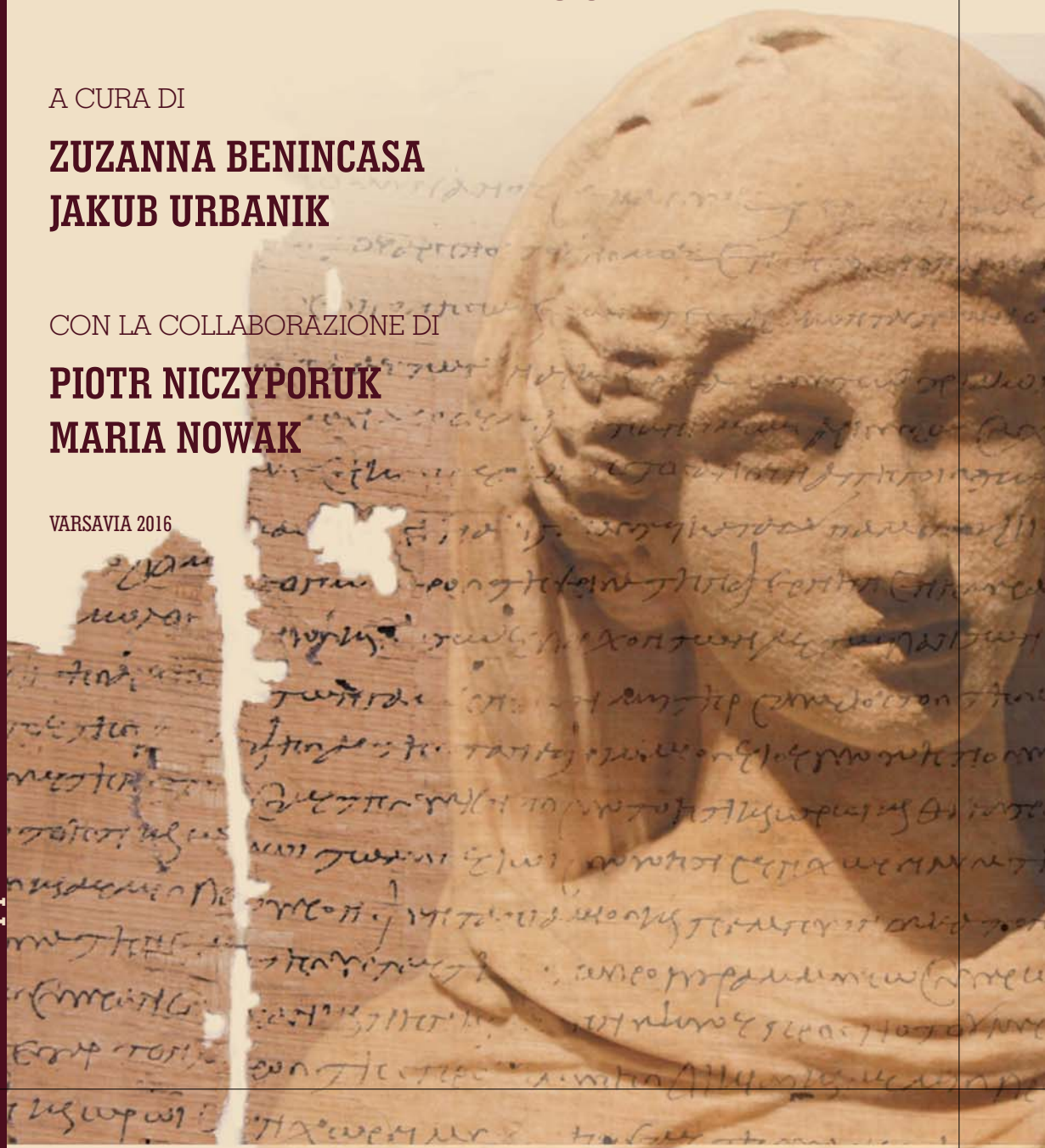
THE JOURNAL OF JURISTIC PAPYROLOGY
Supplement XXIX

MATER FAMILIAS
SCRITTI ROMANISTICI PER MARIA ZABŁOCKA



A CURA DI

ZUZANNA BENINCASA
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CON LA COLLABORAZIONE DI

PIOTR NICZYPORUK
MARIA NOWAK

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Krzysztof Amielańczyk

IN SEARCH FOR THE ORIGINS OF THE ROMAN PUBLIC LAW OFFENCES (CRIMINA) IN THE ARCHAIC PERIOD

THE CRITERION for distinguishing public law offences – *crimina publica* in Roman law became obvious and unambiguous only following Ulpian's division of law into *ius publicum* and *ius privatum*. Despite jurists' reluctance to create distinct *ius poenale* or *ius criminale* that dichotomic division had to include criminal law.[1] The criterion of *utilitas*, as explaining the involvement of the State in the prosecution of some reprehensible human acts, could, however, have been found much earlier, *i.e.* in the law of Tullius Servius, which mentioned 'offences relating to public affairs' ('de criminibus ad rem publicam pertinentibus').[2] Therefore, while discussing the legal reality of the Roman Monarchy and early Republic, we need to distinguish offences which violate *utilitas publica*, as only such, in princi-

[1] *Cf.* C. GIOFFREDI, *I principi del diritto penale romano*, Torino 1970, pp. 39–40.

