7

Mediaeval Constitutions

As we are unaccustomed to talking about the Roman Empire's *constitution*, we are not accustomed to talking about early mediaeval constitutions in Europe either. As explained in the previous chapter, this may have to do with the fact that the era's laws and rules on leadership, social organisation and legal systems are unrecognisable from a modern perspective. There are two main reasons for this difficulty in discerning constitutions in mediaeval rules and regulations on the structure of government and legal systems. First, *states*, as we know them – delineated territories with a supreme sovereign power governing a population – did not exist in the millennium between 500 and 1500. The modern state is a fairly recent innovation that was created in principle by the Peace of Augsburg (1555)[1] and definitively by the Peace of Westphalia (1648).[2] Our conception of constitutions is profoundly associated with, even rooted in this idea of states. A second factor clouding our understanding is the difficulty that our modern eyes have in localising the core of the mediaeval dispensation's power structure. To us, mediaeval governance structures often seem to resemble both spaghetti – everything is connected to everything (through family ties and marriages) – and a doughnut – a mass of dough with a hole in the middle. We can still grasp the principle of feudal governance as it emerges from the Carolingian period (c. 750),[3] but everything seems to disintegrate and fragment in the high mediaeval period (from about the eleventh century). We are dazzled by the welter of relationships, liaisons, privileges, the jumble of classes and status, heraldic forms of government and (a little later) town and city

[1] After the European wars of religion had raged for more than a century, several Western European kingdoms and territories (most of them near present-day Germany) agreed to peace according to the territorial principle of 'Cuius regio, eius religio' (a ruler's right to determine the religion of his own state).

[2] The Treaty of Münster, the Peace of Münster and the Peace of Osnabruck constituted this peace settlement.

[3] The *First Europe*, as Van Caenegem calls the Carolingian Empire a little misleadingly. Van Caenegem 1995, p. 50–53.

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powers and government. Again, it is mainly because we are looking through a modern 'state-based' lens and hence struggle to get the right focus, so to speak. What were the organisational principles of mediaeval law and governance? The modern answer is often something along the lines of a murky trilogy of religion, disarray and (personal) relations. The executive summary: no constitution. But this is incorrect; this trilogy actually encapsulates the old Roman Empire's three organisational principles. The European mediaeval period most certainly did have a constitutive organisational principle of government and law, but it is almost unrecognisable to us. The constitution of the mediaeval period was no more or less than that of the *Roman Empire* – the empire's old state structure, supplemented by the new state religion, Christianity. The answer to the 'we' question, which is always at the heart of constitutional law, was quite plain to a mediaeval person. The mediaeval 'we' was the 'we' of the Christian community in Europe, ruled by religious and Roman law.[4]

THE VIRTUAL EMPIRE

'Not so, absolutely not so', traditional legal scholars, especially those raised in the tradition of Carl von Savigny's (1779–1861) Historical School,[5] will argue.[6] 'Other sources of law were as important as Roman law in the mediaeval period.' For instance, local customary law, such as Salic law (the Salian Frankish civil law code) or the Saxons' customary law (the *Sachsenspiegel*),[7] recorded at the beginning of the thirteenth century, and other forms of non-Roman law, collectively called the *leges Barbarorum*.[8] This is a little odd, considering that the non-barbarian Romans had not been around for nearly 800 years by the time this name was coined. But, fair enough, other rights (hunting and fishing rights, the right to levy taxes, the right to administer justice, and so on) and privileges (tax exemptions, inheritance of titles, administrative functions) associated with the mediaeval feudal dispensation cannot be traced to Roman law.[9] Then again, this might be so, but local (customary) law had always played a prominent role in Roman law – in ancient times too. It was essentially an integral part of it. As with religion, the Romans did not interfere with

[4] For more about the constitutional element of mediaeval legal systems, cf. Greenberg & Sechler 2013, especially p. 1026–1043.

[5] Wauters & De Benito 2017, p. 135 ff.

[6] Greenberg and Sechler can attest that imagining the existence of a constitution even in the mediaeval period, or finding roots of modern constitutionalism in it, always generates opposition. 'A narrative that insists on the commanding presence of mediaeval theorising in the development of Western constitutionalism is not one that finds universal favour among scholars'. Greenberg & Sechler 2013, p. 1023.

[7] Wauters & De Benito 2017, p. 77.

[8] Including the *Breviary of Alaric* (*Lex Romana Visigothorum*, Roman law of the Visigoths established by Alaric II in 506) and *Lex Romana Burgundionum* (Roman Law of the Burgundians – established from the start of the sixth century). Wauters & De Benito 2017, p. 35–38.

