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MAGNA CARTA TODAY

1215, 1415, 1615, 1815, 2015: Reflections on Magna Carta after 800 Years

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Mountebank and masque laughed their laugh, and went their way; and a silence followed them, not unforetold; for amidst them all, through century after century of gathering vanity and festering guilt, that white dome of St Mark's had uttered in the dead ear of Venice: "Know thou, that for all these things, God will bring thee into judgement".

(John Ruskin, *Stones of Venice, Collected Works*, Vol 10, p 142)

1215

What, you might ask, has Ruskin's condemnation of Venice to do with Magna Carta? The dome of which Ruskin speaks comes from roughly the same time as Magna Carta (end of the twelfth century and 1215, respectively). Both St Mark's and Magna Carta have become defining symbols of their places of origin, Venice and England, and have been revered through the ages. (I say England advisedly; more on that to come.) And both are products of a mentality which recognised a higher law, a higher jurisdiction than the temporal. Ruskin again: the Venetians 'did honour something out of themselves; they did believe in spiritual presence judging, animating, redeeming them; they built to its honour, and for its habitation.' (*ibid*: 68) Note, judging. The condemnation is that in later centuries Venetians forgot about being judged and gave themselves over to decadence and debauchery. We will leave that aside for now, and focus on Magna Carta.

Historically speaking, Magna Carta was an agreement forced out of a reluctant king in 1215 by his unruly and discontented barons. Much of it has to do with what appear to be somewhat petty or parochial matters, such as the freedoms of the city of London, the building of embankments, the movement of corn, the placing of weirs on the Thames, the standardisation of weights and measures and the detail of inheritances. However, within the plethora of detailed provisions, and also, unfortunately, some anti-Jewish clauses, there is this:

'No free man shall be taken, or imprisoned, or dispossessed of his free tenement, or liberties, or free customs, or be outlawed, or exiled, or in any way destroyed; nor will we condemn him, nor will we commit him to prison, excepting by the legal judgement of his peers, or by the laws of the land. To none will we sell, to none will we deny, to none will we delay right or justice.' (Clause 29)

In addition, no one can be condemned merely on the oath of a bailiff, but faithful witnesses must be produced, and merchants will be allowed to move about and trade in safety. Thus we have a resounding statement of the rule of law in England, perhaps the first such statement anywhere in post classical times. The rule of law, of course, meant that there was a law to which everyone in the land, sovereign or subject, was subject. Magna Carta also limited the payment of taxes by the barons, and also made the imposition of some subject to consent by a council of the barons. Indeed part of its context had been precisely dispute over taxation. This aspect of Magna Carta eventually broadened out into the key constitutional doctrine that the sovereign could raise taxes only with the consent of parliament.

For eight hundred years these provisions have been held to determine the limitations of sovereignty in England, with, in the fourteenth century, free men being glossed in as simply 'men', and legal judgement to include trial by jury. (Women, of course, were included later, and though Magna Carta does forbid the arrest of a man for murder on the appeal of a woman, it does allow widows the right to re-marry or not to marry and also to keep their inheritances, rights not accorded them in other parts of the world even fairly recently.) Magna Carta's pre-eminence in English constitutional thinking is well represented in the seventeenth century by Sir Edward Coke's lapidary utterance, 'that if any statute be made contrary to the great Charter, that shall be holden for none'. This is from the Proeme to his *Second Institute*, a work written around 1630, but significantly suppressed by King Charles Ist, until 1641; note that Coke says *any* statute: it would apply to a parliamentary statute as much as to a regal one. Interestingly this stance of Coke's was strongly opposed not just by the King, but also by the republican 'Protector' Oliver Cromwell; when it was invoked against his imprisoning of the eminent lawyer Sir John Maynard, Cromwell derisively called Magna Carta Magna Farta, not, in his view, to be allowed to over-ride 'the safety of the Commonwealth'.

