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A Few Remarks on Slaves and Criminal Law: Deliberations Based on D. 48, 2, 12, 4

Kilka uwag na temat niewolników i prawa karnego. Rozważania w oparciu o D. 48, 2, 12, 4

SUMMARY

The purpose of the article is to present the legal situation of a slave under Roman criminal law. The analysis conducted proves that the approach towards slaves changed along with the transformation of the government system of ancient Rome. In the Period of the Republic, criminal liability of slaves evolved in two directions. The *dominica potestas* was exercised by owners, as well as the collegial body – *tresviri capitales*. From the Principate period, Roman jurists were convinced that the legal status of a slave and a free person was identical under criminal law. The difference between these offenders was non-exercise of *leges criminales* with a penalty that would be inadequate for their legal status, or ruling and exercising of more severe penalties against slaves.

Keywords: slave; Roman criminal law; *leges criminales*

The legal status of slaves in *ius civile* was obvious to the ancient Romans. A *servus*[1] was perceived as a speaking tool (*instrumentum vocale*) and belonged to the category of *res mancipi*[2]. As an object of property rights, from the economic point of view, slaves played a significant role in Roman trade in goods. On the other hand, slaves contributed to increase in wealth of their master (*dominus*),

[1] There is extensive literature on slavery. Worth mentioning as an example is L. Schumacher, *Sklaverei in der Antike. Alltag und Schicksal der Unfreien*, München 2001, passim (= *Niewolnictwo antyczne: dzień powszedni i los niewolnych*, Poznań 2005, passim).

[2] See G. 2, 14a; A. Guarino, *Diritto privato romano*, Napoli 2001, p. 675.

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by committing legal acts[3] within the scope of the awarded *peculium*[4] or making statements of will while not being holders of *peculium*[5]. It is thus clearly visible that having a certain legal capacity, slaves participated actively in trade of goods to the direct benefit of their masters[6]. It should also be kept in mind, however, that a *servus* could also bring noxal liability[7] upon their owner by committing a delict.

The outline of the slave's legal status in private law, described above, differed greatly from that derived from public law. The purpose of this article is to provide a short description of the scope of liability of a slave, who has committed a public law offence.

In the Period of the Republic, jurisdiction over slaves committing crimes evolved in two different directions[8]. In the first place, it seemed that the competent authority would be the master (*dominus*), as the master's power over a slave (*dominica potestas*) went much further than that of a father over his children (*partia potestas*)[9]. A slave owner was not obliged to convene the *iudicium domesticum*[10] but had the authority to judge the offender, determine and exercise the penalty[11].

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[3] D. 50, 17, 133.

[4] Literature on *peculium* is very broad. Examples of Polish researchers dealing with the subject include: I. Żeber, *'Peculium' w terminologii wcześniejszego prawa rzymskiego*, „Acta Universitatis Wratislaviensis. Prawo" 1971, no. 34, pp. 117–125; idem, *A Study of the Peculium of a Slave in Pre-classical and Classical Roman Law*, Wrocław 1981; A. Zaborowska, *Powstanie 'peculium' ('permissus domini, constituere peculium, concessio peculii') w rzymskim prawie klasycznym*, „Studia Iuridica Toruniensia" 2010, vol. 7, DOI: https://doi.org/10.12775/SIT.2010.017, pp. 148–161; B. Sitek, *'Peculium' – the beginning of the concept of limited liability in civil law*, "Law and Forensic Science" 2015, vol. 10.2, pp. 218–230. Recently see A. Grebieniow, *Die Unkenntnis der Vermögenslage im Sklavenrecht am Beispiel des ‚peculium duplicis iuris' aus Ulp. 29 ed. D. 15.1.19.1–2*, [in:] *Acta diurna. Beiträge des IX. Jarhestreffens Junger Romanisten*, eds. B. Forschner, C. Willems, Wiesbaden 2017, pp. 119–138.

[5] See a detailed analysis of the scope of legal acts of persons subject to their *pater familias* in: A. Jurewicz, *Pater familias dominusve iussit. Umowy zawierane z podległymi władzy na podstawie polecenia zwierzchnika*, Olsztyn 2015, pp. 35–71.

[6] G. 1, 52.

[7] G. 4, 75; A. Guarino, *Diritto…*, p. 535; R. Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, New York 1996, pp. 916–917.

[8] O. Robinson, *Slaves and the Criminal Law*, "ZSS" 1981, vol. 98(1), DOI: https://doi.org/10.7767/zrgra.1981.98.1.213, p. 214 ff.

[9] Cf. W. Litewski, *Rzymski proces karny*, Kraków 2001, p. 12.

[10] W. Kunkel, *Das Konsilium im Hausgericht*, "ZSS" 1966, vol. 83, pp. 219–251 (= *Kleine Schriften. Zum römischen Strafverfahren und zur römischen Verfassungsgeschichte*, Weimar 1974, pp. 117–149); A. Balducci, *Intorno al iudicium domesticum*, "Archivio giuridico" 1976, vol. 191(1–2), p. 69 ff.; W. Mossakowski, *Iudicium domesticum w okresie republiki rzymskiej*, [in:] *Rodzina w społeczeństwach antycznych i wczesnym chrześcijaństwie. Literatura, prawo, epigrafika, sztuka*, ed. J. Jundził, Bydgoszcz 1995, p. 85 ff.; N. Donadio, *Iudicium domesticum: riprovazione sociale e persecuzione pubblica di atti commessi da sottoposti alla patria potestas*, "Index" 2012, vol. 40, pp. 176–196.

