

Magna Carta and the Rule of Law Tradition

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Today, and for much of this year, we celebrate the 800th anniversary of a very old document or bunch of documents, that few of us have read and few of those few fully understand. Even among those who do understand, there is considerable controversy about their meanings, significance(s), and what connections, if any, exist between then and now. A simple question, which is nevertheless very hard to answer, is: What have these ancient documents got to do with us? My answer is: less, more, and different than many people believe.

The argument has five parts. First I sketch two opposed views, those of Magna Carta Votaries, True Believers, on the one hand, and Sceptics, on the other. I believe both are mistaken, indeed both make the same mistake on the way to opposite conclusions. Second, I introduce a theme that I think is less banal than it sounds (I hope that's true, because it does sound pretty banal): Everyone is from Somewhere. Then I move from the first part of my title, Magna Carta, to the second part, the rule of law tradition. I treat it in three stages, by saying something first about tradition, then about legal tradition, and finally about rule of law tradition. My conclusion supports two cheers for Magna Carta and three for rule of law tradition.

I Votaries and Sceptics

On one side, we have those I will call votaries, for whom the brightest jewels of our contemporary constitutional framework – the rule of law, *habeas corpus*, jury trial, equality before the law, the independence of the judiciary and, more ambitiously, democracy and representative government - are products of this long distant agreement between King John and some of his barons. Thus in 1988, Baroness Thatcher declared in Bruges, the heart of (non-British) Europe, that 'We in Britain are rightly proud of the way in which, since Magna Carta in the year 1215, we have pioneered and developed representative institutions to stand as bastions of freedom.' On June 15 this year, a successor of the Baroness, David Cameron called the Charter 'a document that would change the world. ... back then it was revolutionary, altering forever the balance of power between the governed and the government.' Lest we wonder why a conservative politician should be so fond of such a revolutionary document, Mr Cameron explains that 'the great charter shaped the world for the best part of a millennium helping to promote arguments for justice and freedom;'

Magna Carta is something every person in Britain should be proud of. Its remaining copies may be faded, but its principles shine as brightly as ever, in every courtroom and every classroom, from palace to Parliament to parish church. Liberty, justice, democracy, the rule of law – we hold these things dear, and we should hold them even dearer for the fact that they took shape right here, on the banks of the Thames.

And it's not just on the banks of the Thames that they are proud. Our own Rule of Law Institute declares that 'the passion that led people to create the Magna Carta in pursuit of justice lives on in our society and leads us to do the same.' On their reproduction of the Australian 1297 copy of Magna Carta they write, 'the document is important because it is the foundation of the rule of law, due process, and many other legal principles that we take

for granted today. The idea that those who have power must follow the rules as developed over 800 years and has come to represent equality and liberty before and through the law'. And while our Chief Justice, Robert French acknowledges the distance, not merely geographical and temporal but also of expectations and interpretations, between then and now, he avers that 'despite the myth and its often overlooked early history, the Magna Carta has transmitted through the centuries the idea that all official power is subject to the law ... its enduring legacy—the lesson that no power is absolute. It informs our constitutional heritage of the rule of law under which Australians can enjoy their freedoms, develop their talents and pursue their opportunities.' His predecessor as Chief Justice, Sir Gerard Brennan similarly acknowledges that though the current symbolic significance of Magna Carta might outrun its meaning as originally understood, it is 'an incantation of the spirit of liberty.'

Such tributes from the great and the good are in virtually unlimited supply, particularly in this octo-centenary year, but we didn't invent them. At least from the seventeenth century onwards, in Britain and its colonial and ex-colonial tributaries, perhaps above all the United States, Magna Carta has had what these days we like to call *iconic* significance.

And yet, there are some who think it a false icon. Thus in an op-ed piece for the *New York Times* earlier this year, Professor Tom Ginsburg, eminent constitutional scholar from the University of Chicago, implores us to 'Stop Revering Magna Carta', (Ginsburg 2015) and rebuts many of the 'myths' that have come to encrust the 'Great Charter'. It was not the first document of its type, though that is often alleged; it was ineffectual, its first incarnation quickly provoking civil war rather than restraining the King; and it was not, he insists, the 'ringing endorsement of liberty' it is so often claimed to be. Instead, some of its less hallowed but more precise clauses include one preventing Jews from charging interest on certain debts, another barring a woman's testimony from leading to the imprisonment of anyone for killing anyone except her husband, and another removing fish traps from the Thames and other waterways (save on the sea coast). Even its most famous clauses that grant 'the lawful judgment of his peers or ... the law of the land' and timely legal justice to every 'free man', particularly chapters 39 and 40,¹ are limited in their substantive scope and social reach. They didn't enunciate habeas corpus or found trial by jury, still less representative government or democracy. They certainly had little to say for those, most of the population then and now, who lacked any of the privileges of those dead white male barons who did the deal.

