

ANDRZEJ CHMIEL*

SUMMUM SUPPLICIUM IN THE LEGISLATION OF CHRISTIAN ROMAN EMPERORS

The issue of punishment, in particular the death penalty, in Roman Criminal Law has been repeatedly the subject of the scholarly literature on Roman Law.¹ This publication aims to answer the question: what was the role of the criminal penalty, especially in its strictest form (*summum*

* Ph.D., Assistant Professor, Maria Curie-Skłodowska University in Lublin; e-mail: andrzej.chmiel@poczta.umcs.lublin.pl, ORCID ID: <https://orcid.org/0000-0002-8577-1183>.

¹ Cf. K. Latte, s.v. *Todestraf*, in: *Paulys Realencyclopädie der classischen Alterumswissenschaft*, neue Bearbeitung von G. Wissowa, Supplementband vol. 7. *Adobogiona – Triakadieis*, Stuttgart 1940, pp. 1599–1619; D. Grodzynski, *Tortures mortelles et catégories sociales. Les Summa Supplicia dans le droit romain aux IIIe et IVe siècles*, in: *Du châtement dans la cite. Supplices corporels et peine de mort dans le monde antique*, Collection de l'École Française de Rome 79, Rome 1984, pp. 361–403; R. MacMullen, *Judicial Savagery in the Roman Empire*, "Chiron" 16 (1986), pp. 147–166; E. Cantarella, *I supplizi capitali in Grecia e a Roma*, Milano 1991; eadem, *Les peines de mort en Grece et à Rome. Origines et fonctions des supplices capitaux dans l'Antiquite classique*, transl. N. Gallet, Paris 2000; G. Valditara, *Riflessioni sulla pena nella Roma repubblicana*, Torino 2015. On the subject of the death penalty in Polish legal romance cf. A. Dębiński, *Kara śmierci w świetle literatury wczesnochrześcijańskiej*, in: *Religia i prawo karne w starożytnym Rzymie*, ed. A. Dębiński, M. Kuryłowicz, Lublin 1998, pp. 43–56; M. Dyjakowska, *Uwagi Marka Tulliusza Cycerona o karze śmierci*, in: *Kara śmierci w starożytnym Rzymie*, ed. H. Kowalski, M. Kuryłowicz, Lublin 1996, pp. 59–66; E. Gajda, "Summum supplicium" za przestępstwo manicheizmu – dlaczego?, in: *Kara śmierci w starożytnym Rzymie*, ed. H. Kowalski, M. Kuryłowicz, Lublin 1996, pp. 95–100; H. Kowalski, *Prawne i filozoficzne aspekty kary śmierci w procesie Katylinarczyków*, in: *Kara śmierci w starożytnym Rzymie*, ed. H. Kowalski, M. Kuryłowicz, Lublin 1996, pp. 41–57; M. Kuryłowicz, *Lucjusz Anneusz Seneka o karze śmierci*, in: *Kara śmierci w starożytnym Rzymie*, ed. H. Kowalski, M. Kuryłowicz, Lublin 1996, pp. 67–80; E. Żak, *Prawnicy rzymscy o sposobach wykonania kary śmierci w starożytnym Rzymie*, in: *Kara śmierci w starożytnym Rzymie*, ed. H. Kowalski, M. Kuryłowicz, Lublin 1996, pp. 109–120. See also: K. Amielańczyk, *Poena Legis Corneliae*, in: *Kara śmierci w starożytnym Rzymie*, ed. H. Kowalski, M. Kuryłowicz, Lublin 1996, pp. 143–153.

*supplicium*²) in the Roman legislation of Christian emperors?³ Has there been any change in the perception of its role in comparison to the period of classical law? Finally, based on the example of *summum supplicium*, can we reach a conclusion that Christianity somehow influenced the Roman criminal law?⁴ In order to answer these questions, it is necessary to find out what kind of public crime was punished most severely and in what manner, especially during the period of classical law. Even in the Hadrian's era the death penalty was prescribed for the crime of castrating a person, both free and non-free one, and this concerned also those who performed the very procedure of castration.⁵ All categories of persons mentioned were subject to the strictest penalty.⁶ Also, cattle thieves (*abigei*) could have been punished with death penalty, especially if they had been the lower-class people.⁷ On the other hand, those who committed armed robbery

² The term *summum supplicium* was understood as the following "types" or ways of executing the death penalty: burning, crucifixion, hanging on the forks, *damnatio ad bestias* and *culleus* (penalty of sack), cf. D. Grodzynski, *Tortures mortelles...*, p. 364.

³ For the issue of capital punishment in the Roman post-classical religious legislation, cf. A. Dębiński, *Kara śmierci za przestępstwa religijne w okresie dominatu*, in: *Kara śmierci w starożytnym Rzymie*, ed. H. Kowalski, M. Kuryłowicz, Lublin 1996, pp. 81–94. Generally, on the system of penalties in the post-classical Roman law, for the recent studies cf. J. Hillner, *Prison, Punishment and Penance in Late Antiquity*, Cambridge 2015.

⁴ Here, it is worth referring the study by B. Biondi, *Il diritto romano cristiano*, vol. 3. *La famiglia, rapport patrimoniali, diritto pubblico*, Milano 1954, on the influence of Christianity on the Roman criminal legislation, even if not quite up-to-date; cf. comments by D. Grodzynski, *Tortures mortelles...*, p. 364, footnote 6.

⁵ D. 48,8,4,2 (*Ulpianus libro septimo de officio proconsulis*): *Idem divus Hadrianus rescripsit: "Constitutum quidem est, ne spadones fierent, eos autem, qui hoc crimine arguerentur, Corneliae legis poena teneri eorumque bona merito fisco meo vindicari debere, sed et in servos, qui spadones fecerint, ultimo supplicio animadvertendum esse: et qui hoc crimine tenentur, si non adfuerint, de absentibus quoque, tamquam lege Cornelia teneantur, pronuntiandum esse. Plane si ipsi, qui hanc iniuriam passi sunt, proclamaverint, audire eos praeses provinciae debet, qui virilitatem amiserunt: nemo enim liberum servumve invitum sinentemve castrare debet, neve quis se sponte castrandum praebere debet. At si quis adversus edictum meum fecerit, medico quidem, qui exciderit, capitale erit, item ipsi qui se sponte excidendum praebuit."* More on the above-quoted Hadrian's rescript in: K. Amielańczyk, *Rzymskie prawo karne w reskryptach cesarza Hadriana*, Lublin 2006, p. 144.