[2] *Lex Servi Tulli* 4: Ille iudiciis publicis separatis a privatis ipse quidem de criminibus ad rem publicam pertinentibus suscepit cognitionem, rerum autem privatarum privatos iudices esse iussit, quibus normas et regulas leges dedit a se conscriptas. The above passage indicates that it was already in the Royal period that the foundations were laid for the future legislation of the Emperor Augustus, who distinguished independent procedures, *i.e* public law (criminal) and private law ones, by enforcing his laws *lex Iulia iudiciorum publicorum* and *lex Iulia iudiciorum privatorum*.

ple, remain in the area of our interest. Thus, the present discussion does not include either *delicta privata*, or the offences left by the State to ancestral revenge exclusively, in the absence of norms that would indicate the forced nature of the vengeance or the involvement of the State apparatus in its enforcement. Similarly, certain factual circumstances (events), such as manslaughter, which only entailed a sacral expiating obligation – *piaculum* remain beyond *crimen publicum*. It needs to be assumed that the State that left all reaction to a specific offence to the discretion of the victim's family, or perceived the need to offer an expiatory sacrifice to the victim's family or gods, did not notice the threat to *utilitas publica*, yet. Thus, such acts would be difficult to describe as *crimina*.

What is immediately striking while analysing certain royal laws, is the absence of the kind of sanction we are contemporarily accustomed to and which can be found in the later periods of the development of the Roman criminal law. The royal decrees often do not mention *poena* - a public penalty (such as in the case of *parricidium*) at all, or provide for sacral consequences exclusively, whereas public punishment seems to be involved in the definition of *crimen* on a par with other elements that define a crime.[3] During the royal period, when law and religion were combined and mixed, it was more about restoring the peace between humans and gods (*pax deorum*)[4] that was violated by the action of the offender, rather than punishing the offender.[5] Therefore, some Roman *crimina* show the specifics that will be absent in the later history of criminal law, when the term *crimen* becomes more closely related to a penalty. In the earliest period of the Roman law, *crimen* often cannot be defined as a 'punishable' act yet, but more as a 'seditious' or 'sacrilegious' act. Perhaps, a breakthrough is the *Law of the Twelve Tables* with its catalogue of public penalties (Aug. *de civ. Dei* XXI 11).

[3] N. Scapini, *Diritto e procedura penale nell'esperienza giuridica romana*, Parma 1992, pp. 26–30, recognised the State authorities' plan to limit the private vengeance as the main reason behind the distinction of *crimina publica*. .

[4] *Cf.* V. Giuffrè, *La repressione criminale nell'esperienza romana*, Napoli 1998, pp. 1–21.

[5] *Cf.* W. Litewski, *Rzymski proces karny* [Roman Criminal Procedure], Kraków 2003, p. 23.

Based on the Roman distinction of varied consequences of committing a prohibited act, it could be assumed that in the earliest period of the Roman State, the most typical division of offences in the public sphere was the one into crimes that offended gods and other offences.[6] An act which affected the sphere of *ius divinum* constituted an unabsolvable crime that could not be expiated (*scelus inexpiabile*).[7] The sanction for committing such an act was the expulsion of the offender from the Roman community either by *consecratio* – consecration to gods or *deo necari* – the exclusion from the Roman society (not a punishment) by an immediate deprivation of life. *Consecratio* of the wrongdoer, which was proclaimed with the formula *sacer esto*, meant a permanent transition of the offender from the sphere of *ius humanum* to the sphere of *ius divinum*.[8] The offender was proclaimed *sacer* – consecrated to gods. Formally, he was subject to the revenge by gods, which in practice, however, was performed by a human – anyone could kill such a person, and their possessions were consecrated to the god who was offended by the crime (*consecratio bonorum*). The offences which were subject to the sanction of *sacer esto* included the following: removing the border stones (*Lex Numae* 5, D.H. II 74.3), selling the wife by the husband (*Lex Romuli* 9, Plut. *Rom.* XXII 3), betrayal of a patron by his client (*Lex Romuli* 2, D.H. II 10.3 and *XII Tab.* VIII 21), battering a parent by a son or a daughter-in-law (*Lex Ser. Tulli* 6; *lex Romuli* II, Fest. L. 230), whereas the offences which were subject to the immediate killing of the offender by the competent State authorities (specifically, *duumviri perduellionis*) were the offence of high treason, *i.e. perduellio*, which was mentioned in Tullus Hostilius's law and the offence of stealing crops under the cover of the night that was mentioned in the *Law of the Twelve Tables* (*XII Tab.* VIII 9, Plin. *NH* XVIII 3.12).