Similar complaints are even made by people as close to the Thames as Mr Cameron. The historian, novelist, and former London barrister, Dominic Selwood (Selwood 2015), thinks no more than Ginsburg does of either the purpose, the beneficiaries, or the contents of the Charter. In a blog beguilingly titled, 'The cult of Magna Carta is historical nonsense. No wonder Oliver Cromwell called it "Magna Farta"', he argues that the 'widespread worship of Magna Carta as one of the planks of an English person's rights has no basis in law or history. In fact, almost everything commonly attributed to Magna Carta is wrong. ...

¹ 39: No free man shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgment of his peers or by the law of the land.

40: To no one will we sell, to no one will we deny or delay right or justice.

[Later versions of the Charter collapsed these two chapters into one, chapter 29]

Despite widespread beliefs about the charter's contents, it actually contained very little of significance ... did not guarantee freedom to all true-born English people, subject the king to Parliament, enshrine the notion of trial by jury, guarantee freedom of speech, embed the concept of no taxation without representation, or anything along these lines.' Anyway the original agreement 'was only honoured by the barons and King John for a total of nine weeks, before being ignored and consigned to the midden heap.' And what of today? Though the Charter is older than any other English statute, 'It should perhaps come as no surprise that the [three] articles of Magna Carta that do remain on today's statute book are all so vague and undefined that they are largely legally meaningless.'

Equally sceptical, and more intriguing because of the eminence and expertise of its source, is the view of Lord Jonathan Sumption of the United Kingdom Supreme Court, who is mega-distinguished both as a lawyer and a medieval historian. He begins an address on 'Magna Carta then and now' (Sumption 2015) with what might be construed as a self-denying ordinance: 'It is impossible to say anything new about Magna Carta, unless you say something mad. In fact, even if you say something mad, the likelihood is that it will have been said before, probably quite recently. So you must not expect any startling new line from me, least of all in a centenary year in which something portentous is said about Magna Carta every day.' Nevertheless Lord Sumption perseveres, in terms which don't seem to be mad and do seem to be novel, or at least to run against the laudatory current. He contrasts two views of the Charter, 'the lawyer's view ... which holds the charter to be a major constitutional document, the foundation of the rule of law and the liberty of the subject in England. The other is the historian's view, which has tended to emphasise the self-interested motives of the barons and has generally been sceptical about the charter's constitutional significance.' On this matter, while he concedes that 'the lawyers have been more successful in propagating their views than the historians,' Lord Sumption considers the lawyers' claims for the foundational significance of the Magna Carta to be 'high-minded tosh.' I guess that's better than low-minded tosh, but it doesn't seem much better.

To Lord Sumption, the Charter was in no way a constitutional document but one dealing with minor incidents of feudal law, of interest only to King John and the 150 to 180 barons who took part in the negotiations. It spoke not to the future, in which these matters lost their importance due to changing political and social circumstances, but to the quickly vanishing past, in relation to which it said little new. That is why, 'gradually the English lost interest in the Magna Carta.' It had its days in the 13th and 14th centuries, largely disappeared from view in the 15th and 16th, and owed its reincarnation to the myth-making enthusiasms and embellishments of one seventeenth century judge and politician, Sir Edward Coke. His newly mythologised reanimation of the Charter was 'swallowed wholesale by the early American colonists', and following them, one might add, large swathes of what became the English speaking world. So if Magna Carta does matter today, as Sumption concedes, it does so not as a medieval document but rather as 'a chapter in the constitutional history of seventeenth century England and eighteenth century America.'

Why then should we be interested in the original today? No reason really: 'when we commemorate Magna Carta, perhaps the first question that we should ask ourselves is this: do we really need the force of myth to sustain our belief in democracy? Do we need to derive our belief in democracy and the rule of law from a group of muscular conservative millionaires from the north of England, who thought in French, knew no Latin or English, and died more than three quarters of a millennium ago? I rather hope not.' (18)

Of course, neither side – neither votaries nor sceptics – is ignorant of what the other is saying. The votaries are well aware that we find much more and much different in Magna Carta today than did its makers in 1215. They know that many of the chapters of the 1215 Charter do not even hint at the large principles we revere, and that no mention of ‘habeas corpus, prohibition of torture, trial by jury, and the rule of law’ can be found even in the Charter’s most famous chapter 39. They are likely to say, as does the historian Peter Linebaugh, that these have all been ‘derived’ (Linebaugh 2008, 28) from that chapter. And they often commonly qualify their encomia to ‘the triumph’ of Magna Carta [Arlidge and Judge, 2014, 154] with riders such as ‘or more accurately, the ideas for which Magna Carta was the inspiration’ [Arlidge and Judge, 2014, 154, 161] They are fond of metaphors of organic development: the Charter was full of ‘germs’ [Arlidge and Judge, 2014, 78] of future blessings such as due process and representative government, what we have now was there ‘in embryonic form’, even though for long periods of time these embryos must have seemed still-born.

