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Some remarks on "tolerant criminal law of Rome" in the light of legal and rhetorical sources

Studia Prawnoustrojowe nr 25, 189-201

2014

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Introduction

Roman criminal law, as majority of ancient legal systems, is commonly considered cruel and intolerant. Most of these negative views is based on the fact that the Romans created and used a great variety of painful and severe penalties, very often accompanied by different kinds of torture or disgrace[1]. Although such opinions derive from legal and literary sources, occasionally in their context a very important factor seems to be missing. Sometimes in the process of evaluation of foreign or historical legal systems researchers make a mistake and use modern standards, both legal and moral, and from this point of view they proclaim their statements. This incorrect attitude may lead to ascertainment that no legal system before 20th century should be judged positively in this aspect. However, the goal of this paper is not to change those statements, as they are based on sources, but rather to give examples and to underline some important achievements of Roman criminal law which, sometimes forgotten or disregarded, should be considered in the process of its historical evaluation.

[1] The most cruel are definitely aggravated forms of death penalty, such as crucifixion (*crux*), burning alive (*vivi crematio*), throwing to wild animals during the games (*damnatio ad bestias*), throwing to the sea in a sack with ritual animals (*poena cullei*). These are the most common, but during the history of Roman empire there existed many other severe kinds of capital punishment, see A.W. Zumpt, *Das Criminalrecht der römischen Republik*, Berlin 1899, p. 389f.; T. Mommsen, *Römisches Strafrecht*, Leipzig 1899, p. 911–944; C. Ferrini, *Diritto penale romano. Esposizione storica e dottrinale*, Roma 1902, p. 145f.; G.F. Falchi, *Diritto penale romano (dottrine generali)*, Padova 1962, p. 72–73; W. Rein, *Das Kriminalrecht der Römer von Romulus bis auf Justinianus,* Aalen 1962, p. 913; A. Burdese, *Riflessioni sulla repressione penale romana in età arcaica*, "Bulettino dell'Istituto di Diritto Romano" 1966, no. 8, p. 342–354; E. Żak, *Prawnicy rzymscy o sposobach wykonywania kary śmierci*, [in:] H. Kowalski, M. Kuryłowicz (eds.), *Kara śmierci w starożytnym Rzymie*, Lublin 1996, p. 110f. About *damnatio ad bestias* – see P. Kubiak, *„Damnatio ad bestias" i inne kary wykonywane na arenie w antycznym Rzymie*, Łódź 2013.

1. "Material" aspects of historical evaluation of Roman criminal law

First, it would be very beneficial to make a distinction between "material" or "static" aspects of criminal law, such as the types of inflicted penalties or specific features of certain crimes, and its "formal" aspects. The latter are the institutions and mechanisms which were created to determine the extent of perpetrator's responsibility and to inflict adequate penalty for committed offence. This basic distinction seems to be crucial in the historical evaluation of any legal system. Moreover, it has to be remembered that "material" aspects of criminal law are strongly dependant not only on times, but also corresponding to their cultural and social system of values, such as rightness, good, cruelty etc. Thereupon, in order to judge Roman legal system it is necessary to push aside modern moral and legal standards and concentrate on historical opinions and judgments not only of contemporary lawyers, but also writers, philosophers and poets. Thus, in this way it is possible to discover the dominant views about the degree of cruelty of criminal law in ancient Rome. However, this issue, which seems to be a very good foundation for a future analysis, is not a subject of the present paper. I would like to mention only some examples that illustrate that the Romans, or at least some of them, did not consider their system of punishments too harsh. In order to make it brief, but convincing, I would like to refer to opinions of two moralists, Seneca and Tertullian, who were actively commenting on social and moral daily life of ancient Romans.

> Sen. *Epist.* 7.3: *"Sed latrocinium fecit aliquis, occidit hominem". Quid ergo? Quia occidit, ille meruit ut hoc pateretur: tu quid meruisti miser ut hoc spectes?*

Seneca in one of his moral letters to Lucilius describes the event which takes place during the gladiatorial games. At noon, there was an execution of condemned to death penalty during the gladiatorial fight (*damnatio ad gladium ludi*)[2]. Although he is considered a great antagonist of these types of entertainment[3], he admits expressively that because they had committed a crime, in this particular case highway robbery (*latrocinium*), they deserved to die[4]. The concept of just punishment, no matter how severe, seems to be

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[2] T. Mommsen, op. cit., p. 925; C. Ferrini, op. cit., p. 148; W. Rein, op. cit., p. 914; G. Ville, *La gladiature en occident des origines à la mort de Domitien*, Rome 1981, p. 235. See also P. Kubiak, *Szkice z zakresu rzymskiego prawa karnego – skazanie na udział w igrzyskach gladiatorskich (damnatio ad gladium ludi)*, „Studia Prawno-Ekonomiczne" 2011, no. 84, p. 147–165.

[3] The inscription found in Pompeii attests that Seneca was the only Roman writer who condemns "bloody gladiatorial games" – see M. Grant, *Miasta Wezuwiusza – Pompeje i Herculanum*, Warszawa 1986, p. 76.