The main offence which was not targeted directly against the gods, yet affected the interests of the general public was the one of murder – *par-*

[6] *Cf.* J. Zabłocki & Anna Tarwacka, *Publiczne prawo rzymskie* [Roman Public Law], Warszawa 2011, pp. 34–35.

[7] *Cf.* B. Santalucia, *Diritto e processo penale nell'antica Roma*, Milano 1989, pp. 4–14.

[8] *Cf.* idem, 'Il processo penale nelle XII Tavole', [in:] *Studi di diritto penale romano*, Roma 1994, pp. 10–19.

ricidium, understood both in the original sense, as the murder of the father of the family (*pater familias*), and in the sense that was most probably attributed to it by Numa Pompilius, *i.e.* as a voluntary killing of any free man (*lex Numae*).[9] Another offence which ranked in the same category was the one of bodily injury, which involved either injuring or fracturing the victim's bones. Both these offences were subject to the punishment of retaliation, the exercise of which seems to be imposed, or at least suggested by the State, as an obligation for the family of the victim. Such a suggestion lies in the wording: *parricidas esto* (in Numa's law) and *talio esto* (in the *Law of the Twelve Tables*).

Minor transgressions against gods resulted only in the offender's expiating obligation, which reduced to offering a sacrifice – *piaculum* that was a request for propitiation on the one hand, and a compensation, on the other hand. Such offences included unintentional homicide (*lex Numae* and *XII Tab.*), the perpetrator of which was supposed to offer a ram as a sacrifice to the victim's family. In the sphere of family relations: abandoning one's wife without a reason resulted in the obligation to consecrate half of the property to the gods, and the other half to the wife (Plut. *Rom.* XXII 30). In addition, a woman who remarried before the expiry of the one-year period of refraining from marriage after the death of her husband, was obliged to offer a pregnant cow to the god,[10] whereas the father who abandoned his handicapped newborn son without that infirmity being confirmed by legally appointed witnesses, lost half of his property to the god. Such acts, due to the absence of the violation of the public interest and their clearly compensatory nature, could hardly be ranked among the Roman *crimina*.

2. The earliest records on the Roman criminal law go back to the semi-legendary times of the legislation of Romulus, Numa Pompilius,

[9] *Cf.* in part. a broad monograph *Parricidium w prawie rzymskim* [*Parricidium* in Roman Law], Lublin 2008, by M. Jońca.

[10] Plut. *Numa* XII 2. *Cf.* P. Niczyporuk, *Żałoba i powtórne małżeństwo wdowy w prawie rzymskim* [Mourning and the Second Marriage of a Widow in Roman Law], Białystok 2002, pp. 66-78.

Tullus Hostilius, Servius Tullius and the *Law of the Twelve Tables*. The so-called *leges regiae*[11] may as well be a record of the earliest customary law that was wrongly attributed to the kings by much later authors, or the law that was enforced by the legendary rulers.

The king Numa Pompilius was supposed to be the author[12] of two criminal law provisions concerning the crime of homicide: intentional homicide, which was called *parricidium* in the ancient times, and unintentional homicide.

The former one, which is known from a record by the grammarian Festus, provided as follows:

> Fest. L. 247, P. 221. Si qui hominem liberum dolo sciens mortui duit, paricidas esto (*lex Numae* 16).[13]

The regulation concerning *parricidium*, understood as premeditated killing of any free man, may have been even earlier. In fact Plutarch assigns, the mysterious transformation involved in the recognition of *parricidium* as a homicide, to the times of the first king, Romulus:

> Plut. *Rom.* XXII 4 – *lex Romuli* 10: *ἴδιον δὲ τὸ μηδεμίαν δίκην κατὰ πατροκτόνων ὁρίσαντα, πᾶσαν ἀνδροφονίαν πατροκτονίαν προσειπεῖν, ὡς τούτου μὲν ὄντος ἐναγοῦς, ἐκείνου δ' ἀδυνάτου. καὶ μέχρι χρόνων πολλῶν ἔδοξεν ὀρθῶς ἀπογνῶναι τὴν τοιαύτην ἀδικίαν: οὐδεὶς γὰρ ἔδρασε τοιοῦτον οὐδὲν ἐν Ῥώμῃ σχεδὸν ἐτῶν ἑξακοσίων διαγενομένων, ἀλλὰ πρῶτος μετὰ τὸν Ἀννιβιακὸν πόλεμον ἱστορεῖται Λεύκιος Ὄστιος πατροκτόνος γενέσθαι. ταῦτα μὲν οὖν ἱκανὰ περὶ τούτων.*

[11] *Cf.* Anna Tarwacka, '*Leges regiae*. Tekst – tłumaczenie – komentarz' [Text – translation – commentary], *Zeszyty Prawnicze* 4.1 (2004), pp. 233-260. Basic literature: Santalucia, *Diritto e processo penale* (cit. n. 7), pp. 15–17 (literature); Scapini, *Diritto e procedura penale* (cit. n. 3), pp. 15–24. On *leges regiae*, *cf.* also E. Gaughan, *Murder was not a Crime. Homicide and Power in the Roman Republic*, Austin 2010, pp. 9-22.

