**STUDIA PRAWNICZE KUL**
4 (104) 2025

# On the accused's right to a defence counsel in the Roman criminal procedure

O prawie oskarżonego do obrońcy w rzymskim procesie karnym

О праве обвиняемого на защитника в римском уголовном процессе

Про право обвинуваченого на захисника в римському кримінальному процесі

**ANDRZEJ CHMIEL**
Dr., Maria Curie-Skłodowska University in Lublin
e-mail: andrzej.chmiel@mail.umcs.pl, https://orcid.org/0000-0002-8577-1183

**Abstract:** This article is dedicated to the issue of the defendant's right to appoint a defense counsel in a Roman criminal trial. The was aim of the study is to show how the ancient Romans understood the most important procedural right of the accused – namely, the right to appoint a defense counsel – and especially to answer such detailed questions as when such a right was granted to him, i.e. at what stage of the criminal process he could use it. Furthermore, the paper examines whether Roman criminal procedure recognised the institution of mandatory defence. Finally, the purpose of this study will also be to show what changes have occurred in the discussed issue over the historical development of the Roman criminal process (between the ordinary and extraordinary procedures), and what were the reasons for these changes. The studies presented in this paper were conducted using the historical-legal method, but the dogmatic-legal method was used in parallel. In the proceedings before the *quaestiones perpetuae*, the praetor was obliged to appoint a defender for the accused if the latter could not find one himself and requested it, but only when the *reus* became a party to the process – that is, when the so-called *inscriptio inter reos* had taken place. The defendant's right to appoint a defense attorney, became a universal procedural guarantee in the *cognito* procedure, and during the period of the Dominate, it was transformed into universal compulsory defence. Furthermore, the reasons for these changes were dictated by the fact that in the criminal cognition procedure, the jurisdictional body deciding the case was finally equipped with the right of evidentiary initiative, and the fact that the defendant's right to appoint a defense attorney was transformed into a universal "legal" obligation during the post-classical period, should be treated as a manifestation of the phenomenon of unifying the rules and principles of the criminal cognition procedure during the post-classical period, but also as a manifestation of strengthening of the procedural guarantees of the defendant.

**Keywords:** accused, right of defence, right to a defence counsel, Roman criminal procedure, compulsory legal representation, *patronus*

**Streszczenie:** Niniejszy artykuł został poświęcony zagadnieniu prawa oskarżonego do ustanowienia obrońcy w rzymskim procesie karnym. Celem publikacji jest ukazanie, jak starożytni Rzymianie rozumieli najważniejsze obecnie uprawnienie procesowe oskarżonego, czyli prawo do ustanowienia obrońcy, a zwłaszcza udzielenie odpowiedzi na tak szczegółowe kwestie, jak m.in. kiedy takie prawo mu przysługiwało, mianowicie na jakim etapie procesu karnego oskarżony mógł z niego skorzystać, a także czy rzymski proces karny znał instytucję obrony obligatoryjnej. Celem niniejszego opracowania jest również ukazanie, jakie zmiany zaszły w zakresie omawianego zagadnienia w historycznym rozwoju rzymskiego procesu karnego (pomiędzy procesem zwyczajnym a nadzwyczajnym) i jakie były przyczyny owych przemian. Przedstawione w niniejszym opracowaniu badania zostały przeprowadzone przy wykorzystaniu metody historyczno-prawnej, niemniej drugą, zastosowaną równolegle, była metoda dogmatyczno-prawna. W postępowaniu przed *quaestiones perpetuae* pretor miał obowiązek ustanowienia obrońcy na rzecz oskarżonego, jeżeli ten ostatni nie mógł sam go sobie znaleźć i zażądałby tego, ale dopiero wówczas, kiedy *reus* stał się stroną procesu, czyli kiedy miało miejsce tzw.

ISSN: 1897-7146; eISSN: 2719-4264;
https://doi.org/10.31743/sp18857

*inscriptio inter reos*. Prawo oskarżonego do ustanowienia obrońcy stało się zaś jego powszechną gwarancją procesową w kognicyjnym procesie karnym, a w okresie dominatu zostało przekształcone w powszechny przymus obrończy. Ponadto przyczyny tych zmian były podyktowane faktem, iż w kognicyjnym procesie karnym organ jurysdykcyjny rozstrzygający sprawę został w końcu wyposażony w prawo inicjatywy dowodowej. Z kolei fakt przekształcenia prawa oskarżonego do ustanowienia obrońcy w powszechny przymus „adwokacki" w okresie poklasycznym należy potraktować jako przejaw postępującego w okresie poklasycznym zjawiska ujednolicania reguł i zasad kognicyjnego procesu karnego, ale również jako przejaw wzmacniania gwarancji procesowych oskarżonego.
**Słowa kluczowe:** oskarżony, prawo do obrony, prawo do obrońcy, rzymski proces karny, przymus adwokacki, *patronus*

