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RELEVANCE OF MAGNA CARTA TO RIGHTS OF VICTIMS OF ABUSE OF POWER

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ABSTRACT

Magna Carta Libertatum is one of the few documents that continuously imply thorough discussions about fundamental principles of the law. In 2011, *Lord McNelly*, Justice Minister of UK at the time, has emphasized the core and everlasting principles that derived from this document:

- that the power of the state is not absolute
- that whoever governs the state must obey the law
- and that whoever governs the state must take account of the views of those who are governed (McNally, 2011).

These are the fundamental principles of any government that strives to be distinguished as democratic, these are the self-evident truths that have been developed in the theory of social contract that established the modern day democracies.

It is very common that article 39 of Magna Carta that provides for the right to due process, as well as article 40 that provides for the right to access to justice and justice itself, to be usually analyzed from the point of view of the rights of the person accused of a crime. However, it must be taken into consideration, that failure to guarantee these two very important human rights makes the accused person a victim of abuse of power.

This article aims to analyze the relevance of Magna Carta in the rise of the concept of rights of victims of abuse of power. Although it is a concept developed later in history, the clauses of Magna Carta that remain in power can be directly linked to this category of victims.

The thirteenth century provides a very important perspective on the position of the victim of crime and can be analyzed in a comparative aspect regarding the Common Law and the Civil Law historical development. The article will briefly explain the evolution of the concept of victims' rights throughout these eight centuries to the modern times when these rights have become a crucial part of the national legislations of Western Balkan countries.

INTRODUCTION

Magna Carta Libertatum (1215) is continuously mentioned in every introductory Constitutional Law class as one of the first documents known to the world that provides for a certain limit to the absolute power of the ruler. Although historians argue that there are other earlier documents that provide for this principle, Magna Carta is established in a global scale as the first written document that explicitly contains certain limitations to that absolute power and as such has produced some legal consequences.

However, the idea of supremacy of law in preference to the supremacy of the ruler's will is not a new one. *Aristotle*, although not mentioning the phrase "rule of law", clearly indicates this concept by stating that "Law should govern" (Aristotle, 2013, p. 3.16). Having in mind that the foundation of the modern concept of the rule of law lies within the practice of limiting the power of the ruler, also, taking into consideration that Magna Carta is considered to be the first official document declaring those limits, it can be stated without hesitation that this very important document has directly contributed to the rise of the rule of law concept that was developed in the later centuries. The fact that this document was signed 800 years ago, in the thirteenth century, when the absolute power of the rulers was uncompromised and undoubted, gives a clear distinction of the very high importance of this document not only for England or UK, but for the entire world and human civilization.

It is not a coincidence that Magna Carta is one of the historical documents that constitutes the "English Constitution". It opened the path for the Habeas Corpus Act of 1679 and the Bill of Rights of 1689 as other important documents for England and UK that were an inspiration for setting the fundaments of the modern democratic societies. They reflect the limitation of the power of the ruler (whoever that might be, an elected or unelected ruler) found in Magna Carta. The lessons that derive from the enlightenment philosophy, the natural law school and the theory of social contract (Rousseau, (1762)1968) and other liberalism and utilitarianism authors (such as *John Stuart Mill* who argues against the "tyranny of the majority" (Mill, (1859) 2002)), reflect in the foundation documents of the modern day democracies, such as the Declaration of Independence, the Bill of Rights and the Constitution of USA, the Declaration of Rights of Man and Citizen in France, and other fundamental documents of modern day constitutional democracies.

Taking into consideration this high scale of impact in the democracy and rule of law concepts, *Joshua Rozenberg* rightfully indicates the following:

> "Magna Carta is a world-class brand. It stands for human rights and democracy. It stands for trial by jury. It stands for free speech, the rule of law and personal liberty. Except it doesn't mention any of these things – even in translation… regardless of what it sais in the parchment, it enjoys instant recognition as the most important legal document in the common law world." (Breay & Harrison, 2015, p. 209)

In other words, it's the concept that matters, it's the very spirit of the Magna Carta that has echoed through the centuries to this day that gives this document the eternal power and value.