[11] The types of penalties inflicted upon slaves, on the basis of comedies by Plautus, have been summarized and presented by O. Jurewicz (*Niewolnicy w komediach Plauta*, Warszawa 1958, pp. 142–171). Cf. L. Schumacher, *op. cit*., pp. 276–291 (= pp. 261–275).

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Possibly, this mode of dealing with *servi* at the beginning of the Republic was the only one available[12].

It is worth noting that the procedure of *iudicium populi*[13], a trial before an assembly of the people, was not applicable to *servi*. Slaves were also unable to take advantage of the *provocatio ad populum*[14], applicable to Roman citizens, who questioned the rulings of *iudicia populi*[15]. Therefore, it is worth asking whether a slave could also be a party of a criminal procedure conducted before the *quaestiones perpetuae*[16], and in this context, it is necessary to quote a fragment by Cicero:

Cic. pro Clu.: 54, 148: *...'Qui eorum': quorum? videlicet, qui supra scripti sunt. Quid interest utro modo scriptum sit? Etsi est apertum, ipsa tamen lex nos docet. Ubi enim omnes mortales adligat ita loquitur, "qui venenum malum fecit", fecerit". Omnes viri, mulieres, liberi, servi in iudicium vocantur...*

In his deliberations on *lex Cornelia de sicariis et veneficis*[17], Cicero stated clearly that this regulation applied to all inhabitants of Rome, including slaves. Would this mean that it was possible[18] to subject *servi* to *quaestio de sicariis*? It

[12] Cf. O. Robinson, *The Criminal Law of Ancient Rome*, Baltimore 1995, p. 15.

[13] Eadem, *Slaves*..., p. 214.

[14] The institution of *provocatio ad populum* has been subject to extensive research. For example, see E. Tassi Scandone, *'Leges Valeriae de provocatione'. Repressione criminale e garanzie costituzionali nella Roma repubblicana*, Napoli 2008; E. Loska, *Provocatio ad populum*, [in:] *Salus rei publicae suprema lex. Ochrona interesów państwa w prawie karnym starożytnej Grecji i Rzymu*, eds. A. Dębiński, H. Kowalski, M. Kuryłowicz, Lublin 2007, pp. 127–135; P. Kołodko, *Ustawodawstwo rzymskie w sprawach karnych. Od Ustawy XII Tablic do dyktatury Sulli*, Białystok 2012, pp. 29–66.

[15] The functioning, role and organization of *iudicia populi* have been examined thoroughly in the literature on the subject. Numerous works dedicated to the subject include *exempli gratia*: B. Santalucia, *Alle origini del processo penale romano*, "Iura" 1984, vol. 35, pp. 47–72 (= *Altri studi di diritto romano*, Padova 2009, pp. 115–138); idem, *Il diritto penale e la codificazione decemvirale*, [in:] *Lineamenti di storia del diritto romano*, ed. M. Talamanca, Milano 1989, pp. 108–115; idem, *La giustizia penale in Roma antica*, Bologna 2013, p. 44 ff.; R.A. Bauman, *Crime and Punishment in Ancient Rome*, London 1996, pp. 7–14; W. Litewski, *Rzymski proces*..., pp. 32–36; R. Pesaresi, *Studi sul processo penale romano in età repubblicana*, Napoli 2005, passim; J. Harries, *Law and Crime in the Roman World*, Cambridge 2007, pp. 12–16.

[16] This has been stated by W. Litewski (*Rzymski proces*..., p. 45). A more moderate, but similar statement was made by O. Robinson (*The Criminal*..., p. 5).

[17] Thorough research in the field has been conducted recently by K. Amielańczyk (*Lex Cornelia de sicariis et veneficis. Ustawa Korneliusza Sulli przeciwko nożownikom i trucicielom 81 r. p.n.e.*, Lublin 2011, passim).

[18] There is also a source, which seems to prove the thesis of possible liability of a slave before *quaestio perpetua* – Val. Max. 8, 4, 2: *Contra P. Atinii servus Alexander, cum in hanc suspicionem C. Flavii equitis Romani occisi venisset, sexies tortus pernegavit ei se culpae adfinem fuisse, sed perinde atque confessus esset, a iudicibus damnatus et a L. Calpurnio triumviro in crucem actus est*. Although the text mentions a slave accused of killing an eques and convicted to death on the cross, concerns with regard to credibility of the Valerius Maximus – in particular, with regard to in-

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seems rather that Cicero wanted to indicate that a slave could also commit a crime categorized in this legal act, which did not necessarily mean he would stand before the standing court. It is known that offenders were not always treated in the same manner, and only some of them were tried by the *quaestio*, while the criteria for choice of the procedure are not known[19].