[9] Cf. Wauters & De Benito 2017, p. 42–43.

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old rights, customs and local traditions, in as much and as long as Roman authority was recognised. The Roman legal system absorbed local systems, or – for those who prefer to see things the other way around – the Roman legal system was a constitutional complement, an additional layer, on top of existing local law.

The British historian Adrian Goldsworthy illustrates this practice with the problems that the Roman proconsul Pliny the younger (61–113 CE) faced when trying a complex case during his proconsulate in Bithynia (112 CE):

> At various times Pliny consulted local laws, established practice and specific rulings including ones by Pompey, as well as several emperors, and also applied his understanding of Roman Law. In many cases these dealt with specific communities, and only occasionally were applicable to the province as a whole. Each province had its own laws, rules and conventions, and there was no attempt to impose a standard legal system and civic organisation to the entire empire, so that examples from a governor's [Pliny] past experience elsewhere were not applicable.[10]

In the Roman Empire's decentralised relations, as later in the European mediaeval period, local law was the starting point for thinking in matters of law and administration. For mediaeval people, it was quite natural that government and the administration of justice were based on age-old Roman law, bound with local law, even if the reality of the Roman empire was no more than a vague memory for rulers, kings, administrators, and judges.[11] It is hard to imagine that even when there was no longer an actual Roman empire, most mediaeval western European rulers apparently subscribed to the idea of a virtual Roman empire, at times lacking an emperor. Sometimes there was a single emperor in charge, such as Emperor Charlemagne (747/748–814 CE) or Otto I (912–973 CE) and his successors; sometimes there were several emperors; sometimes emperors shared authority with the spiritual leader, the pope; and sometimes only the pope was at the helm. And very often the emperor's throne was vacant (the doughnut situation). Francis Fukuyama shows how, after the Investiture Controversy in the eleventh and twelfth centuries, the state and church competed over the power of investiture of ecclesiastical and secular officials.[12]

[10] (Adrian) Goldsworthy 2016, p. 258.

[11] Greenberg & Sechler 2013, p. 1023–1025.

[12] This mainly concerned the question of who was authorised to invest senior clergy (local bishops) and the abbots and abbesses of local abbeys. Was that the worldly power (the Roman-German emperor or the English king) or the highest spiritual power (the pope)? It was essentially about total control and power over the Christian world in Western Europe, as the church had increasingly become a real centre of governmental power from the end of the ninth century. After Pope Gregory VII literally brought the Holy Roman Emperor Henry IV to his knees in a memorable incident at Canossa in 1077, the matter was finally settled half a century later in favour of this same pope. The Concordat of Worms (1122) formally granted the pope the power of investiture over the clergy, but the emperor retained an important say. He was entitled to determine the secular administrative duties of appointed bishops. This concordat was to rebound on the church: it laid the germ for the separation of church and state, a doctrine that eventually led to the church losing its position in all areas of worldly governance. Fukuyama 2011, p. 266–267.

Gradually, the church gained worldly power and increasingly acted as a state, just as the state turned more or less into a church, trying to control and wield religious power.[13] Nowadays, this seems almost unfathomable to us: worldly and religious authority as bedfellows, power structures dispersed over a patchwork of territories and rulers without the centre of gravity of a centrally-governed state – it leaves us bewildered, makes our heads spin. For mediaeval people however, it was the most normal thing in the world. They considered themselves part of a larger Christian community and felt part of a continuous history, the ancient tradition of the Roman legal and governmental order. This is reflected in mediaeval legal theory – how mediaeval people thought about the whys and wherefores of their law and government.[14] It is partly mistaken to speak of a revival of Roman law at the beginning of the twelfth century, as nineteenth-century legal historians were wont to do. Was there really a renaissance of Roman law in that period?[15] It implies that Roman law had disappeared, which does not appear to be the case, at least not in the minds of mediaeval people. Yet, from the twelfth century the first universities, which arose in Italian cities such as Bologna (1088), did start looking at Roman law differently – they returned to the source. In the newly founded European universities, the *Digest* and the *Codex Justinianus* were rediscovered and re-examined.[16] The scholars there 'revived' the rules from original Roman sources by studying and commenting on them. Like overeager grammar school students, they scribbled comments – glosses – in the margins of those old rediscovered texts.[17] It was their modest contribution to the organically growing body of Roman law.

