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And though this law be the peculiar invention of this Nation, and delivered over from age to age by Tradition, yet may we truly say, that no human law, written or unwritten, hath more certainty in the rules and maxims, more coherence in the parts thereof, or more harmony of reason in it; nay we may confidently aver, that it doth excell all other laws and is the most excellent form of government; it is so framed and fitted to the nature of this people, as we may properly say that it is connatural to the Nation. (Davies, 1615, pp.2b-3a)

Introductory

A semiotics of law studies all the different means by which law is communicated. One of its principal objects is obviously the language of law. In relation to common law it must thus provide some account of the paradoxical fact that English law comes clothed not in the English language but in Latin, French and Middle English, an archaic form of English itself. The fact that the language of English law is in many aspects a foreign dialect indicates that it is unlikely to be widely read outside the profession. The texts of law are thus likely to have a symbolic rather than an immediately semantic – that is linguistic – content. The language of law, however, is only one medium of its transmission. Law is a material presence, a visual structure of everyday life, a heritable form of repetition which comes to constitute in a very real sense part of the nature of things. For a semiotics of law this point is crucial. It is through symbols, its forms of appearance, its phenomenality, its emblematisation of persons and of public space that law makes itself felt as the trace of either a legitimate or simply a de facto sovereign social power. Its traces are legible in all the surfaces of everyday life; precisely because it is experienced as a system of images, not as a system of rules, law represses, repeats and institutes life.

The power of law is not simply that of an external or objective social and administrative force. For a semiotics of law, the legal
order of institutional life is a matter of what is lived, accepted and made familiar through the images and signs, the rituals and sacraments, the liturgies and emblems of law’s public presence. Consider first the element of ritual accompanying the legal institution since it first began to travel out of London: through the aura of reverence, the ceremonies of process and the spectacle of trial, law textualises and inscribes a particular map of the social and so also of the legal subjectivity that inhabits it. Its rituals are historical devices of fascination and conversion through which law enunciates presence and re-creates its subjects, not through reason but through the imagery of reason, the mythology of reason, through policing the true reference of signs. It is these signs of law that go within and capture the subject for the institution and for law. ‘The forms of action,’ comments Maitland, ‘are not mere rubrics or dead categories ... They are institutes of the law, they are – we say it without scruple – living things’ (Maitland and Pollock, 1968, vol. 2, p.561). If the forms of action are living things, we may interpret them as living semiotically, as living within the individual who exists ‘before the law’, as a legal person, as someone waiting, as an upright – walking – instrument or emblem of law, a mask inhabited, a totem of personality. It is interesting to recollect in that respect that the classical sense of emblem, from the Greek emballo, was that of ‘to throw within’ and so, as regards the legal institution, its emblems are the means by which it inhabits the legal subject and dwells within the institution of personal and public life.

A semiotics of common law must thus pursue the tradition through its images, through the forms in which it works itself into the nervature of everyday life. It must account for law as a surface structure which can be evidenced in the masks of everyday life: law as repetition always and already has as its subject the mask. Law is in that sense nothing other than its image, its textuality and its rhetoric – yet as that system of fascination and conversion that institutes the human face as legal person or as a mask, that institutes life from within, law is a deep structure, a heritable discourse, a ‘positive unconscious’, a reservoir of symbols that take hold of the subject, a positive unconscious which is therefore legible only through its disappearance. It is because law disappears (as sign, as symbol, as trace) that it dwells within the subject. And it is only because what without reasserts itself within, only because life represses law by repeating law, forgets law by repeating law, that law makes itself felt in the living body, in the element of everyday life, in the gravity of the normal.

The Iconography of English Law

In this essay we will concentrate upon the Englishness of English law and particularly upon the images, symbols and other icons through which common law as a tradition is transmitted. In cultural and so also in semiotic terms a tradition, legal or otherwise, is not a historical discipline, nor a rational, proven or evidenced sense of the past, but much more a mythology, an unconscious reservoir of images and symbols, of fictive narratives, and oracular (or immemorial) truths. A tradition exists as a sense of familiarity, as a sign of identity, of inclusion, of ‘we’ as against ‘them’. It is in that rhetorical sense of tradition that we will here analyse the peculiar forms, insalubrities and jealousies of English law. More particularly we will examine the history of the contemporary common law form, the history of its present understood as its traditionality, and seek the identity of this tradition through an analysis of its earliest texts. Our argument will revolve around a close examination of the writings of Fortescue, Coke and Davies, of the first doctrinal apologies (or defences) of English law written between the end of the fifteenth and the middle of the seventeenth centuries which reflect the symbolism and mythology of an English tradition and vernacular law in whose shadow we still live.