Cromwell was not, of course, the first to invoke national need for over-riding legal process, nor the last. To take a typical example, only last April a group of British MPs were criticising a properly taken legal decision not to prosecute a man in an advanced stage of Alzheimer's disease (who, therefore, could not defend himself or even appear in court): 'One man's ill-health cannot be a barrier to the greater public interest', they thundered. It did not occur to these parliamentarians that political interference with legal process would be a far greater assault on the public interest, striking as it does at the very notion of the rule of law and the separation of powers. The man in question's alleged crimes, committed a long time ago, were indeed heinous (if proven); but the rule of law implies precisely that there are occasions on which upholding it requires hard decisions against what looks like immediate necessity (or in this case public opinion), in favour of a longer term good, the rule of law itself.

Because Magna Carta was forced on the monarch, the Papacy recognised it as valid only after John's successor Henry III's so-called Parva Carta of 1231, and after Henry had himself validated Magna Carta in 1225. In doing so, Henry added the words '*spontanea et bona voluntate nostra'*, not a sentiment that would have occurred to John. Nevertheless, and significantly, at the start of the 1225 version of Magna Carta was included the message that what followed was being enacted '**in the presence of God, and for the salvation of our own soul, and of the souls of our ancestors, and of our successors, to the exaltation of the Holy Church, and the amendment of our kingdom', and that what it meant was that certain** liberties **were 'to be held in our realm of England for ever.'**

A number of points are worth noting immediately. Magna Carta was something which originated in rebellion. Hence the young Henry III had, in 1225, to assent to its being *freely* given. The mention of ancestors is important: it was founded, or said to be founded, in ancient custom and practice (however mythical that might have been – and what it articulated was even seen in the fifteenth century as deriving from the legendary Brutus, son of the Trojan/Roman Aeneas, fabled to have settled in Britain in deeply pre-historical times). As founded in ancient practice, though the king assented to it, the customs and ways of doing things which it articulated were to be seen as no mere caprice on his part, but as something to which the king also was bound beforehand. And, in perpetuity: that is, not revisable. Free, ancient, logically prior to any decisions of 1215 or 1225, incorrigible, eternal. None of this, I submit, makes sense, or would have made sense in 1215, had it not been seen as expressing and responding to a law higher and more objective than any fallible and self-interested dispositions of a group of fractious medieval nobles and their unpopular and beleaguered monarch.

Naturally in the scholastic philosophy of the thirteenth century it was well recognised that human laws stood subject to divine law. In the Thomistic scheme of things, the whole world is governed by divine providence. With God there is no distinction between law and himself; law is the expression of his own

will. Earthly rulers may be above the law of the land, exempt from it in the sense that the law has coercive power only through the authority of the sovereign; but good laws or perfect justice are those in accordance with divine decrees. Where the sovereign falls short here, there ought to be checks through the voice of the whole community. This was not merely theological speculation. The thirteenth century English jurist, Henry de Bracton (who died in 1268) wrote 'The king has a superior, namely God. Also the law by which he is made king. Also his curia, namely the earls and barons, because if he is without bridle, that is without law, they ought to put the bridle on him.' (*De legibus et consuetudinibus Angliae* in *Bracton on the Laws and Customs of England,* ed S Thorne, Cambridge, Mass, 1968, vol 2, 110) This is a very succinct statement of the spirit underlying Magna Carta.

So in Magna Carta we can identify recourse to a tradition which is older than the deliberations at Runnymede (where it was thrashed out), immemorial even on some accounts, and to a justice – divine justice – which is ontologically superior to any human law-making, and against which human law-making has ultimately to be judged. The Biblical Wisdom 1.1, 'Diligite justiciam, qui judicatis terram' was, not surprisingly, revered by medieval thinkers (rather similar in spirit to the inscription in St Mark's). The great English fifteenth jurist Sir John Fortescue indeed quoted it, as well as emphasising that the King of England was (or should be) unable to change the laws of the country 'without the assent of his subjects nor burden an unwilling people with strange imposts, so that ruled by laws that they themselves desire, they freely enjoy their properties, and are despoiled neither by their own king or by any other.' (*De Laudibus Legum Angliae (1468-71)*, 27 (Ch 9)) Fortescue also emphasised the need for parliamentary consent in matters of taxation and legislation, which by his time had become customary, but based on customs whose spirit Magna Carta had articulated.