Sceptics in turn, though they are likelier to speak of ‘myths’ rather than embryos and germs, don’t deny that these myths have come to be used to significant effect many times and in many places. Both sides, in other words, acknowledge that something has happened between 1215 and 2015, to give the Charter the significance it now is thought to have. It is just that votaries attribute this to the growth and blossoming of seeds already sown in 1215, while sceptics think its present significance has nothing much to do with the original Charter itself, but, centuries on, with mythmaking exploiters and gullible enthusiasts for old fairy stories that support new purposes.

Moreover, another curious feature of these arguments is that, notwithstanding the distance between votaries and sceptics, there doesn’t seem much disagreement about the actual facts of the matter: when the Charter was negotiated, between whom, what was in it, how it was amended, how many versions appeared, who made something of it, when, how it featured in later celebrated invocations, and so on. Rather the disagreements are interpretive: conflicting interpretations of what we already know. In particular, how to characterise the relationship between the original Charter, later invocations, and whatever else has been said by votaries to have been ‘germinating’ in its provisions or, by sceptics to, have been retrospectively read into them. Does the Charter, like some documentary Rip van Winkle, come to bestir itself in later ages, or is it just an old relic, that would have been (should have been?) forgotten had it not been disinterred by later generations, to dignify their new concerns and more specifically to provide an attractive origin myth for them?

In disputes of this sort, no newly discovered fact is going to sway anyone. We know all we need to know. But we might be aided by reminders of things so obvious that, while no one could consider them revelations, few take them into account. They are treated as obvious background, and so unobserved. The point is less to point out that they exist, which no one doubted, but point to their significance, which not everyone has noted. And so, to my next revelation:

II Everyone is from Somewhere

Some thirty years ago, I was writing a piece on revolutions and the continuity of law, with Adam Czarnota, a Polish colleague and friend. He tried to persuade me that until the advent of Communism, no so-called revolution had ever led to anything truly new. I demurred shyly, suggesting that something might be said to have come out of eighteenth-

century America and France. “Bah,” he replied dismissively. ‘Once we learned we were all equal in the sight of God, the rest was interpretation.’ This is not much of an explanation, since, as we know, what might now seem the Bible’s self-evident implications were rejected and/or violated with good conscience by most of the Judeo-Christian world for millennia. One might say ignored, except that for many these implications were not even conceived or conceivable. Christians were Crusaders, Inquisitors, slave owners, and condescending colonialists, and their consciences were rarely torn apart by contradictions between their faith and their practices. Indeed their understandings of their faiths often spurred their practices. Moreover, both those who did and those who didn’t think celestial equality might have some implications for the profane here-and-now, often quoted the same texts. In any event, as the sociologist and theologian, Hans Joas puts it, ‘maturation across centuries is not a sociological category’ (Joas 2013, 5). it is a metaphor which, without more, explains nothing.

That is why airy talk of embryos, gestation, germs, inspirations, is all too swift. It is also why it is so easy to be a sceptic about suggestions that there are any links between Magna Carta then and now. Picking up differences between how it was understood by its framers and its inheritors is like shooting fish in a barrel; easy sport. On the other hand, the sceptic who sees only free manipulative myth-making in the reiterated references to Magna Carta over centuries is blind to an important point that votaries rightly see, but do not have the concepts to express.

For Czarnota’s observation is far from empty. As the sociologist Edward Shils has observed, ‘every human action and belief has a career behind it’ (Shils 43). No one starts from nowhere, and where we start influences where we might go. Equally to the point, it influences who and how many might come with us. That is as true of the first Charter itself as it is of its subsequent appropriations by people such as Sir Edward Coke centuries later. None was putting their quill on a blank piece of parchment. Thus the sceptical claim that the Charter was not the first to express the ideas it contains is far less interesting than sceptics think. Of course it was not. A public document, intended to settle a fierce dispute between warring parties here on earth could not be written by Martians in the language of Mars. It had to be written in terms that made sense to those who were to agree to them. Not only because people would not agree to things they hadn’t thought of, but because to a significant degree they couldn’t even *think* much that hadn’t already been thought, or at least that didn’t make sense in terms of what was already thought.

It is thus not an accident that other countries whose legal traditions stemmed from the same sources saw similar documents with similar provisions at similar times, among them the Hungarian Golden Bull of 1222 and the German Statute in Favour of Princes of 1232 (Berman 1983, 515). Nor that contemporary legal writings expressed similar principles, notably Bracton’s *On the Laws and Customs of England*, arguably more influential on the development of the rule of law tradition in England than was Magna Carta (Reid, 2004, 11ff.). That doesn’t mean that the Charter was not distinctive, either in origin or content. Though the language and concepts were available, they didn’t dictate the precise terms of the agreements reached and recorded, which were specific results of the negotiations between King, Church and barons; hammered out in dramatic circumstances, where the King was forced to make public concessions in legal form; endorsed as a statute by successive monarchs; the Charter became a notable, identifiable part of English law, for lawyers to interpret and in interpreting adapt, over centuries. I just point out, what is a

natural fact about the history of ideas, that its creators were creatures of their time and place.

