

Lady Hale gives the Supreme Court Historical Society Annual Lecture 2015, Washington D.C.

Magna Carta: Our Shared Heritage

1 June 2015

Both our Supreme Courts are surrounded by reminders of Magna Carta. The great doors into this building are adorned with a bronze relief of King John granting the Charter in 1215 and an original of the 1297 Charter is the first document the visitor to your National Archives sees before going upstairs to view the Declaration of Independence, the Constitution and the Bill of Rights. Above the doors leading into the building which now houses the Supreme Court of the United Kingdom is a stone relief of King John granting the Charter; and engraved on the glass doors leading from the entrance hall into our library is a facsimile of the 1225 Charter, with its most famous guarantee highlighted: “to no-one will we sell, to no-one will we deny or delay right or justice”.

Those words, from chapter 40 of the original Charter, together with the original chapter 39 - “No free man shall be arrested or imprisoned or disseised or outlawed or exiled or in any way victimised, neither will we attack him or send anyone to attack him, except by the lawful judgment of his peers or by the law of the land” – still “have the power to make the blood race” (in the words of Lord Bingham of Cornhill, the greatest British judge of this century).¹ They are the embodiment of the rights to life, liberty and property, not to be infringed without due process of law, still to be found on the statute book of the United Kingdom and in the 5th and 14th Amendments to the Constitution of the United States.

¹ T Bingham, *Lives of the Law* (Oxford, 2010), p 4.

My own blood raced too a few weeks ago – just after the last Parliament had been dissolved – when I received my own writ of summons, sealed with the privy seal, giving me exactly 40 days’ notice of “a certain Parliament to be holden at Our City of Westminster” – harking back, I felt sure, to chapter 14 of the original Magna Carta:

“And to obtain the common counsel of the kingdom about the assessing of an aid . . . or of a scutage, we will cause to be summoned the archbishops, bishops, abbots, earls and greater barons, individually by our letters – and, in addition, we will cause to be summoned generally through our sheriffs and bailiffs all those holding of us in chief – for a fixed date, namely, after the expiry of at least forty days, and to a fixed place; . . .”

That is the foundation of a second principle which we can trace at least as far back as Magna Carta – that the people from whom the taxes are levied should have a voice in deciding what they should be – now usually embodied in the slogan “no taxation without representation”. As I understand it, it was disregarding that principle that lost us the American colonies getting on for six centuries later.

I ought, therefore, to protest, because as a member of the House of Lords I do not have a vote in the election of members of the House of Commons – I was summoned to the next Parliament weeks before the General Election which told us who those members were going to be. But since the Law Lords left the House of Lords to become the Supreme Court of the United Kingdom in 2009, neither do I have the right to sit or vote on any Parliamentary business in the House of Lords.² So I am doubly disenfranchised. In fact, the whole House of Lords ought to protest, because since 1911, when the House of Commons asserted their superiority over the House of Lords, they have not been able to interfere with “money bills”.³ Perhaps it is

² Constitutional Reform Act 2005, s 137(3).

³ Parliament Act 1911, s 1.

we, as much as the sentenced prisoners, who should be complaining to the European Court of Human Rights that our rights have been violated.

Another of my favourite provisions from the original Charter is chapter 45:

“We will not make justices, constables, sheriffs, or bailiffs save of such as know the law of the kingdom and mean to observe it well.”

This is but one of the many embodiments in the Charter of the third idea with which it is most associated – the idea that the King and his officials were as much subject to the law as were the rest of his people. The rule of law is not one-way traffic, the law which only the governed have to obey; the governors have to obey it too. Indeed, by chapter 60, the customs and liberties which the king had granted to “our men”, the barons had also to observe towards “their men”. They cascaded down through the feudal ranks.

Thus three great ideas, the essentials of modern constitutionalism, can all be found in the original Magna Carta of 1215: the idea that fundamental rights can only be taken away or interfered with by due process and in accordance with the law (though whether “and” means “and” or “or” is still controversial, as we shall see); the idea that government rests upon the consent of the governed; and the idea that government as well as the governed is bound by the law. No wonder the lawyers get so excited by it. All three ideas do, of course, beg the question of where the law comes from and who makes it, but I’ll come back to that.

