In Search of the Origins of Due Process of Law

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法の適正過程の起源を求めて

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Abstract

The lineage of Magna Carta normally means something that has descended from Magna Carta, e.g., due process, habeas corpus, etc. and not the lineage from which Magna Carta itself descended. The earlier coronation oaths of the kings of England do not reveal anything remotely similar to the liberty clause of Magna Carta. Still, 'The time-honoured view' puts that its origin is 'lost in the mists of antiquity', suggesting as if it is traceable back to Rome. This paper sheds light on this riddle by exploring a hypothesis that Apostle Paul's assertion of his ancient civil liberty while under detention could have inspired and informed the development of feudal English liberty and due process. This paper offers historical and comparative law perspectives and draws some suggestions for today.

Keywords: civil liberties, due process of law, Magna Carta, Apostle Paul, Roman law

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マグナ・カルタは法の適正過程という近代憲法につながる立法用語の先達に位置付けられるが、その起源とされる歴代イングランド王の戴冠宣誓に自由権規定の内容は見当たらず、伝統説は古代の霧の中にそれを消失させ、暗にローマを指し示す。本稿は、この謎を解く鍵として、自由権規定が、中世イングランド封建法にその起源を有すると同時に監禁中の使徒パウロによるローマ市民権の主張とその帰結から想定されるローマ法規定と骨子の上で重なることに着目し、聖書から独立したローマ法源を探索し、聖書を介したローマ法の間接的影響仮説を比較法制史的手法で探求し、自由権発生の現代的意義を再考する。

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In 2003, Lord Judge, when he was the senior presiding judge of England and Wales before becoming the Lord Chief Justice, told those who were dining at the Honourable Society of the Inner Temple to be called to the Bar, that students tended to learn in

school that human rights were developed by philosophers on the continent, but they were mistaken; rights were defined in a professional legal manner and were enforceable from the very beginning; look at Magna Carta. I thought that he was referring to the liberty clause (clause 39). But Lord Judge mentioned clause 61 of King John's Charter first, as he did so during his later conversation with U.S. Chief Justice Roberts about Magna Carta's legal legacy in the Library of Congress on 5 November 2014: 'If the King does not abide by the Charter when he is notified that he is in breach of it, in effect, a council of twenty-five barons can take over the running of the kingdom. They are not to harm him. They are not to injure him. They are not, of course, to treat him with violence or his family but they are no longer stuck with their oaths of allegiance and fealty.'[1] The following part of clause 61 in David Carpenter's translation will illustrate further the very technically 'legal' nature of the text itself:

> '... We make and grant them the below written security: namely that the barons shall choose twenty-five barons of the kingdom, whom they wish, who should with all their strength observe, keep and cause to be observed, the peace and liberties which we have granted to them and have confirmed by this our present charter, so namely that if we, ..., offends against anyone in any way, or transgresses any of the articles of peace or security, and the offence is shown to four barons of the aforesaid twenty-five barons, these four barons shall ... seek that we cause that transgression to be redressed without delay. And if we do not redress it, ... within the time of forty days to be counted from the time when it is shown to us, ... the aforesaid four barons are to refer the cause to the rest of those twenty-five barons, and those twenty-five barons, with the commune of all the land, shall distrain and distress us in all ways they can, namely by taking of castles, lands, possessions, and in other ways as they shall be able, until it is redressed, according to their judgement, saving our person, and those of our queen and our children. And when it is redressed, they shall obey us as they did before. And whosoever of the land wishes, is to swear that for the executing of all the aforesaid things, he shall obey the orders of the foresaid twenty-five barons ...' (Carpenter, 2015, pp. 62-65).

Following the royal 'we', the text adds 'our justiciar, or our bailiffs, or any of our ministers'. It gives similar provisions for very many conceivable contingencies, for example, if the king is absent from the kingdom; if some of the land do not wish of their own accord and spontaneously to swear to the twenty-five barons; if any of the twenty-five barons dies, or departs from the land, or in any other way is impeded; if by chance these

twenty-five barons are present and disagree among themselves on anything, or if any of them, having been summoned, should not wish or should be unable to attend, etc. For modern civil lawyers, it seems quite remarkable that such a very elaborative 'English' drafting skill of a professional legal document had already been practised as early as 1215.

The second clause Lord Judge mentioned was clause 40, 'to no one will we sell, to no one will we deny or delay, right or justice', which is written on an inner glass wall of the entrance hall of the UK Supreme Court building. From this Lord Judge believed was derived the idea of rights of the people and ultimately 'the most important principle' of 'equality before the law.' That clause was combined with clause 39 to make clause 29 of King Henry III's Charter of 1225, which was confirmed by Parliament of Edward I in 1297, which survives to this day as a statute.[2] Lord Judge said, 'due process', 'habeas corpus', 'impartial juries', 'the Bill of Rights' ... 'are in direct lineage from Magna Carta; ... many of the arguments which are well founded [today] stem originally from the thought process which had developed over the last eight hundred years.'[3]

The word 'lineage' has led this paper to want to explore whether Magna Carta itself was in a lineage from something earlier, because such a professional document could not have emerged suddenly from the middle of nowhere. There must have been a model of some kind somewhere. Also, the beginning is rather important because Aristotle said, **εἰ δή τις ἐξ ἀρχῆς τὰ πράγματα φυόμενα βλέψειεν, ὥσπερ ἐν τοῖς ἄλλοις, καὶ ἐν τούτοις κάλλιστ᾽ ἂν οὕτω θεωρήσειεν** (1252a 24-25), which is, 'If one looks at pragmatic matters in development from their beginning, as in the other matters, she could attain the fairest view/theory of them.'