We should also keep in mind that every standing court (*quaestio perpetua*) issued rulings only to determine whether the defendant is guilty, while the criminal sanction was defined in the proper *lex* (sometimes passed in the form of a *plebiscitum*)[20], which established the specific *quaestio perpetua*. It is also of significance that the standing court could not inflict the death penalty[21] on the convict, as this criminal sanction was not provided for in these acts (or *plebiscita*)[22]. Typical punishments of the Period of the Republic, inflicted upon convicts by the standing court[23], included exile (*exilium*)[24], infamy, *interdictum aquae et ignis* or pecuniary sanctions, among which practically none could be applied to a slave.

Therefore, it seems that in the Period of the Republic, *servi* were not subject to *quaestiones perpetuae*. Obviously, the following question arises: Was there any other body competent to judge and inflict punishment upon this group of offenders?

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formation on the criminal procedure – make it impossible to assume without a shadow of doubt that a standing court (*quaestio perpetua*) was the competent authority to inflict punishment upon slaves. Sf. O. Robinson, *Slaves…*, p. 216.

[19] Cf. *ibidem*, pp. 133–134.

[20] Cic, *Sull*. 63: *...Damnatio est enim iudicum, quae manebat, poena legis, quae levabatur…*; D. 50, 16, 131, 1. See W. Litewski, *Rzymski proces…*, p. 107; idem, *Podstawowe wartości prawa rzymskiego*, Kraków 2001, p. 179; K. Amielańczyk, *Crimina legitima w rzymskim prawie publicznym*, Lublin 2013, p. 48; A. Chmiel, *Przyznanie się oskarżonego do winy w rzymskim procesie karnym*, „Zeszyty Naukowe KUL" 2017, vol. 60(3), p. 472.

[21] G. Valditara, *Riflessioni sulla pena nella Roma repubblicana*, Torino 2015, p. 54. K. Amielańczyk (*Lex Cornelia…*, pp. 161–169) has presented interesting remarks on the interpretation of *poena capitis* and *interdictum aquae et ignis* in the context of *poena legis Corneliae*.

[22] It is also worth mentioning that *provocatio ad populum* could not be used when a death penalty was exercised by *quaestio perpetua*. It would be against the Republican tradition to refuse a citizen the last resort in the case of ruling of *poena capitis*. See J.L. Strachan-Davidson, *Problems of the Roman Criminal Law*, vol. 2, Oxford 1912, pp. 43–50; B. Santalucia, *Studi di diritto penale romano*, Roma 1994, pp. 238–239; K. Amielańczyk, *Lex Cornelia…*, p. 163.

[23] See O. Robinson, *Slaves…*, p. 214; eadem, *The Criminal…* p. 6. Cf. B. Santalucia, *La giustizia penale…*, p. 75.

[24] It was rather about voluntary exile (*exilium voluntarium*). More information about this institution: G. Crifò, *Ricerche sul' "exilium" nel periodo repubblicano*. *Parte prima*, Milano 1961; idem, *L'esclusione dalla città: altri studi sull'exilium romano*, Perugia 1985; E.L. Grasmück, *Exilium. Untersuchungen zur Verbannung in der Antike*, Paderborn–München–Wien–Zurich 1978; G.P. Kelly, *A History of Exile in the Roman Republic*, Cambridge 2006; M. Jońca, *Exilium jako przejaw humanitas w rzymskim prawie karnym okresu republiki*, [in:] *Humanitas grecka i rzymska*, ed. R. Popowski, Lublin 2005, pp. 191–203; idem, *The Scope of exilium voluntarium in the Roman Republic*, [in:] *La repressione criminale nella Roma repubblicana fra norma e persuasione*, ed. B. Santalucia, Pavia 2009, pp. 77–91.

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In the first place, it is necessary to mention here the *tresviri capitales*[25] (also known as *tresviri nocturni*), a collegial office established in the early 3rd century B.C., which, among other things, cared for peace and order during the night (thus the common name *tresviri nocturni*), who also had the jurisdiction over *servi*[26]. However, this was not a typical *iudicatio*, but rather a criminal-administrative mandate (*cöercitio*)[27], enabling the magistrate to respond to cases of violation of public order. It was probably used mainly to dispense justice for crimes committed by slaves.

In the period of the Empire, Roman jurists had no doubts as to the scope of criminal liability of *servi*. The starting point for further analysis will be the following source fragment:

D. 48, 2, 12, 3 (*Venuleius Saturninus libro secundo de iudiciis publicis*): *Si servus reus postulabitur, eadem observanda sunt, quae si liber esset, ex senatus consulto Cotta et Messala consulibus.*

The author of this text – Venuleius Saturninus – was a very mysterious jurist, who lived in the mid-2nd century A.D. We know little about his life or political activity[28]. Nevertheless, he was probably a good jurist[29], since the compilers of Justinian decided to quote in *Digesta Iustiniani* the above fragment of his book *De iudiciis publicis*[30], consisting of three volumes[31].