We have already quoted Coke on the scope of Magna Carta, but it is worth noting now that Coke, as the medieval jurists, bases its spirit in earlier custom, tracing it in his case to Saxon times and to King Arthur, and ultimately to a transcendent realm, for ancient law is the expression of the divine mind. 'Without question', he says, '*lex orta est cum mente divina*'; this admirable unity and consent in such diversity of things, proceeds only from God, the fountain and founder of all good laws and constitutions.'(Coke, *Third Reports*, 3) 'Without question': the alternative to the involvement of the divine mind would be '*quod principi placuit legis habet vigorem'* - what pleases the prince, or the parliament or the people has the force of law. But what pleases these entities can hardly, in virtue of pleasing them, have claim to perpetual force, rightly to be held in the realm of England (or anywhere) for ever. Such indeed was the discovery of Hobbes a mere decade or two after Coke, but a world away in spirit – in Hobbes' philosophy law would become whatever emerged from a sovereign emerging out of a social contract founded on fear and loathing. So Hobbes repudiates both the notion of social arrangements prior to explicit contract and any curb on the dictates of the Sovereign so long as he continues to uphold order, or, more generally, the dispersal of power that is the essence of Magna Carta. And, to anticipate, law and social contract founded on professions of universal benevolence would in practice have little claim to be better.

1415

Two hundred years after Magna Carta, the English and the Welsh (and, if we are to believe Shakespeare, some Scots and Irish too), under their young king Henry V, won a famous victory at Agincourt – well, famous in England, but perhaps not so much in France, where it is seen as but one incident in the Anglo-French wars of the fourteenth and fifteenth centuries. From the French point of view, and probably correctly, far more significant in the long term was the routing of the English by Joan of Arc only fifteen years later in 1430, which paved the way for a speedy expulsion of the English kings from their supposedly ancestral regions of France.

Agincourt may well have been a crime of the sort condemned in dome of St Mark's. Certainly there was not much justice about it. Henry V's claim to the French throne was spurious (via a specious appeal to the ancient Salic law), and his campaign in France was arguably an attempt to distract attention in England from the violent seizure of the English throne in 1399 by his own father, Henry IV.

The reason Agincourt and 1415 resonates in English (British?) minds and hearts has far more to do with Shakespeare's play *Henry V*, which actually dated from 1599. Two aspects of the play are relevant to our general theme. The first is King Henry's speech before the battle (in which the English were greatly out-numbered and were facing annihilation). The St Crispin's day speech is without doubt the greatest patriotic rallying cry in the English language, finding its echo down the ages, including in Churchill's war-time speeches in an equally desperate time (though perhaps with more right). It ends:

We few, we happy few, we band of brothers./ For he to-day that sheds his blood with me/ Shall be my brother; be he ne'er so vile./ This day shall gentle his condition./ and gentlemen of England now abed/ Shall think themselves accursed they were not here./ And hold their manhoods cheap while any speaks/ That fought with us upon St Crispin's day.

What I want to suggest here by referring to Shakespeare and Agincourt is that the life of a country is not just a matter of constitutions and laws and parliaments and rights. It is also a matter of a common feeling and a common sense of history. No doubt Shakespeare's inclusion of the Scots and Irish in his Agincourt was an attempt to work on this sense and to broaden it to encompass other parts of the British Isles. And the significance of this shared sense of nationhood is not only a Shakespearian conceit. In August 1941 at the very height of the danger of the Second World War, George Orwell (no friend of what might be called the British establishment) wrote this: 'What has kept England on its feet during the past year? In part, no doubt, some vague idea of a better future, but chiefly the atavistic emotion of patriotism, the ingrained feeling of the English-speaking peoples that they are superior to foreigners. For the last twenty years the main object of left-wing intellectuals has been to break this feeling down, and if they had succeeded, we might be watching SS men patrolling the London streets at his moment… The energy that actually shapes the world springs from emotions – racial pride, leader-worship, religious belief, love of war – which liberal intellectuals mechanically write off as anachronisms…' And of 'the common-sense, essentially hedonistic world-view' these intellectuals put forward (world government, human rights, utopian socialism etc) 'hardly a human creature is willing to shed a pint of blood'. *(The Penguin Essays of George Orwell*, London: Penguin, 1970, 195-6) No doubt many will find what Orwell was saying uncomfortable, particularly perhaps in the EU, and aspects of it are indeed uncomfortable. However if we stick with the English spirit, articulated by Shakespeare and praised by Orwell, part of that spirit is a sense of the freedom and liberty expressed in Magna Carta and developed through the centuries that followed. And the key point here is that without what Orwell calls an ingrained feeling – here an ingrained feeling among the population about liberty and the limits of government – the freedoms we cherish are unlikely to survive. As Karl Popper put it, in an open society even more than good institution you need people with the spirit of openness to man those institutions. (see *Conjectures and Refutations* , London, Routledge and Kegan Paul, 1969, 133-4) Hence the significance for Britain of the feelings we find in Shakespeare and Orwell.