[12] The origin of the regulations is unclear. They may date from later times, *i.e* the beginnings of the Republic, when the kings had already been expelled, *cf.* J. D. Cloud, '*Parricidium*: from the *lex Numae* to the *lex Pompeia de parricidis*', *ZRG RA* 88 (1971), p. 3. The Greek origin of the norm was indicated by C. Gioffredi, 'L'elemento intenzionale nel diritto penale romano', [in:] *Studi in onore di G. Grosso* III, Torino 1970, p. 38.

[13] *Cf.* Giuffrè, *La repressione criminale* (cit. n. 4), pp. 12–13.

In the view of the above, it may be concluded that the offence of *parricidium* at the time of King Numa may be recognised as the prototype of both homicide – *homicidium*, and patricide (killing of relatives), which were clearly distinct from unintentional homicide that was subject to a sacral compensatory obligation.[14] The expression *dolo sciens* indicated two elements of the offender's state of mind that determined the liability: the word *sciens* expressed the offender's awareness of the illegality of the committed act, whereas the word *dolus* (*dolus malus*) indicated that being aware of the above, the offender intentionally met the criteria of a crime.[15]

Quaestores parricidii was an auxiliary body to the Roman king, and in the later times to the consuls, whose task was to conduct the preparatory proceedings (investigation) in the crime of homicide (*parricidium*) and other serious crimes which were subject to the death penalty. During the Royal period, they may establish the guilt of the offender, yet the sentence was passed by the king. When the king passed the sentence, it was their turn to execute it. At the time of the Republic, *quaestores* would bring and then support before the assembly the most severe cases of crimes.[16]

At the time of Romulus, as stems from several records in literary sources,[17] a law against high treason was also already in force. The offence was described as *proditio*:

[14] On the sacral nature of the regulations concerning homicide in Numa's laws and the *Law of the Twelve Tables*, M. Kaser, *Das altrömische ius*, Göttingen 1949, pp. 43–53; Gioffredi, 'L'elemento intenzionale' (cit. n. 12), p. 37.

[15] The meaning of the word *malus* in the expression *dolus malus* involved 'the objective' (objectively stemming from the letter of law) and 'the subjective' (understood as the offender's subjective consciousness) illegality of an act, *cf.* G. F. Falchi, *Diritto penale romano*, Padova 1937, p. 103, Scapini, *Diritto e procedura penale* (cit. n. 3), pp. 20 and 24. Thoroughly on the meaning of the words: *dolus*, *malus* and *sciens*, *cf.* also Gioffredi, 'L'elemento intenzionale' (cit. n. 12), pp. 40–42. It was correctly noticed by G. D. MacCormack, '*Dolus*, *culpa*, *custodia* and *diligentia*', *Index* 22 (1994), p. 192 that in the archaic law the requirement of intent could not be found in the case of *membrum ruptum*, *os fractum*, or *iniuria*, as opposed to homicide.

[16] On *quaestores parricidii*, *cf.* also Gaughan, *Murder was not a Crime* (cit. n. 11), pp. 15–17; 91–94.

[17] D.H. II 10.1–3; Horat. *ep.* II 1.104; Plut. *Rom.* 13.

D.H. II 10.3 – *Lex Romuli* 2: *εἰ δέ τις ἐξελεγχθείη τούτων τι διαπραττόμενος ἔνοχος ἦν τῷ νόμῳ τῆς προδοσίας, ὃν ἐκύρωσεν ὁ Ῥωμύλος, τὸν δὲ ἁλόντα τῷ βουλομένῳ κτείνειν ὅσιον ἦν ὡς θῦμα τοῦ καταχθονίου Διός.*

The perpetrator of *proditio*, like the perpetrator of *parricidium*, was considered to be *homo sacer* – *i.e.* a person consecrated to the gods of the underworld.[18] Romulus is said to have allowed the capital punishment for every woman who committed *adulterium* or drank wine:

D.H. II 25.6 – *lex Romuli* 7: *ταῦτα δὲ οἱ συγγενεῖς μετὰ τοῦ ἀνδρὸς ἐδίκαζον: ἐν οἷς ἦν φθορὰ σώματος καί ... εἴ τις οἶνον εὑρεθείη πιοῦσα γυνή. ἀμφότερα γὰρ ταῦτα θανάτῳ ζημιοῦν συνεχώρησεν ὁ Ῥωμύλος.*[19]

The case of Horatius[20] enabled King Tullus Hostilius to establish the courts of duumviri to try him.[21] On this occasion, the sources recorded information on the law on *perduellio* passed by the king:

Liv. I 26 – *lex Tulli Hostilli* 4: Rex (Tullus) – 'Duumviros', inquit, 'qui Horatio perduellionem iudicent, secundum legem facio'. Lex horrendi carminis erat: Duumviri perduellionem iudicent: si a duumviris provocarit, provocatione certato: si vincent, caput obnubito, infelici arbori reste suspendito, uerberato vel intra pomerium vel extra pomerium.

