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## PURPOSES AND FUNCTIONS OF PUBLIC PUNISHMENT IN ROMAN LAW IN THE PERSPECTIVE OF JUSTINIAN'S CODIFICATION

1. In both private law and public law, the relationship between crime and punishment was perceived by the ancient Romans as obvious and somewhat natural. Where was crime there was also punishment. Punishment should also be inevitable. The point was that no one who had committed a crime (*maleficium*) could evade responsibility. The postulate of inevitability of criminal repression, so important in the contemporary criminal law, was already put forward by the most eminent Roman jurists of the Principate period. Julian urged: *cum neque impunita maleficia esse oporteat*. Ulpian accompanied him: *expectatur impunita sint maleficia*.

One of the most important issues that could be of interest to anyone wishing to learn the specificity of the Roman punishment policy is the question of how the Romans perceived punishment for a public crime – *crimen* in terms of its objectives and functionality. For the sake of terminological accuracy, it should be noted that “the objectives of punishment” and “the functions of punishment”, although might seem synonymous in common understanding, will be differentiated to maintain terminological precision and will be used for describing the Roman realities in the way the contemporary criminal law scholars do. Therefore, the objectives of the punishment will generally be referred to when discussing the tasks defined by a particular imperial legislature, namely, for the purposes of this study, Emperor Justinian in his criminal policy. Therefore, the objectives of punishment are subjectively expected and desirable effects of a penalty as perceived by the emperor who introduces specific penal-law

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regulations. Legal scholars (the jurisprudence) supporting the emperor could also formulate, on the basis of applicable regulations, the objectives which, in their opinion, should be achieved by the punishment sentenced by the judge. Thus, the objectives of punishment should always be known and intended. On the other hand, one can speak of the functions of the Roman public punishment when the possible objectified social effects of certain penalties present in the system may be decoded from Roman sources by the mere fact that they are provided for in the system and by the fact that they are applied in practice. Using contemporary criminal terminology, first of all, it would be worth verifying, in terms of their presence under Roman law, the preventive (deterrent) function, the educational (rehabilitation) function, the elimination function, or the retaliatory function of public punishment. Since the Roman times until now, it has been obvious that both the objectives and functions of punishment should converge, and the subjective legislator's expectations regarding the impact of penalties being imposed should materialise in their actual functionality.

Due to the short form, this study is not intended to exhaust the subject. It rather constitutes a collection of a few reflections that come up when reading only one source of knowledge of Roman law, namely *Justinian's Codification*. Book 48 of the *Digest* of Emperor Justinian especially allows for some interesting insights into the objectives and functions of public punishment. But it is neither my intention nor ambition to demonstrate the relationship between Christianity and the Roman criminal law of Justinian's era. I presume that such a task would be exceptionally difficult, perhaps even a chancy one. Some of the influence of Christianity on criminal legislation could probably be demonstrated (as in the case of religious crimes), but the fundamental framework of the criminal law, named after Christian Emperor Justinian claimed to be, was shaped by the pre-Christian tradition.

2. Before taking a closer look at the issue of functionality of punishment present in *Justinian's Codification*, it is worthwhile to spare a few words on this pre-Christian tradition. Although it shows a fairly significant diversity in the approach to the subject of the objectives and functions of punishment at subsequent stages of statehood development, it clarifies to some degree the shape of the penal policy of Emperor Justinian who, after all, could not cut himself off this tradition. The omnipresent continuation, which is an obvious and universally accepted paradigm for both

the Roman private law and public law, did not allow for some “revolutionary” changes, this time, either. Justinian, after all, incorporated into his criminal justice system most of the criminal laws of Sulla, Pompey, Caesar and Augustus, the so-called *leges iudiciorum publicorum* together with the public penalties provided for therein, thus accepting, as a rule, the objectives of punishment already established centuries ago. The legislative achievements of the Roman emperors, Justinian’s predecessors, were also appreciated and confirmed in the codification. In addition, Emperor Justinian, and to be more specific: the compilers of the commission appointed by him and chaired by Tribonian, made a compilation from selected treatises of classical lawyers, including also those statements which concerned the objectives and policy of punishment. The voice of the old laws, imperial constitutions, and the voice of *iuris prudentes* were now to become the voice of Emperor Justinian.