William McKechnie (1914) says, 'The traditional view makes Magna Carta the direct descendant of Henry Beauclerk's Coronation Charter [1100], which is, in turn, regarded as merely an amplification of the old coronation oath sworn by the Conqueror and his sons, in terms borrowed from a long line of Anglo-Saxon kings, stretching back from Edward Confessor to Edgar, Alfred and Egbert, until its origin is lost in the mists of antiquity' (p. 93). The word, 'antiquity', tends to point to somewhere around, or perhaps before, the Heptarchy. Is this merely an exaggeration on the part of that which McKechnie called 'the time-honoured view' (p. 93)?

By 1689, Parliament was doubtful about that view, because the Coronation Act says,

> 'Whereas by the law and *ancient* usage of this realm, the kings and queens thereof have taken a solemn oath upon the evangelists at their respective

> coronations to maintain the statutes, laws and customs of the said realm and all the people and inhabitants thereof in their spiritual and civil rights and properties, but for as much as the oath itself on such occasion administered has heretofore been framed in doubtful words and expressions with relation to *ancient* laws and constitutions at this time unknown, [...]' [spelling modernised, and emphasis added, by the present author].

To Pollock and Maitland (1895), Magna Carta was

> 'in form just like an ordinary borough charter [...] Magna Carta, whatever its form, is in substance no deed of grant but a great code of law. That is true; but the fact remains that the form of this solemn instrument is that of a deed of grant. That was the form which to prelates, clerks and lawyers of the time seemed the most apt for the purpose. The king was to grant liberties to the men of England as he had granted them to the men of Cornwall and the men of London' (p. 658).

The form of Magna Carta may be more like that of the Anglo-Norman deed of grant, rather than any oath which Æthelberht of Kent might have made on his crowning or christening. But the question remains as regards its substance. Was there any coronation oath which contained anything similar to the liberty clause (clause 39) of Magna Carta?

> 'Nullus liber homo capitatur, vel inprisonetur, aut dissaisiatur, aut utlaghetur, aut exuletur, aut aliquo modo destruatur, nec super eum ibimus, ne super eum mittemus, nisi per legale iuditium parium suorum vel per legem terre.' (Carpenter, 2015, p. 52)
> 'no free man is to be arrested, or imprisoned, or disseised, or outlawed, or exiled, or in any way destroyed, nor will we go against him, nor will we send against him, save by the lawful judgement of his peers or by the law of the land.' (p. 53)

Pollock and Maitland say,

> 'Selling Christian men beyond seas, and specially into bondage to heathen, is forbidden by an ordinance of Æthelred, repeated almost word for word in Cnut's laws. [...] [The slave trade's] continued existence till [the Conquest] is further attested by the prohibition of Æthelred and Cnut being yet again repeated in the laws attributed to William the Conqueror.' (p. 12)

Still, this is not really close enough to the gist of the liberty clause.

Henry I's coronation charter contains the phrase, 'Legem Eduuardi regis uobis redo

cum illis emendationibus quibus pater meus eam emendavit consilio baronum suorum'[4] which is, 'I restore the law of King Edward [the Confessor] to you with these amendments by which my father [William the Conqueror] has improved it with the advice of his barons.' But there is nothing relevant to the liberty clause there.

William the Conqueror's London Charter on December 75 [sic], 1066, only says:

> 'Et ego vobis notum facio, quod volo, quod vos sitis omni lege illa digni, qua fuistis Edwardi diebus regis. Et volo, quod omnis puer sit patris sui heres post diem patris sui. Et ego nolo pati, quod aliquis homo aliquam injuriam vobis inferat.'[5]
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> 'I make it known to you that you shall be worthy of sharing all that law, which you did during the days of King Edward; and that every child shall be his father's heir after his father's lifetime; and that I will not allow any man to do you any wrong.'

Any part is a little too broad to be an ancestor of the liberty clause.

By contrast, a part of the written agreement (*cyrographum*) dated 28 July 1191 between Lord Chancellor William de Longchamp, who was the chief justiciar looking after the kingdom of Richard I during his absence for the third crusade, and Count John of Mortain, the king's brother and future successor, reads:

> 'Sed et concessum est quod episcopi et abbates, comites et barones, vavassores et libere tenentes, non ad voluntatem justitiarum vel ministrorum domini regis de terris vel catallis suis dissaisientur, sed judicio curiae domini regis secundum legitimas consuetudines et assisas regni tractabuntur, vel per mandatum domini regis. Et similiter dominus Johannes in sua terra faciet observari' (Stubbs, 1870, p. 136).
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> '[But it is also granted that] bishops, abbots, earls, barons, knights and free tenants shall not be disseised of lands and chattels by the will of the justices or ministers of the lord King, but shall be dealt with by the judgment of the court of the lord King according to the lawful customs and assizes of the realm or by the mandate of the lord King. [Lord John shall also make it observed on his land in like manner]' (translation by Holt, 1985, pp. 168-9 but parts in the square brackets are translated by the present author).

