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## ON PROSECUTOR'S OFFENCES IN ROMAN CRIMINAL TRIAL

There are many ways of perverting the course of justice. It might be connected with every person taking active part in the process. The prosecutor might be vindictive and incompetent, the judge might be corrupted, witnesses could be unreliable, the jury might have their own secret agenda in pronouncing the verdict... Many more or less probable scenarios can be imagined.

In Rome, during the Republic, the criminal trial was initially held before popular assemblies (*iudicia populi*) or extraordinary tribunals (*quaestiones extraordinariae*), which were established in cases of exceptional crimes. Due to the complicated procedure before assemblies and *ad hoc* quality of *quaestiones extraordinariae* it had become necessary to introduce permanent criminal tribunals. They acted on the basis of the bills that set them and dealt with individual offences. The trial began with the prosecutor's *postulatio*, that is a request to the tribunal's president (*praetor* or *iudex quaestionis*) to accept the case. If the accusation was likely and the magistrate presiding the tribunal decided to give the case a run, the accuser (*accusator*) had to submit the *iusiurandum calumniae* – an oath that he does not make false accusation, nor bring it for the wrong reasons or for malice. The next stage was the formal submission of the accusation before the tribunal's president, along with full information about the defendant's identity and the details of the act he was accused of. If the accused was present at the time, the preliminary hearing of the case by the tribunal's president took place immediately. Subsequently, the indictment was drafted and formally accepted. The composition of the tribunal was determined, and both the prosecutor and the accused participated in it. The tribunal's president set the first day of the trial, usually after a ten-day break. The trial began with a speech by the prosecutor or his representative, then the accused or his patron responded to the charges. After the speeches, evidence was presented, then a short exchange of questions and answers by the parties (or rather by their representatives) took

place. At the end, of course, the *iudices* issued a verdict, and the decision was taken by a majority<sup>1</sup>.

It seems that in ancient Rome the unreliability of a person accusing someone in the Roman criminal trial was seen as the most treacherous type of malice that could be committed during the lawsuit. In the ancient sources, three types of the prosecutor's offences are preserved: the *calumnia* (false accusation), the *tergiversatio* (abandonment of charges), and the *praevaricatio* (collusion)<sup>2</sup>.

In this paper I would like to discuss in particular the outlines of the crime of the *praevaricatio* and penalty provided by law for committing it.

The first mention of this crime in the juridical text can be traced back in the *lex Acilia repetundarum* of 122 BC<sup>3</sup>.

According to the text of this plebiscite, if the accused was not convicted by a majority of votes of the jury, they were to be considered innocent of any charge described in the *lex Acilia*. However, according to the wording of the text, the existence of a collusion resulted in an exception to this rule<sup>4</sup>. Probably, therefore, the *praevaricatio* could be the basis for re-instigating proceedings against the same accused on the basis of the same charges.

We don't have many juridical sources concerning the issue of the *praevaricatio* in the times of the Republic. However, this subject was mentioned in literary sources. The most interesting examples survived in the vast amount of writings left by Marcus Tullius Cicero.

To quote just one example: Marcus Caelius Rufus, the protégé of the great orator, wrote him a letter in early October 51 BC. Reporting to his former teacher the cases of the Forum, he also mentioned a trial in which a suspicion of collusion arose:

<sup>1</sup> On the course of the trial see i.a.: T. Mommsen, *Römisches Strafrecht*, Leipzig 1899, reprint New York 2010, p. 381 *et seqq.*; A.H.J. Greenidge, *The Legal Procedure of Cicero's Time*, Oxford 1901, reprint 2005, p. 459 *et seqq.*; J.L. Strachan-Davidson, *Problems of the Roman Criminal Law II*, Oxford 1912, reprint Littleton 1991, p. 112 *et seqq.*; B. Santalucia, *Studi di diritto penale romano*, Roma 1994, p. 196 *et seqq.*; W. Litewski, *Rzymski proces karny*, Kraków 2003, p. 45 *et seqq.*; O.F. Robinson, *Penal Practice and Penal Policy in Ancient Rome*, London 2007, p. 31 *et seqq.*

<sup>2</sup> Cf. M.C. Alexander, *The Case for the Prosecution in the Ciceronian Era*. Ann Arbor 2003, p. 7 *et seqq.*

<sup>3</sup> G. Rotondi, *Leges Publicae Populi Romani*, Milano 1912, s. 312 *et seqq.*; A.W. Lintott, H.B. Mattingly, M.H. Crawford, *Lex repetundarum*, (in:) M. Crawford (ed.), *The Roman Statutes*, London 1996, p. 39 *et seqq.* Literature on the subject of *lex Acilia* is very extensive, the most important editions of this source text and its elaboration are listed in the publication edited by Crawford.