[4] Romans realized well what the functions of criminal law were – see F. M. De Robertis, *La funzione della pena nel diritto romano*, [in:] *Studi in onore di S. Solazzi*, Napoli 1949, p. 169–196; C. Dupont, *Le Droit Criminel dans les Constitutions de Constantin. Les peines*, Lille 1955, p. 81–83; C. Gioffredi, *I principi del diritto penale romano*, Torino 1970, p. 41–63; idem, *Sulla concezione romana della pena*, [in:] *Studi in onore di E. Volterra*, vol. II, Milano 1972, p. 333–350; O. F. Robinson, *Penal practice and penal policy in ancient Rome*, London 2007, p. 181, 193. About the functions of punishments, see especially Sen. *Clem.* 1.22.1 and Gell. 7.14.1.

dominant in his opinion and at the same time to surpass individual convictions and believes. Even this famous stoic and philosopher, while attacking gladiatorial games as senseless and cruel bloodshed, considered brutal punishments fair, when inflicted against hardened criminals. Similar attitude may be found in one of Tertullian's treatise.

Tert. *Spec.* 19.2: *"Bonum est, cum puniuntur nocentes". Quis hoc nisi nocens negabit?*

One of the most active defenders of Christians, who were persecuted and killed mainly in the arena, emphasizes that even severe and cruel penalties, such as *damnatio ad bestias* or *damnatio ad gladium ludi*, would be considered justified, if inflicted against criminals. On the other hand, he is intensely opposing the fact that people were taking pleasure in watching these savages forms of entertainment. He underlines also the possibility of judicial error and conviction of innocent[5]. Even though, he agrees that criminals should be punished severely.

These two voices are evidently not sufficient to verify social attitude towards criminal law in ancient Rome. However, they suggest that even on the side of ethical writers and opponents of public executions, the cruelty of penalties could be considered justified and adequate. Moreover, presented views may be similar to the dominant opinion about system of penalties of the rest of the Roman society, though it requires further research, because generally law is derived from and is based on social demands and judgments. It seems that Seneca and Tertullian may have expressed common conviction and deeply settled understanding of rightness and justice. Postulates of this kind strongly influenced legislation also in ancient Rome[6]. Certainly the emperors were delivering constitutions individually, but even they were greatly dependant on the attitude of their advisors and Roman citizens as well. Some examples of imperial law breaking or misuse of the authority are still to be considered exceptions and not the general rule[7].

2. "Formal" aspects of historical evaluation of Roman criminal law

2.1. Legal sources: principles of law

"Formal" aspects of any legal system has to be considered a much more precise tool of its historical evaluation, because they are definitely much more objective, independent of changeable human attitudes and prevailing policy. Their existence or non-existence can be considered as a litmus paper of legal system maturity and tolerance – they deliver precise tools for legal argumentation, accusation and conviction. Furthermore, those insti-

[5] Tert. *Spec.* 19.2-3.

[6] Especially when sources of Roman law are taken into consideration.

[7] Certainly there are examples of emperors cruelty and misuse of authority, e.g. Galba who ordered to cut hands of dishonest banker and to nail them to his table or when he crucified Roman citizen, what was against the law, and to honor him, he gave him white and taller cross, see Suet. *Galba* 9.1. But still, they were rather singularities and specific expressions of imperial "caprices" than the general procedures.

tutions in the most expressive way show the level of legal reflection and juridical development than simple description of kinds of criminal offences or inflicted penalties[8].

In order to underline the achievements of Roman jurists and to show considerable development of Roman criminal law, I would like to concentrate on some phenomena of more general manner. Thus, I will not describe and analyze specific institutions, but rather present a few most important guidelines and principles of Roman criminal law concerning criminal procedure and the role of judges in the process of establishing the perpetrator's guilt. Again, it is highly important not to mention only legal sources, Roman jurists had given many commentaries and opinions in this field, but also rhetorical writings, which may be regarded as handbooks for advocates[9]. In order to prepare them for trials, these works had to contain very effective rules and advices for defense and means to exculpate or at least mitigate the penalty. In such way rhetorical works can be considered an essential supplementation of legal writings, especially in the sphere of judicial procedure[10].

The first important principle to underline would be an initial, but fundamental issue of the appearance of the accused at the trial. This general rule is a basic guarantee of the right to defend against accusation and a basis for most of the modern legal systems[11]. Its precise example is contained in one of Marcianus' works.

> D. 48.17.1 pr. Marcianus 2 publ.: *Divi Severi et Antonini Magni rescriptum est, ne quis absens puniatur: et hoc iure utimur, ne absentes damnentur: neque enim inaudita causa quemquam damnari aequitatis ratio patitur.*

The Divine Severus and Antoninus stated in a rescript that absentee should not be punished. In their opinion it would be contrary to the equity to condemn somebody, who could not be heard[12]. This requirement is closely connected to the fact that Roman

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[8] In the process of criminal law development a main point is the recognition of guilt and distinction between the intentional and unintentional guilt. On such basis further precise analysis is possible, e. g. mitigating circumstances. See K. Amielańczyk, *The guilt of the perpetrator*, Labeo, Napoli 2000, p. 82–95.