Take as a starting point the notion propounded by one contemporary philosopher that we recognise law in much the same manner that we recognise a language even though we have no conscious grasp of its grammatical rules. The question is, what is it that we recognise, with which we are familiar or at ease? At the level of greatest generality it can be suggested that what is recognised initially – both in historical and psychological senses – is Englishness, a particular systemic context, a specific system of law tied to a unified sense of geographical and national-political identity. The uniqueness of England and the national character of the island race, the antiquity and excellence of the cultural identity underlying and expressed through the common law, is captured most vehemently and explicitly, though by no means idiosyncratically, by the early Lord Chancellor Sir John Fortescue: ‘Other countries ... are not in such an happy situation, are not so well stored with inhabitants. Though there be in other parts of the world, persons of rank and distinction, men of estates and possessions, yet they are not so frequent and so near situated one to another, as in England’ (Fortescue, 1470/1737, p.64). It can be suggested thus as a point of departure that we look precisely for an identity, for that which differentiates common law from other laws, the law of a nation (ius commune) from the law of nations (ius gentium). The answer is likely to be found in the language and particularly the imagery in which the common law
establishes itself as a tradition, as having a separate yet identifiable history, an insular and unique sense of the past. Only once we have identified the elements of that sense of the past, of that time out of mind which is also time immemorial (classically the basic source of common law) can we endeavour to understand the nature of the English constitution or the character and colour of English law.

**Time, Tradition and Source In the Antique Law**

To understand the aura and imagery of the common law as a system of signs, to understand it as the sense of identity and of pre-judgement with which we read the texts of that law it is necessary to approach law from a much broader definition than is currently accepted in common law jurisprudence. In virtually all its pre-classical definitions, the word law (as for example, halacha, shari'a, Dike or dharma) refers either directly or incidentally to the path, the way or the road: the comings and goings that map out our everyday lives, the ‘again and again’ through which a routine or a route is made across the landscape of everydayness, the chart of memory, inscribed in the heart, which circumscribes our place, and helps us find our direction, our next encampment.\(^3\) The common law does not differ in its desire to map out both a time not yet lived and a history, to indicate at once a familiar path to the future and a conceptual lineage, to trace a genealogy and also to provide an origin and a line. In this very generic sense, the qualities of Englishness and so of an English law are well-established in the writings of its early apologists; the common law is the law of the land (*lex terrae*), a rustic law for rural types. Despite innumerable conquests, we are told by Coke and the other ‘sages’ of the common law, English law is sacred and stretches back to the halcyon times of King Arthur, to Cornwall, to Camelot (Coke, 1611/1777, vol. IX, p.C2a). Coke, on another occasion, also manages to refer it to Brutus, ‘the first king of this land’ (ibid., II b 1 a). In more generic terms it can be traced also beyond the time of memory or the imaginings of ‘the best historians’, to an original time and lost (temporal) place where dwell the vast hosts of the dead, the ancestors. It is from these ancestors, according to Coke, that is from the original antique and unquestionable time of the fathers of our law, that its truth derives: it is nothing other than ‘testi temporum, veritatis vitae, nuncio vetustatis – the witness of time, the life of truth, the herald of old age’ (ibid., I A 4 a). The time of law is constantly specified as that of ancient custom, a time of inheritance, antiquity and establishment about which we learn through the arcane and wise books of the law, although, paradoxically, the ‘reports are but comments or interpretations upon the text of the common law: which Text was never originally written, but has ever been preserved in the memory of man, though no man's memory can reach to the original thereof’ (Davies, 1615, p.1b).\(^4\) Despite the Greek, Latin and French, which even Coke recognised as elements of legal language, these books and their disparate accompanying unwritten knowledges have survived all the invasions of England and have perpetuated the ancient realm, the sceptred isle, the immemorial tongue.

It is its origin in a time outside memory, a time outside chronologies that enshrines the particular national code as an inheritance that is closer to nature and to divine law than any other existent system of laws. It is first, as we have seen, the oldest of all laws or, as Fortescue proclaims it ‘nor in short, are the laws of any other kingdom in the world so venerable for their antiquity ... the laws and customs of England, are not only good, but the very best’ (Fortescue, 1470/1737, pp.32-3). The law of England is thus intestable in its truth by virtue of an antiquity that is peculiar to the discipline and external to the normal procedures of historical proof. It is an enduring law, a continuance which has a secondary implication of excellence. In Davies' strident formulation, this customary law is the most perfect, and most excellent, and without comparison the best ... as the law of nature, which the schoolmen call *ius commune*, and which is also *ius non scriptum*, being written only in the hearts of men, is better than all written laws ... so the customary law of England, which we do likewise call *ius commune* as coming nearest to the law of nature ... doth far excel our written laws, namely our statutes or Acts of Parliament; which is manifest in this, that when our Parliament have altered or changed any fundamental points of the Common Lawe, those alterations have been found by experience to be so inconvenient ... as that the Common Lawe hath in effect beene restored again, in the same points, by other Acts of Parliament in succeeding ages. (1615, pp.2a-b)

It is this naturalness of a law inscribed in nature itself, in the heart, that guarantees that it will return, again and again, as the 'same' law or as the customary or unwritten law which would return as the same law were it appropriately embodied in the legal subject. This unwritten writing of a common law, the immemorial memory of a common subject, serves to validate law's unnatural nature: it returns against the written text because a written law that stays a while,\(^5\) that remains law for long enough, becomes unwritten law – but also and already against its own practice and its own disappearing text, since the customary law is in fact not at all the customs remembered by the common people but the royal custom, a feudal law of vassalage, homage and other forms of status and service.
Texts of the First Law

