

# THE GLOBAL LEGACY OF THE COMMON LAW

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## I. PRELIMINARY REMARKS

This year we celebrate the 800<sup>th</sup> anniversary of the promulgation of Magna Carta. Amongst the great number of initiatives for this event, Professor Mark Hill QC and the Reverend Robin Griffith-Jones have edited an interesting book, which gives a detailed account about the origins of Magna Carta, the social and political context of the time, and the religious background which forms the very foundation of the main principles of the Charter<sup>1</sup>.

I am neither an historian of law, nor a specialist in public law, nor an expert in the field of law and religion. I try only to be a humble comparatist, that is, a “strange” person, because comparative law itself is “strange”<sup>2</sup>, in the sense that, unlike other fields of law studies, it is not a body of rules, but a way of legal learning, looking at law as a phenomenon which is relative and universal at the same time, and trying to identify the profound features which characterize the form and substance of a legal system. I dare to venture gingerly into the debate and to discuss some aspects of the “global legacy of the common law”, whose origins, to my understanding, are closely interconnected with Magna Carta.

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<sup>1</sup> R. Griffith-Jones-M. Hill (eds.), “Magna Carta, Religion and the Rule of Law”, Cambridge, 2015. See also Lady Hale, “Magna Carta: Our Shared Heritage”, in <https://www.supremecourt.uk/docs/speech-150601.pdf>.

<sup>2</sup> R.B. Schlesinger, “Comparative Law: Cases, Text, Materials”, 7 ed., St. Paul, 2009, p. 2: “Comparative Law is not a body of rules and principles. It is primarily a *method*, a way of looking at legal problems, legal institutions, and entire legal systems. By the use of the method of comparison, it becomes possible to make observations and to gain insights that would be denied to one whose study is limited to the law of a single country”.

First, I will depart from the assumption that one of the most important aspects of Magna Carta is the idea of law as a limit of the sovereign's power. In reality, this concept was not new, nor was it peculiar to English law, as it had been developed on the Continent by the efforts of medieval jurists, but it was fixed in 'black letters' in Magna Carta at the end of a difficult period of controversies and it can be said that it is at the origin of the doctrine of the Rule of law. Second, I will consider the process of codification of law taking place on the Continent between the end of the XVIII and the beginning of the XIX century and in particular the idea of *Rechtsstaat*, shaped on different basis than the conception of the Rule of Law in English law, which flows from the Magna Carta and continues to characterize, at various degrees, the common law legal mentality. Third, I will concentrate on the main legacies of the conception of law which underlies the doctrine of Rule of Law, focusing on some features which still connote the common law tradition as opposed to the civil law tradition: the idea of the primacy of the unwritten law over statutory law and the unity of jurisdiction; the attitude of judges towards the interpretation of statutes; the circulation of precedents in a vibrant legal tradition. At the end, I will draw some conclusions.

## II. MAGNA CARTA AS AN ICON OF AN IDEA OF LAW.

At the time of its drafting (the beginning of the XIIIth century) Magna Carta was "far from unique, either in content or in form"<sup>3</sup>. For instance, many statutes of Italian cities and provinces contained rules and principles which are very similar to those written in Magna Carta: the ideas about the protection of the Church, about the conduct of officials, about the availability of justice in courts and, in general, about limitations on the power of the political authority can be said to be a pan-European phenomenon<sup>4</sup>.

Gino Gorla's fundamental studies make clear that the principle according to which "iura naturalia" ("natural rights") limit the power of the "prince" is essentially a creation of the glossators and the commentators<sup>5</sup>. In fact, § 11 of the Institutions of the

<sup>3</sup> R.H. Helmholz, "Magna Carta and the law of nations", in R. Griffith-Jones-M. Hill (eds), *supra*, note 1, p. 71.

<sup>4</sup> R. Griffith-Jones-M. Hill (eds), *supra*, note 1, p. 73. See M. Ascheri, "The Laws of Late Medieval Italy (1000-1500)", Leiden, 2013, p. 140.

