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The long transition from a natural state to a liberal economic order☆

Mark Koyama

Center for Study of Public Choice, Carow Hall MSN 1D3, George Mason University, 4400 University Drive, Fairfax, VA 22030, United States

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ABSTRACT

Magna Carta is often heralded as the foundation stone for the subsequent emergence of the rule of law in England. But what made it enforceable and ensured that its terms were adhered to by subsequent monarchs? This paper develops an institutional account of the emergence of the rule of law in medieval England that draws on the work of North, Wallis and Weingast (2009). I argue that the Magna Carta should be seen as just one episode in the long process of establishing a centralized but constrained state in England. Similar documents to Magna Carta were common throughout medieval Europe. It was the subsequent development of a consensus-based tax state that was of decisive important for the later emergence of the rule of law in medieval and early modern England.

> Those two problems, mutually complementary, arise in the history of every nation, and in every age: the problem of *order*, or how to found a central government strong enough to suppress anarchy, and the problem of *freedom*, or how to set limits to an autocracy threatening to overshadow individual liberty
> William Sharp McKechnie, *Magna Carta*, 4

1. Introduction

How do societies secure individual liberty and economic growth? The answer to this question is crucial to understanding what Deirdre McCloskey calls the 'great enrichment' that first occurred in Western Europe and North America around 1800, and subsequently spread to much, but not all, of the rest of the world (McCloskey, 2010). An important part of the answer to this question is the rule of law.[1] Rule by law, rather than rule by men, provides the stability and certainty that enables individuals to truck, barter and exchange their way to prosperity (Dicey, 1908, 198–199; Hayek, 1960). But, powerful as this answer undoubtedly is, it is also somewhat unsatisfying. It simply pushes the puzzle one step back, begging a further question: where does the rule of law come from, and what ensures that it is stable and long lasting? In the Anglophone tradition for the past four hundred years, the origins of the rule of law have been traced back to Magna Carta.

However, as historians have long pointed out, the relationship between the Great Charter of 1215 and what modern scholars understand by rule of law is more complex and nuanced than is usually recognized (McKechnie, 1914; Holt, 1992). Magna Carta was a document of its time: the outcome of a civil war, and an attempt to make peace between the king and his barons. The barons who forced king John to set his seal to it were largely interested in protecting their own domains from the fiscal predation of the king and less interested in extending these privileges to other members of society. How then did this agreement eventually led to the emergence of the rule of law for all? Magna Carta was not an exceptional document in the political environment of 13th century Europe. Similar agreements to Magna Carta were signed by rulers in Leon and Castile and in Hungary without giving rise to a stable or long-lasting system of rule of law. This poses a puzzle for those who attribute the origins of the rule of law in England to Magna Carta and addressing this puzzle requires an examination of the consequences of Magna Carta. This paper attempts this and in the process seeks an answer to the question: what accounts for the exceptional character of England's subsequent political development?

To provide an answer to these questions, I develop an interpretation of Magna Carta from an institutional economics perspective, or to be more specific, a perspective influenced by the framework proposed by North et al. (2009) and other recent work in new institutional economics (e.g. Greif and Laitin, 2004; Greif, 2006). Among the various aspects of Magna Carta studied by historians, I wish to focus on one of these: the transition between rule of law for an elite and rule of law for all.

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E-mail address: mkoyama2@gmu.edu

[1] For a classic statement see Hayek (1960); for a more recent quantitative assessment of the importance of the rule of law for economic development see Rodrik et al. (2004).

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To begin with we need a workable definition of the rule of law. Lon Fuller and others suggest the rule of law requires (1) a concept of legal equality, that is, that all individuals from the ruler downwards are equally subject to the law; (2) laws should be prospective, open, and clear; (3) laws should be stable over time; (4) the making of laws should be open and guided by general rules; (4) the judiciary should be politically independent; (5) legal institutions such as courts should be access to all; (6) rules should be general and apply uniformly (Fuller, 1969). This is a procedural or thin interpretation of the rule of law.[2] However, for present purposes it is more useful to think about a broader concept of the rule of law (Hayek, 1960; Neumann, 1986; Ferández-Villaverde, 2016).[3] This liberal rule of law entails a fundamental commitment to the protection of property rights, and this was how the concept was understood by scholars as such A.C. Dicey (1908). This vision of the rule of law emphasizes the importance of general rules. As Hayek (1960) argued, because general rules are predictable, they enable individuals to plan their lives around them. Adherence to general rules maximizes the scope for individual freedom and limits the arbitrary power of rulers.[4] In assessing whether a society possesses rule of law, we can assess to what extent it is governed by general rules and to what proportion of the population do these rules apply.

Medieval England, while governed by laws, did not possess the rule of law. In the terminology of North, Wallis, and Weingast (henceforth NWW), 13th century England was a 'natural state'. The term natural state describes the ruling coalitions that constituted the vast majority of premodern polities in which violence organizing capabilities played the determining role in structuring the character of politics.

