LEGAL REMEDIES IN CRIMINAL PROCEEDINGS IN ROMAN AND MODERN LAW

Aleksandar Arsić[*]
student IV course, Faculty of Law, University of Nis

INTRODUCTION

In Romanistics, far more attention is directed towards the study and interpretation of Roman private law, while Roman public law is unjustly neglected (especially criminal proceedings). It must be pointed out that the importance of Roman law is not reflected only in the construction of private law, whose sources are abundant in Romanistics and which has been especially emphasized in the last 800 years, but in the construction of public law too, not discussed much, which, without grounds, leads to the neglect of Roman public law.[1]

Throughout this paper, specifically through the institutes of ***provocatio*** and ***appellatio***, the very beginnings of the right to appeal are studied as one of the fundamental rights of parties in modern criminal proceedings, without which today's criminal proceedings cannot be imagined. Also, the paper will point to the emergence of the principle of multiple instances, which represents one of the legacies of Roman public law. At the end of this paper, based on the obtained conclusions from Roman law, these institutes will be observed in terms of modern law, or more precisely Serbian criminal procedural legislation, in order to determine whether Roman law influenced the formation of legal remedies in modern law.

1. IUS ROMANUM PUBLICUM

Taking into account that Roman law covers a long period of thirteen centuries, that is, the period "from Romulus to Justinian" (VIII century BC – VI centu-

[*] E-mail: aca.arsic@gmail.com

[1] See: IGNJATOVIĆ, M. – O uticaju pojedinih pravila rimskog javnog prava na savremeno pravo (On the Impact of Certain Rules of Roman Public Law on Modern Law, Social change in the global world, Štip, 2014, page 357.

ry AD)[2], we come to the inevitable conclusion that Roman law is undoubtedly one of the world's most developed legal systems with an impressive wealth of ideas and legal institutions. Studying legal norms and institutes, one may conclude that it is almost impossible to study Roman public law separately from Roman private law, because until the adoption of *Lex duodecim tabularum*, and even in it, the provisions of private law were not clearly distinct from the provisions of public law. It was necessary to know Roman public law in order to study Roman private law because it, in a way, presents the nervous system of the Roman social organism in whose private law we can see highly developed legal awareness of the Romans.[3]

Through developing and reforming the already existing legal system, the tendency to separate private from public law is clearly evident. Bearing in mind that in the period of the Kingdom, the laws were merely compilations of collected customary and legal norms, one cannot deny the progress of Roman law. With the adoption of *Lex duodecim tabularum*, the provisions of public and private law began to separate, influenced by the factors that were subject to the standardization of public law. During the period of the Republic, the Roman jurists who filled legal gaps created the basis for the reception of Roman law and its institutes by the legal systems of other countries and nations.[4] The development of Roman private and public law could be further traced to the opinions of respectable jurists, the decisions of the Senate and the imperial decisions from the latter days of the Roman State; the Institutes of Gaius and Justinian's Codification, as the culmination of the development of Roman law.

From today's point of view, the correlation of Roman public and Roman private law is indisputable, and their study must be correlated because private law of every nation owes to public and legal state organization not only its formal origin, but also its external authority and application in practical life.

---

2 Read more: APASIJEV D. – *Iudicia publica* Rimskoto krivično procesno pravo (So poseben osvrt na pravosudniot sistem vo vremeto na Republikata), Skopje, 2014, page 6.

3 details: MILOSAVLJEVIĆ, Ž. – Rimsko javno pravo (Roman Public Law), Belgrade, 1898, page III.

4 About that: NOVKIRIŠKA, M. – Za rimskoto publično pravo, Rimsko i съvremenno publično pravo, Sofia, 2013, page 29.

2. DEVELOPMENT OF LEGAL REMEDIES THROUGHOUT THE PERIODS OF THE ROMAN STATE

2.1. The period of the Kingdom

In the period of the Kingdom, criminal proceedings did not exist. In the development of the Roman State, this period was accompanied by a high degree of repression of the King, the Supreme Military Commander and the High Priest on one hand, and on the other, the unlimited power of *pater familias* to impose various types of sanctions on subordinate members of his family. It was only during the period of the Republic that the first criminal proceedings appeared, which inevitably created the first legal remedies available to parties in the proceedings.