Commentaries and the First Universities

The glosses soon developed into complete, regular commentaries for which there was great demand in the Italian cities' emerging mercantile economies. Rules of this kind give purchase to trade relations which were often overseas. In the thirteenth century, the Italian jurist Franciscus Accursius organised the profusion of glosses, numbering almost 100,000, into a sort of standard gloss, which he called the *Glossa Ordinaria*.[18]

[13] Fukuyama 2011, chapter 18 (*The Church becomes a State*) and chapter 19 (*The State becomes a Church*) p. 262–289.

[14] Strong 1963.

[15] An almost intact copy of part (*Institutes*) of Justinian's *Corpus Juris Civilis* was discovered in Bologna around 1070. Its significance was not much more than the rediscovery of the actual text: its principles and most important rules had never been out of currency. They were taken and copied from other forms of the *Lex Barbarorum*. Was it really a 'discovery' at all? Wauters and De Benito assert that a copy of Justinian's Digests had already surfaced in Amalfi (a town south of Naples) in the middle of the tenth century. This copy was allegedly taken as loot to Pisa in northern Italy and, possibly, thence to Bologna. The mists of time obscure what really happened. Wauters & De Benito, p. 50.

[16] Wauters & De Benito, p. 50 ff.

[17] *Ibid*., p. 52–57.

[18] *Ibid*., p. 53–54.

The study of Roman law at the new mediaeval universities kept pace with the development of canon law. This also had Roman underpinnings: the law and the writings of the ancient Roman censors, the magistrates who ensured compliance with moral and religious laws. Ecclesiastic or *canon law*, too, was eagerly studied, commented on and developed.[19] Schools of law like Bologna not only wrote about it, but taught it too. As a result, Bologna rapidly developed into a popular university.

Italian universities spread legal knowledge throughout Europe. After their studies at universities such as Bologna, Paris and Montpellier, lawyers found work in the service of bishops, royal courts, cities and courts, or became professors, in turn, at later universities. In the thirteenth century, universities were founded throughout western Europe, in Cambridge,[20] Orléans, Toulouse, Padua, Naples and Salamanca, followed a century later by Cologne, Heidelberg, Erfurt, Siena, Pisa, Perugia and Dublin. Universities were also founded in cities in central and eastern Europe, such as Vienna, Prague, Krakow, Budapest. The first university in the Low Countries was at Leuven (1425). These schools focused primarily on the study of Roman and canon law, which was developed by local ecclesiastical courts together with ecclesiastic councils, synods, and papal bulls.[21] As in Bologna, old texts were studied and given glosses and new commentaries, which led to all kinds of new doctrines on subjects like legal persons, unjust enrichment, property and contractual obligations, but also on political issues.[22]

Grants of Authority: Magna Carta, Bulls, Charters and Joyous Entries

Chris Thornhill, a legal sociologist and historian at the University of Manchester, contends that we should look for the start of modern constitutions in the high mediaeval period, sometime from the twelfth century.[23] It is in this same period that Francis Fukuyama marks the birth of our modern idea of legality, the rule of

[19] Wauters & De Benito 2017, p. 57–61.

[20] The University of Oxford – established 1096 – predates its counterpart at Cambridge. Oxford is the second-oldest university of Europe after Bologna (founded 1088).

[21] From the twelfth century, fragmented canon law was codified for the first time by Gratian in the *Decretum Gratiani*. In the thirteenth century, Pope Gregory IX had all known and applicable papal decrees compiled and recorded in the *Decretales Gregorii IX* (also known as the *Liber Extra* – 1234), the Canon (collection of key laws and legal principles) of ecclesiastic law. Pope Boniface VIII had Gregory's decretals supplemented in 1298 with the *Liber Sextus* – a compilation that was influential in canon law until the beginning of the twentieth century.

