Whose history? Some reflexions on the history of rights and freedoms

Frederik Dhondt[1]

If all legal history ought to be relevant to the present, in John Gilissen's view,[2] one could also twist this relationship for Serge Gutwirth: "thinking through" contemporary challenges involves rising to a higher conceptual level and taking a back seat, combining legal history, political thought, comparative law and legal anthropology.[3] Serge's research programme on the commons interrogates not only the link between human beings and their terrarium (*Gaïa*), but also the foundations of the societal and economic power underpinning our legal system.[4]

To a certain extent, Serge's publications illustrate the successive twists and waves in the humanities and social sciences, as well as their impact on the field of legal dogmatics: criticism of the "liberal state" and the narrative of progress since the revolutions of the seventeenth century[5] from a social history perspective[6] is succeeded by the postmodern turn with Foucault (1926-1984) and the environmental–scientific paradigm of Bruno Latour (1947-2022). Among the rich writings of Serge Gutwirth, an exceptional and iconic legal scholar at

1 My thanks to Stefano Cattelan and Vincenzo De Meulenaere for proofreading and suggestions, as well as to the editors and publisher of this volume.

2 Frederik Dhondt, 'John Gilissen and the Teaching of Legal History in Brussels' (2022) 99 *Folia Iuridica*, 19.

3 Cf. most recently: Serge Gutwirth, 'Les Communs: Avec, Malgré ou contre le droit?' (2022) *Journal des Tribunaux*, 582; Alessia Tanas & Serge Gutwirth, 'Le pluralisme juridique retrouvé au temps des désordres écologiques. Penser la relation entre le droit et les communs de la terre avec Paolo Grossi' (2021) 86 *Revue interdisciplinaire d'études juridiques*, 37.

4 See also Thomas Piketty, *Capital et idéologie* (Seuil 2019); Jacques Généreux, *La dissociété* (Seuil 2006); Katharina Pistor, *The code of capital: How the law creates wealth and inequality* (Princeton University Press 2019).

5 Gutwirth (n 3) 582; Serge Gutwirth & Paul De Hert, 'Human rights: A secular religion with legal crowbars. From Europe with hesitations' (2021) 33 *National Law School of India Review*, 421-426.

6 E.P. Thompson, *Whigs and hunters: The origin of the Black Act* (Allen Lane 1975); Heide Gerstenberger, *Die subjektlose Gewalt: Theorie der Entstehung bürgerlicher Staatsgewalt* (Westfälisches Dampfboot 1990).

our institution, the theme of fundamental rights is a recurrent one.[7] His recent reminder of the English *Charta de Foresta* (1217)[8] as a persistent testimony to the relationship between human beings and their environment is a fitting illustration of his syncretism of old and new.[9]

History is essentially the science of time, of continuity, change and memory. All those who practice it realise that it is impossible to resuscitate a past that is irredeemably lost.[10] Powerful ideas and principles should be studied in their reciprocal relationship with context, both for their origins and for their adaptation through evolution.[11] Of course, the hermeneutics of history are such that every author writes from his or her own situated contextual and generational position.[12] Professional historians have no right of exclusion against trespassers on the domain of history, but welcome them, in the words of John H. Elliott (1930-2002): "the past has become an open terrain over which representatives of all the humanist disciplines have felt free to roam at will."[13] The past is the inevitable "common" of mankind: no *ius disponendi vel vendicandi* exists for individuals.[14] If appropriation exists, we should see it more as *usus* or *fructus*, subject to criticism by peers, whose consensus collectively protects the study of written and unwritten sources.[15]

When lawyers delve into the past, multiple uses are possible. Some pursue a quest for authority, hoping to convince a judge or public opinion at large.[16] Some are animated by a desire to construct a pedigree, a "history of

7 Gutwirth & De Hert (n 5).

8 Discussed by Edward Coke in the same volume as the *Charta Libertatum* or *Magna Carta*: Edward Coke, *The second part of the Institutes of the Lawes of England. Containing the exposition of many ancient and other statutes* (Flesher & Young 1642) proemium. See also Colbert's solicitude for forests, intended to preserve woods and prevent illegal chopping, with his *Ordonnance sur le fait des eaux et forêts*, which remained in force from 1669 to 1827: Lucien Bély, 'Forêts, eaux et forêts' in Lucien Bély (ed.), *Dictionnaire Louis XIV* (Robert Laffont 2015), 515-516.