The second point we can derive from *Henry V* is the King's speech in which he laments the cares of office, the 'infinite heartese' that kings must 'neglect that private men enjoy./ And what have kings that privates have not too,/ Save ceremony, save general ceremony?/ And what art thou, thou idol ceremony?' He then expatiates on the emptiness of ceremony, 'the farced title running fore the king' and so on and so forth, but 'not all these, laid in bed majestical/ Can sleep so soundly as the wretched slave/ Who with a body filled and vacant mind/Gets him to rest…' The slave wants the ceremony, nonetheless, while the peace he enjoys, unappreciative of it as he is, is due to the 'watch the King keeps to maintain' it. Magna Carta notwithstanding, in Shakespeare's day, and in Henry's too, the peace the ordinary man enjoyed (or

not) was intimately linked to the watch of his rulers, barons as well as kings. Certainly in 1415, and even in 1599, there was still a long way to go.

1615

I have to admit that the actual year 1615 contained no single event of great significance for our story. However the first decades of the seventeenth century did turn out to house a process which is both related to Magna Carta and which has certainly had momentous consequences all over the world. I refer, of course, to the early settlements by English exiles of the eastern part of what is now the United States of America. These English pioneers came to what was called the New World somewhat after Spanish and French settlers. However, they quickly became more successful than either of these other groups because they brought with them English notions of property. These notions and the corresponding rights were explicitly recognised in James Ist's Virginia charter of 1606, the first one to be granted to the colonists. English colonists were to be granted the same constitutional rights as Englishmen at home.

To quote *A Patriot's History of the United States*, by Larry Schweikart and Michael Allen (New York: Sentinel Books, 2007, 16), 'Born out of the fierce struggles by English landowners to protect their estates from seizure by the state, by the 1600s, property rights had become so firmly established as a basis for English economic activities that its rules permeated even the lowest classes in society. English colonists found land so abundant that anyone could own it. When combined with freedom from royal retribution in science and technological fields, the right to retain the fruits of one's labor – even intellectual property – gave England a substantial advantage in the colonization process over rivals that had more than a century's head start.' Thus the spirit and the letter of Magna Carta was transported to the New World, forming the background to the success of the English-based colonies.

Both spirit and letter of Magna Carta were dominant a century and a half later, during the American war of Independence. It was as free-born Englishmen that the colonists revolted against the British parliament and crown. Against the current and long established interpretation of Magna Carta they were being taxed and legislated for without any say or check on their part, as indeed the original revolutionaries in Massachusetts and Virginia proclaimed in 1767, when they shouted 'Treason' and 'Magna Carta'. In this, indeed, they were supported by in England by no less a proponent both of governmental accountability and of personal liberty than Edmund Burke. According to Burke the colonists were 'not only devoted to liberty, but to liberty according to English ideas, and on English principles'. John Adams himself argued that the edicts of George III of England which stipulated that for the colonies a single judge in an admiralty court could decide on governmental 'forfeitures and penalties' relating to trade amounted to the repeal of clause 29 of Magna Carta. That same Clause 29 had been incorporated both in the original (colonial) constitutions of the thirteen states pre-independence, in many of their declarations of independence, and in the US Fifth Amendment itself ('**No person shall be deprived of life, liberty or property without due process of law**.')