The officials known as *duumviri perduellionis*, unlike *quaestores parricidii*, did not carry out a pre-trial investigation, but only stated the obvious perpetration of high treason – *perduellio*, and upon the failure or absence of *provocatio*, carried out the execution.[22] The reason for the above was

[18] *Cf.* Tarwacka, *Leges regiae* (cit. n. 19), p. 250.

[19] *Cf.* R. Bauman, *Crime and Punishment in Ancient Rome*, London 1996, p. 9.

[20] Extensively on the case of Horacius: Marzena Dyjakowska, *Crimen laese maiestatis*, Lublin 2010, p. 25; also Tarwacka, *Leges regiae* (cit. n. 19), p. 258; Zabłocki & Tarwacka, *Publiczne prawo rzymskie* (cit. n. 7), pp. 34–35; and Gaughan, *Murder was not a Crime* (cit. n. 11), p. 15.

[21] Liv. I 26.5–6; Fest. F. 279, *Sororium tigillum*; Cic. *de rep*. II 31.54; Liv. I 26.13.

[22] *Cf.* Scapini, *Diritto e procedura penale* (cit. n. 4), pp. 20–23.

probably the nature of the events that met the criteria of the crime. Originally, all acts against the State that offended both its internal and external interests, were recognised as *perduellio*. The scope of the concept, however, was not clear, but rather almost unlimited and, in practice, determined individually for the purposes of various political interests by *duumviri perduellionis* themselves.[23] For instance, the type of offence involved the desire to restore the old regime, the cases of abuse of power by the Roman magistrates, also the desertion to the enemy, the desertion from the army, the inciting the enemy against the Roman State, *&c*. A characteristic feature of the offence were therefore the criteria that were not precisely determined, and whether a given act was *perduellio* was decided by 'the court' represented by the royal officials. It is not difficult to imagine what such liability looked like. The offence of *perduellio* was attributed to the perpetrator, with extending the scope of criteria so as to encompass the act committed by the person the elimination of whom the ruler wanted. Thus, it is not surprising that an investigation was not carried out if such an investigation, by nature, was to be aimed to establish whether the offence meeting the determined, generally known criteria, was committed. What mattered here was that a specific act was committed against the State (an indisputable fact), and it was 'only' up to the officials to qualify it within 'the broad structure' of the criteria of *perduellio*.

There are at least three arguments that speak in favour of recognising the archaic *parricidium* (*homicidium*) and *proditio* (*perduellio*) from the royal laws as public law crimes (*crimina*). Firstly, the criteria of those acts correspond to the criteria of future *crimina legitima* (*crimina publica*). The offence of *parricidium* will transform into *homicidium*, whereas the criteria of *proditio* (*perduellio*) will be easily found in the type of crime called *crimen maiestatis*. Secondly, the abovementioned offences exhibited a common feature: they were more a violation of *utilitas publica*, rather than *utilitas privata*. Also when *pax deorum* was violated, as such an act also largely

[23] J. L. Strachan-Davidson, *Problems of Roman Criminal Law* I, Oxford 1912 (Amsterdam 1969), p. 105; Dyjakowska, *Crimen laese maiestatis* (cit. n. 20), p. 26, says that the mechanism of the operations of *duumviri* can be grounds for distinguishing a new type of crime, *i.e crimen imminutae maiestatis*. On *duumviri perduellionis*, *cf.* also Gaughan, *Murder was not a Crime* (cit. n. 11), pp. 15–17; 106–108.

threatened *utilitas publica*. This shift in the centre of gravity resulted in the interest on the part of the State authorities, which although not always usurped the formal right to administer any possible punishments (particularly the death penalty) as yet, resorting to the sanction of 'the consecration of the offender to the gods', yet in practice it was they themselves who decided about the application of the sanction. Thirdly, as regards offences other than those offending the gods, the Roman State established authorities for prosecuting and trying cases of the most serious acts affecting the social safety and order – *quaestores parricidii* and *duumviri perduellionis*.[24]

3. The *Law of the Twelve Tables* was exaggeratedly described by Livius as *fons omnis publici privatique iuris* ['the source of all public and private law']. The reconstruction may indeed suggest that, besides the private law issues, the law also regulated numerous issues within the scope of public criminal law, including criminal law.[25] The criminal law issues were probably only discussed in Tables VIII and IX.[26] The casuistic nature of criminal events involved in prohibited offences suggests that the Roman criminal law was then at the stage of quite selective response to acts that threatened *utilitas publica*. Naturally, it cannot be excluded that a number of criminal law provisions have not been preserved until our times, and that the legislator did, indeed, aim at was a complete law, regulating all possible reprehensible acts.

What particularly draws attention is the regulation on homicide, which was probably modelled on Numa Pompilius' legislation.[27] However, the law has not been fully preserved. As regards the inclusion of intentional homicide – *parricidium* in the *Law of the Twelve Tables*, we only have access to sources which indirectly indicate the existence of such a regula-

[24] *Cf.* B. Santalucia, 'Il processo penale nelle XII Tavole' (cit. n. 7), pp. 13–14.