**Резюме:** Настоящая статья посвящена вопросу права обвиняемого на назначение защитника в римском уголовном процессе. Цель публикации – показать, как древние римляне понимали наиболее важное в настоящее время процессуальное право обвиняемого, а именно право на назначение защитника, и, в частности, дать ответы на такие подробные вопросы, как, например, когда он имел право на это, на каком этапе уголовного процесса обвиняемый мог воспользоваться этим правом, а также известен ли был римскому уголовному процессу институт обязательной защиты. Целью настоящего исследования является также показать, какие изменения произошли в области обсуждаемого вопроса в историческом развитии римского уголовного процесса (между обычным и чрезвычайным процессом) и каковы были причины этих изменений. Исследования, представленные в данной статье, были проведены с использованием историко-правового метода, однако параллельно был применен и догматико-правовой метод. В разбирательстве перед *quaestiones perpetuae* претор был обязан назначить защитника для обвиняемого, если последний не мог найти его самостоятельно и требовал этого, но только в том случае, если *reus* становился стороной процесса, то есть, когда имела место так называемая *inscriptio inter reos*. Право обвиняемого на назначение защитника стало его общей процессуальной гарантией в когниционном уголовном процессе, а в период Империи было преобразовано в общее обязательство защиты. Кроме того, причины этих изменений были обусловлены тем фактом, что в когниционном уголовном процессе судебный орган, рассматривающий дело, был наделен правом инициативы в отношении доказательств. В свою очередь, факт преобразования права обвиняемого на назначение защитника в общее обязательное участие защитника в постклассический период следует рассматривать как проявление прогрессирующего в постклассический период явления унификации правил и принципов уголовного процесса, но также и как проявление усиления процессуальных гарантий обвиняемого.
**Ключевые слова:** обвиняемый, право на защиту, право на защитника, римский уголовный процесс, обязательное участие защитника, *patronus*

**Анотація:** Стаття присвячена дослідженню права обвинуваченого на призначення захисника в римському кримінальному процесі. Метою публікації є розкриття розуміння цього права у стародавніх римлян, зокрема аналіз процесуальної природи права на призначення захисника, а також надання відповідей на питання щодо моменту виникнення цього права, тобто етапу кримінального процесу, на якому обвинувачений міг ним скористатися, і щодо наявності чи відсутності інституції обов'язкового захисту в римському кримінальному процесі. Метою роботи є також висвітлення еволюції зазначеного інституту в історичному розвитку римського кримінального процесу (у межах звичайного та надзвичайного процесу) і встановлення причин відповідних трансформацій. Дослідження, викладені у роботі, проведено із застосуванням історико-правового методу, а також паралельно використано догматично-правовий метод. У провадженні перед *quaestiones perpetuae* претор був зобов'язаний призначити обвинуваченому захисника, якщо той не міг самостійно його знайти та заявляв відповідне клопотання, але лише з моменту, коли *reus* набував статусу сторони процесу, тобто після здійснення так званої *inscriptio inter reos.* Право обвинуваченого на призначення захисника набуло характеру загальної процесуальної гарантії в когнітивному кримінальному процесі, а в період домінату було трансформовано у загальний примус до забезпечення захисту. Крім того, зазначені зміни були зумовлені тим, що в когнітивному кримінальному процесі юрисдикційний орган, який вирішував справу, був нарешті наділений правом доказової ініціативи. У свою чергу, трансформацію права обвинуваченого на призначення захисника в загальний "адвокатський" примус у посткласичний період слід розглядати

як прояв уніфікації правил і принципів когнітивного кримінального процесу, що посилювалася у цей період, а також як посилення процесуальних гарантій обвинуваченого.

**Ключові слова:** обвинувачений, право на захист, право на захисника, римський кримінальний процес, примус до забезпечення захисту, *patronus*

## Introductory remarks

The right of defence of the accused is one of the guiding principles of modern criminal procedure. It is guaranteed both by the provisions of the Polish Code of Criminal Procedure and by the Polish Constitution itself in Article 42 (2), which reads: "Anyone against whom criminal proceedings have been brought shall have the right to defence at all stages of such proceedings. He may, in particular, choose counsel or avail himself – inaccordance with principles specified by statute – of counsel appointed by the court."[1] The Code of Criminal Procedure, in Article 6, also states: "The accused shall have the right of defence, including the right to assistance by a defence counsel; and the accused should be advised of this right."

The concept of the right of defence currently includes both substantive and formal rights of defence. The substantive right of defence, according to Article 74 (1) of the Code of Criminal Procedure, is understood today as the lack of obligation for the accused to prove their innocence or to provide evidence against themselves. As part of the substantive right of defence, the accused has the right to provide clarifications or refuse to do so, to refuse to answer specific questions, and to be present during evidentiary proceedings.[2] The formal right of defence, on the other hand, has the right to legal assistance, either at the accused's request or ex officio where statutory provisions impose such an obligation (mandatory defence).[3] Currently, the accused's right of defence has become one of the fundamental principles of criminal proceedings, not only in Europe (continental system), including our Polish system, but also in international criminal proceedings.[4]

---

1 S. Waltoś, P. Hofmański, *Proces karny. Zarys systemu*, Warszawa 2018, p. 309.

2 See Article 175 § 1–2 of the Polish Code of Criminal Procedure; cf. S. Waltoś, P. Hofmański, *Proces karny*…, p. 310; see in more detail: P. Sowiński, *Uprawnienia składające się na prawo oskarżonego do obrony. Uwagi na tle czynności oskarżonego oraz organów procesowych*, Rzeszów 2012, passim.

3 See Article 79 of the Code of Criminal Procedure; S. Waltoś, P. Hofmański, *Proces karny*…, p. 312; P. Wiliński, *Zasada prawa do obrony*, Warszawa 2006, p. 291 ff.

4 Cf. P. Hofmański, H. Kuczyńska, *Międzynarodowe prawo karne*, Warszawa 2020, p. 181.

The aim of this study is to present how the ancient Romans understood the most important procedural right of the accused today, namely the right to a defence counsel, to determine when such a right was granted, at what stage of the criminal process it could be exercised, and whether a form of mandatory defence existed in Roman criminal procedure. Finally, this publication will seek to demonstrate what changes occurred in the accused's right to a defence counsel between the ordinary Roman criminal procedure of the period of the Republic and the extraordinary cognition proceedings of the imperial period, and what were the causes of these changes.