For the following reasons, this provision of John's earlier agreement with William de Longchamp, less than twenty-four years before his own sealing of *Magna Carta Liberatum* (the great charter of liberties) on 15 June 1215, seems to be the direct origin of the latter's

liberty clause. First, the negative singular subject in Magna Carta, 'no free man' (*nullum liber homo*), replaced the positive enumeration of numerous examples of such a man in John's earlier agreement. Second, the banned conduct in the agreement was disseisin only, and the Magna Carta extended it to arresting, imprisoning, outlawing, exiling, destroying in any other way. Third, the agreement gave the power of authorising such conduct either to the judgment of the king's court following the lawful customs and assizes of the realm or to the king himself who might delegate the power (*mandare*). So, it can be said that the agreement purported to exclude the arbitrariness of the king's justices and ministers, including William de Longchamp, but not necessarily that of the king himself (Richard I) who happened to be a long way away from his kingdom, whereas the Magna Carta proclaimed to exclude the arbitrariness of the king himself (John).

The 'assizes of the realm' in the agreement seem to mean 'ordinances' for the production of which the king and council sat, for example, the Assizes of Clarendon 1164 and 1166,[6] the Assize of Northampton 1176, the Assize of Windsor 1179, whereby Henry II introduced petty assizes and a grand assize as 'form [s] of jury' (Baker, 2002, p. 73). These purported to produce a speedy enquiry by neighbours into either the question of fact (petty assizes) or into the right (grand assize), and as such, provided parties with the royal opportunities to settle their feudal-tenure disputes by solemnities of judicial combat rather than by battle (p. 233). Therefore, 'by the lawful judgement of his peers or by the law of the land' in the baronial charter which John sealed twenty-four years later might appear to correspond roughly with 'the judgment of the court of the lord king according to the lawful customs and assizes of the realm or by the mandate of the lord king'. However, from the particular point of view of the king, who was forced to seal the former, its wording would seem to have grossly watered down his kingly authority, because every mention of the king was meticulously removed from the liberty clause of 1215. There are many apparent parallels between John's agreement in 1191 and his charter in 1215, but their purposes were, with a closer look, quite the opposite. William de Longchamp had insisted on the authority of King Richard I in his deal with Count John in 1191, while the barons at Runnymede asserted their customary power in their deal with King John in 1215, while diplomatically imitating John's own earlier agreement to make it easier for him to seal the charter. The clergy and barons had a political motive to believe that Magna Carta restored their *ancient* liberties which they believed had been eroded by Henry II's legal reforms. The question remains how *ancient* they were.

Baker (2002) argues that the idea of swearing men (*jurata*) to tell the truth (*veredicere*) or furnish true information was very old and not peculiar to England; it was only a way

of collecting data needed for fiscal or administrative purposes (p. 72). Long before Henry II, juries of twelve had been sworn in at the king's behest to settle difficult property disputes (p. 73). To support this, Baker cites *Bishop of Rochester v Picot* (c. 1077/87) 106 Selden Society annual volume 106, p. 50 at p. 51 and *Bernard's Case* (1133) Selden Society vol. 106, p. 257. Baker adds that such use of juries 'perhaps again adopted pre-conquest practice' (p. 73), following, for example, the inquest, which had roots in Scandinavia and in the old Carolingian empire (p. 72) and the Anglo-Saxon jury of accusation, sworn to name suspected criminals without hiding anything, which became a permanent institution of grand jury from the reign of Henry II (pp. 72-73). These suggest that the institution of jury had *ancient* roots.

Jolliffe (1955) says the Angevin kings had provided justice as never before and trained their subjects in the law, while disseising men by will, ordering the seizure of castles and hostages, even imprisoning and exiling (pp. 50-109). This suggests that the charter's additions of arresting, imprisoning, outlawing, exiling, etc. on top of disseisin in the agreement, were local improvisation in England.

However, it is significant that Baker says the following: "the older forms of ending disputes are better referred to as methods of 'proof' than 'trial', because trial suggests the weighing up of evidence and arguments by a tribunal acting judicially. Supernatural proofs and the oaths which they tested were absolute and inscrutable; no legal questions were asked, no reason given, no acts found, no rules declared. ...The king's judges did not start out in the twelfth century with an inspired vision of things to come; they simply took over and continued what had gone before, ... The ordeals of fire and water, wager of law, and the Norman judicial combat, thus became part of the procedure of the royal courts in their earliest phase. Nevertheless, a different, more investigative approach began to appear in the twelfth century in certain kinds of case, and its advantages very soon made the older ways obsolescent" (p. 72).