<sup>5</sup> G. Gorla, "Iura naturalia sunt immutabilia". I limiti al potere del "principe" nella dottrina e nella giurisprudenza forense fra i secoli XVI e XVIII, in G. Gorla *et al.*, "Diritto e potere nella

*Corpus Iuris* did not contain any limitation on the power of the *Princeps*. The original meaning was rather an acknowledgment of an historical fact, determined by divine will. The relevant text provides: “The laws of nature, which are observed by all nations, inasmuch as they are the appointment of the divine providence, remain constantly fixed and immutable. But those laws, which every city has enacted for the government of itself, suffer frequent changes, either by tacit consent, or by some subsequent law, repealing a former”<sup>6</sup>. Since the time of the Glossa, the *ius gentium* was related to the problems of the limits to the power of the *Princeps* and it was conceived as the “*naturalis ratio inter omnes homines constituit*”<sup>7</sup>. For the medieval jurists, the *ius gentium* (the law of the people) included the *ius divinum* (the divine law) and it formed part of the *ius civile* (civil law) or *ius positivum* (positive law) of the different states.

Without going into further detail, we can state that, notwithstanding the fact that the roman texts are not clear about the concept of *ius gentium*, there is no doubt that “the conception of a higher law pervades the Middle Ages”<sup>8</sup>. This “higher law” was not a vague or generic concept. On the contrary, it identified some natural rights (*iura naturalia*) which limited the power of the *Princeps*, such as the right to be heard (in the courts, but also administrative action), the right of property (which cannot be forfeited without a *juxta causa*), the right of imposition of taxes, which was limited by public utility and necessity (*publica utilitas sive necessitates*) and so on<sup>9</sup>. It is worth noting that these ideas continued to be developed during the period between the XVI-XVIII centuries and the limits to the power of the *Princeps* were considered to concern not only the monarch, but also every authority, which had the power to legislate<sup>10</sup>.

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storia europea, Atti del quarto congresso internazionale della Società Italiana di Storia del Diritto in onore di Bruno Paradisi”, vol. 2, p. 629. A reduced version of this study has been published with the title: ““*Iura naturalia sunt immutabilia*” Limits to the power of the “*Princeps*” (as sovereign) in legal literature and case law between the 16<sup>th</sup> and 18<sup>th</sup> centuries”, in A. Pizzorusso (eds), “Italian Studies in Law”, Dordrecht, 1992, vol. 1, p. 55.

<sup>6</sup> “Sed naturalia quidem iura quae apud omnes gentes peraeque servantur, divina quadam providential constituta semper firma atque immutabilia permanent: ea vero, quae ipsa sibi quaeque civitas constituit, saepe mutari solent vel tacito consensu populi vel alia postea lege lata” (Instit., I, II, § 11).

<sup>7</sup> See again G. Gorla, *supra*, note 5, p. 58.

<sup>8</sup> E.S. Corwin, “The “Higher Law” Background of American Constitutional Law”, in *Harvard Law Review*, 1928-1929, p. 164.

<sup>9</sup> G. Gorla, *supra*, note 5, p. 59, referring also to Baldo’s definition of *iura naturalia*: “*res decisae et determinatae naturali lege vel moribus gentium*”.

<sup>10</sup> G. Gorla, *supra*, note 5, p. 59.

From these brief reflections we can conclude that the principles laid down in Magna Carta are not peculiar to English law and that they derived from continental sources.

If Magna Carta is not unique and the principles it contains not peculiar to English law, where does its importance really lie? An answer to this question can be drawn, again, from the chapters in the volume under discussion. What is really special in Magna Carta is its later history, that is, the uses to which it was subsequently put<sup>11</sup>. The title of Griffith-Jones and Hill's book provides a clue for answering our question, as it emphasizes the connection between Magna Carta and the Rule of Law. I think that this is one of the keys not merely to simply celebrate an anniversary, important though it may be, but primarily to identifying a legal mindset.

