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FROM MAGNA CARTA TO THE CONTEMPORARY SYSTEM OF FINANCIAL PENALTIES IN THE CRIMINAL LAW

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ABSTRACT

Magna Carta Libertatum or the Great Charter of the Liberties is a historical document of great significance for the constitutional history and human rights and liberties development. Although at its initial version it addressed a limited number of liberties and principles, it represented a solid foundation for the evolution of the principles of the rule of law, right to justice, right to a fair trial, just and reasonable sentencing, limitation of powers, etc.

Namely, article 20 of the Charter states: *A freeman shall not be amerced for a slight offense, except in accordance with the degree of the offense; and for a grave offense he shall be amerced in accordance with the gravity of the offense, yet saving always his "contenement"; and a merchant in the same way, saving his "merchandise"; and a villein shall be amerced in the same way, saving his "wainage" if they have fallen into our mercy: and none of the aforesaid amercements shall be imposed except by the oath of honest men of the neighborhood.*

An analysis of this article undoubtedly leads us to the basic principles of the contemporary systems of fine, namely the daily-fine system introduced in the Macedonian Criminal Code in 2004 according to which the fine will be calculated and pronounced according to the gravity of the offence and the financial state and condition of the perpetrator. As one can notice, the gravity of the offence and the saving of the perpetrators "contenement" from the abovementioned article of the Great Charter refer to the aforesaid principles.

In this article, a comparison will be made on the meaning of the term "amercement" and its similarities and differences with the modern financial penalties and measures in the criminal law from comparative perspective, to find which one corresponds to the latter: fine, assets forfeiture or compensation of damages made with the criminal offence.

1. INTRODUCTION

Created in specific historical circumstances and conditions and inspired primarily by political considerations in order to resolve the situation with the uprising of the barons in England, the Magna Carta was signed by King John who ruled England from 1199 to 1216.

One of the most popular documents in the history also known as The Great Charter of Liberties sets up the protection of the rights in the area of religion, the churches rights, the barons' rights in the area of justice etc. It has a great significance for both English and American Law and societies. From historical point of view, it has been annulled and reissued several times. It is thought that its influence has been passed to the USA via the first American colonists and furtherly transferred to the later American legal and human rights documents. Scientists, historicists, lawyers and politicians have polarized opinions regarding the significance of the Magna Carta (McKehnie, 1914). Some stand the opinion that it had no meaningful value as it was primarily addressed to the barons and not to ordinary people. Others consider this document a foundation on the individual freedoms against arbitrary authorities. Whatever opinion is taken into consideration, one thing cannot be denied: it is an influential document about many basic rights and liberties (Breay, Harrison, 2015).

The analysis of one of the articles of Magna Carta that is subject of this paper aims to confirm the starting hypothesis that there is strong connection between the Magna Carta institutes and the modern Criminal law concepts. Therefore, it will be tested through use of the analytical, normative, comparative and other methods.

Subject of analysis in this paper will be article (or better known as section) 20 of the Great Charter of Liberties.

2. ARTICLE 20 OF THE MAGNA CARTA AND ITS TERMINOLOGY

Magna Carta Libertatum's text was originally written in Medieval Latin language. However, it was later translated in several languages. The first translation into English language has been performed by George Ferrers and published in 1534 by Robert Redman (The Boke of Magna Carta: With Divers Other Statutes, <http://www.bl.uk/collection-items/the-boke-of-magna-carta-with-divers-other-statutes>). The text has been corrected several times in subsequent publishings and editions. Since it differs from the modern English language, it has been translated into modern English many times.

Article 20 of the Great Charter originally states: *Liber homo non amercietur pro parvo delicto, nisi secundum modum delicti; et pro magno delicto amercietur secundum magnitudinem delicti, salvo contenemento suo; et mercator eodem modo, salva mercandisa sua; et villanus eodem modo amercietur salvo waynagio suo, si inciderint in misericordiam nostram; et nulla predictarum misericordiarum ponatur, nisi per sacramentum proborum hominum de visneto* (Mont, 1892).

In Medieval English it states: *A freeman shall not be amerced for a slight offense, except in accordance with the degree of the offense; and for a grave offense he shall be amerced in accordance with the gravity of the offense, yet saving always his "contenement"; and a merchant in the same way, saving his "merchandise"; and a villein shall be amerced in the same way, saving his "wainage" if they have fallen into our mercy: and none of the aforesaid amercements shall be imposed except by the oath of honest men of the neighbourhood* (White & Notestein, 1915).

As one can notice, this article contains terms that are not (commonly or often) used in the modern English language. Such are, for example, amercement, contenement, merchandise, wainage etc.

