MAGNA CARTA – AS THE CONCEPTUAL PREDECESSOR OF THE RULE OF LAW CONCEPT IN THE MIDDLE AGES

ZH. TEMIRBEKOV,
PhD student of KAZGUU University, Department of State and Legal disciplines

The 1215 Magna Carta, or the Great Charter of the Liberties as a legal document, that according to its historical-philosophical origin is an idea embodiment about an origin of the king's power from «a common law» which provided for «the universal recognition of mutual rights and duties» between the governor and his citizens. As for the historical-political origin, this document appeared as a result of resistance to lawlessness from the monarch as attempt to put the king into a certain legal framework. Finally, the philosophical-legal contents of this document, in the author' opinion, gives the answer to the question: «Which should be supreme – the rule of law or will of a ruler?». Subsequently, provisions of the Great Charter had a great influence on the development of such human rights, as the right to life and the right to freedom, and also many procedural guarantees which in turn played an important role in the formation of the rule of law concept.

Keywords: the Magna Carta, the Great Charter, common law, government under law, the fundamental law, basic rights, due process, the rule of law, constitutionalism, the Constitution.

In XII and XIII centuries in societies of Western Europe the system of power was impregnated with authoritative methods of government. The opinion which noted the responsibility of the monarch, the necessity to put him in a certain framework of law served as a counterbalance to such state. Due to such thoughts the resistance against the power abuse from monarchs was extending and getting stronger.

The problem of implementing the real control over the absolute power of whimsical kings has captured many countries across Europe. The ideas concerning functioning the monarchic power were «spreading from one country to another», they became a «part of the very atmosphere».[1]

In medieval England where there was neither the concept of personal freedom, nor the concept of the sovereign's action freedom restriction yet, there was a theory which as the doctrine of antique thinkers about «the law which rules the world» proclaimed existence of «common law which rules the world».

In the cases over it the English lawyer, Henry de Bracton is often quoted, who lived in the XIII century and is considered as one who wrote a fundamental work following an English legal tradition – «De legibus et consuetudinibus Angliae» («On the laws and customs of England»). Bracton considered that «the king who broke or did not execute the law would be punished by God».[2] But the most important idea, in our opinion, expressed by the lawyer of the early Middle Ages was that the governor has to be limited. Bracton claimed that not a person but God and laws shall be over the king as far as laws creates the king.[3]

Due to that Henry Bracton was persistent in limiting the omnipotence of the king, having subordinated the unlimited monarch – to the law; this author traditionally and reasonably is perceived as the first medieval theorist of institutional restriction of the royal powers, and consequently – the supporter of the idea, «the rule of law», in spite of the fact that in Italy and Normandy, the similar ideas were expressed even earlier.

For example, in the Treaty of Constance (1883) which was concluded between the emperors, Frederick I Barbarossa and Lombard League, there was a provision that the military tenants would not be deprived of their fiefs «except by the laws of our ancestors and the judgment of their peers».[4] In the first hand-written collection of a common law of Normandy (which it was finished in 1200) there is a record: «peer ought to be judged by peer».[5]

Historically established that the document where the «normativization» of the above-mentioned ideas had occurred was the 1215 Magna Carta.[6]

In a number of articles of this legal document which is still of a great value, in the form of concrete legal formulas the provisions reflecting ideas of «constitutional monarchy» and «restriction of the power» were fixed. Therefore, it is not coincidence that some western authors considered the Great Charter in its many manifestations as the spiritual and legal predecessor of what everybody perceives nowadays as the concept of «the rule of law».[7]

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[1]See: James C. Holt. Magna Carta. Cambridge University Press. 1992. P. 81.

[2]See: Манеева Т.И. Развитие государственно-правовых институтов в Англии XIV-XV вв.: thesis ... of doctor of juridical science. Нижний Новгород, 2011. P. 186.

[3]Bracton H. On the Laws and Customs of England. Vol. 2. Cambridge, 1968. P. 33.

[4]See: Constitutiones et acta publica imperatorum et regum, ed. L. Weiland, Monumenta Germaniae Historica. 1896. Vol I. P. 415.

