

# MATER FAMILIAS

## SCRITTI ROMANISTICI PER MARIA ZABŁOCKA

A CURA DI

**ZUZANNA BENINCASA**  
**JAKUB URBANIK**

CON LA COLLABORAZIONE DI

**PIOTR NICZYPORUK**  
**MARIA NOWAK**

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*Scritti per Maria Zabłocka*

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Marzena Dyjakowska

**VERBA IMPIA ET MALEDICTA  
THE INFLUENCE OF ROMAN LAW  
UPON THE WESTERN EUROPEAN DOCTRINE  
OF VERBAL INSULT OF THE RULER  
IN THE 16–17TH CENTURIES**

IN AN ARTICLE PUBLISHED some years ago, Luigi Garofalo<sup>1</sup> drew attention to the long-underrated influence of Roman law on the science of criminal law in mediaeval and modern Europe. The author demonstrated that a number of theoretical constructs, shaped, or at least rooted in the classical jurisprudence, permeated into the criminal law of the era governed by common law. His major focus were the issues of intentional and unintentional fault, circumstances excluding fault or liability, stages of a crime, although – as pointed out by the author based on the scholarly findings – Roman law, very handy in formulating general

<sup>1</sup> L. GAROFALO, 'Pojęcia i żywotność rzymskiego prawa karnego' *Zeszyty Prawnicze* 3 (2003), 1, pp. 7–42. The article was published earlier in Italian: 'Concetti e vitalità del diritto penale romano', [in:] *Iuris Vincula. Studi in onore di Mario Talamanca* IV, Napoli 2001, pp. 73–106. The thesis of the existence in Roman legislation, in Emperor Hadrian's rescripts to be precise, of some elements or rudiments of the modern, in the contemporary sense, science of criminal law is advanced by K. AMIELAŃCZYK, *Rzymskie prawo karne w reskryptach cesarza Hadriana* [Roman Criminal Law in Hadrian's Rescripts], Lublin 2006, p. 20 and in particular pp. 64–90.

principles of law, was also the cause of errors in specific cases also due to the misinterpretation of sources.<sup>2</sup> Garofalo closed his observations by concluding that the theoretical solutions, especially adopted through the work of the classical jurisprudence in Roman criminal law, were able to endure the test of time.<sup>3</sup>

The monograph of the author of this study is part of the research on the impact of Roman criminal law on modern solutions. It is devoted to the influence of Roman law on the concept of the violation of majesty in Poland before the Partitions,<sup>4</sup> in which considerations relating to this crime in the sources of law in Poland, in Polish legal doctrine and in legal practice in the XVI–XVIII centuries were preceded by the analysis of the influence of Roman solutions on western European doctrine. The European legal doctrine created – along with the norms of Roman law adopted in the First German Reich and canon law – the common legal order (*ius commune*) of Christian Europe.<sup>5</sup> Even a cursory analysis of the Western European legal literature reveals a tremendous influence of Roman law on the author's views regarding *crimen laesae maiestatis*. What is more, it is clearly observable that the authors treated the Roman law regulations on this offence as still valid (even in countries where there was no reception of Roman law), or, in any event, as a source of inspiration for legal solutions tailored to their contemporary reality. Based on the titles from the *Digest* and the Code of Justinian (*ad legem Iuliam maiestatis*), the doctrine furnished both the very concept of the offence of lese-majesty as well as the catalogue of acts falling within the scope of this concept.

<sup>2</sup> L. GAROFALO, 'Pojęcia i żywotność (cit. n. 1), p. 10; cf. G. FALCHI, *Diritto penale romano. I singoli reati*, Padova 1932, p. 10.

<sup>3</sup> FALCHI, *Diritto penale romano* (cit. n. 2), p. 39.

<sup>4</sup> Marzena DYJAKOWSKA, *Crimen laesae maiestatis. Studium nad wpływami prawa rzymskiego w dawnej Polsce*, Lublin 2010; English version: *Crimen laesae maiestatis. A Study of Roman Law Influences in Old Poland*, Lublin 2013.

<sup>5</sup> Cf. e.g., M. KURYŁOWICZ, 'Prawo rzymskie jako fundament europejskiej kultury prawnej' [Roman law and the basis of the European legal culture], *Zeszyty Prawnicze* 1 (2002), pp. 9–25; W. WOŁODKIEWICZ, *Europa i prawo rzymskie. Szkice z historii europejskiej kultury prawnej* [Europe and Roman Law. Essays in the History of the European Legal Culture], Warszawa 2009, p. 57, with the references therein.

