

“Stephen Langton, Magna Carta and Church Law”

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Magna Carta was not merely the product of baronial strength and regal weakness, but was also a reflection of evolving concepts of law. This law included the nascent common law, and the principles of the newly revived *ius commune ecclesiasticum*,¹ or canon law. The influence upon Magna Carta of canon law, and the Church, was very great, and few individuals had as much personal influence as Stephen Cardinal Langton, Archbishop of Canterbury (c. 1150-1228, Archbishop 1207-1228). Though Langton was born almost a century after the Great Schism, the influence of eastern church canon law may be detected in his work.

Langton, who may have written Magna Carta, and at the very least had a significant role in its drafting, was a canon lawyer with a Europe-wide reputation as a scholar (he had studied and taught at the University of Paris for 25 years). It was from his canon and civil law training, rather than from the principles of the common law, or of the practices of English feudalism, that he derived much of his inspiration.

The history of the canon law is beyond the scope of this paper, but a brief outline may prove instructive. As the church matured, local custom, varied or controlled by local episcopal regulation, soon built up a series of elastic and rudimentary systems. Later, local councils and General Councils issued canons of more general application² and, with the growth of papal authority, the decretals of the popes assumed an ever-growing importance. These decretals were later incorporated into codes.³

In the lands under the patriarch of the west (the Pope, or Bishop of Rome), including the provinces of Canterbury and York, canon law drew from Roman civil law for the training of its lawyers,⁴ for its procedure, and for much of its jurisprudential concepts and language.⁵ For its substantive law, however, it looked to the general codes and canons and decretals and to the ordinances of provinces and of dioceses.⁶

From the *Collectio Francofurtana* (around 1180) onwards collections get a more systematic character and a school appears, the decretalists, who compile, organise and study the decretals as the basis of canon law. In quick succession four so-called *compilationes* appeared between 1191 and 1226, a sign of the growing

¹ *Evers v. Owen* (1627) Godbolt's Report 432 (K.B.) per Whitlock J.

² A conciliar, consultative process for making decisions, especially on major policy matters, may be observed in Acts 15 and Galatians 2 (the “Council of Jerusalem”).

³ Garth Moore, *An Introduction to English Canon Law* (1967), 3. See also Sir John Baker, *Monuments of Endlesse Labours* (1998); Richard Helmholz, *The spirit of classical canon law* (1996).

⁴ Though Roman Catholic lawyers are predominantly canonists as such, rather than civilians; Ladislav Örsy, *Theology and Canon Law* (1992), 32.

⁵ James Coriden, *An Introduction to Canon Law* (1991), 12-14; Albert Gauthier, *Roman Law and its Contribution to the Development of Canon Law* (2nd ed., 1996).

⁶ Garth Moore, *An Introduction to English Canon Law* (1967), 4.

importance of papal decretals. The fifth compilation, the *Compilatio Quinta*, was made by the canonist Tancred (who died about 1235) for Honorius III in 1226, who sent it immediately to the University of Bologna. It was organized in five books

Pope Gregory IX commissioned the Dominican Raymund of Peñafort to edit a comprehensive collection of papal decretals. This collection of nearly 2,000 decretals appeared in 1234 as the *Decretales Gregorii IX*, also known as the *Liber Extra*, which was also immediately sent to the universities of Bologna and Paris. In 1298 pope Boniface VIII published the next major collection of decretals. He entrusted three canonists with its redaction. This collection is known as the *Liber Sextus*. But in the 1180s, when Langton was teaching canon law in Paris, and even in 1215, when he was writing Magna Carta, the decretals were not yet formally consolidated and would have been less influential on his thinking.

Orthodox Christian tradition is generally much less legalistic than western canon law became, and treats many of the canons more as guidelines than as absolute laws, adjusting them to cultural and other local circumstances.⁷ Some Orthodox canon law scholars point out that, had the Œcumenical Councils (which deliberated in Greek) meant for the canons to be used as laws, they would have called them *νομοι* (*nomoi*, laws) rather than *κανονες* (*kanones*, standards).⁸

After the Reformation the canon law of the Church of England developed along distinct, though sometimes parallel, paths to that of the Roman Catholic Church; ironically perhaps, in a manner that coincidentally mirrored that of Orthodoxy. Constitutional developments also necessitated the creation or codification of canons in the overseas churches of the Anglican Communion in the course of the eighteenth and nineteenth centuries, and in England itself in the twentieth century.⁹ But at the time of Magna Carta canon law in England was closely linked to that of other parts of Western Christendom. Canon law influenced secular law through such instruments as Magna Carta. It did not