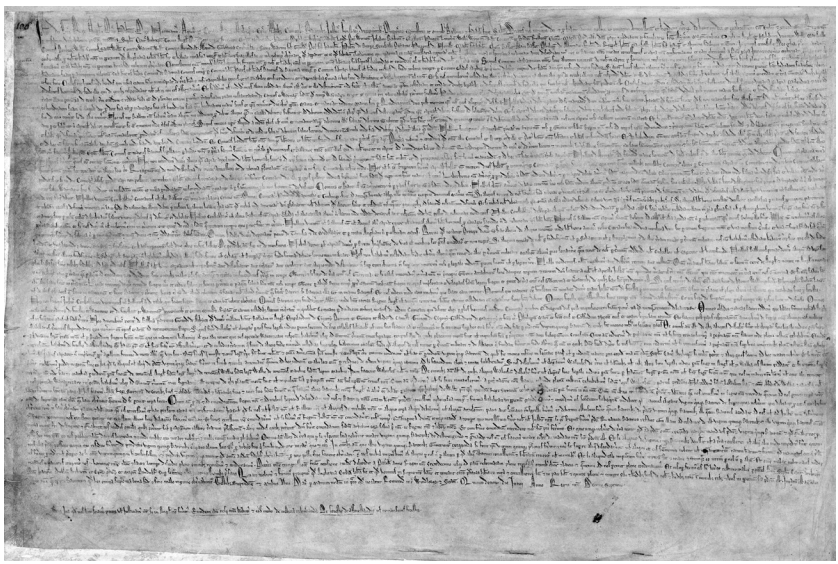
It was only in 1917 that they were replaced by the complete codification of canon law: Benedict XV's Code of Canon Law. The mediaeval codifications were intended to support education at the newly established universities, to which copies were sent. In this way university education contributed towards standardising canon law. For an account of the lives of the colourful Gregory IX, who lived to a great age, and the later Boniface VIII – founder of the University of Rome, whose papacy was so controversial that he had to be crowned again in 1295 – cf. Norwich's entertaining 2012 papal biography, p. 183 and p. 190 ff.

[22] Cf. the website 'History of Law ('Rechtshistorie'); A gateway to legal history' www.rechtshistorie.nl/en/medieval-law (Consulted on 18 June 2019).

[23] Thornhill 2011, p. 20.

law.[24] This era, the High Middle Ages, heralds the start of the gradual development towards the modern constitution, or at least our current understanding of it. They undoubtedly have a point, but it is – as explained – a bit facile to ignore the fact that there certainly had been a systematic organisation of law, society and governmental power for the previous 750 years or so. The – admittedly fragmented – arrangement of law and government did accord authority to both centrally and locally promulgated law and rule. Understanding this clarifies how the events in this period would probably not have been regarded as a watershed by mediaeval people, but that they simply lived on in what we would call a virtual order: the Roman Empire's legal order – or rather, the continuation of its story.[25]

Not that everything stayed the same – from the twelfth century, a new wind blew through Europe: *negotiated* government. Most of us will have heard of the *Magna Carta* ('Great Charter'), in which King John of England ('John Lackland') promised his barons to govern the country according to the conditions in the charter.



Magna Carta 1215

Militarily surrounded by rebellious barons at Runnymede, a water-meadow on the south bank of the Thames near Windsor, the king signed the agreement under duress on 15 June 1215. It is undoubtedly an iconic story: a defeated king, head bowed,

[24] Fukuyama 2011, p. 271 ff.

[25] In this sense, Fukuyama's assessment of the 'reappearance of Roman Law' in the high mediaeval period may not be entirely correct. It had never disappeared. On the other hand, if Fukuyama is referring to the reappearance of the original Roman texts, then, of course, he is correct. Cf. Fukuyama 2011, p. 261 ff.

forced to recognise his subjects' rights. Many people nowadays interpret this event as the birth of individual freedoms and fundamental rights, and the first step towards constitutional rule. But this is not the document's primary purpose. 'Magna Carta wasted no time on political theory', in the words of the historian David Carpenter.[26] It is a concise document, with several financial agreements at its core, elucidating what the king could – and more especially could not – demand of his nobles. It is also about granting fishing rights, managing forests and other rights, with the intention of increasing vassals' financial strength and curbing royal arbitrariness. The document mainly granted privileges to the nobility and reconfirmed several of them. It is chiefly more minor parts of the document which subsequently gained importance, such as the right to a fair trial,[27] protection of 'church' rights,[28] limits to free men's socage,[29] and compensation for expropriation[30] (which was a more or less indirect recognition of property rights). Reading it now, you are confronted with a great deal of mediaeval preoccupations and paraphernalia. It is not immediately clear from the text why we attach such import to Magna Carta, which is still legally valid in the United Kingdom. Magna Carta's importance is not so much the moment itself, but its consequences – what later generations made of it. Or in the words of the English judge and jurist Lord (Thomas) Bingham:

> The significance of Magna Carta lay not only in what it actually said but, perhaps to an even greater extent, in what later generations claimed and believed it had said. Sometimes the myth is more important than the actuality.[31]

Perhaps it is not the text, or the rights and privileges expressed in it, but more the underlying principle of negotiated governance that has made Magna Carta such a momentous document. King John himself certainly did not believe in the myth nor in the text of the charter. From the very moment he signed the document, he did not feel bound by it as he had done so under duress. As we know, agreements resulting from mistake, fraud or threat are invalid – this was also the case in the mediaeval period. The fact that the king did not much care is perhaps the reason that the document still exists today. He did not even bother withdrawing or revoking it.