2.2. Provocatio de populis (Period of the Republic)

Provocatio[5] was the second phase of the Cognitive proceedings[6]. It was allowed to all adult male Roman citizens, but not to women, who had no right to participate in the work of the Assembly. *Provocatio* was established in the period of early Republic and was first legally regulated in 509 BC by *Lex Valeria de provocatione*, which allowed citizens to appeal against the death penalty, corporal punishment and high fine imposed by the magistrates[7]. The provisions of the criminal proceedings in *Lex Valeria de provocatione* were subsequently confirmed in *Lex duodecim tabularum*[8].

The following were exempt from the right to *provocatio*: *dictator optima lege creatus*, magistrates (consuls, praetors) in the exercise of their military *imperium*, and the consuls who would be given quasi-dictatorship[9].

---

5 Summons for a national trial.

6 Cognitive proceedings were conducted for the crimes for which the capital punishment or maximum fine (3200 aca) could not be imposed, and they were conducted in two phases. The first phase was in front of a magistrate that was the sole representative of the state in the proceedings (prosecutor, coroner and judge), while the second phase, after filing *provocatio*, took place before the National Assembly.

7 ",*Ne quis magistratus civem Romanum adversus provocationem necaret neve verberaret".*

8 *Lex duodecim tabularum*, brought in Rome in 451-450 BC, was written on twelve tablets (first ten, then two more) and created as a result of the conflict between patricians and plebeians.

9 More details: MILOSAVLJEVIĆ, Ž. – Rimsko javno pravo (Roman Public Law), Belgrade, 1898, page 90.

The legal remedy *provocatio* aimed to annul the final verdict of a magistrate and to transfer to the Assembly the final verdict of the guilt and punishment of the offender. However, this rule encountered certain problems in practice. For example, the case could not be brought before the National Assembly if the magistrates who had the authority to convene the Assembly did not agree with the request of the convicted person. If, however, one of the magistrates adopted the convict's *provocatio*, he would have to summon the Assembly – the Centuriate Assembly, if the subject of the appeal was the death penalty; or the Tribal Assembly, if the subject was *multa suprema* (high fine)[10]. From the day of the acceptance of *provocatio* by a magistrate to the session of the National Assembly, at least 24 days had to pass, during which period the hearing of the one who brought *provocation* would be conducted again. If that was not the case, and the Assembly met, the convicted person would be acquitted of his/her previous sentence, which would end the proceedings.

If all the conditions for bringing the case before the National Assembly were fulfilled, the factual state of the committed criminal offense would be determined again. The factual state was determined in special assemblies right before the main session of the Assembly.

There were two kinds of verdict – liberating (absolute) and condemnatory (conviction). If the absolute verdict was pronounced, a person would be released, and in case of the condemnatory verdict, the presiding magistrate would order the execution of the sentence already determined by the previous verdict.

During the late Republican period, *provocatio* spread to the entire territory of the Roman State through *Leges Porciae* and *Lex Sempronia* of 123 BC.

2.2.1. Auxilium tribunicium

In addition to the already existing *Provocatio de populis*, a citizen whom the magistrates would damage (or if they would damage the interest based on law) had the right to seek the protection of national tribunes if he was in Rome. or outside within the area of 1,000 steps from it, or the right to appeal against one magistrate to another, to his colleague or a senior magistrate[11].

