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review@seeu.edu.mk

SAMI MEHMETI

MAGNA CARTA AND THE ROMAN LAW TRADITION

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ABSTRACT

Magna Carta is one of the most important illustrations of the exceptionalism of English common law. Within a completely feudal framework it gave the clearest possible articulation to the concept of the rule of law and at the same time it also showed that there were certain basic rights which every freeman enjoyed without any specific conferment by the king. From English perspective, continental European law after the process of the reception of Roman law was commonly regarded to be apart and different from the English legal tradition, as well as being perceived to pose a continual threat. The English Parliament constantly turned down royal attempts to emulate the continental reception of Roman law by characterizing it as something entirely foreign to English law. Roman law was supposed to promote an authoritarian and absolutist vision of the relationship between rule and subjection and this was expressed in the famous phrases *'princeps legibus solutus'* and *'quod principi placuit legis habet vigorem'*. Roman law was also anti-feudal, because one of its main principles that all power originated from one central source was the antithesis of the distribution of power over multiple centers, which was a crucial element of the feudal society. Many English historians have held the view that the English law is democratic, whereas the continental tradition is undemocratic and authoritarian, and this is why the Roman law succeeded on the Continent and failed in England.

MAGNA CARTA AND THE ROMAN LAW TRADITION

Many authors who consider Magna Carta to have a 'protoconstitutional' character say that it is one of the most important undertakings in the English legal history, as it was the first written statute, and it laid the foundations of the later development of the English law (Barche, 2015). Some have characterized Magna Carta as a legal document that exemplified commonly recognized European values of its age (Helmolz, 1999). Concepts like the rule of law, limitation of the power of a king and the right not to obey him when he deliberately flouts the laws and customs of the land, were encouraged by the religious ideology of the time, the political and economic frailty of ruling elites and by the pluralism of jurisdictions. They were also backed by the increasing levels of legal awareness and sophistication that characterized the Western Europe during the twelfth and thirteenth centuries (Berman, 1983).

The aforementioned concepts were enshrined in the provisions of Magna Carta, but they were also were part of the Saxon Mirror (*Sachsenspiegel*) of 1220, the Hungarian Golden Bull of 1222, and the German Statute in Favor of Princes of 1232 (Berman, 1983). The Saxon Mirror (*Sachsenspiegel*), which was written in the early 13th century about the period of Bracton, stipulated that 'a man must resist his king

and his judge if he does wrong, and must hinder him in every wrong, even if he be his relative or feudal lord. And he does not thereby break his fealty.' In Hungary, as a response to the royal authority, the nobles and small landowners compelled King Andrew II to sign the Golden Bull, a legal document which was based on emerging legal concepts of limitation of royal authority. Among its 31 articles, one made it illegal to imprison a noble until he had been duly tried and sentenced (Kern, 1939, 84).

When compared to the legal systems of the countries of continental Europe, where a reception of the Roman law occurred in the late medieval period, the English law seems like a 'thoroughly native species' (Van Caenegem, 1987). Magna Carta is a very important illustration of the exceptionalism of English common law. Even if any influence *ius commune* comes into sight in Magna Carta, it is not there because any English lawyer had the idea that the norms of Roman and canon law should be embraced for the needs of the immature English common law. The influence Roman and canon law in the content has nothing to do with common law (McSweeney, 2015). They were used for offensive and defensive purposes in this epoch by the main actors in England's major political disputes, such as the Becket controversy of the 1160s and 1170s. (Carpenter, 1999). The two legal systems were important because the pope was frequently a prominent character in these political conflicts. He was one of the main figures that the different conflicting parties were seeking to please, and he understood the language of Roman and canon law (Hudson, 2012).

Magna Carta does not follow the form and structure of *ius commune* texts. It is written in the form of charter of liberties, and there are other legal documents of this style that predate it, including charters that established cities, rural charters of liberties, and especially the charter of the coronation of Henry I. The style of charters is not specifically related to the Roman law (Buckland & McNair, 1965). Even though among those who composed Magna Carta there might have been supporters of Roman law, their influence is not felt so much. Moreover, there were many reasons to suppose that the drafters could have adopted the terminology of Roman law in the text of Magna Carta, even in accidental way. Van Caenegem, a leading Belgian legal historian, who had analyzed the influence Roman law in Magna Carta, came to conclusion that 'Magna Carta, unlike other old English legal texts, contains no Roman terminology' (Van Caenegem, 1992, 181). For example, Article 9 of Magna Carta, embodies a Roman law principle, but it does not utilize the Roman terminology. According to this article, the guarantors of a debtor cannot be pursued as long as the principal debtor is solvent and able to pay his debts. This rule is related to the Roman law's *beneficium excussionis* (Buckland & McNair, 1965).

