

**PARALLELS BETWEEN CERTAIN DELICTS
AGAINST THE PERSON IN ROMAN LAW
AND CERTAIN INSTITUTES OF CONTEMPORARY
MACEDONIAN CRIMINAL LAW (ENGLISH
LANGUAGE)**

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Abstract: An attempt is made for possible systematizations of the delicts in the Roman law, with a presentation of the relevant sources, as well as a brief overview of the basic characteristics and the development of some of the delicts. Analysis of the contemporary forms with a focus on Macedonian legislation is also provided. Several conclusions are derived regarding the importance of roman criminal law for contemporary law.

Keywords: iniuria; Parricidium; homicidium; vis privata; vis publica.

**СРАВНЕНИЕ МЕЖДУ НЯКОИ ДЕЛИКТИ
СРЕЩУ ЛИЧНОСТТА
В РИМСКОТО ПРАВО И НЯКОИ ИНСТИТУТИ
НА СЪВРЕМЕННОТО МАКЕДОНСКО
НАКАЗАТЕЛНО ПРАВО (НА АНГЛИЙСКИ
ЕЗИК)**

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Резюме: Прави се опит за евентуална систематизация на деликтите в римското право с представяне на съответните източници, както и кратък преглед на основните характеристики и развитието на някои от деликтите. Анализират се съвременните форми с акцент върху македонското законодателство. Изведени са няколко заключения относно значението на римското наказателно право за съвременното право.

Ключови думи: iniuria; Parricidium; homicidium; vis privata; vis publica.

1. INTRODUCTION

In this paper, an attempt is made for possible systematizations of the delicts in the Roman law, with a presentation of the relevant sources,¹ as well as a brief overview of the basic characteristics and the development of some of the delicts. The issues of criminal responsibility, as well as the sanctions in the Roman law, because of their extensiveness, should be elaborated in a separate paper.

Similar to other institutes of Roman law, the rules of the delicts were built up through the evolution of court proceedings.² According to Kranjc, following stages in the development of the Roman criminal procedure, i.e. Roman criminal law, can be noticed: (1) the period of absence of courts (the so-called pre-decemviral period) when the trial was in the hands of the magistrates); (2) period of special courts.³

Hemmer, Wüst and Knecht point to the following periodization of Roman criminal law: the kingdom, the early republic, the late republic, and the empire.⁴

Esemin also agrees with the generally accepted position in the Roman law that for each category of delicts there was a special judgment body but also a separate procedure.⁵ Regarding the development of the criminal procedure in Roman history, he distinguishes several important moments: early courts (tribunals), when the judgment was brought either before the court of the king, with the assistance of a council, or with the help of other authorities (*quaestors* and the like); *questiones (perpetuae and extraordinariae)*, established with specific *leges*; and the availability of the judicial function to other persons (*equites*) be-

¹ Because of clarity, the sources of Roman law relevant to the delicts are given in Latin. The presented sources are edited by MOMMSEN, T. und KRÜGER, P. *Corpus Iuris Civilis*. 3 vols. Berlin, 1954; SCOTT, S. P. *The Civil Law*. Cincinnati, 1932; MOYLE, J. B. *The Institutes of Justinian*. Translated, with an Index, by ... 5. ed. Clarendon Press, 1913, and BAVIERA, J. *Fontes Iuris Romani Antejustiniani*. Vol. 2. Firenze, 1968.

² For details on the Roman criminal procedure see: BUZHAROVSKA, G. and NAUMOVSKI, G. *Criminal Procedure in Roman Law*. Code in honor of Professor Stefan Georgievski. Skopje, Faculty of Law "Iustinianus Primus", 2009, p. 623–644.

³ KRANJC, J. *Delicta in crimina v rimskem kazenskem pravu*. – In: *Zbornik znastvenih razprav*, XLII letnik.

⁴ HEMMER, K. E. und WÜST, A. Knecht: *Rechtsgeschichte*. Vol. 2. *Römische Rechtsgeschichte*. Stand 10, 2004, S. 69–118.

⁵ ESMEIN, A. *A History of Continental Criminal Procedure with Special Reference to France*. Little. Boston, Brown and Company, 1913, p. 13–18.

sides to the senators,⁶ which was practically made possible by the adoption of *Lex Aurelia Iudiciaria* in 70 BC.