Amercement signifies financial penalty in English law, common during the middle ages, imposed either by the court or by peers. It is defined as a punishment or a penalty applied at the discretion of a court or other authority, as a contrast to the penalty set by statute (The Free Dictionary, <http://www.thefreedictionary.com/amerement>). This word has Anglo- Norman origin. While it is often considered to be a synonym of a fine, it is different because the fine represents a sum prescribed by statute, while an amercement is arbitrary. Amercements were commonly used as a punishment for minor offenses or as an alternative to imprisonment.

From historical point of view, both amercement and fine existed at the same time. According to commentaries of the Great Charter, the amercement was imposed as punishment to a person who could not refuse it whereas the fine was voluntarily offered to the King so that the offender could escape from punishment or gain the King's mercy again. From contemporary point of view, it was the historical amercement that is close or similar to the modern concept of fine, whereas the historical fine and modern fine totally differ.

Even though it is arbitrary, in this article of Magna Carta we can notice that there is a direction regarding the maximum that can be imposed to the perpetrator. And especially in this respect, we will try to explain the meaning of the terms *contenement*, *merchandise* and *wainage*.

Not even taking into account the meaning of these three terms, we can assume that they represent the upper limit which the peers can go to in determining the amercement.

As to the meaning, *contenement* means that the man shall be left the necessary assets for his own sustenance and for those dependent on him, or in other words, for maintaining of life and existence. Therefore, *contenement* equals livelihood that represent the means of securing the necessities of life (McKehnie, 1914, p. 287). The *contenement* is saved for the free people.

In case the person is merchant, what will be saved is the merchandise, and in case the person is villein, then the *wainage* will be saved. This means that no person that will be imposed with an amercement, should not be left without the source of his living.

This explanation can be accepted more obviously if one takes a look at the translation of this article in modern English: *For a trivial offence, a free man shall be fined only in proportion to the degree of his offence, and for a serious offence correspondingly, but not so heavily as to deprive him of his livelihood. In the same way, a merchant shall be spared his merchandise, and a villein the implements of his husbandry, if they fall upon the mercy of a royal court. None of these fines shall be imposed except by the assessment on oath of reputable men of the neighbourhood.* (English translation of Magna Carta, <http://www.bl.uk/magna-carta/articles/magna-carta-english-translation#sthash.jI6L8zrv.dpuf>)

3. MAGNA CARTA VS THE CONTEMPORARY CONCEPTS IN THE CRIMINAL LAW

In this section a normative comparative analysis will be made of every segment of the provision of article 20 of the Magna Carta *vis –a –vis* the corresponding concepts and institutes in the modern criminal law in order to determine whether there is a correlation and to prove that the modern legal solutions have backgrounds in the Magna Carta.

3.1 THE SLIGHT OFFENSE AND EXCEPTION FROM PUNISHMEN

The phrase of the article 20 of Magna Carta stating: "...*A freeman shall not be amerced for a slight offense...*" can be compared with the provision of the Macedonian Criminal Code regarding the so called "act of minor significance." The Act of minor significance or petty offence also known as trivial/slight offence is regulated in article 8, according to which: *An act shall not be considered a crime even though it contains characteristics of a crime, due to the lack or insignificance of the harmful consequences and the low level of criminal liability of the offender. The provision referred to in paragraph 1 may be applied to a crime for which a law prescribes a fine or an imprisonment sentence of up to three years* (Тупанчески, 2014, p. 17).

The act of minor significance is subject of observation and debates in the legal circles even from the Roman times, when it was determined that the court should not act in cases of small offenses. And today in the penal legislations worldwide dominates the determination which is an expression of the principle of rationality through the institutes of dismissal of prosecution, exclusion of the offense, transfer of such acts in the field of minor offenses, misdemeanours etc. (Камбовски, 2011, p. 241). The current solution in the Macedonian criminal legislation, as we can see, considers the act of minor significance (petty, slight offence) as an independent basis for exclusion of the criminal offense (Марјановиќ & Каневчев, 2010, p. 149). The provision of article 20 of the Magna Carta is in the same direction, essentially determining that for minor offenses the perpetrator will not be punished.

3.2 THE GRAVITY OF THE OFFENSE AND METING OUT A SENTENCE

Continuing with the analysis, the Magna Carta article 20 further states: *A freeman shall not be amerced...except in accordance with the degree of the offense; and for a grave offense he shall be amerced in accordance with the gravity of the offense.*

Evidently, in the abovementioned part the provision enters the domain of matter of meting out the punishment, which leads to the conclusion that the principles of individualization, fairness, justice and proportionality have obviously been taken into consideration (Марјановиќ & Каневчев, 2010, p. 337). Namely, punishment in general (the fine in this case) should be proportionate to the extent and severity, gravity of the crime.

