ResearchGate

See discussions, stats, and author profiles for this publication at: https://www.researchgate.net/publication/341089458

SYSTEM OF PUNISHMENT IN ROMAN LAW, Ius romanum, Societas pro Iure Romano

Article · January 2017

CITATIONS
0

READS
963

1 author:

Filip Mirić
University of Niš
43 PUBLICATIONS **9** CITATIONS

SEE PROFILE

All content following this page was uploaded by Filip Mirić on 01 May 2020.

The user has requested enhancement of the downloaded file.

SYSTEM OF PUNISHMENT IN ROMAN LAW

Filip Mirić, Ph.D.
Associate for Post Graduate Studies,
University of Niš, Serbia

INTRODUCTION

The history of reaction to crime is, in fact, the history of punishment. As compared to the contemporary forms of punishment, classical forms of punishment have long been the primary criminal sanctions. This tendency did not circumvent Roman law at different times of its application. The aim of the paper is to explore the concept of punishment in Roman law, which has not been frequently examined in domestic literature on Roman legal tradition. This may be supported by the fact that very few domestic authors studied Roman criminal law and criminal procedural law, as well as the methods of execution of penalties in Roman law[1]. One is the most important reasons certainly lies in the fact that the basic tenets of the Roman law tradition are most prominent in the field of civil law[2]. However, the Roman law heritage also encompases the Roman substantive and procedural criminal law. This segment of Roman law seems to have been unjustifiably neglected in scientific research. The subject of this paper is the system of punishment in Roman law, as part of Roman criminal law. The penal system changed in different historical periods of the Roman state. Moreover, there are very few record on the use of corporal punishments (such as flogging, mutilation, stoning), which fully corresponds to the pragmatic spirit of the Romans. The paper aims to point out the significance of the penalty system in Roman law for the functioning of the Roman state, as well as the necessity of its further research.

---

1 In the Serbian Citation Index, there are no scientific papers about penalties in Roman law. Retrieved 23 July 2017 from http://scindeks.ceon.rs/.

2 About the influence of Roman law on contemporary civil law, see more IGNJATOVIĆ, 2012.

LEGAL REACTION TO CRIMINALITY IN ANCIENT ROME

The Romans made a clear distinction between public and private delicts. The reaction of the state was only due for public delicts (crimes and offenses against the public interest that constituted a violation of public values). It does not mean that every attack on an individual was a private delict. The Law of the XII Tables (*Lex duodecim tabularum*) speaks of the murder of *pater familias*, betrayal, casting spells on another's crops, singing the magic song "cat's serenade". As the number of prescribed criminal offences subsequently increased, some offenses that initially had a private character became criminal offenses (e.g. serious bodily injury). Some of the typical offences that constituted a violation of the public interest were ploughing the estate boundaries, deliberate arson to crops and houses, *servus corruptus* (negative impact on slaves), etc. (Stanojević, 2001, p. 175–176). Among others, the criminal offense of insulting dignitaries or royalty (*crimen lasae maiestatis*) is particularly interesting as a form of high treason.[3] Although it was initially envisaged to provide protection to the Roman people as a whole, this criminal offence was later used exclusively as a means of protecting rulers and eliminating political opponents. On the basis of characteristics of the prescribed crimes, we can observe which values enjoyed special protection under ancient Roman law.

When analyzing the legal reaction to crime in ancient Rome, it is essential to draw attention to the basic characteristics of the Roman criminal procedure. It is necessary considering that an imposed criminal sanction was, as a rule, the result of a conducted criminal proceeding. Initially, the judicial function was performed by lay *magistrates* (justices of peace) and, quite exceptionally, the Centuriate Assembly *(comitia centuriata)*. The person convicted to death penalty was entitled to file an appeal with the Assembly, which was called "*provocatio ad propulum"* (the right of appeal to the people). Such a right did not exist if the verdict was pronounced by the dictator or a military commander. Later, the ruler decided on the *provocatio* (Stanojević, 2001, p. 177). Interestingly, criminal proceedings in Rome were mainly initiated by the injured party, his family or the magistrate. This practice is quite different from proceedings in modern criminal