In the absence of sufficiently reliable sources, it is most difficult to discuss in detail the objectives and functions of punishment in the archaic period. However, a cursory analysis of the royal laws and the Law of the Twelve Tables shows that in the earliest times there were no such sanctions that may be found in later periods of the development of the Roman criminal law. The royal laws often did not mention anything about *poena*, public punishment (as in the case of *parricidium*), or only provided for consequences of religious nature. Meanwhile, public punishment seems to define *crimen* as much as other elements defining a criminal offence. In the royal period, marked by the blend of law and religion, it was more about restoring peace between people and gods (*pax deorum*) violated by the offender’s actions, than punishing him. In the earliest period of Roman statehood, the most characteristic division of crimes in the public sphere is the division into offences that offend the gods and other offences. A deed touching the sphere of *ius divinum* was a crime that could not be absolved, not subject to propitiation (*scelus inexpiabile*). The sanction for committing such an act was to exclude the perpetrator from the Roman community either through *consecratio* – dedication to the gods or *deo necari* – exclusion from the Roman society (not punishment) by immediate deprivation of life. *Consecratio* expressed in the formula imposed on the perpetrator – *sacer esto*, meant the perpetrator’s permanent transition from the sphere of *ius humanum* to the sphere of *ius divinum*. The perpetrator was considered *sacer* – dedicated to the gods. He was formally subject to their revenge, which in practice was being done by a human

hand – anyone could kill such a person, and his property was forfeited to a deity affected by the insult arising from the crime (*consecratio bonorum*). Minor offences against the gods only resulted in the perpetrator's expiatory duty, which boiled down to making a sacrifice – *piaculum*, which was on the one hand propitiative in nature, and on the other was a kind of compensation.

The crimes which were not directly aimed against the gods, and those violating the interests of the general public, included primarily manslaughter – *parricidium*, understood both in the original sense as the murder of the father of the family (*pater familias*) and in the sense given to it most probably by Numa Pompilius, i.e. the murder of every free man (*Lex Numae*). Moreover, this category included a crime of bodily injury, consisting of injury or fracture of the victim's bones. Both of those crimes were under a penalty of retaliation (*lex talionis*), enforcement of which seemed to be imposed and, at least, suggested by the state as an obligation of the victim's family. This suggestion is seen in the expressions: *parricidas esto* (as in the Numa's law) and *talio esto* (as in the Twelve Tables). To conclude, in the archaic period it is often difficult to talk about punishment in the modern sense. The purpose of sanctions related to crime was rather propitiation of the gods, if it was considered possible at all. *Lex talionis* and compensation to the injured family suggest a similarity to the retaliatory function of the penalty. For the most serious crimes, it is possible to speak of the elimination function of the sanction (penalty) for the offence towards, in particular depriving the perpetrator of life.

In principle, only with the advent of the first *quaestiones*, initially convened only occasionally, then appointed permanently to judge certain categories of public crimes (*quaestiones perpetuae*), the nature of public punishment changed significantly. Other functions of punishment have also emerged. Such authors as M. Tullius Cicero (106–43 B.C.), Seneca the Younger (4 B.C.–A.D. 65), or Aulus Gellius (died A.D. 180) spoke broadly about the objectives and functions of punishment, including the death penalty.

In Cicero's works, the justice, retaliatory function of public punishment was probably most prominent. For example, in *On the Laws* (*De Legibus*), he justified any punishment, including the death penalty, as a fair, necessary reprisal: Cic. De leg. 3,20: *Ut in suo vitio quisque plectatur, vis capite, avaritia multa, honoris cupiditas ignominia sancitur.*

On the other hand, Cicero lived in the period of the greatest activity of *quaestiones perpetuae*, which, according to tradition, when pleading the accused citizens guilty, allowed them to escape. This was possible due to an institution called *aquae et ignis interdictio* characteristic of the Roman Republic. If to treat it as a kind of quasi-punishment, it still reflected the spirit of the archaic law expressing the need to isolate the perpetrator from society, and thus expressed the elimination function, which was also associated with the ordinary death penalty: *ultimum supplicium*. This elimination function, however, was rather more related to the protection of society from the criminal and the anger of the gods (the propitiative, and at the same time protective function, still present) than with the desire for retaliation (retaliatory function).