So the American Constitution follows Magna Carta in respect of fundamental liberties, in respect of the rule of law, and also in respect of the balancing of power between the sovereign (or executive), parliament and the judiciary. This much is well known and generally agreed. But there are also the aspects of a law more than human and of the perpetuity of its provisions. As to the first, it is fairly clear that the framers of the Constitution believed that they had hit upon a set of principles which pointed to ultimate, trans-historical truth. 'We hold these truths to be self-evident', they said in the Declaration of Independence, and they could hardly have said that had they believed that what was being enunciated was good just for a particular time and place. The rights they claimed, and which the Constitution was to give effective force to, they claimed on the basis both the Laws of Nature and of Nature's God, and they held them to apply to all men, everywhere. In retrospect we can see that the sources of this confidence were two-fold, the

Judaeo-Christian tradition of natural law and the Lockean political philosophy which under-wrote the (English) Glorious Revolution of 1688, in which a King had been deposed for asserting a divine right to govern without parliamentary curbs. Both Locke's rationalism and the natural law of the Christian philosophers pointed in the direction of a morality and a political philosophy which was not merely or purely historical.

The second aspect in which the Founders of the Constitution may be said to be following Magna Carta is in the perpetuity and scope of its provisions. They understood that freedom required not just the separation of powers, but also that government should have only those powers explicitly required by law and by the constitution itself. This was a protection both against arbitrary power and against encroachment by the state. This is what is intended by the Ninth and Tenth Amendments: '**The enumeration in the constitution of certain rights, should not be taken to deny or disparage others retained by the people. The powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States respectively, or to the people**.' And the Ninth should be read alongside the Fourteenth: '**No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States'** – States are thus as constrained as the federal government in this crucial respect. Note too 'retained' in the Ninth: the Constitution did not give the citizens their rights: rather citizens who had rights (by natural law) agreed to give powers to the State. And note 'to the people' in the Tenth: just as John was forced to recognise certain liberties for his subjects, 'to be held in our realm of England forever', so the Tenth Amendment appears to do the same (and more) for the people of the United States, to protect them against what might be called governmental mission creep. The assumption that even desirable new laws and powers , which are not already ceded to the government by the Constitution would appear to be ruled out by this Amendment, in the same way that under Magna Carta the Englishman has traditionally seen his basic liberties protected under Magna Carta.

In fact, in American history there has been a divergent trend, increasingly dominant both in politics and the judiciary, which does not see the Constitution in its Founders' terms, but rather as something revisable, extendable and even expendable for all sorts of political and social ends. This is not the place to go into any detail on this drift away from the idea that in the Constitution are timeless, even transcendent truths. However, what is worth noting here is that, when Presidents and latterly the Supreme Court are ready to bend the Constitution to suit their own intuitions, sometimes *politicians* have stood firm, as we can see from this resounding statement from the Senate Judiciary Committee objecting to President Roosevelt in 1937. In its view the preservation of the American constitutional system was 'immeasurably more important… than the immediate adoption of any legislation however beneficial. For the continuation and perpetuation of government and rule by law, as distinguished from government and rule by men.. we are but re-asserting the principles basic to the Constitution of the United States.' (Quoted in F.A.Hayek, *The Constitution of Liberty*, University of Chicago Press, 1978, 191) And, I would add, to the principles basic to the meaning of Magna Carta.

1815

1815 was the year of the battle of Waterloo, and so the end of Napoleon's Empire in Europe and of the revolutionary era in France which had paved the way for it. As far as Britain and (I imagine) the United States are concerned, there was and still is a big divide between the spirit of law deriving from Magna Carta and the US Constitution, and that which derives from the Napoleonic system. And here, it seems, aside from the deposition of the Emperor and the restoration of the ancient regime in France, 1815 does not mark such a momentous turn.