## 1. The accused's right to a defence counsel in republican criminal law

The right of defence of an accused who was a Roman citizen (*civis Romanus*) was reognised in Roman law from the earliest times[5]. That defence could, in today's sense, be both substantive and formal although the Romans did not develop distinct theoretical concepts in this regard. Every citizen was therefore entitled to defend himself in person and by a defence counsel appointed for that purpose. The custom whereby every *civis Romanus* appearing before the court had his "adviser" was undoubtedly rooted in the institution of patronage. The ancient relationship that arose between *patroni* and their *clientes* became both an inspiration and a model for the legal defence relationship that was then shaped through judicial practice. The main duties of a wealthy patron towards his poorer client, who enstrusted himself to the patron's protection, included, in particular, representing him in court. Over time, this necessity became a generally accepted custom, according to which rich people with legal knowledge began to represent those poorer in the courts, who in turn agreed to such representation. The former, wishing to gain more and more influence and social recognition (and thus, often accompanying wealth), while at the same time wishing to exercise their skill in legal and procedural matters – and in time in the art of rhetoric – began to represent in court, more and more often, those poorer who did not know the law, thus becoming the guarantors of the public successes of

5 See A.W. Zumpt, *Der Criminalprocess der römischen Republik*, Leipzig 1871, p. 83 ff; G. Pugliese, *Le garanzie dell'imputato nella storia del processo penale romano*, Temi Romana 1969, vol. 18, p. 605 ff.; cf. A. Chmiel, *Reus vel suspectus? On the Status of the Accused and the Suspect in the Roman Criminal Procedure*, Studia Iuridica Lublinensia 2021, vol. 30, no. 2, pp. 63, 73 ff.; idem, *Defence Right of the Accused and the Evidence from Slave's Testimony in the Roman Criminal Procedure*, Studia Iuridica Lublinensia 2021, vol. 30, no. 5, p. 107 ff.

the latter.[6] As a result, the term *patronus* gained a new meaning – that of the legal representative of a party (the defence counsel of the accused) – as evidenced by the following account of Cicero:

> Cic. *pro Cluentio*, 40, 110: *Nam Quinctius quidem quam causam umquam antea dixerat, cum annos ad quinquaginta natus esset? quis eum umquam non modo in patroni, sed in laudatoris aut advocati loco viderat?*

According to the cited passage contained in the speech *Pro Cluentio*, during the period of the Republic, parties to a criminal trial could use three categories of defence counsels, namely: *patroni, advocati* and *laudatores*.[7] Apart from the listed categories of defence counsel, there were also *oratores*, – that is, court speakers – who sometimes assumed such a role.[8] Naturally, the last category mentioned by Cicero, namely *laudatores*, constituted a special kind, as they primarily served as witnesses in the trial, but were summoned not with regard to the specific event subject to accusation, but primarily to testify about the morality of the accused.[9]

Originally, the most important of all these categories of defence counsel were the *patroni*, referred to first by Cicero. They constituted a distinct type of defence representatives. They differed from *advocati* and *oratores*, in that as a rule they acted in the trial as "supporters (attorneys) of the litigant (the accused or the accuser)," whereas *advocati* and *oratores* initially acted as judicial assistants of the party, whose main task was to provide legal assistance and make speeches during the trial.[10] It should not come as a surprise that it was the *patroni* who were the most notable group of defence counsel, especially in the period of the Republic, due to the fact that they came from the richest and most influential aristocratic families. More importantly, in addition to taking part in trials, they sometimes also engaged in what was the main domain of *iuris prudentes*, namely legal consultancy, which made them exceptionally well equipped to perform their role in criminal proceedings as well.[11] As early as 123 BC, the *lex Acilia repetundarum* imposed on the president of

---

6 Cf. A.W. Zumpt, *Der Criminalprocess*…, p. 82 ff.

7 Cf. Ibidem, p. 84.

8 Cf. W. Neuhauser, *Patronus und Orator*, Innsbruck 1958, p. 171 ff.

9 See W. Mossakowski, *„Laudatores" w procesie rzymskim*, Zeszyty Prawnicze UKSW 2001, no. 1, p. 167 ff.; A. Chmiel, *Zeznania świadków i ich wartość dowodowa w rzymskim procesie karnym*, Lublin 2013 [non-published], p. 92 ff.

10 A. Chmiel, *Zeznania świadków*…, p. 110; cf. in more detail: J.A. Crook, *The Legal Advocacy in the Roman World*, London 1995, p. 146 ff.

11 See P. Kubiak, *Kilka uwag na temat znajomości prawa u mówców sądowych republikańskiego Rzymu*, Krakowskie Studia z Historii Państwa i Prawa 2015, vol. 8, no. 1, p. 21. According to L. Bablitz, in the period of the Republic, the original term *patronus* was supplemented by *advocatus* and both were

the *quaestio* the obligation to appoint a *patronus* – interestingly however, only for the benefit of the accuser, if the latter requested it:

> *Lex Acil.* L. 11: *[---] quaestione<ue> ioudicio<q>ue puplico condemnatu[s siet, quod circa eum in senatum legei non liceat, neiue eum det que]i ex h(ace) l(ege) ioudex in eam rem erit, neiue eum que[i e]x h(ace) l(ege) patronus datus erit. vvv de patrono repudiando. vvvv quei ex h(ace) l(ege) patronus datus erit, sei is mora[m fecerit ei, quei petet, quo minus ioudicium ex h(ace) l(ege) fiat, ei eum repudiare liceto --- in]*[12]