---

10 NAUMOVSKI G., BUCKOVSKI V., POLENAK-AKIMOVSKA M., PUHAN I. – Roman Law, Skopje, 2014, p. 450.

11 MILOSAVLJEVIĆ, Ž*, op. cit.*, p. 91.

2.3. Appellatio

2.3.1. Appellatio during the Principate

The first indications of the legal remedy *appellatio* can be seen during the Participate when the jurisdiction to conduct criminal proceedings, on behalf of the emperor, was transferred to *praefectus urbi* (urban prefect), whose jurisdiction spread in Rome and in the vicinity of 100 miles, and in Italy outside the 100-mile radius and over persons who were exempt from the jurisdiction of provincial governors.[12]

In the event that special or general imperial delegates were in the role of a judge, a person not satisfied with their verdict could file *appellatio* directly to the emperor. For any criminal proceedings, specific judges were delegated. *Appellatio* was a new institute in Roman law that could only appear in a hierarchical state,[13] so that the hierarchically higher authority had the power to accept, approve or amend, that is, to abolish and make the decision on its own, instead of the decision of its subordinate body. During this period, the principle of multiple instances emerged in trials, so that the convicted person could appeal even to a princeps whose decision would be legally binding and final.

2.3.2. Appellatio during the Dominate

Appeal proceedings in the Dominate period did not experience significant changes. *Appellatio* was filed to the first-instance court; the court then considered whether it could adopt the appeal, and only if that was not possible, it transferred the appeal, together with all the files of the case and the opinion, to a hierarchically higher court (Court of Appeal). A judge who unjustly denied the right to appeal risked being fined. The deadline for the *Appellatio* statement was two to three days, and that deadline was extended to ten days by the Tribonian reform. When deciding on the appeal, the public was excluded. As in the Principate period, the decision of a hierarchically lower court could be annulled, changed or confirmed, but the Court of Appeal was authorized to reach a new verdict on its own.

In addition to the criminal proceedings before the lower and appellate courts, in this period, the possibility of personal mediation of the emperor in the

---

12 *Ibid*, p. 501.

13 NAUMOVSKI G., BUCKOVSKI V., POLENAK-AKIMOVSKA M., PUHAN I., *op. cit,* p. 459.

justice system remained. According to one law of Theodosius II, the emperor was in the role of a judge only in those disputes that were adjudicated by *judices inlustres* (first ranked), and when appealing against the decisions of judges called *judices spectabiles*, trials were given to the commission.[14]

3. IMPACT OF THE INSTITUTES PROVOCATIO AND APPELLATIO ON THE MODERN SERBIAN CRIMINAL PROCEDURAL LEGISLATION

When studying and interpreting Roman law, its provisions should not be considered only from a legal-historical point of view, but its imposing role in the development of modern positive law must also be recognized. However, the reception of Roman law did not mean, in the literal sense, the application of unchanged Roman law, but its transformation and the adjustment of Roman law to modern law, that is, the contemporary version of Roman law.[15]

By comparatively studying the legal provisions of Roman and modern criminal procedural law, many similarities can be observed, or, better to say, the connection in terms of the basis of the legal development that Roman law represents in relation to the positive criminal procedural legislation of the Republic of Serbia. Primarily, both Roman and modern law accept that "reaching a verdict does not necessarily mean that the process of deciding on the grounds of the criminal law request for punishing the defendant is definitely completed"[16]. From the point of view of the goal that is to be achieved in criminal proceedings, repression as the purpose of criminal proceedings prevailed in Roman law, and it could be said that this is precisely the fundamental difference between the general purpose of criminal legislation then and now. Today, one of the main features of criminal procedural law is its instrumentality, that is, one of its goals is the proper application of substantive legislation, and the indirect goal is to protect society from crime (special and general prevention, from the point of view of criminal substantive law). However, even in Roman law, there are indications of the principles on which modern criminal and criminal procedural legislation will be based. Accordingly, legal remedies appear in order to protect human rights in

14 MILOSAVLJEVIĆ, Ž*, op. cit.*, p. 658.

15 About that: IGNJATOVIC, M. *op. cit*., p. 366.

16 KNEŽEVIĆ, S. – Krivično procesno pravo (Criminal Procedural Law), Niš, 2015, p. 32.

criminal proceedings, to achieve fairness and impartiality in the conduct of courts, and in order for more objective verdicts to be reached.