According to Richard Helmholz, 34 out of 63 chapters have elements of Roman law influence (chapters 1, 4, 5, 7–12, 14, 20–22, 26–28, 30, 31, 33, 35, 36, 38–42, 45, 52-54, 55, 57, 61, and 63) (Helmolz, 1999). This represents a significant part of the text. The chapters differ greatly, both in extent and the possibility of Roman law influence. Some (chapters 1, 22, 52, 53, 57, and 63) undoubtedly manifest the influence of the rules of canon law. Others only have small resemblance to Roman and canon law. John Hudson says that the majority of the norms in Magna Carta that Helmholz claims that show Roman law influence have other sources (Hudson, 2012). The main trouble for Helmholz's maximalist perspective is that the authors of Magna Carta did not actually borrow any legal terminology from the Roman law, with the exception of some chapters (1, 22, 52, 53, 57, and 63) that deal with issues that related to canon law.

The relationship between Magna Carta, i.e. English law and the Roman legal tradition could be addressed from a different perspective, and that has some political implications. According to this perspective England and its legal system are democratic, whereas the Continental Europe and its legal tradition is undemocratic and authoritarian, and as a consequence Roman law succeeded on the Continent and it failed in England. According to Raoul van Caenegem 'democratic England rejected the authoritarianism of Roman law' (Van Caenegem, 1987). According to the viewpoint of many famous historians, the Roman law is not compatible with freedom (Ryan, 2015). Bishop Stubbs, the great Oxford medievalist of the nineteenth century said: 'The civil law has been one of the greatest obstacles to national development in Europe and a most pliant tool of oppression. I suppose that no nation using

the civil law has ever made its way to freedom: whilst whenever it has been introduced the extinction of popular liberties has followed sooner or later' (Van Caenegem, 1987).

There are two points in this hypothesis. The first is that Roman law is authoritarian. The second is that the English legal tradition is considered democratic. The first hypothesis is easier to be dealt. The downfall of feudalism in the West has repeatedly been associated with the emergence of Roman law notions of public power (Barche, 2015). Roman law is assumed to offer a quasi-absolutist conception of the relationship between ruling and subjection, because Roman law in the Late Antiquity for several centuries had been characterized with absolutism as its imperial government was autocratic and over-centralized (Colognesi, 2009). *Corpus iuris civilis* narrates how the Roman state ceased to be governed by the people of Rome and transformed its constitutional system, so that it would be ruled by emperors. This allegedly took place when the Roman people adopted a 'royal statute' delegating to the emperors all their *imperium* and *potestas*. The concept that imperial powers had been established by a single legal act was historically inaccurate. These texts claim that the Roman people had transferred all their sovereignty to the emperors. For the majority of the 12th century, academic lawyers adhered to the idea of Irnerius that the *lex regia* had decisively transferred the monopoly to legislate from the Roman people to the emperors. Bassianus and Azo claimed that 'the emperor was superior to individuals within the Roman people, but not to the entire people taken as a corporate whole', a doctrine which is summarized in the formula: *princeps maior singulis minor universis* (the prince is more than the individual citizens, but less than their totality) (Ryan, 2015).

In the law of the period of Roman Principate and Dominate, there were no elements of direct or indirect democracy. Roman law was convenient to the emerging monarchies of the Late Middle Ages, because it was absolutist and authoritarian. It was also anti-feudal, not as a mindful assault on feudalism, because it was not known in Antiquity, but because the fundamental idea that all power originated from one central authority was contrary to the diffusion of power over various sources, which was a noticeable component of feudal society as it evolved in Europe in the Late Middle Ages. Ideas and principles derived from Roman law continued to inspire late medieval states, which liked to affirm themselves as 'empires' (Stacey, 2007).

Corpus Iuris Civilis as the most comprehensive code of Roman law, due to the medieval obsession of referring to words out of their context, could be used in support of representative systems of government as well as autocratic rule: in other words the Corpus Iuris could be used in different manners. For example, the precept *princeps legibus solutus* (the Roman emperor himself is not bound by the law) can be used in three different contexts (Stein, 1999). According to the Roman jurist Ulpian, the author of this maxim, its meaning was that the emperor was excluded from a specific norm which deprived unmarried or childless citizens from some rights. In the Digests of Justinian, in the sixth century, the phrase carried a more comprehensive meaning. In this context, the statement was interpreted to imply that the ruler is exempt from all statutes. In the legal and political philosophy of European absolutism, this statement finally became the explanation of the doctrine that the ruler is not bound by law at all (Stacey, 2007). The Roman law could be used in the reverse direction: it could be used in support of representative systems of government by referring a famous statement from the Digests: *quod omnes tangit ab omnibus approbetur* (what concerns all, should be approved by all). This is one of the best quotations that could be used in favor democratic forms of government. It could be interpreted to mean that public issues, i.e. those that affect the whole community, should be subject of acceptance by the whole community, or its elected representatives. However, the trouble with the adoption of this popular slogan was that the *Corpus iuris* did not deal with state or public issues, but with problems of private law (Van Caenegem, 1987).