Seneca, in his numerous statements, seem to focus, following Plato, on the corrective and rehabilitation function of punishment of the perpetrator. However, he also had a perspective on preventive and deterrent function:

Sen. De ira 1,19,7: *Hoc semper in omni animadversione seroabit, ut sciat alteram adhiberi ut emendet malos, alteram ut tollat; in utroque non praeterita sed futura intuebitur (nam, ut Plato ait, nemo prudens punit quia peccatum est, sed ne peccetur; revocari enim praeterita non possunt, futura prohibentur) et quos volet nequitiae male cedentis exempla fieri palam occidet, non tantum ut pereant ipsi, sed ut alios pereundo deterreant.*

In another of his writings, Seneca was arguing that the legislation aimed either to correct whoever it punished, or to warn and correct others, or finally to get rid of the villains, so that the whole society could live in peace:

Sen. De clem. 1,22,1: *Transeamus ad alienas iniurias, in quibus vindicandis haec tria lex secuta est, quae princeps quoque sequi debet: aut ut eum, quem punit, emendet, aut ut poena eius ceteros meliores reddat, aut ut sublatis malis securiores ceteri vivant. Ipsos facilius emendabis minore poena; diligentius enim vivit, cui aliquid integri superest. Nemo dignitati perditae parcat; impunitatis genus est iam non habere poenae locum.*

As it may be seen, Seneca also noticed the protective function of punishment, because punishment could protect society from the perpetrator. Interestingly enough, however, among Seneca's numerous statements concerning almost all of today's known functions of punishment, there is no argument in favour of a retributive, retaliatory function.

On the other hand, Aulus Gellius saw generally three functions of punishment:

Gell. 7,14,1–4: *Poeniendis peccatis tres esse debere causas existimatum est. 2 Vna est causa, quae Graece vel kolasis vel nouthesia dicitur, cum poena adhibetur castigandi atque emendandi gratia, ut is, qui fortuito deliquit, attentior fiat correctiorque. 3 Altera est, quam hi, qui vocabula ista curiosius diviserunt, timoriam appellant. Ea causa animadvertendi est, cum dignitas auctoritasque eius, in quem est peccatum, tuenda est, ne praetermissa animadversio contemptum eius pariat et honorem levet; idcircoque id ei vocabulum a conservatione honoris factum putant. 4 Tertia ratio vindicandi est, quae paradeigma a Graecis nominatur, cum poenitio propter exemplum necessaria est, ut ceteri a similibus peccatis, quae prohiberi publicitus interest, metu cognitae poenae deterreantur.*

According to Gellius, punishment is used for chastening and correcting the offender (today this function is called individual prevention), when the penalty is intended to preserve the victim's dignity (retaliatory, compensatory function), and also when the punishment is necessary for deterrence, to make other people refrain from committing crimes (general prevention).

3. It is hard not to get the impression that during the Principate period the death penalty became a kind of a popular measure and found universal application. Not only did the successive emperors, including Justinian, accept and willingly use it, but also even competed in cruelty of the methods (manners) of its execution. It seems that this cruelty of methods of execution may be related to the shift of the centre of gravity from the protective and propitiative functions to the deterrent function of the punishment.

What is extremely important, with the emergence of the imperial judiciary *extra ordinem* in criminal matters, it became possible to perform various functions assigned to various penalties, along with the possibilities offered by the discretionary nature of court decisions. As a rule, all active Roman emperors, from Augustus to the Antonine dynasty, then the Severan dynasty, to Justinian, can be attributed a consistent criminal policy of strengthening *cognitio extra ordinem* at the expense of the existing criminal court system. The period of the empire was marked in the Roman public law, as well as in other areas of the Roman social life, by the growing activity of emperors seeking to revise republican solutions. This activity also

concerned criminal law. During the periods of Kingdom and the Roman Republic, it was sufficient for the organisation of an efficient justice system to classify crimes into *crimina publica* and *delicta privata*, parallel to the classification of proceedings into *iudicia publica* and *iudicia privata*.