9 Gutwirth (n 3) 582.

10 Henri-Irénée Marrou, *De la connaissance historique* (Seuil 1954).

11 Richard Bourke & Quentin Skinner (eds), *History in the humanities and social sciences* (CUP 2022).

12 Yann Potin & Jean-François Sirinelli (eds), *Générations historiennes: XIX^{e}–XXI^{e} siècle* (CNRS Editions 2019).

13 J.H. Elliott, *History in the making* (Yale University Press 2012), x.

14 Robert Feenstra, 'Dominium utile est chimaera: Nouvelles réflexions sur le concept de propriété dans le droit savant' (1998) 66 *Tijdschrift voor Rechtsgeschiedenis/The Legal History Review*, 382.

15 Richard J. Evans, *In defence of history* (Granta 2004); Zachary Schrag, *The Princeton Guide to Historical Research* (Princeton University Press 2021).

16 Randall Lesaffer, 'International law and its history: The story of an unrequited love', in Matthew Craven, Malgosia Fitzmaurice & M Vogiatzi (eds), *Time, history and international law* (Martinus Nijhoff 2006), 27-41.

texts", or a foucauldian "archaeology of knowledge",[17] while others prefer a bottom-up, contextual approach.[18] Serge's work is reminiscent of recent critical interrogations of the language of property and sovereignty and of claims to transcend the *summa divisio* between private and public law[19] in order to identify law as a discourse justifying the exercise of power by various actors.[20]

The present chapter is a modest reflection, based on an impressive recent work that focuses on the role of lawyers in creating fundamental rights. If we take Raoul Van Caenegem (1927-2018)'s triad "Judges, legislators, professors",[21] the judge-made nature of the common law seems essential in the latest state of the art to explain why the constitutional "moment" Magna Carta (1215) has come to be seen as declaratory with regard to higher rights enshrined in a legal order where … sovereignty resides with the "King in Parliament".

Magna Carta: a "reinvented" text

Sir John Baker, one of the most prominent if not the most prominent historian of English law,[22] published an intriguing study on the most venerated of all charters: King John II of England (1166-1216)'s *Magna Carta*, *Carta libertatum Regni*,[23] or "Great Charter" of 15 June 1215.[24] The *magnum opus* was intriguingly

17 Martti Koskenniemi, *To the uttermost parts of the earth: Legal imagination and international power, 1300-1870* (CUP 2021).

18 Dirk Heirbaut, 'A tale of two legal histories. Some personal reflections on the methodology of legal history', in Dag Michalsen (ed.), *Reading past legal texts* (Unipax 2006), 91-112.

19 The distinction between private law (*ad utilitatem singulorum*) and public law (*ad statum rei Romanae*) is attributed to the late Classical Roman lawyer Ulpianus (+ 223) in the Digest (I, 1.2) and Institutes (I, 1.4): Michael Stolleis, *Öffentliches Recht in Deutschland: Eine Einführung in Seine Geschichte, (16.–21. Jahrhundert)* (CH Beck 2014), 21.

20 For example, Martti Koskenniemi, 'What should international legal history become?', in Stefan Kadelbach, Thomas Kleinlein & David Roth-Isigkeit (eds), *System, order, and international law. The early history of international legal thought from Machiavelli to Hegel* (OUP 2017), 381-397; Ntina Tzouvala, *Capitalism as civilisation: A history of international law* (Cambridge University Press 2020); Tamar Herzog, *Frontiers of possession. Spain and Portugal in Europe and the Americas* (Harvard University Press 2015).