It was typical of this legislation that it did not impose such an obligation on the presiding magistrate in the case of the accused. This comes as no surprise, because the role of the accused in the trials *de repetundis* was played by former Roman officials – governors who usually came from the class of senators. Thus, entrusting the praetor with such a duty would *de facto* favour a party that had already better position from a social point of view, as was the case with the accused in such trials.[13] Moreover, finding a defence counsel to represent the accused was not a problem for him. In practice, the accuser was in a much more difficult situation, facing a major challenge, which was undoubtedly to pursue the prosecution against the accused who came from prominent political circles. In order to help the *accusator* to properly prosecute, the *lex Acilia* imposed a number of requirements on the person who was to be his *patronus*. Thus, according to its provisions, that role could not be assumed by a person related by kinship or affinity to the accused or belonging to the same association as the latter[14] or who could in some way be involved the case or having an interest in a particular judicial decision.[15] In addition to the above-mentioned reasons, one could not be a patron when convicted by a court sentence.[16] It is not known precisely when the accuser could request the appointment of a patron by the praetor. The *lex Acilia* merely provides that this could occur only after the *nominis delatio*[17] –that is, – after the filing of the indictment. It seems that the praetor appointed a *patronus* for the accuser when the latter became a full-fledged party to

---

used interchangeably, although the former (*patronus*) was used especially in reference to defence counsels – L. Bablitz, *Actors and Audience in the Roman Courtroom*, London–New York 2007, p. 148.

12 As cited in: A. Lintott, M.H. Crawford, H.B. Mattingly, *Lex repetundarum*, in: *Roman Statutes*, ed. M.H. Crawford, vol. 1, London 1996, p. 66; see P. Kołodko, *Ustawodawstwo rzymskie w sprawach karnych. Od Ustawy XII Tablic do dyktatury Sulli*, Białystok 2012, p. 149.

13 See A. Chmiel, *Zasada kontradyktoryjności w rzymskim procesie karnym*, Zeszyty Naukowe Uniwersytetu Rzeszowskiego. Seria Prawnicza. Prawo 2018, vol. 22, p. 49.

14 See P. Kołodko, *Ustawodawstwo rzymskie*…, p. 150.

15 See A. Chmiel, *Zeznania świadków*…, p. 111.

16 P. Kołodko, *Ustawodawstwo rzymskie*…, p. 151.

17 *Lex Acil.* L.9; zob. P. Kołodko, *Ustawodawstwo rzymskie*…, p. 149.

the trial, i.e. only when he filed an indictment and took an oath, thus assuming responsibility for the effectiveness of the *accusatio*.

It was characteristic of the aforementioned law that it did not, however, contain such requirements for the defence counsel of the accused. It is difficult to imagine, due to the lack of such regulation, that the accused had no right to appoint such a representative. If the accused could not find a defence counsel himself, the praetor would probably have been obliged to appoint such counsel if the accused so requested.[18] A provision referring to such a custom on the part of the official can be found in Ulpian's account of the praetor's edict:

> D. 3.1.1.4 (*Ulpianus libro sexto ad edictum*): *Ait praetor: "si non habebunt advocatum, ego dabo." Nec solum his personis hanc humanitatem praetor solet exhibere, verum et si quis alius sit, qui certis ex causis vel ambitione adversarii vel metu patronum non invenit.*[19]

According to the jurist's account, if a party did not have a lawyer, the praetor would appoint one.[20] This raises the question: at what stage of the trial did the praetor appoint the lawyer? According to some opinions in the literature, in trials before the *quaestiones*, the accused could fully exercise their procedural rights only when the jury was convened, meaning when the accused was entered *inter reos*, meaning placed on the list of the accused by the president of the *quaestio*.[21] Therefore, the accused could request the appointment of a defence counsel by the magistrate only when he became a party to the trial, i.e. when the *inscriptio inter reos*[22] had already been made.

Provisions of the law, at least initially, did not regulate how many defence counsel an accused could have.[23] As mentioned in Cicero's account in his speech *Pro Cluentio*, he himself led the defence of Cluentius, according to the old custom.[24] Over time, the custom of having more defence counsel became established. Thus, in the trial of

---

18 A.W. Zumpt, *Der Criminalprocess*…, p. 88.

19 Translation: *The Praetor states: 'If the parties have no advocate I will give them one'. Not only is the Praetor accustomed to show this favor to such persons, but also he will do so where anyone is not able to obtain an advocate for certain reasons; as for instance, because of the intrigues of his adversaries, or through fear* – English translation by S.P. Scott, The Civil Law, III, Cincinnati 1932, https://droitromain.univ-grenoble-alpes.fr, /Anglica/D3_Scott.htm#1 [access: 28.06.2025].

20 Cf. A. Chmiel, *Zasada kontradyktoryjności*…, p. 48.

21 See W. Mossakowski, *Accusator w rzymskich procesach de repetundis w okresie republiki*, Toruń 1994, p. 39; cf. A. Chmiel, *Reus vel suspectus*…, p. 71.

22 Ibidem, p. 74.

23 Cf. L. Bablitz, *The Selection of Advocates for Repetundae Trials. The Cases of Pliny the Younger*, Athenaeum 2009, vol. 97, pp. 197–198.

