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Telum manu fugiens and Involuntary Homicide in Medieval Canon Law[1]

Introduction

One of the key moments in the process of the evolution of criminal law was the introduction of diversification of liability for a crime.[2] As Juliusz Makarewicz points out: "initially the notion of guilt was not treated as separate from the notion of cause and such a distinction was not in use. As a result, special attention was directed to the result and to the intention of the will. Negligence was punished in the same way as malicious intent. The bigger the harm to the common good, the less willingly such a distinction would have been made. The strength of the common wrath was too big to mitigate the natural instinct for revenge with a calm reflection of subjective guilt."[3]

[1] The Polish (shorter) version of the presented text was published as: Maciej Jońca, "Telum manu fugit jako ustawowa przenośnia nieumyślnego zabójstwa w średniowiecznym prawie kanonicznym. Uwagi na marginesie ewolucji teorii winy w prawie karnym," in *Prawo karne i polityka w państwie rzymskim*, ed. Krzysztof Amielańczyk, Antoni Dębiński, and Dariusz Słapek (Lublin: Wydawnictwo UMCS, 2015), 71–85.

[2] Notes on the subject of contemporary law: Paweł Nowak, "O istocie przestępstw nieumyślnych," *Studia Prawnicze KUL* 58, no. 2 (2014): 89–113.

[3] Juliusz Makarewicz, *Wstęp do filozofii prawa karnego* (Lublin: Wydawnictwo KUL, 2009), 136. Originally, the work was published in German as: Juliusz Makarewicz, *Einführung in die Philosophie des Strafrechts auf entwicklungsgeschichtlicher Grundlage* (Stuttgart: Verlag von Ferdinand Enke, 1906). Only the Polish edition will be cited in the following discussion. Unless stated otherwise, all translations are mine.

Ancient Romans, who at least partially managed to curb the primitive instincts, were not able to create clear dogmatic constructions with regard to the culpable liability for the act, that is, constructs which would be abstract and general in their character.[4] Their laws readily operated with metaphors and literary descriptions. An example of such an instance is the situation in which the weapon "by itself" slipped from the hand of the perpetrator of homicide. Due to the fact that it was incorporated into Christian writings, this odd regulation remained in force until the 20th century.

Weapon "Slipping" From the Hand

In accordance with prehistoric custom, the taking of somebody's life did not qualify as a morally reprehensible act. The finding and the punishing of the perpetrator was left to the relatives of the victim and if the victim had no relatives or they were not sufficiently determined to pursue their cause, the killer remained safe.[5] The situation was different, however, when both the perpetrator and the victim belonged to the same *gens* or tribe. If such was the case, the dispute was settled within the *gens*.[6] It happened so due to the surprising fact that "in family law (which is self-contained), the difference between *dolus*, *culpa* and *casus* was known."[7] After establishing that killing was committed with premeditation, the perpetrator – *paricidas* – was anathemized and then put to death.[8] However, when it could not be proven that he had malicious intentions, the specific purification rituals had to be performed which restored the state of peace between the world of people and the world of the spirits.

[4] Cf.: Makarewicz, *Wstęp*, 147. See, however: Maciej Jońca, *Rzymskie prawo karne. Instytucje* (Lublin: Wydawnictwo Werset, 2021), 32–33.

[5] Makarewicz, *Wstęp*, 160: "Murder is usually left to private revenge, as human life is not considered as valuable to society, does not have any value in fact, as the holistic idea has not developed yet. A feeling of loss is felt by the family, the closest relatives, but not the majority of the social group. Only when an individual proves with his behaviour that he may be dangerous to a greater number of people, the majority will decide that it might be advisable to remove him from society."

[6] Makarewicz, *Wstęp*, 110.

[7] Makarewicz, *Wstęp*, 388.

[8] Emil Brunnenmeister, *Das tötungsverbrechen im altrömischen Recht* (Berlin: Verlag von Duncker & Humblot, 1887), 171. For an extensive discussion on the subject of the conceptual range and evolution of the crime of *parricidium*, see: Maciej Jońca, *Parricidium w prawie rzymskim* (Lublin: Wydawnictwo KUL, 2008).