21 Raoul C. Van Caenegem, *Judges, legislators and professors: Chapters in European legal history* (CUP 1987).

22 Knighted by H.M. the Queen for services to legal history in 2003.

23 Coke (n 8) proemium.

24 Theodore F.T. Plucknett, *A concise history of the common law* (5th edn, Liberty Fund 2010), 22.

called "the reinvention of Magna Carta 1216-1616".[25] The eight hundredth anniversary was marked by a blaze of commemorative events, among which the British Legal History Conference in Reading.[26] The global significance of the English legal tradition goes without saying, as the British Empire (and thus its legal culture and legal education) reached to Asia, Australia, Africa and America.[27] This might come across as puzzling, since Magna Carta was in essence a feudal document, by which the King's vassals sought to exploit John II's military defeats across the Channel, and not necessarily a text addressing all of his subjects. In this respect it differs from later documents such as the powerful Bill of Rights (1689), the American Declaration of Independence (1776) or the French *Déclaration des droits de l'homme et du citoyen* (1789).[28]

Yet, the very first page reminds us that "the Charter of Runnymede [Magna Carta] itself had a short life […] were it not for its reinvention in the early-modern period, the charter would be known today only to a few medieval specialists".[29] Its influence "has been achieved more by reputation than by the operation of positive law".[30] Indeed, according to the elder work of Plucknett (1897-1965), the Charter had been positive law for only "nine weeks" before it was damned and annulled by Pope Innocent III (1198-1216).[31]

Magna Carta "timidly prefigurates"[32] the English tradition of the "rule of law",[33] the second of Dicey's distinctive characteristics of English law, transcending "language and culture and even history".[34] Dicey, writing in the 1880s, defined the "rule of law" as follows:

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25 John Baker, *The reinvention of Magna Carta 1216-1616* (CUP 2017).

26 Robert Hazell & James Melton (eds), *Magna Carta and its modern legacy* (CUP 2015).

27 On the impact on legal education: Jean-Louis Halpérin, 'Les circulations transnationales en matière d'enseignement du droit: une perspective globale', in Raphaël Cahen et al. (eds), *Les professeurs allemands en Belgique. Circulation des savoirs juridiques et enseignement du droit (1817-1914)* (ASP 2022) 28-30.

28 Tamar Herzog, *A short history of European law: The last two and a half millennia* (Harvard University Press 2018), 108. For the transnational effect of these declarations, see David Armitage, *The Declaration of Independence: A global history* (Harvard University Press 2007).

29 Baker (n 25) ix.

30 Ibid 1.

31 Plucknett (n 24) 23. Baker underlines the fact that the resurrection of the charter in a 'substantially pared down' version, was due to papal legate Guala. Innocent III had died in July 1216. His successor, Honorius III, whose authority is invoked for the resurrection of Magna Carta on 12 November 1216, 'himself knew nothing about it': Baker (n 25) 5.

32 Gutwirth (n 3) 582.

33 Albert Venn Dicey, *Introduction to the study of the law of the Constitution* (9th edn, ECS Wade ed/Macmillan and Co 1952) 183-415.

34 Baker (n 25) ix.

> *The rule or supremacy of law* […] *is well expressed in the old saw of the courts,* "la ley est le plus haute inheritance, que le roy ad; car par la ley il même et toutes ses sujets sont rulés, et si la ley ne fuit, nul roi, et nul inheritance sera". […] *the security given under the English constitution to the rights of individuals* […].[35]

In contrast with "Belgium, which may be taken as a type of countries possessing a constitution formed by a deliberate act of legislation [sic]", Dicey stressed the fact that personal liberty in England "is part of the constitution, because it is secured by the decisions of the courts, extended or confirmed as they are by the Habeas Corpus Acts".[36] When personal freedom is treated separately, Dicey started … with an integral quotation of the seventh article of the 1831 Belgian Constitution.[37]

To stress the differences with English law, where personal liberty is not attached to any specific text, Dicey cites provision 29 of Magna Carta[38]. He

35 Citing from the *Year books* of Henry VI (1421-1471): Dicey (n 33) 184. See also Baker, according to whom 'there is, admittedly, little agreement as to what precisely this [the rule of law] denotes': Baker (n 25) 449.

36 Dicey (n 33) 197.

37 Ibid 206. Article 12 since the Constitution's coordinated version of 1994. To add to the Constitution's fame, one could refer to what happened with the arrest of '*le docteur Marx, émigré allemand*' in March 1848, just weeks after the publication of the Communist Manifesto: Karl Marx (1818-1883) and his wife Jenny von Westphalen (1814-1881) were arrested by the local police at midnight in a pub near the St Gudula Cathedral, since they could not produce a passport at the hour of the pub's closure. The legal basis for the arrest was the Law of 10 Vendémiaire Year IV. The prosecutor, however, denied that the arrested persons could be detained, since their infraction was only administrative and not of a criminal nature. After interrogation by an examining magistrate, Marx and Jenny were immediately released (*Le Journal de Bruxelles*, 13 March 1848, https://uurl.kbr.be/1335779, accessed 6 April 2023). See also Els Witte, *Belgische Republikeinen. Radicalen tussen twee revoluties (1830-1848)* (Polis 2020) 272-277.