⁶ Cf. K. Amielańczyk, *Rzymskie prawo karne...*, p. 145. For more on the prohibition on castration see: idem, *Praktyka kastrowania niewolników i jej zakazy w prawie rzymskim*, in: *"Crimina et mores"*. *Prawo karne i obyczaje w starożytnym Rzymie*, ed. M. Kuryłowicz, Lublin 2001, pp. 11–19.

⁷ D. 47,14,1,2–3 (*Ulpianus libro octavo de officio proconsulis*): *Sed et qui porcam vel capram vel verovicem abduxit, non tam graviter quam qui maiora animalia abigunt, plecti debent.* 3.

of others' property were subject to the penalty of damnation to beasts, according to the regulations provided by the ruler mentioned above.⁸

Poena cullei for *parricidium* was still in use during the classical period.⁹ Various forms of attack on the ruler were deemed *crimen laesae maiestatis* and evidently punished with death.¹⁰ The highest form of punishment during the period of classical law was also imposed on the Jews and Christians who often gave their lives for their faith.¹¹ Additionally, slaves who enlisted in the legions¹² or pretended to be free people,¹³ or who turned out to be wartime traitors¹⁴, or when they displaced border stones were

*Quamquam autem Hadrianus metalli poenam, item operis vel etiam gladii praestituerit, attamen qui honestiore loco nati sunt, non debent ad hanc poenam pertinere, sed aut relegandi erunt aut movendi ordine. Sane qui cum gladio abigunt, non inique bestiis obiciuntur. (= Coll. 11, 8, 2–4). Cf. K. Amiolańczyk, *Rzymskie prawo karne...*, p. 119. For more on *crimen abigeatus* see: B. Sitek, "Abigeatus crimen". *Ze studiów nad "crimina extraordinaria"*, *Studia Prawnoustrojowe* 2005, vol. 4, pp. 5–28.*

⁸ Coll. D. 11,7,1,2–3 (*Ulpianus libro octavo de officio proconsulis*): *De abigeis puniendis ita divus Hadrianus rescripsit concilio Baeticae: "Abigei cum durissime puniuntur, ad gladium damnari solent. Puniuntur autem durissime non ubique, sed ubi frequentius est hoc genus maleficii: alioquin et in opus et nonnumquam temporarium damnantur."*

⁹ D. 48,9,9 pr (*Modestinus libro 12 pandectarum*): *Poena parricidii more maiorum haec instituta est, ut parricida virgis sanguineis verberatus deinde Culleo insuatur cum cane, Gallo Gallinaceo et Vipera et Simia: deinde in mare profundum Culleus iactatur. Hoc ita, si mare proximum sit: alioquin bestiis obicitur secundum divi Hadriani constitutionem.* For more on *poena cullei* see: K. Amiolańczyk, "Parricidium" i "poena cullei", in: *Religia i prawo karne w starożytnym Rzymie*, ed. A. Dębiński, M. Kuryłowicz, Lublin 1998, pp. 139–150; M. Jońca, "Poena cullei". *Kara czy rytuał?*, *Zeszyty Prawnicze UKSW* 2005, vol. 5, no. 1, pp. 83–100; idem, "Parricidium" w prawie rzymskim, Lublin 2008, pp. 235 ff.

¹⁰ Cf. R. MacMullen, *Judicial Savagery...*, p. 148.

¹¹ On the persecution of Christians see: E. Wipszycka, *Kościół w świecie późnego antyku*, 2nd ed., Warszawa 2017, pp. 93 ff.; cf. also: J. Engberg, *Impulsore Chresto. Opposition to Christianity in the Roman Empire c. 50–250 A.D.*, Frankfurt am Main 2007; especially see: D. Liebs, *Das Recht der Römer und die Christen: Gesammelte Aufsätze in überarbeiteter Fassung*, Tübingen 2015, pp. 108 ff.

¹² Plin, ep. 10,30: *Secundum mandata mea fecit Sempronius Caelianus mittendo ad te eos, de quibus cognosci oportebit, an capitale supplicium meruisse videantur. Refert autem, voluntarii se obtulerint an lecti sint vel etiam vicarii dati. 2 Lecti <si> sunt, inquisitio peccavit; si vicarii dati, penes eos culpa est qui dederunt; si ipsi, cum haberent condicionis suae conscientiam, venerunt, animadvertendum in illos erit. Neque enim multum interest, quod nondum per numeros distributi sunt. Ille enim dies, quo primum probati sunt, veritatem ab iis originis suae exegit.*

¹³ Suet. *Claud.* 25,3.

¹⁴ Tacit. *Hist.* 4,3.

subject to the death penalty as well. They were punished with the death penalty if their owner had failed to pay the fine for them.¹⁵ Fugitive prisoners were also subject to the death penalty.¹⁶ According to the Apuleius' account contained in his *Metamorphoses*, the crime of poisoning was punished with sentencing to the fight against wild animals.¹⁷

The judicial practice covers numerous cases of cruel executions, performed even on Roman citizens. According to historical sources, such cases took place particularly in the provinces under the jurisdiction of some governors.¹⁸ The central government was equally severe in this respect, and some emperors were able to demonstrate incredible ingenuity in the manner of how the most cruel punishments were executed. Tiberius and Caligula are worth mentioning here.¹⁹ Sometimes the execution was shown to a wider audience, the best example being the Christians who, after the fire of Rome, were crucified and set on fire as torches.²⁰

The post-classical period brought a gradual exacerbation of the penalties.²¹ In the *Sentences* of Paulus, the death penalty was extended to new offences that had not been punished that way before, such as the abduction of a person by *humiliores*, which was then punishable with crucifixion

¹⁵ D. 47,21,3,1 (*Callistratus libro quinto de cognitionibus*): *Alia quoque lege agraria, quam divus Nero tulit, cavetur, ut, si serous servave insciente domino dolo malo fecerit, ei capital esse, nisi dominus dominave multam sufferre maluerit*. For more see: R. Świrgoń-Skok, "Crimen termini moti". *Ochrona znaków granicznych w państwie rzymskim*, in: "Salus rei publicae suprema lex". *Ochrona interesów państwa w prawie karnym starożytnej Grecji i Rzymu*, ed. A. Dębiński, H. Kowalski, M. Kuryłowicz, Lublin 2007, pp. 325–337; eadem, *Prawno-karna ochrona granic gruntów w państwie rzymskim*, in: *Ochrona bezpieczeństwa i porządku publicznego w prawie rzymskim*, ed. K. Amielańczyk, A. Dębiński, D. Słapek, Lublin 2010, pp. 275–286, especially p. 283.