Historians tend not to be so excited about the Magna Carta of 15 June 1215. They point out that it was not so very different from the charters of other Kings; that much of its contents were simply reaffirming generally understood principles of feudal law; and above all that its most radical provisions were soon dropped. But, while the story of how the barons succeeded in extorting the Charter from King John is exciting enough, the story of what happened next is

even more exciting.⁴ Only a few days after the Charter was sealed on 15 June 1215, King John asked the Pope, Innocent III, to release him from his oath to observe it. On 24 August, the Pope obliged. King John had sworn fealty to the Pope and the Pope owed him something in return. He denounced the Charter as extorted “by such violence and fear as might affect the most courageous of men”; he forbade King John to keep his oath to observe it and the barons to try and make him do so; and he declared the Charter “null and void of all validity for ever”.

The result was civil war, between the barons who had extorted the Charter and the King and those loyal to him. It looked as if the barons were going to lose until they persuaded the son of the King of France, Prince Louis, to whom they had already offered the Crown, to invade. This he did in May 1216. Louis laid claim to the throne both by hereditary succession (unremarkable but untrue) and by election by the barons (remarkable but true). But he did not promise to abide by the Charter. By October, it looked as though John was heading for defeat when he set out across the Wash – a large shallow bay in the east of England - to reinforce his garrison at Lincoln Castle, one of the few still holding out for him. John made it across the Wash, but most of his baggage did not and sank into the sands. He struggled on to Newark, south of Lincoln, but died there on 18 October. In the words of *1066 and All That* (a humorous account of all the history we think we can remember), “John finally demonstrated his utter incompetence by losing the Crown and all his clothes in the wash and then dying of a surfeit of peaches and no cider; thus his awful reign came to an end”.⁵ His body was conveyed to Worcester Abbey for burial.

Things did not look promising for his heir, his nine year old son, Henry III. But William Marshal, Earl of Pembroke, the greatest warrior of the day and the King’s most loyal servant, quickly took charge. With the support of the papal legate, Cardinal Guala Bicchieri, he arranged

⁴ I have relied mainly on two secondary but learned sources: A Arlidge and I Judge, *Magna Carta Uncovered* (Oxford, Hart, 2014) and D Starkey, *Magna Carta, The True Story Behind the Charter* (London, Hodder, 2015). Fortunately they agree on all essential points.

⁵ WC Sellar and RJ Yeatman, *1066 and all that, A Memorable History of England, comprising all the parts you can remember, including 103 Good Things, 5 Bad Kings and 2 Genuine Dates* (London, 1930; Methuen, 1999), pp 34-35.

for Henry's coronation in Gloucester and was (reluctantly) appointed regent of king and kingdom. The court travelled to Bristol⁶ where the King's council reconvened. There the King was advised to re-issue Magna Carta, which was sealed by Marshal and the Cardinal because the boy-king had no seal. This, the Magna Carta of 1216, reissued in 1217, formed the basis for the Magna Carta of 1225, which King Henry granted when he had acquired a great seal of his own.

The 1216 Charter was a very different document from the one exacted by the barons at Runnymede. One might call it a typical English compromise, designed to reassure the barons that the legal rights they cared about most were preserved but also to preserve the status of the monarchy. Most importantly, it did not contain the original chapter 61 (known as the "security clause"), which had given to 25 barons, to be chosen by the Runnymede rebels, extraordinary powers to enforce the provisions of the Charter against the King and his officials. These powers were what had most provoked the indignation of the Pope and the feudal purists. Some of the other chapters, in which King John had promised to put right particular grievances, were quietly dropped, because they were deemed specific to the political situation in 1215. Other chapters were described in the 1216 Charter itself as "important yet doubtful"⁷ and so were to be "deferred until we have fuller counsel, when we will, most fully in these as well as other matters that have to be amended, do what is for the common good and the peace and estate of ourselves and our kingdom." Among these were the chapters dealing with the levying of aids and scutage, including my favourite chapter 14, but the principle of no taxation without common consent did come back in other ways.