As important as Magna Carta is, it was certainly not a unique phenomenon in its time. The great charter of 1215 is not even the first charter of its kind in England; that distinction belongs to Henry I's *Charter of Liberties* of 1100, which also contained rights and privileges of the nobility and clergy. Comparable documents were

[26] Carpenter 1990, p. 9.

[27] For example, the right to a 'fair' trial (due process) at a permanently established court. Cf. clauses, 34, 39 and 55. An amendment to Magna Carta in 1679 also added a ban on arbitrary arrest (*habeas corpus*). It was not mentioned in the original version of Magna Carta.

[28] This is not the same as the freedom of religion, but still. Clause 1.

[29] A partial ban on forced labour. Clause 15.

[30] Clauses 52, 57 (only for Welshmen) among others and, in a sense, clause 31 too.

[31] Bingham 2010, p. 12. Cf. Spiegelman 2015, especially p. 30.

commonplace in the high mediaeval period. Many cities and countries in Europe had charters, bulls, joyous entries and privileges, in which the sovereign, usually on the occasion of his inauguration, formally confirmed, recorded or specified some kind of agreement on the legal relationship between him and the estates (clergy, nobility, common folk, townsmen and so on). Such grants of authority were the main source of institutional public law and constitutional law in several parts of the continental Europe well into the eighteenth century. Documents of this kind confirmed and reaffirmed existing rights and freedoms (enumerated as *privileges*) and, more generally, laid down the conditions to the exercise of governmental power, usually consisting of levies, taxes, and (military) services that the ruler could claim. They often contain an element of reciprocity as well. On this point, these grants of authority differed from unilateral edicts and acts promulgated by a sovereign. Multilateral grants of authority, such as bulls, charters and joyous entries,[32] were not unilaterally revocable and their enforcement was safeguarded by special guarantees.[33] They usually had to be reconfirmed and acknowledged by every new sovereign or governor at their inauguration. The sovereign could demand loyalty and obedience as long as he complied with the charter's conditions. This was of direct bearing on their reciprocal obligation in the agreement: a conditional power to rule linked to subjects' conditional loyalty. If the ruler or sovereign did not meet the conditions, subjects were – at least theoretically – freed from their oaths of allegiance to their liege and the loyalty due to him.[34] The bilateral nature of grants of authority such as Magna Carta, the Golden Bull of 1222 (Hungary), the Joyous Entry of 1356 (Brabant), the Golden Bull of 1356 (Holy Roman Empire),[35] the Carta de Logu

[32] A Joyous Entry ('Blijde Intrede', 'Blijde Inkomst' or 'Blijde Intocht' in Dutch; 'Joyeuse Entrée' in French) is the official name used for the ceremonial royal entry – the first official peaceable visit of a reigning monarch, prince, duke or governor into a city – mainly in the Duchy of Brabant or the County of Flanders and occasionally in France, Luxembourg or Hungary, usually coinciding with recognition by the monarch of the rights or privileges of the city, and sometimes accompanied by an extension of them.

[33] For example, Magna Carta provides for an independent supervisory mechanism (clause 61) – 25 barons were to monitor the king's adherence to the agreement. They were entitled to report violations.

[34] This idea is reflected in the Low Countries' Act of Abjuration of 1581, in which the States General complained that their sovereign – King Philip II of Spain – had not complied with the agreed governmental conditions. The Act of Abjuration explains how Philip had failed in his obligations to his subjects, by oppressing them and violating their ancient rights (an early form of social contract). The Act argues that Philip had thus forfeited his thrones as ruler of the provinces which had signed the Act.

[35] This Golden Bull was an important charter. It stipulated that seven (German) Prince-Electors would henceforth have the formal right to elect the king, who was then eligible to be crowned emperor of the Holy Roman Empire by the pope. They occasionally even took the title of Holy Roman emperor without a papal coronation. The Bull also stipulated that the Prince-Electors' territories should remain undivided to prevent Holy-Roman gerrymandering. The title of Prince-Elector become hereditary, on the understanding that it could only be passed down to a Prince-Elector's first legitimate son. The Bull also confirmed the

(Sardinia, 1392) and the Treaty of Tübingen (1514) are for this reason often considered precursors of modern written constitutions. The comparison is not entirely correct. Grants of authority were not intended as comprehensive arrangements establishing political or legal systems with rules on social organisation and leadership. The clauses in these mediaeval documents usually arranged only a few aspects of the feudal relationship between a sovereign or guardian and their estates. The norms for the existence and functioning of the legal system, as well as the social organisation and political system of mediaeval western European societies followed from the rules and logic of (the vestiges of) the Holy Roman Empire – the natural and hence almost invisible constitutional centre of gravity. The charters were not much more than a sort of subtenancy contracts.