⁷ As shown in the eastern notion of economy compared with the western concept of dispensation (the eastern churches in communion with Rome occupy a position broadly equivalent to the Latin Church, the *Codex Canonum Ecclesiarum Orientalium* (1990) being broadly analogous to the 1983 Latin *Code of Canon Law*); see Noel Cox, "Dispensation, Privileges, and the Conferment of Graduate Status: With Special Reference to Lambeth Degrees", *Journal of Law and Religion* 18(1) (2002-2003): 249-74; Emmanuel Amand de Mendieta, *Rome and Canterbury* (1962), 143.

⁸ Mar Melchizedek, "The Interpretation Of Holy Canons Within The Canonical Tradition Of The Orthodox Church", *Theandros: An Online Journal of Orthodox Christian Theology and Philosophy*, 1:3 (2004) available at <<http://www.theandros.com/hcanon.html>> (17th March 2006).

It is obvious that what is well intentioned for the Church as a whole may not be so well suited to some particular local conditions. Similarly, what is good for one age or place may under different conditions constitute a hindrance. Thus it is that the Church's canonical tradition has such regard for local custom. Having evolved within the context of local conditions, it best expresses the mind of the local Church on how the cause of God may be served in her special conditions. Custom is the continuously expressed will of God's people.

⁹ In particular, the 1963 and 1969 canons.

always prevail, particularly under a strong king, but its influence was nonetheless great. This was particularly so at the time of Magna Carta.

There has been a thesis, widely discussed for several decades, that any mediæval European legal text written after c. 1150 was probably influenced by the canon law. The University of Bologna (founded 1088 and chartered 1158) in particular was a centre for the study of civil law, and fostered the eleventh century revival of canon law. Raoul van Caenegem argued that it is possible to trace the influence of the canon law if the drafters give specific clues in their texts.¹⁰ These clues were essentially the existence of norms similar to those of the *ratio scripta*, the received assessment of the canon law.

But if the legal norm is present, and the terminology differs from that commonly used in the canon law, then it is more uncertain that the former actually influenced the latter. Magna Carta is just such an example. However, Dick Helmholz has shown that many chapters of Magna Carta must have been influenced by canon law,¹¹ despite the absence of specific terminology. What he didn't emphasise, however, is how much commonality was to be found with Orthodox canon law, and Langton's own debt to the eastern, as well as to the western, canon law traditions.

The influence of the canon law can be seen in a brief review of the text of Magna Carta.¹² The great majority of the 38 articles – 63 with the Charter of the Forests included – are obsolete. Possibly only three can be regarded as being of permanent importance. These are that the Church should be free; that the city of London and all the other cities and boroughs of the kingdom should enjoy their ancient rights and privileges unimpaired; and that no freeman should be deprived of life, liberty or property, except by the legal judgment of his peers or by the law of the land. Each of these was strongly influenced by the canon law, but especially the first and third. The second was most strongly influenced by the Roman civil law, which Langton himself represented in a country dominated by the then nascent and evolving common law. Due process was not absent from the common law, but the church, in particular, had much to gain from insisting on its enforcement in all secular actions, civil and criminal.

The Church's law differs essentially from secular law. Its difference lies mainly in the premise that the original source of canon law is found in the will of God to establish His Church on earth. Consequently, the source of its authority stems from the will of God. Furthermore, the Church's law differs from secular law in purpose (humanity's salvation), time (extending beyond this life into the next life), scope (including one's conscience), and place (the universal Church). In the late twelfth and early thirteenth centuries, when Langton was teaching in Paris, the divide between east and west – in

¹⁰ Raoul van Caenegem, *An Historical Introduction to Private Law* (Cambridge, 1992, originally published in French, 1988), 180-181.

¹¹ Helmholz, 'Magna Carta' argues that chapters 1, 7, 8, 10, 12, 14, 20, 22, 26, 35, 38, 40, 41, 52, 54, 61, were congruent with doctrines found in canonical jurisprudence. Archbishop Stephen Langton has long been considered one of the drafters of Magna Carta (Helmholz, 'Magna Carta' 360-361). As a judge in his episcopal court he would have learned canon law while settling cases, but his court also had a number of men formally trained in law and legal argument.