This argument utilizes the concept of equilibrium in order to better understand political and social institutions.[5] From an institutional perspective, in order to be stable, formal rules and informal norms have to be consistent with the underlying economic and political structures of a society. That is, rules and laws have to be in line with the distribution of military, political or economic power. Any structure incompatible with these deep parameters will be transitory. For lasting institutional development to occur, the reforms of formal political institutions cannot be out of sync with economic developments or the realities of military or political power.[6]

Placed in this context, Magna Carta should be seen as the product of a conflict among members of the ruling elite of medieval England.[7] Magna Carta was not a constitution—even if in later centuries it became interpreted as such. Nor did it establish the rule of law for all. But it did secure the rule of law for the political elite and restricted the ability of the king to use either feudal law or his discretionary authority for fiscal purposes, while at the same time confirming the expansion of royal authority in the enforcement of the common law. My argument is that Magna Carta marked the limitations of the particular set of institutional arrangements that governed England at the time and, after a period of conflict, laid the foundation for the emergence of a consensus-based tax state (a more mature natural state in NWW's terminology) later in the 13th century. As a result, Magna Carta marks a change in the direction of the institutional evolution of the nascent medieval English state.

The importance of Magna Carta for English political history (and therefore for the political history of the West) then lies in its role at the beginning of a long process of political development in medieval England that laid the foundations for constitutional government. This perspective indicates that constitutional moments like Magna Carta cannot be viewed in isolation. They are part of an ongoing process. Had political developments taken a different turn in subsequent centuries, Magna Carta might be as forgotten today as the Golden Bull of Hungary signed at approximately the same date. This essay argues that it was these historical and political developments—in particular, the conjunction of a strong, but constrained tax-state and a representative, national parliament after 1300—that enabled Magna Carta to be seen as a founding document for the rule of law and liberal democracy.

2. The political economy of medieval England in the lead-up to Magna Carta

The laws of England in middle ages were a mixture of customary laws, feudal laws, church laws, and the decisions of the royal courts (Helmholz, 2004). The Norman rulers of England had inherited an Anglo-Saxon legal system that was based on customary law. Most laws varied from place to place: written laws represented 'only a fraction of the laws men lived by' (Cam, 1962, 13). This legal system was enforced by institutions that had initially evolved gradually over time in order to resolve disputes effectively at a decentralized level in the absence of strong state power, although by the tenth century Anglo-Saxon kings had already begun to use these institutions in order to enforce royal justice.[8] It was on top of this preexisting system that the Normans imposed the institutions of a feudal monarchy.

This system did not conform to the rule of law in the sense that we have outlined. There was no legal equality. Different laws applied to different individuals according to their status in society. There was a lack of certainty. This was partly due to the fact that there were many different levels of authority within feudal society so that legal authority was routinely contested.[9] Finally, the enforcement of the law was highly variable. Law enforcement was in the hands of local officials or the victims themselves. From the perspective of modern historians, at least, the judgements of this legal system appear arbitrary.[10]

[2] Joseph Raz extends the logic of such procedural definitions of the rule of law arguing that '[a] nondemocratic legal system based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, confirm to the requirements of the rule of law' (Raz, 2009, 4).

[3] Also see the discussion in Koyama and Johnson (2015). Raz's argument was developed as a critique of Hayek (1960). However, it largely misses the mark because it fails to address Hayek's most compelling arguments for the virtue of the liberal rule of law. A useful interpretation of the relationship between the rule of law and economics is Zywicki (2003).

[4] Neumann (1986), a leftwing critic of classical liberal ideas, nonetheless acutely observed the congruence between general rules and the market economy, noting 'the general law in a competitive economic system has finally the function of rendering the exchange processes calculable and predictable' (Neumann, 1986, 223).

[5] See Chapter 2 in Greif (2006) for a related discussion. In economics an equilibrium is used defined as formally defined as corresponding to a fixed point of set of equations. Our use of the concept here is more informal but appeals by analogy to the application of this idea to understanding the relationship between political institutions and economic outcomes.

[6] Note that this framework is not the same as a Marxist or purely materialist framework as it allows for ideas and beliefs to affect these underlying structural parameters.

[7] This was a conflict between members of what political scientists call the selectorate (de Mesquita et al., 2003).

[8] As Harold Berman writes: 'the basic law of the peoples of Europe from the sixth to the tenth century was not a body of rules imposed from on high but was rather an integral part of the common consciousness, the "common consciousness" of the community. The people themselves, in their public assemblies, legislated and judged; and when kings asserted their authority over law it was chiefly to guide the custom and the legal consciousness of the people, not to remake it' (Berman, 1983, 77).

[9] This is exemplified by the laws of the forest. The scope of the royal forest was a matter of serious contention between the king and his subjects throughout this period.

[10] In her study of the Lincolnshire Assize, Hanawalt (2010) observes that in the majority of cases the accused could not be brought to the court suggesting how easy it was to evade justice (120). One may suspect that we are in danger of applying anachronistic standards here. It was in part to compensate for the low probability

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