

A NOTE ON CHAPTER 39 OF MAGNA CARTA

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It is not my intention here to discuss the importance of the most famous chapter in the most famous Charter of Liberties, but only to have a close look at the meaning of a single word – *vel* – at the end of the text, on which there is some disagreement among scholars. This controversy goes back a long way. In the seventeenth century the Quakers, already appealing to Magna Carta, became involved in the debate because they were interested in the idea of trial by peers.¹

The gist of chapter 39 is that no free man should be molested or punished except by the lawful judgment of his peers or by the law of the land. The original Latin text reads as follows: “Nullus liber homo capiatur, vel imprisonetur, aut disseisiatur, aut utlagetur, aut exuletur, aut aliquo modo destruat, nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum vel per legem terre.”

The traditional opinion is that *vel* in this phrase is disjunctive. Professor JC Holt, who wrote an authoritative book on the Great Charter, translated as follows: “except by the lawful judgement of his peers or by the law of the land”.² Professor A Torre, a well-known student of the British constitution and of English legal history, translated similarly as follows: “se non in virtù di un legittimo giudizio di suoi pari o in applicazione della legge del paese”.³ They understood the phrase to mean that no sanction could be inflicted on a free man without either a lawful judgment of his peers or a judgment according to the law of the land.

A dissenting opinion was voiced, however, by the eminent legal historian Professor Walter Ullmann, who argued that here the *vel* is to be understood in a conjunctive sense,

- 1 Th. A. GREEN, *Verdict According to Conscience. Perspectives on the English Criminal Trial Jury 1200-1800*, Chicago and London, 1985, p. 129.
- 2 J.C. HOLT, *Magna Carta*, Cambridge, 2nd ed., 1992, p. 461.
- 3 A. TORRE, *Magna Carta [1215]. Testo latino a fronte*, Macerata, 2008 (Il Monitore costituzionale. Collana diretta da Alessandro Torre, 1), p. 23.

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so that article 39 should be read as meaning that “no free man should be sanctioned except by a legitimate court of peers and by the law of the land”.⁴

The question is of some importance since the two interpretations are fundamentally different. In Ullmann’s version, there is one procedure in the *judicium parium* (a great feudal principle, to which I shall return later). In Holt’s version, there are two procedures, either sentencing by peers or judgment by some other procedure in any court that applies the law of the land.

I would now like to offer some considerations as a modest contribution to the debate, and to dedicate them to Laurens Winkel, an eminent scholar and good friend. The laws of logic provide my first argument because “a lawful judgment according to the law” (Ullmann’s reading) amounts to tautology. It is indeed hard to imagine a lawful judgment of peers against the law of the land.

Another argument in favour of the Holt thesis is the understanding of our text in a contemporary translation into Norman French, where *vel* occurs as “o”, namely “or” and not as “and”.⁵ It is moreover noteworthy that “the clerk who transcribed the version of the Charter used in the confirmation of 1253 used the word *aut* here”.⁶

My third argument belongs to social history, for it is clear that the alternative of judgment by peers or judgment according to the law of the land relates to two different social classes. If the lawful *judicium parium* is distinct from the law of the land, according to what law do the peers pronounce their lawful judgment? There is little doubt that it is the feudal law of the barons and knights, as opposed to the law of ordinary folk. Feudal law is the body of customs regulating fiefs and homage, inheritance and *relevium*, primogeniture, knight service, various “feudal incidents”, *auxilium et consilium*, loyalty to the overlord and treason (felony being to this day the most heinous crime).⁷ Judgment by peers was a venerable part of this body of law. A vassal appearing in his lord’s court was not judged by the lord himself but by his peers, namely his fellow vassals. The court in which this *judicium parium* was pronounced would be the *curia regis* for the tenants-in-chief, or some baronial court for the enfeoffed tenants (*vavassores*) down the feudal pyramid.

Chapter 21 of Magna Carta itself laid down that earls and barons were not to be amerced except by their peers and then only in accordance with the nature of the offence:

4 W. ULLMANN, *A History of Political Thought The Middle Ages*, Harmondsworth, 1965, p. 150. His rendering of *judicium* as a court is surprising for, as HOLT, *op. cit.*, p. 328, n. 154 points out, in the English legal records of the period *judicium* meant judgment, and a court was called *curia*.

5 The full text is given in J.C. HOLT, *Magna Carta and Medieval Government*, London and Ronceverte, 1985, pp. 249-257. Ch. 39 is on p. 253, where the relevant phrase is as follows: “fors par leal jugement de ses pers, o par la lei de la terre.”

6 HOLT, *loc. cit.*

7 The classic work is F.M. STENTON, *The First Century of English Feudalism*, Oxford, 2nd ed., 1961. More recently: S.F.C. MILSOM, *The Legal Framework of English Feudalism*, Cambridge, 1976; T.N. BISSON, *The Crisis of the Twelfth Century*, Princeton, 2008 (contains a good deal on English feudalism); G. GARNETT, *Conquered England Kingship, Succession and Tenure, 1066-1166*, Oxford, 2007; J. HUDSON, *Land, Law, and Lordship in Anglo-Norman England*, Oxford, 1994; J. HUDSON, *The Formation of the English Common Law Law and Society in England from the Norman Conquest to Magna Carta*, London, 1996.