Yet, something did change. From the high mediaeval period (1000–1250), forms of law came into being that extended beyond purely feudal bric-a-brac, like estates' privileges and negotiated government conditions. An early example is the *Pravda Yaroslava* (The Truth of Yaroslav the Wise; Yaroslav's Law, 1017) in which Yaroslav the Grand Prince of Kiev granted privileges to the city of Novgorod, recorded and recognised the city's existing customary law and traditions, and added rules on his method of government – about taxes, justice, the military and so on. A set of rules on the set up and operation of government. From the middle of the eleventh century, the *Pravda Yaroslava* was gradually absorbed into the *Russkaya Pravda* (The Truth of the Russians),[36] the legal code that applied in the whole federation of Kievan Rus'. Together with some Byzantine law (derived, in turn, from Roman law) and the Statutes of Lithuania (from the sixteenth century), these *Pravda* would remain part of Russian law for centuries.[37] In Serbia, the Nomocanon of Saint Sava (Saint Sava's canon of laws) was completed in 1219. It was a compilation Roman and canon law, all drawn from Byzantine texts and sources. This record of law and governance rules went far beyond Magna Carta, which is only four years older. In the principality of Catalonia, the first Catalan constitutions were promulgated in 1283, containing collections of legal and institutional rules which were constantly renewed and reaffirmed, and were ultimately important in unified Spain after the *Reconquista* (1492). Like the Serbian laws, the Catalan constitutional rules are relatively integral and less feudal: they govern many aspects of law and administration. They are also relatively independent in the sense that they are much less reliant on any underlying Roman constitution.

From the early fourteenth century, the kings of France (the Capetians) also tried to break free of the constitutional foundations of the old order by bypassing the nobility and clergy and granting liberties directly to the people. It was an attempt to strengthen royal power against the powerful high nobility and the pope. French

Prince-Elector's entitlement to levy tolls, administer justice, mint coins and so forth. It was in force for almost five centuries.

[36] Via the *Pravda Yaroslavichey* (The law or truth of Yaroslav's sons, 1045).

[37] Feldbrugge 2017.

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sovereigns started enfranchising free cities by granting cities rights, and established the Estates General – a national assembly of the estates.[38] It gave the merchant class a place in leadership alongside the landed gentry and clergy, and allowed the king to use divide-and-rule tactics, as well as centralise governmental power, generate funds and mobilise forces in the epic attrition of the Hundred Years' War (1337–1453).[39] This protracted Anglo-French war of succession led, as did the later English War of the Roses (1455–1485),[40] the War of the Brabant Succession and the Burgundian Wars in the fifteenth century, to increased scale and centralisation of governmental and judicial authority, which were ultimately far more important to constitutional development in Europe than the Magna Carta incident at Runnymede.

The increasing scale and centralisation of governance from the thirteenth century onwards were gratefully accepted by ordinary people. It freed them from the worst of feudal arbitrariness and static, ossified relationships. Centralised government provided greater certainty, as well as better opportunities for trade, industry and prosperity, whilst at the same time giving people a little more say. The administration of justice was also increasingly consolidated.[41] Centralisation was self-reinforcing: it increased the king's capacity to fight and expand his realm, which enabled him to centralise and strengthen his power even further. This led to major changes over time.[42] It heralded a development in which the feudal idea of personal authority – governmental power as personal property – was gradually superseded by impersonal, abstract ideas on power and authority (state power, power of the people) and the abstract functioning of legal rules such as the idea that a government or ruler is bound by the law (the rule of law), and the associated idea of central and abstract administration of law (centralised, uniform administration of justice and equality before the law).

[38] Philip IV convoked an assembly of the estates in 1302 to aid him in his conflict with Pope Boniface VIII. He had admonished Philip in 1301 with the papal bull 'Ausculta fili' ('Give ear, my son') – a final warning to acknowledge the pope's authority.

[39] A war, mainly waged in France, between the French kings of the House of Valois and the English kings of the House of Plantagenet (descendants of William the Conqueror) – a.k.a. the Anjou dynasty – over the dynasties' conflicting claims to the French Crown.

[40] An English civil war over the English throne, fought between the mighty royal houses of Lancaster and York.