For Anglo-American law, as we saw in the case of the Ninth, Tenth and Fourteenth Amendments rests on an assumption of individual liberty, such that whatever is not explicitly forbidden or reserved to the

government is permitted. Very broadly, what is still called the Napoleonic system, and which still obtains in much of the rest of Europe, rests rather on the idea that the state has explicitly to permit things for citizens to be free to do them: what is not in law allowed is forbidden. There have to be regulations governing all kinds of things, which someone brought up with the idea of the mode of life a freeborn Englishman might well think was none of the state's business. The spirit of Agincourt lives on!

No doubt I have over-simplified this contrast, and no doubt in 2015 Anglo-American law is by no means as permissive as once it was. Our legislators seem perfectly capable of regulating our freedoms out of existence on their own without any help from Europe. However, it is clear (to me anyway) that much of the tension between Britain (or Britons) and the EU arises from these different understanding of law, and the sense in Britain that EU law is legislating and interfering – laying down what is permitted - in all kinds of areas in which it would be felt that the law has no proper remit, and this even if our own governments do similar things on their own.

Aside from the introduction of Napoleonic law, what we saw in the French Revolution was exactly the kind of tyranny Jefferson and his colleagues hoped to avoid by their separation of powers, and also by making aspects of the Constitution sacrosanct, as reflecting eternal truths, so as to protect liberty and to give due recognition to human nature. They were, in fact, acutely conscious of the potential danger even democratic rule could pose to fundamental liberty. As Jefferson himself said '173 despots would surely be as oppressive as one… As little will it avail us that they are chosen by ourselves. An elective despotism was not the government we fought for.' (*Notes on the State of Virginia,* Query 13, 1784, 120) France, it could be said, in the 1789-1815 period suffered successively from 173 (or so) despots, claiming democratic mandate, and then from one. But this danger is not confined to France, or even solely to non-Anglo-Saxon jurisdictions. The sage words we have already quoted from the Senate Judiciary Committee of 1937 continued with something to-day's President and Supreme Court might well ponder: 'If the Court of last resort is to be made to respond to a prevalent sentiment of a current hour, politically imposed, that Court must ultimately become subservient to the pressure of the public opinion of the hour, which might at the moment embrace mob passion abhorrent to a more calm, lasting consideration…'

2015

Mob passion is a strong description, though not entirely inapposite in a world of social media and instant responses from politician and legislators. Elective despotism remains a current danger, and one which is anathema to Magna Carta's insistence on the liberties and property of free men. We are brought back by this impressionistic and selective survey of 800 years of history to the fundamental question of what government is for. Is it, fundamentally, to serve immediate purposes which capture the imagination of the majority or of those who hold the reins of power from one time to another, or is it really to preserve and uphold basic liberties which reason tells us should be afforded to all men at all times?

In Britain, in 2015, we actually saw an election whose result was wholly unexpected, but which (at least in the non-Scottish part of the country) led to the humiliation of a party which had campaigned very largely on a programme of resentment and partiality. Maybe this was a case of 173 populist would-be despots attempting to seize power by their one sided and blinkered relentless assaults on the rich and powerful in any way which occurred to them (and inspired incidentally by academic economists of the same bent). The rich and the powerful did deserve some of these criticisms the populists were making, but in the wholly factional and partisan way they made them, they also offended the vast majority of people in the middle of society, because they seemed to be despising them and their aspirations too, as well as seeming to threaten them with ever higher taxation. There was, of course, nothing guaranteed here: the defeat of the sectional populists was quite unexpected, as just observed; but it is arguable that 800 years after Magna Carta, some of its spirit was visible in 2015 in that a partial group, playing on the resentments of just one section of the

population, was held in check by those who responded more to the well-being and sense of justice of the whole.

Publius in *Federalist 51* puts it like this: ‘Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit. In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger.’ So if fundamental liberties and justice are not secured, there can be anarchy in a democracy just as much as in the state of nature. And the worry is that if governments do not rank the spirit of liberty and justice encapsulated in Magna Carta higher than the pursuit of their own ulterior ends and policies we will end up with injustice, illiberality, degrees of tyranny, and ultimately anarchy. There is a higher law than the laws we or our rulers make in the here and now. *Diligite justitiam, qui judicatis terram*; else masque and mountebank, for all these things God will bring thee into judgement.