1. THE MEANING OF MAGNA CARTA FOR VICTIMS' RIGHTS

It is well known that separate aspects of the position of the crime victim or separate rights of the victim are not mentioned in Magna Carta. However, as *Rozenberg* has observed very clearly in the above cited paragraph, the main values that are linked today to Magna Carta, are not in fact mentioned in this document. Therefore, it must be said that the concept of protection of victims of abuse of power, although a concept developed much later in history, finds its roots in Magna Carta. The victims of abuse of power and their rights will be discussed further on in this article. The following subtitles will try to give a perspective of the position of the crime victim in the historical reality when Magna Carta was sealed. It will also briefly explain the evolution of the position of the crime victim to this day.

1.1. THE CONCEPT OF THE CRIME VICTIM IN THE 13TH CENTURY

Author *Jonathan Doak* explains that the origins of the modern day criminal law in UK derive from the early law of tort. He indicates that "[i]n the absence of a central state authority, the victim/offender conflict was historically conceptualized as a private matter outside the State's immediate interests." (Doak, 2008, p. 2). Furthermore, he explains that this system underwent a "seismic shift" during the Middle Ages under the reign of Henry II when a process of centralization was instigated that resulted in many offences being declared crimes (as opposed to torts) which would fall under the king's jurisdiction. This explains the process of the gradual shift of criminal law from private to public law. However, As *Doak* explains citing various authors in this field (such as *Ashworth, Van Ness, Young* and *Clerman*), there still existed a thorough distinction between the Pleas of the Crown (through which the crimes were prosecuted in the name of the King) and Appeals of felony (though which the crime victims were able to take a private action against their offender in terms of a private prosecution). Taking this into consideration *Doak* cites the explanation given by *Schafer* who describes the Middle Ages as "the golden age of the victim", in so far as the system was based on the principle of restitution to the party who had suffered a loss (Doak, 2008, p. 3). Another interesting observation of *Doak* is that the "victims could choose whether to pursue a criminal or a tortuous action, depending on whether they were motivated primarily by vengeance or compensation" (Doak, 2008, p. 3). It is very important to mark that the right of a victim to compensation for the crime it has suffered is one of the fundamental rights of the victims acknowledged by the modern international documents providing for the rights of the crime victim.

The explanations given above indicate the reason why the crime victims are not particularly mentioned in Magna Carta. Historical facts and studies have shown that in the thirteenth century, the position of the victim in criminal trials has been much more active and involving in comparison to its position in modern times. At least there has been one subject of the criminal procedure that has had its 'golden age' in the 'dark ages', and that is the crime victim. It is evident that this reality underwent substantial changes in the following centuries.

1.2. MAGNA CARTA V. THE FOURTH LATERAN COUNCIL

1215 is a historically important year for several reasons:

- Firstly, that year is globally remembered as the anniversary of Magna Carta Libertatum
- Secondly, in that same year, the Fourth Lateran Council was convoked by Pope Innocent III
- Thirdly, the creation of the inquisitorial procedure which emerged from the Lateran Council resulted in gradual diversification between the common law adversarial criminal procedure and the civil law inquisitorial criminal procedure.

It can be stated that until the 13th century the legal systems of common law and civil law countries were very similar, regardless of the different sources of law. Of course, the main difference between the civil law codifications and the common law principle of equity is evident, however, having in mind the historical situation of the legal traditions in Middle Age Europe, it can be stated that the criminal procedure itself was adversarial and of course, very rudimentary and primitive. This is the time when irrational means of proof and evidence were used throughout Europe and the islands known as trials by ordeal.

The thirteenth century, changed everything. In England, under the direct impact of Henry II the criminal procedure was changed, and Pleas of the Crown were introduced, which, as explained above, ensured the public prosecution of crimes by the King's authority, whereas the private Appeals for felony

continued to coexist as private prosecutions. The irrational means of proof were abolished and ordeals were used no longer to prove a crime, rational evidence was introduced as the only way of proving a crime. On the other hand, the way the criminal procedure functioned remained adversarial and secular except for crimes related to the church which were subject to the inquisition.

On the other hand, in continental Europe 1215 is remembered because of the Fourth Lateran Council which finally established the inquisitorial criminal procedure system. While the use of public prosecution and the development of the institute of public prosecutor is a major benefit, as well as the fact that in the same time the irrational means of proof were also abolished in Europe and were replaced with the system of rational evidence, however, the very fact that the inquisitorial procedure gave no space for a check and balances system nor did it provide for any democratic and secular means of fair trial, it raised to become a major problem in regard to civil rights and liberties including those of the crime victim and especially those of the offender.