[3] Crimen Majestatis Law and Legal Definition, Retrieved November, 9, 2017 from https://definitions.uslegal.com/c/crimen-majestatis/.

justice systems, where criminal proceedings for most serious crimes are initiated by the public prosecutor. In particular, *Lex Calpurnia* introduced significant changes regarding the initiation of criminal proceedings. *Inter alia*, this law provides that criminal proceedings can be initiated by anyone through *accusatio popularis*.[4]

The criminal trial in Rome had its own specificities. The work of the court was supervised by a *pretor,* who kept order in court, swore in lawyers and witness (under oath), gave the floor to court participants, organized the voting process, and pronounced a judgment. The trial was public and it took place in a Roman forum. In particular, the general public attention was drawn to criminal proceedings featuring renowned orators (such as Socrates, Plato, Aristotle, Cicero, etc). The participants' speeches in court were timed and they could not take too long. The speech duration was measured by one of the oldest time-measuring devices, the "water clock" (*clepsydra),* where time was measured by the flow of water from the upper vessel into the lower vessel; thus, the speech could last only as long as there was water in the upper vessel.

The opening statement was first given by the prosecutor, and then by the defendant (the accused) or his defense counsel, after which they had the right to ask questions to all parties involved in the proceedings. Then, each of them was entitled to present the evidence, examine witnesses and produce relevant documents The defendant's friends and relatives could testify in his favour as character witnesses (praising his character), which is a relic of ancient law and a reminder of the institute of *coniurationes,* agreements or alliances between friends *(fedus amicicie).* At the end of the procedure, a vote was taken. The *"iudices"* (acting as jurors or the "jury" composed of senators and respectable citizens)[5] only decided on the verdict (guilty or not guilty) for the accused, whereas the sentence was determined under the law, in compliance with the principle of legality. The "iudices" (lay-justices or jurors) voted by casting a clay tile, inscribed with letter C (lat. *condemus* – I condemn) or letter A (lat. *absolve* – I release), into a vessel. The decision was made by a majority of votes. If both options re-

[4] For more on Lex Calpurnia, see: LANG, G. Repetundiae. Retrieved 21 July 2017, from http://penelope.uchicago.edu/Thayer/E/Roman/Texts/secondary/SMIGRA*/Repetundae.html

[5] See Roman Law. Retrieved November, 9, 2017 from http://www.tribunesandtriumphs.org/roman-life/roman-law.htm.

ceived the same number of votes, the defendant was released from criminal charge. Voting was secret, but the defendant could demand it to be public. Pretor counted the tiles and pronounced the guilty verdict, and then delivered the court decision (judgment). (Stanojević, 2001, p. 178).

At the end of this explanation of the legal reaction to crime in ancient Rome, it may be useful to briefly refer to the main characteristics of the Byzantine criminal procedure law. It should be noted that it was developed mainly by upgrading the criminal court proceedings of Justinian's time. The key developments refer to gradual introduction of the principles of investigative procedure, as well as the emergence of torture as form of punishment. The statements of the participants in criminal proceedings were recorded, witnesses are summoned by court decision to appear in court and they are obliged to respond, and the law explicitly regulated the circle of person who could not appear as witnesses: juveniles, women, hired workers, servants, mentally impaired individuals, deaf and blind persons, business partners testifying in favour of other business partners, sons testifying in favour of their fathers and vice-versa, heretics, Jews in disputes involving Christians or in criminal proceedings concerning the defendant of Christian creed (Nikolić, 1997. p. 215). From the standpoint of contemporary law, the criteria on who cannot be examined as a witness in criminal proceedings is certainly discriminatory, but it was definitely in line with the spirit of that time. The justification for comparing the Roman and the Byzantine criminal procedure law can be found in the fact that Byzantium was the Eastern Roman Empire (*Basileia Rhōmaiōn*). Wanting to emphasize their connection with the Romans and once mighty Roman empire, the Byzantines called themselves *Ῥωμαῖοι (Romaioi)*.[6]

FORMS OF PUNISHMENT IN ROMAN LAW

The conducted criminal proceeding may result in imposing a criminal sanction. In this part of the paper, we will discuss different kinds of punishment which were the predominant form of social reaction to crime in Roman law.