2. THE CHARACTERISTICS OF SOME TYPES OF DELICTS

Starting from the fact that some of the delicts were at first *delicta privata* and then treated as *delicta publica* and thus had a dual regime of criminal prosecution, depending on the particular case, it seems that it is most purposefully if the delicts in Roman law are considered from the aspect of the good that they had violated. In addition to the presentation of the evolutionary review of the concrete delict, it will also enable the perception of its basic characteristics, as well as the predicted punishment.

We could talk about several groups of delicts in Roman law: delicts against the person, delicts against family and morals, delicts against property, and delicts against the state. Similar classifications are found in most of the researchers of Roman criminal law.⁷ At this occasion, the delicts against the person will be elaborated.

2.1. Concept of the delicts against the person

2.1.1. *Iniuria*

The *iniuria* delict (*violation, injustice*) derives from *Lex XII Tabularum*, which covers all types of violation, regardless of whether it is about personal or material goods. The eighth table contains a provision according to which "[...] if any one has inflicted upon another (*iniuria*), let the penalty be twenty-five asses."⁸

The concept of *iniuria* is further developed with the adoption of *Lex Cornelia de iniuriis* (81 BC). This law provided for *iniuria*, depending on the action: *pulsare* (beating), *verberare* (punching, causing pain) and *introire* (violent intrusion into one's home).⁹

⁶ Ibidem.

⁷ According to Robinson, the delicts in Roman law are divided into: (a) thefts and similar delicts; violence against the person; (b) sexual offenses; (c) offenses against the state; and (d) other offenses (against morality and public order) – see ROBINSON, O. F. *The Criminal Law of Ancient Rome*. Maryland, Johns Hopkins University Press, 1995.

⁸ *Lex XII Tab. 8.4: [...] si iniuriam faxsit, viginti quinque poenae <asses> sunt.*

⁹ BERGER, A. *Encyclopedic Dictionary of Roman law*. The American Philosophical Society, Philadelphia, 1953.

As examples of iniuria, the Lex Cornelia de iniuriis is also referred to as: the oral or public insult of the honor of the person (convicium), especially when it is made with loud yelling in the public (vociferatio), the writing of mocking articles and other derogative writings (libellus famosus),¹⁰ of the violation of morality, including the loss of sexual virginity (adtemptata pudicitia) and the like.¹¹

The very serious form of iniuria, the so-called *iniuria atrox*,¹² existed in cases where the delict was committed either in a public place or when the victim was a public official,¹³ i.e. it derived from the way it was committed.

Although it was created as a delictum privatum, gradually iniuria transformed itself into crimen, that is, it was processed in extraordinary procedure.¹⁴ This transformation of the iniuria occurred at the time of Sulla.¹⁵ Thus, in addition to the private lawsuit (actio iniuriarum aestimatoria), there was a possibility for public prosecution.¹⁶

2.1.2. Parricidium, homicidium

The terms parricidium and homicidium denoted *homicides* as delicts. The term *parricidium* is closely bound with the term "parricidas" which is contained in one law of Numa Pompilius, the second Roman king. This law contains a provision according to which "If someone consciously and with an evil

¹⁰ The cases of libellus famosus, possibly referred only to written work, a composition, or a published work. D. 47.10.5.9: *Si quis librum ad infamiam alicuius pertinentem scripserit composuerit ediderit dolove malo fecerit, quo quid eorum fieret, etiamsi alterius nomine ediderit vel sine nomine, uti de ea re agere liceret et, si condemnatus sit qui id fecit, intestabilis ex lege esse iubetur.*

¹¹ PUHAN, I. and POLENAK-AKIMOVSKA, M. Roman Law. Skopje, Ss. Cyril and Methodius University, 1991, p. 287.

¹² The term atrocitas denotes fear, horror, ruthlessness, cruelty.

¹³ Inst. 4.4.9: *Atrox iniuria aestimatur vel ex facto, veluti si quis ab aliquo vulneratus fuerit vel fustibus caesus: vel ex loco, veluti si cui in theatro vel in foro vel in conspectu praetoris iniuria facta sit: vel ex persona, veluti si magistratus iniuriam passus fuerit, vel si senatori ab humili iniuria facta sit, aut parenti patronoque fiat a liberis vel libertis; aliter enim senatoris et parentis patronique, aliter extranei et humilis personae iniuria aestimatur. nonnumquam et locus vulneris atrocem iniuriam facit, veluti si in oculo quis percussus sit. parvi autem refert, utrum patrifamilias an filiofamilias talis iniuria facta sit: nam et haec atrox aestimabitur.*