A verbal insult – as defined by Heinrich Bocer – is the use offensive and punishable words in regard to the emperor or to the nation of Rome, a definition the author drew from the constitution in *Cj.* 9.7, from the fragment of *PSent.* 5.29 and from Modestinus' statement in *D.* 48.4.7.3:

Maledicto committitur maiestatis crimen, cum quis impiis, injuriis et puniendis verbis adversus Imperatorem, vel populum Romanum utitur.<sup>6</sup>

The wording of the definition above points to an almost verbatim repetition of the provisions of Roman law and its relevance in the seventeenth century may raise doubts. However, it should be noted that its author, being a German scholar, understood the words *Imperator* and *populus Romanus* as referring to the currently reigning emperor and to the inhabitants of the Holy Roman Empire of the German Nation; by using the definition based on Justinian law it is indeed easy to explain the reception of Roman law in Germany. At the same time, in another part of his thesis about the crime of violating majesty, the same author defined majesty in a more general way, as the supreme dignity of a sovereign nation, i.e. not subject to anyone's authority, and therefore not only to the German Empire.<sup>7</sup> However, most authors

<sup>6</sup> H. BOCER, *Tractatus compendiosus de Crimine Maiestatis*. Tubingae 1629, p. 43.

<sup>7</sup> 'Est autem maiestas ... suprema dignitas et amplitudo liberii alicuius populi, id est, potestati alterius populi non subiecti. Unde et populi Romani maiestas est' (BOCER, *Tractatus compendiosus* [cit. n. 6], p. 32). The structure of the statement indicates that the Roman people are merely one of numerous independent nations equipped with *maiestas*, although – as mentioned elsewhere – in yet another place, the author clearly attributes this quality to the German Empire only. Admittedly, there was a popular view among the German authors of the linkage not only between *maiestas* and *honor*, *dignitas* or *auctoritas*, which befit any nation or ruler, but between *maiestas* and *summa potestas*, obviously attributed only to the German emperor: as with the Roman emperors, so with the modern emperor – his authority is supreme, and to determine its features reference was made to the famous statement of Ulpian in *D.* 1.3.31: 'Princeps legibus solutus est'. In the first half of the 17th century, B. CARPZOV wrote about the imperial power: 'Nihil namque dignitas, nihil personalis honor ad maiestatem imperantis facit...sed per maiestatem ius ipsum, quod in summa potestate consistit, intelligendum est: ut proinde vere ac proprie maiestas dicatur et definiatur summa et perpetua legibusque soluta potestas'. (B. CARPZOV, *Practica nova imperialis saxonica rerum criminalium*. Lipsiae 1739, p. 215). In the author's opinion, the attribute of *maiestas* does not influence dignity but makes the ruler stand above the law.

clearly attributed majesty to all independent nations and their rulers.<sup>8</sup> This is the context in which the use of phrases such as *imperator* and *populus Romanus* in legal literature should be understood.

While the qualification of rebellion against the ruler (*rebellio*) and causing riots (*seditio*)<sup>9</sup> as a violation of majesty did not raise any doubts for the authors, the views in European literature on whether the crime of verbal insult of the monarch should be considered as one of the forms of *crimen laesae maiestatis* or as a separate offence, were not uniform. Most authors opted for the latter view, finding arguments in the writings of Roman historians and in sources of Roman law. One of the arguments indicated was that the location of the provisions on the verbal insult of the emperor in the Justinian Code was under a different title, than those of the violation of majesty. Tiberio Deciani drew attention to this, starting his comprehensive reasoning devoted to this offence by suggesting that it is an offence of a different type: 'Proximum crimen laesae maiestatis videtur esse maledictio in Principem'<sup>10</sup> – they are therefore offences similar to each other, but separate. These words bring to mind the beginning of Ulpian's statement about the crime of violating majesty ('Proximum sacrilegio crimen est, quod maiestatus dicitur' – *D. 48.4.1 pr.*) – as Ulpian regarded *crimen maiestatis* as the closest semantically to *sacrilegium*, T. Deciani saw the closeness between the violation of majesty and verbal insult of the ruler, finding reasons for justifying the punishability of this act in the words of the *Old Testament*: 'You shall not blaspheme God or curse the ruler of your people.' (*Ex 22.27*),<sup>11</sup> in the state-

<sup>8</sup> H. GIGAS conveys the opinion that majesty, once held by the Roman Empire, is now common to all states, and anyone who goes against the state perpetrates the offence of violation of majesty (H. GIGAS, *De crimine laesae maiestatis*, Venetiis 1557, p. 48 v.). J. REDIN expressed the view that, although the legal sources usually speak of *Imperialis Maiestas*, this term can be regarded as fitting any monarch in his kingdom and not only the emperor: 'Quae tamen omnia non ita intelligenda puto, ut Imperatoribus solum hic titulus debeat. Iuris enim esse arbitror, quemlibet Regem in suo Regno Maestate Regia vocari' (*Tractatus Universi Iuris* xvi, Venetiis 1584, pp. 154–155). Also CARPZOV, *Practica nova* (cit. n. 7), p. 216, says that majesty is a quality of all European monarchs, as each of them enjoys sovereignty in their own country.