[25] *Cf.* W. Kunkel, *Untersuchungen zur Enwicklung der römischen Kriminalverfahrens in vorsullanischer Zeit*, München 1962, pp. 37–45.

[26] Naturally, it is only a hypothesis that stems based on the reconstruction of the *Law of the Twelve Tables*.

[27] *Cf.* E. Costa, *Crimini e pene da Romolo a Giustiniano*, Bologna 1921, pp. 27–28.

tion.[28] The only regulation of the *Law of the Twelve Tables* that has been preserved in its literal form is the one on unintentional homicide: *Si telum manu fugit magis quam iecit aries subicitur* (*lex duodecim tabularum* 8.24). This provision requires a broader commentary, as it gives some idea about the Romans' perception of crime as a punishable act. An act deserved to be punished when it was committed intentionally and premeditatedly. Only then was it considered an offence, *i.e* the prototype of the future *crimen*. Like in Numa's legislation, it is difficult to find arguments for the thesis that 'a sacrifice of a ram' served as a punishment.[29] Leaving its expiating and sacral character beside, it can, if at all, be attributed a compensatory value. Already in the early centuries of their State, the Romans were perfectly aware of the primary significance of the offender's mental attitude, and did not deem it necessary for public law to react to acts that were committed unintentionally and accidentally.[30] They did not consider such acts as *crimina publica*. The direction of the perception of the essence of a public law offence that had been set by the first Roman laws containing criminal provisions was clearly defined for many hundreds of years. The first attempt to revise the direction will only be made by Emperor Hadrian, who, in his constitutions, will qualify at least certain unintentional acts to be *crimina*. The wording of the provision, although suggesting the casuistic nature of the regulation that limited it to the case which involved an unfortunate throw of a spear, should not belittle its importance. Although nothing is known about the possibility of its application in similar cases, yet the legislator provided such a description of the act that contained a thought pattern, and thus could be applicable in analogical cases. The provision provided the addressee with clear information on what the legal reasoning resulting in a given act being ignored by crim-

[28] *XII Tab.* IX 4 (ex Pomp. *D.* 1.2.2.23): 'Quaestores – qui capitalibus rebus praeessent, – appellabantur quaestores parricidii, quorum etiam meminit lex XII tab.'; *XII Tab.* IX 6 (*ex* Salv. *de gubern. Dei* VIII 5.24): 'Interfici – indemnatum quemcunque hominem etiam XII tabularum decreta vetuerunt.'

[29] *Cf.* GIOFFREDI, 'L'elemento intenzionale' (cit. n. 12), p. 37.

[30] On the intentionality and unintentionality of public law crimes in the *Law of the Twelve Tables*, *cf.* GIOFFREDI, 'L'elemento intenzionale' (cit. n. 12), pp. 39–40.

inal (public) law, should be like. The words *magis quam* ('more than') were supposed to serve a proper assessment of human actions as caused by pure chance, rather than ill will. The mechanism of such reasoning was later adopted by the legislators in the Roman Empire period, when the criminal law of the Romans was much better developed.

The *Law of the Twelve Tables* certainly included a regulation on *perduellio*. The specifics of this crime was discussed already in the Royal period. Its criteria were not clearly defined. Whether a given act fell within the criteria of that type of crime, was decided by *duumviri perduellionis*, who decided about the guilt and exercised the death penalty. Perhaps the provisions of the *Law of the Twelve Tables* are evidence of the attempt to include at least some factual circumstances within a statutory framework. The evidence of the inclusion of *crimen perduellionis* in the Law is owed to the jurist Marcianus:

> *D.* 48.4.3 (Marcian. 14 *xii tab.*) – *xii Tab.* ix 5: Lex xii tab. iubet eum, qui hostem concitaverit quive civem hosti tradiderit, capite puniri

In the passage from Book 14 of Marcianus's *Institutes* on criminal law, which was included by Justinian compilers in the book entitled *ad legem Iuliam de maiestatis* ('On the Julian law of high treason'), the jurist reported that offences involving 'stirring up an enemy' or 'handing over a citizen to the enemy' were liable for the death penalty under the *Law of the Twelve Tables*.

Other types of offences that were regulated under the Law of the Twelve Laws, are known thanks to the preserved words by Gaius in his commentary to this Law. This information varies as regards its details or value. The most useful piece of information is the one concerning *incendium* that is to be found in Justinian Digests:

> *D.* 47.9.9 (Gai. 4 *xii tab.*) – *xii Tab.* viii 10: Qui aedes acervumve frumenti iuxta domum positum combusserit, vinctus verberatus igni necari (xii Tab.) iubetur, si modo sciens prudensque id commiserit; si vero casu, id est neglegentia, aut noxiam sarcire iubetur, aut, si minus idoneus sit, levius castigator.