¹⁴ Inst. 4.4.10: *In summa sciendum est de omni iniuria eum qui passus est posse vel criminaliter agere vel civiliter. et si quidem civiliter agatur, aestimatione facta secundum quod dictum est, poena imponitur. sin autem criminaliter, officio iudicis extraordinaria poena reo irrogatur; hoc videlicet observando, quod Zenoniana constitutio introduxit, ut viri illustres quique supra eos sunt et per procuratores possint actionem iniuriam criminaliter vel persequi vel suscipere, secundum eius tenorem qui ex ipsa manifestius apparet.*

¹⁵ PUHAN, I. and POLENAK-AKIMOVSKA, M. Op. cit., p. 288.

¹⁶ Ibidem.

intention deprived a free man of his life, let him be parricidas".¹⁷ Separate bodies were in charge of parricidium, so-called quaestores parricidii, introduced with Lex XII Tabularum.¹⁸

The first systematized rules for the homicides in today's sense of the word (including assassinations, homicidal poisoning, and the like.) were contained in Lex Cornelia de sicariis et veneficis, brought by dictator Sulla (Lucius Cornelius Sulla Felix) in 81 BC.¹⁹ The punishment according to this law could be the expulsion to a desert island or the death penalty (usually executed by throwing to wild beasts). The type of punishment depended on the perpetrator's status.²⁰ It is interesting that the killing of deserters was not punishable.²¹

With the adoption of *Lex Pompeia de parricidio*, in 53 BC, parricidium became a valid term for all types of homicides. It contained several rules for parricidium. Parricidium had the character of crimen. *Lex Pompeia* contains extensive provisions for the homicides of members of the family listing almost all members of the cognate family and envisaging that these homicides are also subject to the rules of Lex Cornelia de sicariis et veneficis.²²

The convicted for the parricidium was punished with death, and the sentence was executed in the form of a ritual "as prescribed by ancestors." It was the so-called "poena cullei". The convicted man was first beaten with batons soaked with his blood, and then was placed in a bag made of wolf skin (culleus), together with a dog, cock, snake and monkey. After the bag was sewn, it was

¹⁷ *Si quis hominem liberum dolo sciens morti duit, parricidas esto.*

¹⁸ D. 1.2.2.23: *Quaestores [...] qui capitalibus rebus praeesent, [...] appellantur quaestores parricidii, quorum etiam meminit lex XII tabularum.*

¹⁹ D. 48.8.1: *Lege Cornelia de sicariis et veneficis tenetur, qui hominem occiderit: cuiusve dolo malo incendium factum erit: quive hominis occidendi furtive faciendi causa cum telo ambulaverit: quive, cum magistratus esset publicove iudicio praeesset, operam dedisset, quo quis falsum iudicium profiteretur, ut quis innocens conveniretur condemnaretur.*

²⁰ D. 48.8.3.5: *Legis Corneliae de sicariis et veneficis poena insulae deportatio est et omnium bonorum ademptio. Sed solent hodie capite puniri, nisi honestiore loco positi fuerint, ut poenam legis sustineant: humilliores enim solent vel bestiis subici, altiores vero deportantur in insulam.*

²¹ D. 48.8.3.6: *Transfugas licet, ubicumque inventi fuerint, quasi hostes interficere.*

²² D. 48.9.1: *Lege Pompeia de parricidiis cavetur, ut, si quis patrem matrem, avum aviam, fratrem sororem patrualem matrualem, patruum avunculum amitam, consobrinum consobrinam, uxorem virum generum socrum, vitricum, privignum privignam, patronum patronam occiderit cuiusve dolo malo id factum erit, ut poena ea teneatur quae est legis Corneliae de sicariis. Sed et mater, quae filium filliamve occiderit, eius legis poena adficitur, et avus, qui nepotem occiderit: et praeterea qui emit venenum ut patri daret, quamvis non potuerit dare.*

thrown into the sea. If there was no sea in the vicinity, the convict was thrown to the wild beasts.²³

Hommicidium is a later term for the homicides which is found in the imperial constitutions, but also appears in Cicero, in his speech for defense of the praetor Milo (Titus Annius Milo Papianus), charged with the murder of his political rival, Publius Clodius.²⁴ Although Cicero clearly pointed to the existence of the necessary defense, due to political pressure, the defendant was convicted. *Hommicidium* was treated as a crimen to which the rules of *Lex Cornelia de sicariis et veneficis* also applied, even in the time of Justinian.