[5]'Par per perem iudicari debet' (Le Tres Ancien Coutumier de Normandie, Coutumiers de Normandie, ed. E.J. Tardif, Rouen, 1881, I, cap XXVI).

[6]There is an opinion that the history of the Great Charter is a history not only the document, but also history of political and legal thought. "If we can seek truth in Aristotle, we can seek it also in Magna Carta". See: James C. Holt. Op. cit. P. 18.

[7]See: A.E. Dick Howard. The Road from Runnymede: Magna Carta and Constitutionalism in America. Charlottesville: The Univ. Press of Virginia, 1968. P. x.

Magna Carta (1215)

THE GREAT CHARTER AS AN AGREEMENT BETWEEN THE KING AND BARONS

In June, 1215 the king of England, John Lackland, had no other choice but to set the seal on a piece of a pergament with the unusual text, which occurred directly at the place called Runnymede, near London.[8] In opposition two forces met face to face. On one hand – the force of the risen British nobility[9] strengthened by soldiers in Wales and Scotland together with the armed clergy who demanded some certain rights and freedoms for themselves and threatened to punish the monarch someway.[10] And on the other hand – the lonely king who still acted as a symbol of strong centralized power of dynastic origin, but now suddenly was in hands and in favor of those whom he pursued till the moment.

Contrary to everything, the revolt ended with a peace outcome, though the victory was won by the nobility. The outcome is really estimated as unexpected: there was no execution of the king and his close relatives, which was traditional for medieval England of that time; there were no searches of a new king and a new dynasty that, eventually, could return everything as it was before – that is to the power of other tyrant. Why it occurred, nobody knows. However many know, how exactly it occurred. According to one of the authors, it became possible due to «a great piece of paper drown by great minds».[11]

So, in medieval England the Great Charter became a peculiar peace answer against power abuse from the sons of the king Henry II concerning usual feudal duties. The history developed in such a way that for the British, according to one of authors here, it was necessary to endure «bloodless revolution» to give the answer to the important question: «Which should be supreme – the rule of law or will of the ruler?».[12] We believe that it exactly exposes the enduring value of the Great Charter as a way of normalization of relations between the power (state) and her citizens – on the basis of law, under the direction of law or within the law.

The king of England John Lackland

Also this document is the first attempt to provide public supervision of almost unlimited powers of the king, an attempt to define royalty borders.[13] Therefore it is not casual in Anglo-American tradition that the Great Charter is considered as the first Constitution.[14]

Besides, the value of the Great Charter is also high because initially the purpose of an embodiment of this document was a principle according to which «the rule of law has to extend not only over the population, but also over the king».[15] It means that the rule of law exists only where authorities take an equal position with the subjects subordinated to law.

In addition to aforesaid, it would be to express the thought of E.A. Litvinova who considered the Great Charter – as «the first document which put the monarch into dependence on his citizens».[16] In other words, the king, having signed the Great Charter, assumed liabilities to be subordinated to law, i.e. to be dependent on the law which was created by the people of England in the form of common law in those days. Therefore, submitting to the provisions of the Great Charter, indirectly, the monarch also submitted to the people.

[8]See: Eric. T. Kasper. The influence of Magna Carta in limiting executive power in the war in terror // Political Science Quarterly. 2011-2012. Vol. 126. Number 4. P. 546.

[9]See: Хатунов С.Ю. Тридцать вторая статья великой хартии вольностей и ее основные положения // Российский юридический журнал. 2011. № 4. P. 232.

[10]See: Mark F. Grady and Michael T. McGuire. The Nature of Constitutions // Journal of Bioeconomics. 1999. Number 1. P. 237.

[11]See: Ray Stringham. Magna Carta: Fountainhead of Freedom. Seattle: Aqueduct Books, 1966. P. 2.

[12]See: A.E. Dick Howard. Op. cit. P. xi.