As regards written law, it is for Coke and Davies an interference from the contemporary legislature with an antique spirit and perennial wisdom that the ‘moderns’ are seldom capable of understanding. Where the legislature or written law does interfere it is more likely than not that it will have to be corrected and absorbed again to the true condition of the antique law, to the eternal return of the same: ‘some points of ancient common law [being] altered or diverted from his due course, yet in revolution of time, the same ... have been with great applause for avoiding many inconveniences, restored again’ (Coke, 1611/1777, II C 3a). Lord Chief Justice Hale takes the argument even further and perhaps makes the most salient point, namely that in the eyes of the tradition all legislation aspire to the status of unwritten law (1975, p.4). The written law aspires, in other words, for that acceptance of time and custom which will incorporate it into the common law, the unwritten tradition. What written law there is in the antique tradition can thus be suspected of having a function that is more emblematic than administrative, a status more symbolic than practical. Domesday Book and Magna Carta, the two most significant symbols of written law after the Conquest, both share the peculiar characteristic of administrative and substantive legal irrelevance (Clanchy, 1979, Chapter 1). It is interesting that it is precisely because they had no legal ‘present’ that they could so quickly come to serve as original texts, monuments, symbols of a freedom that no Englishman ever experienced save in the imagination of the law.

Consider then the primordial emblem of freeborn Englishness, of ancestral honour and liberty, the Magnae Chartae libertatrum Angloiae, the Charta de Foresta and particularly the Magna Carta itself, a concession extracted from the crown, a royal grant primarily concerned with the relationship between church and monarch and only incidentally with the ‘amendment of the realm’. For Coke, the two charters together contain the bulk of the ancient customs, the inheritance, the antique laws, the birthright of our land (1611/1777, VIII L 6b). Ironically, as far as liberties are concerned and so far as the great charters can genuinely be labelled the freedom of the community ‘because they make or set us free’ - communis libertas (quia liberos faciunt), or the charter of franchises - chartre de franchises, Magna Carta simply extorts from the monarch the promise not to diminish further or arbitrarily to extinguish customs and liberties that had formerly been recognised by the crown. Thus the city of London is guaranteed ‘the old liberties and customs’; the knight’s fee will not be further raised; free men will not be forced to build bridges to their homes nor walls around their property; merchants were guaranteed safe passage through the kingdom.

The rights and liberties symbolically affirmed in Magna Carta are all, however, subject to the law of the earth, the realm, lex terrae, which is nothing other than the judgement of the king as chief justice of the kingdom (justiciarum regni), as maker or voice of the law. In that respect even rights as fundamental - that is to say, as ancient - as the writ of habeas corpus (who has the body?), or of the inviolability of land or of home are all provisional and defeasible. In Darnel’s Case (1627, 3 St. Tr. 1) the writ of habeas corpus was of no use in the face of committal to prison per speciale mandatum domini regis (by special command of his majesty). Where the realm requires it the monarch has also always had a prerogative right of access to soil and to property, papers, diaries, even the post. Take an even more striking example, that of The Case of the Prerogative of the King in Saltpetre (12 Co Rep 12, 13) where the following rights and liberties of the subject are eloquently and lengthily and purposelessly rehearsed:

the king cannot take the trees of the subject ... and he cannot take gravel ... he cannot charge the subject to make a wall around his house, or for to make a bridge to come to his house. The ministers of the king cannot undermine, weaken or impair any of my wall or foundations of any house, be they mansion houses, or out-houses, or barns, stables, dove houses, mills or any other buildings ... for that my house is the subject place for my refuge, my safety and comfort of my family.

In the event, however, the crown required access to the property to extract saltpetre and no degree of antique freedom, custom or law could contradict that claim. The very title given to Magna Carta, Charta libertatum Regni (charter of the freedoms of the crown) indicates that these are liberties by and of the ruler, of the sovereign and not of the governed. We are left with an image of freeborn and gentle and indeed natural Englishness which is less notable for its antiquity than for its furtive insecurity: the ancient order is an order of vassalage, dominium and service, a feudal order in which every subject is a tenant of the crown and liable, when the realm so requires, to serve and to die for a soil which is not his own.  

Garden, Castle and Home

Who are the inhabitants of the well-mapped paths of the common law? What people is it, what subjects of law, attend upon the itinerant court? The initial answer is that in classical terms the English are a somewhat melancholic and saturnine people. They live an institutional temporality of repetition, of the immemorial coming round
Englishman's home is his castle and in which Magna Carta secures for all time and unto heaven the innate right of the Englishman to his property and his person. The realm of privacy constitutes the political and legislative as 'other', as foreign, as something best left to those who legislate as of right and by distinction of birth.

The tacit quality of a knowledge, together with decisions that are always already made, always already there, behind the scenes, are both extremely English phenomena. It is the manners of 'good form', chivalry or a sense of fair play, that have traditionally been supposed to act as the bulwark protecting the subject of law from the tyranny of judgement. It is the aristocracy in the upper house of Parliament who have traditionally been supposed to mediate between the sovereign and the governed: 'the Lords being trusted with a judicatory power, are an excellent screen and bank between the Prince and the People, to assist each in any encroachments of the other, and by just judgements to preserve the law which ought to be the rule of all three' (Coke, 1660, A 3 b), a point to which we will return.