¹⁶ See D. 47,18,1; cf. K. Amielańczyk, *Środki przeciwdziałania unikaniu odpowiedzialności karnej w prawie rzymskim okresu pryncypatu*, *Czasopismo Prawno-Historyczne* 2007, vol. 59, no. 2, pp. 45–68.

¹⁷ *Apul. Metam.* 10,28; cf. R. MacMullen, *Judicial Savagery...*, p. 149.

¹⁸ See Eusebius, *Hist. Eccles.* 1.44,47,50; cf. R. MacMullen, *Judicial Savagery...*, p. 149.

¹⁹ Cf. A. Pawłowska, *Sposoby wykonania kary śmierci w relacjach Tacyta i Swetoniusza*, *Studia Prawnoustrojowe* 2007, vol. 7, pp. 77 ff.; eadem, *Sposoby wykonania kary śmierci w państwie rzymskim: polityka a fantazja cesarska*, in: *Prawo karne i polityka w państwie rzymskim*, ed. K. Amielańczyk, A. Dębiński, D. Słapek, Lublin 2015, pp. 119–133.

²⁰ Cf. M.J.G. Gray-Fow, *Why the Christians? Nero and the Great Fire*, *Latomus* 1998, vol. 57, no. 3, pp. 595–616.

²¹ See R. MacMullen, *Judicial Savagery...*, pp. 154–155; cf. A. Dębiński, *Kara śmierci za przestępstwa...*, p. 81.

(previously with a fine).²² Interestingly, the post-classical period brought a gradual blurring of the differences in respect to the severity of the criminal repressive measures between *humiliores* and *honestiores*.²³ While the period of classical law was characterized by conditioning the severity of the punishment on the social status of the accused, which was reflected in the distinction as to the terms of criminal responsibility between the two mentioned social categories – *honestiores* and *humiliores*,²⁴ it may be interesting to note that in the post-classical period the social position of the accused as a criterion for imposing the most severe penalties ceased to be as important as in the classic period.²⁵ Undoubtedly, an interesting material for the analysis of the phenomenon of the increasing severity of the criminal repression in the post-classical period is provided by the legislation of Emperor Constantine the Great.²⁶ This legislation was also characterized by the creative ingenuity in contriving the new, sophisticated ways of killing the subjects. One of those new and unconventional methods of execution was the pouring of hot lead down the convict's throat. This punishment was imposed especially on those who participated in *raptus puellae* i.e. kidnapping a girl.²⁷ This sanction concerned in particular the custodians of the kidnapped women who, by giving the false testimony, were

²² PS. V,30,B1: *Lege Fabia tenetur, qui civem Romanum ingenuum, libertinum seroumve alienum celaverit vendiderit vinxerit comparaverit. Et olim quidem huius legis poena nummaria fuit, sed translata est cognitio in praefectum urbis, itemque praesidis provinciae extra ordinem meruit animadversionem. Ideoque humiliores aut in metallum dantur aut in crucem tolluntur, honestiores adempta dimidia parte bonorum in perpetuum relegantur.* Cf. R. MacMullen, *Judicial Savagery...*, p. 155

²³ R. MacMullen, *Judicial Savagery...*, p. 155.

²⁴ See G. Cardascia, *L'apparition dans le droit des classes d'"Honestiores" et d'"Humiliores"*, *Revue Historique de Droit Français et Étranger* 1950, vol. 27, pp. 319 ff.; M. Jońca, *The Criminal Liability of the Honestiores in the 2nd and 3rd Centuries AD. According to Selected Legal Acts*, *Review of Comparative Law* 2004, vol. 9, p. 27. For more see: R. Rilinger, *Honestiores – Humiliores: zu einer sozialen Dichotomie im Strafrecht der römischen Kaiserzeit*, München 1988.

²⁵ R. MacMullen, *Judicial Savagery...*, p. 157; cf. D. Grodzynski, *Tortures mortelles...*, p. 382.

²⁶ For more on the legislation of Constantine the Great, particularly in criminal matters, see: C. Dupont, *Le droit criminel dans les Constitutions de Constantin. Les infractions*, Lille 1953; idem, *Le droit criminel dans les Constitutions de Constantin. Les peines*, Lille 1955. For recent studies on the legislation of this emperor see: J.N. Dillon, *The Justice of Constantine: Law, Communication, and Control*, *Ann Arbor* 2012, pp. 35 ff.