The record concerns the offence of setting fire (to a building or a stack of hay) near a household. The offender, if the offence was committed intentionally, was severely punished, *i.e* by the death penalty by burning preceded by flogging. The severity of the punishment may have stemmed from the assumption that such an arson directly threatened the lives of people living in the household. Unintentional arsons (caused by negligence) were subject to a compensation obligation, and if insolvent, the offender was punished with a lighter penalty (perhaps, a mere warning). The provision on arson shows the future direction of the offence of *incendium*. First of all, only an intentional offence was recognised as *crimen*. Secondly, the crime was linked with a threat to a human life which it caused. Such a legal status was preserved for several centuries, and was confirmed in *lex Cornelia de sicariis et veneficis* dating from 81 BC. The penalty provided under Sulla's law was imposed on arsonists (*incendiarii*) who intentionally set fire, thus causing a threat to human life or property (*D.* 48.8.1 *pr.*). An unintentional arson, as a legal delict, was regulated by *lex Aquilia*.

In his commentary on the *Law of the Twelve Tables*, Gaius also discussed the offence of poisoning (*veneficium*).[31] This may indicate the presence of a separate regulation concerning *veneficium* in the Law:

> *D.* 50.16.236 pr. (Gai. 4 *XII tab.*) – *XII Tab.* VIII 25: Qui venenum dicit, adicere debet, utrum malum an bonum; nam et medicamenta venena sunt.

The term *venenum* had two opposite meanings in Latin: 'poison' or 'medicine'. To avoid confusion, Gaius suggested adding whether it was *veneum malum* (poison), or *venenum bonum* (medicine) that was meant.[32]

[31] On the tradition of *veneficium* in the *Law of the Twelve Tables*, *cf.* J. ERMANN, *Strafprozess, öffentliches Interesse und private Strafverfolgung. Untersuchungen zum Strafrecht der römischen Republik*, Köln 2000, pp. 48–57.

[32] *Cf.* also Marcianus's discussion on *bona* and *mala venena* in *D.* 48.8.3.2 (Marcian. 14 *inst.*): 'Adiectio autem ista "veneni mali" ostendit esse quaedam et non mala venena. Ergo nomen medium est et tam id, quod ad sanandum, quam id, quod ad occidendum paratum est, continet, sed et id quod amatorium appellatur: sed hoc solum notatur in ea lege, quod hominis necandi causa habet.'

The above distinction and the criminal liability for an intentional administration of *mala venena* will be distinct of the regulation on *veneficium* in *lex Cornelia de sicariis et veneficis*. Among other *crimina publica* that are known from *lex Cornelia de sicariis et veneficis*, one may also mention *in iudicio circumventio*, which type also included accepting bribes by judges at the time of the late Republic. This offence also originates from the *Law of the Twelve Tables*:

> Gell. XX 1.53 – *XII Tab.* IX 2: Dure autem scriptum esse in istis legibus (XII tab.) quid existimari potest ? nisi duram esse legem putas, quae iudicem arbitrumve iure datum, qui ob rem [iu]dic[a]ndam pecuniam accepisse convictus est, capite poenitur?.[33]

As Gellius reported, if a sentence was passed following the taking of a bribe by the judge, then under the provisions of the *Law of the Twelve Tables*, the corrupt judge was capitally punished.

The *Law of the Twelve Tables* also provided for a severe penalty for *falsum testimonium* (giving false testimony). This regulation, which was the origin of the future *lex Cornelia de falsis* and *crimen falsi*, is also mentioned in *Noctes Atticae* by Aulus Gellius:

> Gell. XX 1.53 – *XII Tab.* VIII 23: Si non illa etiam ex XII tab. de testimoniis falsis poena abolevisset et si nunc quoque ut antea qui falsum testimonium dixisse convictus esset, e saxo Tarpeio deiceretur.

In his discussion on the severity of the *Law of the Twelve Tables* with the philosopher Favorinus, Gellius reminded of the Law's provision providing for punishing the crime of *falsum testimonium* with the death penalty by flinging the convict from the Tarpeian Rock.

The Law of the Twelve Tables also included provisions that provided for penalties for acts that fell within the broad category of insults – *iniuria*. One such act was discussed by Pliny and Cicero:

[33] *Cf.* particularly G. *D.* MacCormack, 'The liability of the judge in the Republic and Principate', *ANRW* II 14 (1982), p. 4.

> *XII Tab.* VIII 1a–b: Qui malum carmen incantassit... b. nostrae XII tab. cum perpaucas res capite sanxissent, in his hanc quoque sanciendam putaverunt: si quis occentavisset sive carmen condidisset, quod infamiam faceret flagitiumve alteri[34]

Singing insulting, evil (magical) incantations (*carmen incantare*) was one of the few offences that were liable for the capital punishment under the *Law of the Twelve Tables*.[35] In turn, injuring (cutting off) a part of someone's body, in the absence of any agreement between the offender and the victim, was punished with the penalty of talion (retaliation):[36]

> *XII Tab.* VIII 2: Si membrum rup<s>it, ni cum eo pacit, talio esto.