Nor does the fact that generations who have drawn upon the Charter find different implications than those that could have been apparent to the original participants, deny links between them. The interpreters too lived sometime in some place, not any time anywhere. It is not an accident that specific later histories and traditions in Hungary and German states meant that the fates of their thirteenth century 'charters' were very different from that of the English one. Yes, Coke was spurred by novel annoyances to find things in the Charter that could not have occurred to your average thirteenth century baron, but could speak to audiences among seventeenth century English lawyers and parliamentarians. Yes, Kings James I and Charles I bitterly, and by all accounts sincerely, rejected his arguments, and had their own arguments, which were also not invented out of whole cloth by them and spoke to many of their supporters.

On the other hand, had Coke been trying to speak to the Mongol invaders who conquered Russia only a few years after Magna Carta, or to Aleksandr Nevsky who ruled Russia as their vassal for much of the rest of that century, or to the Tsar in the seventeenth century, or even to Mr Putin today, he would have had less traction than he did, even if he had somehow been able to bring himself to make the same arguments about the same texts as the original Coke did. Because for an argument to strike root, the soil must be receptive. It is not always or everywhere so. Russia has for centuries had very different legal and political traditions than western Europe generally, and England more particularly. Indeed it makes more sense to speak of Russian *state* traditions rather than specifically *legal* ones, and certainly not rule of law ones (see Pipes 1974). The Russian tradition made no room for constraints on the Tsar, who did not merely rule but *owned* the Russian lands, and whose 'barons' served him but could not resist him. There was rule without reciprocity in the Russian tradition, whereas European (not just English) feudalism was full of rule and reciprocity and productive tensions between them which generations of lawyers could exploit, and many political thinkers sought to resolve. In these circumstances, over centuries, what I will call a rule of law tradition was largely absent from Russia. In England, such a tradition was never the only game in town, it had many participants saying many things, and its implications were never predetermined, but it was hugely significant, connected Magna Carta to Edward Coke, and that came to matter.

So I will now turn to the second part of my title: 'rule of law tradition.' Of course, when we talk of Magna Carta, we are already simplifying since, as everyone knows, there were several different texts produced in the thirteenth century and it came to stand for many different things. But that is as nothing to the simplification involved in invoking a rule of law tradition, which is an altogether more amorphous, plural, and variegated phenomenon. Still, there is something in it, and it is a key part of the context which explains Magna Carta, explains its survival, contributions and adaptations, explains much of what we value in our legal order, and connects them all. It is the elephant in the room; rather large, rather old, and rather rare. We would do well to take it into account. I will try to do so, first with some observations about traditions in general, then about legal traditions more particularly, and finally about rule of law traditions, more specifically still.

III Tradition

Michael Oakeshott has observed that ‘a tradition of behaviour is a tricky thing to get to know.’ (Oakeshott 1962, 88). Quite so. Partly because, typically, a significant tradition is rarely one thing, but an intricate order of interrelated elements, some explicit, many implicitly assumed, some containing injunctions about matters of substance, others instructing participants how to regard, read, respond to such injunctions, what are appropriate questions to ask, what appropriate answers to give. Not only are traditions highly complex, theirs is a layered complexity where insiders learn from some layers, eg, rules of interpretation, authorised ways of understanding how to deal with other layers, eg, rules of behaviour. It’s also tricky because so much that matters in complex traditions is not explicit, but just part of the background, tacit knowledge, that novices in traditions are required to learn, in order to become adepts. To return to Oakeshott:

[a]ll actual conduct, all specific activity springs up within an already existing idiom of activity ... The questions and the problems ... spring from the knowledge we have of how to solve them, spring from the activity itself. Oakeshott 1962, 101-02)

The idiom of activity *within which* – not simply with which – lawyers learn to think and speak is that of their particular legal order and it is transmitted in the traditions of that order, sometimes for an extraordinarily long time. Learning to ‘think like a lawyer’ – which is what law schools profess to teach when they despair of teaching anything specific, and which is perhaps the only important thing they do manage to teach – is only a particular way of saying ‘learning the idiom of activity of a tradition’, though even then the phrase is not absolutely accurate. One does not learn to think like *any* lawyer, but rather like a lawyer from a specific legal tradition, one at home in a particular legal idiom.