²⁷ C. Th. 9,24,1,1 (*Imp. Constantinus a. ad populum*): *Et quoniam parentum saepe custodiae nutricum fabulis et pravis suasionibus deluduntur, his primum, quarum detestabile ministerium*

supposed to allegedly thwart the pursuit.²⁸ The literature is divided as regards the opinion on the function of the punishment performed in such a way.²⁹ Another novel Constantine's solution was also the punishment of mutilation which was applied in different ways to certain perpetrators. The punishment of hand mutilation was prescribed for bribery committed by the officials demanding bribes in exchange for the opportunity of access to a judge.³⁰ Delators were to be punished by ripping out the tongue.³¹ Slaves who tried to escape out of the Empire could have been, instead of being sent to a mine, punished with cutting off a foot.³² Mutilation was a characteristic feature for this period since it had not existed as a separate

fuisse arguitur redemptique discursus, poena immineat, ut eis meatus oris et faucium, qui nefaria hortamenta protulerit, liquentis plumbi ingestione claudatur.*

²⁸ For more on this constitution see: D. Grodzynski, *Ravies et coupables. Un essai d'interprétation de la loi IX, 24, 1 du Code Théodosien*, Mélanges de l'École Française de Rome. Antiquité 1984, vol. 96, no. 2, pp. 719 ff.; L. Desanti, *Costantino, il ratto e il matrimonio riparatore*, *Studia et Documenta Historiae et Iuris* 1986, vol. 52, pp. 204–209; J. Wiewiorowski, *Porywanie kobiet jako zjawisko społeczne w późnym antyku. Moralność i prawo*, in: "Homo, qui sentit". Ból i przyjemność w średniowiecznej kulturze Wschodu i Zachodu, ed. J. Banaszkiwicz, K. Ilski, Poznań 2013, pp. 203 ff.

²⁹ Cf. Ch. Reitzenstein-Ronning, *Performing Justice. The Penal Code of Constantine the Great*, in: *Contested Monarchy. Integrating the Roman Empire in the Fourth Century AD*, ed. J. Wienand, New York 2015, p. 279.

³⁰ C. Th. 1,16,7 (*Imp. Constantinus a. ad provinciales*): *Cessent iam nunc rapaces officialium manus, cessent inquam: nam si moniti non cessaverint, gladiis praecedentur. non sit venale iudicis velum, non ingressus redempti*, non infame licitationibus secretarium, non visio ipsa praesidis cum pretio: aequae aures iudicantis pauperrimis ac divitibus reserentur. absit ab inducendo eius, qui officii princeps dicitur, depraedatio. nullas litigatoribus adiutores eorundem officii principum concussionibus adhibeant; centurionum aliorumque officialium, parva magnaue poscentium, intolerandi impetus oblidantur, eorumque, qui iurgantibus acta restituunt, inexplata aviditas temperetur. semper invigilet industria praesidialis, ne quicquam a praedictis generibus hominum de litigatore sumatur. qui si de civilibus causis quicquam putaverint esse poscendum, aderit armata censura, quae nefariorum capita cervicesque detruncet, data copia universis, qui concussi fuerint, ut praesidium instruant notionem. qui si dissimulaverint, super eodem conquerendi vocem omnibus aperimus apud comites cunctos provinciarum aut apud praefectum praetorio, si magis fuerit in vicino, ut his referentibus edocti, super talibus latrociniiis supplicia proferamus.*

³¹ C. Th. 10,10,2 (*Imp. Constantinus a. ad populum*): *Comprimatur unum maximum humanae vitae malum, delatorum execranda pernicies, et inter primos conatus in ipsis faucibus stranguletur, et amputata radicitus invidiae lingua vellatur, ita ut iudices nec calumniam nec vocem prorsus deferentis admittant; sed si qui delator exstiterit, capitali sententiae subiugetur.*

³² C. 6,1,3: *Si fugitivi servi deprehendantur ad barbaricum transeuntes, aut pede amputato debilitentur aut metallo dentur aut qualibet alia poena adficiantur.*

punishment before the fourth century.³³ The novelty in the post-classical period was, unheard of on such a large scale before, to make the method of capital punishment execution public. At that time, it became a definite habit to execute the convict in front of the people gathered at public places.³⁴

In addition, the *summa supplicia* mentioned in the title hereof, i.e. the “types” of capital punishment³⁵ or the methods of execution known to the post-classical legislation included: burning, crucifixion, hanging on the forks, *damnatio ad bestias* and *culleus* (penalty of sack).³⁶ In the legislation of Constantine, the punishment of the crucifixion ceased to be included among the aforementioned penalties. Interestingly, the words *crux*, *crucis* (cross) does not appear in the *Justinian’s Digest*.³⁷ According to some researchers, the term *furca* was interpolated, because Tribonian and his associates turned the word *crux* into *furca* (fork, gallows).³⁸ However, it is typical for the post-classical period that the *Sentences* of Paulus uses repeatedly the term *crux*.

Consequently, a significant change, which can be observed especially in the Constantine’s legislation, was not only disappearance of the penalty of crucifixion but also elimination of the penalties of hanging on the forks and *damnatio ad bestias*.³⁹ Naturally, one can find some exceptions, e.g. *patibulum* (that is, hanging on the gallows) reserved for slaves who informed against their owners,⁴⁰ or *ad bestias* provided for plagiarists.⁴¹

³³ R. MacMullen, *Judicial Savagery...*, p. 158.

³⁴ For more on this trial tactics in the post-classical period see: J. Arce, *Sub eculeo incurvus: tortura e pena di morte nella societa tardo romana*, in: *Atti dell’ Accademia Romanistica Costantiniana, XI Convegno Internazionale in onore di Felix B.J. Wubbe*, Napoli 1996, pp. 361 ff.

³⁵ According to U. Brasiello, these *summa supplicia* were rather types of death penalty than methods of their execution, cf. idem, *La repressione penale nel diritto Romano*, Napoli 1937, p. 257.

³⁶ D. Grodzynski, *Tortures mortelles...*, p. 364.

³⁷ Ibidem, p. 365.

³⁸ For more detail see: P. Franchi de’ Cavalieri, *Della furca et della sua sostituzione alla croce nell diritto penale Romano*, *Nuovo Bullettino di Archeologia Cristiana* 1907, vol. 13, pp. 63–114.

³⁹ Cf. D. Grodzynski, *Tortures mortelles...*, p. 369.