¹² Richard Helmholz, "Magna Carta and the *ius commune*" (1999) 66 *University of Chicago Law Review* 297-371.

law and in other things – was not so great as it latter became. Indeed, the development of canon law in the west (where greater strides were made, often at the behest of the lawyer popes) was often aimed at enshrining a papal dominance that did not have its equivalent in the east – despite the imperial influence over the Œcumenical Patriarch.

The holy canons, which are the basis of the Church’s canonical tradition in the Orthodox church, stem from three main sources: Œcumenical Synods (representing the universal Church), Local Synods (subsequently ratified by the Œcumenical Synods as representing the tradition of the universal Church), and the Fathers of the Church. All of these canons, which number about one thousand, are contained in several collections.

Unlike secular law, or Mosaic law, the purpose of the Church’s law is the spiritual perfection of her members. Mere application of the letter of the law is replaced by a sense for the spirit of the law, and adherence to its principles. This purpose is the determining factor when authority is granted to apply the law when circumstances warrant according to each individual case. The spirit of love, understood as commitment to the spiritual perfection of the individual, must always prevail in the application of the law. The abolition of the letter of the law by the spirit of the law has led to the institution of “economy,” exercised in nonessential matters. Through “economy,” which is always an exception to the general rule, the legal consequences following the violation of a law are lifted.

The Christian church¹³ is a human institution, and also the body of Christ on earth. Having a dual nature of this nature, it reflects and encompasses an inherent dichotomy, if not, indeed, an inherent contradiction. Human and divine do not necessarily sit comfortably together, not through any weakness on the part of the divine (or indeed of the human), but because human institutions, and human actors, are flawed, and can but dimly perceive only small parts of the divine plan. This creates an in-built tension, which is reflected both in the workings of the church, and in the relationship between church and State within any given country or time, and more generally. This is so whether or not the Church is established, quasi-established, dis-established, or there exists a more complete division and separation between Church and State.¹⁴

This tension, potential and occasionally actualised, has existed since the days of Roman Emperor Constantine the Great (when Christianity became the official state religion within the confines of the Roman world),¹⁵ and indeed from long before his time. The search for the divine in each of us is echoed in the search, by states and by the church itself, for legitimacy. One consequence of this is that authority within the church, and the exercise of that authority, have long been matters of contention. Both secular and religious institutions seek legitimacy.¹⁶ Government in the church of God is an exercise

¹³ The word “Church” (initial upper case) is generally used throughout this book where a particular denomination is intended, and “church” (lower case) where the intended meaning is the community of faithful, at least those who acknowledge an historical and theological link with the early Christian church (the church universal, rather than the Anglican Church, or the Roman Catholic Church).

¹⁴ The categorisation of quasi-established is from Doe’s taxonomy; Norman Doe, *Canon Law in the Anglican Communion* (1998).

¹⁵ See, generally, Thomas Elliott, *The Christianity of Constantine the Great* (1996).

¹⁶ Randall Collins, *Weberian Sociological Theory* (1986).

of ruling power, *potestas regiminis*, or the power of governance.¹⁷ This authority of the church has both secular and religious origins, though, for theological reasons at least, the latter must always predominate.¹⁸

The church is the Church of God, in the world but not of this world, and is eternal and unchanging in its essential nature.¹⁹ Because it is in the world, and comprises the children of men, it cannot avoid contamination by merely human influences, if indeed these influences ought to be avoided. Identifying its essential nature, and knowing what is unchanging and unchangeable, and what may be changed and adapted to meet contemporary conditions, is an exercise which is fraught with difficulties. But certain principles remain essential, such as the independence of the church – subject to imperial authority post-Constantine the Great – and the desire to do what is right and proper in any given situation (an understanding that ultimately led to the development of equity²⁰).

Magna Carta must also be seen in its wider European context. The Europe-wide Papal investiture contest led to King John being excommunicated in 1209. Although the king and pope were reconciled in 1213, a Christian king had been declared unworthy of kingship.²¹ The Church modified and restrained the scope of the king's authority.²² The king's duty to maintain the peace in his kingdom and provide justice for his subjects underwent a major transformation in the twelfth century, which emphasised the king's authority throughout England, and made more explicit his obligations and the parameters within which he ruled. His role as judge and law-maker was revolutionised.²³

The law served to develop the powers of kings, and to direct and limit their action.²⁴ The balance between the king and the community as the fount of law and the dispenser of justice was perceptibly altered in favour of the king by Ælfred's time.²⁵ Kings and their subjects were increasingly made aware of the kings' religious and moral responsibilities;²⁶ and the Church was active in this endeavour. It is perhaps no

¹⁷ James Coriden, *An Introduction to Canon Law* (1991), 18.