Too often traditions are thought of as static and past. More realistically they are commonly dynamic and ever-present, though always connected to the past. Again, think languages, idioms, not relics. And another fact that should be obvious, but is often missed: *argument* stands at the core of vibrant traditions. As one of the most perceptive observers of traditions, the philosopher Alasdair MacIntyre has remarked: ‘a tradition is an argument extended through time’ (MacIntyre 1988, 12); ‘Traditions, when vital, embody continuities of conflict. ... A living tradition then is an historically extended, socially embodied argument, and an argument precisely in part about the goods which constitute that tradition. Within a tradition the pursuit of goods extends through generations, sometimes through many generations.’ (MacIntyre, 1985, 222) Given this, one of the commonest misunderstandings of complex normative, particularly legal, traditions is to imagine that they are or indeed can be unchanging. In a tradition of any longevity and significance, argument meets counter-argument, and both are modified continually. Change is not inconsistent with continuity but an element of it.

Let us return to the Charter. In what is widely accepted as the classic text on Magna Carta. Professor J.C. Holt makes a profound observation, about the Charter specifically but of much more general significance as well: ‘The history of Magna Carta is the history not only of a document but also of an argument. The history of the document is a history of repeated re-interpretation. But the history of the argument is a history of a continuous element of political thinking.’ (Holt, 2014, 46) Moreover, this was an argument that did not start in the thirteenth century but had begun at least in ancient Greece, and Rome, and by the time of the Charter was not merely going on in England but throughout western Europe. If David Cameron’s litany of ‘liberty, justice, democracy, the rule of law’ was in some way the result, Magna Carta can hardly have been the single cause, because its elements are

thriving in France, Switzerland, Denmark, and numerous other countries where the Thames does not flow. And even where it does, in such enduring arguments even the most hallowed symbolic contributions, Magna Carta among them, are never the only moving parts. They are embedded in traditions where there is always a lot else going on, particularly where traditions mix arguments from many sources, and when different traditions mix. A document that is part of a significant tradition will draw upon arguments already made, will contribute its own, and will be reinterpreted by later participants in the tradition, in the light both of what they find in it and what they bring to it. For traditions of thought are not mere neutral vehicles for the passage of sacred relics, even when that is what they say they are.

If there is all this arguing going on, does this necessarily support Lord Sumption's preference for scepticism about the seminal significance of Magna Carta. I think not. Rather, it exposes the false choice we are invited to make by votaries on the one hand and sceptics on the other. Both are right and wrong at the same time, for the same reasons, and in ways typical of argumentative traditions. Interweaving of inheritance, present response and continuing reception and transformation lies at the heart of enduring traditions and makes them so tangled, absorbing and important in social life. Inheritance is not sovereign, responses are not autonomous. On the one hand, traditions provide contexts and resources for action and thought; often they provide *scripts* for adepts to follow. Think of written constitutions, even those that purport to bind. They never determine how they will be interpreted over time, but in serious constitutional cultures they are rarely irrelevant to the ongoing arguments about proper interpretation either. Interpreters embroider, improvise and innovate within these framing idioms, and the resources and limitations they provide. More broadly, we can adopt another felicitous observation of MacIntyre's. St Thomas Aquinas, a not insignificant near contemporary (1225-1274 AD) of Magna Carta, 'writes out of a tradition' (MacIntyre, 1988, 164), and the expression is a good one, both for Magna Carta itself and what came to be made of it. They were written out of, and also into, a tradition.

Interpretive traditions and the arguments they embody and transmit are often as important as they are unnoticed; interpreters develop them, often in unprecedented ways. Inheritances from, and versions of, the past are continually being refashioned for present purposes. In all complex and enduring traditions, there is constant interplay between inherited layers which pervade and – often unrecognised – mould the present, and the constant renewals and reshapings of the purported past in which authorised interpreters and guardians of the tradition and lay participants indulge. In such a context creativity is inescapable and pervasive but it is conducted 'within an already existing idiom of activity,' often of considerable power and complexity. Magna Carta only has importance within the traditions to which it did, and was made to, contribute. It itself was no 'unmoved mover' both because it was not unmoved – it came from somewhere particular and embodied particular concerns – and on its own it couldn't move much at all. It needed to be absorbed, invoked and argued about. It was in the thirteenth and fourteenth centuries when it was repeatedly confirmed, less so in the two centuries that followed, was picked up again in the seventeenth. It now remains as a symbol rather than an argument most of the time, since at least at the level of rhetoric the argument has been won.

IV Legal Traditions

What has been said about arguments and traditions is true of all sorts of traditions. But it is not irrelevant to the career of Magna Carta that it was a legal document generated

within a developing legal tradition and interpreted and reinterpreted by lawyers over centuries. For it matters that lawyers have been particularly central in the animation and re-animation of the Charter. Law is one of the most self-consciously traditional of practices, and lawyers have a distinctive preoccupation with the legal pasts. They are always mining the past for *authorities* they can deploy in the present; that is something engineers, for example, don't do in the same way – their tradition has a thinner presently active past than does law - and it is characteristic of the profession. They are not expected to recommend a result simply because it would be a great idea, they recommend it because they claim it flows from the existing law, some of it – particularly in the common law – very long-existing law. That law has *authority*, and it also contains ideas, arguments, resources for thought. Lawyers are expected to take the legal past seriously.