<sup>4</sup> L. 54-55: *quouis ex h(ace) l(ege) nomen delatum erit — nisei de eo sententiae ibei plurumae erunt, condemnno.] [qu]od praeuaricationis causa factum non erit, is ex hace lege eius rei apsolutus esto* (ed. Crawford).

Cic., *Fam.* 8,8,2: Quo vento proiicitur Appius minor, ut indicaret pecuniam ex bonis patris pervenisse ad Servilium praevaricationisque causa diceret depositum HS. XXX<sup>5</sup>.

In this part of the letter, Caelius described the case of M. Servilius, who supposedly had received the money from the estate of the father of some Appius minor. The reason for giving him this sum (presumably simply the bribe) was the collusion with C. Claudius Pulcher, the ex-governor of Asia, accused of extortion (*repetundae*)<sup>6</sup>. Caelius tried to accuse Servilius of the *praevaricatio* but his case was dismissed<sup>7</sup>, probably as a result of confusion of the law by the presiding praetor, M. Juventius Laterensis<sup>8</sup>. The reason might also be that the collusion was unsuccessful, as Claudius was exiled as a result of his trial.

Cicero himself has tried to discredit his political opponent, Publius Clodius Pulcher, using the charge of collusion as well<sup>9</sup>.

The misconduct of the prosecutor could induce the lack of judgment at all. It could also generate an incorrect verdict as a result of the trial. If, for example, the *accusator* did not appear at the trial initiated by his indictment, this resulted in the dismissal of the charges against the accused<sup>10</sup>. During the Republic, in the proceedings in *quaestiones perpetuae*, it was especially important, as in most cases, after the verdict was issued, it was not possible to re-charge the same person with an offense that had been the subject of the trial<sup>11</sup>. There was no possibility of appeal.

I would like to focus now on how the crime of collusion is described in the Justinian's *Digest*, as this part of the compilation seems to collect the most comprehensive information on this crime.

It can be assumed that in ancient Rome, as it is today, people relied on the integrity and *bona fides* of the prosecutors. Emphasis on this aspect is clearly put in the definition preserved in the *Digest*, which Ulpian included in his monograph *De adulteriis*:

<sup>5</sup> "Tossed up on the crest of this wave, Appius minor lays information concerning money received by Servilius out of his father's property, alleging that HS 3,000,000 had been deposited to rig the prosecution".

<sup>6</sup> M.C. Alexander, *Trials in the Late Roman Republic, 149 BC to 50 BC*, Toronto 1990, p. 163 (n. 336); T. Corey Brennan, *The Praetorship in the Roman Republic*, Oxford 2000, p. 569.

<sup>7</sup> M.C. Alexander, *Trials...* p. 163 (n. 337).

<sup>8</sup> Cic., *Fam.* 8,8,3.

<sup>9</sup> Cic., *Har. resp.* 42; Cic., *Pis.* 23; Asc. *in tog.* 87C l. 1. 13-15; Asc. *in Pis.* 9C l. 1. 17-18.

<sup>10</sup> A.H.J. Greenidge, *The Legal Procedure*, p. 468.

<sup>11</sup> M. C. Alexander, *Repetition of Prosecution, and the Scope of Prosecutions, in the Standing Criminal Courts of the Late Republic*, „Classical Antiquity” 1982, issue 1.2, p. 141.

D. 50,16,212 (Ulp. 1 de adult.): „Praevaricatores” eos appellamus, qui causam adversariis suis donant et ex parte actoris in partem rei concedunt: a varicando enim praevaricatores dicti sunt<sup>12</sup>.

A fragment of the jurist’s work explains the word *praevaricator*, used to describe the prosecutor who was in collusion with the accused. Ulpian thought it had derived from the word *varico*<sup>13</sup> – to put the legs wide apart or to straddle. However, it was not about the literal meaning of the term. The *praevaricator* was the one who played both sides, even the one who crossed that thin line – he did not behave like a prosecutor, but acted clearly in the interest of the other party. Therefore, he did not perform along to the role assigned to him in the trial – instead of trying to convict the accused, he sought to achieve their acquittal<sup>14</sup>. He then clearly violated the rules according to which he was supposed to proceed. The prosecutor’s task was obviously to support the accusation<sup>15</sup>.