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[25] Th. Mommsen, *Römisches Strafrecht*, Leipzig 1899, p. 298 ff.; O. Jurewicz, *op. cit*., pp. 160–161; A.H.M. Jones, *The Criminal Courts of the Roman Republic and Principate*, Oxford 1972, p. 26 ff.; O. Robinson, *Slaves*..., p. 214; F. Càssola, L. Labruna, *Gli edili, i questori, c.d. vigintisextiviri*, [in:] *Lineamenti di storia*..., p. 175; M. Kuryłowicz, *Tresviri capitales oraz edylowie rzymscy jako magistratury policyjne*, „Annales UMCS sectio G (Ius)" 1993, vol. 40, pp. 71–79; W. Nippel, *Public Order in Ancient Rome*, Cambridge 1995, pp. 22–26; K. Amielańczyk, *Crimina legitima*..., p. 177.

[26] M. Jońca, *Kogo boi się Sozja? Tresviri capitales w republikańskim Rzymie*, [in:] *Thaleia. Humor w antyku*, ed. G. Malinowski, Wrocław 2004, pp. 173–180. See also C. Cascione, *Tresviri capitales. Storia di una magistratura minore*, Napoli 1999, pp. 85–117.

[27] W. Nippel, *op. cit*., pp. 5–12; P. Kołodko, *Rzymska terminologia stosowana na określenie narzędzi używanych podczas chłosty*, „Zeszyty Prawnicze" 2006, no. 6.2, DOI: https://doi.org/10.21697/zp.2006.6.1.08, p. 121, footnote 1; F.K. Drogula, *Commanders and Command in the Roman Republic and Early Empire*, Chapel Hill 2015, p. 99 ff.

[28] See W. Litewski, *Jurysprudencja rzymska*, Kraków 2000, p. 155. Cf. W. Kunkel, *Herkunft und soziale Stellung der römischen Juristen*, Graz–Wien–Köln 1967, p. 181 ff.

[29] It is necessary to keep in mind that the works of Venuleius Saturninus were addressed to students and practitioners of law – probably the system of justice and the imperial officials. See R.A. Bauman, *op. cit*., p. 117.

[30] More information on the work *De iudiis publicis* see L. Fanizza, *Giuristi, crimini, leggi nell'età degli Antonini*, Napoli 1972, pp. 15–89; S. Pietrini, *I libri de publicis iudiciis di Venuleio Saturnino. Aspetti metodologici e problemi di autenticità*, [in:] *Giuristi e officium. L'elaborazione giurisprudenziale di regole per l'esercizio del potere fra II e III secolo d.c.*, ed. E. Stolfi, Napoli 2011, p. 47 ff.

[31] In his work *De iudiciis publicis*, Venuleius Saturninus focused in the first place on procedural issues to subsequently present the individual *leges criminales*. Therefore, his work is of a material and procedural nature, used by jurists as one of the models when compiling works on criminal law. More on this issue, see A. Chmiel, *Dzieła naukowe jurystów rzymskich w zakresie prawa karnego*,

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The fragment quoted indicates clearly that the legal status of a slave in criminal law was similar to that of free persons[32], practically from the beginning of the Principate period. It is worth mentioning here that the systemic reform, originated by Octavian August, was followed by changes in the Roman criminal law. These took the form of gradual withdrawal from *quaestiones perpetuae* on behalf of a new procedure outside the order (*cognitio extra ordinem*)[33] set by the *leges iudiciorum publicorum*. An active role in this process was played by the jurisprudence, particularly active in the period of the Severan dynasty. Another factor of great significance were the *senatus consulta*[34], passed in the Early Principate, which, on the other hand, resulted from the diminishing role of assemblies. Most resolutions of the senate[35] concerned interpretation of the existing criminal law[36], established back in the Period of the Republic.

The consuls mentioned by Venuleius Saturninus – Marcus Aurelius Cotta and Marcus Valerius Messala Messalinus[37] – were brothers, serving as consuls in 20 A.D.[38], when *s.c. Messalianum* was passed. The two consuls are mentioned in known sources two more times: once in the context of liability of proconsuls for offences committed by their wives (D. 1, 16, 4, 2) and once with regard to criminal liability of a person providing dishonest legal assistance[39] on the basis of *lex Cornelia de falsis* (Coll. 8, 7, 1). A great majority of authors[40] quoting *s.c. Messalianum*, focus on presentation of its content, which has been preserved until our times only fragmentarily, from the

„Studia Iuridica Lublinensia" 2016, vol. 24(3), pp. 156–158, 160, passim. Cf. L. Fanizza, *op. cit*., pp. 34–89.

[32] See O. Robinson, *Slaves…*, pp. 216–217. A slave was held liable for a crime, but the criminal sanction was different from a situation, in which a free citizen was punished for the same offence – cf. D. 48, 19, 16, 3. A short analysis of this fragment has been presented recently by K. Amielańczyk (*Crimina legitima…*, p. 92).

[33] This subject has been analyzed lately by K. Amielańczyk (*Cognitio extra ordinem w rzymskim prawie publicznym karnym*, „Studia Iuridica Lublinensia" 2016, vol. 25(3), DOI: https://doi.org/10.17951/sil.2016.25.3.41, pp. 41–51). Cf. J. Harries, *op. cit*., pp. 21–27; B. Santalucia, *La giustizia penale…*, p. 91.