Time immemorial is the vanishing point of origin against which all later times of the law are to be measured. Time beyond memory is the time of foundation, the time of myth whereby history is converted into tradition and the linear temporality of historical narrative is displaced by the repetitive and symbolic time of the unconscious, or unconscious that binds our affections to very explicit and vivid images. The time of the unconscious is that other time in which the divine right of status was forged, in which the sacral quality of establishment or hierarchy was apodictically given from above, a time which we repress by repeating in habit, in instinct, in our movement through everyday life. It is to those aural and unwritten images, those onetic or unconscious symbols of tradition as they inhabit English law, as they accompany and underpin the legal text, that we will now turn.9

Mystic Body and Unwritten Law

If we return to the question of the iconic unity of law as that which we recognise when we first recognise law as being our law, the image is of old England, an England that is eternal: it is our ground and our circumstance, our landscape, our nature, both mystical and thoughtless. It is at one level a purely internal history, the history of the survival of the English line, the history of the exclusion or repression of all forms of foreignness, even or especially when such foreignness is in our midst as language, as conqueror or indeed as royal family. In a secondary sense the internal character of the history of the English is a product of the fact that it is not a considered or explicit history; it is nature in the sense that it is given and
indisputable: what is English, be it law or any other institution, is first and unquestionable. Its history is therefore something which can be assumed, it is internal in the sense of being inside all true English, all free English, mystical and inexplicit. In the end it is a family history, a history of a domestic constitution, a constitution that is unwritten because gentlemen do not need to put their word in writing, it is enough simply to give one's word (Kington v. Preston [1773] 99 Eng Rep 437). It is also an unwritten constitution because domestic agreements are outside the law; they are irreducible to law for the reason that law assumes that no reasonable person, no gentleman, would wish to jeopardise the harmony or honour of family agreements by taking them to court (Balfour v. Balfour [1919] 2 KB 271), just as it was until recently the case that no one could threaten a marriage by taking a husband to court for rape of his wife (R v. Miller [1954] 2 AER 529). The question remains as regards the constitution as to whose body, whose family (whose history), which line?

The authors of the ancient tradition are quite explicit, the constitution is one of 'regulated monarchy' and, as Coke also puts it, the crown is the hieroglyph of all our laws. If we turn to the icon itself, the literal representation of our nation and of our national legal system - the two are inseparable, the 'best inheritance a subject has [being] the law of the realm' (Coke, 1681, II A 2a) - it is the monarchy which paradoxically coheres both the identity of our character and the unity of the national legal system. The point is one which has been made variously in historical terms through the analysis of the corpus mysticum or undying royal body and its various forms of portraiture, while in specific terms of the common law as it exists today, there is the exhaustive and excellent study by Tom Nairn (1988) of the quintessentially monarchical character of the historical and contemporary English constitution. What Nairn also makes abundantly clear is the dependency of the national psyche, the media, the communications industry, the entire fabric of social placement and personal differentiation upon one icon, one family, one parent, one law, one crown. If we move now to examine what it is that we belong to, what constitutes our tacit culture and our law, what it is that we know before we read any individual text, it is the monarchy that will emblematise the space of law, the deep structure, the waking and the sleeping dream. It is precisely to a monarchical culture that we belong before we read the law: it is from that culture that we make our decisions as to interpretation and state with each judgement our allegiance to a literal Englishness, to an identity that excludes all consideration of any other culture or any other way.

The elements of an unwritten constitution can be listed with relative brevity; the key to the English constitution - to how we 'stand together' (con-statuere) - is precisely that it is unwritten, that it is tacit and traditional: it is law as dharma, as way or path or road, as a manner of doing things, as good form, and not as an idea or a dialogue or even as anything to be thought about. In that sense it is pure tradition kept alive by the circulation of one symbol, one icon, one family, of what 'we are' as represented in the comings and goings, doings and sayings, court news and state functions of the royal family. The search for an identity could thus well begin with a statement of the obvious: the constitution as it exists today was primarily the product of the arrogation of the powers of the church to the crown in 1534. The monarch became both spiritual and secular sovereign, Leviathan twice over, the irerasible and singular image of a national legal system that had broken with Rome and with the Roman church. Law, as the frequently misread philosopher John Austin had no hesitation in specifying, was best defined as being no more or less than the command of the sovereign: a command that could be positive and direct or could take the more subtle form of the adoption of existing law or tacit command as the judgements of the sovereign's judicial representatives.

As regards the spheres of adoption and tacit command we move into the realm (the regalis) of the unsaid or unstated of a legal system that has accumulated, discovered or 'found' law far more often than it would claim to have directly devised it. Law as tradition depends upon the notion that what is established requires no further or no rational justification; it simply belongs, it is there, part of the system of symbols that constitute a legal identity and system of law. In so far as it is surprising and could be amusing, we can borrow some statistics from Nairn (1988) to suggest the extent to which the monarchy as symbol pervades the national consciousness, and its unconscious as well. Taken from surveys in the late 1960s and 70s, we learn that 77 per cent of labour voters and 50 per cent of the unemployed would retain the monarchy (the royal family does no harm), over 50 per cent of the population indeed believed that God took a special interest in England, 'that God guides this country in times of trouble'. Finally over a third of the population had dreamt about the royal family. The statistics can be added to the other indices of a quiet but obsessive national concern with the crown, with its omnipresence in public life. The question to be posed is that of how serious that pervasive regality is in terms of the constitution of our laws.