[9] The most important is definitely Cicero's *De inventione*, *Rhetorica ad Herennium* of an unknown author and Quintilian's *Institutio Oratoria*. They contain not only rhetorical knowledge, but also some references to legal institutions which may be used at court. See A.A. Schiller, *Roman Law: Mechanisms of Development*, Malta 1978, p. 84; C. Gioffredi, *I principi...*, p. 70. However, the caution should be undertaken when analyzing rhetorical writings – see O.F. Robinson, *Quintilian (Book III) and his Use of Roman Law*, [in:] O.E. Tellegen-Couperus (ed.), *Quintilian and the Law: The Art of Persuasion in Law and Politics*, Leuven 2003, p. 59–66.

[10] Recently about relations between Roman law and rhetoric – see O. E. Tellegen-Couperus, *Roman Law and Rhetoric*, "Belgisch Tijdschrift voor Filologie en Geschiedenis" 2006, no. 84, p. 59–75; A.R. Emmett, *Hermogenes of Tarsus: Rhetorical Bridge from the Ancient World to the Modern*, [in:] J.T. Gleeson, R.C.A. Higgins (eds.), *Rediscovering Rhetoric: Law, Language and the Practice of Persuasion*, Sydney 2008, p. 114–162; J.W. Tellegen, O.E. Tellegen-Couperus, *Artes urbanae. Roman law and rhetoric*, [in:] P.J. Du Plessis (ed.), *New Frontiers: Law and Society in the Roman World*, Edinburgh 2013, p. 31–50.

[11] Defendant can be absent only during the simplified procedure, see e.g. art. 479 of Polish Code of Criminal Procedure.

[12] This general principle is very often connected with fundamental rule of legal procedure *audiatur et altera pars*. See A. Wacke, *Audiatur et altera pars. Zum rechtlichen Gehör im römischen Zivil- und Strafprozess*, [in:] M.J. Schermeier, Z. Vegh, *Ars boni et aequi. Festschrift für W Waldstein zum 65. Geburtstag*, Stuttgart 1993, pp. 369–399; W. Litewski, *Rzymski proces karny*, Kraków 2003, p. 65–66; K. Amielańczyk, *O kształtowaniu się niektórych zasad procesowych w postępowaniu karnym okresu pryncypatu*, „Studia

criminal procedure was mainly adversial. Both the accuser and the accused, who had right to defend himself, present pieces of evidence and call witnesses – as a rule they have the same position and privileges at court[13]. Obviously the defendant could ask for help of professional orators and advocates. The appearance of the accused in the inquisitional court was also necessary for legally valid sentence, despite the absence of the accuser.

One of the major problems of the modern legal systems is default at court. Even ancient Romans had to cope with the situations of unjustified absence of the defendant as means of postponing the trial and conviction. An effective solution concerning weight of the matter was introduced by Traian.

> D. 48.19.5 pr. Ulpianus 7 de off. procons.: *Absentem in criminibus damnari non debere divus Traianus Iulio Frontoni rescripsit. Sed nec de suspicionibus debere aliquem damnari divus Traianus Adsidio Severo rescripsit: satius enim esse impunitum relinqui facinus nocentis quam innocentem damnari. Adversus contumaces vero, qui neque denuntiationibus neque edictis praesidum obtemperassent, etiam absentes pronuntiari oportet secundum morem privatorum iudiciorum. Potest quis defendere haec non esse contraria. Quid igitur est? Melius statuetur in absentes pecuniarias quidem poenas vel eas, quae existimationem contingunt, si saepius admoniti per contumaciam desint, statui posse et usque ad relegationem procedi: verum si quid gravius irrogandum fuisset, puta in metallum vel capitis poenam, non esse absentibus irrogandam.*

The Emperor even before the regulation of Severus and Antoninus decided that nobody could be convicted when absent[14] . It is hard to determine, whether he was aware of some difficulties which could appear during the trial like contumacy, if that rule would be absolute or it was Ulpian's commentary (which is more probable), but the source provides a few more specific guidelines. The conviction of an absent defendant was allowed only in smaller cases endangered with milder punishments, such as pecuniary fines, penalties affecting reputation and even relegation. In more serious crimes and punishments, like hard labor in mines or death, the accused had to be present. This limit determined by the jurist most likely relates to the loss of citizenship, although delegation is not mentioned in the text[15]. It is worth to mention also other solutions concerning the problem of default at court. If the accused in capital matter still resisted and did not appear at court, the judge could search for him with a warrant and sequester his goods. If

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Iuridica Lubliniensia" 2007, no. 10, p. 19; F. Longchamps de Bérier, *„Audiatur et altera pars". Szkic o brakującej kolumnie pałacu sprawiedliwości*, [in:] W. Uruszczak, P. Święcicka, A. Kremer, *Leges sapere. Studia i prace dedykowane profesorowi Januszowi Sondlowi w pięćdziesiątą rocznicę pracy naukowej*, Kraków 2008, pp. 271–284.