Roman law recognizes several types of punishment. Most types of punishment are explicitly mentioned in the oldest source of Roman law: Law of the

[6] See *Byzantine Empire.* Retrieved November 9, 2017 from https://www.britannica.com/place/Byzantine-Empire.

Twelve Tables (*Leges duodecim tabularum)*.[7] One of the oldest forms of punishment was *aeque et ignis interdictio* (prohibition of the use of water and fire, banishing the offender from the community (being an outcast) and being incapacitated to exercise the privileges of Roman citizen (*exsilium*), or depriving the offender of Roman citizenship). This punishment actually implied exclusion from the community or exile (for the committed crime of treason (*perduellio*);[8] after death penalty, it was the second most severe crime. Apart from this punishment, Roman law recognized death penalty/capital punishment, the penalty of deprivation of liberty and fines.

Capital punishment (poena capitalis) was commonly executed by beheading (*percussio securi)* but it also had other modalities of execution. such as: crucifixion *(in crucem actio)*, throwing the offender from the Tarpean rock (*dejectio e rupe Tarpeia)* as punishment for slaves caught in theft, burning at the stake for arsonists, fights with animals *(damnatio ad bestias),* burying a person alive, etc. In particular, death penalty was imposed for patricide, the murderer of one's father, which was considered the greatest sin in the patriarchal society. The spectacular and highly symbolic way of execution entailed that the killer was sewed up in a leather sack together with a snake, a cock, a dog and a monkey, and thrown into the sea. Thus, he was denied the right to rest peacefully in the grave, which was considered to be an additional punishment (Stanojević, 2001, p. 176).

The deprivation of liberty was also used as punishment by the Romans, but to a considerably lesser extent than other nations. Yet, the execution of this sentence had certain specificities, which will be discussed in more detail later. In addition to these, other types of penalties were also available in Roman law. A special type of penalties for defamation were *difamine (*defamatory fines). The offender was placed on the "pillar of shame" (Jovašević, 2006, p. 40) and exposed to public humiliation. If the criminal offense was the result of betrayed trust arising from partnership, a term of office (mandate), taken loan (etc.), the defendant could be even stipped of all honors. Possible consequences of being

[7] Leges duodecim tabularum (450. p.n.e), Retrieved 23 July 2017 from http://www.harmonius.org/sr/pravni-izvori/pravo-eu/privatno-pravo/Zakon_12_tablica%20.pdf (in Serbian).

[8] Perduellio*,* November 9, 2017, Retrieved from http://latinlexicon.org/definition.php?p1=043317.

dishonored were the prohibition of testamentary disposition, the prohibition of testifying under oath, the prohibition of running for and being elected to public functions, etc.

Fines (*poena pecuniariae)* can occur in the form of confiscation of entire property or in the form of different pecuniary penalties. It is interesting that Roman imperators used this type of punishment to deal with political opponents, by taking away their entire property.

Special types of punishment were the so-called proscriptions (*proscriptiones),* which implied a condemnation to death or banishment of the state enemies for political reasons.[9] They were executed in such a way that the names of the convicted offenders were publically proclaimed in several places in the city; every citizen had the right to kill them and to receive a certain prize: free citizens received money, and slaves were granted liberty and some money. Those who gave money or provided any assistance to the convicted offenders were also proscribed (Stanojević, 2001, p. 177). In time, this type of punishment was abandoned.