The previous dual classification of offences based on the criterion of *utilitas* into *crimina publica* and *delicta privata* proved to be not too capacious in the period of the Empire and thus insufficient. This deficiency stemmed from the fact that successive emperors strived to be able to influence the ongoing criminal proceedings taken over almost entirely by *quaestiones perpetuae*. Thus, it was rather the system of the imperial *cognitio* which influenced the formation of new categories of crimes, called *crimina extraordinaria*, those not encompassed by the *ordo* system, than such crimes enforced the development of *cognitio*. Of course, the process was two-way, but history has shown that the imperial *cognitio* was so expansive that first a few offences hardly dealt with as part of the statutory types of offences were taken out of the jurisdiction of the *quaestiones*, but afterwards the same happened to deeds traditionally fitting in these types. The latter could always be justified by the emperor's decision on hearing any case by the imperial court *Quaestiones perpetuae* and related rigidly defined statutory penalties had to be then pushed into a gradual *desuetudo*.

The catalogue of penalties used in the Roman criminal law of the Empire era was established and quite diverse. It may be easily reproduced from the writings of jurists Ulpian and Callistratus. Ulpian introduced a fundamental classification of penalties, Callistratus supplemented with the ways of executing the death penalty:

D. 48,19,6,2 (Ulpianus libro nono de officio proconsulis): *Nunc genera poenarum nobis enumeranda sunt, quibus praesides adficere quemque possint, et sunt poenae, quae aut vitam adimant aut servitutum iniungant aut civitatem auferant aut exilium aut coercionem corporis contineant.*

D. 48,19,28 pr.- 1 (Callistratus libro sexto de cognitionibus): *Capitalium poenarum fere isti gradus sunt. Summum supplicium esse videtur ad furcam damnatio. Item vivi crematio: quod quamquam summi supplicii appellatione merito contineretur, tamen eo, quod postea id genus poenae adinventum est, posterius primo visum est. Item capitis amputatio. Deinde proxima morti poena metalli coercitio. Post deinde in insulam deportatio. 1. Ceterae poenae ad existimationem, non ad capitis periculum pertinent, veluti relegatio ad tempus, vel in perpetuum, vel in insulam, vel cum in opus quis publicum datur, vel cum fustium ictu subicitur.*

Therefore, the catalogue of penalties included life-depriving penalties, i.e. the death penalty executed in various ways, imprisonment penalties (the penalty of working in a mine, the penalty of public works or even imprisonment) or deprivation of citizenship, exile penalties (deportation and relegation), the penalty of loss of citizenship combined with the penalty of death, deportation, and corporal punishment (flogging). The death penalty used to be carried out primarily by crucifixion (probably during the Justinian era not practised for a long time), burning alive, beheading, throwing a condemned person to wild animals to be eaten. Since the times of Hadrian, the individualisation of criminal responsibility through the gradation of criminal repression depending on various important factors has been noticeable. Those include: the gravity of the crime committed, the manner in which the perpetrator acted, including in particular whether he acted intentionally or unintentionally, the prevalence of crime in a given territory and obstinacy of the perpetrator in committing the crime, the status of the accused and his age.