Law, Correct Speech and the Logic of the Centre

The key to an understanding of the significance, the absolutism, of a monarchical and wholly pre-revolutionary constitution does not lie
in the literal manifestations of monarchism, in its ordinariness or its triviality, but in the impossible and unspoken realm of everyday power that circulates along lines of force that emanate from the throne. Let us continue the list, but now in terms of symbols that refer the citizen, the litigant, the subject to the liturgical or inaugural space of the monarchy, of that mystic body that never dies: 'King is a name of Continuance, which will always endure as the Head and Governor of the People (as the Law presumes) as long as the People continue ... and in this Name the King never dies' (Wilton v. Berkley, Plowden Reports, 3 Eliz 1774). We may go further than Justice Brown and observe that not only does the monarch as mystic body, or body politic, never die, but the political and legal attributes of that body, its mystic members, its offices and honours, statuses and creeds do not die either (Kantorowicz, 1957, pp.11-15). To adopt a classical civilian motif, dignitas non moritur: dignity (meaning office, honour and status) does not die, though we may certainly die for it; we may die for an office, a country, honour, a mask (Legendre, 1988, pp.33-42).

If we remain in search of the regalis, of the crown in public or abroad we must look to the courts. In one of its earliest guises the court was the royal court, the royal household or 'the body of persons who form the [sovereign's] suite or council' and accompany the monarch's person on its constant journey through the kingdom and other possessions (Milsom, 1981, pp.31-33). As curia regis (coram rege) it was also the first court of the common law, though the notion of the court as that which follows the crown, as a suite or continuance, provides a useful insight into both senses of court; first, as site of etiquette and decorum in the proper sense - that of ceremonies of court; and, second, as being the site of judgement or mercy, preferment or punishment. The court follows the crown, it is peripatetic as part of the royal entourage and later itinerant through delegation: the provincial courts and assizes are simply the royal court 'sitting elsewhere', the monarch's person in its capacity of body politic rather than natural being.

That the court is the royal court sitting in the absence of the monarch does not in any sense preclude the presencing of majesty. The labyrinthine structure of the Royal Courts of Justice amply indicates an architecture of place, a pageantry and regality that constitute in the most direct of senses a plastic elocation of an iconic authority: the emblematic name of the law is to be found endlessly repeated in the alternative space and the other time of the court. 'That is the great lesson of the history of ... law, that the power and authority of reason are the same thing' (Legendre, 1985, p.38).12 In more aphoristic terms, it is through the institution of the image that the law gets under the skin. Consider the iconic order of licit representation as it is to be found in the architectural and ornamental organisation of a court, in the symbolism of its physical places, in the aura of its furniture and gargoyles, its inscriptions and devices (crests and arms), in its modes of dress and address, and finally in its terms, its moments of appearance and disappearance, of sitting and dissolution. Our concern is with that panoply of symbols that exist to create a legal place, a site or space of law, of legal annunciation13 if that term can be so adapted from its biblical usage to indicate an announcement that is simultaneously a mode of sacramental presence, the presence that has to be brought to law for it to be law. The fascination of power must always take a material form, it must be re instituted to create a space, an architecture within which a discourse becomes solemnised, a language approaches a liturgy and the signs are all there to indicate the distances necessary to a place, that will allow the judge to speak in the mask of the Other, to speak innocently as a mouth of the law. The places are mapped according to criteria of ascension and both physically and verbally all points look up to and are directed towards the bench, upon which, after the ushers have demanded silence and respect, it is the law that sits down in the place of merely human demands (Miller, 1986). Consider too the forms of dress, the apparel of justice, always recollecting Carlyle's aphorism that 'the beginning of all wisdom is to look fixedly on Clothes' (1893, p.45). Recollect also, the order of its coming and going and the restriction upon the forms in which it can be addressed, the various metonymies as well as the sacramental appellations: the court, the bench, your honour, your worship, your lordship.

What the court takes with it is the awful logic of the centre, the English tradition, the custom of the realm which is of course the custom of the crown. Consider again that English is first a language and second a law, the common law. Immediately prior to the era when Sir Edward Coke, Sir John Davies, and others were forging the records of English legal tradition and creating the secular myth of the common law, Richard Mulcaster, Henry Peacham, Thomas Wilson, Sir Thomas Elyot and others less well-remembered were nurturing English as the national and the best of all languages. English was being forged against the Latin and French of the law, although it was Latin that was most decried:

Is it not a marvellous bondage, to become servants of one tongue for learning's sake, the most of our time, with loss of most time, whereas we may have the very same treasure in our own tongue, with the gain of most time? Our own bearing the joyful title of our liberty and freedom, the Latin tongue reminding us of our thraldom and bondage? I love Rome, but London better. I favour Italy,
but England more, I honour the Latin but I worship the English. (Mulcaster, 1582/1970, pp.254-5)

Consider then the work of a barrister, George Puttenham, on the geography of correct linguistic usage:

[you] shall follow generally the better brought up sort, such as the Greeks call (charientes) men civil and graciously behaved and bred. Our matter therefore at these days shall not follow Piers Plowman nor Gower nor Lydgate nor yet Chaucer neither shall [you] take the terms of Northern men ... nor in effect any speech beyond the river Trent, though no man can deny but that theirs is the purer English Saxon at this day, yet it is not so courtly or so current as our Southern English, no more is the far Western men’s speech ... ye shall therefore take the usual speech of the court, and that of London and the shires lying about London within 40 miles, and not much above. (Puttenham, 1589, pp.120–1).

