews began to have the same civil rights as Anglicans. The right to liberty as we conceive it can also be traced back to the 17<sup>th</sup> century with the *habeas corpus* legislation<sup>4</sup>, which abolished the rule that a royal *fiat* was a satisfactory justification for detention. As to slavery, the Domesday Book suggests around 10% of the population of England were slaves in the 11<sup>th</sup> century<sup>5</sup>. Slavery was alive and well in the 18<sup>th</sup> century, when the Attorney General and Solicitor General in the so-called “Yorke-Talbot opinion” expressed the view that slavery was lawful in England. Fifty years later, this opinion was described by Lord Mansfield as probably having been given after dinner at Lincoln’s Inn,<sup>6</sup> but it represented conventional legal thinking for many decades after it was given in 1729.
4. Freedom of association would have been a joke to the most people in the 13<sup>th</sup> century, and it only finally arrived in the UK in 1871 with the recognition of trades unions<sup>7</sup>. And

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<sup>4</sup> *Habeas Corpus Acts 1640 and 1679*

<sup>5</sup> David Pelteret, *Slavery in early medieval England from the reign of Alfred until the twelfth century* (1995)

<sup>6</sup> As Lord Mansfield noted in the *Somerset* case: (1772) 98 E.R. 499

<sup>7</sup> *Trade Union Act 1871*

torture was a standard judicial tool throughout most of medieval Europe - in some cases (Portugal and parts of Switzerland for instance) until well into the 19<sup>th</sup> century<sup>8</sup>, and it was part of the Inquisition's investigative armoury in relation to heresy until 1816<sup>9</sup>.

England had a slightly better record: judicial torture was unlawful, but the executive could use it until about 1640, with a royal warrant, and apparently about eighty warrants were issued in the 100 years up to 1640<sup>10</sup>, including in respect of Guy Fawkes<sup>11</sup>.

However, *peine forte et dure* was part of the English common law system till 1772: that meant that defendants who refused to plead could have increasingly heavy stones placed on them till they either entered a plea or died<sup>12</sup>.

5. And when it comes to discrimination, one does not have to go back very far to see how things can change. It is scarcely 150 years since gay sex between men in England was punishable by death<sup>13</sup>, and less than 50 years ago it was still a crime for which men were regularly prosecuted and imprisoned.<sup>14</sup> And now of course, gay men and women in England can marry in the same way as straight people<sup>15</sup>.
6. Similarly, overt, and to all right thinking people in this century today, disgraceful racism was not merely current and lawful, but quite acceptable to many otherwise liberal-minded people in the 1960s<sup>16</sup>. We have all seen the photographs of signs in the window along the lines of "Room to Let – no dogs, no Irish, no Blacks". Maybe many of the photographs are of modern copies, but they undoubtedly did exist, and in significant numbers. A century ago, no woman could vote in Parliamentary elections. In the 1930s,

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<sup>8</sup> *ibid*

<sup>9</sup> It was formerly introduced by a Papal Bull issued by Pope Innocent IV *Ad Extirpanda*, in 1252

<sup>10</sup> John H. Langbein, *Torture and the Law of Proof: Europe and England in the Ancien Régime* (1977), p 81

<sup>11</sup> Antonia Fraser, *The Gunpowder Plot* (1996), p 211

<sup>12</sup> Standing Mute under the *Statute of Westminster 1275* involved harsh imprisonment, but by the 16<sup>th</sup> century, it had become heavy stones, and it was finally ended in 1772 –William Pollock and Frederick Maitland, *The History of English Law* 1968, vol 2, pp. 650–651

<sup>13</sup> The *Buggery Act 1533* formally introduced the death penalty for the offence and it was only reduced to an imprisonable offence by the *Offences Against the Person Act 1861*

<sup>14</sup> It remained a crime in Scotland until 1980, see Criminal Justice (Scotland) Act 1980

<sup>15</sup> *Marriage (Same Sex Couples) Act 2013*

<sup>16</sup> *Race Relations Acts 1965 and 1968*

many employers required their female employees to give up work when they go married as they would otherwise be keeping a man out of a job<sup>17</sup>.

7. And standards change with place as well as with time. The death penalty is thought by most people in the UK today to be wrong today<sup>18</sup>, but it was only abolished in 1965<sup>19</sup>. No doubt, in the 18<sup>th</sup> century, it was thought by most people to be somewhat eccentric to oppose the death penalty. And, even today, the death penalty is still part of the law and practice of over twenty countries, including China, India, the USA, Indonesia, Egypt, Pakistan, and Japan<sup>20</sup>. Indeed, the death penalty still exists in many of the states and territories, such as Jamaica, whose final appellate court is the Judicial Committee of the Privy Council, over which I preside. And even part of the United Kingdom, Northern Ireland, has a significantly different legal position in respect of important social issues such as women's reproductive rights,<sup>21</sup> blasphemy and gay marriage.
8. So, while the human rights we talk and litigate about so much are fundamental to a modern civilised and democratic society and should be nurtured and treasured, we should not fool ourselves into thinking that they are timeless, let alone absolute. If we can look back with disbelief, or at least with surprise or disapproval, at accepted norms and laws 200 years ago, or even 50 years ago, then, particularly in a world that is changing ever more quickly, we may expect the same reaction from right-thinking people in the 22<sup>nd</sup> and 23<sup>rd</sup> centuries looking back to our laws and norms. I leave it to you to speculate as to which of our currently accepted views and norms will be viewed as barbaric. The notion that we have reached some sort of Nirvanic state of perfection, a