Within the rules for the homicide, the degree of guilt is clearly determined in the sources of Roman law, i.e. the intent as the highest degree of guilt is differentiated, wherein the rule "*dolus pro facto accipitur*" (the intent is considered as the act is committed) was applied.²⁵ Moreover, in contrast to the responsibility contained in the contract law, in the case of homicides the principle "*culpa lata dolus est*" (the high negligence is intent, fraudulence) did not apply.²⁶ Accordingly, one may speak of the existence of a **negligent homicide** in Roman law.²⁷

The accomplices in the murder were treated equally, i.e. it did not matter whether it was a factual assassin or a person who ordered the assassination.²⁸

Mentally impaired persons (*infantes*) (*furiosi*), were released from the responsibility for murder because of absence of intention.²⁹ Miscarriage is also

²³ D. 48.8.3.9.pr. *Poena parricidii more maiorum haec instituta est, ut parricida virgis sanguineis verberatus deinde Culleo insuatur cum cane, Gallo Gallinaceo et Vipera et Simia: deinde in mare profundum Culleus lactatur. Hoc ita, si mare proximum sit: alioquin bestiis obicitur secundum divi Hadriani constitutionem.*

²⁴ Cicero, Pro Tito Annio Milone ad iudicem oratio, IV.11: *Silent enim leges inter arma; nec se expectari iubent, cum ei qui expectare velit, ante iniusta poena luenda sit, quam iusta repetenda. Etsi persapienter et quodam modo tacite dat ipsa lex potestatem defendendi, quae non hominem occidi, sed esse cum telo hominis occidendi causa vetat; ut, cum causa non telum quaereretur, qui sui defendendi causa telo esset usus non minis occidendi causa habuisse telum iudicaretur. Quapropter hoc maneat in causa, iudices, non enim dubito quin probaturus sim vobis defensionem meam, si id memineritis quod oblivisci non potestis, insidiatorem iure interfici posse.*

²⁵ D. 48.8.7: *In lege Cornelia dolus pro facto accipitur. Neque in hac lege culpa lata pro dolo accipitur. Quare si quis alto se praecipitaverit et super alium venerit eumque occiderit, aut putator, ex arbore cum ramum deiceret, non praclamaverit et praetereuntem occiderit, ad huius legis coercionem non pertinet.*

²⁶ Ibidem.

²⁷ Part of fragment D. 48.8.7 in translation in Macedonian would read: "If someone throws himself from a height and falls on another and kills him, or if a man tearing trees throws a branch without warning and thus kills a passerby, he will not be punished under this law (see *Lex Cornelia de sicariis et veneficis*)."

²⁸ D. 48.8.15. *Nihil interest, occidat quis an causam mortis praebet.*

regulated within the homicides, i.e, the deliberate *termination of pregnancy*, by the pregnant woman, that is, in the event when she "applies force to her abdomen to cause miscarriage". The sanction for this delict was expulsion, that is, deportation.³⁰

The rules for certain delicts against the body, such as *castration*, were also contained in Lex Cornelia, that is, apart from the rules of the homicides. Thus, conversion to eunuchs was forbidden.³¹ The circumcision was allowed only to Jews, otherwise it was treated as castrating.³²

2.1.3. *Vis privata, vis publica*

The term *vis* (force) in the Roman law has several meanings. It is found in *ius quod ad res pertinet* (property law), which speaks of the so-called *vis ac metus* (force and fear) as one of the forms of disagreement between the statement and the will of the parties. The definition of *vis ac metus* in this sense constitutes an illegal action over the body of the other contractual party in order to physically be forced to conclude an agreement that he would not conclude, i.e. to agree with something he did not like.³³

From the point of view of Roman criminal law, the concept of *vis* as a private delict is important, but also as one of the types of *crimina*. In the first case it is *vis privata*, and in the second case it is *vis publica*.³⁴ For *vis privata* and *vis*

²⁹ D. 48.12. *Infans vel furiosus si hominem occiderint, lege Cornelia non tenentur, cum alterum innocentia consilii tuetur, alterum fati infelicitas excusat.*

³⁰ D. 48.8.8. *Si mulierem visceribus suis vim intulisse, quo partum abigeret, constiterit, eam in exilium praeses provinciae exiget.*