Imperial judges in criminal cases heard *extra ordinem* were given considerable discretionary powers. It was manifested in the possibility of independent assessment of the degree of guilt of the accused, but also the choice of the type and severity of the penalty, without the rigid system of penalties provided for by the *leges* establishing *quaestiones perpetuae*. Of course, the penalties provided for in the *leges* were still available to the judges despite the gradual disappearance of the *quaestiones*. Ulpian's and Paulus's strong statements convince us of this:

D. 48,1,8 (*Paulus libro singulari de iudiciis publicis*): *Ordo exercendorum publicorum capitalium in usu esse desiit, durante tamen poena legum, cum extra ordinem crimina probantur.*

D. 48,19,13 (*Ulpianus libro primo de appellationibus*): *Hodie licet ei, qui extra ordinem de crimine cognoscit, quam vult sententiam ferre, vel graviorem vel leviolem, ita tamen ut in utroque moderationem non excedat.*

A judge hearing a criminal case *extra ordinem* was absolutely free to choose the penalty: he could (as Paulus said), despite the fact that the system of *quaestiones* was no longer in use, apply a statutory penalty, but could also (as Ulpian stated) choose a heavier or lighter penalty, bearing in mind to be moderate in his choice in order not to be accused of exaggeration. The penalty should be adequate to the gravity of the crime committed.

4. One may quite safely propose a thesis that Emperor Justinian, continuing on the one hand the development of the judiciary *extra ordinem*, and on the other hand authorizing and developing the system of extraordinary crimes, finally accepted and gave permission for individualization of the punishment, possible due to discretionary rulings of judges of officials. This individualisation could allow for the simple implementation of various functions of punishment. However, it is not disputed that, in the light of the programme known from *Constitutio Tanta*, the deterrent function of punishment was still a priority, and in practice there was no room for leniency.

The Roman criminal law of the era of the Empire, including the Christian one, was generally characterised by the severity of penalties. The death penalty in the Principate period was used much more often than in the period of the Republic. The aforementioned *aquae et ignis interdictio* ceased to serve as a substitute for the death penalty and transformed into the punishment of exile, well-known of several varieties. A severe penalty was the deterrent (preventive) value but also the retaliatory one.

The best exemplification of the spirit of punishment in the period of Principate and clarification of the functions of punishment is the account provided by Callistratus who invoked the "majority opinion":

48.19,28,15 (*Callistratus libro sexto de cognitionibus*): *Famosos latrones in his locis, ubi grassati sunt, furca figendos compluribus placuit, ut et conspectu deterreantur alii ab isdem facinoribus et solacio sit cognatis et adfinibus interemptorum eodem loco poena reddita, in quo latrones homicidia fecissent: nonnulli etiam ad bestias hos damnaverunt.*

It is uncertain whether the wording "majority opinion" concerned most of the jurists, according to the authors of the Polish translation of *Digest*, or most judges (governors hearing criminal cases), or rather most of the public. It seems, however, certain that in the era of Christian Emperor Justinian, this opinion was also fully accepted. The imposition of penalties in this way was intended to ensure the implementation of the deterrent function on the one hand, and the retaliatory function on the other.

Emperor Justinian was not a great reformer in the field of criminal law. Criminal law was, above all, a convenient tool of the internal policy. The work of the great codification that he carried out, however, gives him a mandate to be recognised as an outstanding lawmaker. First of all, Justinian may be credited for reviewing the existing *leges iudiciorum*

*publicorum* along with its centuries-old interpretative layer contained in the imperial constitutions, senate resolutions and statements of jurists in terms of the topicality and usefulness of the regulations. Secondly, a significant merit was that the criminal law was collected in one codified system and its internal structure was created. As part of a consistent penal policy expressed in the codification, primarily the types of individual criminals of the public were redefined by means of original normative content from old laws, senate resolutions, imperial constitutions, as well as statements of classical jurists. Moreover, the categories of crimes called *crimina extraordinaria* were terminologically distinguished, raising their rank. Now, it is time to attempt to identify the assumptions of Justinian's penal policy, and consequently, the goals and functions of punishment.