[34] The issue of significance of *senatus consulta* for development of Roman criminal law has been discussed by B. Santalucia (*Diritto e processo penale nell'antica Roma*, Milano 1989, p. 95 ff.).

[35] G. 1, 4: *Senatus consultum est, quod senatus iubet atque constituit; idque legis vicem optinet, quamvis [de ea re] fuerit quaesitum*.

[36] K. Amielańczyk, *Z historii ustawodawstwa rzymskiego w sprawach karnych. Próba periodyzacji*, „Acta Universitatis Wratislaviensis. Prawo" 2008, no. 3063, p. 21.

[37] It is worth mentioning here that the consul was the father of Messalina, the wife of Emperor Claudius. See Suet., *Claud*. 24.

[38] P. von Rohden, s.v. *Aurelius (110)*, „RE" 1986, Bd. 2.2, col. 2489–2490.

[39] See K. Amielańczyk, *Crimina legitima…*, p. 191.

[40] E.E. Kocher, *Überlieferter und ursprünglicher Anwendungsbereich der „Lex Cornelia de Falsis"*, München 1965, pp. 50–51; A. Guarino, *Storia del diritto romano*, Napoli 1969, p. 450; T. Spagnuolo Vigorita, *Secta temporum meorum. Rinnovamento politico e legislazione fiscale agli inizi del principato di Gordiano III*, Palermo 1978, p. 35; V. Giuffrè, *Il "diritto penale" nell'esperienza*

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perspective of its impact on broadening of the definition of forgery (*crimen falsi*). Taking into account the condition of preserved sources on *s.c. Messalianum*, this perception of the core of the issue seems to be right and proper. The compilers of Justinian, selecting the source materials preserved in *Digesta Iustiniani*, decided that information on broadening of the definition of *crimen falsi* were more valuable than those referring to the legal status of slaves in criminal law. We can hardly suspect that in 20 A.D. two *senatus consulta* were passed, one of them dedicated to the new definition of *crimen falsi*, and the other focusing on procedural issues, including the possibility of judging slaves before the *cognitio extra ordinem*. Therefore, we must exclude the possibility of existence of two documents bearing the same name and assume instead that the basic objective of *s.c. Messalianum* was to broaden the definition of forgery, while "by the way", the resolution of the senate contained an *expressis verbis* description of the scope of criminal liability of slaves, as well as liability of proconsuls for crimes conducted by their wives.

As the quoted fragment by Venuleius Saturninus indicates clearly the identical status of slaves and free persons[41], it is a good idea to analyze the actual scope of criminal liability of *servi.* Worth analyzing in this context is another fragment of text by Venuleius Saturninus:

D. 48, 2, 12, 4 (*Venuleius Saturninus libro secundo de iudiciis publicis*): *Omnibus autem legibus servi rei fiunt excepta lege iulia de vi privata, quia ea lege damnati partis tertiae bonorum publicatione puniuntur, quae poena in servum non cadit. idemque dicendum est in ceteris legibus, quibus pecuniaria poena irrogatur vel etiam capitis, quae servorum poenis non convenit, sicuti relegatio. item nec lex Pompeia parricidii, quoniam caput primum eos adprehendit, qui parentes cognatosve aut patronos occiderint: quae in servos, quantum ad verba pertinet, non cadunt: sed cum natura communis est, similiter et in eos animadvertetur. item Cornelia iniuriarum servum non debere recipi reum cornelius sulla auctor fuit: sed durior ei poena extra ordinem imminebit.*

This fragment contains a lot of valuable informations on the legal status of slaves in criminal law. As a rule, the jurist assumed liability of *servi* on the basis of all *leges criminales*[42], to then move on to discussing exceptions to this rule. Such presentation

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romana. Profili, Napoli 1989, p. 71; O. Robinson, *The Criminal…*, p. 37; K. Amielańczyk, *Crimina legitima…*, p. 191.

[41] In development of Roman criminal law, offenders being free citizens were further divided into *honestiores* and *humiliores*. The origins of this dichotomy emerged in the 2nd century A.D., under the rule of Emperor Hadrian. Cf. A.H.M. Jones, *op. cit*., p. 109 ff.; K. Amielańczyk, *Rzymskie prawo karne w reskryptach cesarza Hadriana*, Lublin 2006, p. 234 ff.

[42] The catalog of *leges criminales* has been presented by Macer in D. 48, 1, 1: *…lex Iulia maiestatis, lex Iulia de adulteris coercendis, Lex Cornelia de sicariis et veneficis, lex Pompeia de parricidii, lex Iulia peculatus, lex Cornelia de testamentis, lex Iulia de vi privata, lex Iulia de vi publica, lex Iulia ambitus, lex Iulia reptundarum, lex Iulia de annona*. A synthetic discussion of these legal acts has been presented by K. Amielańczyk (*Z historii ustawodawstwa rzymskiego…*, pp. 16–20). Cf. Fanizza, *op. cit.*, pp. 22–32. It is also worth noting that the list provided by this jurist lacks *lex*

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of arguments must have been much more accessible for readers of *De iudiciis publicis* than enumeration of all legal acts defining criminal liability of slaves. It seems that this part of the jurist's disquisition, taking into account its present shape delivered in *Digesta Iustiniani*, should be free from any suspicions of interpolation.