One of the most important differences in relation to the positive legislation of both the Republic of Serbia and most of the modern countries is the circle of persons who can appeal. As previously stated in the paper, only adult males could file *provocatio*, while today such distinction by gender would constitute a serious violation of human rights prohibited by international law too. Also, today the right to file an appeal is not related to a particular type of punishment, as was the case with *provocatio*.

Observing the conditions that Roman law demanded for the use of *appellatio*, it is first noticed that the use of this legal remedy requires a hierarchically-regulated state. A great resemblance to the modern legal provisions of criminal procedural law can be seen in the specific case that *appellatio* was filed to the first-instance court, which then considered whether it could adopt an appeal. If that was not possible, the appeal, together with all the files of the case and the opinion, was sent to a hierarchically higher court. This can be directly linked to today's proceedings on the appeal against the verdict of the first-instance court. It takes place before a court that has reached a verdict that is challenged (preparatory proceedings), as well as before a legal remedy court (main proceedings).[17]

From the above, it can be concluded that today the basic principles of criminal procedural law are the principles whose foundations were laid back in the time of Roman jurisprudence, and not only that; by studying this in more detail, the application of almost identical solutions to the problems of criminal proceedings that occur, which are, of course, adapted to the changed circumstances, is observed.

CONCLUSION

The study of Roman private and Roman public law should not be strictly separated and demarcated, since these branches of law developed in parallel through centuries with periods of stagnation, continually exerting influence on each other. Observing the development of Roman law through the periods of the

[17] *Ibid*, p. 32.

development of the Roman State, we also noticed the evolution of legal institutes ***provocatio*** and ***appellatio***. From the perspective of modern law, these institutes have today grown into one of internationally recognized standards, as well as constitutional principle – Article 36 provides for the right to equal protection of rights and legal remedy.[18]

The importance of Roman law for the development of modern positive criminal procedural law is reflected in a high level of the development of certain principles that are still valid today: the principle of publicity, literacy, the principle of immediacy, the right to defense, the principle of contradiction, accusation and the principle of legality. Also, three basic functions in criminal proceedings were established back then – accusation, defense and trial.

After a comparative study of the development of the institutes ***provocatio*** and ***appellatio*** through the periods of the Roman State, it can be concluded that their evolution is exactly one of the witnesses of a high degree of the development of Roman law – the fact is that, to date, the essence of these institutes is not greatly changed.

References

1. APASIEV, D. – Iudicia publica rimskoto krivično procesno pravo (so poseben osvrt na pravosudniot sistem vo vremeto na Republikata), Doctoral thesis, Skopje, Faculty of Law "Justinian I", 2014

2. IGNJATOVIĆ, M. – O uticaju pojedinih pravila rimskog javnog prava na savremeno pravo (On the Impact of Certain Rules of Roman Public Law on Modern Law), Зборник Zbornik na trudovi (Opštestvenite promeni bo globalniot svet), Štip, 2014

3. MILOSAVLJEVIĆ, Ž. – Rimsko javno pravo (Roman Public Law), Belgrade, 1898

4. NAUMOVSKI, G., PUHAN, I., POLENAK-AKIMOVSKA, M., BUČKOVSKI, V. – Rimsko pravo (Roman Law), Skopje, 2014

5. NOVKIRIŠKA, M. – Rimsko i съvremenno publično pravo, Sbornik statii i dokladi, Sofia, 2013

6. KNEŽEVIĆ, S. – Krivično procesno pravo (Criminal Procedural Law), Niš, 2015

7. CONSTITUTION of the Republic of Serbia, Official Gazette of RS, 98/2006

[18] Article 36 of the Constitution of the Republic of Serbia (Official Gazette of the Republic of Serbia, No. 98/2006): "Equal protection of rights before courts and other state bodies. entities exercising public powers and bodies of the autonomous province or local self-government shall be guaranteed. Everyone shall have the right to an appeal or other legal remedy against any decision on his rights, obligations or lawful interests".