In *Constitutio Tanta* (Const. Tanta 8a) implementing *Digesta Iustiniani* there is a fragment in which Emperor Justinian announced the applicability of two books (*terribiles libri*) on criminal law:

Const. Tanta 8a. *Et post hoc duo terribiles libri positi sunt pro delictis privatis et extraordinariis nec non publicis criminibus, qui omnem continent severitatem poenarumque atrocitatem. Quibus permixta sunt et ea quae de audacibus hominibus cauta sunt, qui se celare conantur et contumaces existunt: et de poenis, quae condemnatis infliguntur vel conceduntur, nec non de eorum substantiis.*

The Latin phrase *terribiles libri* was being translated in Polish encyclopedic literature in various way (e.g. "terrible books", "horrible books", "books of fear", "books of horror"). Borys Łapicki even used the term "intimidation of the population" with regard to Justinian's policy, noting that in order to strengthen the effect of fear in the addressees of criminal rules, the Emperor also threatened by invoking "the wrath of God" and "God's punishment". In the Polish translation of the *Digest* edited by T. Palmirski the term "books of fear" (Polish: "księgi wzbudzające strach") was used.

On the occasion of deliberations herein, having regard to the findings about the functions of punishment in Roman law, a different version of the translation may be proposed - "books of deterrence", only seemingly semantically similar to the aforementioned one. The term "books of deterrence" is more appropriate because it better characterises Justinian's criminal policy. A serious argument for verifying the translation of the term *terribiles libri* is located in the remainder of the text, which suggests that the emperor's intention was not so much the colouring of the account (florid style or linguistic emphasis), or even the expression of a different

nature of the regulations contained in Books 47 and 48 of the *Digest* in comparison with the subject matter of other (previously announced) books, but to present a specific punitive programme. This passage relates to two very important issues relating to the imperial criminal policy, namely severe punishment for crimes and the fulfilment of the postulate of inevitability of criminal liability. First of all, already in the first sentence Justinian announced *libri terribiles* as introducing the severity (*severitas*) and cruelty (*atrocitas*) of the sentences ruled on the basis of the provisions in those books. Given the terminology commonly adopted in today's legal language, the "deterrent nature of punishment", which is the same as its "preventive measure", and the conviction that this (i.e. deterrent, preventive) nature characterised mainly the penalties imposed during the period of the Roman Empire (in particular the death penalty executed using often cruel methods), it should be stated that the emperor decided to pursue a criminal policy of "deterring" potential criminals from committing crimes with severe penalties and the policy of inevitability of criminal repression. This is how the account – in which Justinian refers to the rules on penalties, convicted persons and their estates – ends. The absolute severity of penalties and the inevitability of their application are also repeatedly confirmed by Justinian's amendments.

In addition, one may also consider whether the criminal policy of Emperor Justinian, signalled in *Constitutio Tanta*, also contained some important content, the interpretation of which could additionally bring closer the intentions of this ruler in terms of imposing penalties and their functions.

Justinian distinguished three types of crime in *Constitutio Tanta*: *delicta privata*, *crimina extraordinaria* and *crimina publica*. The first two categories of crime found their place in Book 47 of the *Digest*, while the third one – in Book 48. There are two more observations for the purposes of the discussion herein: the Latin and Greek versions of the *Digest* were slightly different. The Greek version pointed to *crimina extraordinaria* as crimes moderately punished: more severely than *delicta privata*, and more leniently than *crimina publica*. The second observation concerns the closer relationship of *crimina extraordinaria* with *delicta privata*, than with *crimina publica*, which is reflected in the fact that they are put together in one book. The account would even indicate that *delicta privata* and *delicta extraordinaria* were being distinguished from *crimina publica*. This last idea, however, should be disregarded for an obvious reason: title 11 of Book 47 of the *Digest* is called *De extraordinariis criminibus*, although apart from title 11 of Book 47,

the name *crimina extraordinaria* does not function in *Justinian's Codification*. This does not change the fact that Roman law owes Justinian the final classification of extraordinary crimes gradually distinguished during the Empire period by various mechanisms at the level of *cognitio extra ordinem*. At the same time, it should be taken into account that some extraordinary crimes may have appeared in the Roman reality also as a result of the empire's expansion to new territories having their own pathologies and perhaps their own local criminal policies. Particular emperors, and finally Justinian himself, could simply adopt and unify such local policies. Justinian's own significant legislative activity may be evidenced by quite numerous legislative amendments.