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<sup>17</sup> Ex rel Angela Holdsworth

<sup>18</sup> Just - *Support for death penalty below 50%*, Metro Newspaper of 27 March 2015, p. 6

<sup>19</sup> *Murder (Abolition of Death Penalty) Act 1965* abolished the death penalty for murder, but it survived, albeit in theory but not in practice, for a number of different offences, including treason, mutiny and piracy with violence, until 1998

<sup>20</sup> [http://en.wikipedia.org/wiki/Use\\_of\\_capital\\_punishment\\_by\\_country](http://en.wikipedia.org/wiki/Use_of_capital_punishment_by_country)

<sup>21</sup> Illustrated by the recent decision of *R (on the application of A) v Secretary of State for Health* [2014] EWHC 1364 (Admin)

sort of Whig interpretation of history on stilts, is no more valid than the eschatological obsessions of those who thought, and in some cases apparently still think, that the end of the world is about to occur.

9. So our perceptions of the fundamental requirements of a civilised society are very different from those which were shared by the people who gathered in Runnymede almost exactly 800 years ago. Most of what we rightly regard as fundamental constitutional principles would have seemed very strange to them. They would, as mentioned, have had grave difficulties understanding our notion of human rights, which we now believe to be an important ingredient of one of the principal pillars on which a civilised society rests, namely the rule of law. But the Barons would have appreciated the need for the rule of law itself. However much it may be said that the famous clauses 39 and 40, promising no punishment without trial and no delay or sale of justice, have to be read in their 13<sup>th</sup> century context, they are concerned with justice. And justice is a basic human concept, which even very young children appreciate, when they say, as they do so often, "*It isn't fair*". I suppose it might be said that, in clause 20, the 1215 Magna Carta also recognised a nascent version of the doctrine of proportionality, a concept which modern UK lawyers think we have only recently adopted. Clause 20 stated that no freeman should be fined for an offence save "in accordance with its gravity, saving his livelihood", a merchant "saving his merchandise", and even a villein "saving his wainage"
10. The Barons would have been undoubtedly bemused by the equally important second pillar supporting a modern civilised society, namely democratic government. While some version of the rule of law would have been supported by the Barons, democracy was simply not on their agenda: its tiny seed was only first planted in this country almost exactly fifty years later with Simon de Montfort's 1265 Parliament, which took over 600 years to develop into a parliamentary system which in modern terms could even

arguably be characterised as democratic. Indeed, the importance of universal suffrage, whose importance was recently emphasised by Supreme Court in the *Moohan* case<sup>22</sup>, was not recognised for (slightly more than) half of the population until the early twentieth century<sup>23</sup>.

11. On the other hand, I think that the third pillar of a modern successful society, economic prosperity, would have been understood by the Barons, not least as they had been groaning under taxes raised to assist John in his misconceived attempts to recapture his French lands. More specifically, the preservation of the “ancient liberties and free customs” of the City of London in clause 13 of the 1215 Magna Carta strikes a very strong chord today. Both “UK” and “PLC” may be somewhat anachronistic acronyms to attribute to the authors of Magna Carta, but clause 13 carries that sort of message. The Barons would most certainly have also recognised the right to property, and it is a curious thing to a lawyer in this country that such a long established right was not included in the European Convention, and had to be added through a Protocol.
12. Not only the constitutional principles, but the practicalities, religious beliefs, the state of technology, and social and cultural mores governing the lives of people in 1215 England were very different from those which govern our lives today. So it requires a great leap of imaginative thought and immersion in the culture before we can begin to understand what the Barons and the King thought that they were doing when they met at Runnymede. None of the painfully few 13<sup>th</sup> century records we have about what King John or the Barons said, did or thought at Runnymede comes from an eyewitness – and none is even contemporaneous or first hand. There were no baronial equivalent of Samuel Pepys or Tony Benn who kept diaries to publish; the 8-year old Prince of Wales was too young to write any letters to the Barons; there were no 13<sup>th</sup> century equivalents

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<sup>22</sup> *Moohan v The Lord Advocate* [2014] UKSC 67 [2015] 2 WLR 141

<sup>23</sup> *Representation of the People Act 1918* and *Representation of the People (Equal Franchise) Act 1928*

of Maynard Keynes and Harold Nicholson who were at Versailles in 1919 and wrote about it afterwards. But, when it comes to the 1215 Magna Carta, while there are a few factual straws in the wind, who wrote and said what and why, whether anyone thought it important and why, and whether it was expected to last or not, are all matters of conjecture. Like a court interpreting a contract<sup>24</sup>, historians can refer to a few surrounding circumstances, but they do not know about the intentions or wishes of the parties or about their earlier negotiations.

