

MATER FAMILIAS

SCRITTI ROMANISTICI PER MARIA ZABŁOCKA

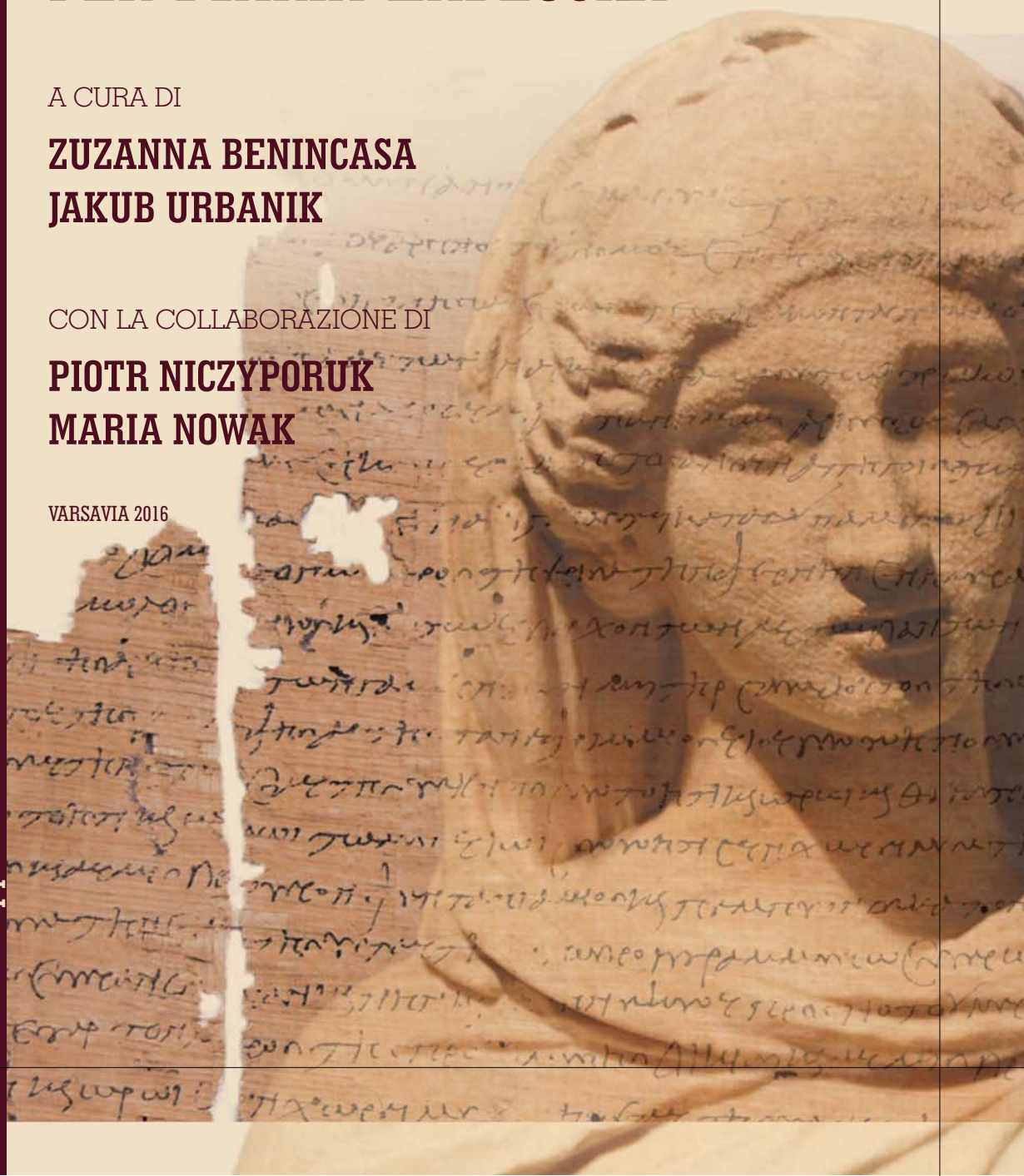
A CURA DI

ZUZANNA BENINCASA
JAKUB URBANIK

CON LA COLLABORAZIONE DI

PIOTR NICZYPORUK
MARIA NOWAK

VARSAVIA 2016



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Supplements to The Journal of Juristic Papyrology are jointly published by the Faculty of Law and Administration of the University of Warsaw, the Institute of Archaeology of the University of Warsaw, and Fundacja im. Rafała Taubenschlaga, Krakowskie Przedmieście 26/28, 00-927 Warszawa 64 tel. (+48 22) 55 22 815 and (+48 22) 55 20 384, fax: (+48 22) 55 24 319 e-mails: g.ochala@uw.edu.pl, t.derda@uw.edu.pl, kuba@adm.uw.edu.pl web-page: <<http://www.taubenschlagfoundation.pl>>

Cover design by Maryna Wiśniewska
Computer design and DTP by Jakub Urbanik

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Warszawa 2016

ISBN 978-83-938425-9-9

Wydanie I.
Druk i oprawa: Sowa Sp. z o.o., Piaseczno



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Scritti per Maria Zabłocka

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**BETWEEN EMOTIONS AND RATIONALITY
REMORSE AS MITIGATING CIRCUMSTANCE
IN ROMAN MILITARY LAW**

THE PROBLEM OF THE EMOTIONS and rationality, although may be considered rather as the subject of philosophical or psychological analysis, was always in the scope of special interest of legal experts and *iuris prudentes*. It is enough to mention that the issue of guilt and intentionality of different human acts was the key concept of criminal law since the Antiquity. However, Roman jurists were surely not preoccupied with such definitions and avoided abstract classifications, especially in the field of criminal law. They have treated almost every case separately, guided by their legal knowledge and intuition, sense of justice and *mores maiorum*. Modern solutions, such as ‘active remorse’,¹ have never taken the shape of