Thus it was that, by losing those chapters, the famous chapters 39 and 40 of the 1215 Charter were combined to form chapter 29 of the 1216 and all subsequent Charters, including that of 1297, which was enrolled on the English statute book (the notion that the King and his council,

⁶ Then the second city in the country and one with which I am proud to be associated, as Chancellor of the University of Bristol.

⁷ Chapter 42.

in Parliament assembled, could make laws having emerged during the 13th century). In granting the 1297 Charter, Edward I did no more than quote the 1225 Charter of his father Henry III. This had three significant changes from the 1215 and 1216 charters: it was granted by the King “of our own spontaneous goodwill”; it was not granted on the advice of his counsellors, who merely witnessed it; but “in return for this grant and gift of these liberties . . . the archbishops, bishops, abbots, priors, earls, barons, knights freeholders and all of our realm have given us a fifteenth part of their movables”. No longer a product of coercion, it was nevertheless a contract with the people: liberty and the rule of law in return for the taxes the King needed to run maintain his state and wage his wars.

That Henry III was still around in 1225 to reissue the charter was largely due to his regent, William Marshal, “the best knight in all the world”. In 1217, he and the loyalists defeated the French army and their English supporters at the battle of Lincoln, and the French fleet was later defeated in a battle off Sandwich in Kent. Prince Louis renounced his claim to the English throne and promised never to assist the rebels again. The rebels were pardoned and their lands restored to them. As David Starkey puts it:⁸

“Magna Carta *was* revolutionary; the idea of monarchy *was* shaken to its foundations; the republican challenge *was* real. That it all ended in a classic English compromise was *not* inevitable. . . . But the central ideas of Magna Carta were retained in the reissue of the Charter in 1216 and became inviolable.”

Fast forward now to the 17th century: the century of the English revolutions and the century of the English colonisation of America. The English lawyers had not entirely forgotten about the principles underlying Magna Carta in the intervening years.⁹ Magna Carta was, after all, on the statute book and procedures for putting the guarantees in chapter 29 into effect had been

⁸ *Op cit*, pp 135-136.

⁹ See eg, JH Baker, “Magna Carta and personal liberty”, in R Griffith-Jones and M Hill (eds), *Magna Carta, Religion and the Rule of Law* (Cambridge, Cambridge University Press, 2015).

developed. Magna Carta was first printed in Latin in 1508 and in English in 1534. Lawyers would also be familiar with Treatises attributed to Glanvill and Bracton on the *Laws and Customs of England*. Glanvill, writing before the Charter in about 1190, had said that “what please the Prince has force of law”; but Bracton, writing after the Charters in about 1250, had said instead that “whatever has been rightly decided and approved with counsel and consent of the magnates and general agreement of the community, with the authority of the king or prince first added hereto, has the force of law”. As he explained, “the King ought not to be subject to man, but subject to God and the Law”. Lawyers might also be familiar with the treatise of Sir John Fortescue, Chief Justice of the King’s Bench under Henry VI in the mid 15th century, *In Praise of the Laws of England*, who said that “The King of England cannot alter nor change the laws of his realm at his pleasure. . . . he can neither change Lawes without the consent of his subjects, nor yet charge them with strange impositions against their wils”.

But Magna Carta as such was not much in their minds until it was resurrected and given almost mythical power by Sir Edward Coke, appointed Chief Justice of Common Pleas by James I in 1606, just as the battle between the common law courts and the prerogative powers of the King was developing nicely, along with the battle between the King and Parliament. The three ideas, that a person should not be deprived of his liberty or his property without due process of law, that there should be no taxation without common consent, and that there were limits to the royal prerogative, featured prominently in each battle. The Great Charter of the Liberties of England was referred to in the Petition of Right of 1628, drafted by the House of Commons (of which Coke was now an elder statesman, having been sacked as Chief Justice in 1616), presented by Coke to the House of Lords and eventually accepted by them, and equivocally given royal assent by Charles I, as so often in return for the taxes he needed to raise.¹⁰

¹⁰ Very soon afterwards, the King ordered the recall of the formula of Royal Assent, “let right be done as is desired”, and substituted his own, “right should be done according to the laws and customs of the realm”, which begged the question.