Venuleius Saturninus assumed that the type of criminal sanction against the perpetrator would be the criterion excluding liability of *servi* for specific *crimen*[43]. Therefore, slaves were not subject to *lex Iulia de vi privata*, as this legal act provided for confiscation of a third of one's property[44], and a *servus* had no legal capacity and thus could not have any property. This statement, however, is inconsistent with another fragment of *Digesta Iustiniani* written by Macer[45], which refers to the possibility of active participation and use of violence by a slave. How can we explain this divergence? It seems that the compilers of Justinian – or the legal practice at the time – found it difficult to distinguish clearly between *vis publica* and *vis privata*[46]. Moreover, *cognitio extra ordinem* started to apply to slaves more broadly, extending beyond the scope of their criminal liability defined in the Period of the Republic[47]. Therefore, Macer's text should not be read as undermining the principle of liability imposed upon slaves for crimes committed by them, delivered by Saturninus, but rather as an addition to it. Discretionary authority[48] of the system of justice, broadened within the framework of *cognitio extra ordinem*, encompassed slaves committing criminal offences, for which they could not be tried according to the original legal act.

Continuing his thought, Venuleius Saturninus referred to other legal acts (*ceteris legibus*), which provided for criminal sanctions that were not adequate for the legal status of the slave[49]. It is worth understanding that the jurist did not mention any of these *exempli gratia*. Taking into account the list of *leges criminales*, it should be

Fabia de plagiariis, although the compilers dedicated title 15 of volume 48 of *Digesta Iustiniani* to *crimen plagii*. An attempt to explain why *lex Fabia de plagiariis* is missing from Macer's list has been made by K. Amielańczyk (*Crimina legitima…*, pp. 265–266).

[43] L. Fanizza, *op. cit.*, pp. 60–66.

[44] See D. 48, 7, 1.

[45] D. 48, 7, 3 (*Macer libro primo publicorum*): *pr. Nec interest, liberos an servos et suos an alienos quis ad vim faciendam convocaverit. 1. Nec minus hi, qui convocati sunt, eadem lege tenentur. 2. Sed si nulli convocati nullique pulsati sint, per iniuriam tamen ex bonis alienis quid ablatum sit, hac lege teneri eum qui id fecerit*.

[46] See K. Amielańczyk, *Crimina legitima…*, p. 296.

[47] Cf. O. Robinson, *Slaves…*, p. 217.

[48] F.M. De Robertis, *Arbitrium iudicantis e Statuizioni imperiali. Pena discrezionale e pena fissa nella cognitio extra ordinem*, "ZSS" 1939, vol. 59(1), DOI: https://doi.org/10.7767/zrgra.1939.59.1.219, pp. 219–260.

[49] It is worth noting that apart from crimes codified in the *leges criminales*, and then their catalog broadened by the creative role of the imperial jurisprudences and constitutions, slaves could also commit other prohibited acts, which, due to the nomenclature, cannot be referred to as crimes. These included, e.g., an accusation against their own master, made to the city prefect (D 1, 12, 1, 8), a freed

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noted that the list of these was not very long. Why, then, is the jurist's comment so laconic? We might answer this question by hypothesizing that Venuleius Saturninus did not intend to write a long text with an enumeration of *leges* and the associated sanctions. It was sufficient to quote those penalties, which were not adequate to the legal status of a slave, that is, *poena pecuniaria* or *relegatio*[50]. When passing a judgement concerning a slave, the judge knew, which *leges criminales* were not applicable. Moreover, it is necessary to keep in mind that ancient Romans distinguished between *crimina communia* and *crimina propria*[51]. The concept behind this distinction seems to be the core of the jurist's statement – it was obvious to the jurist that he should not focus on *crimen ambitus*[52] or *crimen repetundarum*[53], as slaves had no capacity of committing these. The same could be said about *crimen annonae*[54] due to the sanction introduced by *lex Iulia de annona*, that is, a fine in the amount of 20 aurei[55].

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slave being prohibited by a relegated person to stay in Rome (D. 48, 22, 13), a prohibition to serve in the military (D. 49, 16, 11). More on the subject, see O. Robinson, *Slaves*…, p. 219.

[50] More on *relegatio*, see G.P. Kelly, *op. cit.*, pp. 65–67; A. Washburn, *Banishment in the Later Roman Empire 284–476 CE*, New York 2013, passim.

[51] See W. Litewski, *Podstawowe wartości*…, p. 173.