In lighter cases of insult, the penalties were compensatory in nature (*XII Tab.* VIII 3; 4). Thus, at the time of the *Law of the Twelve* Tables, the punishment of an insult varied depending on the severity of the offence.[37] In cases of more serious offences, *iniuria* can be seen as the origin of the future public law crime. Published a few centuries later, *lex Cornelia de iniuriis*, which established *quaestio iniuriarum*, would include in its provisions specific types of insult committed by means of violence involving: *pulsare* (beating), *verberare* (flogging), *domum introire* (forcible entry into someone's house). Later, at the time of the Empire, in more severe cases of *iniuria*, the private complaint proceedings would be increasingly replaced by the public complaint proceedings (*accusatio*).

Additionally, it may be added that the *Law of the Twelve Tables* also provided for a very severe punishment (the death penalty) for the offence of

[34] *Cf.* Plin. *NH* XXVIII 2.10–17; Cic. *de rep.* IV 10.12; Aug., *de civ. Dei* II 9 .

[35] *Cf.* Bauman, *Crime and Punishment* (cit. n. 29), p. 9.

[36] *Cf.* J. Zabłocki, 'La pena del taglione nel diritto romano', [in:] *Fides, humanitas, ius. Studii in onore di Luigi Labruna* VII, Napoli 2007, pp. 5990–6009; Gaughan, *Murder was not a Crime* (cit. n. 19), p. 62.

[37] It is surprising, however, that unlike in the case of homicide or arson, the provisions of the *Law of the Twelve Tables* concerning bodily injury or insult, did not mention the intentionality of the offender's actions, which could suggest the absence of a uniform concept of offence in the archaic law, *cf.* MacCormack, '*Dolus, Culpa*' (cit. n. 23), p. 192. On the above inconsistency, *cf.* also. Gioffredi, 'L'elemento intenzionale' (cit. n. 20), p. 39.

stealing another person's crops by harvesting or grazing animals ('frugem aratro quaesitam noctu' – *XII Tab.* VIII 9). A theft committed at night (*furtum nocturnum* – *XII Tab.* VIII 12)[38] gave the right to kill the thief, while an open theft (*furtum manifestum*) was liable for flogging (*XII Tab.* VIII 14).[39] The above provisions are also a prelude to the dual evolution of *furtum* in the Roman law, not only as a delict, but also as *crimen*.[40] At the time of the Empire, some acts involving stealing property, which were qualified as the basic type of *crimen furti*, or qualified types, as for instance *abigeatus* (stealing cattle), would be considered as the so-called *crimina extraordinaria*.

To conclude, it may also be worthwhile to indicate that the institution of *poena legis*, which was so significant to the Roman penal culture, also originated from the legislation of decemviri. Referring to the authority of Cicero,[41] Augustine reported a catalogue of 'statutory penalties' that was known to the *Law of the Twelve Tables*. It is difficult to establish the place of the provision on penalties in the Law. In the reconstruction by S. Riccobono, on which Maria and Jan Zabłocki based their edition,[42] it is placed as the seventh on the list of 'Fragments of uncertain location':

> *XII Tab.* fr. incer. 7: Octo genera poenarum in legibus esse scribit Tullius: damnum, vincula, verbera, talionem, ignominiam, exilium, mortem.

According to Cicero, the catalogue of statutory penalties (*genera poenarum in legibus*) that were known to the *Law* included: compensation, prison, flogging, retaliation, infamy, exile, the death penalty and slavery. Such a broad catalogue of penalties is a significant proof that at the time of the legislation of decemviri, the State was actively engaged in prosecuting and punishing offences threatening both individual citizens and the society as a whole.

[38] *Cf.* Giuffrè, *La repressione criminale* (cit. n. 4), p. 21.

[39] Catching the thief was red-handed classified the theft as manifest.

[40] *Cf.* J. Harries, *Law and Crime in the Roman World*, Cambridge 2007, pp. 50–58.

[41] Aug. *de civ. Dei* XXI 11. *Cf.* also Isid. *Orig.* V 27.

[42] Maria Zabłocka & J. Zabłocki, *Ustawa XII Tablic. Tekst – tłumaczenie – objaśnienia* [The Law of the Twelve Tables, Text – Translation – Commentary], Warszawa 2000, p. 81.

CONCLUSIONS

In the earliest period the Roman State, the most typical division of crime in the public sphere was the one into offences offending the gods and other offences. What may be noticed about the laws of the Kings, is the absence of sanctions (public penalties), to which we are accustomed today and which are present in the later periods of the development of the Roman public criminal law. The first breakthrough in this respect was, perhaps, the *Law of the Twelve Tables* with its catalogue of public penalties.

The most important types of offences of the Roman public law that originated in the Archaic period were *perduellio* and *parricidium*. The criteria of these acts corresponded to the criteria of the future *crimina legitima* (*crimina publica*). The crime of *parricidium* transformed into *homicidium*, whereas the criteria of *proditio* (*perduellio*) would be found in the type of offence called *crimen maiestatis*. The above offences shared a common feature: they more violated *utilitas publica*, rather than *utilitas privata*. The Roman State established bodies for persecuting and trying the most serious acts threatening the social safety and order – *quaestores parricidii* and *duumviri perduellionis*.

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