24 Cic. *pro Cluent*. 70, 199; zob. A.W. Zumpt, *Der Criminalprocess*…, p. 89.

C. Rabirius,[25] L. Flaccus and P. Sestius,[26] the legal representatives were Q. Hortensius and Cicero.[27] In the trial of M. Caelius, the defence was pursued by M. Crassus and Cicero.[28] Three defence counsels spoke in defence of L. Murena, who was accused of electoral bribery (*ambitus*).[29] Towards the end of the Republic, the number of defence counsel standing in trials increased. In the case of M. Scaurus, the accused was defended by as many as six counsels, an unprecedented number for the time. After the civil war before Octavian Augustus took power, and before the issuance of the *lex Iulia iudiciorum publicorum* by the latter, there were times when as many as twelve lawyers appeared in a trial.[30] An exception was the legislation introduced in 52 BC on the initiative of Pompey, which greatly simplified proceedings in the cases they regulated.[31] The number of advocates appearing in a particular case was only limited in the legislation of Augustus, who accepted the maximum number as twelve.[32]

Like today, acting as a defence counsel in the trial, at least in the initial period of the Republic, did not take place without remuneration. Over time, this situation changed. Probably the widespread "greed of speakers and lawyers," as Tacitus notes, became so excessive that they began to charge such large sums for prosecution or defence that public dissatisfaction eventually compelled the state to intervene.[33] This resulted in the adoption in 204 BC of the *lex Cincia* (*de donis et muneribus*).[34] The aforementioned law – or rather plebiscite – led to the solution that everything that a citizen concerned gave, promised to give or accepted in exchange for the provision of, among others, assistance in court cases, should be considered a gift. The law most likely set the maximum amount of such a donation.[35] As a result of this law, the counsel's efforts in court related to handling someone's case were not considered paid work. The citizen could reciprocate for such a service, but the fee was only a certain

25 Cic. *p. Rab*. 6, 18.

26 Cic. *p. Sest*. 1, 3.

27 Cic. *p. Flacc*. 17, 41.

28 Cic. *p. Cael*. 10, 23.

29 A.W. Zumpt, *Der Criminalprocess*…, p. 90.

30 W. Kunkel, *Quaestio*, in: *Kleine Schriften. Zum römischen Strafverfahren und zur römischen Verfassungsgeschichte*, Weimar 1974, p. 83.

31 A.W. Zumpt, *Der Criminalprocess*…, p. 90.

32 W. Kunkel, *Quaestio*, p. 83, W. Litewski, *Rzymski proces karny*, Kraków 2003, p. 86; cf. A.W. Zumpt, *Der Criminalprocess*…, p. 90.

33 Tac. Ann XV, 20: *usu probatum est, patres conscripti, leges egregias, exempla honesta apud bonos ex delictis aliorum gigni. sic oratorum licentia Cinciam rogationem, candidatorum ambitus Iulias leges, magistratuum avaritia Calpurnia scita pepererunt*.

34 See W. Litewski, *Słownik encyklopedyczny prawa rzymskiego*, Kraków 1998, p. 153.

35 A.W. Zumpt, *Der Criminalprocess*…, p. 93.

gift for such courtesy. In addition, *Lex Cincia* introduced quite interesting provision, according to which the recipient, i.e. the defence counsel, could not demand the gift of the promised gifts, while the giver, i.e. his client, could demand the return of the gift and was under no obligation to fulfil what had been promised.[36] This situation had gradually changed and the ban on donations to lawyers was mitigated.[37] In the post-classical period, a specific bar service tariff was already in force.[38]

## 2. Accused's right to a defence counsel in *cognitio extra ordinem*

The right to the assistance of a defence counsel was also safeguarded for the accused in the *cognito criminalis* procedure. A particularly interesting piece of information on this matter is contained in an account by Paulus:

> D. 48.18.18.9 (*Paulus libro quinto sententiarum*): *Cogniturum de criminibus praesidem oportet ante diem palam facere custodias se auditurum, ne hi, qui defendendi sunt, subitis accusatorum criminibus obprimantur: quamvis defensionem quocumque tempore postulante reo negari non oportet, adeo ut propterea et differantur et proferantur custodiae*.[39]

In the first part of his account, the jurist described the people to be questioned not as *rei*, but as *custodias* – that is, "those who are prisoners," or, modern terminology, "the detained." In the further part of the jurist's account, a kind of principle of the right of the accused to appoint a defence counsel was formulated. The jurist states: *quamvis defensionem quocumque tempore postulante reo negari non oportet* – "although, if at any time the defendant requests it, he should not be refused permission to defend himself." Further in his account, however, Paulus, returns to the situation of the detainee and outlines his procedural position. Namely, the jurist stated in his account that the governor has the right to refuse to appoint a defence counsel at this preliminary stage of proceedings, when the trial has not yet begun.[40]

---

36 Ibidem.

37 Cf. W. Litewski, *Słownik*…, p. 15 3.

38 W. Litewski, *Rzymski proces karny*, p. 86.

39 Translation: *A Governor who is to take cognizance of a criminal accusation must publicly appoint a day when he will hear the prisoners, for those who are to be defended should not be oppressed by the sudden accusation of crime; although, if at any time the defendant requests it, he should not be refused permission to defend himself, and on this account, the day of the hearing, whether it has been designated or not, may be postponed*, S.P. Scott, *The Civil Law*, XI, Cincinnati 1932, https://droitromain.univ-grenoble-alpes.fr/Anglica/D48_Scott.htm#18 [access: 28.06.2024].