⁴⁰ C. Th. 9,5,1,1 (*Imp. Constantinus a. ad Maximum praefectum Urbi*): *In servis quoque vel libertis, qui dominos aut patronos accusare aut deferre temptaverint, professio tam atrocis audaciae statim in admissi ipsius exordio per sententiam iudicis comprimatur ac denegata audientia patibulo adfigatur.*

⁴¹ C. Th. 9,18,1 (*Imp. Constantinus a. ad Domitium Celsum vicarium Africae*): *Plagiarii, qui viventium filiorum miserandas infligunt parentibus orbitates, metalli poena cum ceteris ante cognitis suppliciis tenebantur. Si quis tamen eiusmodi reus fuerit oblatus, posteaquam super crimine*

However, the most common type of *summum supplicium* in the legislation of Constantine became the penalty of burning.⁴² An important novelty in the legislation of Constantine that took place in A.D. 325 also proved to be the abolition of the penalty of gladiator fights.⁴³ The emperors Valens and Valentinian went even further and banned, in the Constitution of 365, punishing Christians who committed crimes of any kind with the arena fights.⁴⁴ While the abolition of the penalty of arena fights can be justified by the Christian ideology,⁴⁵ it is quite difficult to explain the fact of overlooking the penalty of burning. To explain this situation, Paul Veyne compared the pagan society of the Constantine era to a herd where the emperor becomes a shepherd who leaves his flock to its own instincts, and the fire, according to this scholar, constitutes an element that is supposed to help the ruler to keep this herd together.⁴⁶

As it was previously mentioned, the increasing severity of repression during the post-classical period was a distinctive feature of the Roman criminal legislation. Interestingly, some deeds were not punishable with *summum supplicium* in the *Theodosian Code*. These included: *sacrilegium* (which obviously was a widely interpreted offence with a quite wide-range catalogue of penalties) and treason against the state⁴⁷ (that was pun-

patuerit, serous quidem vel libertate donatus bestiis primo quoque munere obiiciatur, liber autem sub hac forma in ludum detur gladiatorium, ut, antequam aliquid faciat, quo se defendere possit, gladio consumatur. Eos autem, qui pro hoc crimine iam in metallum dati sunt, numquam revocari praecipimus.*

⁴² D. Grodzynski, *Totures mortelles...*, p. 369.

⁴³ C. Th. 15,12,1 (*Imp. Constantinus a. Maximo praefecto praetorio*): *Cruenta spectacula in otio civili et domestica quiete non placent. Quapropter, qui omnino gladiatores esse prohibemus eos, qui forte delictorum causa hanc condicionem adque sententiam mereri consueverant, metallo magis facies inservire, ut sine sanguine suorum scelerum poenas agnoscant.*

⁴⁴ C. Th. 9,40,8 (*Idem aa. ad Symmachum praefectum Urbi*): *Quicumque christianus sit in quolibet crimine deprehensus, ludo non adiudicetur. Quod si quisquam iudicum fecerit, et ipse graviter notabitur et officium eius multae maximae subiacebit.*

⁴⁵ As proposed by D. Grodzynski, *Totures mortelles...*, p. 370.

⁴⁶ P. Veyne, in: G. Ville, *La gladiature en Occident des origines à la mort de Domitien*, préface P. Veyne, Rome 1981, pp. 469 ff.

⁴⁷ C. Th. 9,14,3 pr. (*Imp. Arcadius et Honorius aa. Eutychiano praefecto praetorio*): *Quisquis cum militibus vel privatis, barbaris etiam scelestam inierit factionem aut factionis ipsius susceperit sacramenta vel dederit, de nece etiam virorum illustrium, qui consiliis et consistorio nostro intersunt, senatorum etiam, nam et ipsi pars corporis nostri sunt, cuiuslibet postremo qui nobis militat cogitarit, eadem enim severitate voluntatem sceleris qua effectum puniri iura voluerunt: ipse quidem utpote maiestatis reus gladio feriatu bonis eius omnibus fisco nostro addictis, filii vero eius,*

ished by decapitation with a sword).⁴⁸ Similarly, magic and divination⁴⁹ – apart from the exception of *haruspex* (*haruspices*) i.e. priest(s) practising haruspicy (inspection of sacrificed animals' entrails) – were punished by beheading with a sword, as well as the profanation of a grave which was punishable by various penalties.⁵⁰

Many new criminal offences appeared in the *Theodosian Code* that had not been punishable by *summum supplicium* before. To begin with: adultery (*adulterium*) – punishable by burning or the penalty of sack.⁵¹ Further, the cases of pederasty (i.e. male prostitution).⁵² Finally, *haruspicia*, or divination from the entrails of sacrificed animals was also punished with burning.⁵³ In addition, the same method of executing the offender was

quibus vitam imperatoria specialiter lenitate concedimus, paterno enim deberent perire supplicio, in quibus paterni, hoc est hereditarii criminis exempla metuantur, a materna vel avita, omnium etiam proximorum hereditate ac successione habeantur alieni, testamentis extraneorum nihil capiant, sint perpetuo egentes et pauperes, infamia eos paterna semper comitetur, ad nullos umquam honores, nulla prorsus sacramenta perveniant, sint postremo tales, ut is perpetua egestate sordentibus sit et mors solacio et vita supplicio.

⁴⁸ Cf. D. Grodzynski, *Totures mortelles...*, p. 374.

⁴⁹ C. Th. 9,16,4 (*Imp. Constantius a. et Iulianus c. ad populum*): *Nemo haruspicem consulat aut mathematicum, nemo hariolum. Augurum et vatum prava confessio conticescat. Chaldaei ac magi et ceteri, quos maleficos ob facinorum magnitudinem vulgus appellat, nec ad hanc partem aliquid moliantur. Sileat omnibus perpetuo divinandi curiositas. etenim supplicium capitis feret gladio ultore prostratus, quicumque* iussis obsequium denegaverit.*

⁵⁰ C. Th. 9,17,1.