¹ ‘Active remorse’ is a modern legal and technical term used in Polish criminal law and cannot be found in Roman sources. It does not exist in English legal system as well, in which remorse may be only one of mitigating circumstances. However, the term ‘remorse’ seems to be the best possible solution, cf. Laurel FULKERSON, *No Regrets. Remorse in Classical Antiquity*, Oxford 2013, pp. 24–45. Therefore, it will be used in the present paper, because it precisely describes Roman solution – the perpetrator was actively trying to remove negative consequences of his actions. Similarly to current interpretation of this institution, no remorse or regret was examined, only facts were taken into consideration. Moreover, it will be also more comfortable for modern lawyers to follow the analysis, remembering about the danger of transfer of present terminology and institutions in

entirely precise and expressly formulated institutions, which dominate present legal systems of criminal law. Still, it does not mean that jurists did not grasp the idea of such elaborative ideas or that Roman law was not sufficiently developed. On the contrary, sometimes they met and struggled with complicated cases, in which remorse or change of mind played a significant role, both in civil and criminal law.²

In general, remorse or change of mind was most often described by Latin word *paenitentia*.³ Certainly, Roman jurists did not formulate its precise definition, but detailed examination of legal sources reveals that it consisted of two separate groups of cases, very similar to modern solutions of criminal law.⁴ The culprit could depart from perpetration or, after committing criminal act, try to reverse its consequences or indemnify the damage counting on mitigation of penalty. According to jurists' opinions, remorse could be taken into consideration in the first scenario, at least in case of *falsum*, which is confirmed by the only legal source con-

ancient times. For jurists, opinions concerning *paenitentia* were only casuistic solutions of a legal problem and not elaborated theory or coherent legal institution.

² On remorse in Roman criminal law, cf. Th. MOMMSEN, *Römisches Strafrecht*, Leipzig 1899, p. 98, 670 n. 3 and p. 1044; H. KOCH, *Culpa – paenitentia – venia (und ihre griechischen Entsprechungen) in den Darstellung der römischen delictio bei republikanischen und augusteischen Historikern*, Erlangen 1955, pp. 33–36; 40–45; Th. MAYER-MALY, 'Der rechtsgeschichtliche Gehalt der Christenbriefe von Plinius und Trajan', *SDHI* 22 (1956), pp. 327–328; W. WALDSTEIN, 'Zur Beachtlichkeit der tätigen Reue im römischen und im modernen Strafrecht', [in:] *Auf dem Weg zur Menschenwürde und Gerechtigkeit: Festschrift für Hans R. Klecatsky*, Wien 1986, pp. 999–1009; A. RIECHELMANN, *Paenitentia: Reue und Bindung nach römischen Rechtsquellen: Voraussetzungen und Wirkungen einseitiger Willensänderungen*, Frankfurt 2005, pp. 138–148. Very interesting analysis of social and historical role of remorse and change of mind in the Antiquity was carried out by FULKERSON, (cit. n. 1). In Polish literature recently P. KUBIAK, 'Czynny żal w rzymskim prawie karnym w świetle pism jurystów oraz retorów' ('Active remorse in Roman criminal law in the light of juristic and rhetorical writings'), *Studia Prawnoustrojowe* 27 (2015), pp. 11–26.

³ A. BERGER, *Encyclopedic Dictionary of Roman Law*, Philadelphia 1953, s.v. 'paenitentia'; J. SONDEL, *Słownik łacińsko-polski dla prawników i historyków* [Latin-Polish Dictionary for Lawyers and Historians], Kraków 2001, s.v. 'paenitentia'. Cf. also KOCH, *Culpa* (cit. n. 2), p. 33, 40; FULKERSON, *No Regrets* (cit. n. 1), pp. 24–45.

⁴ Cf. *Polish Criminal Code* art. 17, art. 146, art. 295 and art. 340.

cerning the matter.⁵ It is not much of a revelation, if one considers that, apart from very few exceptions, attempt was not punished in the field of Roman criminal law.⁶ As a matter of fact, the lack of legal sources in that field could be reasonably excused in such a way. There was no need for any jurists' explanations or clarifications, until the crime was not committed. On the other hand, when the act has been already perpetrated, remorse was completely irrelevant, according to the rule: 'nemo enim tali peccato paenitentia sua nocens esse desinit'.⁷ In case of intentional crimes, no regret or remorse could improve the position of the accused.⁸ Such a solution was consistent with the social conviction concerning the role of remorse and change of one's mind. Nowadays, it may be considered as a kind of reconciliation or sincere modification of behaviour, but for Romans the main virtue was consistency. They did not distinguish that precisely human character from behaviour and for them regret had

⁵ *D.* 48.10.19 *pr.* (Paulus 5 *sent.*): 'Qui falsam monetam percusserint, si id totum formare noluerunt, suffragio iustae paenitentiae absolvuntur'. Cf. MOMMSEN, *Römisches* (cit. n. 2), p. 670; WALDSTEIN, 'Zur Beachtlichkeit' (cit. n. 2), p. 1000; RIECHELMANN, *Paenitentia* (cit. n. 2), p. 144.

⁶ Cf. Marzena DYJAKOWSKA, 'Cogitationis poenam nemo patitur – karalność zamiaru i usiłowania w rzymskim prawie karnym' [*Cogitationis poenam nemo patitur* – penalization of intent and attempt in Roman criminal Law], [in:] B. SITEK, K. NAUMOWICZ & Katarzyna ZAWORSKA (eds.), *Interes prywatny a interes publiczny w prawie rzymskim*, Olsztyn 2012, pp. 31–44; K. AMIELAŃCZYK, *Crimina legitima w rzymskim prawie publicznym* [*Crimina legitima* in Roman Public Law], Lublin 2013, pp. 147–153.