“Lawful judgment by peers, as Professor Holt points out, was an antique remedy ... which had gone so awry in the years before 1215”.⁸

The alternative was the law of the land, the body of ancient customs, sometimes going back to the Old English dooms and recorded in such law books as the *Leges Henrici Primi*⁹ or in borough charters,¹⁰ or developed and fixed in the case law of the hallmoot, namely the manorial court, or the borough court or court leet or husting, or in the hundred or county court.

Chapter 39 says nothing about jury trial and has nothing to do with it. There is, nevertheless, a tenacious belief that the famous English jury goes back to Magna Carta. This once widespread misapprehension, accepted even by the United States Supreme Court in *United States v Booker* in 2005, was based on the *judicium parium* of our chapter 39, but it has rightly been abandoned by the historical profession as an unwarranted *Hineininterpretation*.¹¹

The feudalism that produced Magna Carta was part of a vast European experience. It is therefore natural to look for continental parallels to chapter 39.

Some information could, for example, be provided by neighbouring Flanders, where Galbert of Bruges, a notary in the count's administration, was a keen observer of what went on in the law courts. He wrote an account of the dramatic events following the murder of the childless Count Charles the Good in 1127, who was succeeded by William Clito, a son of Duke Robert Curthose of Normandy and supported by the king of France, the suzerain of the county of Flanders.¹² During the months following his accession the young count, as reported by Galbert (c 87), decided to punish the murderers and their accomplices, who were indicted by grand juries. A distinction was drawn between those belonging to the feudal class, namely the vassals of the late Count Charles, who were outlawed, and the other folk who were to be sentenced by the *scabini* of the land, as they had requested.¹³

Similarly but even more clearly expressed, we find the contrast between the barons and knights on the one hand, and the ordinary free men on the other in Galbert's c 102, where we read that in March 1128 William Clito's rival, Thierry of Alsace, was elected

8 HOLT, *op. cit.*, p. 330.

9 L.J. DOWNER (ed.), *Leges Henrici Primi*, Oxford, 1972 (with translation and commentary).

10 A. BALLARD (ed.), *British Borough Charters, 1042-1216*, Cambridge, 1913; M. BATES (ed.), *Borough Customs*, 2 vols., 1904-1906 (Selden Society vols. 18, 21).

11 See, most recently, J.H. LANGBEIN, R.L. LERNER and B. SMITH, *History of the Common Law. The Development of Anglo-American Legal Institutions*, Austin etc., 2009, p. 125.

12 There are two modern editions of Galbert's work. One is H. PIRENNE (ed.), *Histoire du meurtre de Charles le Bon comte de Flandre par Galbert de Bruges*, Paris, 1891. The other is J. RIDER (ed.), *Galbertus Notarius Brugensis. De multro, traditione, et occisione Gloriosi Karoli comitis Flandriarum*, Turnhout, 1994 (Corpus Christianorum. Continuatio Mediaevalis, LXXXI). Pirenne's edition had its merits, but was recently criticized by J. RIDER, *Henri Pirenne at work. Editing Galbert of Bruges*, in *Essays in Memory of Bryce Lyon*, Kalamazoo, 2012, pp. 51-74.

13 The *scabini* of the land were the judges in the courts of the castellanies or the towns. See the commentary in R.C. VAN CAENEGEM, *Galbert of Bruges on serfdom, prosecution of crime and constitutionalism (1127-28)*, in B.S. Bachrach et al. (eds.), *Law, Custom and the Social Fabric in Medieval Europe. Essays in Honor of Bryce Lyon*, Kalamazoo, 1990, pp. 101-102.

Count of Flanders by an important section of the Flemish people. It was then ordained that all those who had been outlawed in 1127 might return to Thierry's court and demonstrate their innocence (*excusationem facerent*) according to the judgment of the barons or feudatories if they were knights and had belonged to the count's court, or otherwise they might prove their innocence (*sese purgarent*) before the *scabini* of the land.¹⁴ And in May 1128, Galbert tells us (c 110) that almost all those who had been banned as accomplices in the betrayal of Count Charles returned and requested that anyone who was challenged on account of this treachery would answer either in the count's court, if he was a knight, or before the *scabini* or judges of the land, if he was of inferior status (*inferioris conditionis*).¹⁵

Thus, somewhat paradoxically, Flemish events of 1127 and 1128 throw light on an English Charter of 1215.

Abstract

Scholars disagree about the meaning of c 39 of Magna Carta (1215). Some read that no freeman shall be punished "except by the lawful judgment of his peers *or* by the law of the land", but others "except by the lawful judgment of his peers *and* by the law of the land". The present author believes the former version to be correct on the strength of legal and linguistic arguments. He also refers to comparable situations on the Continent that support his conclusion.

14 Professor Holt (*op. cit.*, p. 278) mentions some other continental parallels, such as the Golden Bull of Hungary of 1222 which laid down that "no noble was to be taken or destroyed ... unless he had first been summoned and convicted by judicial process" and the Sicilian Concession of 1283, which provided for judgment by peers for "counts, barons and holders of fiefs".

15 One is reminded of the medieval French rule that stipulates "Si les vilains sont soumis à la loi de la terre, les nobles revendiquent le bénéfice d'un droit propre" (quoted in P. OURLIAC and J.-L. GAZZANIGA, *Histoire du droit privé français de l'an mil au code civil*, Paris, 1985, p. 68).