Baker (2002) says the usual defendant envisaged when the assize [of novel disseisin] was introduced [in 1166 or late in the 1170s] was not a rival tenant, but a lord acting *sine judicio*, which is, 'without [a judicial] judgment' (p. 233, p. 544). The emergence of such a rule against an arbitrary and unscrupulous feudal overlord, even if not the lord paramount, seems to be a key development, leading to John's agreement in 1191 and his charter in 1215, and eventually to the idea of due process of law during the reign of Edward III. The statute of the 28th year of Edward III, chapter 3 (1354) says, 'that no man of what estate or condition that he be, shall be put out of land or tenement, nor taken, nor imprisoned, nor

disinherited, nor put to death, without being brought in answer by due process of law (*due proces de lei*)'[7] and the statute of the 42nd year of Edward III, chapter 3 (1368) says, 'that no man be put to answer without presentment before justices, or matter of record, or by due process and writ original, according to the [ancient] law of the land (*due processe & brief original, solonc launcien leye de la terre*)', both originally in Norman French as shown in brackets.[8] It is interesting to find that the erosion of the kingly authority in King John's Magna Carta was not reversed by the subsequent process of refining the rule against acting 'without judicial decision' into the due process of law.

This paper's question is whether or not there was an *ancient* model which somehow guided the improvisation of, and the course of development of, the rule of law in feudal England against arbitrary overlords from the twelfth century onwards.

In this connection, it is significant to find that the Bible contains an apparent, parallel rule of Roman law underpinning a civil liberty that was asserted by Apostle Paul and frightened those Roman officials, who had detained him in Philippi (Acts 16: 36-38) and in Jerusalem (Acts 22: 24-29):

> (In Philippi) So the keeper of the prison reported these words to Paul, saying, 'The magistrates have sent to let you go. Now therefore depart, and go in peace.' But Paul said to them, 'They have beaten us openly uncondemned, being Romans, and have thrown us into prison. And now do they fetch us out secretly? No indeed! Let them come themselves and get us out.' And the officers told these words to the magistrates, and they were afraid, when they heard that they were Romans.
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> (In Jerusalem) The commander ordered [Paul] to be brought into the barracks, and said that he should be examined under scourging, ... And as they bound him with thongs, Paul said to the centurion who stood by, 'Is it lawful for you to scourge a man who is a Roman, and uncondemned?' When the centurion heard *that*, he went and told the commander, saying, 'Take care what you do, for this man is a Roman.' Then the commander came, and said to him, 'Tell me, are you a Roman?' He said, 'Yes.' And the commander answered, 'With a large sum I obtained this citizenship.' And Paul said, 'But I was born a citizen.' Then immediately those who were about to examine him withdrew from him; and the commander was also afraid, after he found out that he was a Roman, and because he had bound him.

Attention should be paid to the apparent rule of Roman law, rather than the particular manner in which the relevant stories were delivered by the authors of Acts, in order to compare the rule with the gist of Magna Carta's liberty clause. Here, Paul is invoking his Roman civil liberty against being beaten and imprisoned, or bound and scourged, without condemnation. The word 'uncondemned' in the New King James version corresponds to *indemnatus* in Vulgate Latin and ἀκατακρίτος in Greek,[9] which is very literally, 'without having been judged down', or 'without guilty verdict' or something similar. The rule was quite effective because the officials and the officers in the respective episodes were afraid. The officers included someone as powerful as 'the commander of a thousand soldiers', ὁ χιλίαρχος (Acts 22: 29). The rule which can be discerned from the conduct of the relevant parties in these episodes seems to be this: if you cudgel[10] or imprison or bind or scourge any Roman citizen before finding him guilty, you shall be guilty of an offence. This rule seems to be implicitly protecting a kind of due process of law.

From this rule, we can derive, for example, the presumption of innocence until the accused is found guilty. There is a clear parallel with Magna Carta's liberty clause, which purported to ban depriving a free man of his liberty, estate (a feudal concept consisting of status and property) and the protection of law, 'save by the lawful judgement of his peers' even though the clause adds another exception, 'or by the law of the land'.

Also, Acts chapter 25 gives more examples of Roman law as applied to Apostle Paul, as he said, when he was invited by the Roman governor, Festus, to go to Jerusalem and be judged before him concerning the matters brought by the high priest and the elders of the Jews, 'I appeal to Caesar.' Then Festus, when he had conferred with the council, answered, 'you have appealed to Caesar? To Caesar you shall go!' (Acts 25: 9-12). Also, Festus had told the Jewish leaders, 'It is not the custom of the Romans to deliver any man to destruction before the accused meets the accusers face to face, and has opportunity to answer for himself concerning the charge against him' (Acts 25: 16). The Roman custom of giving the accused an opportunity to answer the charge against him chimes well with the fourteenth-century English statutes of due process, above, and with the accused's right to be confronted with the witnesses against him in the Sixth Amendment.

By the reign of Henry II, there was a renaissance of the study of Roman law across Europe, stemming from Bologna. Pollock and Maitland (1903) said, 'In 1038 Conrad II, the emperor whom Cnut saw crowned, ordained that Roman law should be once more the territorial law of the city of Rome. In 1076, the Digest was cited in the judgment of

a Tuscan court. Then, about 1100, Irnerius was teaching at Bologna' (p. 23). Peter Birks (1987) noted that by 1150, Vacarius, who had been a student and a teacher of law at Bologna, came and taught in England (p. 7).