⁷ *D.* 21.1.17.1 (Ulpianus 1 *ad ed. aedil. curul.*): 'Caelius autem fugitivum esse ait eum, qui ea mente discedat, ne ad dominum redeat, tametsi mutato consilio ad eum revertatur: nemo enim tali peccato, inquit, paenitentia sua nocens esse desinit'; *D.* 47.2.66 (Ulp. 1 *ed. aedil. cur.*): 'Qui ea mente alienum quid contrectavit, ut lucrifaceret, tametsi mutato consilio id domino postea reddidit, fur est: nemo enim tali peccato paenitentia sua nocens esse desinit'. Cf. MOMMSEN, *Römisches* (cit. n. 2), p. 1044; RIECHELMANN, *Paenitentia* (cit. n. 2), p. 148; MAYER-MALY, 'Der rechtsgeschichtliche Gehalt' (cit. n. 2), p. 315 n. 27. Differently WALDSTEIN, 'Zur Beachtlichkeit' (cit. n. 2), p. 1008.

⁸ However, in case of unintentional crimes remorse of the ignorant perpetrator sometimes was necessary to achieve full acquittal: *Coll.* 6.5.1: 'His, qui incestas nuptias per errorem contrahunt, ne poenis subiciantur, ita demum clementia principum subvenit, si postea quam errorem suum rescierint, ilico nefarias nuptias diremerint'. Also *Coll.* 6.6.1; *Cf.* 5.5.4.1–2; *D.* 48.5.39.6. Cf. Joanna MISZTAŁ-KONECKA, *Incestum w prawie rzymskim* [*Incestum* in Roman Law], Lublin 2007, pp. 100–101.

no positive aspect – it only confirmed that one had done wrong and confessed it.⁹ Moreover, change of mind could indicate some kind of instability or lack of rationality and therefore evoke negative evaluation of personality. If perpetrator committed a crime, he had to be punished.

Obviously, there are no rules without exceptions and it applies also to ineffectiveness of remorse in Roman criminal law. Apart from few imperial constitutions, such an exception can be found in the field of military law.¹⁰ Leaving beside the problem of existence of Roman military law as separate branch of law, it has to be admitted that historical sources include a vast number of legal opinions and imperial constitutions concerning situations when soldiers have committed a variety of different crimes.¹¹ Among them, there are some interesting solutions concerning the influence of subsequent behaviour of the perpetrator, in form of remorse, on the severity of his punishment.

⁹ FULKERSON, *No regrets* (cit. n. 1), pp. 213–219.

¹⁰ E.g., *CTh.* 16.7.4.1 (= *CJ.* 1.7.3.2–3). From unknown reasons all analysed sources concerning Roman military law are almost entirely omitted in above-mentioned literature on remorse.

¹¹ There exists a vast literature on Roman military law. Cf. e.g., C. E. BRAND, *Roman Military Law*, Austin 1968; J. H. JUNG, 'Die Rechtsstellung der römischen Soldaten. Ihre Entwicklung von den Anfängen Roms bis auf Diokletian', *Aufstieg und Niedergang der römischen Welt II* 14 (1982), pp. 977–990; Sara Elise PHANG, *Roman Military Service. Ideologies of discipline in the Late Republic and Early Principate*, Cambridge 2008 (rev. M. N. FASZCZA, 'Bourdieu, gender i rzymska dyscyplina wojskowa' [Bourdier, gender and Roman military discipline], *Studia Europaea Gnesnensia* 10 [2014], pp. 384–394); Catherine WOLFF, *Déserteurs et transfuges dans l'armée romaine à l'époque républicaine*, Napoli 2009; EADEM, *L'armée romaine. Une armée modèle?*, Paris 2012 (rev. M. N. FASZCZA, *Res Historica* 38 [2014], pp. 285–293); M. GUEYE, 'Délits et peines militaires à Rome sous la République: *desertio* et *transfugium* pendant les guerres civiles', *Gerión* 31 (2013), pp. 221–238. In the Polish literature, cf. G. KULECZKA, *Studia nad rzymskim wojskowym prawem karnym* [Studies on Roman Military Criminal Law], Poznań 1974; W. KUTZMANN, 'Dezercja i samowolne oddalenie w rzymskim wojskowym prawie karnym epoki pryncypatu' [Desertion and absence without leave in Roman military criminal law in Principate], *Wojskowy Przegląd Prawniczy* 36(4) (1981), pp. 431–441; IDEM, 'Pozakarne środki i uregulowania prawne oraz inne sposoby utrzymania dyscypliny w wojsku rzymskim. Część I oraz II' [Non-penal means and legal regulations and other ways of keeping discipline in Roman army. Part I and II], *Wojskowy Przegląd Prawniczy* 2–3 (1997), pp. 3–15 and 3–4 (1997), pp. 3–13.