Eventually, as every school child in my country ought to know, the King tried to rule without Parliament, and there was a civil war between the Royalists, the cavaliers, who were “Wrong but Wromantic”, and the Parliamentarians, the roundheads, who were “right and repulsive”.¹¹ The roundheads won the war and the King was put on trial for treason and executed in 1649. His calls for the adjournment of his trial were met by “the good words in the great old Charter of England” (presumably meaning “to no-one shall we delay justice”, but perhaps not in the way originally intended). But his conqueror, Oliver Cromwell, was not a great respecter of civil liberties either, famously declaring that “your magna farta cannot control actions taken for the safety of the Commonwealth”.¹² The monarchy was restored in 1660, but once again became precarious when James II reasserted his prerogative powers. The “glorious revolution” of 1688 was the result. William of Orange, married to James’ daughter Mary, invaded, James fled, Parliament offered the Crown to them both, but on conditions: the Bill of Rights was enacted in 1689 and the sovereignty of the King in Parliament was firmly established. The King alone could not make law or suspend or dispense with the laws which Parliament had made. Although the Bill of Rights also prohibits excessive bail and “cruel and unusual punishment”, it is mainly about the power of Parliament and not about the rights of individuals.

Meanwhile, of course, the English were establishing their American colonies on the other side of the Atlantic. They took the common law and Magna Carta with them. The Royal Charter granted to the colonists of Virginia in 1606 was partly the work of Coke and asserted that the English colonists were to enjoy the same rights as the English possessed in the homeland. Some colonists chose to create their own Magna-Carta like constitutions, such as the Body of Liberties of Massachusetts Bay, the first section of which reads remarkably like chapter 29 of the 1216 Charter, except that it refers to “in case of the defect of a law in any particular case by the word

¹¹ Sellar and Yeatman, *op cit*, p 71.

¹² According to Clarendon, *History of the Rebellion* (not necessarily the most reliable of historians): see Arlidge and Judge, *op cit*, p 143.

of God". William Penn is being credited with the first American printing of the Great Charter and used it in framing the laws of Pennsylvania (he had had, of course, first-hand experience of the battle for English liberties before he came to found the colony¹³).

So was it the common law and Magna Carta which motivated the Declaration of Independence in 1776 and the framing of the new Constitution in 1787? You will know much better than I, but it seems to me obvious that the denial of their heritage as Englishmen will have played a part in the demand for independence, but the framing of the new Constitution will have needed something more. The lawyers will have known all about the writings of Sir William Coke and also of Sir William Blackstone, the pioneering academic scholar of English law, who in 1759 had disentangled the different medieval texts of Magna Carta.¹⁴ They will have known about the struggles for civil liberties in late 18th century Britain. The colonists had no votes in the Parliament which was now sovereign and could pass laws which overrode their ancient rights. When that Parliament voted to impose direct taxes upon them without representation, they could cite Magna Carta when they revolted and declared their independence.

On the other hand, important though the appeal to ancient history is, the framers of the Constitution were looking to create a new model of government. Magna Carta had at least three defects from their point of view: it was a grant from the King, rather than the work of the people; it could be overridden by a sovereign Parliament; and it limited only the operations of government, not of the legislature. For the framers, it was the people, not Parliament, still less the King-in-Parliament, who were sovereign, and invested the Constitution which they adopted with its authority. They were soon persuaded that it was also necessary to enshrine their freedoms in a Bill of Rights, in order to protect them from the potential tyranny of the majority. Much of its content is an echo of the rights in Magna Carta and the Petition of Right, and of the

¹³ It was his acquittal of riotous assembly in 1670 which led to *Bushell's Case* (1670) 124 ER 1006, establishing that jurors could not be punished for returning a verdict of which the authorities disapproved.