As already noted, the sentence of deprivation of liberty had specific features in terms of the manner and place of execution. In this regard, it should be borne in mind that incarceration was not explicitly prescribed as a criminal sanction in Roman law. It was used as a form of debt bondage, until the debtor returned the debt. Yet, there was the sentence of life imprisonment in conjunction with forced labor in the general public interest (*opera publica*). The Romans used the term *carcer* (jail) for this type of prison, which was a kind of investigative prison or custody (Konstantinović-Vilić and Kostić, 2011, p. 126). Therefore, the earliest forms of imprisonment were not aimed at serving the imposed sentences. They were primarily aimed at detaining the criminal offenders awaiting trial or delivery of the judgment and, subsequently, awaiting corporal punishment or capital punishment to be put in place (Milutinović, 1988, p. 19).[10]

One of the renowned prisons in the Roman Empire was the ancient public prison *Mamertine*, which still exists at the foot of the Capitol in Rome. It consist-

---

9 See more: Proscription, Retrived November 9, 2017 from https://www.revolvy.com/main/index.php?s=Proscription&item_type=topic&sr=200.

10 The famous Roman lawyer Ulpinianus testifies about the character of Roman prisons. He emphasizes the principle “Cercer contiendos non puniendos hominess” – Prisons should only be used for detention, not for punishment" (cited from Milutinović, 1988, p. 19).

ed of two rooms, one on top of the other. The lower room, known as *Tullianum,* was intended for the supporters of Carthage who were kept there until their execution. It is believed that St. Peter was kept prisoner there as well. The name of the lower room originates from the Latin word *tullius (*the water pipe), which suggests that Tullianum was some kind of a water tank. The upper room had very narrow openings for air and daylight. At the top, there was an opening through which the convicts were thrown into the dungeon. Generally speaking, there were two types of incarceration: *publica vincula* (detention in chains) and *publica custodia* (as a temporary custody prior to trial or execution). The imprisonment was either time-limited or lifelong. Prisons were managed by *triumviri capitals,* three inferior officials who were in charge of the keeping the situation in prisons under control and supervising the execution of punishment.[11] In Roman provinces under military control, prisons were under the jurisdiction of the local administration. The argument, frequently used by theorists in defending the stance that imprisonment was not a punishment in ancient times, implies a lack of any differentiation and classification of the accused offenders, which was a predominant feature of all prisons in antiquity (Dimovski, 2008, p. 253).

In Roman law, imprisonment was a preventive measure, envisaged either as a measure of keeping the defendant in custody (*custodia*) until the final judgment is delivered, as a subsidiary measure for debtors who failed to settle their obligations, or as the last preventive measure aimed at beggars, vagrants and mentally impaired patients (Konstantinović-Vilić and Kostić, 2006, p. 121). Consequently, in Roman law, imprisonment was not regarded as a form of punishment as perceived in the contemporary criminal law.

This brief consideration of the system of penalties and their execution in Roman law shows that the penal system was quite different from the contemporary one, but it can be concluded that it was in compliance with the existing socio-political relationships in the huge and powerful Roman state (*cives Romana*). Hence, the Roman penal system should be subject to further exploration, study and analysis.

[11] *Mamertine Prison,* November 9, 2017, Retrieved from https://en.wikipedia.org/wiki/Mamertine_Prison.

IN LIEU OF CONCLUSION: WHY SHOULD WE STUDY ROMAN CRIMINAL LAW?

The literature dealing with the study of Roman law includes opinions that the institutes of Roman criminal law have little significance for modern law (Bujuklić, 2014, p. 1).[12] Although the Roman law heritage is rightly associated with the area of civil law and private law in general, it is wrong to believe that the Romans did not have well-developed criminal law or criminal proceedings. *Leges duodecim tabularum* and many other legal sources bear witness of the developed system of criminal sanctions and the clearly defined criminal procedure, the manner of rendering judgments in criminal matters and the execution of punishment. Certain specificities of Roman criminal law are also reflected in the system of criminal sanctions. Unlike in other ancient systems, corporal punishment was inconsistent with the pragmatic spirit of the Romans, who replaced it with imprisonment (deprivation of liberty) or exile, but kept capital punishment. Thus, instead of being institutions for imprisonment of convicted offenders, prisons were places for detaining offenders awaiting trial or delivery of the judgment, which points to their role in ensuring the presence of the accused in criminal proceedings.