Consequently the killer, undisturbed by anybody, was able to function within society.[9]

As Makarewicz observes, "if we were to analyse any social norm of natural peoples, it is already obvious at a glance that at its basis there is a brutal social utilitarianism."[10] The archaic Rome was no exception to that rule. Therefore, when it was also noticed there that vendetta produces disastrous social effects, human life came to be treated as a value in itself and thus deserving protection. In order to restrict the scale of retribution practices and bring them under the control of the state, the tribal customs were extended to have a broader scope. According to the Law of King Numa, everyone who committed murder of a free man was to be treated in the same way as a murderer of relatives – *paricidas*.[11] In the case of unintentional killing, the family of the victim was to be offered a ram.[12] Additionally, a special tribunal was established (*quaestores parricidii*), which was one of the first "dilettante courts"[13] in Rome, appointed to investigate merely the existence of premeditation on the side of the perpetrator or a lack of thereof.

The provision concerning unintentional homicide was included in the Law of the Twelve Tables. The evidence on the subject was preserved in two works by Cicero. In his *Topica*, one can read the following: "For to shoot an arrow is an act of intention; to hit a man whom you did not mean to hit is the result of fortune. And this is the reason why a ram is given on the basis of your complaints: 'if a weapon has flown from the man's hand rather than been thrown by him.'"[14] At the same time, in the treatise *De oratore*, while reflecting on the various rhetorical ways of effectively reaching the addressee, Cicero explains: "Sometimes, also, brevity is the objective attained by a metaphor; as in 'the weapon slipped from his hand.' The lack of intent regarding the thrown weapon could hardly be expressed in more succinct terms than in this

[9] Maciej Jońca, *Rzymskie prawo karne*, 162, footnote 5. Notes on the Romans' move away from applying objective liability for ritual filth caused by crime to liability for the culpability of the perpetrator: 77–79.

[10] Makarewicz, *Wstęp*, 63.

[11] Festus, *De verborum significatu*, 247 (ed. Lindsay): *Si qui hominem liberum dolo sciens mortui duit, paricidas esto.* It should be noted, however, that even though in the sources there exists the name "royal laws" (*leges regiae*), at that time Roman law still functioned as a "closed system of customary criminal law." (Makarewicz, *Wstęp*, 95, 97). This author rightly refers to the *leges regiae* as "priestly provisions" – 181. For further notes on the royal laws, see: Zika Bujuklič, "Leges regiae: pro et contra," *Revue internationale des droits de l'antiquité* 45 (1989): 89–142.

[12] Makarewicz, *Wstęp*, 391.

[13] Cf.: Makarewicz, *Wstęp*, 97.

[14] Cicero, *Topica* 64: *Nam iacere telum voluntatis est, ferire quem nolueris fortunae. Ex quo aries subicitur ille in vestris actionibus: si telum manu fugit magis quam iecit.*

single-image metaphor."[15] The late-antique grammarian Servius in his commentary to Virgil's *Bucolica* reminds his readers of the royal regulation in the following words: "In the Law of King Numa, it was laid down that if somebody kills a man without intent, he will compensate his agnates with a ram at a public gathering."[16]

On the basis of the two above-mentioned fragments, a reconstruction of the said provision of the law might sound as follows:

> "IF A WEAPON RATHER SLIPPED FROM THE HAND THAN WAS THROWN INTENTIONALLY, a ram is to be offered as sacrifice [instead of the perpetrator]."[17]

For the family-based structure of the early Roman society, the weapon "slipping" from the hand could indicate a phenomenon easily understood in itself. In Athenian law, the objects which caused somebody's death were put to trial, judged, sentenced and then thrown away beyond the borders of the state.[18] Therefore, it was probable that the need to put the blame on somebody or something in the face of human death was so compelling that it made Romans believe that it was not the strength of one's muscles but "the malicious inanimate nature" that was the cause of the tragedy.[19]

A short note should be devoted to the word *telum* used in the law.[20] As it were, for the ancient Romans it was clear that it was a term that had many denotations. In his commentary to the Law of the Twelve Tables, Gaius explains: "The term *telum* usually refers to the object shot from a bow, but it also denotes a weapon thrown with the hand. From the above it transpires that the

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[15] Cicero, *De oratore* 3.39.158: *Non numquam etiam brevitas translatione conficitur, ut illud "i telum manu fugit": imprudentia teli missi brevius propriis verbis exponi non potuit, quam est uno significata translato.*

[16] Servius, *In Vergilii Eclogae commentarius* 4.43: *In Numae legibus cautum est, ut si quis imprudens occidisset hominem, pro capite occisi agnatis eius in contione offerret arietem.*

[17] *Lex duodecim tabularum* 24a: *SI TELUM MANU FUGIT MAGIS QUAM IECIT, aries subicitur.* Quoted after: Carl Georg Bruns, *Fontes Iuris Romani Antiqui* (Freiburg im Breisgau – Leipzig: In libraria I.C.B. Mohrii P. Siebeck, 1893), 33.