[13] W. Litewski, op. cit., p. 84–85; K. Amielańczyk, *O kształtowaniu się niektórych zasad...*, p. 18f.

[14] The rule could exist even before – see F. Longchamps de Bérier, op. cit., p. 276 and *Actes of Apostles*, 25.16.

[15] D. 48.19.6.2: *Nunc genera poenarum nobis enumeranda sunt, quibus praesides adficere quemque possint. Et sunt poenae, quae aut vitam adimant aut servitutem iniungant aut civitatem auferant aut exilium aut coercitionem corporis contineant.* So in the cases concerning loss of citizenship, the accused had to be present. *Relegatio* meant exile without loss of citizenship, while *delegatio* was connected with such a loss – see J. Sondel, *Słownik łacińsko-polski dla prawników i historyków*, Kraków 2001, s. v. *relegatio, delegatio.*

he did not appear in front of the governor in one year, they would be confiscated and he would be still searched and trial would be continued[16].

Traian mentioned in his rescript also another fundamental principle of criminal law – presumption of innocence. In his view no one should be convicted only on the basis of suspicion, what he expressed: "It is better to permit the crime of a guilty person to go unpunished than to condemn one who is innocent"[17]. However, this rule was not his invention probably. It is hard to determine its origins in Roman criminal law, but already in the times of Republic Cicero was emphasizing that it is much better to free the innocent than not to condemn the guilty (*utilius est autem absolvi innocentem quam nocentem causam non dicere*)[18]. The main justification of this principle is still the same in present times – irreversibility of capital punishments in case of judicial errors[19]. That is why the emperors and especially Hadrian warned his officials and judges to take caution when deciding on perpetrator's guilt[20]. In more general terms presumption of innocence can be related to *in dubio pro reo*. This tendency penetrated both civil and criminal procedure and its examples may be found in many legal sources[21]. Together with previous principles, they can be considered as the root of modern systems of criminal law and in the same way the expression not only of Roman pragmatism, but human values in general. The exact attitude may be found in Marcianus' text concerning mitigation of penalty.

> D. 48.19.11 pr. Marcianus 2 de publ. iudic.: *Perspiciendum est iudicanti, ne quid aut durius aut remissius constituatur, quam causa deposcit: nec enim aut severitatis aut clementiae gloria affectanda est, sed perpenso iudicio, prout quaeque res expostulat, statuendum est. Plane in levioribus causis proniores ad lenitatem iudices esse debent, in gravioribus poenis severitatem legum cum aliquo temperamento benignitatis subsequi.*

Marcianus suggests deliberation and caution in the process of judging, so as not to inflict penalty too mild or too severe in comparison to the case demands. The judge should be aware of extremes and avoid the reputation of being harsh or the glory of being lenient. In order to obtain this goal he should weighed all the important circumstances of the case and decide whatever it required. It seems however that Marcianus encourage milder attitude, since he is suggesting inclination to lenity in minor cases and, when heavier penalties are involved, also some degree of indulgence. In the strict terms and limits of law judges had a considerable amount of discretion, so their decisions were crucial[22]. Thus, their activity and jurisdiction had great impact on social understanding

[16] See title XVII of the 48th book of Digest: *De requirendis vel absentibus damnandis.*

[17] See W. Wołodkiewicz, *Regulae iuris. Łacińskie inskrypcje na kolumnach Sądu Najwyższego Rzeczypospolitej Polskiej*, Warszawa 2011, p. 52.

[18] Cic. *Pro Rosc. Amer* 56.

[19] See W. Wołodkiewicz, *Europa i prawo rzymskie: szkice z historii europejskiej kultury prawnej*, Warszawa 2009, p. 476f.

[20] K. Amielańczyk, *O kształtowaniu się niektórych zasad...*, p. 22f.: D. 48.3.6pr.; D. 48.20.2.

[21] E. Żak, *Rzymskie korzenie zasady „in dubio pro reo"*, „Folia Societas Scientiarum Lubliniensis" 1993, no. 34, p. 85–91.

[22] In *cognitio extra ordinem*. In *quaestiones perpetuae* judges decided only about guilt of the accused and the penalty was determined in the lex.

and estimation of criminal law. It also seems that Roman judges not only had a wide range of penalties to select from, but also they were encouraged or even urged to act with moderation. More jurists expressed the same idea in their writings.