Definitely the most important is the case of desertion.¹² It was (and still is) one of the most serious crimes of military law. It created a considerable risk for Roman excellent 'war machine' and military manpower, owing to which Rome was an empire for centuries. Desertion was a pathology, which had to be eliminated, threatening not only the efficiency and coherency of Roman legions, but also internal integrity and security – most often deserters joined armed brigands and plundered civilians.¹³ They were even more dangerous than *latrones*, because they were well trained and had fighting skills as well as necessary weaponry. However this 'disease' has never been cured – the number of deserters changed throughout history. Nevertheless, it was always in the focus of commanders and the State, what kind of policy would be best to diminish it. Many attempts were taken to find balance between the harshness of punishments, strengthening the preventive aspect of penalties and deterring possible culprits, and leniency, encouraging deserters to return to their units. The role of desertion and its significance for military success and welfare of Rome were also the main reasons which evoked jurists' interest in that matter. As a result, they gave a number of opinions, which can be found in the *Digest*, distinguishing separate crimes depending on voluntarily abandonment of the camp, according to the intensity of the perpetrator's guilt. It may be surprising, how refine and sophisticated these distinctions were, even in comparison to remaining regulations of Roman criminal law. The influence of Hadrian's policy and his rescriptive activity has to be underlined in this area.¹⁴

¹² Cf. MOMMSEN, *Strafrecht* (cit. n. 2), p. 46; KULECZKA, *Studia* (cit. n. 11), pp. 63–64, 84–88; KUTZMANN, 'Dezercja' (cit. n. 11), pp. 431–441.; A. ŚWIĘTOŃ, 'Desertores et latrones. Problem żołnierzy-rozbojników w świetle konstytucji cesarskich zachowanych w Kodeksie Teodozjańskim' [*Desertores et latrones. Soldiers-brigands in the light of imperial constitutions in the Theodosian Code*], *Studia Prawnicze KUL* 2-3.30–31 (2007), pp. 85–96; WOLFF, *Déserteurs* (cit. n. 11); GUEYE, 'Délits' (cit. n. 11), pp. 221–238. Cf. also unpublished master's thesis of T. BANYŚ, *Problematyka przestępstwa wojskowego dezercji w rzymskim prawie karnym okresu pryncypatu w świetle D. 48 oraz D. 49* [Military crime of Desertion in Roman Criminal Law under the Principate in the Light of D. 48 and D. 49].

¹³ V. GIUFFRÈ, 'Latrones desertoresque', *Labeo* 27 (1981), pp. 214–218; ŚWIĘTOŃ, 'Desertores' (cit. n. 12), pp. 85–95.

¹⁴ A. A. SCHILLER, 'Sententiae Hadriani de re militari', [in:] *Sein und Werden im Recht. Festgabe für Ulrich von Lübtow zum 70. Geburtstag*, Berlin 1970, pp. 295–306; KULECZKA, *Studia*

The emperor began or at least strengthened the process of humanisation and individualisation of responsibility and considerably increased the number of solutions concerning different circumstances which could lead to extenuation of penalty or even full acquittal of the accused.¹⁵

Classical jurists identified three separate crimes of desertion in Roman military law: *transfugium*, *desertio* and *emansio*.¹⁶ *Transfugium* was the most severe form of desertion – a *transfuga* not only abandoned his unit, but he fled directly to the enemy and joined its forces. The intensity of malice of the traitor was the highest and therefore he was punished in the most cruel way. He could be tortured and hanged (*furca*), but also burnt alive (*vivi combustio*) or even thrown to wild beasts (*damnatio ad bestias*).¹⁷ As a rule, Roman soldiers could not be punished by these aggravated and shameful forms of death, usually reserved for slaves and *humiliores*, but *transfugae* were considered enemies – they were officially and disgracefully discharged from the army.¹⁸ The seriousness of this crime provoked the most extreme measures – the soldier who had only intended to join the enemy and had prepared for it, but did not yet commit such an act, was already punished with death.¹⁹

(cit. n. 11), p. 90; KUTZMANN, 'Dezercja' (cit. n. 11), p. 432. Cf. also K. AMIELAŃCZYK, *Rzymskie prawo karne w reskryptach cesarza Hadriana* [Roman Criminal Law in the Rescripts of Emperor Hadrian], Lublin 2006.

¹⁵ PHANG, *Roman* (cit. n. 11), p. 113.

¹⁶ Cf. BERGER, *Dictionary* (cit. n. 3), s.v. 'deserere'; 'emansor'; 'transfuga'; SONDEL, *Słownik* (cit. n. 3), s.v. 'desertio'; 'emansio'; 'transfugium'.

¹⁷ D. 48.19.8.2 (Ulpianus 9 *de off. procons.*): 'Hostes autem, item transfugae ea poena adficiuntur, ut vivi exurantur'; D. 48.19.38.1 (Paulus 5 *sent.*): 'Transfugae ad hostes vel consiliorum nostrorum renuntiatores aut vivi exurantur aut furcae suspenduntur.'; D. 49.16.3.10 (Modestinus 4 *de poen.*): 'Is, qui ad hostem confugit et rediit, torquebitur ad bestiasque vel in furcam damnabitur, quamvis milites nihil eorum patiantur.' Cf. KULECZKA, *Studia* (cit. n. 11), p. 64, 88; WOLFF, *L'armée* (cit. n. 11), pp. 29-73; GUEYE, 'Délits' (cit. n. 11), pp. 225-227.

¹⁸ D. 49.16.7 (Tarruntius 2 *de re milit.*): 'Proditores transfugae plerumque capite puniuntur et exauctorati torquentur: nam pro hoste, non pro milite habentur'. Cf. also D. 48.8.3.6; D. 49.15.19.4.

¹⁹ D. 49.16.3.11 (Modestinus 4 *de poen.*): 'Et is, qui volens transfugere adprehensus est, capite punitur.' This solution is one of the exceptions from the rule concerning punishment of attempt in Roman criminal law.

As it might be expected, according to the sources, there were not any extenuating circumstances for the accused of this qualified form of desertion. Even in case of remorse in the form of voluntary return, *transfuga* was treated with full severity.

D. 49.16.3.10 (Mod. 4 poen.): Is, qui ad hostem confugit et rediit, torquetur ad bestiasque vel in furcam damnabitur, quamvis milites nihil eorum patiantur.