Even so, it would be too far-fetched to believe that the authors of the twelfth-to-fourteenth century English law of liberty and due process were well-acquainted with Roman law. To draft the liberty and due process clauses, the drafters must have been far better versed in feudal English law than in the Digest. The drafting style was already very characteristically English, even though the text was expressed in Latin and Norman French. The vocabulary of the liberty and due process clauses was almost entirely feudal English, which was so to speak translated into Latin and Norman French.

Still, the Bible they read was the Vulgate. Stephen Langton, one of the authors of Magna Carta, was the Archbishop of Canterbury, and as such, was educated in the church. William de Longchamp who made the agreement with John in 1192 as King Richard I's virtual viceroy, could neither understand nor speak English but could author *Practica Legum et Directorum* in Latin on the practice of civil and canon law in France. He would have read the Vulgate, too. The authors of the assize of novel disseisin during Henry II's reign were interested in enhancing the kingly authority by offering non-violent means of security in feudal land tenure against overlords acting *sine judicio* (Baker, 2002, p. 233, p. 544). Was this rule against feudal overlords acting *without judicial decision*, from which the idea of due process of law was derivable, entirely English? The first language which expressed the liberty clause was Latin and the idea of due process of law Norman French. This paper suggests that Apostle Paul's assertion of his ancient Roman civil liberty against being bound and beaten *without having been condemned* (*indemnatus*) could have informed and inspired those Latin and Norman French authors of Angevin English law. Importantly the authors of such Angevin English law would not have to recognise their model for refining feudal English law to be Roman because it would have been sufficient for their purposes to identify it to be Christian law from Antiquity. They did not need to ask doctors of law to teach them about the Julian statute (which will be discussed below). The Angevins had a good source of *ancient* civil liberty for their purposes already available in the Bible.

Bartolus in the fourteenth century described the relationship between *ius commune*, a common legal heritage of Latin Christendom, which was derived from Roman jurisprudence, and *iura propria*, which were laws of particular feudal societies, big and small, was something similar to the relationship between the sun and the planets (Bellomo,

1995, p. 192). England's *ius proprium* was orbiting perhaps as far as Neptune in the age of the Angevins. But when we place the Biblical account of the *ancient* civil liberty in the position of the sun, the English civil liberty would be a planet orbiting a lot closer to the sun than Neptune.

There is a further question of how far Acts' description of the application of Roman law is accurate in the light of sources which are independent of the Bible. Ekkehard Weber (2012) said, 'Even if the impression arises that the supporters and opponents of a civil right for Apostle Paul are more or less balanced, it still seems as if the critical voices are predominant in modern theology' (p. 193, n. 1). Weber seems to be one of the supporters. It is not the purpose of this paper to dive into the theological debate on this topic but to explore and examine how far those Roman law sources, which are independent of the Bible, are clear about the 'without condemnation' part of the said rule.

For reasons which will be set out below, some rules of the Julian statute of public violence *circa* 17 BC,[11] seem to be quite close to the Roman civil liberty which Apostle Paul asserted. The Julian statute seems to have descended from an older lineage of Roman civil liberty, *libertas civium*, 'liberty of citizens' which Cicero mentioned in his defence of C. Rabirius on a charge of treason before the assembly of Roman citizens.[12] Along the lineage, there was the Twelve Tables, parts of the Valerian and Porcian statutes.[13]

According to Book 48, Chapter 6 of the Digest, the Julian statute of public violence contained quite a wide range of offences from sedition to abuse of power. This paper finds the following three sources pertinent to the Roman civil liberty in question.

(a) D.48.6.7 (Ulpian, *Duties of Proconsul, book 8*)

'lege Iulia de vi publica tenetur, qui, cum imperium potestatemve haberet, civem Romanum adversus provocationem necaverit verberaverit iusseritve quid fieri aut quid in collum iniecerit, ut torqueatur. Item quod ad legatos oratores comitesve attinebit, si quis eorum pulsasse et sive iniuriam fecisse arguetur.'[14]

'By the Julian statute on public violence, anyone who has the commanding authority or power shall be held liable, if he kills or scourges a Roman citizen or gives an order to that effect, or puts his neck under a yoke in order to torture him against his right of *provocatio*. Anyone who is proven to have beaten or caused unlawful harm to ambassadors, messengers, or their followers, belongs to the same category.'

(b) D.48.6.8 (Maecian, *Criminal Proceedings*, *book 5*)

'lege Iulia de vi publica cavetur, ne quis reum vinciat impediatve, quo minus Romae intra certum tempus adsit.'

'By the Julian statute on public violence, no one shall bind or hinder an accused so as to prevent him from being present at Rome within the fixed period.'

(c) (*Pauli*) *Sententiae Receptae* 5.26.1[15]

'lege Iulia de vi publica damnatur, qui aliqua potestate praeditus civem Romanum antea ad populum, nunc imperatorem appellantem necaverit necaverive iusserit, torserit verberaverit condemnaverit inve publica vincula duci iusserit. Cuius rei poena in humiliores capitis in honestiores insulae deportatione coercetur.'[16]

'By the Julian statute on public violence, anyone who is assigned certain power shall be guilty if he has done any of the following acts to a Roman citizen who is appealing to the people in the past, and to the emperor today: killing, giving an order to kill, torturing, scourging, finding him guilty, or giving an order to chain him publicly. On conviction, those who are of lower birth shall be corrected by death and those who are nobler by insular deportation.'