D. 48.19.13 Ulpianus 1 de appellat.: *Hodie licet ei, qui extra ordinem de crimine cognoscit, quam vult sententiam ferre, vel graviorem vel leviorem, ita tamen ut in utroque moderationem non excedat.*

D. 48.19.42 Hermogenianus 1 epit.: *Interpretatione legum poenae molliendae sunt potius quam asperandae.*

D. 50.17.125 Gaius 5 ad ed. provinc.: *Favorabiliores rei potius quam actores habentur.*

D. 50.17.155. 2 Paulus 65 ad ed.: *In poenalibus causis benignius interpretandum est*[23].

In the first fragment of Ulpian's work the discretion of judges is clearly underlined – they could inflict any sentence they desired in the frames of extraordinary jurisdiction. However, the famous jurist is recommending to act reasonably and not to punish too severely, but moderately. Hermogenianus is suggesting even more by stating that penalties, in the process of interpretation of the laws, should rather be mitigated than increased in severity. Also Gaius is admitting that the position of the defendants is much more favorable than that of the accuser. And at last, Paulus is clearly underlining that in criminal cases the law should be interpreted very kindly.

All presented comments and opinions are consistent that judges should act with caution and be inclined towards leniency rather than severity. On the other hand, it is also expressly stated that they possessed wide scope of discretion, so generally their activity could influence social opinion about harshness of Roman law. In the process of evaluation of any legal system there is always an issue of contrast between the direct understanding of the law and its application. Sometimes it is very difficult to estimate whether the regulations are indeed severe and unfair or rather administration of justice apply them in such cruel manner. This point should not be forgotten as well when evaluating Roman criminal law. That is also the reason, why the analysis of social views concerning types of penalties and harshness of criminal law in general are necessary to be determined.

2.2. Legal sources: circumstances of criminal offence mitigating penalties

As it seems, in the field of Roman criminal law existed many fundamental principles which may be found also in modern legal systems. Administration of justice in ancient Rome were equipped with considerable scope of discretion, but on the other hand they were obliged to act in moderation and with leniency. However, it would be insufficient to evaluate this system positively, if they did not possess very specific and subtle means of reasoning and argumentation necessary to determine the perpetrator's responsibility and guilt. The issue of different circumstances of criminal offence mitigating the measurement

[23] D. 50.17.56 Gaius 3 de legatis ad ed. urb.: *Semper in dubiis benigniora praeferenda sunt* and D.50.17.192.1 Marcellus 29 Dig.: *In re dubia benigniorem interpretationem sequi non minus iustius est quam tutius.*

of penalty definitely is very complex subject[24]. In order to present the extent and depth of judicial analysis and give the most important examples of juristic reflection, I would like to remind a very well known fragment of Claudius Saturninus' writing[25] and then underline some conclusions resulting from rhetorical handbooks.

> D. 48.19.16 pr. Saturninus l. s. de poen. paganorum.: *Aut facta puniuntur, ut furta caedesque, aut dicta, ut convicia et infidae advocationes, aut scripta, ut falsa et famosi libelli, aut consilia, ut coniurationes et latronum conscientia quosque alios suadendo iuvisse sceleris est instar. Sed haec quattuor genera consideranda sunt septem modis: causa persona loco tempore qualitate quantitate eventu. Causa: ut in verberibus, quae impunita sunt a magistro allata vel parente, quoniam emendationis, non iniuriae gratia videntur adhiberi: puniuntur, cum quis per iram ab extraneo pulsatus est. Persona dupliciter spectatur, eius qui fecit et eius qui passus est: aliter enim puniuntur ex isdem facinoribus servi quam liberi, et aliter, qui quid in dominum parentemve ausus est quam qui in extraneum, in magistratum vel in privatum. in eius rei consideratione aetatis quoque ratio habeatur. Locus facit, ut idem vel furtum vel sacrilegium sit et capite luendum vel minore supplicio. Tempus discernit emansorem a fugitivo et effractorem vel furem diurnum a nocturno. Qualitate, cum factum vel atrocius vel levius est: ut furta manifesta a nec manifestis discerni solent, rixae a grassaturis, expilationes a furtis, petulantia a violentia. Quantitas discernit furem ab abigeo: nam qui unum suem subripuerit, ut fur coercebitur, qui gregem, ut abigeus. Eventus spectetur, ut a clementissimo quoquo facta: quamquam lex non minus eum, qui occidendi hominis causa cum telo fuerit, quam eum qui occiderit puniat*[26].

The jurist enumerates basic distinctions of crimes used by the ancient Romans. He identifies four kinds of offences based on perpetrator's ways of behavior. He mentions acts, words, documents and advices. To each one he is giving a typical example of crime: theft or homicide; insults or betrayal by advocates; forgeries and criminal libels; advices given in conspiracies or the agreements of robbers. Next, he specifies seven circumstances of the crime, which could influence the measurement of punishment and again each one is equipped with description and typical examples. These are the cause, the status of person, the place and the time, the quality and the quantity of crime and its result. The cause is relevant, when somebody was hit by the parent or a teacher in order to correct his behavior or by a stranger to do some harm. Obviously the former case is not considered as a crime. Personal features are considered both of the perpetrator and the victim: their social and family status, age and others as well. Sometimes the place and the time of the offence is decisive for its qualification. A theft committed in the sacred place becomes sacrilege and deserves more severe penalty. Similarly stealing at night. The same result

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[24] See F.M. De Robertis, *La variazione della pena „pro qualitate personarum" nel Diritto Penale Romano*, Bari 1939; G.F. Falchi, op. cit., p. 142f.