13. So we search for the truth of what it meant at the time. If you read all the splendid books which have been published this year about the Great Charter, you will find very little about its actual negotiation, drafting or sealing, and nothing at all about what happened at Runnymede. We know quite a bit about the surrounding circumstances, but apart from the date and place (and the place is not in fact precisely known), as one of the prime historians on the topic delicately puts it, “the precise circumstances of the drafting elude us”<sup>25</sup>.

14. So it is inevitable that there are different views about what the great Charter meant at the time. One view was parodically embodied by the authors of *1066 and All That*<sup>26</sup>, who had this to say on the topic:

*“Magna Charter ... was the first of the famous Chartas and Gartas of the Realm and was invented by the Barons on a desert island and in the Thames called Ganymede. By congregating there, armed to the teeth, the Barons compelled John to sign the Magna Charter, which said:*

*a. That no one was to be put to death, save for some reason (except the Common People)*

*b. That everyone should be free (except the Common People)*

*....*

*c. That the Courts should be stationary, instead of following a very tiresome medieval official known as the King’s Person all over the country*

*...*

*d. That the Barons should be tried except by a special jury of other Barons who would understand*

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<sup>24</sup> See *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101

<sup>25</sup> Nicholas Vincent, *Magna Carta, The Foundation of Freedom 1215-2015* (2014), p 69

<sup>26</sup> RJ Yeatman and WC Sellar, *1066 And All That* (1930), Chapter XIX, *Magna Charter*

*Magna Charter was therefore the chief cause of Democracy in England, and thus a Good Thing for everyone (except the Common People)."*

In its skittish way, that represents the traditional view of Magna Carta, which, to quote another childhood favourite, "*any fule kno*"<sup>27</sup>. But, at least from today's perspective, it is not so much what Magna Carta meant at the time but what it started, what it represents.

15. And as to that, there is a sharp difference of opinion, which is well illustrated by a recent discussion, if that is not too kind a word, on the Radio 4 *Today Programme* on, somehow it seems appropriate, Saint George's Day. Helena Kennedy, a "*leading barrister*"<sup>28</sup> (as is accurately recorded on her website) expressed the view that Magna Carta was the basis of jury trial. David Starkey, describing himself as a "*great historian*", responded to her, or more accurately hectored her, saying "*This is myth. This is lawyer myth. This is lawyer myth. This is myth*", adding "*1215 doesn't matter*"<sup>29</sup>. The apparently equally peppery Professor Max Radin took the opposite view in 1947 decrying the idea that:

*"Magna Carta is an ancient fetish, a sort of medicine bag, pulled out of the dust of the record-room by Coke and made into the symbol of the struggle against arbitrary power; and that the true effect of the Charter, if any, had been merely the hardening of the privileges of some hundred petty kings."*<sup>30</sup>.

16. These views represent two schools of thought albeit almost in caricature. One school sees what happened at Runnymede as little more than a dramatic moment of history which has captured the public imagination, and which only has symbolic importance due to the subsequent accidents of history. This view was characterised as "the historian's view" by my colleague Jonathan Sumption in his excellent talk to the Friends of the

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<sup>27</sup> Geoffrey Willans, *Down with Skool! A Guide to School Life for Tiny Pupils and their Parents* (1953), *passim*

<sup>28</sup> <http://www.helenakennedy.co.uk/about/main.html>

<sup>29</sup> <http://www.legalcheek.com/2015/04/kennedy-qc-v-starkey-in-almighty-magna-carta-bust-up-on-this-mornings-bbc-radio/>

<sup>30</sup> Max Radin, *Myth of Magna Carta* (1947)



British Library a couple of months ago<sup>31</sup>. The other view is the more romantic view, although given that Lord Sumption calls it “the lawyer’s view”, there is every reason to wonder whether it really can be romantic. This view of the Great Charter was encapsulated by Igor Judge in a stirring speech, in Middle Temple, when he called it “the banner, the symbol, of our liberties”<sup>32</sup>. In truth, rather than two extreme views, there is, as usual, more of a spectrum of views, with a stark difference between the ultra-violet David Starkey historian’s view that Magna Carta was a dramatic but ultimately insignificant flash in the pan; and the infra-red, Helena Kennedy lawyer’s view that it was the foundation of modern constitutional values.