As regards the types of penalties applied, Justinian did not substantially introduce major changes to the catalogue of Roman penalties known from Callistratus (D. 48,19,28 pr.-1). The cruelty of various methods of executing the death penalty still remains a showcase of Roman law. Furthermore, Justinian seems to require the judges to strictly apply severe penalties, reserving that any leniency of a statutory penalty requires his consent, provided that the law setting out the penalty raises doubts. The only noteworthy thing is the absence of the crucifixion penalty in the catalogue of Justinian's penalties. However, as already mentioned, it is likely that the first to ban this penalty was Constantine the Great because of its symbolic significance to Christians. Even if Justinian's merit was to uphold this prohibition, it cannot be forgotten that in its place the equally cruel punishment of hanging on a fork-shaped pole (*in furcam tollere*) was used. The penalty of sentencing one to become a gladiator was discontinued, but only due to public order and family peace, while retaining *damnatio ad bestias* for slaves and freedmen. It is also difficult to consider the inclusion of the prohibition to stigmatise a convict's face of the Constantine's constitutions in the *Code* to be a particularly humanitarian solution since it was still possible to stigmatise other parts of a convict's body, likewise allowing for the mutilation of a convict's body in a "moderate manner".

According to contemporary studies on punishment, one of the most important functions of punishment is the educational (rehabilitation) function. It would be interesting to consider whether Justinian's Roman law knew the educational (rehabilitation) function of punishment? In particular Seneca's writings could suggest that the Romans should also have

remembered it several centuries later, especially since such a view seems to be confirmed by the statement of jurist Paulus in the *Digest*:

D. 48,19,20 (*Paulus libro octavo decimo ad Plautium*): *Si poena alicui irrogatur, receptum est commenticio iure, ne ad heredes transeat. Cuius rei illa ratio videtur, quod poena constituitur in emendationem hominum: quae mortuo eo, in quem constitui videtur, desinit.*

However, this account is rather isolated. Moreover, the statement on the educational function of punishment plays a secondary role here, subordinated to the opinion on the non-inheritance of penalties. It may be argued that Paulus's view, taken out of this context, would be rather "irrelevant" especially in view of the universality of the use of the death penalty in the Roman Empire. What is also quite symptomatic is that *Constitutio Tanta* is silent about the educational (rehabilitation) function. Although the declaration of the jurist may hardly be attributed the feature of universality, there is some evidence of the existence of the beginnings of "rehabilitation" – in a rather specific sense of the word, i.e. gradation of penalties; it may already be found in Hadrian's legislation, which was included in the codification by Justinian's will. The account containing the need for educating through punishment may also be found in the rescript issued in the case of Evaristus, against whom Hadrian approved the imposition of a five-year sentence of relegation for having caused his friend to die for rogue motives in a playful game. Among Roman penalties, such a role could be played by public works (*opus publicum*) ruled for minor crimes, although this is only a matter of speculation not supported by sources. It should also be noted that the Roman criminal law system did not (or only to a marginal extent) know the punishment of deprivation of liberty, with its basic, assumed, rehabilitation effect. In practice, this circumstance weakens the argument that the Roman penalties being imposed during the Roman Empire, even during the reign of Justinian, may have had a wider educational value. Therefore, rejecting B. Biondi's opinion as not supported by convincing sources, that perhaps Justinian intended to educate through the severity of the punishments imposed, one should remain with the explicit declaration of the emperor himself from *Constitutio Tanta*, that public punishment should have, first and foremost, a deterrent function.

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## Summary

The objectives and functions of the punishment for a public offence (*crimen*) had already been discussed by M. Tullius Cicero, Seneca the Younger, or Aulus Gellius many centuries before Emperor Justinian. According to their statements, the Romans distinguished in principle all the types of punitive functions known today: deterrence (special and general prevention), reprisal (retaliation),

elimination (protection of society against the perpetrator), and even the rehabilitation (educative) function.