[25] Its analysis, see B. Bonini, *D. 48.19.16 Claudius Saturninus de poenis paganorum*, "Rivista italiana di scienza giuridica" 1959–1962, no. 10, p. 119–179; J.-C. Genin, *La répression des actes de tentative en droit criminel romain*, Lyon 1968, p. 254–255; G. Impallomeni, *Reflessioni sul tentativo di teoria generale penalistica in Claudio Saturnino (D. 48.19.16)*, "Studi in onore di Arnaldo Biscardi", vol. III, Milano 1982, p. 177–203; G. Sposito, *Quattuor genera... septem modis. Le circonstanze del reato in D. 48.19.16*, "Studia et documenta historiae et iuris" 1999, no. 65, p. 95–115; W. Mossakowski, *Czyn karalny wedlug Klaudiusza Saturnina*, „Studia Historycznoprawne" 2008, no. 305, p. 217–229.

[26] To simplify the analysis the Greek examples of these circumstances were omitted in this fragment.

could have other circumstances concerning the quality of the crime. That is why more atrocious acts are expressly distinguished from lighter, such as manifest theft and non-manifest, quarrels and highway robberies, pillage and ordinary theft, impudence and violence. The quantity of things stolen may be crucial in determination of common thief and cattle stealer, who may be punished even with death. And at last, the result is also relevant, but sometimes is not necessary for conviction, like in the example of somebody, who provided with a weapon for the purpose of killing did not succeed. He is treated as the actual killer.

The catalogue is non enumerative, in legal sources there are many more specific examples of other circumstances, which could also be taken into consideration by judges. Even though, at this point it is clear that juridical analysis of every case was very detailed and accurate and included all the important facts, even the most subtle, which could lead to mitigation of the penalty or even acquittal.

2.3. Rhetorical sources: circumstances of criminal offence mitigating penalties

Above mentioned commentary presents jurists' opinion about the judicial procedure in criminal cases. However, the same phenomenon can be analyzed also from another point of view. Rhetorical writings contain many detailed descriptions of specific argumentations and acts which could be performed by advocates in court in order to win the case. One of the most important handbooks of this kind is *Rhetorica ad Herennium* written in the republican times. In the second book of this work there is a reference to the circumstances which should be considered when deciding on perpetrator's guilt. It shows precisely, how thorough analysis was conducted by the judge to establish criminal's responsibility.

> *Rhet Ad Her.* 2.23-24: *Concessio est, per quam nobis ignosci postulamus. Ea dividitur in purgationem et deprecationem. Purgatio est, cum consulto a nobis factum negamus. Ea dividitur in necessitudinem, fortunam, inprudentiam. De his partibus primum ostendendum est; deinde ad deprecationem revertendum videtur. Primum considerandum est, num culpa ventum sit in necessitudinem. Deinde quaerendum est quo modo vis illa vitari potuerit ac levari. Deinde is, qui in necessitudinem causam conferet, expertusne sit, quid contra facere aut excogitare posset. Deinde, num quae suspiciones ex coniecturali constitutione trahi possint, quae significent id consulto factum esse, quod necessario cecidisse dicitur. Deinde, si maxime necessitudo quaepiam fuerit, conveniatne eam satis idoneam causam putari. Si autem inprudentia reus se peccasse dicet, primum quaeretur, utrum potuerit nescire an non potuerit; deinde utrum data sit opera, ut sciretur, an non; deinde, utrum casu nescierit an culpa. Nam qui se propter vinum aut amorem aut iracundiam fugisse rationem dicet, is animi vitio videbitur nescisse, non inprudentia; quare non inprudentia se defendet, sed culpa contaminabit. Deinde coniecturali constitutione quaeretur, utrum scierit an ignoraverit; et considerabitur satisne inprudentia praesidii debeat esse, cum factum esse constet.*

The author of this treatise mentions varies parts of the defendant's speech. One of them could contain the acknowledgement (*concessio*) through which the accused was pleading for pardon. It could be divided into plea for exculpation (*purgatio*) and plea for

mercy (*deprecatio*). The former consisted in the acceptance that the crime was committed, but also in denial that it was done deliberately or intentionally[27]. In order to do that, it could relate to three separate situations: necessity, accident and ignorance. If they were proven, they could result in full acquittal[28]. However, the judicial analysis was much more detailed. When analyzing the necessity the judge had to consider whether it was the defendant's fault that he was brought to this situation. So if he was guilty in any way that he appeared in the situation of necessity and in order to save himself he committed a crime, he would be responsible for such an act. Next, the judge had to inquire what means he had to avoid or lighten this superior force and what he could do or contrive against it. And again, if he could prevent or diminish the consequences of this necessity or he could influence somehow its results and he did not do it, he would not be exculpated. Afterwards, the judge had to make some observations based on conjectural issues, which may show that the perpetrator's action was premeditated. They are enumerated and precisely described in *Rhetorica ad Herennium*, but their analysis surpasses the objectives of this paper. It is enough to mention that conjectural premises are divided in six parts: probability concerning criminal's motive and manner of life, comparison with others, signs such as place, time or occasion, presumptive proof of the criminal offence, subsequent behavior of the perpetrator and the confirmatory proof[29]. Each of them is also divided in smaller sections and precisely analyzed. At last, the judge should decide, whether the necessity was a sufficient excuse for acquittal. All these circumstances were checked in order to establish the responsibility of the defendant in case of necessity.