We can also find the entire title of the *Digest* on this matter – D. 47,15 *De praevaricatione*. Reading passages contained in it can determine exactly what the *praevaricatio* was to the Roman jurists. The text presented here also comes from Ulpian’s commentary to the praetor’s edict:

D. 47,15,1 pr. (Ulp. 6 ad ed. pr.): Praevaricator est quasi varicator, qui diversam partem adiuvat prodita causa sua. Quod nomen Labeo a varia certatione tractum ait: nam qui praevaricatur, ex utraque parte constitit, quin immo ex altera<sup>16</sup>.

Once more the jurist stressed that in the case of the *praevaricatio* the prosecutor did not help the party of the trial in which interest he should act. As already mentioned, the role of the prosecutor was to support the accusation, which meant its proper conduct. It can be assumed that this meant to make allegations in accordance with the state of affairs or with the best knowledge of the prosecutor, in order to convict the accused. If, therefore, the *accusator* failed to comply with

<sup>12</sup> „We describe as ‘praevaricators’ those who give away their case to the adversaries and move from the part of a prosecutor to that of a defendant; for prevaricators are named from the variation in their parts”. All *Digest* translations are quoted after the English edition *Digest*, A. Watson (ed.), University of Pennsylvania Press, 1998.

<sup>13</sup> A. Walde, *Lateinisches Etymologisches Wörterbuch*, Heidelberg 1954, s.v. *varico*; A. Ernout, A. Meillet, *Dictionnaire étymologique de la langue latine. Histoire des mots*, Paris 2001, s.v. *varus*; *Oxford Latin Dictionary*, P.G.W. Glare (ed.), Oxford 2007, s.v. *varico*. Cf. N.W. de Witt, *Praevaricatio and Delirium*, „The American Journal of Philology” 1918, issue 39.4, p. 407 *et seqq.*

<sup>14</sup> Very similar reasoning is visible in Cicero’s work, *Cic., part. or. 126*, *praevaricator* is not a “real” accuser because he supports contradictory cases, straddling between them (*vare*).

<sup>15</sup> W. Mossakowski, *Delator w rzymskich procesach karnych*, „Studia Iuridica Toruniensia” 2013, issue 12, p. 206.

<sup>16</sup> „A double dealing prosecutor, a prevaricator, is like one straddling both sides; for he assists the other party, betraying his own client. Labeo says that the term derives from a manifold contest; for the prevaricator act on both sides, not on one alone”.

this obligation, it was only right to accuse him of committing a crime. Ulpian also cited the observation of Labeo, who associated the word *praevaricatio* with a fight on opposite sides – in that case, the prosecutor represented both parties to the trial.

In the next part of the commentary on the edict, the jurist pointed to the differences between the proper and improper use of the *praevaricator* term:

D. 47,15,1,1 (Ulp. 6 ad ed. praet.): Is autem praevaricator proprie dicitur, qui publico iudicio accusaverit: ceterum advocatus non proprie praevaricator dicitur<sup>17</sup>.

As he stated, “colluding” rightly relates to the one who accuses in the criminal trial. The term was sometimes used incorrectly to describe an advocate. This is an accurate and fundamentally obvious distinction. The advocate, whose task was to defend the accused in the trial, could not be reasonably accused of any action aimed at acquitting a person in whose favor he spoke before the jury. B. Levick<sup>18</sup>, calling the fragment of the Tacitus’ *Annales*, indicated the existence of a less known form of the *praevaricatio*, when the defender abandoned the accused<sup>19</sup>. The historian described the suicide of an *eques* in the house of a fraudulent defender. It is possible, however, that Tacitus used the word *praevaricatio* in a colloquial and not strictly legal sense.

This crime is also defined in the title of the *Digest* devoted to *SC Turpillianum*<sup>20</sup>:

D. 48,16,1,6 (Marc. l.s. ad SC Turpill.): Praevaricatorem eum esse ostendimus, qui colludit cum reo et translaticie munere accusandi defungitur, eo quod proprias quidem probationes dissimularet, falsas vero rei excusationes admitteret<sup>21</sup>.