[52] *Crimen ambitus*, committed in the Period of the Republic, have been discussed in many works: L. Fascione, *Crimen e quaestio ambitus nell'età repubblicana. Contributo allo studio del diritto criminale repubblicano*, Milano 1984, passim; T. Wallinga, *'Ambitus' in the Roman Republic*, „Revue Internationale des Droits de L'antiquité" 1994, vol. 41, pp. 411–442; P. Nadig, *Ardet ambitus. Untersuchungen zum Phänomen der Wahlbestechungen in der römischen Republik*, Frankfurt am Main 1997, passim; W. Wołodkiewicz, *„Okręcanie" wyborców – czyli crimen ambitus w prawie rzymskim*, „Palestra" 2007, no. 11–12, pp. 121–124; B. Sitek, *«Convivium», «cena» i «donum munus» w antycznym Rzymie a współczesne dylematy korupcji wybroczej («crimen ambitus»)*, „Studia Prawnoustrojowe" 2010, no. 11, pp. 5–15, P. Kołodko, *Ustawodawstwo rzymskie*…, pp. 67–104. Lately, research on *crimen ambitus* in the Period of the Empire has been conducted by an Italian researcher A. Trisciuoglio (*Studi sul crimen ambitus in età imperiale*, Milano 2017, passim). See also O. Robinson, *The Criminal*…, pp. 84–86; K. Amielańczyk, *Crimina legitima*…, pp. 329–336.

[53] An extensive study of *crimen repetundarum* has been published by an Italian Romanist C. Venturini (*Studi sul «crimen repetundarum» nell'età repubblicana*, Milano 1979, passim; idem, *Concussione e corruzione: un intereccio impliacto*, [in:] *Au-Delà des Frontières. Mélanges de droit romain offerts à Witold Wołodkiewicz*, eds. M. Zabłocka, J. Krzynówek, J. Urbanik, Z. Służewska, vol. 2, Varsovie 2000, pp. 1004–1024; idem, *Il crimen repetundarum nell Verrine. Qualche rilievo*, [in:] *La repressione criminale*…, pp. 317–338). See also O. Robinson, *The Criminal*…, pp. 81–82; J. Harries, *op. cit.*, pp. 61–70; P. Kołodko, *Ustawodawstwo rzymskie*…, pp. 104–187; K. Amielańczyk, *Crimina legitima*…, pp. 249–264.

[54] More about *crimen annonae*: E. Höbenreich, *Annona. Juristische Aspekte der stadtrömischen Lebensmittelversorgung im Prinzipat*, Graz 1997, passim. Cf. M. Kuryłowicz, *Przestępstwa spekulacji contra annonam w prawie rzymskim*, „Folia Societatis Scientiarum Lublinensis" 1993, vol. 34, pp. 5–14; idem, *Crimen artioris annonae*, „Res Historica" 2010, vol. 29, pp. 73–80; K. Amielańczyk, *Crimina legitima*…, pp. 309–314; O. Robinson, *The Criminal*…, p. 89.

[55] D. 48, 12, 2, 1–2. The penalty for *crimen annonae* in the Principate period was made even harsher – see K. Amielańczyk, *Crimina legitima*…, p. 314.

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The most interesting part of the text is dedicated to *lex Pompeia de parricidiis*[56]. Venuleius Saturninus stated clearly that *servi* were excluded from the scope of this legal act, as it pertained to protection of the closest family members and patrons. Obviously, slaves had nothing to do with any of the two groups of subjects protected by *lex Pompeia*. The further part of the text, referring to this act, seems even more mysterious. The phrase *natura communis*, used by the jurist, suggests an interpolation[57], although he also presents a more balanced stance[58]. How should we then understand this part of his statement: *sed cum natura communis est, similiter et in eos animadvertetur*? It seems that the jurist used an analogy here to show that, in fact, if slaves are treated as equal to free citizens on the basis of *ius naturale*[59], their criminal liability should not be any different[60]. Therefore, there is no reason not to inflict upon a slave the penalty, which was commonly used in the jurist's times – the sack penalty (*poena cullei*)[61]. The slave did not have to be the direct perpetrator, which, in fact, was based on the catalog of individuals subject to legal protection, but rather participate in the trial as a co-perpetrator[62]. It is also necessary to keep in mind that ancient Romans did not define a general concept of participation in a crime[63]. In such a case, an argument based on an analogy would be that there was no significant difference – in the period of the Empire – between perpetrators being slaves or free citizens. Both groups faced the consequences of their actions, and discretionary authority of the judges allowed them to punish *servi* more severely.

The last part of the analyzed fragment refers to *lex Cornelia de iniuriis*. *Iniuria*[64] went through a substantial revolution in Roman law – from a delict in private law

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[56] More on *parricidium*, see M. Jońca, *Parricidium w prawie rzymskim*, Lublin 2008, passim.

[57] R.A. Bauman, *op. cit*., p. 117; M. Jońca, *Parricidium…*, p. 149. Lately, an extensive article on interpolations and their significance in Roman law has been written by F.J. Andrés Santos (*Brevissima storia della critica interpolazionistica nelle fonti giuridiche romane*, "Revista de Estudios Histórico-Jurídicos. Sección Derecho Romano" 2011, no. 33, DOI: https://doi.org/10.4067/S0716-54552011000100002, pp. 65–120).

[58] P. Strace, *Venuleio, il parricidio, i servi, la natura*, [in:] *Testi e problemi di giusnaturalismo romano*, eds. D. Mantovani, A. Schiavone, Pavia 2007, p. 504 ff.