In this sense, one of the main legacies of Magna Carta, through the recognition of the role of religion and the respect due to the Church, can be seen in the acknowledgment that law is something more than the King's will. The enduring principles of Magna Carta, such as no taxation without representation, due process, fair trial, effective restraint upon the executive, can only be understood with a fuller understanding of these underlying principles.

### III. *STAATSRECHT* (*ETAT DE DROIT*, *STATO DI DIRITTO*) AND RULE OF LAW.

Following these reflections, we can now make a further step. If we can find in Magna Carta the formulation of an idea of law which was familiar to the entire European legal tradition, why was this idea abandoned over subsequent centuries on the Continent, whereas in England and in the common law world it continued to flourish? It is useful to concentrate on the difference between the common law and continental conceptions of rule of law.

It is neither possible, nor useful, to rehearse the impact of the codification movement, which took place in Europe soon after the French Revolution of 1789. But it is still worth noting, from a general comparative perspective, that with the codifications a real discontinuity took place on the Continent with the previous conception of law. Law had

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<sup>11</sup> R.H. Helmholz, *supra*, note 3, p. 71, referring to Prof. Thomson's researches.

never been conceived merely as the product of the will of the political authority, whereas from that time the situation changed radically with law becoming identified with legislation enacted by the state.

The theory of *Staatsrecht* is clearly an effect of this great change. Shaped in Germany by Robert von Mohl in the thirties of the XIX century<sup>12</sup>, but developed only after the restoration after the riots of 1848, the idea of *Staatsrecht* accomplishes a kind of compromise between liberal doctrine (supported by the enlightened bourgeoisie) and the authoritarian ideology of the conservatives (the monarchy at first). In fact, the *Staatsrecht* is opposed to the absolutist state, through elaboration of the two classical liberal principles of public enforcement of individual rights and separation of powers. On one side, individual rights are conceived as a creation of the state and they limit its power; so, in contrast with the French revolution view, the source of individual rights is not the people's sovereignty, but the legislative power of the State itself, which expresses the spiritual identity of the people. On the other side, the principle of primacy of law is transformed into the principle of legality: the system of rules given by Parliament is to be respected rigorously by both the executive and the judiciary, as a condition of the legality of their acts. In this perspective, an arbitrary use of legislative power is not contemplated, because the assumption is that there is a perfect correspondence between state's will, legality and moral legitimacy<sup>13</sup>. So, the *Staatsrecht*, in its original and complete understanding, is the State which limits itself through statute law<sup>14</sup>. With substantial variation, this concept was later followed also in France<sup>15</sup> and in Italy and we can say that it characterizes all the civil law countries.

If we compare the *Staatsrecht* with the common law conception of the *Rule of Law*, we can realize that they share the same aim, that is the need to subject the exercise of public powers to legal regulation, in order to protect the rights of citizens. But the ways through which this aim is pursued are very different. In the common law tradition, the limitation of state power is achieved through a "law" which does not derive from the

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<sup>12</sup> R. von Mohl, "Die Polizeiwissenschaft nach den Grundsätzen des Rechtsstaates", Tübingen, 1832-4.

<sup>13</sup> Cf. D. Zolo, "Teoria e critica dello Stato di diritto", in P. Costa-D. Zolo (eds.), "Lo Stato di diritto. Storia, teoria, critica", Milano, 2002, p. 21.

<sup>14</sup> Cf. G. Sartori, "Nota sul rapporto tra Stato di diritto e Stato di giustizia", in G. Sartori *et al.*, "Dommatica, teoria generale e filosofica del diritto", vol. 2, Milano, 1964, p. 310.

<sup>15</sup> Cf. A. Laquière, "Etat de droit e sovranità nazionale in Francia", in P. Costa-D. Zolo, *supra*, note 13, p. 284.

state itself, but from the common law, ie. from a law which develops autonomously from the state (case law)<sup>16</sup>. It is worth remembering the ancient *dictum* contained in the year books and expressed in the language of the time (the so called “law French”), according to which: “La ley est la plus haute inheritance que le Roi ad; car par la ley il meme et tous ses sujets sont rulés, et si le ley ne fuit, nul Roi, et nul inheritance sera”<sup>17</sup>. As we can readily see, the idea at the basis of this formulation is that law preexists the sovereign’s authority and binds him.