¹⁴ *The Great Charter and the Charter of the Forest* (1759).

machinery developed to give effect to them, such as habeas corpus and trial by jury. But did its motivation and authority come, not so much from the appeal to ancient history, but from the appeal to nature and reason, from the puritan covenant between God and his people and John Locke's theory of natural rights?¹⁵

Be that as it may, having marched together for two centuries, the constitutions of the United States and the United Kingdom went their separate ways for the next two centuries. We in the United Kingdom had to wait until the Human Rights Act of 1998 before we had a proper Bill of Rights of the sort which citizens of the United States of America would recognise. This developed out of the Universal Declaration of Human Rights of 1948, which Eleanor Roosevelt described as "an international Magna Carta of all men everywhere". Impatient at the lack of progress by the United Nations in translating its aspirations into binding obligations in international law, the Council of Europe enshrined a similar set of civil and political rights in the European Convention on Human Rights of 1950. Article 5, protecting the right to liberty and security of person, bears a remarkable resemblance to chapter 29 of Magna Carta (at least if "or" means "and").

The jurisprudence of the European Court of Human Rights began to develop in earnest once the United Kingdom and other member states accepted the right of individuals to petition the court against their own governments; many of the seminal cases which established the fundamental doctrines by which the Convention is interpreted came from the United Kingdom;¹⁶ the complacency of the English lawyers who thought that the Convention embodied rights which for the most part the English had enjoyed for centuries was shaken by a number of

¹⁵ D Little, "Differences over the foundation of law in seventeenth and eighteenth century America", in Giffiths-Jones and Hill, *op cit*.

¹⁶ An account is given in "Beanstalk or Living Instrument? How tall can the European Convention on Human Rights grow?" Gray's Inn Reading at Barnard's Inn, 2011, accessible at www.supremecourt.uk/news/speeches.html.

adverse decisions in Strasbourg; eventually, our sovereign Parliament decided that these rights should become rights in United Kingdom law, enforceable in the United Kingdom courts.

It is still not a proper Bill of Rights in the American sense or indeed in the sense of any of the many other written Constitutions of the modern world. The UK courts do not have the power to strike down a provision in an Act of the UK Parliament which is incompatible with a Convention right. All we can do is, so far as this is possible, interpret the provision so that it is not incompatible (and a great deal can be achieved by interpretation);¹⁷ or, if this is not possible, we can make a declaration of incompatibility.¹⁸ Parliament then has three choices. First, it can swiftly approve a remedial Order in Council which removes the incompatibility¹⁹; this is suitable for simple cases where a single provision can easily be amended to make it fit. Second, it can pass an Act of Parliament providing a comprehensive scheme to deal with the incompatibility. Third, it can do nothing and risk the wrath of the Council of Europe. So far, all the 19 surviving declarations have been acted upon by the UK Parliament, with one exception. They have not yet brought themselves to amend the so-called “blanket ban” on sentenced prisoners voting in elections.²⁰

Not only that, of course: what Parliament has granted, Parliament can take away. The Conservative Party manifesto before the recent election promised to “scrap the Human Rights Act and introduce a British Bill of Rights. This will break the formal link between the British courts and the European Court of Human Rights, and make our own Supreme Court the ultimate arbiter of Human Rights in the UK”. However, in the Queen’s speech to the new

¹⁷ Human Rights Act 1998, s 3(1). This is the preferred solution, and a surprisingly flexible one: see *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557.

¹⁸ Human Rights Act 1998, s 4.

¹⁹ Human Rights Act 1998, s 10.

²⁰ Held contrary to article 3 of the First Protocol to the Convention by a Grand Chamber of the European Court of Human Rights in *Hirst v United Kingdom (No 2)* (2006) 42 EHRR 41, and declared incompatible by the Court of Session in *Smith v Scott* 2007 SC 345.

Parliament, on 27 May, the new Government promised only to bring forward “proposals” for a British Bill of Rights, so we shall have to wait and see what they contain.