17. The so-called lawyers’ view is that the 1215 Magna Carta was the first time since the Norman Conquest that a deal was struck between the King and any of his subjects, and that it was the first step on the long road from a dictatorial monarch and arbitrary laws to the rule of law and parliamentary democracy. The Great Charter’s contemporary importance was self-evident from the many copies which were contemporaneously circulated across England, and its frequent re-issue and confirmation by successive Kings – over thirty times - during the ensuing two centuries, the last time being on behalf of the 7-year old Henry VI in 1429, the year Joan of Arc helped Charles VII of France to capture Orleans.
18. The sceptical historians, on the other hand, point out that in 1215, it was not even called Magna Carta: the name was conferred a couple of years later by the scribes simply in order to distinguish it from the Charter of the Forests<sup>33</sup>, because it was longer, not because it was more important. The sceptics also say that Magna Carta contained nothing of general significance which had not been in the coronation charters of Henry

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<sup>31</sup> <https://www.supremecourt.uk/docs/speech-150309.pdf>

<sup>32</sup> Igor Judge, *Magna Carta: Luck or Judgment*, Middle Temple, 19 February 2015

<sup>33</sup> Albert Beebe White, *The Name Magna Carta*, (1915) XXX (CXIX) *The English Historical Review*, pp 472–475

I and Henry II in the previous century, which in turn merely reflected what was believed to be “common custom” anyway. It was, they say, no more than a feudal law code. Even, it is said, the famous clause 39 and 40 were merely aimed at requiring the King, when dispensing justice, to behave like one of his judges<sup>34</sup>. Anyway, the 1215 Charter itself was a complete failure, given that it was repudiated by both sides and annulled by the Pope within two months of its execution. True it is that it was resurrected from time to time over the next two centuries, mostly before 1300, but it is not a great exaggeration to say that that was merely to help the King pacify and tax his subjects, or to provide the Barons with an excuse for rebelling against the King. After 1450, it was largely forgotten and did not even feature in Shakespeare’s *King John* at the end of the 16<sup>th</sup> century<sup>35</sup>

19. Well, whichever view is right, in the first half of the 17<sup>th</sup> century, Edward Coke, as unsound an historian as he was a brilliant, if ruthless, lawyer and propagandist, resurrected Magna Carta. He did so to undermine the Stuart monarchy’s notion of the divine right of Kings. In particular, he did so to justify his view that no proceedings could be enforced by the state against anyone without complying with the common law requirement of what we would now call due process. He regarded the Great Charter as the “root” from which the nine “branches” of “the tree of liberty” had grown, and he wrote that clauses 39 and 40 were “pure gold”<sup>36</sup>. After that, the Civil War in the 17<sup>th</sup> century and the enlightenment in the 18<sup>th</sup> century encouraged a hyper-Edward Coke view of Magna Carta as the origin of English liberty, the rule of law and even of parliamentary government. And the American colonists bought this version

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<sup>34</sup> Jonathan Sumption *supra*

<sup>35</sup> Although the 1225 Charter was cited in Holinshed’s Chronicle, one of Shakespeare’s principal sources, as the source of *good laws and laudable ordinances which have been from time to time by the kings and princes of this realme confirmed so that a great part of the law now in use dependeth of the same*”.

<sup>36</sup> Edward Coke, *Institutes of the Laws of England* (1642), chapter 29. The nine liberties were no imprisonment, disseisin, outlawry, exile, destruction, and conviction, without due process of law, and no sale, denial or delay of “justice or right”.

enthusiastically, or maybe just lazily, enshrining it in most state constitutions, and purporting to draw on it for their federal constitution.

20. In the 19<sup>th</sup> century, many UK historians (Lord Sumption and David Starkey please note) seemed content to be passengers on the same bandwagon. Macaulay identified the Charter as “commenc[ing] the history of the English nation”<sup>37</sup>, and Bishop Stubbs observed that “[t]he whole of the constitutional history of England is little more than a commentary on Magna Carta”<sup>38</sup> – but that may have been intended to show that we have no constitution. However, the more sober Maitland, ironically a lawyer as much as an historian, took a more cautious view<sup>39</sup>, famously describing Magna Carta as caught between “theoretical sanctity and practical insecurity”.
21. And of course Magna Carta has featured far more in the US jurisprudence than it ever has done in ours. An internet search suggests that it has been cited only ten times in House of Lords judgments in the past 120 years<sup>40</sup>. And the US has done a great job exporting Magna Carta values, or, if you prefer, the Magna Carta myth, across the globe. To take but one example, when launching the Universal Declaration of Human Rights at the UN on 1 January 1949, Eleanor Roosevelt said in her short and pithy speech that the declaration “may well become the international Magna Carta for all men everywhere”<sup>41</sup>. (The words “all men” are an indication how things change).
22. And in the past 150 years, Magna Carta has also been the basis for some pretty weird notions. Thus, it famously guarantees rights to freemen, and there is some sort of association of “freemen on the land”, who regard gaining this mythical status as a kind

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<sup>37</sup> Thomas Babington Macaulay, *the History of England from the Accession of James II* (1848)

<sup>38</sup> William Stubbs, *Constitutional History of England* (1878).