The Roman citizen's right of *provocatio* (D.48.6.7) seems to be his right of appeal, earlier to the people, and later to the emperor, in Rome (D.48.6.8; *Sententiae Receptiae* 5.26.1). If the accused 'calls out/on [the help of] the Roman people' (*provocat ad populum*), the tribunes of plebeians (*tribuni plebis*) request the people to give their judgment (*iudicium populi*) (Roselaar, 2017). A modern appeal lies against the ruling (condemnation or guilty verdict) of a lower court, and as such, presupposes the presence of the judgment of a lower authority. Roselaar (2017), too, explains the right of provocation in this way. This leads modern readers to find it strange for *Sententiae Receptiae* 5.26.1 to have *condemnaverit* ('if [a magistrate] has found a Roman citizen guilty') on the list of *actus reus* (guilty conduct) of the abuse of power.[17] However, in the Biblical example, Apostle Paul's appeal to the emperor in Rome prevented Festus from trying him in Jerusalem or in Caesarea (Acts 25: 1-12). This Biblical example rather corroborates the text of *Sententiae Receptiae*, showing that the right of *provocatio* could have been used pre-emptively, depriving the immediate magistrate of the power to give his judgment.

Before turning our attention to Cicero and Livy, it can be remarked at this stage that the relevant rules of Julian statute on public violence fit quite neatly with the conduct of the relevant parties, including Apostle Paul, as narrated by the Biblical authors. There is not much contradiction, except two. First is that the governor Felix kept Paul under

arrest for two years without fearing the legal consequences (Acts 24: 27). Second is that Acts 16: 37 and 22: 25 testify to the inviolability of Roman civil liberty without a lawful judgment, while the actual Roman law rule, above, made only the Roman civil liberty inviolable during the exercise of the right of *provocatio* until the adverse popular, or later imperial, judgment. To rationalise the difference with reference to the Bible is methodologically unacceptable. But on the second contradiction, the magistrates and the commander in question in the episodes of Acts 16: 37 and 22: 25 had not made any decision about the guilt of Paul yet, and this makes difference in practice. Paul only made his *provocatio* explicit in Acts 25: 10-11. A possible explanation is that the Roman citizen's privilege (*provocatio*) was so powerful that Paul did not find it necessary to make it so explicit until Festus invited him to go to Jerusalem.

Roselaar (2017) cautions that the views of Livy and Cicero were influenced by events in the later Republican period, in which *provocatio* served very different aims than in earlier periods. But their views in the later Republican period, may well be more pertinent to the interpretation of that right in the Biblical time, than the right's archaic purposes.

(d) Cicero, *De Re Publica* (Republic) 2: 53-55

> '[P. Valerius], in quo fuit Publicola maxime, legem ad populum tulit eam, quae centuriatis comitiis prima lata est, ne quis magistratus civem Romanum adversus provocationem necaret neve verberaret. [54] Provocationem autem etiam a regibus fuisse declarant pontificii libri, significant nostri etiam augurales, itemque ab omni iudicio poenaque provocari licere indicant xii tabulae conpluribus legibus; et quod proditum memoriae est, xviros, qui leges scripserint, sine provocatione creatos, satis ostenderit reliquos sine provocatione magistratus non fuisse; Luciique Valerii Potiti et M. Horatii Barbati, hominum concordiae causa sapienter popularium, consularis lex sanxit, ne qui magistratus sine provocatione crearetur; neque vero leges Porciae, quae tres sunt trium Porciorum, ut scitis, quicquam praeter sanctionem attulerunt novi. [55] Itaque Publicola lege illa de provocatione perlata statim securis de fascibus demi iussit [...]'.[18]
>
> '[P. Valerius] by conduct having lived up to his name 'the people's friend' in the highest sense, proposed to the people that law first passed by the centuriate assembly, which forbade any magistrate to kill or scourge a Roman citizen in the face of his appeal (*provocatio*). [54] The records of the pontiffs, however, reveal that there used to be the right of appeal even from kings' decisions, and our augural books corroborate. Furthermore, more than one laws on the Twelve Tables show that an appeal was allowed from any judgment or sentence, and the outstanding memory

that the ten composers of the Twelve Tables were elected without being subject to appeal shows clearly enough that there was no other magistrate who was not subject to this right of appeal. And the consular law of Lucius Valerius Potitus and Marcus Horatius Barbatus, men wisely acting together for the cause of the people, provides that no magistrate not subject to appeal shall be elected. Nor indeed did the Porcian laws, which, as you know, are three in number and were proposed by three different members of the Porcian family, add anything new except the provision of a penalty for violations. [55] Thus 'the people's friend', as soon as his law concerning the right of appeal was passed, ordered the axes to be removed from the bundle of rods; [...]'. [translation by the present author]