[13]See: Баранов В.Ф. Возникновение и развитие английского общего права в XII-XVII веках: thesis ... of Ph.D. Москва, 2012. P. 24. See also: Миряшева Е.В. Идея конституционализма в Европе и практика его распространения в североамериканских колониях Англии // История государства и права. 2013. № 5.P. 55.

[14]See: Mark F. Grady and Michael T. McGuire. Op. cit. P. 237.

[15]See: Drumbl, M.A. (2013, October 25). Process for the Dispossessed: Procedural Rights from Magna Carta to Modern International Law [Review of the book Global Justice and Due Process, by Larry May]. Criminal law and Philosophy. DOI 10.1007/s11572-013-9262-5.

[16]See: Литвинова Е.А. Историко-правовые аспекты парламентской реформы в Великобритании в начале XX века: thesis ... of Ph.D. Рязань, 2010. P. 44.

THE GREAT CHARTER ABOUT RIGHTS AND FREEDOMS OF THE PERSON AND ABOUT JUSTICE

The known provision of the Great Charter is Chapter 39 in the 1215 edition:

«No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land».[17]

The essence of this formula was that the Great Charter as the document, acted as a following guarantee: no one can be grabbed and putted, dispossessed, recognized as the criminal or expelled out of borders of the country, except as on the basis of pronouncement of the relevant decision by court. The king itself could not use force to the person who was accused of commission of crime. For this purpose it needed to have the judgment.

The formula applied in Chapter 40 of the text of 1215 was very short, but not less known. It sounds so: «To no one will we sell, to no one deny or delay right or justice».[18]

The king promised to provide with three things on the base of this formula. It was talked of three «no» without which it is impossible to provide fair, justice functioning of an institute of protection of human rights: No – to justice «sales»! No – to «refusal» in justice! No – in «delaying» of justice! According to lawyers, these three «no» concern a ban on «three evils which always caused deep concern of everyone who appeared either as the claimant, or as the respondent in court». The mentioned three «no» of the Great Charter «set a basic pattern for judicial behavior that has not always been adhered to but must have played its part the improvement of the administration of justice».[19]

CONCLUSION

So, the analysis of emergence and the maintenance of the Magna Carta give the grounds for such conclusions:

1. The Great Charter as a legal document of 1215 as for the historical-philosophical origin is an embodiment of thoughts exposing that the power of the king comes from «a common law» which provided with the «universal recognition of mutual rights and duties» between the governor and his citizens.
2. According to the historical-political origin this document was the manifestation of resistance to continuous and long abuses of the power by monarchs and a successful attempt to put the specific individual governor into a certain legal framework.
3. According to the philosophical-legal contents this document gave a definite answer on the question: «Which should be supreme – the rule of law or will of the ruler?».

In opinion of S.Yu. Hatunov: «In spite of the fact that all representations of originators of GCL (the Great Charter of Liberties – Zh.T.) were based on feudal customs and medieval mentality, they were that base on which many law-based states grew nearly 800 years later».[20] Thus, the Great Charter became one of the earliest documents whose provisions regarding

John of England signs Magna Carta

restriction of discretion of the power were realized in practice.

Provisions of the Great Charter had direct impact on the formation of such human rights, as the right to life, the right to freedom, the right to a private property, and also many procedural guarantees. Besides, due to such provisions, the Great Charter became the conceptual predecessor of the concept created for many centuries later. Today it is one of the most progressive ideas of the best way to ensure human rights – the concept of the rule of law.

Ж. Р. Темирбеков: «Ұлы Еркіндік Хартиясы» – ортағасырдағы құқық үстемдігі тұжырымдамасының негізін қалаушы.