Marcianus stressed that the *praevaricatio* resulted from secret collusion. Doing it, the prosecutor knowingly and intentionally managed the charges in such a way as to lead to the acquittal of the accused<sup>22</sup>. The jurist also specified the actions of the prosecutor, which could be considered as forms of this crime. They included concealing the evidence incriminating the accused, which he had at his disposal, as well as readiness to accept his false excuses. It was clearly not a full

<sup>17</sup> „He is properly called a prevaricator who prosecutes in a public prosecution; an advocate is not correctly so styled”.

<sup>18</sup> B. Levick, *Primus, Murena, and 'Fides': Notes on Cassius Dio LIV.3*, „Greece & Rome” 1975, issue 22.2, p. 161 *et seqq.*

<sup>19</sup> Tac., *Ann.* 11,5,2.

<sup>20</sup> On the subject of procedural offenses set out in this *senatus consultum*, see L. Fanizza, *Delatori e accusatori. L'iniziativa nei processi di età imperiale*, Roma 1988, p. 43.

<sup>21</sup> „The prevaricator we demonstrate to be the man who colludes with the accused and discharges his duty of accusation negligently by concealing his own proofs and accepting the accused’s spurious defenses”.

<sup>22</sup> Cf. W. Mossakowski, *Delator...*, p. 207 *et seqq.*

list, but only the most common prosecutors' activities undertaken in the interests of the accused. It is worth emphasizing that the *praevaricatio* could be committed only consciously, as only the result of a deliberate act of the prosecutor could be seen as a crime. The inept conduct of the prosecution, which was not the result of collusion with the accused, was not treated as such.

And finally, let me present one more non juridical, but very interesting source-text which demonstrates that proving *praevaricatio* was not easy – it required the rejection of all other reasons for the accused being acquitted. Those other reasons were described by Quintilian in his *Institutio Oratoria*:

Quint. 7,1,32: “Ut absolvatur reus, aut innocentia ipsius fit aut interveniente aliqua potestate aut vi aut corrupto iudicio aut difficultate probationis aut praevaricatione. Nocentem fuisse confiteris: nulla potestas obstitit, nulla vis, corruptum iudicium non quereris, nulla probandi difficultas fuit: quid superest nisi ut praevaricatio fuerit?”<sup>23</sup>

Quintilian pointed to the *praevaricatio* as one of the means which led to the acquittal of the accused. The others include: actual innocence of the accused or the problems in proving their guilt, the intervention of anyone in power or authority or the use of violence or bribery. It follows from the wording of the passage where Quintilian listed a full catalogue of these measures. It can therefore be assumed that, in his opinion, there were no other reasons for this result of the trial.

So, the crime of the *praevaricatio* consisted basically of failing the prosecutor's duties. The person committing it wanted to lead to the acquittal of the defendant in the trial. If this action did not come to light, the perpetrator would not suffer a well-deserved punishment. As far back as in the already mentioned *lex Acilia*, the counter mechanism is visible – if there was collusion in the trial, the proceedings before the *quaestio de repetundis* could be brought once more against the same person on the basis of the same charges. The jurists' texts relating to the *praevaricatio* preserved in the Justinian's *Digest* in addition to indicating the nature of this crime also showed the different ways the accuser acted in the interests of the accused.

The allegation of a collusive trial could also be used to gain the fame in the Forum or slander the name of a political opponent – that was the case, for example, when Caelius tried to accuse Servilius, or when Cicero implied Clodius had done it in the trial of Catiline.

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<sup>23</sup> „The means for securing the acquittal of an accused person are strictly limited. His innocence may be established, some superior authority may intervene, force or bribery may be employed, his guilt may be difficult to prove, or there may be collusion between the advocates. You admit that he was guilty; no superior authority intervened, no violence was used and you make no complaint that the jury was bribed, while there was no difficulty about proving his guilt. What conclusion is left to us save that there was collusion?” (transl. LOEB edition).

The penalty for the *praevaricator* is the same as it would be for the wrongly acquitted – at least someone would be punished for the judged crime<sup>24</sup>. In addition, the *praevaricator* could become *infamis* and would not be allowed to prosecute ever again<sup>25</sup>.

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<sup>24</sup> D. 47,15,6.

<sup>25</sup> D. 47,15,4-5.

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### **Summary**

The subject of the article is to present a crime of collusion (*praevaricatio*) in Roman criminal law. It is one of the forms of obstruction of the criminal process by the prosecutor. The main scope was to show this crime in the juridical sources, preserved in the Justinian's *Digest*.

### **KEYWORDS**

criminal trial, *accusator*, *praevaricatio*

### **SŁOWA KLUCZOWE**

proces karny, *accusator*, *praevaricatio*