[18] The situation in Athens was actually slightly different, as inanimate objects were taken to trial and were convicted in a situation when it was impossible to determine the perpetrator of the killing who was a man. Demosthenes: *Oratio* 23.76; Aristotheles: *Athenaion politeia* 57.4. See also: Douglas M. MacDowell, *Athenian Homicide Law in the Age of the Orators* (Manchester: Manchester University Press, 1999), 86–87; Maciej Jońca, "Ateńskie procesy o zabójstwa w V i IV wieku p.n.e," in *Współczesna romanistyka prawnicza w Polsce*, ed. Antoni Dębiński and Monika Wójcik (Lublin: Wydawnictwo KUL, 2004), 131–132; Dieter Nörr, *Causa Mortis: auf den Spuren einer Redewendung* (München: C.H. Beck, 1986), 68.

[19] Cf.: Makarewicz, *Wstęp*, 383.

[20] Cf.: Maciej Jońca, "s.v. *telum*," in *Leksykon rzymskiego prawa karnego. Podstawowe pojęcia*, ed. Maciej Jońca (Warszawa: C.H. Beck, 2021), 269.

term may refer to stone, wood and iron because of the fact that those objects are thrown at a distance, which in Greek is described as *apo tou tylou*. That is why this meaning can also be identified in the Greek equivalent [of the discussed term], as what we describe as *telum*, they refer to as *belos appellant: apo tou ballesthai*. Xenophon instructs us on this subject in the following words: 'they brought with themselves arrows, spears, bows, slingshots and many stones.'[21] Thus, what is shot from a bow, among the Greeks is called by the term *toceuma*, whereas we commonly refer to it as *telum*."[22]

A situation when a weapon slips from the hand "of its own accord" is by no means an only scenario in which a man may lose his life as a result of someone else's carelessness. Yet, for many centuries it was precisely this formula that was to serve as a synonym of human actions committed without malicious intent and resulting in the death of another human being. What is interesting, the Roman jurists used it relatively rarely.[23] Roman law repeatedly refers to the subject of liability for an act committed without prior premeditation.[24] However, in the writings of the lawyers or imperial constitutions there are no fragments that would repeat the archaic formula: *telum manu fugit*. Neither the Theodosian Code nor the Code of Justinian make any reference to it.

[21] Cf.: Xenophon: *Anabasis* 4.2.14.

[22] *Digesta Iustiniani* 50.16.233.2: *"Telum" volgo quidem id appellatur, quod ab arcu mittitur: sed non minus omne significatur, quod mittitur manu: ita sequitur, ut et lapis et lignum et ferrum hoc nomine contineatur: dictumque ab eo, quod in longinquum mittitur, Graeca voce figuratum apo tou thylou. Et hanc significationem invenire possumus et in Graeco nomine: nam quod nos telum appellamus, illi belos appellant: apo tou ballesthai Admonet nos Xenophon, nam ita scribit: kai ta bely homose efereto, logxai toceumata sfendonai, pleistoi de kai livoi. Et id, quod ab arcu mittitur, apud Graecos quidem proprio nomine toceuma vocatur, apud nos autem communi nomine telum appellatur.*

[23] Cf.: Seneca: *De beneficiis* 4.34. In older studies one can also find references to a rather obscure tragedy by Euripides (*in quadam tragoedia Euripidis*), which allegedly contained the expression: *Si telum manus meas liquit.* See: *Novus Thesaurus Iuris Civilis et Canonici: continens varia et rarissima optimorum interpretum, inprimis Hispanorum et Gallorum, opera taedita antehac, quam inedita, in quibus Ius Romanum emendatur, explicatur, illustratur atque ex humanioribus litteris, antiquitatibus, et veteris aevi monumentis illustrator* in *Ex collectione et museo Gerardi Meerman*, vol. 2 (Hagae: Apud Petrum de Hondt 1751), 34.

[24] The collection of sources: Evelyn Höbenreich, "Überlegungen zur Verfolgung unbeabsichtigter Tötungen von Sulla bis Hadrian," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung* 107, no. 1 (1990): 249–314. See also: Robert Feenstra, "The Historical Development of Delictual Liability for Killing and for the Infliction of Bodily Harm," *Acta Juridica* (1972): 227–237.