40 Cf. A. Chmiel, *Reus vel suspectus*…, pp. 73–74.

As a reason for limiting the right to defence, the jurist cites the attempt to protract the interrogation of the accused, the so-called *interrogatio* (*adeo ut propterea et differantur et proferantur custodiae*). During this act, the person suspected *de facto* was questioned in connection with the charges brought against him, and then the indictment was filed against him and the date of the hearing was set. This account confirms that it was only after the detainee had been questioned, and thus probably after the indictment had potentially been brought against him and the registration *inter reos*, when he had already become a party to the proceedings, that he had the full right to demand the appointment of a defence counsel.[41]

The fact that the accused had the right to appoint a defence counsel once an indictment had already been filed against him and he appeared at trial is confirmed in one of the imperial constitutions:

> C. 9.3.2 (*Imperatores Gratianus, Valentinianus, Theodosius*)[42]: *Nullus in carcerem prius quam convincatur omnino vinciatur. 1. Ex longinquo si quis est acciendus, non prius insimulanti accommodetur adsensus, quam sollemni lege se vinxerit. 2. Eique qui deducendus erit ad disponendas res suas componendosque maestos penates spatium coram loci iudice aut etiam magistratibus sufficientium dierum, non minus tamen triginta tribuatur, nulla remanente apud eum qui ad exhibendum missus est copia nundinandi. 3. Qui posteaquam ad iudicem venerit, adhibita advocatione ius debebit explorare quaesitum ac tamdiu pari cum accusatore fortuna retineri, donec reppererit cognitio celebrata discrimen*.[43]

The constitution further provides that if a person was summoned as an accused to court from a distant place, the person, once standing before the judge, had to be assisted by a lawyer to examine the case that was brought against him. According to the wording of the ordinance, the accused had to be provided with a defence

---

41 It is worth mentioning at this point e.g. the trial of Jesus of Nazareth or the case of Apollonius of Tyana – for more detail on this topic, see ibidem, pp. 72–75.

42 C. 9.3.2 (= C.Th. 9.2.3).

43 Translation: *No accused person shall, under any circumstances, be confined in prison before he has been convicted. If he should happen to be a long distance away, the accusation shall not be received before the accuser formally agrees that, if he should fail to legally prove the charge, he will submit to the penalty which the other party would have suffered if he had been found guilty. A sufficient time, consisting of not less than thirty days, shall be granted by the judge of the district to the accused, for the purpose of arranging his business; and no more shall be granted to him who has been ordered to produce the defendant. After he has appeared in court, and an advocate has been appointed to defend him, the case shall be heard, and, whether the guilt or the innocence of the accused is established, he and his prosecutor must be treated in the same manner, without any distinction. Given at Constantinople, on the third of the Kalends of January, during the Consulate of Gratian, Consul for the fifth time, and Theodosius*, S.P. Scott, The Civil Law, XIV–XV, Cincinnati 1932, https://droitromain.univ-grenoble-alpes.fr// Anglica/ CJ9_Scott.htm#3 [access: 28.06.2024].

counsel[44] to help him examine the legal basis upon which he was charged. Further in this constitution, the emperors stipulated that the accused had to be held in the same conditions as the accuser until an investigation was carried out and a proper judgment rendered. The cited imperial constitution confirms the thesis that, in the post-classical period, the use of lawyers in criminal cases, who played the role of defence counsels of the accused, was a "*sine qua non*" condition of Roman public proceedings.[45]

The discussed regulation was formulated in relation to a case where the accused was a person who came from afar (*ex longinquo si quis est acciendus*), thus having limited opportunities in choosing an appropriate defence counsel. However, it should be assumed that even if the accused came from a nearby area, in a situation where he failed to secure a lawyer himself, the judge was obliged to appoint one ex officio. The cited imperial constitution allows us to propose a thesis that in the post-classical period, in *cognitio extra ordinem*, there was already a universal requirement for legal representation in criminal cases. However, it should be emphasised that the law did not impose such a requirement on the judge in private-law cases.[46]

At this point, it is worth mentioning that an important manifestation of the accused's right to appoint a defence counsel was the restriction on the admissibility of witness evidence. Thus, the accuser could not summon as witnesses those who acted as defence counsel for the accused.[47] Such provisions were already set out in the *lex Acilia repetundarum*.[48] Such an evidentiary prohibition was, however, relative in nature – that is, the defence counsel had the right to refuse to testify. Interestingly, according to this law, only one of the accused's defence counsel had such a right.[49] From Cicero's account in his speech *In Verrem* (II, 8, 24), it appears that such a prohibition was already of an absolute nature in the late Republican

---

44 See A. Banfi, *Acerrima indagio. Considerazioni sul procedimento criminale Romano nel IV sec. D.C.*, 2nd ed., Torino 2016, p. 149.

45 C. Humfress, *Orthodoxy and the Courts in the Late Antiquity*, Oxford 2007, p. 96.

46 As in ibidem, p. 96. In private law cases in the period of the Dominate advocates, appointed legal representatives were also used and acted in trials in the capacity of *procuratores* – see W. Litewski, *Rzymski proces cywilny*, Warszawa–Kraków 1988, p. 83. Interestingly, *procuratores* i.e. legal representatives, could also stand as defence counsels in criminal cases involving capital punishment, where the accused was not present – see C. 9.2.3 (*Imperator Alexander Severus*): *Reos capitalium criminum absentes etiam per procuratorem defendi leges publicorum iudiciorum permittunt.*

47 See A.W. Zumpt, *Der Criminalprocess*…, p. 271; A.H.J. Greenidge, *The Legal Procedure of Cicero's Time*, New York 1901, p. 484, P. Kołodko, *Ustawodawstwo rzymskie*…, p. 161; A. Chmiel, *Zeznania świadków*…, p. 110.

48 *Lex Acil*. L. 33; see A. Chmiel, *Zeznania świadków*…, p. 110.