<sup>9</sup> See more: DYJAKOWSKA, *Crimen laesae maiestatis* (cit. n. 4), pp. 100–101.

<sup>10</sup> T. DECIANI, *Tractatus criminalis* 1, Venetiis 1590, p. 186 v.

<sup>11</sup> Cf. J. MENOCHIOS, *De arbitrariis iudicium Quaestionibus et causis libri duo*, Venetiis 1569, p. 355 v.; the author, citing the same fragment of the *Old Testament*, considered cursing the

ment referring to these words of St. Paul (*Acts* 23.4–5). The author then noted that in the Justinian Code, insult of the ruler was regulated under title 7 book 9 *Si quis imperatori maledixerit* and violation of majesty under title 8 of that book *Ad legem Iuliam maiestatis*, which argues for a separate classification of both acts. He pointed out that the same argument was used by other authors: Hieronymus Gigas<sup>12</sup> and Aymo Cravetta. The latter also pointed out the analogy in the different treatment of the violation of divine majesty, *i.e.* heresy (*Cf.* 1.5.4), and blasphemy:

Rursus ab imperatore nomimibus diversis appellantur in titulis distinctis et separatis, ergo delicta sunt diversa ... Sed in Deo et Christo nostro crucifixo rere regum et domino dominantium, crimen laesae maiestatis, quae in Deum aut Christum committuntur, ponuntur et considerantur ut diversa.<sup>13</sup>

The separate treatment of both offences is justified also by their different gravity, since – as pointed out by Pomponius in *D.* 21.1.48.3 – deeds are more important than words: ‘... multo enim amplius est id facere, quam pronuntiare.’

Referring to these words, A. Cravetta also cited the statement of Modestinus in *D.* 48.4.7.3 and concluded that it would not be correct for the two acts to be the same in terms of punishment:

Rursus ab imperatore nomimibus diversis appellantur in titulis distinctis et separatis, ergo delicta sunt diversa ... Sed in Deo et Christo nostro crucifixo rere regum et domino dominantium, crimen laesae maiestatis, quae in Deum aut Christum committuntur, ponuntur et considerantur ut diversa.<sup>14</sup>

ruler as a kind of blasphemy (‘nam et hoc blasphemiae genus quoddam est’). The same fragment was also cited by GIGAS, *De crimine laesae maiestatis* (cit. n. 8), p. 40, and A. CONTIUS, *Digestorum liber xxxviii. Ad legem Iuliam maiestatis tit. iv*, Parisiis 1616, p. 375.

<sup>12</sup> GIGAS, *De crimine laesae maiestatis* (cit. n. 8), p. 24.

<sup>13</sup> A. CRAVETTA, *Consiliorum sive responsorum Primus et Secundus tomus*, Francoforti ad Moenum 1572, p. 24. The author stressed that the violation of divine majesty and blasphemy are different, among others, in terms of punishability, more severe in the case of the first offence.

<sup>14</sup> CRAVETTA, *Consiliorum sive responsorum* (cit. n. 13), pp. 24–25.

According to A. Cravetta and J. Menochius, insulting the ruler can therefore be considered a severe abuse (*iniuria atrox*), a serious crime, but not to the same extent as *crimen laesae maiestatis*.<sup>15</sup>

Another interesting argument, albeit rather less credible, was used by T. Deciani, indicating that once (*i.e.* in Roman times) on the basis of certain provisions belonging to the *ius civile*, verbal insult of the emperor was qualified as *crimen maiestatis*, but the wording of these provisions was changed still in the period of the Empire. The author had in mind words from Paulus' *Sentences*:

*PSent.* 5.29: Quod crimen [sc. maiestatis] non solum facto, sed ex verbis impiis et maledictis maxime exarcebatur.

T. Deciani shared the view of Jacob Cuiacius ('quod est satis verosimile'), according to which the fragment above originally appeared also in Modestinus's statement (*D.* 48.4.7), but was by interpolation modified by Tribonianus, so that it would correspond in terms of sense to the constitution of Emperors Theodosius, Arcadius and Honorius from 393, placed after some time under title 7 of book 9 of the Justinian Code *Si quis Imperatori maledixerit*.<sup>16</sup>

Arguments for the different treatment of the verbal insult of the ruler were drawn by the authors of legal works from the history of ancient Greece and Rome, indicating that good rulers were not usually inclined to severely punish the authors of defamatory statements. T. Deciani drew attention to the fact that the trial of Claudia, the sister of Claudius Pulcher, was considered to be the first trial on the violation of majesty, for words seen as contemptuous of the people (Suet. *Tib.* 2), however, he considered that case to be completely unique.<sup>17</sup> Among the examples of a tolerant approach to disparage statements in literature, cases described by

<sup>15</sup> CRAVETTA, *Consiliorum sive responsorum* (cit. n. 13), p. 356; MENOCHIOS, *De arbitrariis iudicium* (cit. n. 11), p. 25.