[41] In *L'ordonnance de Montils-lès-Tours*, Charles VII promulgated the codification of customary law in the provinces in 1454 and he designated the Parlement de Paris as the highest judicial body. Designating this court as the highest court established the precedence of written (in particular royal and Roman) law over other forms of (customary) law and introduced the principle of a separate supreme judicial body – as opposed to the sovereign himself. The aim of the ordinance, as expressed in Article 125, was '*abréger les procez et litiges d'entre nos subjects et les relever de mises et despens et oster toutes matières de variations et contrariétez*.' Freely translated, it can be summarised as: 'brisk and effective dispute resolution between our burghers'.

[42] Van Caenegem 1995, p. 74–78. Following the French example, Philip the Good convened a States General in Bruges for the first time in the Burgundian Netherlands on 9 January 1464. This too was part of a project to centralise the Duchy of Burgundy but resulted in greater assertiveness by the estates. Some assert that it was a prelude to the Dutch Revolt a century later.

LATE MEDIAEVAL PERIOD AND EARLY MODERN PERIOD

Centralisation

Understanding how things worked in the European mediaeval period is, as said, difficult for our modern minds. You are soon overwhelmed by the colourful patchwork of kingdoms, lordly dukes, baronies and counties flecking the map with their incessant conflicts and ever-changing borders. And, we understand mediaeval western Europeans' motivations and intentions even less. Modern concepts blur our view and seem to cut us off from a history that lasted more than a millennium. Yet, the European mediaeval period is of utmost importance in understanding why our world is pervaded by constitutions with abstract forms of governance and social organisation in accordance with a legal system's abstract norms and institutions. Apprehending this period is somewhat like viewing a pointillist painting: instead of zooming in on the details, you must step back to appreciate the coherence of the picture in its entirety. This brings the mediaeval organisation principle into focus – the remains of the Roman Empire's order – as well as the most important developments in that era: centralisation of governance and the rise of humanism. As set out above, this gradual centralisation can be seen everywhere. (Dynastic) wars drove this development – as they had earlier in China, for example.[43] Centralisation and increasing scale usually go hand in hand. Increasing scale gives competitive advantages (more land, more revenue, more military power) over other social-administrative units – facilitating their conquest or subjugation. And centralisation can help to keep larger units manageable. The idea is that it facilitates control and imposition of a ruler's will. Centralisation as a cause and effect of increasing scale is a recognisable mechanism in the late European mediaeval period. A chain reaction seemed to take place. The Tudors, for instance, asserted control over taxation and law in England at the end of the fifteenth century, after a series of foreign and domestic conflicts.[44] At the same time parallel developments unfolded in France. In the Holy Roman Empire, which governed large parts of Germany as well as all of Austria and the Low Countries at the end of the fifteenth century, future emperor Maximilian I established the *Reichskammergericht* (Imperial Chamber Court) in 1495. This court would be the Holy Roman Empire's highest judicial body.[45] It mainly applied Roman law and was primarily intended to settle incessant feudal conflicts (not only about government, but also about the formation of law and jurisdiction) in the realm. At the same time, Maximilian promulgated the *Ewiger*

[43] Roberts & Westad 2014, p. 136–143; Fukuyama 2011, chapter 7 (*War and the Rise of the Chinese State*), p. 110–127.

[44] Thornhill 2011, p. 77.

[45] However, this was in concurrent jurisdiction to the Aulic Council (*Reichshofrat*), a supreme court of the empire, comparable to the later Councils of State in Spain (*Consejo de Estado*, 1523), the Netherlands (*Raad van State*, 1531) and France (*Conseil d'Etat*, 1557).

Landfriede ('perpetual public peace'). This was a uniform legal arrangement, based on the earlier Golden Bull (yet another mediaeval charter), which applied in all German parts of the Empire and replaced the very diverse old Germanic peace or atonement statutes.[46] It was one of the many contemporaneous endeavours to centralise government. The Habsburgs in particular, ruling the Holy Roman Empire between 1438 and 1806 and possessing the largest empire on Earth from about 1500, after its conquests in the new world, had little option but to rationalise and centralise their form of government – if only to hold on to what they had. Unsurprisingly, a change of this magnitude was met with resistance after many centuries of decentralised feudal government. The Habsburgs' centralisation policy was the proximate cause of the revolt in the Low Countries, starting in the mid-sixteenth century.