Soldier who had run to the enemy and came back voluntarily could be tortured and punished by hanging or thrown to wild beasts.²⁰ *Transfuga* was the enemy of Rome and for him there was no leniency. Modestinus' opinion is coherent with the general attitude concerning effectiveness of remorse – every crime should be severely punished. Though it may be interesting to add that the situation did change, but as late as in the times of Emperor Leo VI. In one of his constitutions, in which he referred to moderation between harshness and indulgence in administration of justice, he expressively referred to aforementioned solution and abolished it.²¹ He clearly decided that, if a *transfuga* should return to his country voluntarily, expressing remorse, he should be pardoned, if he had deserted only once. Obviously, every following desertion resulted in more and more severe treatment. However, if a deserter returned not of his own accord, but was brought back to Rome by force, then he should be punished as an enemy, without any leniency, especially if he had previously stained his hands with the blood of his fellow-citizens.

²⁰ In times of Constantine the Great crucifixion was banned and replaced with hanging, cf. MOMMSEN, *Strafrecht* (cit. n. 2), p. 921 n. 2. About *damnatio ad bestias*, cf. P. KUBIAK, *Damnatio ad bestias i inne kary wykonywane na arenie w antycznym Rzymie* [*Damnatio ad bestias and other Penalties Inflicted in the Arena in Ancient Rome*], Łódź 2014.

²¹ Cf. *NovL. 67*, concerning those who go over to the enemy and voluntarily return: '...Wherefore We, desiring to abolish a law of such severity, not to say injustice (for it is not unjust to punish with such barbarity a delinquent, who voluntarily attempts to make reparation for his crime?), do hereby decree that if a deserter should return to his country, he shall be pardoned, if he has only deserted once... (tr. S. P. SCOTT, *The Civil Law* xvii, Cincinnati 1932).

Nevertheless, already in classical times there existed a small chance for a traitor to avoid responsibility and be pardoned. Such a solution was firstly proposed by Hadrian and later commented by Menander.²²

D. 49.16.5.8 (Menand, 2 re milit.): Qui transfugit et postea multos latrones adprehendit et transfugas demonstravit, posse ei parci Divus Hadrianus rescripsit: ei tamen pollicenti ea nihil permitti oportere.

Hadrian stated in a rescript that a soldier who had deserted and afterwards seized several robbers (*latrones*) and detected other deserters (*transfugae*), might be spared, but nothing should be promised to one who agreed to do anything of this kind. Unfortunately, there are no other sources concerning this case and not much more can be said about the situation itself. It has been suggested that the rescript concerned a deserter who joined a group of robbers and then decided to return to his unit. In order to avoid penalty, he chose to betray his companions.²³ The number of caught robbers and traitors needed for acquittal is also unknown. It seems however that a *transfuga*, in order to gain his pardon, had to demonstrate considerable activity in that field. It is most unlikely that catching one or two criminals would be sufficient to equalise his crime. Hadrian's advice not to promise anything to the deserter willing to express such remorse suggests as well that it was not certain that in every case it would be effective to do so. Definitely, the commander judging the case had to take into consideration also other circumstances of the case, such as time of absence, was it the first desertion or not, other subsequent actions of the deserter or his previous behaviour.²⁴ Moreover, the

²² Cf. KULECZKA, *Studia* (cit. n. 11), p. 90, who called *expressis verbis* this situation an example of 'active remorse'.

²³ ŚWIĘTOŃ, 'Desertores' (cit. n. 12), p. 87. Cf. also GIUFFRÈ, 'Latrones' (cit. n. 13), p. 216.

²⁴ For example, was he a good or negligent soldier, *remansor* etc., cf. e.g., *D. 49.16.5.6 (Men. 2 de re milit.): 'A barbaris remissos milites ita restitui oportere Hadrianus rescripsit, si probabunt se captos evasisse, non transfugisse. Sed hoc licet liquido constare non possit, argumentis tamen cognoscendum est. Et si bonus miles antea aestimatus fuit, prope est, ut adfirmationi eius credatur: si remansor aut neglegens suorum aut segnis aut extra contubernium agens, non credetur ei.'*

deserter had to seize other criminals and return to Rome voluntarily. If he was arrested and brought back by force, his chance for mitigation of penalty drastically diminished or most likely even disappeared. Although it was just an individual solution, its presence in the *Digest* may suggest its validity, until the times of Justinian. However, the policy against deserters definitely was changing with time, according to present needs and circumstances, therefore it is difficult to judge, was this regulation applicable more often during the whole period of Roman Empire. Obviously, there were periods of time when no remorse could influence the severity of punishments in case of *transfugium*.

The main type of desertion consisted in unexcused abandonment of the unit, but without the intention to join the enemy. Similarly, *emansor* was also an absent without leave. Modestinus gave very precise and brief definitions of both types of crime, which enabled clear distinction between them.

D. 49.16.3.2–3 (Modest. 4 *poen.*): *Emansor est, qui diu vagatus ad castra re-
greditur. Desertor est, qui per prolixum tempus vagatus reducitur.*

Emansor was the one who returned voluntarily to the camp after some time, e.g. exceeding his furlough.²⁵ On the other hand, a deserter was a soldier who after a long time of absence was brought back. It can be concluded, that *emansio* was a kind of privileged type of desertion – *emansor* was not only absent for shorter time, but also he returned to the unit voluntarily.²⁶ In many legal sources it was clearly stated that the main point of distinction between these two crimes was time.²⁷ But it might be inter-

²⁵ M. P. SPEIDEL, 'Furlough in the Roman army', [in:] IDEM (ed.), *Roman Army Studies* II, Stuttgart 1992, pp. 330–341.