<sup>16</sup> DECIANI, *Tractatus criminalis* (cit. n. 10), p. 188.

<sup>17</sup> DECIANI, *Tractatus criminalis* (cit. n. 10), p. 187.



Plutarch,<sup>18</sup> Valerius Maximus (VI 2),<sup>19</sup> Suetonius (*Caes.* 75)<sup>20</sup> and Tacitus (Ann. I 73; 74; II 50)<sup>21</sup> were the most frequently cited. Cases of the severe treatment of perpetrators of verbal insult<sup>22</sup> did not escape the authors' attention, however – according to them – they should be considered typical for tyrants, and not truly great rulers, who are inclined to generosity.<sup>23</sup>

Finally the rules of proceedings in cases of *crimen maiestatis* were resorted to in the justification of treating verbal insult of the ruler as a separate crime. These proceedings possessed some special features, among others, many persons were entitled to the right of accusation, who for other offences would not have such a right. This group of people included in particular: women, people without a good reputation, relatives of the accused (*familiares*), minors, slaves against their owners, freedmen against their patrons, and finally people, who were proved to have been guilty of false testimony in exchange for financial benefits (Mod. *D.* 48.4.7 *pr.*–2; Pap. *D.* 48.4.8). The authors of legal works supported the thesis that the sources of Roman law relating to the plaintiff also apply to the witnesses, therefore in trials for the crime of the violation of majesty the testimony of people generally considered untrustworthy (*testes non idonei, testes inhabiles*)<sup>24</sup> should be allowed. However, with regard to trials

<sup>18</sup> Plut. *Apophthegmata regum et imperatorum* 173; 184 (MENOCHIOS, *De arbitrariis iudicium* [cit. n. 11], p. 355 v.; 356 v.; DECIANI, *Tractatus criminalis* [cit. n. 10], p. 187).

<sup>19</sup> MENOCHIOS, *De arbitrariis iudicium* (cit. n. 11), p. 355 v.; DECIANI, *Tractatus criminalis* (cit. n. 10), p. 187–187 v.

<sup>20</sup> MENOCHIOS, *De arbitrariis iudicium* (cit. n. 11), p. 355 v.; Suet. *Aug.* 51, cf. MENOCHIOS, *De arbitrariis iudicium* (cit. n. 11), p. 355 v.; DECIANI, *Tractatus criminalis* (cit. n. 10), p. 187 v.

<sup>21</sup> DECIANI, *Tractatus criminalis* (cit. n. 10), p. 187 v. T. Deciani also cited the *Old Testament* story of King David's leniency towards the son of Gershon named Shimei, who insulted him (2 *Sam* 16.5–13; 1 *Kings* 2.8).

<sup>22</sup> Plut. *Apophthegmata regum et imperatorum* 174; 176; 175; 177 (MENOCHIOS, *De arbitrariis iudicium* (cit. n. 11), p. 356); Suet. *Tib.* 58 (DECIANI, *Tractatus criminalis* (cit. n. 10), p. 187 v.–188); Suet. *Nero* 32 (DECIANI, *Tractatus criminalis* [cit. n. 10], p. 188).

<sup>23</sup> 'At certe Regii semper fuit atque alti animo maledicta negligere et connivere: tyrannicum autem severe castigare' – DECIANI, *Tractatus criminalis* (cit. n. 10), p. 187; cf. MENOCHIOS, *De arbitrariis iudicium* (cit. n. 11), p. 356 v.

<sup>24</sup> Cf. e.g., GIGAS, *De crimine laesae maiestatis* (cit. n. 8), p. 78; 95; J. CLARUS, *Opera omnia sive Practica civilis atque criminalis*, Venetiis 1614, p. 81; J. DAMHOUDER, *Praxis rerum crimi-*

of insult of the ruler, it was emphasized – in the times of A. Cravetta – that such witnesses cannot be taken into account, because since the active infringement of majesty is a crime more serious than insult, procedural rules concerning *crimen maiestatis* should not also apply to trials of the latter act:

Videlicet, quo dubi non agitur principaliter de crimine laesae maiestatis, prout ex facto oritur, sed ex solis verbis petulantibus et iniuriosis, non videntur admittendi testes, qui alias admitti solent in crimine laesae maiestatis, videlicet, testes non idonei aut integri ..., nam illud privilegium recipiendi testes non idoneos, cum habeat locum, ubi agitur de crimine laesae maiestatis, non videtur extendendum, ubi maiestas laeditur solum ex verbis, cum enim gravius sit laedere maiestatem principis facto quam verbis, et dispositum in crimine graviore, non videtur extendendum ad crimen levius, in quo non est tanta ratio.<sup>25</sup>

The cited author, using the argument *a minori ad maius*, derived from the words of Paulus in *D.* 23.2.44.7<sup>26</sup> and from the gloss to Paulus's statement in *D.* 24.3.24, tried to prove that violation of majesty is connected with a danger to the state and to public order, which is not the case with verbal insult. Accordingly, although an insult is a serious crime, it is not to that extent – to use modern wording – socially harmful, to justify extending the interpretation of provisions allowing witnesses to the trial affected by bar:

Nam quando laeditur maiestas principis facto, agitur de gravissimo praeiudicio non solum ipsius principis, sed totius regni et omnium subditorum, secus quando verbis tantum procacibus offenditur princeps. Etenim licet offensio illa verbalis gravissima sit, tamen non est tanti praeiudicii, quantum

*nalium*, Antverpiae, p. 150; DECIANI, *Tractatus criminalis* (cit. n. 10), p. 164 v.-165 v.; BOCER, *Tractatus compendiosus* (cit. n. 6), p. 220. The authors relied in particular on: Modestinus, *D.* 48.4.7; *Cf.* 9.1.20; Papinianus, *D.* 48.4.8; Marcellus *D.* 11.7.35. *Cf.* also: Laura SOLIDORO MARUOTTI, 'La disciplina del *crimen maiestatis* tra tardo antico e medioevo', [in:] C. CASCIONE & Carla MASI DORIA (eds.), *Diritto e giustizia nel processo. Prospettive storiche costituzionali e comparatistiche*, Napoli 2002, pp. 361-446.

<sup>25</sup> CRAVETTA, *Consiliorum sive responsorum* (cit. n. 13), pp. 25-26.

<sup>26</sup> 'Eas, quas ingenui ceteri prohibentur ducere uxores, Senatores non ducent'.

in se habet offensio realis, ideo non videtur licita extensio de casu realis offensionis ad casum verbalis iniuriae, in quo casu ratio tanta privilegiandi non versatur.<sup>27</sup>

In literature, however, sometimes a view was presented that a verbal insult of the ruler does not constitute a separate crime, but one of the forms of *crimen laesae maiestatis*. The most comprehensive justification was done by Heinrich Bocer, who inferred that it is wrong to treat an insult as a separate crime only on the basis of regulations in the separate title of the *Justinian Code*. After all, an insult (*iniuria*) made in writing (*famosum libellum*) is dealt with under a separate title of the *Code*, and yet it is a form (species) of tort referred to as *iniuria*:

Non patrocinator huic Interpretum errori, quod in C. Tit. Si quis Imperatori maledixerit [sc. *Cf.* 9.7], separatur a Tit. Ad leg. Iul. maiest. [sc. *Cf.* 9.8]. Cum enim diversae sint species criminis maiestatis, maledictum, et factum, quibus maiestas violatur, iccirco singulare illae species singulis titulis explicantur; sicuti species iniuriae, quae per famosum libellum inferitur, speciali titulo Cod. De famosis libellis [sc. *Cf.* 9.36] proponitur, qui titulus distinctus est a Tit. De iniuriis [sc. *Cf.* 9.35].<sup>28</sup>

The highlighted by many authors less serious nature of verbal insult of the ruler influenced the level of penalties against perpetrators of this act. The authors of legal works did not have any doubts as to the possible sanctions for violation of the majesty of a monarch committed by act, recognizing that, in general, the provisions of Roman law should be applied, mandating a total punishment of the death penalty, infamy and confiscation of property.<sup>29</sup> Differences of views occurred when deter-

<sup>27</sup> CRAVETTA, *Consiliorum sive responsorum* (cit. n. 13), p. 26. This view was shared by DECIANI, *Tractatus criminalis* (cit. n. 10), p. 188 v., and P. FOLLERI, *Practica criminalis*, Lugduni 1556, p. 566.

<sup>28</sup> BOCER, *Tractatus compendiosus* (cit. n. 6), pp. 126–127.

<sup>29</sup> In particular, they referred to *lex Quisquis* of the emperors Arcadius and Honorius from 397 (*Cf.* 9.8.5 and to comments to *lex Iulia maiestatis* contained in the *Digest* (Marcian. *D.* 48.4.3; Hermog. *D.* 48.4.9).

mining the sanctions for verbally insulting the ruler. The authors, considering this act a separate crime, expressed the belief that it should also be different in terms of sanctions:

Dico tamen non esse eadem poena afficiendum, qua reus criminis laesae maiestatis.<sup>30</sup>

... nam esset absurdum parem esse poenam dicentis et facientis.<sup>31</sup>

Since the sanction for verbal insult was not determined precisely in the provisions of the law – as opposed to the punishment for violating majesty by act – it was argued that this sanction is arbitral:

Quia vero isthaec Impp. Dispositio [sc. *Cj.* 9.7] non definit huic iniurioso maledicto specialem et certam aliquam poenam, dubium est nullum, quin ea sit arbitraria.<sup>32</sup>

The victim is the ruler, and therefore the decision as to the sentence belongs first and foremost to him, because it is clearly stipulated in the imperial constitution:

constituit [sc. Imperator in *Cj.* 9.7] dolosum et temerarium latratorem ad principem ipsum, quem laessisset, esse remittendum. Princeps autem ipse quam poenam constituat, extra officium est advocatorum.<sup>33</sup>

J. Menochius saw an argument for the exclusive judgement of the ruler in the above-mentioned matters in the *Institutes* of Justinian:

Secundo suadet et lex civilis, quae illatam iniuriam privato ulciscitur § atrox inst. de iniuriis [sc. *Ijust.* 4.4.6], a fortiori ergo vindicanda est illata

<sup>30</sup> MENOCHIOS, *De arbitrariis iudicium* (cit. n. 11), p. 356.