The Human Rights Act has given us the tools with which positively to protect fundamental rights against the organs of the state. But it has also made us think rather harder about the content of fundamental rights in the common law and to wonder about whether we too have a concept of constitutional statutes which are different from ordinary Acts of Parliament.²¹ All of this has been taking place against a backdrop of the atrocities of 9/11 and later international developments, which have brought new challenges to the fundamental values which we associate with Magna Carta.

We in the UK tend to think that the American courts are far more conscious of Magna Carta than are we. Stivison calculated in 1991 that between 1940 and 1990 the Supreme Court of the United States had cited it in more than 60 cases.²² We have found another 31 US Supreme Court cases since then, including nine in the last ten years. As far as we can discover, it has been referred to in judgments in only 24 cases before the House of Lords, the Judicial Committee of the Privy Council and the Supreme Court of the United Kingdom, but six of these are in the last ten years. Does this indicate a renewed interest in the values it embodies?

In 2003, in the Court of Appeal, Lord Justice Laws held that there is a category of constitutional statutes, including Magna Carta, but also the European Communities Act 1972, which cannot be impliedly repealed or modified by later ordinary Acts of Parliament.²³ Last year, in the *HS2* case,²⁴ the Supreme Court questioned whether one constitutional statute could impliedly modify another. This was a challenge to the government’s decision to gain planning consent and the

²¹ For an account, see “UK Constitutionalism on the March”, keynote address to the Administrative Law Bar Association, 12 July 2014, accessible at www.supremecourt.uk/speeches-140712.pdf.

²² DV Stivison, “Magna Carta in American Law”, in DV Stivison (ed), *Magna Carta in America* (1993) at 103.

²³ *Thoburn v Sunderland City Council* [2003] QB 161, at para 62.

²⁴ *R (Buckinghamshire County Council) v Secretary of State for Transport* [2014] UKSC 3, [2014] 1 WLR 324.

necessary compulsory powers for the construction of a new high speed rail link between London and the English midlands by way of a bill before Parliament. The challengers argued that Parliamentary scrutiny would be inadequate to comply with the requirements of the European Directive on Environmental Impact Assessments, which we are obliged by the European Communities Act 1972 to observe. Until the case got to the Supreme Court, no-one had taken the point that for us to enquire into the adequacy of the parliamentary process would be contrary to article 9 of the Bill of Rights of 1689, which provides that “freedom of speech or debates or proceedings in Parliament ought not be impeached or questioned in any court or place out of Parliament”. Lord Neuberger and Lord Mance, in a joint judgment with which the rest of us all agreed, referred to a number of constitutional instruments, including Magna Carta, the Petition of Right 1628 and the Bill of Rights 1689, and continued,

“It is certainly arguable that there may be fundamental principles, whether contained in other constitutional instruments or recognised at common law, of which Parliament when it passed the European Communities Act 1972 did not contemplate or authorise the abrogation.”

This is heady stuff for those of us who were brought up to believe that “Parliament can make or unmake any law”, although it falls well short of constitutional entrenchment.

Not only that, our courts have become more vigorous in applying the “principle of legality”, by which Parliament is assumed not to have authorised the abrogation of a fundamental right by executive action unless it does so in plain language, so that any Parliamentarian would understand what was at stake and be prepared to take the political risk in agreeing to it.²⁵

Fundamental rights are not to be overridden by general or ambiguous words. This means, I

²⁵ *R v Secretary of State for the Home Department, ex p Pierson* [1998] A 539; *R v Secretary of State for the Home Department, ex p Simms* [2002] AV 115; *HM Treasury v Ahmed* [2010] UKSC 5, [2010] 2 AC 534.

think, that three of the earlier cases in which Magna Carta was mentioned in judgments in the House of Lords might have been decided differently today.