Similar analysis was performed in the case of ignorance. The judge had to determine, whether the defendant could be uninformed and did he make an effort to inform himself or whether it was his fault. Then, if the error was a result of some accidental situation such as being under emotions or influence of wine, he could not defend himself with ignorance. They were clearly distinguished and hence did not result in exculpation. So the perpetrator who committed crime of passion or was drunk in the course of action was considered as guilty and punished respectively[30]. In the end, it had to be checked on the basis of some assumptions and general premises, whether he was really uninformed and if that was a sufficient justification for his deed. The same observations took place in case of accidental offences.

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[27] On the other hand, *deprecatio* was full acknowledgment, both of the fact and the guilt, but even so the defendant plead for mercy, see *Rhet. Ad Her.* 2.25.

[28] These institutions are similar to modern solutions: error (art. 28-30 of Polish Penal Code); higher necessity (art. 26) and principle of guilt (art. 1).

[29] *Rhet. Ad Her.* 2.2-8.

[30] See P. Kubiak, *Czyn Patrokłosa a rzymskie prawo karne – czyli o przestępstwach popełnionych w afekcie w antycznym Rzymie*, „Studia Prawnicze Katolickiego Uniwersytetu Lubelskiego" 2013; idem, *Stan nietrzeźwości jako „afekt" w rzymskim prawie karnym*, „Zeszyty Prawnicze Uniwersytetu Kardynała Stefana Wyszyńskiego" 2013.

Conclusions

Roman criminal law indeed provided, for modern standards of human rights, many cruel and brutal penalties. However, in its total evaluation some other aspects has to be taken into considerations as well. In the light of presented analysis it may be assumed that not only jurists, what can be expected, but also other authors including Christian writers emphasized that severe punishments are just and fair, if executed against guilty criminals. Obviously the limits of what is good or bad, right and cruel had to be different than in modern times. The idea of severe but deserved penalty for criminal offences seems to be rooted very deeply in the Romans' mentality, but evidently *tempora mutantur et nos mutamur in illis.*

However, more important is the fact that Roman jurists created and implemented many fundamental principles which are considered basis for most of modern legal systems as well. Prohibition of proceedings against absentee, presumption of innocence and general *in dubio pro reo* are just the most eminent examples of general rules which are considered foundations of criminal's right to defend. In the opposition to the harshness of system of Roman penalties jurists were not only encouraging but also compelling judges to be very kind in their decisions and act with moderation and leniency. They had all the conditions to follow these instructions especially in *cognitio extra ordinem* procedure, where their discretion was considerable. Thus their sentences could have major impact on the social perception of criminal law. In this way, an issue of contrast between the law *sensu stricto* and its application arises. Even if the law is soft for criminals, it provides mild punishments, still the judges in the frames of their discretion can deliver the most severe sentences. And *vice versa* – the variety of cruel punishment can be inflicted very rarely by benevolent judges. Their activity seems to be essential for proper evaluation of application of criminal law. In this way, these two phenomena has to be distinguished when judging any legal system.

Moreover, Roman judges were not only equipped with wide scope of discretion and were obliged to leniency, but they possessed also very subtle and refined methods of judicial analysis of every case. Not only jurists, but also orators and rhetors contributed in this specific field. Although the Romans are famous for their unwillingness to create definitions and precise distinctions in their commentaries, there are many examples of high level of juridical reflection and legal reasoning in the sources. They were considerably inventive and perceptive in the range of circumstances of criminal offences influencing the measurement of penalties concerning both aspects of the crime as to the doer and to the deed. Thus the judges could take into consideration even the smallest facts of the case. On the other hand rhetorical writings are extremely helpful in this field. They can be considered an important supplementation of legal sources, because they reveal the extent and depth of judicial analysis and main types of argumentation used by accusers and defendants. It seems that process of establishing the perpetrator's guilt and the range of analyzed circumstances is similar to the present procedures.

Obviously, negative judgments about Roman criminal law could be maintained. The vivid stories from Christian martyrology or history of gladiatorial games are probably the most convincing arguments. However, the subject of such evaluation has to be precisely determined. And it may be only suggested that in order to be call them "thorough analysis", they should include the social opinion of ancient Romans about their legal system and also some "formal" achievements of jurists and rhetors in the field of criminal law. In such case the answer is no longer so simple, because both of these factors suggest other evaluation. Even though, there would be still an imperceptible aspect of judging the system as a collection of rules or its application in daily life. Thus the question, whether the Roman criminal law was "tolerant" can be transformed into the issue of tolerance of the Romans themselves. But this is definitely different story...