<sup>39</sup> Per Clare Simmons, *Absent Presence: The Romantic-Era Magna Charta and the English Constitution* In Shippey and Utz, *Medievalism in the Modern World. Essays in Honour of Leslie J. Workman* (1998), p 208

<sup>40</sup> [http://www.bailii.org/cgi-bin/sino\\_search\\_1.cgi?method=phrase&query=magna+carta&results=50&submit=Search&rank=on&callback=on&mask\\_path=uk%2Fcases%2FUKHL](http://www.bailii.org/cgi-bin/sino_search_1.cgi?method=phrase&query=magna+carta&results=50&submit=Search&rank=on&callback=on&mask_path=uk%2Fcases%2FUKHL)

<sup>41</sup> You can watch it on <https://www.youtube.com/watch?v=Nq5pp-7Ndv0>

of legal get out of jail free card - literally. At least according to a communication recently sent to the Advisory Council on Historical Manuscripts, “freemen” regard themselves as “*bound only by common law*” and having “*no obligation ... to abide by the action of legislative orders coherent only with fictitious, governing, corporate bodies*” on the basis that “*Magna Carta entitles any free person to elect whether or not to be bound by legislation*”. This echoes the reference by Edward Jenks in his 1904 magisterial essay to the mystical “freeman” status, which he terms the “*great secret of the false glamour which invests Magna Carta*”, and he added that “[u]nhappily for this pleasing theory, the wording of the Charter itself renders it quite untenable<sup>42</sup>.”

23. The different perceptions of Magna Carta over time and the different perceptions of modern writers and speech-givers, whether historians, lawyers or conspiracy theorists, serve to reflect the Humpty Dumpty view of life: Magna Carta means what just what I choose it to mean; this is both the beauty and the danger of historical “facts” which become part of spurious national myth. But, however dubious one may be about its importance, standing before a contemporary 1215 version of the Great Charter, as we can all now do at the splendid British Library exhibition, is a memorable and emotional moment for anyone with even the slightest feeling for English history or the slightest interest in the rule of law. And that is true even though it is illegible except to those historians or other medievalists who are trained to read 13<sup>th</sup> century script.
24. One feels a shiver of excitement when looking at the original vellum; there is an instinct to lower ones voice as when standing before a great masterpiece or walking into a place of worship. That is partly because of its dramatic historical context, the famously bad King, the reputedly over-mighty barons, the oppressed populace, the shadowy Archbishop Langton, the riverside setting, the imminent civil war and French invasion, and the not-too-distant royal death. And it is because the document contains some good

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<sup>42</sup> Edward Jenks ‘The Myth of Magna Carta’ (1904) *Independent Review* 260, 268-269.

and sensible laws; they may seem a bit quaint or worse now, but many of them were significant and sensible then: the requirement in clause 33 for removal of fish weirs in rivers, for instance, seems a bit arcane, but they were seriously impeding river commerce, and the requirement was repeated in subsequent legislation<sup>43</sup>.

25. But above all, our feeling of reverence when standing before the original Charter is attributable to the lawyer's myth as David Starkey would have it, which surrounds this piece of vellum, its almost religious symbolism, as the foundation or origin of the rule of law, and, indirectly, of parliamentary democracy. Clauses 39 and 40 do carry a very fundamental message to modern readers, however much Antonin Scalia-like originalist analysis suggests that they may have been understood 800 years ago. After all, if ever there was a living instrument, it is Magna Carta. Like Doctor Who, it may have changed its character from time to time over the centuries, but that is the privilege accorded to legends – and, unlike the story of Doctor Who, the Magna Carta story is directly grafted onto hard fact. Even Justice Scalia apparently has the lawyer's view, as he is quoted as having said that “an understanding of the meaning and history of the U.S. Constitution starts with Magna Carta”<sup>44</sup>; there is also at least one example of a US court striking down a statute as incompatible with Magna Carta<sup>45</sup>.
26. There can be little doubt that the “lawyer's view” of Magna Carta is partly mythical. Of course, there is nothing wrong with myth. As the late Tom Bingham put it:

*“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.”*<sup>46</sup>

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<sup>43</sup> *Statutes of the Realm*, vol.2, 1810-28, pp.439-42

<sup>44</sup> <http://www.nationallawjournal.com/legaltimes/id=1202676302669/Magna-Carta-101-With-Justice-Scalia#ixzz3Z7TdpOPP>

<sup>45</sup> *Bowman v. Middleton*, 1 Bay 252 (S. C. 1792).