Ұлы Еркіндік Хартиясы 1215 жылы заңды құжат ретінде өзінің тарихи-философиялық шығуы жағынан «жалпы құқықтан [«common law»]» король билігінің пайда болуы туралы идеялардың жүзеге асуы болып табылады, яғни ол билеуші мен оған бағынатындардың арасында «өзара құқықтар мен міндеттерді жалпы мойындауды» қарастырған. Тарихи-саяси шығу жағынан бұл құжат королдің озбырлығына қарсыласудың нәтижесінде, яғни королді белгілі бір құқықтар шеңберіне енгізуге тырысудан пайда болған. Автордың пікірі бойынша, бұл құжаттың философиялық-құқықтық мазмұны «Не жоғары – құқықтың үстемдігі ме немесе билеушінің еркі ме?» деген сұраққа жауап береді. Соңында, Ұлы Хартияның ережелері адамның өмір сүру құқығы, бостандық құқығы сияқты құқықтарының және құқық үстемдігі тұжырымдамасын қалыптастыруда маңызды рөл атқаратын көптеген процессуалдық кепілдіктердің дамуына үлкен ықпал етті.

[17]http://www.bl.uk/magna-carta/articles/magna-carta-english-translation (accessed 13 May 2015)

[18]Idem.

[19]See: Ray Stringham. Op. cit. P. 55.

[20]Хатунов С.Ю. Тридцать вторая статья великой хартии вольностей и ее основные положения // Там же. P. 237.

Түйінді сөздер: Ұлы Еркіндік Хартиясы, жалпы құқық, билеушінің еркі, құқық жетекшілігіндегі билік, негізгі заң, негізгі құқық, әділ заңгерлік процедура, құқық үстемдігі, конституционализм, адам құқығы, Конституция.

Ж. Р. Темирбеков: «Великая Хартия Вольностей – концептуальный предшественник концепции верховенства права в средневековье»

Великая Хартия Вольностей 1215 г., как юридический документ, по своему историко-философскому происхождению является воплощением идеи о происхождении власти короля от «общего права [«common law»]», которое предусматривало «всеобщее признание взаимных прав и обязанностей» между правителем и его подданными. Что касается историко-политического происхождения, то этот документ появился в результате сопротивления произволу со стороны монарха, как попытка поставить короля в определенные правовые рамки. И наконец, философско-правовое содержание данного документа, по мнению автора, дает ответ на вопрос: «Что выше – верховенство права или воля правителя?». Впоследствии, положения Великой Хартии оказали большое влияние на развитие таких прав человека, как право на жизнь и право на свободу, а также многих процессуальных гарантий, которые в свою очередь сыграли важную роль в формировании концепции верховенства права.

Ключевые слова: Великая Хартия, общее право, воля правителя, власть под руководством права, основополагающий закон, основные права, справедливая юридическая процедура, верховенство права, конституционализм, права человека, Конституция.

NEW BOOKS

The commission on Human Rights under the President of the Republic of Kazakhstan.The Special Report on current issues affecting Human Rights Protection in the area of combating trafficking in persons in the Republic of Kazakhstan. Under the general editorship of KuanyshSultanov, TastemirAbishev. Astana, 2015.– 104 pages.

The Special Report of the Commission on Human Rights under the President of the Republic of Kazakhstan is devoted to highlighting current issues of combating trafficking in persons, providing comprehensive analysis of the situation with the rights of victims of trafficking in Kazakhstan and ensuring their rights to access special social services.

The Special Report was approved by a resolution № 32-47.327 of the President of the Republic of Kazakhstan on December 29, 2014.

The Special Report provided a comparative analysis of anti-trafficking national legislation and its implementation. In particular, the Special Report revealed gaps in the national legislation and practice in the field of combating human trafficking, in providing social services to victims of trafficking, and in social and legal protection of victims of abuse, including victims of trafficking.

The report is based on the results of human rights activities of the Commission on Human Rights and its special investigations during the past period of time. It also includes data of state bodies and nongovernmental human rights organizations of the Republic of Kazakhstan, the International Organization for Migration (IOM) in Kazakhstan and other international organizations. The report contains the conclusions and recommendations for prevention of human trafficking, protection of victims of trafficking, prosecution of traffickers, and partnership between state authorities and NGOs in the field of combating human trafficking.

The findings of the report will be useful for three branches of government: the executive, the legislative and the judicial. The report will be of specific interest of law enforcement bodies, lawyers, institutions of extrajudicial protection of human rights, NGOs and international organizations, and other public organizations.

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