In the contemporary criminal law, meting out the punishment (by the court) is performed on certain grounds or circumstances (Камбовски, 2011, p. 479). Some of them relate to the offense itself, and the other to the person. The seriousness (gravity) of the offense as a criterion belongs to the first category. The gravity of one offense is usually reflected through its damaging effects. Here we talk about an objective criterion and the amount of damage is not the only aspect considered, but also the manner, in which the offence is perpetrated, for example, can raise the level of its seriousness.

Despite the severity (seriousness) of the offense, the provision of article 20 of the Magna Carta mentions the term *degree of the offense* that could be interpreted in several ways. The first possible meaning is that this expression is tied to the term *slight offence* as an unpunishable form, but a need for punishment arises in those cases where the presence of certain circumstances brings the offense to a higher level. The second potential meaning is that it stands for another expression for the term gravity of the offense.

If we make a comparison with the Macedonian Criminal Code's article 39 on meting out punishment, we will see that the gravity of the crime is still (800 years later) one of the basic criteria for this procedure. Namely, article 39 of the Macedonian Criminal Code states: *The court shall mete out a sentence to the offender within the limits prescribed for that crime by law, bearing in mind the criminal liability of the offender, the gravity of the crime and the purposes of the punishment* (Тупанчески, 2014, p. 47-48).

Going further, according to the Magna Carta "...and for a grave offense he shall be amerced in accordance with the gravity of the offense, yet saving always his "contenement"..." signifies that the amercement should not effect in existential problems for the perpetrator and his family. If we take a look at the relevant provisions of the Macedonian Criminal Code in this respect, the provisions about the fine - article 38 and subsequent, stipulate that the court shall determine the level of the daily fine considering the material and personal circumstances of the offender, starting, as a rule, from the net daily income the offender makes or might make, as well as the family and other obligations of the offender and his property at the time of adopting the court decision. As we already mentioned above, the contenement, merchandise and wainage were the "limit" stipulated by the Charter above which the peers could not go above. In the contemporary criminal law some circumstances like the age, family

obligations, economic situation etc. need to be taken into consideration by the court. This leads to the conclusion that the principle of justice and non-violability of other people rights when punishing a perpetrator have foundations of meting out a punishment concepts even in Magna Carta.

Further in-detailed explications in respect with the fine and the contenment clause will be given in the section 3.

3.3 IMPOSITION OF THE AMERCEMENT BY AUTHORITY

The Magna Carta provision which is subject of this analysis further expresses that “...none of the aforesaid amercements shall be imposed except by the oath of honest men of the neighborhood”.

Although amercement represents a financial penalty but it was not determined by statute as the case is with the fine, we can assume that with this provision it is secured that the imposition will not come from anybody, but from the honest people and by oath and wouldn't be arbitrary, but limited by the rules set up in this article. The basic meaning is that an authoritative body or person will be approved for imposition of this financial penalty (Марјановиќ & Каневчев, 2010, p. 311).

The contemporary criminal law in Macedonia determines that “the court shall mete out a sentence...” –article 39 or that “the court shall determine the level of the daily fine...” –article 38 (Тупанчески, 2014, p. 42-48).

We can conclude that the imposition of a sanction nowadays can be done only by authority according to law (charter or other act...). This is another, although weaker connection between Magna Carta provisions and the respective ones in the contemporary Criminal Law.

4. THE FINE IN THE CURRENT MACEDONIAN LEGISLATION

The fine in wider sense of the word is considered to be the first alternative to the sentence of imprisonment (Камбовски, 2011, p. 462). It is a financial sentence that is particularly envisaged for perpetrators of criminal offences that commit crime in order to get unlawful financial gain.

As people differ according to their financial situation and wealth, it is very important that the fine is determined on a level that will satisfy the objective of enforcement of justice and to be strictly individualized (Srzentic, Stajic & Lazaravic, 1978, p. 360).

The intentions established by the provision of article 20 of the Magna Carta, regulating that the fine will be imposed to the extent that will not leave the perpetrator and his family existentially threatening position in contemporary penal legislations are met by accepting a system of daily fines. This system originates from Sweden, and was first established in Scandinavian jurisdictions. Before the introduction of this system, widely present was the system of fixed amounts, where the law stipulated the minimum and maximum amount (Камбовски, 2011, p. 464).

The system of daily fines occurred as a reaction to the criticism that the fine has as a great weakness in the fact that it does not affect equally all perpetrators given the different financial circumstances and economic situation each of them is in (Srzentic, Stajic & Lazaravic, 1978, p. 361).

The system of daily fines allows adjustment of the fine as a sanction to the property situation of the offender, while taking into account the objectives aspects and circumstances related to the offense itself, as for example, its seriousness.

In this respect, the introduction of the daily – fine system in the Macedonian Criminal Legislation took place in 2004 and it has been a big step forward towards modern and just system of sanctions (Марјановиќ & Каневчев, 2010, p. 315).