The emergence of the imperial judiciary *extra ordinem* in criminal matters could have been conducive to performance of various functions assigned to various penalties, along with the possibilities offered by the discretionary power of judicial decisions. However, when reading Emperor Justinian's *Constitutio Tanta* and the numerous accounts from the Roman jurists included in his codification, contained in Book 48 of the *Digest*, one may be convinced that the function of paramount importance for the emperor was to deter potential perpetrators by means of severe penalties, including notably the death penalty. The educational function was rather marginal. The primary objective of the imperial criminal policy was the ruthlessly severe punishing for criminal offences (*severitas, atrocitas*) and the implementation of the postulate of inevitability of criminal responsibility.

**Key words:** functions of the punishment, the Roman penal public law, *Justinian's Codification*, imperial criminal policy

## O CELACH I FUNKCJACH KARY PUBLICZNEJ W PRAWIE RZYMSKIM Z PERSPEKTYWY KODYFIKACJI JUSTYNIAŃSKIEJ

### Streszczenie

O celach i funkcjach kary za przestępstwo publiczne (*crimen*) rozprawiali już na wiele wieków przed cesarzem Justynianem: M. Tulliusz Cynceron, Seneka Młodszy, Aulus Gellius. Z ich wypowiedzi wynika, że Rzymianie rozróżniali w zasadzie wszystkie rodzaje znanych dzisiaj funkcji karania: funkcję odstraszącą (prewencję szczególną i ogólną), odpłacającą (odwetową), eliminacyjną (ochrona społeczeństwa przed sprawcą), a nawet resocjalizacyjną (wychowawczą).

Pojawienie się cesarskiego sądownictwa *extra ordinem* w sprawach karnych mogło sprzyjać realizacji różnych funkcji przypisanych do różnych kar, wraz z możliwością, jaką dawała dyskrecjonalność orzeczeń sądowych. Lektura *Konstytucji Tanta* cesarza Justyniana oraz licznych przekazów jurystów rzymskich włączonych do jego kodyfikacji, zawartych w Księdze 48 *Digestów* przekonuje jednak, że funkcją mającą dla cesarza pierwszorzędne znaczenie było odstraszenie potencjalnych sprawców przestępstw surowymi karami, w tym szczególnie karą śmierci. Funkcja wychowawcza miała raczej marginalne znaczenie. Podstawowym celem cesarskiej polityki karnej jawiło się bezwzględnie surowe karanie za przestępstwa (*severitas, atrocitas*) oraz realizacja postulatu nieuchronności odpowiedzialności karnej.

**Słowa kluczowe:** funkcje kary, rzymskie prawo karne publiczne, kodyfikacja justyniańska, cesarska polityka karna

## О ЦЕЛЯХ И ФУНКЦИЯХ ПУБЛИЧНОГО НАКАЗАНИЯ В РИМСКОМ ПРАВЕ С ТОЧКИ ЗРЕНИЯ КОДИФИКАЦИИ ЮСТИНИАНА

### Резюме

О целях и функциях наказания за публичное преступление (*crimen*) говорили уже за много веков до императора Юстиниана: М. Туллий Цицерон, Сенека Младший или Авл Геллий. Из их высказываний следует, что римляне различали, в принципе, все виды функций наказания, известных сегодня: сдерживание (специальная и общая профилактика), оплата (ответная реакция), устранение (защита общества от преступника) и даже социальная реабилитация (воспитание).

Появление императорской судебной системы *extra ordinem* в уголовных делах могло способствовать выполнению различных функций, возложенных на различные меры наказания, наряду с возможностью вынесения судебных решений по усмотрению. Однако, читая Конституцию *Tanta* императора Юстиниана и многочисленные свидетельства римских юристов, включенные в его кодификацию, содержащиеся в Книге 48 *Дигест*, можно убедиться, что главной задачей императора было удерживать потенциальных преступников суровыми наказаниями, включая смертную казнь. Воспитательная функция имела скорее второстепенное значение. Основной целью императорской уголовной политики было строгое наказание за преступления (*severitas, atrocitas*) и реализация постулата о неизбежности уголовной ответственности.

**Ключевые слова:** функции наказания, публичное уголовное право Рима, Кодификация Юстиниана, императорская уголовная политика