It is very interesting to make that distinction that while in England 1215 is related to a globally known document considered to be the predecessor of the human rights and rule of law system of values, in continental Europe this year is linked to the beginning of the inquisition and inquisitorial trials.

In the table below, some of the major differences among the legal systems in England and Western Europe as in 1215 are shown:

Table 1.

1215	
England	**Western Europe**
Sealing of Magna Carta Libertatum	The Fourth Council of the Lateran
Dispute between King John and the Barons	Dispute and than alliance between Innocent III and King John
Continuity of adversarial criminal procedure	Switch to the inquisitorial criminal procedure
Secular (jury) trials for matters not related to the church	Inquisitorial trial for all kinds of matters
Private prosecution of crimes through Appeals for felony	State only prosecution of crimes

On the other hand, it is of course, unthinkable to believe that these values that originated from Magna Carta were directly implemented in the thirteenth century. The relation between King John and Pope Innocent III is a well known fact. In 1213 King John, threatened with growing baronial opposition and the prospect of a French invasion, had surrendered England to the feudal over-lordship of the papacy turning his long-term enemy, the pope, into his ally overnight (given the fact that the pope had previously excommunicate him). Therefore, in July 1215, just weeks after the sealing of Magna Carta, King John sent envoys to the pope seeking an annulment of the charter and, before most of its terms could be properly implemented, Innocent III issued a papal bull on 24 August 1215 declaring Magna Carta null and void. It had been legally valid for only ten weeks (The British Library Board, 2007, pp. 3-5).

2. THE ETERNAL CLAUSES OF MAGNA CARTA

As explained by the *Brithish Library Board*, only three of the original clauses in Magna Carta are still valid. One defends the freedom and the rights of the English Church, another confirms the liberties and the customs of London and other towns, but the third is the most famous:

> (39) 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 other 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.
>
> (40) To no one will we sell, to no one deny right or justice.

In regard to these clauses, the *British Library Board* indicates the following:

> "This statement of principle, buried deep in Magna Carta, was given no particular prominence in 1215. It applied only to free man of England, but its intrinsic adaptability has allowed succeeding generations to reinterpret it for their own purposes and this has ensured its longevity. In the fourteenth century, Parliament saw it as guaranteeing trial by jury. Sir Edward Coke, the Chief Justice, interpreted it as a declaration of individual liberty in his conflict with the early Stuart kings. It has resonant echoes in the American Bill of Rights and the Universal Declaration of Human Rights. Even today, it is regularly cited by lawyers and quoted by politicians for their own ends." (The British Library Board, 2007, pp. 8-9)

As it is well known, these provisions are the roots of the rule of law and the limiting of the power of the ruler principles. The fundaments of the modern concept of human rights are also sought in these provisions, regardless that for that time, they were only dedicated to the free men of England. As *David Carpenter* rightfully observes:

> "In the thirteenth century the charter was hardly of equal benefit to all sections of society. Yet, society changed while Magna Carta remained, so that in the end the principle of the rule of law shielded everybody. Already by 1300 those from top to bottom of the English society saw the Charter as a protection against arbitrary rule. Magna Carta was set on the long journey that would take it around the world. It would indeed last 'in perpetuity'." (Carpenter, 2015, p. 460)

3. THE EVOLUTION OF THE CONCEPT OF THE VICTIM AND VICTIMS' RIGHTS

The role of the victim as a passive subject of the criminal act but also of the criminal procedure has historically evolved in a very interesting way: from an active prosecutor in the past (as explained above, the thirteenth century and the Middle Ages are considered 'the golden age' of the victim due to its extremely active role in civil and criminal proceedings), the victim has slowly transformed in a passive and secondary subject whose role is limited to giving testimony as a witness of the crime. However, in the last decades of the twentieth century, the victim's role and position has re-emerged, it has been studied thoroughly and vividly ameliorated. Nowdays victims' rights are treated differently in different legal systems. Certain internationally recognized rights of the crime victim such as: the right to compenstion, the right to access to justice, the right to protection and the right to special assistance, are interpreted and applied differently in common-law, civil-law and former socialist countries.