Although the punishment was entrusted to the state and the punishment of slaves and family members to the *pater familias*, who enjoyed the state-guaranteed imperative norms *ius vitae ac necis*, Roman law was the legal source of numerous institutions and principles which are still present in the contemporary substantive and procedural criminal law. The principle of the legality of the criminal offense and punishment *("nullum crimen, nulla poena sine lege")*, the right to the defense counsel, trial by jury, the principle of the publicity of criminal proceedings, the practical absence of corporal punishments, and the principle "*ne bis in idem*" are just some of them. We consider that the Roman substantive and procedural criminal law, as well as the methods of execution of criminal sanctions, should be subject to more substantial exploration, study and analysis in the future because these parts of Roman law seem to have been unjustifiably neglected.

[12] This approach is apparent in the titles of some university textbooks in the area of Roman law. See, for example, the textbook *Roman Private Law* (Bujuklić, 2014).

REFFERENCES

1. BUJUKLIĆ, Ž. (2014) Rimsko privatno pravo (Roman Private Law). Beograd, Pravni fakultet Univerziteta u Beogradu – Centar za izdavaštvo i informisanje i Dosije studio
2. BYZANTINE Empire. Retrieved November 9, 2017 from https://www.britannica.com/place/Byzantine-Empire
3. DIMOVSKI, D. (2008) Pojam i razvoj kazne lišenja slobode (The Concept and Development of Punishment of Imprisonment), Zbornik radova Pravnog fakulteta u Nišu, br. 52, str. 249–278
4. IGNJATOVIĆ, M. (2012) Rimsko pravo i njegov trajni karakter : uticaj rimskog prava na savremeno pravo (Roman Law and its permanent character: influence on contemporary law), Pravo-teorija i praksa, vol. 29, br. 7-9, str. 55–70
5. JOVAŠEVIĆ, D. (2006) Leksikon krivičnog prava (Lexicon of Criminal Law), Beograd, JP "Službeni glasnik"
6. KONSTANTINOVIĆ-VILIĆ, S. and KOSTIĆ, M. (2006) Penologija (Penology), Niš, Sven
7. KONSTANTINOVIĆ-VILIĆ, S. and KOSTIĆ, M. (2011) Penologija (Penology), Niš, Centar za publikacije Pravnog fakulteta
8. LANG, G. Repetundiae. Retrieved 21 July 2017, from http://penelope.uchicago.edu/Thayer/E/Roman/Texts/secondary/SMIGRA*/Repetundae.html
9. Leges duodecim tabularum (450. p.n.e), in Serbian. Retrieved 23 July 2017 from http://www.harmonius.org/sr/pravni-izvori/pravo-eu/privatno-pravo/Zakon_12_tablica%20.pdf
10. Leges duodecim tabularum (450. p.n.e), Retrieved 23 July 2017 from http://www.harmonius.org/sr/pravni-izvori/pravo-eu/privatno-pravo/Zakon_12_tablica%20.pdf (in Serbian)
11. Mamertine Prison, November 9, 2017, Retrieved from https://en.wikipedia.org/wiki/Mamertine_Prison
12. MILUTINOVIĆ, M. (1988) Penologija (Penology), Beograd: Savremena administracija
13. NIKOLIĆ, D. (1997) Fragmenti pravne istorije – Fragmenta historiae iuris, Niš, Institut za pravna i društvena istraživanja Pravnog fakulteta
14. Perduellio, November 9, 2017, Retrieved from http://latinlexicon.org/definition.php?p1=2043317. Proscription, Retrived November 9, 2017 from https://www.revolvy.com/main/index.php?s=Proscription&item_type=topic&sr=200
15. Roman Law . Retrieved November, 9, 2017 from http://www.tribunesandtriumphs.org/roman-life/roman-law.htm
16. Serbian Citation Index, Retrieved 23 July 2017 from http://scindeks.ceon.rs/
17. STANOJEVIĆ, O. (2001) Rimsko pravo (Roman Law), Beograd: Dosije

Proofreading and translation: Gordana Ignjatović

View publication stats