Just as the courts follow the court, English law follows the English language in respect at least of the geography of correct usage, the centrality of records and places, and the pre-eminence of manners, forms of correct behaviour and of speech as determinative of propriety (or more strongly of normality). The phonetic basis of class identity is only comprehensible to those who have lived in England: a certain tone, an accent, use of received pronunciation and standard English vocabulary are together the most powerful of indicators of class and determinative of institutional place. It is frequently the case that no more is needed than a few choice, well-spoken words; the aural signs of law are here the unwritten constitution and precede any explicit rule, or any writing, any text.14

**Status, Honour and Spoken Law**

The unwritten constitution, the English constitution, is a court-based custom, a series of conventions transmitted through an unwritten knowledge of forms and tacit rules of behaviour associated with the better classes, the better educated, the honourable and the gentle. Just as the court has its place, namely London, so the people have their places with ‘every man in his room of honour according as his place requires’ (Ridley, 1607/1676, p.134). The distinction of blood, of breeding, of genealogy has been as important (possibly more important) than any particular behaviour: the barrister John Legh writes in a work called The Accedens of Armory, one of several legal manuals of the rules and insignia of status of the period, that ‘the distinction between gentle and ungentle, [is one] in which there is as much difference, as between virtue and vice’ (1562, fol. 11 b). It was the lawyers in the main who systematised and spelled out the system of honours, manners, proper speech and social law.15 We can learn from them. The system of honour depicts or, better, represents the various forms of ancestral or acquired nobility, through which an unwritten but nonetheless well-marked network of power is transmitted.

As Sir John Ferne defines it, that nobility is derived as a word from the Latin nobilitas which in turn has a root in nosco, to know (1586, p.4). By extension we might argue that the system of nobility not only signifies generosity (or gentility), viz nobility, of blood and degree which is known by its insignia, which is represented in the ‘deviser’ or mark or crest, but it is also a form of codification, an encoding of knowledge, a hidden language or initiate wisdom even if that wisdom is of manners and mores and little else. Through their arms the gentle, the honoured, those of social standing are known and noted. They bear their status on their breast as *symbolica heroica* (heroic symbols), as signs of dignity and of birth. What is known and noted, however, is strictly and opaquely encoded. All the treatises of armory emphasise: it is a secret science, known of God (Legh, 1562, fol. v b); it is the art of hieroglyphical or enigmatic symbols and signs, testifying the nobility or gentry of the bearer (Guillim, 1610, fol. 3a); they are ‘true symbols’ (Fraunce, 1588, fol. H 3b), and being ‘obstruse and sacred’, enigmatic and holy in origin, the meanings of arms of honour are best protected by dark and foreign words (Estienne, 1643, fol. B 1ia). The unwritten constitution spans equally the political and legal domains. It establishes a power that is both unknown and nomadic, a moving target in that the generic secrecy of the institution means inevitably that for every success in eliciting information countless documents disappear, oral culture reasserts itself, archives sink into the flowerbeds, new laws of secrecy are passed or old laws are exorbitantly enforced. The principle involved is summarised prosaically by Naismith: ‘from the 1680’s to the 1980’s the right of those in power to discuss nothing about the exercise of power but what suited them has been a constitutive principle of British tranquillity and decency’ (1988, p.268).

The two principles of English constitutionalism, those of monarchism and secrecy, of an aura or display of power that simultaneously hides the logic of its practice, can be traced without difficulty or too great a degree of digression into the common law itself. The aura of majesty that is put in place by the architecture of the court, by the placement of the judiciary within the courtroom by the direct ennoblement of the judges, by the appropriate modes of addressing the bench, by the order of speech, by the rules of evidence, by costume, pageantry and language – all these display the
making of a liturgical, legal setting. These symbols are the servants of the crown, they issue their writs by the grace of God and in defence of the faith, and in the name of the crown their space is the regal space of the law. Like the constitution, the law that they carry is unwritten: it is custom, it is tradition, it is *ius non scriptum*, unwritten reason, that can be terroristically applied as and when the judicial memory of the Immortal or of ‘time out of mind’ comes on the scene of the present.

The notion of time out of mind describes legal method most exactly; it is time unbound to any life or object, free of any specific temporality, a time of repetition and so a thoughtless time. It is what Legendre terms the ‘delirium of the institution’ which unravels itself within the discrete confines of the legal form, as a prisoner not of life but of normative governance (1976). It is in this sense that the law unfolds as a prison of the *deep structure*: a prison in the sense of a mathematic envelope, of a reality that outlasts or outlives another. The law is a prison of the deep historical structures which time treats badly. Hence time out of mind is a time of repetition but in this repetition is always and already difference, and loss: that is to say, what is repeated in the again and again of a precedent is not the same case, not the same life, not the same thought, the same rule, the same instance. The institution hallucinates standard forms of procedure and norms of usual behaviour on the strength of half-remembered arguments, through the dazed recollection of unreported cases or largely forgotten conversations:

In those cases where judges were declaring law it was a transient, oral, informal process and only those present at the arguments could hope to achieve a wholly accurate impression of what had been decided, and then only when the judges spoke loudly enough. (Baker, 1978, vol. 2, p.159)

These were the tools of the common law, these were their memories, a *communis opinio*, a collective memory, as law. Law is a presence which implies the totality of its history, but this implication is not logical or historical; rather, it is traditional and mythic. The hallucinating mind is in strict terms a mind that wanders, that ‘lucinates’, that goes astray. That is the source of common law, of unwritten law, it is the meandering of the legal mind, a temporal and geographic nomadism that snakes its path across the justificatory texts, the judgements, of the year books and the law reports. Here we can understand how the text is also the unwritten structure of everyday life, a reality which time treats badly and transmits very slowly over long periods, how reason itself becomes a mask ‘worn by longstanding historical and political facts, the memory of which

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**Conclusion: *Ius Imaginarium*, the Law of Images**

The protection of the sacral aura of courtroom process is one of the oldest powers known to the common law. The common law of contempt of court is indeed ‘coeval with their first foundation and constitution: it is a necessary incident to every Court of Justice’. (R v. Almer [1975] Wilm 243, 97 Eng Rep 94) Its basis is interestingly enough forgotten, it belongs to time out of mind, it is part of the *lex terrae*, part of the very soil, the earth from which the law springs unseen and unremembered till its reinstatement as the presence of the living present. This immemorial usage has no origin, the chief justice admitting readily that ‘I have examined very carefully to see if I could find out any vestiges or traces of its introduction, but can find none. It is as ancient as any other part of the common law, there is no priority or posteriority to be discovered about it ...’ (ibid, 99-100). It is simply there, established and unchallengeable, part of precedent, part of the law even if we have no reason, no justification, no memory of why that might be – or, better, might have been – the case. The justificatory principle is classic common law logic and to return to Sir John Fortescue, this time sitting on the bench in 1458, we may cite a remarkably precise formulation: ‘Sir, the law is as I say it is, and so it has been laid down ever since the law began; and we
have several set forms which are held as law, and so held for good reason, though we cannot at present remember that reason' (1458, YB 36 Hen. VI 25b–26).

For amnesia to resemble reason, for amnnesia to be the proper form of legal knowledge, requires that the subject understand that what occurs in court is emblematic. To paraphrase the work of Louis Marin,

the [law] is only truly [law], that is, [justice], in images. They are its real presence. A belief in the effectiveness and operativeness of these iconic signs is obligatory, or else the law is emptied of all its substance through lack of transubstantiation, and only simulacrum is left; but inversely, because its signs are the [legal] reality, the being and substance of the [law], this belief is necessarily demanded by the signs themselves (Marin, 1988, p.9).

The Image of the court is protected in the occasion of its appearance and even more so in the public relay of that appearance through the press and other media. The law which governs 'contempt of court' is unique in that it allows summary indictment of offenders without the option of jury trial: to take some recent examples, people laughing in the courtroom; witnesses too frightened to give evidence against people they know; persons too confused to respond to judicial questions, have all been imprisoned on the spot for common law contempt of court in praesentia, in the presence of the court.

Two points need to be made, one spatial and one temporal. From early on in its history, the court was not geographically limited to the courtroom: it was a 'place' and it was to be protected as such, that is to say in its other offices, in its chambers, in the Inns of Court, in the chancelleries, the libraries and all the other sacred hiding places (sacramentorum latibula) including the royal treasure chest (thesauria regis) in which the records and the other writings of the law were either forged or kept. In Thorpe v. Makerel, to take a geographically extreme example, a clerk of the King's Court was urinated on in Fleet Street while on his way to Westminster, in the company of other men of the court. In the writ issued, a venire facias, the trespass charged was stated as having been in presencia curiae (1318, Selden Society vol. 74 at 79).

The point of that little history, however, is larger than is perhaps apparent: all aspects of the honour of the court and of its aura are protected: what cannot be geographically charged as contempt in the face (imago) or presence of the court, can be indicted as scandalising the court in absentia. The emblematic image, the reputation, the presence of the court and of what occurs within it is rigorously (not to say draconianly) controlled. Nothing can be published that would be, in the eyes of the court, prejudicial to any civil or criminal trial. Their vision is often surprising and it has been held, for example, to be contempt for a lawyer to show documents that had been read out in open court to an investigative journalist, even though the journalist could have obtained a transcript of the hearing (Home Office v. Harman [1982] 1 AER 532). It has been held more recently that republication of information that was already in the public domain could be a contempt of court (Attorney General v. Newspaper Publishing PLC and others [1989] Guardian, May 8). Further, 'any act done or writing published calculated to bring a Court or a judge of the Court into contempt or lower his authority is a contempt of court' (R v. Gray, [1900], 2 QB 36, 40). Thus any adverse criticism of any aspect of a trial, a judge, a court, or a verdict, is potentially in danger of incurring the strictures of the law. It is to be reported, in other words, according to and In its majesty; it is to be reported reverently, darkly, emblematically – for such are the characteristics of the institution. They are also embedded in its language, in its annunciation, in all its forms of appearance and disappearance, in all the icons and other totems behind which lurk the unreason of legal practice.