So lawyers have a special interest in the past, but it is different from an historian's interest. It is not primarily to establish what happened but to draw on the present-past of law to deal with present legal problems. This gives lawyers a distinctive way with the past, captured by the great historian, F.W. Maitland's remark, in seeking to explain 'Why the History of English Law is not Written' (though he did a lot to write it), that the lawyer is less interested in 'medieval law as it was in the middle ages, but rather [in] medieval law as interpreted by modern courts to suit modern facts' (Maitland 1911, 49).

This is not a modern foible that needs to be cured; it's part of what it means to interpret the law for lawyerly ends, to 'think like a lawyer', and it has always been so. Returning to our context, what the master, Holt, observes in response to ultra-literalists' criticisms of deviation from the sacred text of Magna Carta applies equally to sceptics' claim that its influence is 'mythical' because such deviations have occurred:

It is quite invalid to treat Magna Carta as a kind of datum from which all subsequent departure was unjustified. Magna Carta was simply a stage in an argument and bore all the characteristic features of the argument – the erection of interests into law, the selection and interpretation of convenient precedent, the readiness to assert agreed custom where none existed. It was not only law: it was also propaganda. Hence to accuse Coke or anyone else of 'distortion' is scarcely illuminating, for to distort a distortion is little more than venial. (Holt, 2014, 48)

To ask whether these processes of affirmation and transformation are either unaltered transmission or prefiguration, on the one hand, or mythmaking on the other, is simply to misunderstand the enterprise. Though we never start from nowhere, once we do start we're unlikely to end up in the same place. If we were to start somewhere else, thirteenth or seventeenth century Russia, to recall my earlier examples, the questions we would put to our sources, and the answers we would glean from them, would be different from beginning to end, even if the sources were the same.

The present of any complex and enduring tradition is profoundly influenced by what comes down to it from the past, but little that is important remains without change. What has to be stressed is the constant *interplay* between inherited layers which pervade and – often unrecognised – mould the present, and the constant renewals and reshapings of these inheritances, in which authorised interpreters and guardians of the tradition and lay participants in it indulge, and cannot indulge. So the traditionality of a highly traditional practice such as the common law, or a revered icon within it, such as Magna Carta, does not depend upon the identification of perennially enduring essential elements, objective

carriers of meaning - the same meaning – from distant forebears to us. Nor does the absence of such elements by itself point to the absence or unimportance of continuity in any social practice. Nor, finally, can traditions survive without continuous change, addition, innovation.

Within any legal tradition, authoritative documents do not merely contribute arguments of their own; they often become the *foci* of arguments by other participants, *foci* that it is necessary to appropriate and reappropriate, interpret and reinterpret. That makes them at once central to the argument and malleable, because subject to interpretation. Documents that were treated as central within a tradition can cease to be so treated, as Lord Sumption (somewhat controversially) alleges happened to Magna Carta in the fifteenth and sixteenth centuries; certainly there were fewer public and official invocations then. When such changes occur, it seems odd to attribute them to the document itself which hadn't changed since when it was everywhere, and did not change again when it was nowhere, nor when it reappeared. But it was part of the legal tradition, it didn't disappear, and it could be revived by partisans whose interpretations suited their aims. And so, Sir Edward Coke, the great reviver, and the greatest of all votaries of Magna Carta and the supremacy of law.

It might be true that Coke, who Lord Sumption takes above all and virtually single-handedly to have fashioned our 'myth' of the Magna Carta, was a fundamentalist votary in my sense about Magna Carta, and saw it as an unchanged bequest, that inherited, encoded and transmitted elements of the 'ancient constitution' of England. That was the original interpretation of Coke by J.G.A. Pocock, our most famous interpreter of his thought. According to Pocock, Coke saw the common law as a kind of unextinguished flame which, once lit in 'time immemorial' had burnt 'throughout the centuries and derives its authority from its having survived unchanged all changes of circumstances' (Pocock 1987: 37). As a result, 'the men of 1628 could believe that they were not only repeating the solemn act of 1215, but taking part in a recurrent drama of English history at least as old as the Conquest' (Pocock 1987: 45). On this interpretation, Coke saw himself as keeper of the flame against blowhards like James and Charles I, who were seeking to snuff it out.