[59] D. 50, 17, 32 (*Ulpianus libro quadragensimo tertio ad Sabinum*): *Quod attinet ad ius civile, servi pro nullis habentur: non tamen et iure naturali, quia, quod ad ius naturale attinet, omnes homines aequales sunt*.

[60] O. Robinson, *Slaves…*, p. 217; R.A. Bauman, *op. cit*., pp. 117–118; M. Jońca, *Parricidium…*, p. 149. Cf. L. Fanizza, *op. cit*., pp. 65–66.

[61] M. Jońca, *Parricidium…*, p. 150.

[62] About the issue of co-perpetration in the context of *parricidium*, see *ibidem*, p. 138 ff. Cf. K. Amielańczyk, *Crimina legitima…*, p. 230 ff.

[63] W. Litewski, *Podstawowe wartości…*, p. 170. See also K. Amielańczyk, *Crimina legitima…*, pp. 153–157.

[64] Recently, thorough research on *iniaria* has been conducted by D. Nowicka (*Zniesławienie w prawie rzymskim*, Wrocław 2013, passim).

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to a public law offence. This dual preception of *iniuria* had some far-reaching consequences, in particular in the trial procedure, where public and private law components intersected one another. In the case of a *crimen iniuriae*, there was no *accussatio*, but a private *actio iniuriarium*[65]. Moreover, the penalty for this offence provided in *lex Cornelia de iniuriis* was a financial one (a fine)[66], and, as it had been indicated by Venuleius Saturninus, *poena pecuniarnia* could not apply to slaves. A question thus arises: Why the jurist mentioned this act, if *servi* could not be tried independently on its basis? The answer can be found in the last sentence of Venuleius Saturninus's statement. It seems that the legal expert wanted to make it clear that in the Republican version of *legis Corneliae de iniuriis*, there was no such thing as liability of slaves – however, it was much different in the case of *cognitio extra ordinem*. This would prove, in fact, that discretionary authority of the judge reached much beyond typification of *crimen iuniuriae* in its original Republican version. This argument may be supported by preserved mentions in legal sources[67], which confirm the application of *cognitio extra ordinem* towards *servi*. The available literature does not mention interpolation in the last sentence of this statement; therefore, assuming the text is authentic, it can be stated that public law liability of slaves for *crimen iuniuriae* has its roots in the 2nd century A.D.

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Summarizing the above deliberations, it should be underlined that the legal status of slaves in Roman law was of a dual nature. From the perspective of *ius civile*, they were treated as *res mancipii*, and having *peculium* at their disposal (or being devoid of it), they could execute legal acts to improve the financial situation of their owner.

The legal status of slaves in criminal law underwent a more significant evolution. Apart from jurisdiction of owners based on *dominica potestas*, slaves could be tried for their crimes by *tresviri capitales*. They were excluded from jurisdiction of *quaestiones perpetuae*.

From the Principate period, slaves, like free persons, become a party to the criminal procedure. There were some exclusions from application of *leges criminales* in

[65] K. Amielańczyk, *Crimina legitima…*, p. 201.

[66] O. Robinson, *The Criminal…*, p. 51.

[67] See D. 47, 10, 45 (*Hermogenianus libro quinto epitomarum*): *De iniuria nunc extra ordinem ex causa et persona statui solet, et servi quidem flagellis caesi dominis restituuntur, liberi vero humilioris quidem loci fustibus subiciuntur, ceteri autem vel exilio temporali vel interdictione certae rei coercentur*; PS. 5, 4, 22: *Servus, qui iniuriam aut contumeliam fecerit, si quidem atrocem, in metallum damnatur, si vero levem, flagellis caesus sub poena vinculorum temporalium domino restituitur*. Cf. D. Nowicka, *op. cit.*, p. 232 footnote 824 and pp. 243–245.

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their case, due to the penalty being inadequate to their status (*poena pecuniaria*). On the other hand, the discretionary authority of judges, extended in the Empire Period, allowed for creative interpretations of the Republican criminal legislation, particularly with regard to penalties inflicted upon slaves.

Roman jurists had no doubts as to whether slaves could commit crimes categorized in the *leges criminales*. Their legal status was equal to that of free persons with a single exception – penalties inflicted upon them were much harsher in comparison with other perpetrators.

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STRESZCZENIE

Artykuł ma na celu przedstawienie sytuacji prawnej niewolnika na gruncie rzymskiego prawa karnego. Przeprowadzone rozważania dowodzą, że podejście do niewolników ulegało zmianie wraz z ewolucją systemu władzy w starożytnym Rzymie. W okresie republiki odpowiedzialność karna niewolników kształtowała się dwutorowo. Jurysdykcję w ramach *dominica potestas* wykonywali ich właściciele, a także kolegialny urząd – *treviri capitales*. Juryści rzymscy, począwszy od epoki pryncypatu, nie mieli żadnych wątpliwości, że status prawny niewolnika i osoby wolnej był na gruncie prawa karnego tożsamy. Różnica dotyczyła niestosowania wobec nich *leges criminales* z sankcją karną nieadekwatną do ich statusu prawnego czy też orzekania i wykonywania surowszej kary wobec niewolnika.

Słowa kluczowe: niewolnik; rzymskie prawo karne; *leges criminales*

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