In *R v Halliday*,²⁶ during the First World War, the majority decided that the broad enabling powers in the Defence of the Realm Act 1914 permitted regulations to be made which authorised the internment of persons with “hostile origins or associations”. Lord Shaw of Dunfermline disagreed. The most famous provision of Magna Carta itself could not be abrogated in this way. He poured scorn on the majority view:

“No rights, be they as ancient as Magna Carta, no laws, be they as deep as the foundations of the Constitution: all are swept aside by the generality of the power vested in the Executive to issue ‘regulations’. ‘Silent enim, leges inter arma.’”²⁷

Then again, during the second World War, in *Greene v Secretary of State for Home Affairs*²⁸ and the more famous *Liversidge v Anderson*,²⁹ the majority held that the Home Secretary’s power to authorise detention where he had “reasonable cause to believe” that the grounds existed did not mean that he actually had to have such reasonable grounds, only that he had genuinely to think that he did. They rejected counsel’s arguments that provisions which took away the fundamental rights to liberty and due process conferred by Magna Carta had to be narrowly construed.

Interestingly, in his famous dissent, Lord Atkin did not refer to Magna Carta at all. He regarded it as a simple question of the meaning of words. The only authority for the view taken by the majority was Humpty Dumpty:

“‘When I use a word, . . . it means just what I choose it to mean, neither more nor less.’ ‘The question is,’ said Alice, ‘whether you can make words mean so

²⁶ [1917] AC 260.

²⁷ At p 289.

²⁸ [1942] AC 284

²⁹ [1942] AC 206,

many different things.’ ‘The question is,’ said Humpty Dumpty, ‘which is to be master, that’s all.’”³⁰

Maybe Lord Atkin’s reluctance to rely on Magna Carta had something to do with the protestations of the British Union of Fascists that these regulations put “Magna Carta in the dustbin”. I do not know. These days, while I believe that we would share his view of the words themselves, we would also take the view that any legislation interfering so drastically with the liberty of the subject should be strictly construed.

The relaxed view taken by the majority of the House of Lords to the deprivation of liberty in times of war contrasts with the much stricter view taken of the deprivation of property. In both *Central Control Board (Liquor Traffic) v Cannon Brewery Co Ltd*³¹ and *Attorney General v De Keyser’s Royal Hotel*,³² they contrived to find that war-time powers to requisition property had not deprived the owners of the right to compensation. Lord Parmoor in each case opined that, at least since Magna Carta, the Crown had had no prerogative power to confiscate property for its own benefit.

These days, we would have to judge such cases, not only against the fundamental principles of the common law, but also against the Human Rights Act. Derogation from its protection of the rights to liberty and to property is possible in times of war or “other emergency threatening the life of the nation”, but even such derogations have to be justified. Thus in the famous *Belmarsh* case,³³ we held that the power given to the executive, shortly after the atrocities of 9/11, to detain suspected foreign terrorists indefinitely without trial was unjustifiably discriminatory against foreigners. If there was a real need for such a measure, we had plenty of home-grown terrorists who needed it too.

³⁰ Lewis Carroll, *Through the Looking Glass*, ch vi.

³¹ [1919] AC 744.

³² [1920] AC 508.

³³ *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68.

I like to think that, with or without the Human Rights Act, we would have reached the same conclusion as the majority of your Supreme Court in the most famous of those nine recent cases in which Magna Carta has been cited in that court, *Boumediene v Bush*.³⁴ Under the Human Rights Act, it would have been easy. The Act governs the actions of the British authorities wherever they are in the world. The Convention rights protect “everyone”, alien or citizen, who is “within the jurisdiction” of the United Kingdom. Those who are detained by the British authorities are undoubtedly within its jurisdiction.³⁵ Article 5 of the Convention therefore applies. Not only must there be good grounds for detaining them but the existence of these grounds must be proved before an independent and impartial tribunal established by law.

Without the Human Right Act, it would have been a little more complicated. But aliens are undoubtedly entitled to apply for habeas corpus, just as the slave Somerset, a “negro of Africa”, successfully did in 1772.³⁶ The test of whether the writ will run against the British authorities is whether they have sufficient control over the person detained.³⁷ We recently held that this test was satisfied in the case of a Pakistani man detained by the British authorities in Iraq but handed over to the American authorities who then transferred him to Bhagwan in breach of the memorandum of understanding between our two countries.³⁸ Two of us were not satisfied with the Government’s return to the writ, and thought that it should have pushed harder for answers from your government, but that is another story. The point is that habeas corpus would undoubtedly have run against the British authorities detaining an alien in a British detention centre on foreign territory. The question would then be whether they had any legal right to do so.