⁵¹ C. Th. 11,36,4 (*Impp. Constantius et Constans aa. ad Catullinum*): *Oportuerat te publici instituti respectu confessione detectos legum severitate punire nec frustra vitam differentum moratorias provocationes admittere, sed delatum adulterii crimen et quaestionibus ahibitis adprobatum pari scelere immanitate damnare. Quod deinceps in huiusmodi criminibus convenit observari, ut manifestis probationibus adulterio probato frustratoria provocatio minime admittatur, cum pari similique ratione sacrilegos nuptiarum tamquam manifestos parricidas insuere culleo vivos vel urere iudicantem oporteat.*

⁵² C. Th. 9,7,6 = Coll. V,3 (*Idem aaa. Orientio vicario urbis Romae*): *Omnes, quibus flagitii usus est, virile corpus muliebriter constitutum alieni sexus damnare patientia (nihil enim discretum videntur habere cum feminis), huius modi scelus spectante populo flammis vindicibus expiabunt.*

⁵³ C. Th. 9,16,1 (*Imp. Constantinus a. ad Maximum*): *Nullus haruspex limen alterius accedat nec ob alteram causam, sed huiusmodi hominum quamvis vetus amicitia repellatur, concremando illo haruspice, qui ad domum alienam accesserit et illo, qui eum suasionibus vel praemiis evocaverit, post ademptionem bonorum in insulam detrudendo: superstitioni enim suae servire cupientes poterunt publice ritum proprium exercere. Accusatorem autem huius criminis non delatorem esse, sed dignum magis praemio arbitramur.*

prescribed for: a soldier who had cut off his fingers,⁵⁴ an Egyptian abusing the Nile,⁵⁵ a kidnapper of a young girl (the offender being a slave),⁵⁶ a male slave who seduced his female master,⁵⁷ *occultator* (a person hiding someone) being a slave and hiding a deserter,⁵⁸ a thief⁵⁹ or a decurion.⁶⁰ Finally, the penalty of burning was imposed on a *tabularius* (a financial officer) who had forged the documents, thus certifying the untruth.⁶¹ The penalty of burning was also imposed on a manager of private property, called *actor res privata* who had abused his power.⁶² The same kind of punishment was also prescribed for the Jew who had stoned his religious adherent converted to Christianity.⁶³ The followers of Manichaeism faced the same

⁵⁴ C. Th. 7,13,5 (*Idem aa. ad Viventium praefectum praetorio Galliarum*): *Si quis ad fugienda sacramenta militiae fuerit inventus truncatione digitorum damnum corporis expedisse, et ipse flammis ultricibus concremetur et dominus eius, qui non prohibet, gravi condemnatione feriat.*

⁵⁵ C. Th. 9, 32,1 (*Imp. Honorius et Theodosius aa. Anthemio praefecto praetorio*): *Si quis posthac per Aegyptum intra duodecimum cubitum fluminis nili ulla fluenta de propriis ac vetustis usibus praeter fas praeterque morem antiquitatis usurpaverit, flammis eo loco consumatur, in quo vetustatis reverentiam et propemodum ipsius imperii adpetierit securitatem: conscii et consortibus eius oasena deportationi constringendis, ita ut numquam supplicandi eis vel recipiendi civitatem vel dignitatem vel substantiam licentia tribuatur.*

⁵⁶ C. Th. 9,24,1.

⁵⁷ C. Th. 9,9,1.

⁵⁸ C. Th. 7,18,4.

⁵⁹ C. Th. 9,29,2 (*Imp. Gratianus, Valentinianus et Theodosius aaa. ad Flavianum pf. p.*): *Post alia: latrones quisquis sciens susceperit vel offerre iudiciis supersederit, supplicio corporali aut dispendio facultatum pro qualitate personae et iudicis aestimatione plectatur. Si vero actor sive procurator latronem domino ignorante occultaverit et iudici offerre neglexerit, flammis ultricibus concremetur.*

⁶⁰ C. Th. 12,1,179.

⁶¹ C. Th. 13,10,8,1 (*Imp. Gratianus, Valentinianus et Theodosius aaa. ad populum*): *His nostrae serenitatis edictis civitatum tabulariis erit flamma supplicium, si cuiusquam fraude ambitu potestate iniusta cuiuspiam profiteretur immunitas, ac non secundum praecedentem definitionem omnes omnino, abolita specialium immunitatum gratia, necessitas tributariae functionis firmata censorum peraequorum provincialium iudicum peraequatione constrinxerit.*

⁶² C. Th. 10,4,1 (*Imp. Constantinus a. ad Philippum vicarium urbis*): *Si quis ab actore rerum privatarum nostrarum sive a procuratore fuerit vexatus, super eius calumniis vel depraedationibus deferre querimoniam non dubitet. Quae res quum fuerit comprobata, sancimus, ut idem, qui contra provincialem quicquam moliri fuerit ausus, publice concremetur, quoniam gravior poena constituenda est in hos, qui nostri iuris sunt et nostra debent custodire mandata.*

⁶³ C. Th. 16,8,1 pr. (*Imp. Constantinus a. ad Evagrium*): *Iudaeis et maioribus eorum et patriarchis volumus intimari, quod, si quis post hanc legem aliquem, qui eorum feralem fugerit sectam*

fate.⁶⁴ It is not surprising that these last two cases were punishable by one of the highest penalties.

Taking all above into consideration, a question arises what was the legal and social situation of those sentenced to a *summum supplicium* in the post-classical legislation of Roman emperors? As already mentioned, the dividing line between *honestiores* and *humiliores* blurred to some extent during the late Empire. It should be noted that the words *honestior* and *humilior* are rarely used in the *Theodosian Code*. The distinction between these two groups is less apparent than before, i.e. in the period of classical law. It is interesting that, in the finest illustration of the era of Justinian, the Justinian's *Digest*, sentence of *summa supplicia* was adjudicated only in cases of *humiliores* and slaves, whereas in the *Sentences* of Paulus the state declared this sentence to both, *honestiores* and *humiliores*, while in the *Theodosian Code* the state did so as well to *honestiores*, *humiliores*, but above all to slaves.⁶⁵ According to the Justinian's *Digest*, if *honestiores* had been sentenced to the death penalty, they were beheaded with a sword, while *humiliores* could have experienced the punishment of fork hanging, burning or *ad bestias*.⁶⁶

In the *Theodosian Code*, one can notice a distinctive difference between the slaves and free people in regard to the method the death penalty was applied. For example, the constitution contained in C. Th. 7,18,8,1 of A.D. 383, addressed to Nicomachus Flavianus, Proconsul of Asia,⁶⁷ shows that the *procurator possessionis sive actor vel etiam colonus* who allowed the deserter to hide was subject to the ordinary death penalty, not a *summum supplicium*. It is symptomatic for this example that when several people were charged with criminal responsibility and among them at least one person had a status of a free man (in this case *colonus*), the punishment provided for a free person was to be imposed on all the perpetrators. However, if

et ad dei cultum respexerit, saxis aut alio furoris genere, quod nunc fieri cognovimus, ausus fuerit adtemptare, mox flammis dedendus est et cum omnibus suis participibus concremandus.