¹⁸ This is reflected in the nature of canon law, and in particular, the distinction between the immutable and the changeable in law, doctrine, dogma and mere detail.

¹⁹ "It is misleading to speak of religious experience as something distinct from ordinary experience for the latter possesses a dimension of holiness"; J.G. Davies, *Every Day God: encountering the holy in world and worship* (1973), 80.

²⁰ Justification for disturbing common law judgments explained in *The Earl of Oxford's Case* (1615) 1 Ch Rep 1, (1615) 21 ER 485 (Court of Chancery, per Lord Ellesmere, LC): "The office of the Chancellor is to correct men's consciences for frauds, breach of trust, wrongs and oppressions, of what nature soever they be, and to soften and mollify the extremity of the law." This left the common law unchanged; it just could not be enforced against this particular plaintiff.

²¹ *Ibid.*, p. 106.

²² *Ibid.*, p. 108.

²³ *Ibid.*, p. 110.

²⁴ John Cannon and Ralph Griffiths, *The Oxford Illustrated History of the British Monarchy* (Oxford University Press, Oxford, 1988), p. 34.

²⁵ *Ibid.*, p. 66.

²⁶ *Ibid.*, p. 104.

coincidence that Archbishop Hubert Walter, who crowned King John, supposedly made a speech which outlined, for the last time, the theory of a king's election by the people (rather than his hereditary, or parliamentary, right). Subsequently the notion of legal right prevailed, alongside a maturing land law.

The freedom of the Church was an inevitable inclusion in Magna Carta, given the wider conflict between Pope and King. Innocent III was a friend of Langton, and was also one of the first of the great advocates of papal sovereignty. John had been compelled to recognise the suzerainty of the pope in 1213, and this had enraged the barons and most of the English church – Langton himself included. It was for this as much as for any other grievance that John found himself forced to negotiate at Runnymede.

Langton may have been a protégé of the Pope, and a canonist, but he was also an Englishman. To him, as to the barons, the independence of the church meant limiting the power of the King – even if this also meant that he was opposing himself to the Pope also. The right to appeal to Rome was long subject in England to restrictions imposed by the king or Parliament.²⁷ The separation of Church and State, and ultimately religious freedom, owes much to Langton's actions. The church had to maintain its independence, even if this meant negotiating the twin dangers of King and Pope. The English church continued along this path from several more centuries, bolstered by Magna Carta.

The church did not interfere in secular cases, but it did offer sanctuary and benefit of clergy, both of which were eventually to descend into disrepute, and lead to the embarrassment of the church. The church had its own concurrent jurisdiction, as Magna Carta allowed. The criminal jurisdiction of the ecclesiastical courts included, at various times, heresy, adultery, incest, fornication, simony, brawling in church, defamation,²⁸ and others. Some Tudor and Stuart legislation made secular offences of conduct that had formerly fallen within the Church's exclusive jurisdiction.²⁹ This led to a shared jurisdiction, which in the long term proved harmful to the ecclesiastical courts, in the face of the jealousy of the common law, and the allegedly more efficient processes of the common law courts.³⁰ The settlement of the Church after the disruption of the civil wars of the seventeenth century may have led to an intellectual rapprochement between Church courts and secular courts, but this encouraged intellectual borrowing from the

²⁷ See, for instance, the Prohibition to spiritual courts Act 1285 (13 Edw. I Stat. *Circumspecte Agatis*) (Eng.). There were similar restrictions elsewhere, for instance, in France.

²⁸ This was lost in 1855; Ecclesiastical Courts Act 1855 (18 & 19 Vict. c. 41) (U.K.), s. 1. In Ireland the same effect was achieved by the Ecclesiastical Courts Jurisdiction Act 1860 (23 & 24 Vict. c. 32) (U.K.).

²⁹ Witchcraft Act 1562 (5 Eliz. I c. 16) (Eng.); Sodomy Act 1562 (5 Eliz. I c. 17) (Eng.); Fraudulent Conveyances Act 1571 (13 Eliz. I c. 5) (Eng.); Bankruptcy Act 1571 (13 Eliz. I c. 7) (Eng.); Poor Act 1575 (18 Eliz. I c. 3) (Eng.); Bigamy Act 1603 (1 Jac. I c. 11) (Eng.); Plays Act 1605 (3 Jac. I c. 21) (Eng.).