(e) Cicero, *pro C. Rabirio perdvellionis reo ad Quirites oratio* 4: 12

'popularis vero tribunus pl. (*plebis*) custos defensorque iuris et libertatis! Porcia lex virgas ab omnium civium Romanorum corpore amovit, hic misericors flagella rettulit; Porcia lex libertatem civium lictori eripuit, Labienus, homo popularis, carnifici tradidit; C. Gracchus legem tulit ne de capite civium Romanorum iniussu vestro iudicaretur, hic popularis a iiviris (*duumviris*) iniussu vestro non iudicari de cive Romano sed indicta causa civem Romanum capitis condemnari coegit.'[19]

Cicero, *speech to the Romans in defence of C. Rabirius on a charge of treason*, 4: 12

'The tribune of the plebeian people is truly [Cicero's irony] the custodian and defender of the right and liberty of the people! The Porcian statute has removed flogging from the body of all Roman citizens. This statute mercifully has restored whips [irony]. The Porcian statute has taken the liberty of citizens away from a lictor. Labienus, a man of the people [more irony], has gave it over to a hangman. C. Gracchus has brought a bill that decision concerning the capital punishment of Roman citizens should not be made without your [Roman people's] order. Here, this man of the people [yet more irony] has concluded not that a decision about a Roman citizen should be made by two tribunes without your order, but that a Roman citizen should be condemned of a capital offence only by indictment, i.e., a *cause published* [to the Roman people].' [translation by the present author]

Procedurally, the defendant, C. Rabirius, seems to have appealed to the people's judgment (*iudicium populi*) so that Cicero is making his speech in the popular assembly (*forum*) in defence. Cicero is so full of irony that it is not easy to follow. Therefore, this paper has added tips in square brackets. Cicero here shows that the history of Roman civil liberty was that of struggles against arbitrary persecution of Roman citizens by those in power, in other words, a dynamic process in which balance was struck between the

government and the people from time to time to make Roman due process of law. Livy's *History of Rome*, gives the following accounts, describing the relevant power struggle between the patricians and the plebs.

(f) Levy, *ab urbe condita* 3.55.14-15

'M. Duillius deinde tribunus plebis plebem rogavit plebesque scivit, qui [...] magistratum sine provocatione creasset, tergo ac capite puniretur. haec omnia ut invitis, ita non adversantibus patriciis transacta, quia nondum in quemquam unum saeviebatur.'[20]

'Marcus Duilius, the tribune, then proposed a resolution which the plebs adopted, that anyone [...] who should create a magistrate from whom there was no appeal (*provocatio*), should be scourged and beheaded. All these transactions were distasteful to the patricians, but they did not actively oppose them, as none of them had yet been marked out for vindictive proceedings.'[21]

(g) Levy, *ab urbe condita* 10.9.3-7

'eodem anno M. Valerius consul de provocatione legem tulit diligentius sanctam. tertio ea tum post reges exactos lata est, semper a familia eadem. causam renovandae saepius haud aliam fuisse reor, quam quod plus paucorum opes quam libertas plebis poterat. Porcia tamen lex sola pro tergo civium lata videtur, quod gravi poena, si quis verberasset necassetve civem Romanum, sanxit; Valeria lex cum eum qui provocasset, virgis caedi securique necari vetuisset, si quis adversus ea fecisset, nihil ultra quam "improbe factum" adiecit. Id, qui tum pudor hominum erat, visum, credo, vinculum satis validum legis: nunc vix serio ita minetur quisquam.'[22]

'In this year the consul, M. Valerius, proposed to make the law of appeal (*provocatio*) more carefully enacted. This was the third time since the expulsion of the kings that this law had been proposed, and always by the same family. I think that the reason for renewing it so often was simply that the wealth of a few could overpower the liberties of the plebs. The Porcian law, however, seems to have been proposed solely for the protection of the citizens' skin, for it enacted severe penalties against anyone who scourged or killed a Roman citizen. While the Valerian law forbade anyone who had exercised his right of appeal to be scourged by a rod or killed by an axe, where anyone violated its provisions, it added nothing other than declaring that such violation was "shameful conduct". Such was the sense of honour amongst the men of those days, that I believe that the stigma on their reputation was a sufficiently strong deterrent of the law. Today, such would hardly frighten anyone seriously.' [translation by the present author]

Then, the Julian statute on public violence circa 17 BC seems to have corrected the mischief which (g) Livy had identified in the Valerian statutes, by adding the penal provision to which (c) *Sententiae Receptiae* testify. Roselaar (2017) cautions that the power of the Senate increased in the 120s BC by the *Senatus Consultum Ultimum*, which gave the Senate unlimited power to execute citizens who were seen as a threat to the state. The establishment of *quaestiones perpetuae* at this time further weakened the importance of *provocatio*, since these courts' judgements were not subject to appeal. Even so, the scope of Roselaar's caution, especially on account of geography, may need to be examined further, because the Biblical sources tend to suggest that *provocatio* retained considerable utility at least in the Empire's eastern provinces. The exception is Felix's audacious detention of Paul for two years. But a possible explanation would be that the enforcement of the law against the provincial governors depended on many contingencies, and that Festus was perhaps a little more honest than Felix.

So, it would appear that the Biblical authors did not seriously misrepresent the rule of Roman law.

In terms of the modern relevance of finding such a Roman parallel of Magna Carta's liberty clause, there are three.

