



**British Institute of
International and
Comparative Law**

BIICL Annual Grotius Dinner 2015 Speech delivered by

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There is one immutable rule of every legal event in 2015; mention must be made of Magna Carta.

Magna Carta pre-dates Grotius by some 300 years and it might be thought that international law was a concept unknown to those who gathered at Runnymede 800 years ago.

Of course it was, but international power play and the rules governing it were not unknown even then. And there are lessons for us in this country – and not just the conventional ones we all know about - which resonate down the ages from Runnymede to us today, lessons which say much about our place in the modern world.

Of course, we all think we know quite a bit about Magna Carta.

We know it was sealed by Bad King John.

We know he was Bad King John because of *1066 and All That* and much of what follows is, I'm afraid, not much more profound than Sellars' and Yeatman's treatment of English history.

We also know he was a bad king because AA Milne told us:

*King John was not a good man
He had his little ways.
King John was not a good man,
And no good friends had he.
He stayed in every afternoon.
But no one came to tea.*

We probably know more than Tony Hancock in his take on Sidney Lumet's classic *Twelve Angry Men*:

"Does Magna Carta mean nothing to you? Did she die in vain? Brave Hungarian peasant girl who forced King John to sign the pledge at Runnymede and close the boozers at half past ten! Is all this to be forgotten?"



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I doubt either Hancock or King John was thinking much about a Hungarian economic migrant taking advantage of our international obligation to permit the free movement of workers within the EU. Or maybe exercising her Article 10 right to speak freely, even unto the King. But maybe we should.

Magna Carta is conventionally seen as the result of a power struggle between Bad King John and the Barons. But there was definitely a foreign element.

The biggest, most powerful supra national player in the 13th century was the Pope, exercising extraordinary powers across the known world. He had a far more potent enforcement tool than Luxembourg fines or a resolution of the Council of Ministers in Strasbourg. He could excommunicate.

And, as Igor Judge and Tony Arlidge make clear in their splendid book *Magna Carta Uncovered*, Innocent III's power hovered over the fields of Runnymede in 1215.

Between 1205 and 1213 he too thought King John was Bad King John. John refused to accept that a foreign Pope could impose his choice of Archbishop of Canterbury on England. He excommunicated John and in early 1213 authorised Holy War against him. The medieval equivalent of a Security Council resolution. He also pronounced the sentence of deposition on John. This went far beyond the merely spiritual and amounted to a direct interference in the civil government of the land.

But by May 1213 Bad King John saw he was in trouble. This was probably a pragmatic rather than a spiritual insight. As Judge and Arlidge point out, John gave in because the Barons were revolting not because he feared for his soul.

And so Bad King John became Good King John – at least in the eyes of the Pope.

This was not good news for the Barons. And in a further direct interference in the civil government of the sovereign state of England, Innocent purported to annul Magna Carta.

But we kept Magna Carta. It is a highly over-simplified analysis, but those exercising real power in England at the time, decided to put England above the supra national authority whose rules we were committed, on pain of eternal damnation, to obeying.

What did those who rejected the international norm of the time feel? Did they perhaps – to use the Prime Minister Cameron's words when faced with the prospect of complying with the law as articulated by the Strasbourg court's judgment on prisoner voting – feel "physically sick" at the alternative? Probably their greatest fear was for their immortal souls if they did defy the supreme authority of the time. We might doubt that they would have embraced eternal damnation just for a bit of cheap populism and an emetic sound bite.



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Whatever they felt, they got away with it largely because, in medieval Europe, England was a major power. John may have lost much of his lands on the continent but the Hundred Years War was still a hundred years away.

We got away with it in the 16th century too.

Another talking point this year has been the television adaptation of Hilary Mantell's novel *Wolf Hall*.

Every proud bureaucrat loves Thomas Cromwell, the founding father of our craft. As a lawyer, of course, I respect Thomas More, the Patron Saint of politicians, statesmen and lawyers. But Cromwell has always been my man.

Whether one is a devotee of a *Man for All Seasons* or *Wolf Hall*, at the heart of it all is Henry VIII's Great Matter.

We all know the story of the Great Matter. The interplay of power politics between Rome and England and much of the rest of Europe. Henry VIII – one minute Leo X's Defender of the Faith, the next excommunicated and Papal authority granted for war against England and for regime change.

What is occasionally forgotten in all this is that Henry's Church of England was not, of course, the Protestant church. That only began to evolve as we embraced the Reformation during the reigns of two of his three legitimate children, Edward and Elizabeth.

To Henry the Church of England was still the Catholic Church – he just was not prepared to accept that Rome was the final authority.

He wanted the English church applying the norms of the internationally accepted standards of the day, England applying all the rules - save the ones he didn't like: Henry, England, not some foreign Pope would be the ultimate authority in our land. English rules for English people.

And again in a horribly over-simplified analysis, it worked – we got away with it - because the tectonic plates of European power were shifting. England could continue to punch above its geographical weight because the Reformation created a rival international powerbase to Rome.

With both Magna Carta and the early Church of England we defied the international rules of the time and we got away with it. In the complex international flux of the times we were too powerful to be cast adrift. But they were pretty big gambles. What if Philip Augustus had done Innocent's bidding and waged Holy War successfully against England? What if Philip II's great Armada had triumphed? And who knows what happened to all those defiant, immortal souls?



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And now? We seem to be greatly troubled by foreigners again. There are too many in our land and they have too much power over us. We are required to obey rules which allow Hancock's Hungarian Magna the right to be in England and the right to speak freely, even if - apparently - we don't much want her here (except, of course, to harvest our crops and nurse our sick) and we don't much like her views.

We are still punching above our weight internationally partly of course because we remain a major economic power. We are still a Permanent Member of the Security Council. We are still a nuclear power. We are one of the largest members of the European Union. We are a founding member of the Council of Europe and claim pride of authorship of the European Convention on Human Rights. We still see ourselves as a great power, punching way above our geographical weight. We don't really quite see ourselves as Norway - yet - whatever the gainsayers of Brussels may say.

And we are respected for amongst other things Magna Carta and the gift to a grateful world of the rule of law. Celebrating the 800th anniversary, the Prime Minister Cameron has said we lead the way in promoting the rule of law around the world.

But this, taken all together, is a fragile, complex and potentially toxic mix. And there are two large clouds on the horizon.

We might decide as a nation that we hate the rules of the EU and the Council of Europe so much that we choose to leave. So be it – Belarus needs all the friends it can get. Making common cause with Minsk might impact on our ability to punch above our weight, it might degrade us further as a major power. But it is legally unobjectionable. Our Parliament gave; it can take back. It would not threaten the rule of law. It is not for us tonight.

What might be for us tonight and, I hope to such an audience is not too controversial or political, is the other cloud on the horizon.

What if, as has been suggested, we try to stay in the clubs but not play by the rules? What if we try to do what Henry did with the Church; to remain but to refuse to comply with some of the rules? To remain bound by the ECHR but refuse to accept the ultimate authority of Strasbourg?

Would we like the Barons and like Henry get away with it?

It would certainly be impossible to reconcile with any pretence to lead the world promoting the rule of law. Leadership of the Pick and Choose Rule of Law doesn't have quite the same ring to it.

There would be smiles in Moscow and gloom in Kiev. We should not get away with it. But would we?

I hope we never have to find out.