This concept, of course, is characterized by a slow and gradual process of adaptation of the medieval inheritance to the needs of modern society, culminating in the XIX century contribution of Albert Venn Dicey. But it still remains the core idea at the basis of the Rule of Law in the common law tradition.

As a consequence of the substantial difference between *Staatsrecht* and the *Rule of Law*, in the civil law systems administrative law is conceived as a distinct branch of law, a “special” one, with a completely separate judicial structure (administrative courts). On the contrary, in the common law “the citizen’s remedies against the state have been enhanced by the development of a system of administrative law based on the power of the court to review the legality of administrative action”<sup>18</sup>. So, in contrast with the continental *Staatsrecht*, characterized by the submission of public authorities to a check of legality of their acts in the context of separation of jurisdictions, the common law Rule of Law implies and postulates a unity of jurisdiction, ie. the submission both of private individuals and of public authorities to the same judge<sup>19</sup>.

#### IV. THE MAIN LEGACIES.

<sup>16</sup> For a full discussion, see L. Moccia, “Comparazione giuridica e diritto europeo”, Milano, 2005, p. 219.

<sup>17</sup> 19 Hen. VI. 63. “The law is the highest inheritance which the King has; for by the law he himself and all his subjects are governed, and if there were no law, there would be neither King nor inheritance”.

<sup>18</sup> J. Beatson, “Has the common law a future”, in *Cambridge Law Journal*, 1997, 291, at p. 296.

<sup>19</sup> L. Moccia, *supra*, note 16, p. 247. For an account of the recent debate in the United Kingdom concerning the utility of a bill of rights, foremost after the Human Rights Act 1998, see Lady Hale, “UK Constitutionalism on the March”, in <https://www.supremecourt.uk/docs/speech-140712.pdf> and N. Walker, “Our Constitutional Unsettlement”, in *Public Law*, 2014, p. 529

Having all this in mind, we can now focus schematically on some features which identify the main legacy of a concept of law which has its remote origins in Magna Carta and, through a long line of modifications and adaptations over history, is still visible in the common law experience, in contrast with the civil law tradition.

#### 4.1) *The primacy of “unwritten law” on statute law.*

If we go back to Magna Carta, we find the first formulation of a principle, whose basis has been well summarized as follows: “the law of the realm should be written down to guide the king in ruling the kingdom” and “due process facilitated by the judgment of peers and guided by the law of the land should be applied not only in the king’s courts but *also to the king himself*”<sup>20</sup>.

This idea, according to which the “king” is bound by a law which is not created by himself, continues to characterize the English tradition, in a never-ending variation of scenarios. Only in this perspective can we understand something which sounds alien to a continental jurist: English “constitutional law remains a common law ocean dotted with islands of statutory provisions [...] Whether we like it or not, the common law is the responsibility of the courts”<sup>21</sup>; as well as the *dictum* of an eminent English judge: “In our society the rule of law rests upon twin foundations: the sovereignty of the Queen in Parliament in making the law and the sovereignty of the Queen’s courts in interpreting and applying the law”<sup>22</sup>. So, according to the common law experience, “the rule of law recognizes two sovereignties, not one and not three”<sup>23</sup>.

This aspect cannot be underestimated, because it is essential to understand that the hallmark of a common law system is the importance accorded to the decisions of judges as sources of law. In this sense, the common law is “unenacted”, and so “unwritten”, law<sup>24</sup> and it binds not only private individuals, but also public authorities. This does not mean that case law can contradict statute law, nor that judges are not

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<sup>20</sup> J.W. Baldwin, “Due process in Magna Carta. Its sources in English law, canon law and Stephen Langton”, in R. Griffith-Jones-M. Hill *supra*, note 1, p. 51.

<sup>21</sup> S. Sedley, “The sound of silence: Constitutional Law without a Constitution”, in *Law Quarterly Review*, 1994, 270, at p. 273.