38 Section 39 of the original Latin Act of 1215: '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' (translation provided by The British Library, https://www.bl.uk/magna-carta/articles/magna-carta-english-translation, accessed 5 April 2023). Baker (n 25) 32. Both the numbering and the phrasing differ from the 1225 Act, which was interpreted and used by the courts of law: 'No free person shall be taken or imprisoned, or disseised of any free tenement or of his liberties or free customs, or outlawed, or exiled, or in any way destroyed, nor shall we go against him or send against him, except by the lawful judgment of his peers or by the law of the land; to no one shall we sell, to no one deny or delay, right or justice.' It should be noted that the 'trial by peers' is an essentially medieval idea: one should be tried by one's 'co-vassals', not by one's overlord: Van Caenegem (n 21) 142.

clarifies that this ought to be read "*in combination with the declarations of the Petition of Right* [7 June 1628]".[39] By the seventeenth century (ergo: four hundred years later), the charter's "*vague promise*" had come to be seen as a warrant for procedural natural justice, habeas corpus, the grand jury and jury trial.[40]

This first glance at one of English law's most famous treatises should warn us that rights and freedoms evolve, particularly so in the common law, which is largely judge-made law.[41] The *Petition of right* is a document originating in the reign of Charles I (1600-1649). It constitutes an intermediary stage in a long struggle between Parliament and sovereign, which radicalised under Charles' father James I of England/James VI of Scotland (1566-1625).[42] The ensuing *Habeas Corpus Act* (1679) and *Bill of Rights* (1689) anchor personal liberty in the seventeenth-century statute book.

Hence sir John Baker's *terminus ad quem* for "reinvention": the early seventeenth century, era of the famous common lawyer Sir Edward Coke (1552-1634), who commented elaborately on Magna Carta in his *Institutes of the Lawes of England*.[43] Coke, who became Chief Justice of the Court of Common Pleas in 1606,[44] opposed the expansion of royal prerogative.[45] In order to convince Parliament and courts effectively, the principles of Magna Carta had to be situated above positive law (which could eventually be revoked).[46] Baker's study concentrates on judge-made law, compensating for the tendency of "political

39 Dicey (n 33) 207; Willem Pieter Blockmans, *Mede-zeggenschap: Politieke participatie in Europa vóór 1800* (Prometheus 2020) 336.

40 John Hamilton Baker, *An introduction to English legal history* (Butterworths 2002) 472.

41 The English (British) parliament is still able to alter anything, and that sovereignty ultimately resides with the 'King in Parliament': Baker (n 25) 23. See Jeffrey Denys Goldsworthy, *Parliamentary sovereignty: History and philosophy* (OUP 2001). For a comparison of legislation as a source of law between England and the continent: Jean-Louis Halpérin, *Five legal revolutions since the 17th century: An analysis of a global legal history* (Springer 2014) 10-19. We should emphasise that medieval interpretations of statute law saw legislation as a clarification or confirmation of the common law and not as an alteration of it: Baker (n 25) 14.

42 Alain Wijffels, 'A British ius commune – a debate on the union of the laws of Scotland and England during the first years of James VI/I's English reign' (2002) 6 *Edinburgh Law Review*, 315. See John Miller, *Early modern Britain, 1450-1750* (CUP 2017), 174-201.

43 Coke (n 8) 1-79. The edition published in Coke is the reissued version in the 'ninth year of the reign of Henry III' (which began in 1216, dated 11 February 1225). This version of the text is on the statute book through its confirmation by 'Edward I (1239-1307) and subsequent Kings', underlining the nature of the Charter of Runnymede as 'a passing historical event': Baker (n 25) 3.

44 Baker (n 25) 351.

45 Ibid. 348.

46 Ibid. 349.

and constitutional historians" to consult statutes, and, conversely, the neglect of the study of public law by specialists of old English law.[47] In the short run, the Charter, granted by John II of England to his barons, had an "immediate" purpose: "to restore, declare and preserve the previous common law."[48] Its vague wording necessitated adjustment (1331), rewording (1354) and reinterpretation in Parliament (1377).