49 See A. Chmiel, *Zeznania świadków*…, p. 111.

period.[50] It is also clear from the imperial constitutions – for example, from the late imperial period – as mentioned by Arcadius Charisius – that there was an absolute prohibition in the Roman procedure at that time to examine defence counsels as witnesses in cases in which they are involved.[51]

The fact that the right of the accused to defend himself, which included the right to appoint a defence counsel, was one of the guiding principles of the Roman criminal procedure is best demonstrated by how the Romans treated the procedural situation of the perpetrator who was a slave. Slaves, despite being deprived of legal capacity in terms of Roman private law, were nonetheless, one might say, empowered under criminal law and could appear at trial as the accused. In this role, they had the right of defence, which they could exercise either through their master, personally, or through third parties. Ulpian, in his commentary on the Praetorian edict, provides information about this right:

> D. 48.19.19 (*Ulpianus libro quinquagensimo septimo ad edictum*): *Si non defendantur servi a dominis, non utique statim ad supplicium deducuntur, sed permittetur eis defendi vel ab alio, et qui cognoscit, debebit de innocentia eorum quaerere*.[52]

The slave's right to be defended by his master was also confirmed in the Code of Justinian[53]:

> C. 9.2.2 (*Imperator Alexander Severus*): *Si cuiusdam criminis obnoxius servus postulatur, dominus eum defendere potest et in iudicio sistere accusatoris intentionibus responsurum. 1. Post probationes autem criminis non ipse dominus, sed servus pro suo delicto condemnationem sustineat. Ideo enim servum suum domino defendere permissum est, ut pro eo possit competentes adlegationes offerre*.[54]

---

50 See Cic. *In. Verrem*, II, 8, 24: *Nonne multa mei testes quae tu scis nesciunt? Nonne te mihi testem in hoc crimine eripuit on istius innocentia, sed legis exceptio?*, see A. Chmiel, *Zeznania świadków*…, p. 112.

51 See D. 22.5.25 (*Aurelius Arcadius Charisius magister libellorum libro singulari de testibus*): *Mandatis cavetur, ut praesides attendant, ne patroni in causa cui patrocinium praestiterunt testimonium dicant. Quod et in exsecutoribus negotiorum observandum est.*; cf. U. Vincenti, *Duo genera sunt testium. Contributo allo studio della prova testimoniale nel processo romano*, Padova 1989, p. 115; A. Chmiel, *Zeznania świadków*…, p. 113.

52 Translation: *If slaves are not defended by their masters, they should not, for this reason, immediately be conducted to punishment, but should be permitted to defend themselves, or be defended by another; and the judge who hears the case shall inquire as to their innocence*, S.P. Scott, The Civil Law, XI, Cincinnati 1932, https://droitromain.univ-grenoble-alpes.fr/ Anglica/ D48_Scott.htm#19 [access: 28.06.2024].

53 The fact that a slave had the capacity to stand in trial under criminal procedure, which was manifested in the procedural guarantees granted to him, one of which was the right of defence and consequently the right to appoint a defence counsel, can be evidenced by the fact that before filing a written indictment, the slave could not be tortured. This is mentioned in one of imperial constitutions – see C. 9.2.13.

54 Translation: *Where a slave is accused of any crime whatsoever, his master can defend him, appear in court, and answer the charge of his accuser. But after the proof of the crime has been established, not*

The fact that the right to appoint a defender became a common procedural guarantee for the accused in the *cognito criminalis* procedure can be evidenced by the development that in the 4th century, it became a common practice among *advocates*, to strive for official registration on the list of lawyers appearing before a specific court. This is referred to in the content of the following legal act, mentioned in the *Codex Theodosianus*:

> C. Th. 2.10.1 (*Imp. Constantinus a. Antiocho praefecto vigilum*): *1) Iussione subversa, qua certus advocatorum numerus singulis tribunalibus praefinitus est, omnes licentiam habeant, ut quisque ad huius industriae laudem in quo voluerit auditorio pro ingenii sui virtute nitatur. Dat. k. nov. Serdicae Constantino a. v et Licinio c. conss. (319 nov. 1).*

The content of the above imperial constitution issued on 1 November 319 AD, addressed to Antiochus, the Prefect of the *Vigiles*, confirms such a practice of "official" registration of lawyers who were to appear before specific courts. The first part of the mentioned regulation states that this constitution has abolished the previous decree had prescribed a fixed number of advocates to be assigned to eash court, and at the same time, granted each lawyer a permission to appear before any tribunal of their choice.[55]

It is noteworthy that later imperial constitutions reintroduced various restrictions on the number of advocates assigned to a particular court, especially to those more prestigious ones such as the courts of the Praetorian Prefect and the Urban Prefect.[56]

To sum up, the accused's right to appoint a defence counsel had been from the beginning one of his fundamental procedural guarantees. During the Republican period, a universal requirement to have a defence counsel in criminal cases had not yet developed. It is likely that even then, Roman criminal procedure recognised instances of mandatory use of a defence counsel. In situations where the defendant was hearing- or speech-impaired, the praetor would certainly have appointed a defence

---

*the master himself but the slave shall be condemned, for a master is only permitted to defend his slave in order to be able to make suitable allegations in his behalf.* Published on the eleventh of the Kalends of December, during the Consulate of Alexander, 222, S.P. Scott, The Civil Law, XIV–XV, Cincinnati 1932, https://droitromain.univ-grenoble-alpes.fr// Anglica/ CJ9_Scott.htm#2 [access: 28.06.2024].