Notes

1. On the relation between repetition and repression, see Deleuze, 1968, especially pp.138–9 where Freud's notion of 'primary repression' is discussed in the following terms: 'one does not repeat because one represses, but one represses because one repeats'. In terms of memory one can thus argue that the primary repression establishes an unconscious that repeats so as not to remember. In Lingis' words, it constitutes 'a system that does not remember, that is, represent, its past, because it repeats it. It does not reestablish its past in the non-actuality of representation but in the actuality of its repetition' (1989, p.158).

2. There is an extensive literature on the impact of printing and so also of the vernacular, on the legal profession. The now standard work is Eisenstein, 1980. For further references and my own justification of the centrality of the sixteenth century to an understanding of the contemporary legal profession, see Goodrich, 1990, Chapter 3.


4. See also Sir Henry Spelman, The Original of the Four Law Terms of the Year (1614, pp.102–3) for further discussion of the unwritten basis of the legal text. Its inscription on the heart of man is a reference both to its divine provenance and to a curiously spurious source in the rulings of Lycurgus of Sparta against the reduction of law to writing.
5. For Peirce, the evolution of a code requires that there be a conservation and development of forms, a logic of continuity which moves language from mere marks to symbols:

the mark is a mere accident, and as such may be erased. It will not interfere with another mark drawn in quite another way. There need be no consistency between the two but no further progress beyond this can be made, until a mark will stay for a little while; that is, until some beginning of a habit has been established by virtue of which the accident acquires some incipient staying quality, some tendency toward consistency. (Peirce, 1931-5, p.204.)

For Peirce's influence on the legal realists, see Kevelson, 1988.


7. The trace itself is always and already the trace of the Other, which, even in its disappearance, its aesthetic of disappearance, is a passage to the limit, a passage across and through a boundary, and thus a movable object, a legal sign, a legal icon.

8. What better image of the difficulty of getting to know the English could one seek than that of inner doors? Each inner door is a new obstacle, a further defence, a subject of independent litigation. For a recent discussion of the concept of the home in the interesting and innovatory area of psychiatric damage cause by damage to the home, see Adina v. British Gas [1987] 3 All E.R. 455.

9. Merleau-Ponty, 1962, defines an original past as 'a past which has ever been present'.

10. The best studies are not of the English monarchy but of the French, the classic study of the iconic form of royal portraiture being L. Martin, 'Le Corps Glorieux du Roi et son Portrait' in Marin, 1986. There is also his longer study (1988).

11. For discussion of such misreadings of Austin, see Moles, 1987.

12. For further discussion of this specific point, namely the inscription of law in the building, in the symbols of place, see the excellent discussion in Hersey, 1986, pp.91ff., of the etymological link between trope and trophy in architectural ornament. See also Vidler, 1987.

13. The annunciation is enunciated with a phonetically indiscernible difference. The biblical annunciation brought news of her pregnancy to Mary via the Archangel Gabriel. It was both the announcement and simultaneously presence of the Holy Spirit.

14. Interesting in this context to note that etymologically the word repetition connotes rehearsal and more distantly, re-hearing it is an auditory phenomenon before it is a matter of record. See Rose, 1984, p.102.

15. The other major works are Fraunce, 1588; Spelman, 1654; J. Logan, Analogia Honororum, 1677; J. Boswell, Works of Armorie, 1610. Full references can be found in Goodrich, 'Rhetoric, Grammatology and the Hidden Injuries of Law', 1989, Economy and Society, no. 18, p.167.

16. The term code comes from the Latin codex and more distantly from caudex meaning structure or support. The etymology is interestingly discussed in U. Eco, Semiotics and the Philosophy of Language, 1984, pp.164-92.

17. The lie of reason is from Nietzsche, The Twilight of the Idols, 1915, pp.24-5, where he argues in effect that the history of truth is the history of an error and presents the narrative of 'How the real world became a myth'. Baudrillard, 1983, translates Nietzsche's six stages of the history of an error into 'four successive stages of the image', the last of which is that the image bears no relation to any reality whatsoever, it is its own pure simulacrum. While this translation provides a semiotically interesting variant of Nietzsche's theme it misunderstanding Nietzsche's principal conclusion, namely that with the suppression of the real world the world of appearance is also abolished. Only theatre and mask, truth as fiction and fiction as truth remain.

References and Further Reading

Works preceded by an asterisk are those most likely to act as suitable introductory readings on semiotics and semiotics of law. The International Journal for the Semiotics of Law appears three times a year and is now in its fourth volume. It promises to cover most areas of the discipline and is open to different perspectives although contributions have so far been predominantly from structuralist and analytical orientations. The annual proceedings of the Roundtable on Semiotics and Law are published from the Centre for Semiotic Research in Law, Government and Economy, Pennsylvania State University, Reading, PA, and are edited by Professor Roberta Kevelson (1988-90). Of more general interest is the journal Semiotica which often carries work on law. In terms of general philosophical introductions to a supplementary jurisprudence of signs a major source of inspiration is Nietzsche (1910) The Genealogy of Morals, Edinburgh: Fouls.


Clanchy, M.T. (1979) From Memory to Written Record (London: Arnold).