<sup>22</sup> *X v. Morgan-Grampian Ltd.* [1991] AC 1, per Lord Bridge of Harwich.

<sup>23</sup> S. Sedley, *supra*, note 21, p. 291.

<sup>24</sup> J. Beatson, *supra*, note 18, p. 295.

bound by statute law: it simply means that the idea of the “two sovereignties” is at the basis of a cultural attitude, still present in the common law tradition, according to which the relationship between the common law and statute law tends to be considered in terms of separateness, as between oil and water<sup>25</sup>. In this perspective, the close relationship between the Rule of Law and case law, ensures the protection of the individuals against the state by subjecting of the action of public authorities to the scrutiny under the jurisdiction of the common law courts.

*4.2) The attitude of common law judges towards the interpretation of law: a recent example.*

As a result, it is worth noting that even if the considerable increase in statute law in all fields has a great impact in England and in other common law countries, the weight of the common law tradition is still clearly visible. There is a strict approach to matters of statutory interpretation. “Psychologically, if not statistically, statutes can still appear to many lawyers as exceptions rather than the rule”<sup>26</sup>.

The most striking emergence of this attitude lies in the tendency to confine statutory provisions to a restrictive reading. A very recent example can be drawn from a case decided by the UK Supreme Court in 2015, in the 800th anniversary of Magna Carta<sup>27</sup>. Very briefly, a journalist employed by a newspaper sought disclosure (under the Freedom of Information Act 2000 and the Environmental Information Regulations) of correspondence sent by Prince Charles to various Government Departments between 1 September 2004 and 1 April 2005. The Departments refused disclosure and the Information Commissioner upheld that decision. The Upper Tribunal ordered that Mr Evans was entitled to disclosure of ‘advocacy correspondence’ falling within his requests, including advocacy on environmental causes, on the ground that it would generally be in the overall public interest for there to be transparency as to how and when Prince Charles sought to influence government. But subsequently the Attorney General used the statutory ‘veto’, according to section 53(2) of the Freedom of Information Act 2000, enabling him to block disclosure. Under section 53(2), the Attorney General can decide that an order against a government department shall cease to have effect. The Supreme

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<sup>25</sup> J. Beatson, *supra*, note 18, p. 300.

<sup>26</sup> J. Beatson, *supra*, note 18, p. 301. For a full analysis, cf. L. Moccia, *supra*, note 16, p. 593.

<sup>27</sup> *R (on the application of Evans) v Attorney General* [2015] UKSC 21.

Court, dismissing the appeal against the decision of the Court of Appeal, upheld a very strict interpretation of the relevant statutory provisions.

It is obviously impossible to examine this decisions in depth, but it is useful to quote the *dictum* of Lord Neuberger (for the majority), focusing on “two constitutional principles which are also fundamental components of the rule of law. First, subject to being overruled by a higher court or (given Parliamentary supremacy) a statute, it is a basic principle that a decision of a court is binding as between the parties, and cannot be ignored or set aside by anyone, including (indeed it may fairly be said, least of all) the executive. Secondly, it is also fundamental to the rule of law that decisions and actions of the executive are, subject to necessary well established exceptions (such as declarations of war), and jealously scrutinized statutory exceptions, reviewable by the court at the suit of an interested citizen”<sup>28</sup>. For this reason, it is worth noting that the right of citizens to seek judicial review of actions and decisions of the executive has “its consequences in terms of statutory interpretation”, in the sense that “[t]he courts will, of course, decline to hold that Parliament has interfered with fundamental rights unless it has made its intentions crystal clear”<sup>29</sup>.

Another matter, which emphasizes the English approach to statute law, is the presumption against the alteration of the common law, so that even if Parliament is sovereign and can alter the common law, in order to do so it must expressly enact legislation to that end. If there is no express intention, courts assume that a statute is to be interpreted in a manner which does not introduce any change to the common law<sup>30</sup>.

This is another example which shows quite well the persistent attitude of common law judges towards statute law, together with the relevance of the doctrine of Rule of Law examined above, which continues to characterize the common law experience and mindset.