<sup>46</sup> Tom Bingham *the Rule of Law* (2010)

27. Whether they are relied on to explain where we are, to justify where we are going, or simply to entertain or educate, myths are and always have been as much part of the human perception of history as the facts they replace or supplement. A good example in the present context is in Isherwood's *Goodbye to Berlin*, where the German Landauer says to the narrator "*You, Christopher, ... with your centuries of Anglo-Saxon freedom behind you, with your Magna Charta engraved on your heart, cannot understand that we poor barbarians need the stiffness of a uniform to keep us standing upright.*"<sup>47</sup> An English image of the German view of the English character. There must be a reason why, unlike every other European country, the UK has had no tyranny, no violent revolution since the mid-17<sup>th</sup> century, and the notion of a continuum from the dramatic moment in Runnymede, does the job very nicely - particularly as the Magna Carta myth was created shortly before that final mid-seventeenth century revolution.
28. I do not see much point in arguing whether myths are a good or a bad thing: there is a human need for myth. Myth simplifies, it personalises, it fills in gaps, it justifies and it engages. We all like stories – as young children we are brought up on them, and most educated adults read fiction. Myth gives a coherence and justification for rules and events which otherwise appear random and unfair – to an atheist or agnostic, myth has much in common with religion. We don't like to be ignorant, and, in relation to the more distant past, including the 12<sup>th</sup> century, myth fills in the gaps. And myth often has a patriotic, or at least a national, resonance – consider Homer, consider Virgil, consider Shakespeare. And, of course, at least for most people, myth is more fun, more engaging, than dry facts. The lawyers' view of Magna Carta ticks all these boxes.
29. And, even for those who do not approve of myths, for all the hype there is no doubt that Magna Carta really was sealed by King John in June 1215 and that it still exists for

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<sup>47</sup> Christopher Isherwood, *Goodbye to Berlin* (1939)

us to look at. The Holy Grail is another myth, a myth which started almost at the same time as Magna Carta, and which, like Magna Carta, is still very much with us. I think most people would agree that, unlike Magna Carta, it is doubtful whether the Grail ever existed, and, without intending to hurt anyone's feelings, I doubt that most of us would credit anyone who said they had seen the Holy Grail. Indeed, it seems unclear from all the early literature on the topic whether the Grail was a dish<sup>48</sup>, a saucer<sup>49</sup>, a stone<sup>50</sup>, a cup<sup>51</sup>, or a platter<sup>52</sup>, and, according to one recent book on the topic, even a sword, a spear, or a book by Jesus, Solomon, or any of the Apostles<sup>53</sup>, although it is normally portrayed as a chalice.

30. However, despite these differences, the two myths have some similarities. Like Magna Carta, the Grail has its origins around the beginning of the thirteenth century, and, like Magna Carta, it had important predecessors. Like the myth of Magna Carta, the Holy Grail's story is one of great resilience and indeed attributed national importance, and like Magna Carta its origin is by no means purely English. The "English" Magna Carta was written in Latin on behalf of a King and Barons who would have spoken French and most of whom were Norman in origin (eighteen of the twenty-five leading barons had "de" in their title<sup>54</sup>). Likewise the "English" Arthurian myths have their origins in French Romances.
31. The starting point for the Grail myth is *Perceval, le Conte du Graal*, the final, and unfinished, romance written by the French troubadour Chretien de Troyes. This was composed shortly before King John succeeded to the English throne. To modern eyes, it is a pretty weird tale, whose weirdness is probably not helped by the fact that Chretien

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<sup>48</sup> Chretien de Troyes *infra*

<sup>49</sup> Hélinand of Froidmont, at least per H. Voorbij, *Helinand of Froidmont: Vie et Oeuvre* (1993)

<sup>50</sup> Wolfram von Eschenbach, *Parzival*

<sup>51</sup> Robert de Boron *infra*

<sup>52</sup> *Peredur fab Efwraig in Mabinogion*

<sup>53</sup> Norma Lorre Goodrich *The Holy Grail* (1993)

<sup>54</sup> <http://magnacarta800th.com/schools/biographies/the-25-barons-of-magna-carta/>

never finished it. The knight Perceval is returning home when he comes across the mysterious wounded “Fisher King”, who invites him to stay at his castle. At the castle Perceval witnesses a procession of men and women carrying strange objects from one chamber to another, including; a bleeding lance and an elaborately decorated “*grail*” (described as *un graal*, rather than *le graal*, which suggests that Chretien did not regard it as unique). Perceval remains silent through all of this and wakes up the next morning alone. He then returns to King Arthur’s court, where a lady admonishes him for failing to ask his host whom the grail served and why the lance bled, because, had he done so, it would have healed the wounded king. Well, I told you that it was weird and unfinished.