55 As in C. Humfress, *Orthodoxy and the Courts*…, p. 99.

56 Ibidem. Such a wide opening of the list of advocates by courts likely led to negative consequences quite quickly, due to the fact that many of them began to register with various courts, which resulted in their failure to fulfil their obligations towards their clients (including failures to comply with time limits), which led to a renewed reduction by the imperial authorities of the number of lawyers assigned to a given court – see C.Th. 2.10.2 (*Idem a. ad Antiochum praefectum vigilum*): *Destituuntur negotia et temporibus suis excidunt, dum advocati per multa officia et diversa secretaria rapiuntur; ideoque censuimus, ne hi, qui semel protestati fuerint, quod apud te causas acturi sunt, apud alium iudicem agendi habeant potestatem.*

counsel *ex officio*.[57] The establishment of *quaestiones perpetuae* likely introduced the obligation to appoint a defence counsel for the accused if the latter requested it. On the other hand, the development of *cognitio extra ordinem* eventually led to the situation where provision of legal assistance to the accused by the court became a common practice over time. In the legislation of the emperors of the Dominate, the defender's right to a defence counsel was transformed into a universal obligation to have one.

The reasons for the introduction of the aforementioned changes in the *cognitio* are probably to be found in the emergence of a completely new model of criminal procedure in which the imperial official, acting as a judge was empowered to propose the taking of evidence. The ability of the public authorities to intervene with the entire evidentiary process had to be balanced in the trial by the imposition of a general obligation on these authorities to appoint a defence counsel for the accused, if the latter failed or was unable to do so. The strengthening of inquisitorialism in the new model of Roman criminal procedure, on the one hand, and the associated principle of officiality (through the emergence of the court's evidentiary initiative), on the other hand, compelled the state authorities also to extend the procedural guarantees inherent in the implementation of the adversarial principle to the *cognitio extra ordinem*. The transformation of the accused's right to appoint a defence counsel into a universal obligation of compulsory legal representation in the post-classical period should therefore be regarded as both an example of the progressive unification of the rules and principles of the criminal *cognito* procedure and a manifestation of the strengthening of the procedural guarantees afforded to the accused.

## Bibliography

Bablitz L., *Actors and Audience in the Roman Courtroom*, London–New York 2007.

Bablitz L., *The Selection of Advocates for Repetundae Trials. The Cases of Pliny the Younger*, Athenaeum 2009, vol. 97.

Banfi A., *Acerrima indagio. Considerazioni sul procedimento criminale Romano nel IV sec. D.C.*, 2nd ed. Torino 2016.

Chmiel A., *Defence Right of the Accused and the Evidence from Slave's Testimony in the Roman Criminal Procedure*, Studia Iuridica Lublinensia 2021, vol. 30, no. 5.

Chmiel A., *Reus vel suspectus? On the Status of the Accused and the Suspect in the Roman Criminal Procedure*, Studia Iuridica Lublinensia 2021, vol. 30, no. 2.

[57] A.W. Zumpt, *Der Criminalprocess*…, p. 85.

Chmiel A., *Zasada kontradyktoryjności w rzymskim procesie karnym*, Zeszyty Naukowe Uniwersytetu Rzeszowskiego. Seria Prawnicza. Prawo 2018, vol. 22.
Chmiel A., *Zeznania świadków i ich wartość dowodowa w rzymskim procesie karnym*, Lublin 2013 [non-published].
Crook J.A., *The Legal Advocacy in the Roman World*, London 1995.
Greenidge A.H.J., *The Legal Procedure of Cicero's Time*, New York 1901.
Hofmański P., Kuczyńska H., *Międzynarodowe prawo karne*, Warszawa 2020.
Humfress C., *Orthodoxy and the Courts in the Late Antiquity*, Oxford 2007.
Kołodko P., *Ustawodawstwo rzymskie w sprawach karnych. Od Ustawy XII Tablic do dyktatury Sulli*, Białystok 2012.
Kubiak P., *Kilka uwag na temat znajomości prawa u mówców sądowych republikańskiego Rzymu*, Krakowskie Studia z Historii Państwa i Prawa 2015, vol. 8, no. 1.
Kunkel W., *Quaestio*, in: *Kleine Schriften. Zum römischen Strafverfahren und zur römischen Verfassungsgeschichte*, Weimar 1974.
Lintott A., Crawford M.H., Mattingly H.B., *Lex repetundarum*, in: *Roman Statutes*, ed. M.H. Crawford, vol. 1, London 1996.
Litewski W., *Rzymski proces cywilny*, Warszawa–Kraków 1988.
Litewski W., *Rzymski proces karny*, Kraków 2003.
Litewski W., *Słownik encyklopedyczny prawa rzymskiego*, Kraków 1998.
Mossakowski W., *Accusator w rzymskich procesach de repetundis w okresie republiki*, Toruń 1994.
Mossakowski W., *„Laudatores" w procesie rzymskim*, Zeszyty Prawnicze UKSW 2001, no. 1.
Neuhauser W., *Patronus und Orator*, Innsbruck 1958.
Pugliese G., *Le garanzie dell'imputato nella storia del processo penale romano*, Temi
Romana 1969, vol. 18.
Sowiński P., *Uprawnienia składające się na prawo oskarżonego do obrony. Uwagi na tle czynności oskarżonego oraz organów procesowych*, Rzeszów 2012.
Vincenti U., *Duo genera sunt testium. Contributo allo studio della prova testimoniale nel processo romano*, Padova 1989.
Waltoś S., Hofmański P., *Proces karny. Zarys systemu*, Warszawa 2018.
Wiliński P., *Zasada prawa do obrony*, Warszawa 2006.
Zumpt A.W., *Der Criminalprocess der römischen Republik*, Leipzig 1871.