#### *4.3) A communicating legal tradition: the circulation of precedents.*

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<sup>28</sup> *Ibidem*, par. 51 and 52.

<sup>29</sup> *Ibidem*, par. 56, quoting the opinion of Lady Hale, in *Jackson v Her Majesty's Attorney General* [2005] UKHL 56, para 159.

<sup>30</sup> For a recent case in this field, see *R v Hughes* [2013] 1 WLR 2461.

A third aspect I would like to focus on can be illustrated by reference to the following statement: “In the Commonwealth [...] the law of England is frequently cited to establish the "context" or "historical background" of the legal issues and to place the issue within the overall structure of the common law”<sup>31</sup>. This means that even if the common law tradition is sometimes seen as an historical heritage, anchored in the past and incapable of guaranteeing a uniform development of various national laws, it continues nevertheless to be vital and visible through the circulation of precedents. Note the continuous recourse of judges to the relevant case law of other common law countries: “Although common law systems do not require Judges to examine foreign law many Judges have used foreign law, especially English law, as a source of possible solutions to a problem”<sup>32</sup>. Without being binding, recourse to foreign common law precedents contributes to the development of a continuous dialogue and source of inspiration, which strengthens the idea of common law as case law, and so as an unwritten law which keeps the common law tradition away from identifying the law with the will of an authority.

This idea of belonging to a common legal tradition is well expressed by an Australian judge sitting in the High Court of Australia: “Our inheritance of the law of England does not consist of a number of specific legacies selected from time to time for us by English courts. We have inherited a body of law. We take it as a universal legatee. We take its method and its spirit as well as its particular rule”<sup>33</sup>. Very recently, speaking extra-judicially, another eminent Australian judge observed: “The method and spirit of the common law apply as much to our legal institutions and courts as well as to the rules of law [...] The pragmatism which marks the development of the common law is part of a culture which we share with the English and which marks out our judicial method. I do not expect that that culture to change significantly in the near or long term. Even if the English or our common law is eventually replaced by codes or statutes we are also still likely to apply the rules of statutory interpretation developed by the common law”<sup>34</sup>.

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<sup>31</sup> T. Allen-B. Anderson, “The Use of Comparative Law by Common Law Judges”, in *Anglo-American Law Review*, 1994, 435, at p. 439.

<sup>32</sup> T. Allen-B. Anderson, *supra*, note 31 p. 443.

<sup>33</sup> *Skelton v. Collins* [1966] 115 C.L.R. 94 HCA at 134-135, per Windeyer J.

<sup>34</sup> J. Douglas, “England as a Source of Australian Law: For How Long?”, in *Australian Law Journal*, 2012, 333, at p. 349-350. Cf. B. Häcker, “Divergence and Convergence in the Common Law. Lessons from the *ius commune*”, in *Law Quarterly Review*, 2015, p. 424.

## V. SOME FINAL THOUGHTS.

The of the quotations above show the legacy of a concept of law: the sense of belonging to a community of jurists, the awareness of adhering to a common methodology and spirit, the continuous circulation of ideas and solutions are features, which characterize the common law tradition, with the advantage of sharing a common language.

Magna Carta can be considered, to a certain extent, as the starting point of this cultural attitude, which is linked to a very strong idea. In fact, through the claim of the respect of the autonomy of the Church, the medieval jurists were not solely animated by a partisan goal, but they pursued a far deeper one: law is more than the will of the king and it acts as a limit on him. This idea was deeply rooted in a conception of man and of life, whereas “ours is a mobile and deracinated generation. The custodians of ancient traditions and principles that have for centuries undergirded our polity do not now earn respect or attention through that wardship alone”<sup>35</sup>.

The question, which arises now, in our complex and multi-cultural society, is how do we ensure that these deep roots do not dry up. This question is the central point on which it is essential to confront each other as men, and so as jurists, in order to go in search of possible answer

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<sup>35</sup> R. Griffith-Jones-M. Hill (eds.), *supra*, note 1, p. 8.