Resumen

Palabras clave: Derecho romano, Derecho penal, principios del derecho, presunción de inocencia, juristas romanos, retórica, accidente, necesidad, ignorancia.

El Derecho penal romano se considera severo e intolerante debido la amplia gama de penas crueles y dolorosas. Sin embargo, en ocasiones, en el proceso de análisis de las fuentes se comete un error de perspectiva histórica. Para evitarlo, se deben tomar en consideración tanto aspectos materiales como formales del ordenamiento jurídico. En cuanto a los materiales, se trata de los aspectos relativos a las características de las infracciones penales, el tipo de sanciones, etc. Es más, en este sentido, la visión social y general de los antiguos romanos sobre el derecho penal debe determinarse sobre la base de fuentes legales y literarios, así, parece que los romanos consideraban su sistema de castigos como justo y equitativo. En cuanto a los aspectos formales del derecho penal, su análisis es mucho más objetivo desde un punto de vista histórico, ya que se trata del estudio de las instituciones y los mecanismos que determinan la culpabilidad del autor del ilícito penal así como de la pena impuesta. A la luz de las fuentes legales deben ser tratadas dos cuestiones esenciales: en primer lugar, se deben analizar los principios fundamentales del derecho penal que también son base de los sistemas jurídicos modernos como la prohibición de las actuaciones en ausencia, la presunción de inocencia y el *in dubio pro reo* y algunos otros; en segundo lugar, las diferentes instituciones del derecho penal que actúan como medio de mitigación de las penas e incluso de exculpación. Igualmente, los jueces tuvieron gran margen de discrecionalidad respecto a los diversos castigos, es más, en ocasiones se les obliga a actuar con moderación y clemencia ya que durante la instrucción judicial debían ser analizadas las diferentes circunstancias de delito, las motivaciones, las características personales, el lugar, el tiempo, el resultado, etc., y, con fundamento en todas ellas, se debía decidir el castigo adecuado. Las fuentes retóricas muestran el alcance y la profundidad de estos análisis. Parece que el Derecho penal romano incluía ciertas instituciones que garantizaban su "tolerancia" de forma que se otorgaba relevancia al del "factor humano" y su influencia en la vida diaria.

Streszczenie

Kilka uwag na temat surowości rzymskiego prawa karnego w świetle źródeł prawnych i retoryki

Słowa kluczowe: prawo rzymskie, prawo karne, zasady prawa, domniemanie niewinności, jurysprudencja rzymska, retoryka.

Rzymskie prawo karne jest postrzegane jako bardzo surowe i nietolerancyjne, głównie z powodu dosyć szerokiego wachlarza okrutnych oraz dotkliwych kar. Opinie tego rodzaju oparte są na źródłach, czasami jednak w procesie ich formułowania popełniany jest błąd perspektywy historycznej. Aby go uniknąć, warto rozważyć zarówno materialne, jak i formalne aspekty tego systemu prawa. Pierwsze dotyczą regulacji odnoszących się do poszczególnych przestępstw, rodzaju stosowanych kar itp. Należy przy tym pamiętać o społecznych poglądach Rzymian na temat surowości prawa karnego oraz zasadności wymierzanych kar. Wydaje się, iż postrzegali oni swój system stosowanych sankcji za sprawiedliwy i uzasadniony jednocześnie. Formalne aspekty prawa karnego, zdecydowanie ważniejsze oraz bardziej obiektywne dla historycznej oceny danego systemu prawa, dotyczą różnego rodzaju instytucji oraz mechanizmów stworzonych w celu ustalenia zakresu odpowiedzialności sprawcy i wymierzenia adekwatnej kary. W świetle źródeł warto wskazać na dwa elementy odnoszące się do łagodności rzymskiego prawa karnego. Pierwszy to sformułowanie fundamentalnych zasad prawnych, takich jak zakaz procedowania pod nieobecność oskarżonego, domniemania niewinności lub orzekania na korzyść oskarżonego, stanowiące podstawę również współczesnych systemów prawnych. Drugi ważny element to pojawienie się w rzymskim prawie karnym pewnych instytucji, które wpływały na złagodzenie odpowiedzialności sprawcy lub nawet jego uwolnienie. Rzymscy sędziowie nie tylko dysponowali szerokim zakresem stosowanych kar, lecz przede wszystkim zachęcani byli do wyrokowania w sposób łagodny oraz z umiarem. W procesie orzekania o danej sprawie drobiazgowo analizowali stan faktyczny oraz jego elementy, takie jak motywacja sprawcy, jego cechy osobiste oraz ofiary, czas i miejsce popełnienia czynu, skutek przestępstwa i wiele innych. Na ich podstawie dopiero decydowali o wymiarze kary. Źródła pokazują charakter oraz rozmiar szczegółowości sędziowskiej analizy. Wydaje się, że prawo rzymskie znało wiele instytucji, które służyły relatywizacji kary do popełnionego czynu, a zatem również nawiązywały do tolerancji w traktowaniu przestępców.