²⁶ Though there is no difference in meaning between *diu* and *prolixum tempus*. Cf. SONDEL, *Słownik* (cit. n. 3), s.v. 'diu'; 'prolixus'. Yet, *D.* 49.16.4.14 (Men. 1 *de re milit.*): 'Leuius itaque delictum emansionis habetur, ut erronis in servis, desertionis gravior, ut in fugitivis.' Cf. KULECZKA, *Studia* (cit. n. 11), p. 84; KUTZMANN, 'Dezercja' (cit. n. 11), p. 433; WOLFF, *Déserteurs* (cit. n. 11), pp. XIV–XV.

²⁷ Similar distinction between a fugitive slave and a vagabond, cf. *D.* 48.19.16.5 (Saturn. *l.s. de poen. pagan.*): 'Tempus discernit emansorem a fugitivo et effractorem vel furem diurnum a nocturno'. Cf. KUTZMANN, 'Dezercja' (cit. n. 11), p. 435.

esting that none of them included precise description of the amount of time necessary to qualify culpable absence as *desertio* or *emansio*. However, it could not be more specific. The evaluation of prolonged absence strongly depended on the circumstances. Each time it was a commander's unrestricted discretion, but not that unlimited as one could think,²⁸ concerning not only the form of desertion, but also its legal consequences. In different commentary Modestinus affirmed that, when a soldier did not return on the day when his furlough expired, he must be treated as if he had wandered away or deserted, according to the time he had been absent.²⁹ The same view expressed Paulus adding that a time consumed by sea voyage or journey should be taken into account as well.³⁰ Some authors even claim that the main reason for different treatment of *emansio* were specific and unpredictable conditions of ancient travel and communications.³¹ Severe punishment of every delayed soldier would lead in very short time to military disaster. Both eminent jurists suggested also that it had to be culpable absence – if a soldier had departed his location not too late to return within the time granted by his furlough, and later was stopped by accident, illness, robbers or any other excusable reason of this kind, he should be treated as not guilty and restored to his rank. Menander in his *De re militari* gave even more precise reasoning and enumerated few more extenuating circumstances, such as affection for rela-

²⁸ Surely commanders had to take into account all the circumstances of the case and long term consequences of their decisions. Moreover, their unrestricted authority over soldiers had its pragmatic reasons – there was no place for complicated procedures in case of emergency or battle, cf. KULECZKA, *Studia* (cit. n. 11), p. 35–39; PHANG, *Roman* (cit. n. 11), p. 115.

²⁹ D. 49.16.3.7 (Mod. 4 *poen.*): 'Si ad diem commeatus quis non veniat, perinde in eum statuendum est, ac si emansisset vel deseruisset, pro numero temporis, facta prius copia docendi, num forte casibus quibusdam detentus sit, propter quos venia dignus videatur.'

³⁰ D. 49.16.14 *pr.* (Paul. *l.s. poen. milit.*): 'Qui commeatus spatium excessit, emansoris vel desertoris loco habendus est. Habetur tamen ratio dierum, quibus tardius reversus est: item temporis navigationis vel itineris. Et si se probet valetudine impeditum vel a latronibus detentum similive casu moram passum, dum non tardius a loco profectum se probet, quam ut occurrere posset intra commeatum, restituendus est.'

³¹ PHANG, *Roman* (cit. n. 11), p. 149.

tives, pursuit after a fugitive slave or being a recruit – *tiro*.³² The aspect of individualisation of perpetrator's responsibility is clearly visible in those opinions – as long as deserter expressed any kind of intent to come back to the camp, he could count on special treatment and be treated as *emansor*.

It seems that remorse of the perpetrator was the main factor distinguishing *emansio* and *desertio*. Within the certain time, the deserter had a choice and he was encouraged by mitigation of penalties to come back voluntarily to his unit. Moreover, his voluntariness to return (specific *animus revertendi*) did not have to be present throughout the time of his absence.

D. 49.16.4.13 (Menan. 1 *re milit.*): Edicta Germanici Caesaris militem desertorem faciebant, qui diu afuisset, sed postea constitutum est, si animum revertendi aliquando habuisset, ut is inter emansores haberetur. Sed sive redeat quis et offerat se, sive deprehensus offeratur, poenam desertionis evitat: nec interest, cui se offerat vel a quo deprehendatur.³³

Menander referred to the decision of Germanicus who counted a soldier who had been absent for a long time as a deserter. However, if he had at any time had the intention of returning, he should be treated as *emansor* and avoid the punishment for desertion, whether he did it voluntarily or he was arrested and handed over. It did not matter as well to whom he gave himself up or by whom he was captured.

First part of above-mentioned source seems logical and confirms previous remarks. Some authors sustain that Germanicus' decision was crucial

³² Cf. KUTZMANN, 'Dezercja' (cit. n. 11), p. 438; *D. 49.16.4.15* (Men. 2 *de re milit.*): 'Examinantur autem causae semper emansionis et cur et ubi fuerit et quid egerit: et datur venia valetudini, affectioni parentium et adfinium, et si servum fugientem persecutus est vel si quae huiusmodi causa sit. sed et ignoranti adhuc disciplinam tironi ignoscitur.' Recruits were treated differently in many other cases as well, e.g., *D. 48.3.14 pr.*; *D. 49.16.3.9*; *D. 49.16.14.1*.