³⁰ Perceived as more efficient, in part because common law courts procedures had been subject to a series of rigorous reforms in the course of the nineteenth century; e.g. see Alan Harding, *A Social History of English Law* (1966), 330-358.

common law, which was to help to erode still further the distinct identity of the ecclesiastical law.³¹

By the nineteenth century the scope of ecclesiastical influence on secular government had greatly diminished in the Christian world, though it retained a strong informal role. Being largely informal it was also subject to uncertainty, and to subtle change without overt paradigm shifts. Until the mid-nineteenth century the Church in England retained a formal role with respect to the legal regulation of marriage,³² divorce,³³ and succession to property,³⁴ and in earlier centuries its jurisdiction was much broader. But the influence of the canon law on Magna Carta meant that the canon law retains a seminal influence upon some of the fundamental principles of the law of this country and others derived from the English legal heritage.

In the twentieth century the church remains an important influence on the secular law. This is both specific, in the handful of articles which remain operative, but perhaps more importantly in the underlying principles which it established. Foremost of these is the rule of law. This is especially important in a country which does not have a written entrenched constitution; though it might be argued that the incorporation of Magna Carta into the very bedrock of government and society has rendered such a constitution unnecessary. The requirement that someone may be deprived of life, liberty or property only by the “lawful judgment of his peers, or by the law of the land”, formed the basis for much subsequent common law jurisprudence, from Sir Edward Coke’s “‘a man’s house is his castle, *et domus sua cuique tutissimum refugium*’ (‘One’s home is the safest refuge for all’),”³⁵ to *Mabo v Queensland (No 2)*.³⁶

The irony of this was that a document owing much to a canon and civil law heritage was to form the basis of a strong traditional of rights. Sir John Fortescue’s doctrine of English kingship was that it was *dominium politicum et regale*, in contrast with the French *dominium regale*.³⁷ Continental rulers ruled on the basis of the civil law of their

³¹ The very term ecclesiastical law has been used to describe the laws of the Church, including those enacted by the secular State, in contrast to the canon law, which is purely ecclesiastical in nature. See the Rev’d. Thomas Glyn Watkin, “Vestiges of Establishment: The Ecclesiastical and Canon Law of the Church in Wales” (1990) 2 Ecclesiastical L.J. 110.

³² Until the Matrimonial Causes Act 1857 (20 & 21 Vict. c. 85) (U.K.). In Ireland, ecclesiastical courts lost their matrimonial jurisdiction only under the Matrimonial Causes and Marriage Law (Ireland) Amendment Act 1870 (33 & 34 Vict. c. 110) (U.K.), and the jurisdiction survived until 1884 in the Isle of Man; the Diocese of the Bishop of Sodor and Man Ecclesiastical Judicature Transfer Act 1884 (Statutes, vol. V, pp. 352-373) (Isle of Man).

³³ Until the Matrimonial Causes Act 1857 (20 & 21 Vict. c. 85) (U.K.).

³⁴ Until the Court of Probate Act 1857 (20 & 21 Vict. c. 77) (U.K.). The Poor (Burials) Act 1855 (18 & 19 Vict. c. 79) (U.K.) had the same effect in Ireland.

³⁵ *The First Part of the Institutes of the Laws of England, or, A Commentary on Littleton* (London, 1628, ed. F. Hargrave and C. Butler, 19th ed., London, 1832), Third Institute, p. 162.

³⁶ (1992) 175 CLR 1.

³⁷ A limited monarchy, in contrast to an absolute monarchy; Sir John Fortescue, *The Governance of England*, notes by Charles Plummer (1979).

stronger Roman legal heritage.³⁸ They relied especially on the maxim *quod principi placuit legis habet vigorem* (“what hath pleased the prince has the force of law”). In England, through Magna Carta, a tradition of parliamentary government helped ensure that the concept of the rule of law prevailed, but that the law was a relatively benign one, enacted by the King-in-Parliament, nor the King alone. For this the church can take some credit.

³⁸ The extent to which the common law resisted the reception of Roman law has been much disputed, though recent research suggests that the mediæval common law, though surviving in an organic sense, actually underwent a substantial reformation in the Renaissance period, especially 1490s to 1540s; See the introduction to *The Reports of Sir John Spelman* (1978), vol. 2 Seldon Society 94; Sir John Baker, “English Law and the Renaissance” (1985) Cambridge L.J. 46.