<sup>31</sup> CRAVETTA, *Consiliorum sive responsorum* (cit. n. 13), p. 25.

<sup>32</sup> BOCER, *Tractatus compendiosus* (cit. n. 6), p. 126; the author found justification of the thesis in Ulp. *D.* 48.3.4.

<sup>33</sup> CRAVETTA, *Consiliorum sive responsorum* (cit. n. 13), p. 37.

iniuria principi. Quibus subinfertur, quod nisi Princeps hos maledicos puniret.<sup>34</sup>

The same author stressed that punishment for an insult is the duty of the ruler and found justification of this duty also in Roman law:

Accedit tertio, quod quemadmodum et leges non debent esse ludibrio et ad contemptum L. si Praetor ff. De iud. [sc. Iul. D. 5.1.75] l. ult. ff. Ne quid in loco publ. [sc. Iul. D. 43.8.7] ita nec ipsi Principes contemptui esse debent. Sed ubi impunita dicacitas haec relinqueretur, dubio procul inde Principum orietur contemptus, atque ita redderentur minus idonei in populorum moderatione. Nam posteaquam contemnuntur, et illorum praecepta non observantur.<sup>35</sup>

The aim of the provisions is therefore – as argued by the author – to protect the authority of the ruler; the lack of punishment for verbal insult leads to a lack of respect towards the ruler from the subjects and failure to execute his orders. This can lead to situation dangerous not only for the ruler but also for the whole state: a ruler lenient to offenders becomes an easier target for conspiracy, since the authors of disparaging comments easily find followers. Punishment will discourage potential criminals to take action:

Quod Principes non sui causa solum, sed et populorum ferre non debent. Conprobatur quarto, quoniam si dicacitatem hanc inultam Principes relinquerent ansam praeberent haud multum difficilem conspirandi in eos: quando quidem ii, qui conspirare desiderant, ex maledicentia animos maledicum intuentur et cognoscunt et hos facile sibi in conspiracy socios asciscere possent ... Nam ubi delicta puniuntur, homines non invitantur ad delicta perpetrandum, ut econtra.<sup>36</sup>

Although bringing the perpetrator to justice and the choice of the penalty was decided by the ruler, the authors of legal works recommended – again based on the provisions of Roman law – moderate severity and

<sup>34</sup> MENOCHIOS, *De arbitrariis iudicium* (cit. n. 11), p. 356.

<sup>35</sup> MENOCHIOS, *De arbitrariis iudicium* (cit. n. 11), p. 356.

<sup>36</sup> MENOCHIOS, *De arbitrariis iudicium* (cit. n. 11), p. 356.

adjusting the penalty to the circumstances of the act. The most guidelines were provided by the repeatedly cited fragments of the *Digests* (Mod. *D.* 48.4.7) and the *Justinian Code* (*Cj.* 9.7). According to the authors, the case of verbal insult of the ruler committed wilfully, with intent to insult, should be distinguished from saying offensive words because of a different, at least in part, justified cause. In the first case, the punishment is not statutory at all, its level should therefore be left entirely to the discretion of the ruler, who could even be generous and forgive the perpetrator.

Poena autem in hos temerarios qui dolose etiam de principibus obloquuntur, non est scripta, nam Modestinus in d. l. famosi ff. ad l. Iul. maie. [sc. Mod. *D.* 28.4.7.3] non ausus est team proponere. Et Imperatores ipsi in dicta l. 1 C. si quis impera. maledix. [sc. *Cj.* 9.7] pariter noluerunt poenam praescribere, sed voluerunt arbitrio suo relinquere, ut scilicet pensata parsona, et facti qualitate et eius circumstantiis ipsi arbitrantur, qua poena dignus est reus.<sup>37</sup>

The polemic on the subject of the correct interpretation of the verb *remittere* used in *Cj.* 9.7 is noteworthy. According to some of the authors, among others A. Cravetta, this verb refers to the perpetrator of the verbal insult and indicates the need to deliver him to the ruler in order to be judged; in that case the ruler himself imposes the arbitral punishment:

Imperator etiam in d. l. 1 C. si quis Impera. maledix. [sc. *Cj.* 9.7] poenam maledictionis, quae per dolum non ex lubrico linguae fieret, noluit expresse taxare ... ideoque constituit dolosum et temerarium latratorem ad principem ipsum, quem laesisset, esse remittendum.<sup>38</sup>

However, many authors were arguing against this interpretation that the verb *remittere* should be referenced to the act of the offender, as indicated by the grammatical forms used in the sentence from the constitution *Cj.* 9.7:

quoniam, si id ... ab iniuria [processerit], remittendum [est].