However, the daily fines system is envisaged for the fine pronounced as primary sentence for individuals. In case the perpetrator is legal entity or it is imposed to an individual as a secondary sentence, the system of fixed minimum and maximum will be applied.

The details about the imposition of the fine as primary sentence for individuals are elaborated in article 38 of Macedonian Criminal code, according to which: *the fine shall be imposed as daily fines, whereas the number of the daily fines may not be less than five or more than 360 daily fines.*

The provisions for meting out the sentence require that the court specifies the number of daily fines in accordance with the general rules for specifying the fine. According to paragraph 3 and the subsequent of the aforementioned article, *the court shall determine the level of the daily fine considering the material and personal circumstances of the offender, starting, as a rule, from the net daily income the offender makes or might make, as well as the family and other obligations of the offender and his property at the time of adopting the court decision. The lowest amount of a daily fine shall be one Euro in Denar counter-value, and the highest amount shall be 5.000 Euro in Denar counter-value. The court decision shall contain the amount of the fine obtained by multiplying the number of daily fines by the specified amount of a single daily fine* (Тупанчески, 2014, p. 42).

The debates preceding the introduction of this model in Macedonia have shown the concern of the judges regarding their ability to obtain all the relevant information in order to determine the amount of the daily fine properly. Therefore, the last paragraph of article 38, states that *”for the purposes of determining the amount of the daily fine, the court may ask for reports from banks, financial and other institutions, state bodies and legal entities that shall be obliged to submit the requested reports and cannot call up on the principle of a trade or any other secret”*.

As already stated, in case when a fine is imposed as a secondary punishment in addition to an imprisonment, the court shall determine the financial amount, without applying the provisions stipulated in the paragraphs of article 38 regarding the daily fine system (Камбовски, 2011, p. 466). The fine, if applied as a secondary fine, cannot be less than 20 Euro in Denar counter-value, or more than 5.000 Euros in Denar counter-value.

The issue of the payment (collection) of the fine is also interesting. Namely, according to article 38-a, the Criminal Code determines that *“...the deadline for payment of the fine shall be specified in the verdict, and it may not be shorter than 15 days or longer than three months, but in justified cases the court may permit the convicted to pay the fine even in instalments, yet the deadline of the payment shall not exceed two years. If the offender is foreigner, the court shall decide the fine to be paid without any delay, or secure its payment in another way”* (Тупанчески, 2014, p. 42).

According to paragraph 2 of article 38, if the person convicted fails to pay the fine within the specified time period, the court may specify a different time period. If the court assesses that the convicted does not want to pay the fine, it will order a coercive enforcement in a procedure specified by law. If the provision of a new time period, which may not be longer than three months, or the forced collection prove unsuccessful, the court may act as follows: for each daily fine determine one day imprisonment or, when the fine is imposed as secondary, for each started Euro 20 in Denar counter-value one day imprisonment, which may not be longer than six months. If the convicted pays only a part of the fine, the rest will proportionally be transformed into imprisonment time, and if the convicted pays the remainder of the fine, the imprisonment shall be terminated. In case of a death of the convicted the fine shall not be enforced (Тупанчески, 2014, p. 43).

In respect with the coercive enforcement of the fine, it will be executed on the property of the convicted (Камбовски, 2011, p. 466). Also, one has to take into account the provisions of the Macedonian Law on execution, which is in the same line and according to which: *Enforcement against salary and pension and compensation instead of salary, can be implemented in the amount of one -third of the salary or pension for most claims* (including those on the ground of non-payment of fine). This means that primarily the court needs to take into consideration the basic needs and the family obligations of the offender when meting out the fine.

5. CONCLUSION

Article 20 of the Magna Carta Libertatum is a specific one setting up rules on imposition of a financial penalty characteristic for the period when this Charter was signed. From all currently present financial penalties, measures and other financial actions against the perpetrator like the fine, forfeiture of assets, damage reparation etc., the so called amercement from Magna Carta has closest connections to the contemporary concept of fine.

The analysis of the concept set up in the respective Magna Carta article and the modern concepts of the Criminal Law proves that there is a strong link between some principles and rules established in Magna Carta and in the contemporary law, especially those for meting out a sentence, the principle of proportionality, the prohibition of double punishment and punishment of innocent people (first with the amercement, second by leaving the offender without “contentment”), imposition of sentences by an authority, etc.

There is also a solid correlation between the modern concept of fine and the historical meaning of amercement. Namely, although the fine as category existed at the time when the amercement has been regulated, its historical meaning does not correspond to the modern one, contrary the modern concept of fine is much closer to the amercement.

The true value of this connection lies in the fact that the sense of justice and fair sentencing have been set on a relatively high level with Magna Carta Libertatum. In fact, it shows as well its solid ethical foundation of the historical criminal law concepts and institutes.

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