But this is not the only way to attribute significance to elements in a long legal tradition, and it was neither the only nor the dominant interpretation in Coke's own seventeenth century, when Magna Carta was revived. More recent interpreters have argued that this image of the common law, and within it Magna Carta, as an unchanging deposit transmitted over centuries, even if true of Coke's version, was never the interpretation widespread among the most distinguished and sophisticated common lawyers. Such lawyers, among them in the seventeenth century Spelman, Vaughan, Selden and Matthew Hale, in the eighteenth Blackstone and Lord Mansfield, had no time for immemorial origins. Since evidence was poor and incomplete, they argued, there was no way of knowing such origins with any exactness. In any event it is not in the nature of law to remain unchanged:

From the Nature of Laws themselves in general, which being to be accommodated to the Conditions, Exigencies and Conveniencies of the People, for or by whom they are appointed, as those Exigencies and Conveniencies do insensibly grow upon the People, so many times there grows insensibly a Variation of Laws, especially in a long tract of Time.

(Hale [1713] 1971, 39)

Indeed, Hale thought it absurd to imagine that the law should remain unchanged:

‘The matter changeth the custom; the contracts the commerce; the dispositions, educations and tempers of men and societies change in a long tract of time; and so must their laws in some measure be changed, or they will not be useful for their state and condition’ (Hale [1665] 1982, 269–70).

If there was all the adding, subtracting, altering and creating that Hale describes, what held things together, in the absence of the glue of identity; what made all these different laws part of the same ‘common law’? For Hale, and the common law tradition more broadly, change was an intrinsic characteristic of a legal order in constant organic evolution. Like a person, the law maintained its continuity through a process of continual change and growth. Or, to change the metaphor as several of them did, the common law survived change just as ‘the Argonauts Ship was the same when it returned home, as it was when it went out, tho’ in the long Voyage it had successive Amendments, and scarce came back with any of its former Materials’ (Hale [1713] 1971, 40). What made all its elements part of the same law was not their changelessness but their continuity. And this continuity had more to do with the continuing authority and reception of the law than it did with any demonstrable objective longevity of all its elements.

I think this is not a bad rendition of what typically happens in argumentative traditions, where an authoritative past is debated in everchanging presents. It is not faithfully rendered by a picture of Magna Carta either as some sort of magician’s hat out of which ever more attractive rabbits pop over time, or as a simple *ex post facto* bit of politically driven myth-making on the other. It is more complex than either of those options; more noble than either too. Noble, not simply because it is traditional, since there are plenty of obnoxious traditions faithfully observed, but because it is a tradition of a particular sort, a rule of law tradition. And that makes Magna Carta noble, too, since it was a plausible, and has been taken to be an actual, emblem of and contributor to that tradition.

V A Rule of Law Tradition

Unless it is five minutes old, every society that has law has legal traditions. But they differ, and not just in their particular rules and institutions. Enduring legal traditions come to be manifest, not simply as particular precepts of law, or particular canons of interpretation or even in particular ideals, but in something broader and more overarching. Comparative lawyers have noted that beyond particulars of machinery and rules, legal traditions embody characteristic and distinctive ‘styles’ [Zweigert and Kötz, 1987, 69] and even ‘visions’ [Atiyah and Summers, 1987, 411] of law. More deeply, a number of authors have emphasised the extent to which particular legal orders embody and presuppose distinctive ideologies in a broad sense, distinctive ‘ways of viewing both law and the world’ (Kamenka and Tay, 1975, 128), which incorporate particular constellations of values, particular ‘legal views of reality’ through which lawyers see the world, particular ‘legal sensibilities’ (Geertz 1983, 215) which are pervasive and inform legal goals, means, doctrines, and machinery. These sensibilities are not seamless or monolithic, and they are subject to strain and to change, but again it is typical that this change has deep roots in what has gone before. And finally it is not merely values and sensibilities *within* the law that matter. Societies differ in the importance and value that they place on law, and such differences also endure. As the American comparativist, J.H. Merryman, has noted:

A legal tradition ... is not a set of rules of law about contracts, corporations, and crimes, although such rules will almost always be in some sense a reflection of that tradition. Rather it is a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught. (Merryman, 1985, 2)

One such 'set of deeply rooted, historically conditioned attitudes' has to do with the rule of law. It is true, significant and has widely been thought appropriate in western legal traditions that law be an independently significant aider *and* constrainer of the exercise of power in society. That has not been the only stream in the tradition, it has mixed chopply with other streams, its significance is often exaggerated, but by comparison with many other legal orders, there has been something significant there to exaggerate. That has not always or everywhere been so. I will be brief here, since elsewhere I have not been (eg., Krygier 2011; 2015). In such a tradition, the exercise of power is viewed as a central problem, and the institutionalised *tempering* of power a central part of the solution. Power is a problem because left to their own devices, power-holders cannot be relied on to avoid exercising it capriciously, and at worst wildly. And as too many people over too many centuries have not only observed but experienced, capricious power is terribly unsettling and wild power is simply terrible. More generally, the potential is alive even when power is not wild but merely, to use the more commonly identified term for this order of vice, arbitrary. Arbitrary power is not necessarily wild but it is usually and already objectionable. That is because, to put briefly what I have argued at length elsewhere: arbitrary power diminishes our freedom, causes our lives to be fearful, denies our dignity, and destroys possibilities of fruitful cooperation among citizens and between citizens and states (Krygier 2011).