Dicey's interpretation of the rule of law is close to the option by which Magna Carta is not seen as a statute, as a feudal document directed at the King's vassals or as a grant by the sovereign to the groups of people identified in the text. No, it is viewed as a statement of earlier pre-existing principles of common law.[49] However, elevating the document to a "fundamental law", in the sense that it could preclude the legislator from changing its content in the future, was not conceivable, since all sovereignty resided with the "King in Parliament".[50]

Principles are neither fact nor myth nor fiction?

The "myth" of Magna Carta was deconstrued by historians of English law more than a century ago. Baker, however, vigorously pleads Edward Coke's case. It would be unfair to judge a seventeenth-century lawyer by the standards of twenty-first-century medieval historiography.[51] Provision 29 was:

> primarily understood […] as a codification of common law principles. Never mind that some of these principles were unknown in 1215.[52]

Reconstructing factual truth and the pedigree of legal reasoning do not abide by the same standards. This:

47 Ibid. ix.

48 Ibid. 1.

49 Ibid. 13. See for 'privilege and liberties' before 1215: James Clarke Holt, *Magna Carta* (2nd edn, University Press, 1992) 50-74.

50 Baker (n 25) 17. Citing first the restrictive interpretation of the interdiction to consider as void 'anything done contrary to the charter' (only 'governmental acts by the king and his ministers, not legislative acts by the king in Parliament') and then the uselessness of parliamentary (!) affirmation in 1368 that 'all statutes contrary to Magna Carta were void', since 'that may have been the intention, but it was never held by any court to have done so': Ibid. 21.

51 Ibid. 444.

52 Ibid.

> does not mean that the latter law was founded on deception, or on naïve Whig history. Principles of law are not facts and cannot therefore be mythical, any more than they can be fictional.[53]

Baker even affirms that "the long-term story" of Magna Carta through interpretation, doctrinal commentary and invocation as a political argument in the English constitutional arena:

> is just as factually true as the story of what happened in the early thirteenth century, and arguable much more important as a strand of world history.[54]

Coke's interpretative work on Magna Carta is depicted as one of "conservation", saving common law from James I's absolutist tendencies and the influence of continental "romanism".[55] Hadn't the author of the treatise known as Bracton,[56] a thirteenth-century treatise in Latin on English law, stated:

> Ipse autem rex non debet esse sub homine sed sub deo et sub lege, quia lex facit regem.

The King in England had always been "under" the law, since the law had made him. The American canon-law scholar Ken Pennington explains that this demonstrated that Bracton "did not understand" the thought of continental lawyers, who were, in his time, associating legislation and pure royal will.[57] In other words, for Baker, Coke intended to preserve this vital rupture between continental and English understandings of sovereignty and the rule of law, of which Magna Carta was just a specific example.

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53 Ibid.

54 Ibid.

55 Ibid. 446. For example, the reference to the prince's power as *patria potestas* or the introduction of *quod principi placuit legis habet vigorem* (royal decisions have the force of law) or *princeps legibus solutus* (the prince is above positive law): see Stolleis (n 19) 25. On Jean Bodin's writings (illustrative of early modern sovereignty) see: Howell A. Lloyd, *Jean Bodin, 'This pre-eminent man of France': An intellectual biography* (OUP 2017). On the intellectual pedigree of sovereignty and property and medieval adaptations see: Koskenniemi (n 17) 19-116; F.F.M. Maiolo, *Medieval sovereignty: Marsilius of Padua and Bartolus of Saxoferrato* (Eburon Academic 2007).

56 The name of Henry de Bracton (+ 1268) appears on the treatise, but the attribution is not settled: Baker (n 25) 176.

57 Ken Pennington, 'Law, legislation and government 1150-1300', in J.H. Burns (ed.), *The Cambridge history of medieval political thought, c. 350-c. 1450* (CUP 1987), 429. See also Harold Joseph Berman, *Law and revolution. The formation of the Western legal tradition* (Harvard University Press 1983), 479.