Legal Humanism

Possibly even more important to the development of modern law – which is the central tenet of contemporary constitutions – was the rise of legal humanism at the end of the mediaeval period. Almost all present-day law, regulating relations between people, companies and governments around the world, is of legal-humanist extraction. This too seems so self-evident that it is hardly noticeable, yet it is a fairly recent innovation in the greater scheme of humankind's history. The idea that law is not a preordained emanation of God's will or decreed by history or tradition but is the work of humans, is a novelty. As is the idea that people are not merely the object of legal rules but are also subject to the law and *therefore* have rights as individuals. It was all brand-new, heretical at the time: a total reversal of the values and principles developed over the preceding millennia. As early as the fourteenth century, legal humanism started to turn the world on its head by gradually assuming that humans were able to discover, criticise and even form the law. Ultimately, at the end of the mediaeval period, this led to the radical idea that humans should be *central* to the law.

It all started quite innocently with a group of lawyers, the Bartolists (named after Bartolus de Saxoferrato 1314–1357). When the Crusades and the Renaissance led to the rediscovery of many ancient legal texts, these Bartolists attempted to bring the tried-and-tested principles of ancient Roman law in the *Digests* in line with the (legal) practices and needs of the mediaeval period (*usus modernus*).[47] A variant of this methodology was used by the Dutch school – best known from the work of Hugo Grotius. He used it creatively to link Holland's[48] legal system with the Roman

[46] Establishing the *Reichskammergericht* and legal standardisation also led to the introduction of a reform of judicial bodies, a more systematic approach to judicial proceedings and – ultimately – a first uniform catalogue of criminal rules laid down in the *Constitutio Criminalis Carolina* – sometimes shortened to 'Carolina' – in 1532 (named after Emperor Charles V). Cf. Thornhill 2011, p. 78.

[47] Wauters & De Benito 2017, p. 100.

[48] Holland was the predominant province in the Dutch Republic.

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idea of *jus commune* (*Introduction to Dutch Jurisprudence*, 1619)[49] and used these communal principles of Roman law to develop international maritime law (*Mare liberum*, 1609) and the law of war and peace (*De iure belli ac pacis*, 1625); principles that could claim universality. These were the first manifestations of – humanist – international public law.

As significant as international public law is, it was not the most important outcome of legal humanism. That distinction goes to the invention of universal 'natural law' – which is legal, universally applicable and binding norms as law. Natural law reflects eternal (divinely or otherwise inspired) laws and applies – axiomatically – eternally and universally to every person, regardless of faith and origins. The idea of divinely inspired universal law was not entirely new in the mediaeval period, but the way this universal law was ascertained certainly was. It was no longer restricted to divine revelation (from the Bible or other sacred texts) and intermediaries such as oracles, diviners or priests, but could also simply be discovered by thinking for yourself, using human reason. According to someone like theologian and philosopher Thomas Aquinas (1225–1274), a reasonable thinking person could discover the content of natural law using his intellect and compare or even contrast them to human laws.[50] This marked a dramatic revolution in thinking about the foundations of law. Hitherto, law had been considered a matter of divine revelation, which the Church Father Saint Augustine of Hippo (354–430) had taught was mediated by the church and divinely-appointed leaders. Aquinas and other scholastics brought individual human beings on par with these intermediaries by saying that they could access knowledge of universal truths and the core of the law as well. That does not mean that Aquinas and the scholastics argued that every human being could simply know the God-given natural laws, nor that these rules were clear and unambiguous, allowing them to be expressed simply and uniformly in worldly or human laws (*lex humana*). Nothing quite this straightforward. Knowing natural law requires a great deal of study and wisdom, and always has to be applied to different situations, with the possibility of different interpretations. To reduce the chance of conflict as much as possible, Aquinas argues, people must come to agreements with their government and enter into a kind of a social contract. Public law can be based on these agreements, which then act as approved reflections on natural law. In this kind of natural law thinking, the government or state is not a necessary evil or impediment obstructing knowledge of god's will (as in Saint Augustine),[51] but rather a precondition to adjusting these divine natural laws to the human scale and putting them into practice so that people, under this protection, can develop as social beings. It is

[49] Translated by Charles Herbert, London 1845 https://books.google.nl/books?id=8BRXAAAAcAAJ&printsec=frontcover&dq=Introduction+to+Dutch+Jurisprudence&hl=en&sa=X&ved=0ahUKEwjH4Lnem_riAhUQesAKHY6FC5kQ6AEIKjAA#v=onepage&q&f=false.

[50] Aquinas 1265 (in particular *Prima Secundae*, Part I–II, *Summa theologiae*).

[51] Cf. Somos 2010.

a cornerstone of later thinking about the relationship between states and subjects. The people – its subjects – are not there to serve the state, but the state is there to serve its citizens. A radical reversal of the former world view in which the goals of the state, the church and the citizens were unified: they all lived to serve God. Aquinas' thinking turned the old world around and set the transition in motion to an anthropocentric world with humans at its heart.