⁶⁴ C. Th. 16,5,9.

⁶⁵ Cf. D. Grodzynski, *Totures mortelles...*, p. 382.

⁶⁶ As proposed by G. Cardascia, *L'apparition dans le droit...*, p. 323.

⁶⁷ C. Th. 7,18,8,1 (*Idem aaa. ad Flavianum praefectum praetorio*): *Quod si procurator possessionis sive actor vel etiam colonus latebram desertori domino ignorante praestiterit, detectus in crimine capitali supplicio mancipetur. Ceteros quoque similis conscientiae exemplum triste deterreat illorum: tantummodo probationibus evidenter ostensis innoxiiis relinquatur habitatio, quos iam dudum fiscus adaeravit.*

the *actor* or *procurator fundi* had been a slave (which also used to happen) and had hidden fugitive decurions, he would have been punished with burning.⁶⁸ Apparently, the Christian legislation, especially the *Theodosian Code* and the *Justinian's Code*, did not reduce the severity of criminal repression against slaves.⁶⁹ When a slave harmed the interests of the state, he was subject to *summum supplicium*. The best example of this was *plagium*. A *liber* committing this crime, according to the *Theodosian Code*,⁷⁰ as well as an *ingenuus* according to the *Code* of Justinian, were punishable by execution with a sword, while a slave – according to the latter legal act – was to be sent *ad bestias*.⁷¹ As a rule, free people were exempt from some *summum supplicium*.⁷² Thus adulterers who, according to the *Theodosian Code* were punished with burning at the stake or with the *culleus*,⁷³ under the *Justinian Code* were also sentenced to death but by decapitation with a sword.⁷⁴ Of course, the example of the *Justinian Code* is the best evidence that the severe criminal repression expressed in the *Theodosian Code* has been, so to

⁶⁸ C. Th. 12,1,179,1 (*Idem aa. Seleuco praefecto praetorio*): *Servus vero actor sive procurator flammis detur ultricibus, obnoxiiis curialibus nihilominus restitutis*. Cf. D. Grodzynski, *Tortures mortelles...*, p. 386.

⁶⁹ Cf. U. Brasiello, *La repressione penale...*, p. 261; M. Morabito, *Les réalités de l'esclavage d'après le Digeste*, Paris 1981, p. 234.

⁷⁰ C. Th. 9,18,1 (*Imp. Constantinus a. ad Domitium Celsum vicarium Africae*): *Plagiarii, qui viventium filiorum miserandas infligunt parentibus orbitates, metalli poena cum ceteris ante cognitio suppliciiis tenebantur. Si quis tamen eiusmodi reus fuerit oblatus, posteaquam super crimine patuerit, servus quidem vel libertate donatus bestiis primo quoque munere obiiciatur, liber autem sub hac forma in ludum detur gladiatorium, ut, antequam aliquid faciat, quo se defendere possit, gladio consumatur. Eos autem, qui pro hoc crimine iam in metallum dati sunt, numquam* revocari praecipimus*.

⁷¹ C. 9,20,16, pr.-1 (*Imperator Constantinus*): *Plagiarii, qui viventium filiorum miserandas infligunt parentibus orbitates, metalli poena cum ceteris ante cognitio suppliciiis tenebantur. 1. Si quis tamen eiusmodi reus fuerit oblatus, posteaquam super crimine patuerit, servus quidem vel libertate donatus bestiis obiiciatur, ingenuus autem gladio consumatur*.

⁷² Cf. D. Grodzynski, *Tortures mortelles...*, p. 394.

⁷³ C. Th. 11,36,4 (*Impp. Constantius et Constans aa. ad Catullinum*): *Oportuerat te publici instituti respectu confessione detectos legum severitate punire nec frustra vitam differentum moratorias provocationes admittere, sed delatum adulterii crimen et quaestionibus athibitis adprobatum pari sceleri immanitate damnare. Quod deinceps in huiusmodi criminibus convenit observari, ut manifestis probationibus adulterio probato frustratoria provocatio minime admittatur, cum pari similique ratione sacrilegos nuptiarum tamquam manifestos parricidas insuere culleo vivos vel exurere iudicantem oporteat*.

⁷⁴ C. 9,9,29.

speak, held up and even mitigated. However, all the acts that were directed against the Christian Church remained punished as they were in the past. A pagan *haruspex*, or an act of a Jew killing one of his fellow believers converted to Christianity, was always punished and forced to share the fate of the first Christians. However, the Manichaeans, because they were Christians, had their punishment mitigated. In turn, the crimes against the state were as severely punished as in the classical period.

The question arises whether the criminal legislation of Christian emperors changed the essence or the function of criminal punishment in Roman law. After all, did Christianity have any impact on Roman criminal law? To sum up the above considerations, it should be stated that the new state religion did not radically change the Roman criminal legislation. Punishment in the Roman legislation has served various functions for centuries. It was primarily intended to prevent or deter perpetrators so that they would not commit crimes again.⁷⁵ Also, punishment was sometimes used for fiscal purposes. Punishment in the legislation of Christian emperors continued to fulfil these functions, however it became even more than ever before, an essential tool for the political struggle of the new state authority. The finest example of this was the legislation of Constantine the Great, followed by all the severity of criminal repression which resulted in the issuing of this legal act. A great desire to bring about a new order, maintain power and even the fear of losing it can be detected in the strictness of the Constantine's legislation. Finally, the once persecuted Christians began to behave like their previous persecutors (such as Nero).