32. Meanwhile, a few years later, around the accession of King John, a grail becomes **the** Grail thanks to another late 12<sup>th</sup> century French poet. In Robert de Boron’s romance in verse, *Joseph d’Arimathie*, Joseph takes the chalice used at the last supper to collect Christ’s blood before he was removed from the Cross. Joseph is then imprisoned, and is visited by Jesus, who tells him of the mysteries of the chalice. On leaving prison, Joseph travels west and founds the dynasty of the Grail, of which Perceval becomes a member. The purpose of the dynasty is to guard the Grail until King Arthur (*rex quondam, rexque futurus*) rises again. This was rather topical because in 1191 the monks of Glastonbury claimed to have discovered the tombs of King Arthur and Queen Guinevere.
33. During the first few decades of the 13th century, there were further Grail romances written, some of which purported to complete the Chretien de Troyes story<sup>55</sup> and others followed the Robert de Boron story<sup>56</sup>. But then what one might call the Grail trail appears to go cold for around 250 years, with only occasional references in romantic and

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<sup>55</sup> Eg *Parzival* by Wolfram von Eschenbach, and The *Lancelot* and the *Queste del Saint Graal* sections of the *Vulgate Cycle*.

<sup>56</sup> Eg Rigaut de Barbezieux (see Barber, Richard, *The Holy Grail: imagination and belief* (2004), p 418) and The *Estoire del Saint Graal* section of the *Vulgate Cycle*



quasi-religious writings. Thus, rather like Magna Carta, it had an initial flourishing after it was first conceived, and then died away – and more quickly than the Great Charter.

34. After around 200 years of eclipse, rather like Magna Carta, the Grail romance was triumphantly revived by a rather remarkable man. As already mentioned, it was the memorable Edward Coke who breathed fresh and apparently eternal life into what David Starkey would call the Magna Carta myth. Coke's equivalent when it came to the Grail was of course Thomas Malory whose famous work was published by William Caxton as *Le Morte Darthur* in 1485 – a date almost as famous in English history as 1215, because it was the year in which the Battle of Bosworth took place.
35. Malory's work represents a fantastic exercise in untangling the narrative strands of the French Romance sources and re-assembling them into something almost akin to a modern novel in an account which is both more detailed and more familiar, and it must be said a good deal more readable, than the Chretien de Troyes or Robert Boron twelfth century versions.
36. Malory provides an interesting contrast with Coke. Apart from resurrecting myths, they both had much experience of the law. However, it was not only the myths they revived which were of a very different in nature. When it came to law, Coke was of course a fearsomely successful advocate, Attorney-General, Chief Justice, legal author and constitutionalist. Malory's involvement with the law was of a rather different nature and suggests that, while he may have been a great author, he was not a great man. In 1451, Malory was charged with a catalogue of crimes, including rape, extortion, theft, cattle rustling, robbery, deer stealing, and attempted murder of the Duke of Buckingham before a court at Nuneaton presided over by, yes I'm afraid so, the Duke of Buckingham. A good illustration of how perceptions of the rule of law have changed.<sup>57</sup>

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<sup>57</sup> P. J. C. Field, *Malory, Sir Thomas (1415/18–1471)*, *Oxford Dictionary of National Biography*, 2004

37. Malory was bailed and then joined a horse-stealing expedition across East Anglia that resulted in another sojourn in prison in London. In 1455, when Henry VI (26 years on from the last re-issue of Magna Carta) suffered a mental collapse, Malory was granted a pardon by the Lord Protector, the Duke of York, but, as soon as Henry VI recovered, the Lord Chief Justice, the great Sir John Fortescue, a Lancastrian, quashed his pardon. But the Yorkist victory in 1461 at Towton, the bloodiest battle ever fought on English soil, which brought Edward IV, the son of the by-now decapitated Duke of York, to the throne, also brought Malory freedom.
38. However, he seems to have been one of those people who could not keep out of trouble and in 1468 Malory was arrested and imprisoned without formal charge in the Tower of London, probably for plotting against King Edward. It was there that he began working on *Morte D'Arthur*, the whole of which he wrote in prison, and completed in about two years by early 1470.
39. The story of the Grail occupies a substantial chunk of Malory's twenty-two book narrative. It is hard to know where to begin, but perhaps the best place is the sudden appearance of the Grail with a crack of thunder, and in a shaft of light, miraculously providing food and drink to all present, before departing suddenly. Like Magna Carta, the Grail's initial appearance is dramatic, but brief. Most of the knights then set out separately on a quest for the Grail, a decision which is a cause of understandable concern to King Arthur. Ultimately, Galahad, Percival, and Bors as the purest knights of the court ride to the Castle of the Maimed King, where they are greeted by Joseph of Arimathea and Jesus Christ. Galahad heals the maimed king, who has waited many years for pure knights to find the Grail.
40. The Grail and King Arthur are now almost as much part of our historical national identity as Magna Carta. Most of us were brought up on stories of King Arthur and his knights and the quest for the Grail, just as much as we were taught about a possibly