Related to the abovementioned concepts, Walter Ullmann describes two contrasting themes which describe the creation of law in the Western world. According to the one called the ascending theme of government and law, the people as a whole is regarded as the bearer of the power to make laws in assemblies or other organs which consist of the representatives elected by the people. The essence of

this theme is that because the sovereign power belongs to the populace, it always controls and guides the direction of the society. The representatives do not act or speak on their own behalf, but on behalf of those that had elected them and as a consequence they are entitled to give consent to legislative measures. The ruler is just a representative of the people, and he continues to be responsible to those who have elected him and they remain responsible to the people as a whole. According to Ullmann, 'power ascends, allegorically speaking, from the broad base of the whole people and culminates in a ruler who has no power other than that which the people have conferred on him' (Ullmann, 1975).

In contrast to the ascending theme, the descending one assumes that power is found not in the broad base of the people, but in divinity which is considered to be the source of all power. The entirety of original power which is concentrated in one supreme being was allocated downward. At pinnacle of pyramid is the ruler who receives power from divinity and distributes it downwards. The public officials do not have the status of representatives: they are nothing but delegates of the ruler. According to Ullmann, the ruler 'can therefore withdraw the power conceded to them for reasons for which he has to account on the day of judgment: the people, because it is governed by him, cannot call him to account' (Ullmann, 1975).Because there are no representatives, consent has no role within this scheme. Consequently there is no right of resistance.

The English law, which was characterized by its oligarchic and feudal nature, was not compatible with the principles of Roman law. The British Parliament constantly turned down royal endeavors to follow the continental reception of Roman law mostly by characterizing it as something entirely foreign to English law. From an English perspective, the law in continental Europe after the process of the reception of Roman law was always considered to be different and detached from the English legal tradition, and sometimes it was identified as threatening. (Lundmark, 2012) Moreover, many prominent English lawyers and politicians were suspicious that a reception would bring about a dependency on the pope, the Holly Roman empire, and an autocratic ruler as the supreme legislative authority. In contrast, the English common law had been developed by judges who were favorably disposed towards the parliament and by that bolstered the class system. English parliamentarians and judges were watchful of their autonomy and authority, and therefore opposed attempts to continentalize the English common law (Hudson, 2012). Actually, those who opposed the reception had little knowledge about the concepts or doctrines of Roman law besides the idea that the ruler was perpetually correct and that professors were those who ultimately construed the law.

The English law was also incompatible with democratic values of Ancient Greece. The lack of enthusiasm for Greek law, and notably the law of the Athenian democracy, is most interesting. Language was not an obstacle, because Greek philosophical and scientific documents were translated in Latin from the Arabic and later they were available from the originals. There was not any absence of interest in Greek thought. On the contrary, western scholars continuously have been captivated by the intellectual treasures of the Greek civilization (Farrar, 1988). The reasons behind this disregard for the Greek legal thought and practice are not entirely clear and require more research. There was no specific compilation of Greek law which would bring together the legal thought and practice as was the case with the Corpus Juris which collected and summarized the best of classical jurists' writings on law and justice and was the main authority for the teachings of the medieval civilists (Harris, 2006). Materials on Greek law have to be collected from dispersed philosophical, historical and rhetorical texts.

Today, the majority of legal historians hold the view that in the cases when the local law was fragmentary or inadequate, English lawyers did not hesitate in seeking recourse to the endless resources of the Roman law. Future diplomats and high ranking church officials were trained in Roman and canon law at Oxford and Cambridge (Stein ,1999, p. 88). Even the common law itself came under the influence of *Corpus iuris*: its major doctrinal text in the late medieval period, the Bracton's Treatise on the Laws and Customs of the Realm of England, is heavily influenced by civilian scholarship. It was written as a *summa*, a form of text that was popular Roman and canon law scholars at the beginning of the 13th century. Many famous English lawyers of later centuries, such as Hale and Blackstone, were familiar

with the jurisprudence of continental Europe as were preeminent English judges of the 19th century (Van Caenegem, 2004).

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