The Christian legislation confirmed both the division of the society into *servi* and *liberii* that had existed in the Roman state for centuries and the diversity of the legal situation of individual social groups. In addition, the flames of *summum supplicium* were supposed to provide another

⁷⁵ Cf. K. Amielańczyk, *Prawo karne i polityka. Czy rzymscy prawodawcy prowadzili ukierunkowaną politykę karną?*, in: *Prawo karne i polityka w państwie rzymskim*, ed. K. Amielańczyk, A. Dębiński, D. Słapek, Lublin 2015, p. 31. The aim of the death penalty in the post-classical period continued to be preventive action, which during that period was directed against the whole of society. The severity of the criminal repression was to serve the purpose of disciplining all the inhabitants of the country, whose morality in that period was very much diminished, cf. B. Santalucia, *Diritto e processo penale nell' antica Roma*, Milano 1989, p. 142. More on the moral decadence of Roman society in the post-classical period see: A. Młeczek, *Dekadencja moralna społeczeństwa rzymskiego w "Res Gestae" Ammiana Marcellina*, Kraków 2019.

chance for purification and moral renewal of the Roman society that perpetually chose to retain the legal tradition of their ancestors. At the end, it is worth quoting the content of the constitution issued by Emperors Valentinian, Theodosius and Arcadius in 390:

Coll. 5,3,1,2: The Emperors Valentinian, Theodosius and Arcadius to Orientius, Vicar of the city of Rome. 1. We cannot suffer, our dearest and most beloved Orientius, the city of Rome, the mother of all the virtues, to be polluted any longer by the poison of shameful effeminacy in males, and the weakening of the rustic vigour of our ancient founders to cast a reproach both on the age of those founders of Rome and the present Emperors. 2. Therefore, let your prudence punish, with avenging flames in the sight of the people, all those whose criminal practice it is to condemn the male body to the submissiveness appropriate to the opposite sex [...].⁷⁶

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⁷⁶ Coll. 5,3,1. Quoted for: *Zbiór prawa Mojżeszowego i rzymskiego. Tekst łacińsko-polski*, ed. A. Dębiński, Lublin 2011, pp. 90-91.

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Summary

This publication is an attempt to answer the question: what was the role of the criminal penalty, especially in its strictest form (*summum supplicium*) in the Roman legislation of Christian emperors? Finally, whether is it noticeable, based on the example of *summum supplicium*, that Christianity influenced the Roman criminal law in any way? As it has been demonstrated, the new state religion did not radically change the Roman criminal legislation. The legislation of the Christian emperors confirmed both, the division of society into *servi* and *liberii* that had existed for centuries in the Roman state and the diversity of the legal situation of individual social groups. Punishment in the legislation of Christian emperors continued to fulfil the role it had played in the previous centuries and became, even more than ever before, an essential tool for the political struggle of the present state authority. The finest example of this was the legislation of Constantine the Great, followed by all the severity of criminal repression which resulted in the issuing of this legal act. A great desire to bring about a new order, maintain power and even the fear of losing it can be detected in the strictness of the Constantine's legislation. Finally, the once persecuted Christians began to behave like their previous persecutors.

Key words: *summum supplicium*, capital punishment, Roman criminal legislation, Christianity

SUMMUM SUPPLICIUM W USTAWODAWSTWIE CHRZEŚCIJAŃSKICH CESARZY RZYMSKICH

Streszczenie

Niniejsza publikacja została poświęcona próbie udzielenia odpowiedzi na pytanie – jaką rolę pełniła kara kryminalna, a zwłaszcza jej najsurowszy wymiar (*summum supplicium*), w ustawodawstwie rzymskich cesarzy chrześcijańskich? W końcu, czy na przykładzie *summum supplicium* można zauważyć, że chrześcijaństwo wpłynęło w jakiś sposób na rzymskie prawo karne. Jak wykazano, nowa religia państwowa nie zmieniła w radykalny sposób rzymskiego ustawodawstwa karnego. Prawodawstwo cesarzy chrześcijańskich utwierdziło istniejący od wieków w państwie rzymskim podział społeczeństwa na *servi* i *liberii* oraz zróżnicowanie sytuacji prawnej poszczególnych grup społecznych. Kara w ustawodawstwie cesarzy chrześcijańskich nadal spełniała te funkcje, które pełniła w poprzednich wiekach, ale stała się w jeszcze większym stopniu niż do tej pory, zasadniczym narzędziem walki politycznej obecnej władzy państwowej. Najlepszym tego przykładem było ustawodawstwo Konstantyna Wielkiego, ale także cała surowość represji karnej, której efektem było wydanie tego aktu prawnego.

W surowości ustawodawstwa Konstantyna widać wielką chęć zaprowadzenia nowego porządku, utrzymania władzy, ale jeszcze bardziej strach przed jej utratą. W końcu prześladowani wcześniej chrześcijanie zaczęli postępować tak, jak ich poprzedni prześladowcy.

Słowa kluczowe: *summum supplicium*, kara śmierci, rzymskie ustawodawstwo karne, chrześcijaństwo

SUMMUM SUPPLICIUM W ZAKONODATELSTWIE CHRZEŚCIANSKICH RYMSKICH IMPERATORÓW

Резюме

Эта публикация посвящена попытке ответить на вопрос – какую роль играло уголовное наказание, и особенно его самое серьезное измерение (*summum supplicium*) в законодательстве римских христианских императоров? Наконец, можно ли на примере *summum supplicium* отметить, что христианство каким-то образом повлияло на римское уголовное право. Как было показано, новая государственная религия не изменила радикальным образом римское уголовное законодательство. Законодательство христианских императоров подтвердило разделение общества на *servi* и *liberii*, существовавшее на протяжении веков в римском государстве, и дифференциацию правового положения отдельных социальных групп. Наказание в законодательстве христианских императоров по-прежнему выполняло те функции, которые оно выполняло в предыдущие века, но стало даже в большей степени, чем прежде, важнейшим инструментом политической борьбы существующей государственной власти. Лучшим примером этого является законодательство Константина Великого, но также и вся строгость уголовных репрессий, которая привела к изданию этого правового акта. Строгость законодательства Константина свидетельствует о большом желании создать новый порядок, сохранить власть, но еще больше о боязни потерять ее. В конце концов, преследуемые ранее христиане начали вести себя как их предыдущие преследователи.

Ключевые слова: *summum supplicium*, смертная казнь, римское уголовное законодательство, христианство