mythical version of the importance of Magna Carta. And TS Eliot's epoch-making *The Waste Land*<sup>58</sup> has a teasing connection with the Grail myth: it is nowhere mentioned in the poem, but the very first of Eliot's notes refers the reader to "the incidental symbolism of the poem" having been "suggested by Miss Jessie L. Weston's book on the Grail legend: *From Ritual to Romance*"<sup>59</sup>. The Holy Grail has become an expression representing something the ultimate goal or prize; I have heard it used as such by courts, although I can find only one reference to it in House of Lords judgment<sup>60</sup>. But following Lord Justice Lewison's warning against the use of metaphors in the law in his excellent lecture last week<sup>61</sup>, perhaps the practice should be abandoned.

41. As with Magna Carta, books on the Holy Grail continue to be published regularly.<sup>62</sup> I suppose that the Grail's 20<sup>th</sup> century equivalent of the Magna Carta's notion of Freemen of the Land is the 1982 *The Holy Blood and the Holy Grail*<sup>63</sup> (described as "an insidious and real corruption" by the historian Marina Warner<sup>64</sup>) which of course featured in a recent plagiarism case<sup>65</sup>. And the Grail's equivalent of Magna Carta in 1066 *And All That*<sup>66</sup> is perhaps the film *Monty Python and the Holy Grail*<sup>67</sup>.

42. It was, of course, this film that led to the title of this evening's talk. I was rather pleased with the title, and that is yet another proof of the accuracy of Dr Johnson's advice "Read over your compositions, and wherever you meet with a passage which you think is particularly fine, strike it out". But there is a sort of connection between the Charter and the Python, in that Monty Python's Terry Jones has been involved in producing an

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<sup>58</sup> T S Eliot *The Waste Land* (1922)

<sup>59</sup> *Ibid*, footnote 1

<sup>60</sup> *Conor Medsystems Inc v Angiotech Pharmaceuticals Inc* [2008] UKHL 49, [2008] RPC 28, per Lord Hoffmann no less

<sup>61</sup> Kim Lewison, *Metaphors and Legal Reasoning*, The Chancery Bar Association Lecture 2015, 5 May 2015

<sup>62</sup> I think the most recent is Margarita Torres Sevilla, *Kings of the Grail* (2014)

<sup>63</sup> M. Baigent, R Leigh and H Lincoln, *The Holy Blood and the Holy Grail* (1982)

<sup>64</sup> *The Times*, 18 January 1982.

<sup>65</sup> *Baigent v The Random House Group Ltd* [2006] EWHC 719 (Ch); [2007] EWCA Civ 247.

<sup>66</sup> *supra*

<sup>67</sup> 1975

animated series of videos explaining the history and legacy of Magna Carta<sup>68</sup>. However, I was somewhat taken aback when my judicial assistant, Hugh Cumber<sup>69</sup> told me that *Magna Carta Holy Grail*<sup>70</sup> is the title of an album by the rapper Jay Z.

43. Listening to the music, digesting the lyrics, and reading its Wikipedia entry<sup>71</sup> leave me little wiser as to why the album has the title that it does, but I suppose that when it comes to subtle allusions, rap-singers may have it over judges. Wikipedia does suggest that Jay Z's *Magna Carta Holy Grail* “received generally mixed reviews from music critics”. That at least strikes a chord. The music critics can't agree about Jay Z's album, the historians and the lawyers can't agree about Magna Carta, the romance poets can't agree about the Grail. We are in a world where, in so many cases, perceptions differ and there is no provably right answer. After a century that has given us Einstein's theory of relativity, Heisenberg's uncertainty principle, Schrödinger's cat, and Gödel's incompleteness theorems, this should come as no surprise. But, just as we can and should manage and enjoy our day-to-day lives by reference to classical, Newtonian principles, without worrying about the rules of subatomic and astronomic physics, so we can and should maintain and develop the rule of law by reference to current fundamental principles without worrying about the fact that standards and perceptions change. We must do what we believe is right today. And that, one hopes, is what at least some of those who congregated at Runnymede eight centuries ago believed and tried to put into effect.

David Neuberger

12 May 2015

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<sup>68</sup> <http://www.openculture.com/2015/03/an-animated-history-of-magna-carta.html>

<sup>69</sup> who has assisted me enormously in preparing this talk. Thank you, Hugh.

<sup>70</sup> For details see [http://en.wikipedia.org/wiki/Holy\\_Grail\\_\(Jay\\_Z\\_song\)](http://en.wikipedia.org/wiki/Holy_Grail_(Jay_Z_song))

<sup>71</sup> [http://en.wikipedia.org/wiki/Magna\\_Carta\\_Holy\\_Grail](http://en.wikipedia.org/wiki/Magna_Carta_Holy_Grail)