Even though the Charter itself would not have been essential – as it merely stated pre-existent principles of common law – its "powerful emotional effect on the high as well as the low" served Coke's cause: Magna Carta was presented as a common "inheritance", which could be positioned against the "Continental learning" (i.e., Roman law-inspired absolutism) used by James I's advisers.[58] Remarkably, the document became an object of merely historical fascination after the *Petition of Right* of 1628, and lost its legal significance.[59]

No Magna Carta on the Continent, or no overarching common law?

Apart from their peculiar nature,[60] the English traditions of "sovereignty of parliament" and "rule of law" neither originated nor evolved in isolation from the continent.[61] Well-known examples from the territory of present-day Belgium were the constitutional documents of Brabant (Charter of Kortenberg (1312),[62] Joyous Entry (1356) and its reaffirmations[63]) and Liège (Paix de Fexhe (1316)).[64] Yet, the use of Magna Carta (ergo: its re-invention, as argued above) through the lens of judge-made common law singled out English constitutional history. Was this purely the result of a different theory of the sources of law?

Recently, the eminent specialist of fifteenth- and sixteenth-century Europe, Wim Blockmans, published a breathtaking survey of representative government (*Medezeggenschap*), labelling the participation of Estates and assemblies as the cradle of present-day European conceptions of the rule of law and parliamentary democracy.[65] The work returns to a major interrogation posited in the 1960s:

58 Baker (n 25) 447.

59 'Magna Carta was almost a spent force in England': Ibid. 449.

60 Dicey explains to his reader why Voltaire's, Tocqueville's or de Lolme's descriptions of England stress the protection of individual liberty, and why the distinction still prevailed in nineteenth-century Europe, when the first edition of his treatise was written (1886): Dicey (n 33) 188.

61 Plucknett (n 24) 25.

62 Pieter Gorissen, *Het parlement en de Raad van Kortenberg* (Nauwelaerts 1956).

63 Valerie Vrancken, *De Blijde Inkomsten van de Brabantse hertogen macht, opstand en privileges in de vijftiende eeuw* (ASP 2018); *Laetus Introïtus Brabantiae, 1356-1956* (Nauwelaerts 1960). The *Joyeuse entrée* of the Dukes of Brabant was confirmed at every accession, which gave rise – as with Magna Carta – to various versions; see the harmonisation table for 1356-1549 (Joan and Wenceslas to Emperor Charles V) in Vrancken 347-356. See also Blockmans (n 39) 182-187.

64 Edmond Poullet, *Origines, développements et transformations des institutions dans les anciens pays-bas* (Peeters 1883), 54-59.

65 Blockmans (n 39). See also Henri Buch, Paul Smets & Maxime Stroobant, 'Représentation

Were pre-revolutionary (often oligarchical)[66] institutions really separated from the "modern" liberal state as it developed from 1789 onwards (and has been criticised by Serge and others)?[67] Their decline around the seventeenth century is undeniable.[68]

However, the rise and fall of checks on monarchical power are attributed by Blockmans to

> phases of thorough economic and demographic expansion, coupled with urbanisation, which increases pressure on the existing political system to extend participation towards freshly ascending social groups.[69]

Curiously, Blockmans relativises big ruptures and reforms by pointing to the slower evolution of political culture and patterns of values:[70] Would the *opinio iuris doctorum* fall into this category? Baker's very thorough analysis of archives tends to suggest that not negotiation between the monarch and his representatives in times of crisis (as in 1215, 1628, 1679, 1688-1689, 1832 …) but the construction of an overarching legal order is the best guarantee to keep *Leviathan* in check.

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et députation en Belgique du XIII[e] au XVI[e] siècle', in *Standen & landen/Anciens pays & assemblées d'états* (Nauwelaerts 1965), 27-46; John Gilissen, *Le régime représentatif avant 1790 en Belgique* (La Renaissance du Livre 1952), 51-115; György Bónis, 'The freedom of the land in medieval Hungarian law', in *Standen & Landen/Anciens pays & assemblées d'états* (Nauwelaerts 1970), 56-96.

66 With the Flemish cities in the fourteenth century as an exception (as craft guilds obtained representation following insurrections): Blockmans (n 39) 212.

67 ibid 17.

68 Olivier Beaud, *La puissance de l'État* (PUF 1994).

69 Blockmans (n 39) 404 (my translation).

70 Ibid. 406-410.