³¹ D. 48.8.4.2: *Idem divus Hadrianus rescripsit: "Constitutum quidem est, ne spadones fierent, eos autem, qui hoc crimine arguerentur, Corneliae legis poena teneri eorumque bona merito fisco meo vindicari debere, sed et in servos, qui spadones fecerint, ultimo supplicio animadvertendum esse: et qui hoc crimine tenentur, si non adfuerint, de absentibus quoque, tamquam lege Cornelia teneantur, pronuntiandum esse. Plane si ipsi, qui hanc iniuriam passi sunt, proclamaverint, audire eos praeses provinciae debet, qui virilitatem amiserunt: nemo enim liberum servumve invitum sinentemve castrare debet, neve quis se sponte castrandum praebere debet. At si quis adversus edictum meum fecerit, medico quidem, qui exciderit, capitale erit, item ipsi qui se sponte excidendum praebuit".*

³² D. 48.8.11.pr. *Circumcidere iudaeis filios suos tantum rescripto divi PII permittitur: in non eiusdem religionis qui hoc fecerit, castrantis poena irrogatur.*

³³ D. 4.2.1: *Ait praetor: "Quod metus causa gestum erit, ratum non habebit". Olim ita edicebatur "quod vi metusve causa": vis enim fiebat mentio propter necessitatem impositam contrariam voluntati: metus instantis vel futuri periculi causa mentis trepidatio. Sed postea detracta est vis mentio ideo, quia quodcumque vi atroci fit, id metu quoque fieri videtur.*

³⁴ D. 50.17.152.pr. *Hoc iure utimur, ut quidquid omnino per vim fiat, aut in vis publicae aut in vis privatae crimen incidat. 1. Deicit et qui mandat. 2. In maleficio rati habitio mandato*

publica, the provisions of the following laws were applied: *Lex Plautia de vi*, *Lex Iulia de vi publica*, and *Lex Iulia de vi privata*.

It is considered that *vis privata* is a force used to carry out a robbery, by which *vis privata* was also similar to *furtum*, at least in terms of criminal prosecution. In the case of *vis privata*, the injured party raised one of the penal claims, *actio vi bonorum raptorum*,³⁵ a means that was also applied in robbery (*rapina*), precisely because of the similarity and equality of *vis visata* and *rapina*.

Vis publica, existed whenever there was at least one element associated with the Roman state in the execution of the delict, that is, the violence was directed in order to put pressure on a government authority, it was aimed to provoke riots, disturbing the court, even certain cases of abuse of the official position.

In the sources of post-classical law through interventions in previous sources, the basic difference between *vis privata* and *vis publica* is sometimes absent. However, it is known that for this delict, the sanction was exile, while in the time of Constantine the capital punishment was often applied.³⁶

3. INSTEAD OF A CONCLUSION

The analysis of the concept of Roman criminal law once again confirms the character of Roman law as a scientific discipline that is "anatomy" and the foundation of contemporary legal science. The contribution of Roman law to contemporary criminal law manifests itself not only on an etymological basis,³⁷ but it has a wider dimension.

Roman criminal law, in particular the provisions of Justinian's legislation, is a kind of "speculum iuris", i.e. a "legal mirror" of the criminal law in antiquity, created as an attempt for the eternal challenges of law in general, outlined by

comparatur. 3. In contractibus, quibus doli praestatio vel bona fides inest, heres in solidum tenetur.

³⁵ BERGER, A. Op. cit.

³⁶ Ibidem.

³⁷ The etymological component is also determinative in the term "criminal law". The terms "crimen" and "poena" are the basis for forming this name in most legal systems: criminal law, penal law, droit pénal, diritto penale, kriminalrecht (as a synonym for strafrecht), derecho penal, Ποινικό Δίκαιο and the like.

Ulpian: to live honestly, not to harm one another and giving everyone what belongs to him.³⁸

"Libri terribiles", due to the significance and their impact on further codification activities, can be considered as one of the first criminal codes in the world, incorporated in wider codification, that is, in Justinian's legislation.

As in other legal branches, and in the area of criminal law, Roman law is, as Goethe says, a duck-diver, sometimes visible on the lake surface, sometimes in the depths, but it is always here.³⁹ From time to time it's hidden, but it's never completely lost, so it can appear again, alive again.⁴⁰

³⁸ D. 1.1.10.2; Inst. 1.1.3: *iuris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere.*

³⁹ ECKERMANN, Johann Peter. *Gespräche mit Goethe in den letzten Jahren seines Lebens.* Bd. 1–11. Leipzig, 1836– 1848.

⁴⁰ *Ibidem.*