³⁴ 128 S Ct 2229 (2008).

³⁵ *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26, [2008] 1 AC 153.

³⁶ *Somerset v Stewart* (1772) 98 ER 499.

³⁷ *Secretary of State for Home Affairs v O’Brien* [1923] 2 KB 361.

³⁸ *Rahmatullah v Secretary of State for Foreign and Commonwealth Affairs* [2012] UKSC 48, [2013] 1 AC 614.

These are the sorts of cases in which Magna Carta is mentioned, but more as a value underpinning later laws than as a surviving rule of law in itself. But we have had one case recently in which it might have made a difference.³⁹ This concerns the sorry tale of Diego Garcia. Diego Garcia is the largest island in the Chagos archipelago in the Indian Ocean. The islands were a dependency of Mauritius which was ceded to Britain by the French in 1814. In the 1960s the United Kingdom and the United States negotiated to make the islands available to the United States for a military base on Diego Garcia. For this purpose it was necessary both to sever the islands from their dependency on Mauritius (which might soon become independent and possibly non-aligned) and to remove the local Chagossian population. So, by Order in Council under the royal prerogative, without any need for Parliamentary approval, the British Government created a separate colony known as the British Indian Ocean Territory (BIOT). In 1971, when the United States wanted to move in, the Commissioner of the BIOT made an Immigration Ordinance which prohibited anyone from entering or remaining on the territory without a permit. This was part of a “legal façade” constructed by the British government to deny that there was any indigenous population, for fear that their obligations towards a non-self-governing territory under article 73 of the United Nations Charter would be used to prevent the construction of the base on Diego Garcia. The local population were moved out, mainly to Mauritius and the Seychelles, with “a callous disregard of their interests”.⁴⁰

Many years later, one of the islanders, Mr Bancoult, brought judicial review proceedings in England to quash the Immigration Ordinance on the ground that the Commissioner’s power to legislate for the “peace, order and good government” of the territory did not include a power to expel all its inhabitants. In 2001, he succeeded.⁴¹ The Government decided to accept this decision and investigate the feasibility of the islanders returning to the outer islands. In 2004,

³⁹ *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61, [2009] 1 AC 453.

⁴⁰ Lord Hoffmann at para 10.

⁴¹ *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] QB 1067.

however, the Government decided that it would be “impossible to promote or even permit resettlement to take place”. Accordingly, they made a new Constitution Order and a new Immigration Order prohibiting it. (They did not mention that this was precipitated by a plan by some of the islanders and their supporters to stage landings on the islands, which were seen as a security threat to the Diego Garcia base.) Mr Bancoult brought a second set of proceedings to quash the new Orders. He succeeded in the High Court and Court of Appeal, but failed in the House of Lords, by a majority of three to two.

Among the many arguments deployed on behalf of the islanders was one based on chapter 29 of Magna Carta: “No freeman shall be . . . exiled . . . but by the lawful judgment of his peers or by the law of the land”. It was accepted that Parliament might pass a law exiling a person from his homeland, but it was argued that an Order in Council in the exercise of the royal prerogative to legislate for the colonies could not do so. Three of the Law Lords disposed of this argument by holding that the Orders were “the law of the land” for the purpose of chapter 29 (thus holding that “or” means “or”). Two of the Law Lords held that there was no prerogative power so to legislate as to exile a population from its homeland. Magna Carta, and the later development of its principles by Blackstone and Lord Mansfield lay at the heart of their reasoning.

I was not a member of the panel which heard that case. I wonder which way I would have decided it? I wonder which way the Supreme Court of the United States would have decided it? Whatever the answer, it seems clear to me that the values which underpinned the Magna Cartas of 1215 and 1225 are as important in today’s world as they were then and as much in need of protection in our courts.