<sup>37</sup> DECIANI, *Tractatus criminalis* (cit. n. 10), p. 188 v.

<sup>38</sup> CRAVETTA, *Consiliorum sive responsorum* (cit. n. 13), p. 37.

The verb form *remittendum est* expresses neuter form and refers to the pronoun *id*, meaning act. If it was to refer to the offender (*quis*), it would assume the masculine form (*remittendus est*). An extensive argument in support of this interpretation was presented – taking into account the grammatical forms also used in verbs preceding the form *remittendum* – by Bocér:

Verum hanc ... expositionem, Grammatica non patitur, quae desiderat, ut ubi dictio *remittendum*, eandem habeat subauditionem, quam praecedentes voces *contemnendum est*, et *dignissimum*, quae voces duae accipiendae sunt de ipso maledicto, non de maledicente, sive obtrectatore. Non enim salva grammatica recte dixeris, *contemnendum est obtrectator*, neque *miseratione dignissimum est obtrectator*.<sup>39</sup>

As the author further argued, the interpretation is consistent with the meaning of the last sentence of the constitution, where a similar verb also appears – *praetermittere*, when emperors promise to decide whether to forgive an insult or initiate proceedings:

Deinde subjiciunt Impp. In fine eiusdem legis unice haec verba: *unde integris omnibus hoc ad nostram scientiam referatur, ut ex personis hominum dicta pensemus, et utrum praetermitti, an exquiri debeant, censeamus*. Ex quibus verbis cognoscimus, iniuriosum alicuius in Imperatorem maledictum, si eiusmodi sit, ut poenam mereatur, ab ipsomet Imperatore coerceri.<sup>40</sup>

J. Menochius was also a supporter of the above mentioned interpretation, because in his opinion, it is compatible not only with the grammar analysis, but also with the Christian attitude of Emperor Theodosius, co-author of the analysed constitution. Since the penalty was not statutorily defined, the Emperor may be generous:

loquitur Theodosius ut verus Christianus, cuius non ulcisci, sed remittere iniurias proprium est. Et ex hoc loquendo modo et formula voluit ostendere Theodosius, iudices ordinarios non ita statim decurrere debere ad hos maledictos coercendos, sed Principi referre debent, qui pro facti qualitate poenam indicare poterit. Concludamus itaque hunc per temulantiam

<sup>39</sup> BOCER, *Tractatus compendiosus* (cit. n. 6), p. 125.

<sup>40</sup> BOCER, *Tractatus compendiosus* (cit. n. 6), p. 125–126.

maledicum Principis arbitrio esse puniendum. Is ergo ut iustius et aequitate insignis ex personae qualitate vel indicere, vel remittere poenam poterit.<sup>41</sup>

An attribute of a just and guided by the principle of fairness ruler – as it is clear from the last sentence of the above mentioned quote – is considering the individual characteristics of the accused when deciding on the sentence. These characteristics were considered in Roman law to be relevant in assessing perpetrators of other crimes as well, even crimes so close to a verbal insult of the ruler as the violation of majesty. The words of Modestinus preceding the guidelines relating to the punishability of insults underlined the need to take into account in individual cases of *crimen maiestatis* circumstances connected with the offender: whether his action was intentional, whether he was capable of committing a crime, if he had a criminal past and if he was of sound mind.<sup>42</sup> Recommendations for a thorough examination of the offender, also included in *Cj.* 9.7, were explained in detail by Bartolomeo Bertazzoli, adding that he is aware of numerous cases of the mild treatment of offenders, especially of those who showed remorse:

... propter verba iniuriosa et maledicta prolata de Principe, verissima est sententia, quod ipse ... posset puniri iuxta dispositionem l. uni. C. si quis Imperato. maled. [sc. *Cj.* 9.7] arbitrio eiusdem, habita ratione qualitatis personae, qui magis peccat in levitate vitae, et cerebri, quam quod multum sit prudens ... lubricum linguae non facile est ad poenam trahendam, et scio multos principes huiusmodi similia verba dissimulasse, et benigne remisisse paenitentibus.<sup>43</sup>

According to the authors of the legal works, the characteristics of the perpetrator should be taken into account particularly in the case of unintentional insult of the monarch. Since the penalty for this offence is not statutorily defined, the ruler should refrain from hasty judgement of harsh punishment against the perpetrator, who committed the offence rather

<sup>41</sup> MENOCHIOS, *De arbitrariis iudicium* (cit. n. 11), p. 356.

<sup>42</sup> *D.* 48.4.7.3 (Mod. 12 *pand.*): 'nam et personam spectandam esse, an potuerit facere, et an ante quid fecerit et an cogitaverit et an sanae mentis fuerit'.