³³ The phrase 'sed postea constitutum est, si animum revertendi aliquando habuisset' was omitted in main text of Th. MOMMSEN's edition of the *Digest* and was only quoted in the critical apparatus. However, the meaning of Menander's opinion is much more clear and reasonable with this expression added. Otherwise, it is hard to explain lack of penalty for such a deserter. Such translation was also suggested in A. WATSON (ed.), *The Digest of Justinian* IV, Philadelphia 1985.

and the process of distinction between *desertio* and *emansio* began with it.³⁴ At the same time remorse of the soldier started to be considered as an extenuating circumstance. However, the second part of the source is quite problematic. It seems that voluntary return was not always a necessary condition for mitigation of penalty and classification as *emansor*, as well as lapse of time, at least in the presented opinion, which may cause some interpretative doubts. It has been suggested that Germanicus meant arrested deserters who decided to continue their service in the army, after they were brought back to the camp by force.³⁵ In this way, he would create an opportunity for every *desertor* to express remorse and be treated lightly as absent without leave, if his absence was not too long. Political reasons are clearly visible in this attitude. As long as there was any chance for recovery of 'lost' soldiers and persuading them to return to their service, commanders were encouraged to administer justice very tolerantly.

The most dangerous for external and internal security of Rome were situations when many soldiers deserted at the same time, especially from the field of battle. Such an act considerably weakened strength and effectiveness of Roman legions and could result in a devastating defeat. However, such deserters were not always punished as severe as one could expect.

D. 49.16.3.9 (Mod. 4 poen.) Si plures simul primo deseruerint, deinde intra certum tempus reversi sint, gradu pulsus in diversa loca distribuendi sunt. Sed tironibus parcendum est: qui si iterato hoc admiserint, poena competentis adficiuntur.

Modestinus explicitly stated that, if several soldiers had deserted simultaneously and returned within a certain time, after reduction in the rank, they should be distributed in different units. Indulgence should be shown to new recruits, but if they repeat the offence, they should undergo the prescribed punishment. This opinion could provoke some interpretative problems, owing to diversity of circumstances influencing the

³⁴ *Emansio* was unknown in the Republic, cf. KUTZMANN, 'Dezercja' (cit. n. 11), p. 436; WOLFF, *Déserteurs* (cit. n. 11), pp. XIV–XV.

³⁵ KUTZMANN, 'Dezercja' (cit. n. 11), p. 438.

measurement of penalty ('plures simul, primo, intra certum tempus reversi sint, tirones'). Nevertheless, remorse and will to return to the camp seems to be the most dominate factor resulting in mitigation of punishment.³⁶ The reason for such a solution again seems to be clearly practical. Capital punishment of all deserters could also considerably diminish the number of soldiers, when degradation and relocation was not only severe enough, but also fulfilled its preventive functions.³⁷ Moreover, although it is not clearly expressed in the source, deserters could be treated as *emansores*. Such interpretation can be sustained on the basis of *intra certum tempus*. It looks that there was a certain limit of time exceeding which did not give the right to lighter penalties.

The lenient policy and attitude of Roman emperors and jurists towards criminal soldiers went even further. After a very long period of absence, which excluded a possibility to be treated as *emansor*, the deserter could still count on some tolerance, if he expressed remorse and voluntarily returned to his troops. It seems that such an opportunity was suggested for the first time by Severus and Antoninus.

D. 49.16.13.6 (Macer 2 re milit.): Desertorem, qui a patre suo fuerat oblatus, in deteriore militiam Divus Pius dari iussit, ne videatur, inquit, pater ad supplicium filium optulisse. Item Divus Severus et Antoninus eum, qui post quinquennium desertionis se optulit, deportari iusserunt. Quod exemplum et in ceteris sequi nos debere Menander scripsit.

In this fragment Macer described two separate cases giving evidence of imperial indulgence towards deserters. Firstly, he referred to the decision of Antoninus Pius who ordered to degrade and not to kill a deserter brought back to the camp by his father, so that it would not seem that he was a cause of his son's death. Next, the jurist related to an opinion of Divine Emperors who ordered to punish with deportation a deserter who voluntarily returned after five years of absence. The last sentence of this

³⁶ This is the only source concerning remorse in Roman military law mentioned by RIECHELMANN, *Paenitentia* (cit. n. 2), p. 145. Moreover, in such a way it could also be used as a specific mean of social manipulation, cf. FULKERSON, *No Regrets* (cit. n. 1), pp. 161–185.

³⁷ KUTZMANN, 'Dezercja' (cit. n. 11), p. 439.

source has to be underlined. Macer affirmed that according to Menander, similar solutions should be taken in other cases as well. In this way, his view became the general regulation concerning voluntary return of all *desertores*, even after long periods of absence. Fortunately, the original commentary of Menander, to which Macer was relating to, is also included in the *Digest*.

D. 49.16.5pr. (Men. 2 re milit.): Non omnes desertores similiter puniendi sunt, sed habetur et ordinis stipendiorum ratio, gradus militiae vel loci, muneris deserti et anteactae vitae: sed et numerus, si solus vel cum altero vel cum pluribus deseruit, aliudve quid crimen desertioni adiunxerit: item temporis, quo in desertione fuerit: et eorum, quae postea gesta fuerint. Sed et si fuerit ultro reversus, non cum necessitudine, non erit eiusdem sortis.

According to jurist's opinion, not all deserters should be punished in the same way, but their rank, the amount of their pay, the place where they deserted and their previous conduct should also be taken into account. The number of the offenders should also be considered, as well as any additional crime committed by deserter. The time during which the soldier was absent and whatever occurred afterwards, should also be ascertained. Finally, Menander affirmed that deserter's fate would be different, if he voluntarily returned to his troops and without being compelled to do so. This quite enigmatic information was clarified by Menander in the next fragment of his commentary, in which he repeated previously presented imperial decision that deserter should be deported to an island, if he returned to the camp on his own accord.³⁸ Although deportation deprived soldier of his citizen's rights and limited his freedom and thus it could be considered a severe punishment, comparing to the standard penalties for deserters, it was a sheer expression of imperial leniency. Deserter could save his life and spent the rest of it in relative piece. It should not be forgotten as well that there always existed a chance for pardon even in situations of much longer absence.³⁹ However,

³⁸ *D. 49.16.5.4 (Men. 2 re milit.):* 'Qui in desertione fuit, si se optulerit, ex indulgentia imperatoris nostri in insulam deportatus est.'