And what makes power arbitrary? When power-wielders are not adequately controlled, the grounds for their exercise of power unspecified and untestable, that power beyond serious question or review, there's a problem. Even if you have that, but power-wielders are inclined and able to use their power without any need to provide space for its targets to be heard, to question, to inform, or to affect the exercise of power over them, there's another problem. Neither problem is a good one to have.

Within rule of law traditions arguments have raged over generations about whose and what sorts of power need to be tempered, how and by what institutional structures, in what circumstances and with what institutional devices. Answers have differed within different rule of law traditions and over time in the same ones. Their sources are many, varied, intertwined, at times in tension with each other, but they matter. If they are effective, that is a good thing. If not, the rule of law stands as a critical principle, available to be invoked when political power-wielders seek to evade the constraints of the rule of law, which they are often inclined to do.

Anyway, that is the argument. It's quite an achievement to get rulers to agree; who but masochists voluntarily bind themselves? But in some places the argument has pretty well won the day, so effectively indeed that it need hardly be made. Unlike Henry VIII or James I, their contemporary successors have no counter-arguments, though they still chafe from time to time, and seek to evade the implications of arguments they do not have room to deny.

Not only is the rule of law never the only game in town, it never wins every game. Nor should it, since there are other things we value that might be in tension with it and might require compromise. But a tradition in which the rule of law has been an animating value shared, always unevenly but still significantly, among initiates, lay people and institutions is a good one to have. It is not universal. On the contrary, as the German political theorist, Heinrich Popitz has noted:

Only rarely has it been possible even just to pose the question of how to constrain institutionalised violence, in a systematic and effective manner. This has only taken place with the Greek *polis*, republican Rome, a few city-states, and the constitutional states of the modern era. The answers have been surprisingly similar: the principle of the primacy of the law and of the equality of all before the law (*isonomia*); the idea of setting boundaries to all legislation (basic rights), norms of competence (separation of powers, federalism), procedural norms (decisions to be taken by organs, their publicity, appeal to higher organs), norms concerning the distribution of political responsibilities (turn-taking, elections), public norms (freedom of opinion and of assembly) [Popitz in Poggi 2014, 48]

Distinctive and strong rule of law traditions are, then, not natural facts. In the Russian imperial state tradition, to which I have referred, law was not a central cultural symbol, and to the extent that it counted, it did so as an arm of central power. The notion that power should be restrained by law, that law should have a power-tempering role, both *horizontally* among members of the society and *vertically* between political power-holders and their 'subjects', or that it should do anything but transmit central orders, was for long periods unknown, then heretical, more commonly alien, and late and weak in developing. Here law was viewed primarily as properly a subordinate – indeed servile – branch of political, administrative, and at time theocratic power.

This is not ancient history. Apart from the countries I have mentioned, many recent and contemporary legal orders, for example those of Myanmar and Sudan over the last decades (see Cheesman 2014; Massoud 2013) make use of law systematically to serve ends contradictory to those of the rule of law. Tempering power is simply not the name of any official game. Other polities still have some rule of law values and practices but they are weak in comparison with other values, or are overborne in times of crisis.

In some legal traditions, however, rule of law values are strong. They are evident in the practices of law and more generally the exercise of power, and they matter and are thought to matter in the everyday workings of a society. Where that is so, it is only partly traceable to the activities of contemporary actors, or to particular rules and institutions, though these matter too. It is buttressed, made to endure, made part of the legal culture, by less obvious but no less important, indeed indispensable, legal traditions which underpin and transmit the values and practices (many unwritten) that accompany them.

And that leads me to my two and three cheers. Whatever the detailed targets and beneficiaries of Magna Carta, hostility to the arbitrary exercise of power by the King was manifest in many of its provisions. It might not have been a general thought among the barons who negotiated the particular provisions of the Charter, but many of its chapters exemplified a general principle. That principle was already part of arguments found in western, among them English, legal traditions, and it continued to be a matter of argument and institutional experimentation. The line was not straight, the arguments were often lost,

power and interest trumped them and co-opted them often enough. However, there were victories, many of them coming to be institutionalised in our legal systems, and our expectations of them. That seems to me more than enough reason to celebrate the contribution of Magna Carta to the rule of law tradition, without which it wouldn't have existed, which made of it what it has become, but to which it gave argument, momentum and heft that was both symbolic and real. That does not make me a votary, since the document would have been of no account without the tradition and there is much else to look to for the rule of law features of our tradition, but it also does not make me a sceptic. The rule of law, to repeat, is a noble achievement, and the (indeterminate) contribution of Magna Carta to it deserves celebration. It didn't do it on its own, but then who of us does anything much good on our own?

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