It is crucially interesting to note that the adversarial criminal procedure that characterises the common law countries has evolved through the centuries into a procedure where the crime victim has an extremely limited role and apears solely as a witness of the crime. Therefore, the fact that the Victims' Rights Movement occured and developed first in UK and USA is not a coincidence. By analysing the legislation of these countries a very clear impression arisises: the role of the victim in the criminal law and procedure of these countries is limited to that degree that it can be said without hesitation that such a position of the victim is inconvinient and in fact uterly unfiar. This opinion is shared not only by authors from the Continent but also by British and American authors. In the conclusions and recommendations of his book dedicated to victims' rights, human rights and the criminal procedure, *Doak* calls for introducing certain elements of the civil law system in the common law one with regard to victims' rights (Doak, 2008, pp. 285-292).

On the other hand, contrary to all the expectations in regard to a legal tradition derived from the inquisition, in the civil-law legal system the victim has a far more important role regardless of the fact whether the criminal procedure of a certain country is inquisitorial or adversarial. In the continent there is an evidently longer tradition of including the victim as an active subject of the criminal procedure, be that as an assistant to the prosecution or as a claimer of the civil compenation claim within the criminal procedure (Partie Civile). Some continental legislation provide a special status for the victim as a procedural party with all the respective rights. In this direction it can be easily noticed that the victim's right to actively participate in the criminal proceedings as well as victim's right to compensation have ben developed earlier in the civil-law system. In the recent time, criminal procedure codes of European countries promote separate rights for the victim of crime, in particular the right to protection from secondary victimisation as well as the right to specific assistance. It needs to be taken into account that most of the European countries have inquisitorial criminal procedures which is characterized by *Bacik et alias* as a judge-centered rather than party-centered procedure (Bacik, Maunsell, & Gogan, p. 234).

Beginning from 1980s, the rights of the victim of crime have received some international attention and multidiciplinary approach. Certain international documents have been adopted with the aim of definign the concept of the victim of crime as well as setting a standard for the fundamental rights of this subject. The following subtitles will analyse this approach through the specter of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985).

3.1. THE IMPORTANCE OF THE UNITED NATIONS DECLARATION OF BASIC PRINCIPLES OF JUSTICE FOR VICTIMS OF CRIME AND ABUSE OF POWER (1985)

Under international human rights law, victims are not afforded legal rights per se. However, a number of nonbinding instruments and declarations set out principles relating to victims, including the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power that was adopted by the United Nations General Assembly in 1985 (hereinafter the UN Declaration of 1985), and the Council of Europe Recommendation No. R (85) 11 on the Position of the Victim in the Framework of Criminal Law and Procedure (1985).

The UN Declaration of 1985 defines Victims of crime as persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power. It furthermore indicates that a person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term "victim" also includes, where appropriate, the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization (United Nations, 1985). According to this Declaration, victims of crime are entitled to four fundamental rights which include:

1) ***Access to justice and fair treatment*** - Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered. This right includes also the right of the crime victim to protection from secondary and repeated victimization.

2) ***Restitution*** - Offenders or third parties responsible for their behavior should, where appropriate, make fair restitution to victims, their families or dependents. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights.

3) ***Compensation*** - When compensation is not fully available from the offender or other sources, States should endeavor to provide financial compensation to: *(a)* Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes; *(b)* The family, in particular dependents of persons who have died or become physically or mentally incapacitated as a result of such victimization.

4) ***Assistance*** - Victims should receive the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means.

These fundamental rights of the crime victim have been taken into consideration especially in regard to reforms of criminal codes and criminal procedure codes in continental countries including Macedonia where a separate chapter containing the definition of the victim of crime, categories of the victim of crime as well as the rights of the victim of crime was introduced in the new Criminal Procedure Code of 2010 that switched the criminal procedure from a pure inquisitorial to a hybrid one tending towards an adversarial procedure (Калајџиев & Лажетиќ-Бужаровска, 2011).

3.2. THE CONCEPT OF VICTIMS OF ABUSE OF POWER

The UN Declaration of 1985 has in fact two separate parts. The first one deals with the concept and the rights of the victims of crime, while the second part introduces the concept of victims of abuse of power.

According to this Declaration, "victims of abuse of power" are defined as persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights. This definition is very important since it introduces the situation where the victims are persons who are in any way abused by the state even when this does not specifically relate to a certain crime according to the national legislation. This definition links the victims of abuse of power directly to the system of international protection of human rights. On the other hand, having in mind that the most common situations of abuse of power consist in unlawful arrests and imprisonments as well as other violations of human right, this category of victims can be directly linked to "offenders" accused of political crimes committed against the state. It definitely represents a very fragile and delicate category of victims, and it stands for the relative and thin line between the concept of victim and offender when it comes to cases of abuse of power and violation of human rights.