³⁹ *Cf. 12.35.5 pr.:* 'Cum adlegatis septem annos in desertione egisse maritum sororis vestrae et indulgentia nostra esse restitutum, non recte desideratis, ut id tempus, ac si in castris fuerit, habeatur.'

the imperial indulgence of this kind could be expressed in case of any crime and not only committed by soldiers.

In the course of time, pragmatic indulgence of emperors have started to prevail in their opinions. In the tumultuous late fourth century AD a considerable number of constitutions concerning deserters and their harbourers was enacted. Among them there was a decision of emperor Gratianus, Valentinianus and Theodosius which guaranteed full acquittal, and not only mitigation of his penalty, to every deserter who returned voluntarily, regardless of the time of his absence.⁴⁰ Although it was addressed to the praetorian prefect and was probably evoked by exceptional events, it was still in force in times of Justinian. It seems that under pressure of different circumstances the imperial policy towards deserters continued to change in the direction of tolerance. However, in the same time the emperors issued many administrative regulations which main goal was to increase the efficiency of searching and arresting of insubordinate soldiers. The most prevailing auxiliary concept was the system of punishments for those who concealed or hid fugitive deserters.⁴¹ It is worth to mention that also among these solutions there are some references to remorse, though not soldiers but those who harbour them.⁴² They could avoid the responsibility for their deeds, if they reported or betrayed such a deserter, seized him and delivered to the judge or governor of the province in a fixed time. Above-mentioned resolutions slightly differ from 'classic' idea of remorse, however, they could be numbered among other presented situations because they express the same concept of active change of one's behaviour resulting in avoidance or ease of penalties. For Roman jurists they were still casuistic and very pragmatic solutions of different situations, serving the welfare of the State.



⁴⁰ *CTb.* 7.18.4.3 (= *Cj.* 12.45.1.3): 'Desertor autem habebitur quisquis belli tempore aberit a signis. Horum qui sponte processerit, peccati anterioris supplicium non timebit ...'.

⁴¹ From confiscation of property and fines to capital punishments. *Cf.* *CTb.* 7.18 and *Cj.* 12.45

⁴² *CTb.* 7.18.4; 7.18.7; 7.18.8; 7.18.9.

It seems that remorse played an essential role in the field of Roman military law, on the contrary to the rest of Roman legal inheritance. First of all, voluntary return of an absent without leave was a key element of distinction between *desertor* and *emansor*. In a certain time, evaluated by the commander in the limits of his discretion, unsubordinated soldier could come back to his unit on his own accord and count on mitigation of penalty or even full acquittal. In case of longer absence, which excluded him from the possibility of being treated as *emansor*, he could avoid full responsibility as well, if he behaved in the same manner. Imperial decisions, motivated by leniency and pragmatics, provided for such a deserter a penalty of deportation. However, later constitutions granted pardon for every deserter who came back of his own free will. Sometimes, even if he was arrested and brought back by force, but he decided to continue his service for Rome, he could still be treated lightly. Even in case of *transfugae* there was a chance for extenuation, if they expressed remorse and seized some robbers or traitors and brought them to the camp.

The jurists and emperors were attempting to find a perfect solution for diminishing the number of deserters, but they have never fully succeeded. In their decisions and commentaries they tried as well to find balance between harshness of penalties and indulgence, in order to deter possible criminals, but also to encourage *desertores* to come back. Although it might be a bit too far-reaching conclusion, on the basis of above-mentioned sources a slow progress of increasing leniency towards remorse of absent soldiers can be noticed. In the republican times desertion was punished very strictly. The situation was slowly changing in the course of imperial Rome. In the first place *emansio* appeared as privileged form of desertion. After some time, *desertor* could count on some leniency as well (he would be deported), if he returned to the camp voluntarily. According to later constitutions, he could even count on full acquittal in such a case. In post-Justinian times even *transfugae*, the most harmful and dangerous of *desertores*, had the opportunity for extenuation, if they came back on their own to the unit. Obviously, there were many exceptional situations in which the measurement of penalty was different and was adapted to the circumstances, but such general tendency can be traced. However, this is only one side of the coin. The punishments for unre-

remorseful deserters were very severe and cruel throughout the period of imperial Rome. The glorified severity of military punishments, ruthlessness and traditionalism were still present in juristic opinions, expressing views of Roman elites but also public opinion.⁴³ However, severe punishments were rarely executed. It seems that in the field of Roman criminal law there existed well-functioning marriage of harsh penalties and prevailing inclination to extenuate remorseful soldiers. But such policy was fully justified. Emperors and commanders had to take care about actual manpower in order to ensure safety for Rome and Roman citizens. Too much severity would definitely result in mutinies and riots, as well as smaller number of new recruits. Imperial system depended on keeping goodwill of the soldiers. On the other hand, excessive clemency would lead to disorganization and lack of so famous Roman military discipline. The policy of 'golden mean' seems to be the best solution, though it has never led to full extermination of the plague of desertion in Roman legions. However, extenuation of penalties in cases of remorse of deserters was one of the main solutions leading to achieve this unreachable goal.

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⁴³ KULECZKA, *Studia* (cit. n. 11), p. 41; PHANG, *Roman* (cit. n. 11), pp. 111-114; 121-123; 151: 'harsh punishments were more easily admired in exemplary literature than imposed in real life'.