<sup>43</sup> B. BERTAZZOLI, *Consiliorum seu Responsorum Iuris in criminalibus et poenalibus controversiis emissorum ... liber primus*, Venetiis 1583, p. 45 v. See also: MENOCHIOS, *De arbitrariis iudicium* (cit. n. 11), p. 357.



due to recklessness or madness. Cravetta, the author of a legal opinion in the case of Roberto Peretti, a resident of the city of Uppia, accused in 1539 – among other actions – of verbally insulting the ruler, was willing to acknowledge his alleged offence as completely improbable, because it suggested a total lack of common sense, while it would be difficult for the accused, a man endowed with many talents and enriched by his own efforts, to be suspected of – as the author put it bluntly – such extreme stupidity:

Nam quomodo est verisimile quod vir facultatibus plenus, ut qui operis sui laboribus et industria late divitias comparavit, stultus adeo fuerit ut in principem suum deblaterare, et procaciter loqui ausus sit, adeo in publico et coram tot testibus .... Profecto qui putant verosimile esse, quod reus accusatus ausus fuerit debacchari ad eum modum contra principem suum adeo excelsum, illud praesumunt quod prodigus esset personae et aeris, id est, quod vitam et bona discrimini vellet subijcere. Quo quid absurdus?.<sup>44</sup>

The purpose of this argument was to show that the accused surely did not commit the alleged offence, because as a sensible man, he would not put in danger his possessions or even his life, which he could lose as a result of losing the trial, after insulting the ruler publicly and in the presence of many witnesses. The aim of the lawyer's argument could have also been to minimize the possible punishment, because if the alleged act of the accused was in fact proven, then the perpetrator would have to be regarded as an insane person and therefore deserve lenient treatment. Cravetta also referred to the recommendation of Modestinus cited above, taken from the *Digest*, to look at the circumstances of the past of the accused, and concluded that nothing had happened in the life of Roberto Peretti that would justify his hatred of the ruler, which is why the use of offensive words would be completely unfounded:

Sed princeps accusato invisus non errat, nec probatur quod ante illa verba fuerit in aliquo molestatus reus per principem, nec quod sustinuerit a principe damnum aliquod, itaque nulla causa movere eum potuit ad prolationem eiusmodi verborum tam turpium.<sup>45</sup>

<sup>44</sup> CRAVETTA, *Consiliorum sive responsorum* (cit. n. 13), p. 27.

From the final part of the opinion, we learn that the author's opinion, who was a well-known lawyer, was taken into account: Roberto Peretti escaped prison and was only sentenced to a fine.<sup>46</sup> Legal rulings cited in the works, however, indicate that those guilty of insult were sometimes subjected to severe sanctions, and for words spoken not against the ruler, but against officials. Godofredus à Bavo, citing two rulings of Senate of the duchy of Savoy against perpetrators of such insults, argued that the insult of an official is indirectly an insult of the ruler, who the official represents.<sup>47</sup> In support of his position, he used the examples of the lack of tolerance of Romans for people insulting officials, derived from the works of Plutarch (*Fab. Max.* 128) and Valerius Maximus (II 9.5).

Even a cursory analysis of the Western European legal literature reveals a tremendous influence of Roman law on the views regarding verbal injury against the ruler. What is more, it is clear that the authors treated the Roman law regulations on this offence as still valid (even in countries where there was no reception of Roman law), or, in any event, as a source of inspiration for legal solutions tailored to their contemporary reality. Based on the titles from the *Digest* and the *Code of Justinian* (*Si quis Imperatori maledixerit*), the doctrine furnished both the very concept of the verbal offence of the ruler.

*Marzena Dyjakowska*

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Chair of History of Judicial Proceedings  
Faculty of Law, Canon Law and Administration  
John Paul II Catholic University of Lublin  
Al. Raławickie 14  
20-950 Lublin  
POLAND  
e-mail: [marzena.dyjakowska@kul.lublin.pl](mailto:marzena.dyjakowska@kul.lublin.pl)

<sup>45</sup> CRAVETTA, *Consiliorum sive responsorum* (cit. n. 13), p. 27.

<sup>46</sup> CRAVETTA, *Consiliorum sive responsorum* (cit. n. 13), p. 48.

<sup>47</sup> One of the accused, named Bruxelles, was sentenced to a fine of 1,000 livres and an unspecified arbitral punishment, and the second, Nicolao Mandrino, was sentenced to five years of galleys and to revoke the defamation in the form of penance (GODOFREDUS À BAVO, *Theorica criminalis ad Praxim forenses accommodata*, Ultrajecti 1646, pp. 294–296). The author suggested that office-holders assigned based on qualifications and merit, such as in the Duchy of Savoy (where he held the honourable office of the chairman of the Senate) deserved greater respect than sold offices, as in France.