The Declaration indicates that states should consider incorporating into the national law norms proscribing abuses of power and providing remedies to victims of such abuses. In particular, such remedies should include restitution and/or compensation, and necessary material, medical, psychological and social assistance and support. States should also consider negotiating multilateral international treaties relating to victims of abuse of power as well as periodically review existing legislation and practices to ensure their responsiveness to changing circumstances, should enact and enforce, if necessary, legislation proscribing acts that constitute serious abuses of political or economic power, as well as promoting policies and mechanisms for the prevention of such acts, and should develop and make readily available appropriate rights and remedies for victims of such acts.

It is clear that the Declaration has emphasized the importance of granting certain rights to the victims of abuse of power, as well as ensuring mechanisms of prevention acts of abuse of political or economic power. The problem with the implementation of these provisions lies in the fact that they depend too much on the political will of persons and political subjects that are in power, who usually tent to overrule these obligations.

3.3. MAGNA CARTA OF VICTIMS' RIGHTS

The UN Declaration of 1985 is often considered and indicated as the Magna Carta for victims (Waller , 2015). Having in mind that this Declaration provides very important rights for crime victims and victims of abuse of power, it must however be taken into consideration that its legal impact is very limited. While the rights of the accused persons to due process and fair trial standards are guaranteed by international conventions and binding documents, the rights of the victims are only promoted by soft law and declarations which do not ensure any guarantees of being implemented properly. This statement is also very important in regard to victims of abuse of power, who are defined by the UN Declaration of 1985, but the respect and advancement of their rights is entirely in the hands of governments and state institutions who are usually the violators of human rights and as such the very creators of victims of abuse of power.

Therefore, the expectations that the rights of victims of abuse of power will be taken into consideration and will be guaranteed by states are similar to the expectations of the barons that King John would respect, guarantee and implement the provisions of Magna Carta Libertatum. Furthermore, the failure to implement the provisions 39 and 40 of Magna Carta which provide for due process of law, fair trial, limitation of state power as well as the rule of law, unequivocally creates victims of abuse of power. Therefore, these two documents, the Magna Carta of 2015 as well as the UN Declaration of 1985 are eternally linked in regard to the concepts and values they provide.

Last but not least, the provisions 39 and 40 of Magna Carta have been interpreted in many ways and have served as a fundament for the Habeas Corpus Act, the Bill of Rights as well as the modern concept of the due process rights of the accused. However, it must be stated that these rights are not only important for the accused person but are equally important for the crime victim. On the other hand, having in mind that the accused person whose right to due process and fair trial has been violated and seeks to establish these rights before international courts such as the European Court of Human Rights constitutes in fact a victim of abuse of power, indicates that the rights provided in Magna Carta are directly linked to the victims of abuse of power and should be interpreted as such in international courts. The European Court of Human Rights has shown in many cases readiness to extensively interpret the rights of the accused to fair trial and due process as equally important to the victims (Osman v. UK, 2000) (Perez v. France, 2005).

CONCLUSIONS

There are authors who claim that without John's barbarous brutality, it is unlikely that Magna Carta would have been written (Aitken & Aitken, 2009, p. 59). It is well established that only after times of mass destruction and global crisis the best laws protecting human rights are written. Therefore, the importance of this document that echoes through the centuries derives from the very human intention of ensuring liberty and rightful existence for every person. As indicated by the *British Library Board*, the real legacy of Magna Carta as a whole is that it limited the king's authority by establishing the crucial principle that the law was a power in its own right to which the king, like his people, was subject (The British Library Board, 2007, p. 9).

Magna Carta has been linked to different values of modern day democracies, such as the rule of law and the due process of law as well as civil rights and liberties, although they are not specifically mentioned in the document itself. The famous clauses 39 and 40 which were not taken very seriously in 1215 have turned to be the major legacy of this document that has reflected in every part of the world.

The link to the position of the victim of crime, the evolution and the creation of the concept of victims of abuse of power is a crucial one if a person wants to understand the way the position of the victim has evolved through centuries. For the moment, the rights of the victims are similar to the rights of the barons and the unfree people deriving from Magna Carta. It is well known that they were not

immediately implemented. However, they have risen to power and have expanded not only to certain groups of people but to every person. In this regard, that is surely the path the rights of the crime victims and victims of abuse of power are headed.

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