First of all, the Digest 48.6.7 clearly manifests that the Roman civil liberty was formulated as a commandment addressed to those who have *imperium*, the power or authority to command. As such, it parallels the baronial charter imposed upon King John. Following such inceptions, any modern constitution worthy of the name is limiting the commanding power, imposing duties on those who have public power to respect the liberties of helpless individuals. For example, Inoue Kowashi, one of the three drafters of the Imperial Constitution of Japan 1889, said that Article 23 was a partial Japanese translation of Magna Carta's liberty clause, which he described was the 'cerebrospinal fluid and skeleton of any modern constitution worthy of the name' 近代憲法ノ脳髄骨子 (Inoue, 1890). So, the modern popular witch-hunting purportedly enforcing 'liberties' horizontally on powerless individuals like J. K. Rowling is against the due process of law.

Second, as Livy and Cicero as well as a modern critic of their understanding show that the Roman civil liberty was originally developed by the plebs to defend their fellow helpless people from the abuse of power by the upper class. In this sense, civil liberty emerged as a very democratic right of the people. There have been parallel developments in the thirteenth- and seventeenth-century England, in the eighteenth-, nineteenth- and

twentieth-century United States, and beyond. These hard-won civil liberties cannot be taken for granted but fragile.

Finally, the Roman civil right of 'appeal' or application (*provocatio*) for *judicium populi* (popular judgment) is not apparent in the Bible, because by the apostles' time, the authority of *populus Romanus* (Roman people) had been replaced with the emperor for the purpose of this right. But for such an imperial development, there is a parallel between the Roman right of *provocatio ad populum* and the common law institution of jury, which Lord Devlin (1956) said 'is a little Parliament' and 'the lamp that shows that freedom lives' (p. 164).

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Notes

1 Library of Congress, Magna Carta's Legal Legacy: Conversation with Chief Justice Roberts and Lord Judge. https://www.loc.gov/item/webcast-6505/

2 https://www.legislation.gov.uk/aep/Edw1cc1929/25/9/contents

3 Library of Congress, Magna Carta's Legal Legacy: Conversation with Chief Justice Roberts and Lord Judge.

4 A copy taken from *Textus Roffensis* by William Blackstone (1762) *Law Tracts*, Oxford, pp. viii-ix. But this is entitled, *Institutiones Henrici regis* (Collection of Laws of King Henry) and dated anno ... dominice MCI (1101).
https://archive.org/details/lawtractsintwovo02blac/page/n17/mode/2up

5 Felix Liebermann, *Die Gesetze der Angelsachsen*, vol. 1, Wilhelms I. Urkunde für London [1066, Dec. -75] p. 486. https://earlyenglishlaws.ac.uk/laws/manuscripts/liebermann/?tp=s&nb=4580

6 Baker (2002) says the assize of 'novel disseisin' was introduced either 'in 1166 or late 1170s' (p. 73, n. 7).

7 https://www.legislation.gov.uk/aep/Edw3/28/3/section/III

8 https://www.legislation.gov.uk/aep/Edw3/42/3/section/III

9 https://biblehub.com

10 δείραντες in Acts 16: 37, which is translated as 'beating' in the King James version, means skinning, flaying or beating with a cudgel while *caesos* in Vulgate means having been cut or stricken with a cudgel or something, or killed.

11 Lex Julia de vi publica et privata in M. H. Crawford, et al. (1996) *Roman Statutes*, II, London,

pp. 789-92, n. 62. https://droitromain.univ-grenoble-alpes.fr/Leges/iulia_vi_crawford.html 〈accessed 14 September 2021〉

12 Pro C. Rabirio perdvellionis reo ad quirites oratio, 4: 12.

13 Saskia Roselaar (24 May 2017) 'lex Veleria de provocatione' in Oxford Classical Dictionary. https://oxfordre.com/classics/view/10.1093/acrefore/9780199381135.001.0001/acrefore-9780199381135-e-8191

14 https://droitromain.univ-grenoble-alpes.fr/Corpus/digest.htm

15 Riccobono, S. et al. (1940) *Fontes Iuris Romani Antejustiniani*, vol. II, p. 412.

16 Riccobono, S. et al. (1940) *Fontes Iuris Romani Anteiustiniani*, II, p. 412. http://www.ancientrome.ru/ius/library/paul/paul5.htm#26 puts praeditur in error.

17 e.g. Weber (2012, p. 201, n. 26) omits *condemnaverit*.

18 http://data.perseus.org/citations/urn:cts:latinLit:phi0474.phi043.perseus-lat1:2.53-55

19 https://droitromain.univ-grenoble-alpes.fr/Leges/Porcia1.html

20 Edited by W. Weissenborn, H. J. Müller, (1898) Leipzig. http://data.perseus.org/citations/urn:cts:latinLit:phi0914.phi0013.perseus-lat1:55

21 Translation by Rev. Canon Roberts (1912) New York: E. P. Dutton and Co. http://data.perseus.org/citations/urn:cts:latinLit:phi0914.phi0013.perseus-eng3:55

22 http://data.perseus.org/citations/urn:cts:latinLit:phi0914.phi00110.perseus-lat1:9.3-6

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