The Concept of Saint Augustine

The phrase *telum manu fugit* as a metaphor relating to unintentional homicide re-emerged in the common consciousness due to the writings of Christian authors. Saint Augustine in the treatise *On Free Will* carries out the following argumentation: "If *homicidium* denotes the killing of one person by another, it may be sometimes committed without a sin. Indeed, a soldier killing his enemy and a judge or his subordinate killing a criminal and *he who, against his will and due to carelessness lets his weapon slip from his hand* – does not seem, in my opinion, to be committing a sin in killing a human being. And they are usually not referred to as killers. This same was written in the Book of Leviticus: 'When a man is killed in accordance with the law, it is the law that deprives him of life, not you.'"[25]

It is hard to determine which sources inspired Saint Augustine to include the motif of the "slipping" weapon into his reflections. It is known that the first reconstruction of the Law of the Twelve Tables was made by a Roman jurist Sextus Aelius in his work entitled *Tripertita*. However, the text of this treaty has not survived to the modern times. The Father of the Church could have known it as he had received a thorough legal education and, being a bishop, he settled disputes over numerous occasions (*episcopalis audientia*).[26] At the same time, Cicero's influence on the concepts created by Augustine is evident and unquestionable.[27] If we add to this the fact that for some time the future bishop of Hippo was a teacher of rhetoric, the source from which he might have drawn information on the ancient regulation under discussion seems to be obvious.

The weapon "slipping" from the hand also appears in the commentary which Boethius wrote to Cicero's *Topica*: "*Si telum manu fugit magis quam*

[25] Augustinus Hipponensis: *De libero arbitrio* 1.4.25: *Si homicidium est hominem occidere, potest accidere aliquando sine peccato. Nam et miles hostem, et iudex vel minister eius nocentem, et cui forte invito atque inprudenti telum manu fugit, non mihi videntur peccare, cum hominum occidunt. Sed nec etiam homicidae isti apellari solent. Item in questionibus Levitici: Cum homo iuste occiditur, lex eum occidit, non tu*. For interesting considerations on the problem of the legal and moral responsibility of a judge for passing a death sentence on a criminal, see: Rosalba Sorice, "Impune occidetur, licite occidetur? La non punibilità dell'omicidio nella dottrina medievale e moderna," in *Der Einfluss der Kanonistik auf die europäische Rechtskultur*, ed. Mathias Schmoeckel, Orazio Condorelli, and Franck Roumy (Köln-Weimar-Wien: Böhlau, 2009), 99–106.

[26] Stanisław Jóźwiak, *Państwo i Kościół w pismach świętego Augustyna* (Lublin: Wydawnictwo KUL, 2004), 165–170.

[27] He mentions this himself: Augustinus Hipponensis: *Confessiones* 3.4; 3.5; 5.6; 8.7. See also: Miles Hollingworth, *Saint Augustine of Hippo: An Intellectual Biography* (Oxford: Oxford University Press, 2013), 105–127.

iecit – if, for that matter, somebody is in the state of being charged with homicide, the best defence – if others have failed – is to claim that the weapon rather slipped from the perpetrator's hand than that he wanted to throw it himself in order to separate the effect from the intention, which will result in finding the perpetrator guilty and sentencing him, but not on account of a premeditated act."[28]

Nevertheless, it was neither Boethius's succinct explanation nor a sophisticated construction of Servius but the learned argumentation of Augustine which had a significant impact on the shape of the practice and teaching of law in both the medieval period and the modern era. It happened somewhat by accident. The aim of Augustine's book was not to initialize a revolution in law, but to oppose the Manichaean sect.[29] The treatise is philosophical and religious in its essence, not legal. Yet, it was no obstacle to medieval dogmatic thinkers to approach Augustine's literally and transfer his spiritual conception of one's responsibility for sin onto the grounds of criminal liability in matters relating to tort or delict.

Christian Morality

The Catholic Church became a depositary of the numerous concepts delineated by Roman law. However, it should be remembered that the wisdom of the ancient Romans did not constitute the ultimate truth for the Church legislators and served merely a subsidiary role.[30] According to Makarewicz, "the Christian Church was created in its beginnings as an association independent of the state. From the very foundation it had its own punishments, out of which the most

[28] Si telum manu fugit magis quam iecit*: nam si quis caedis accusatur, optima solet esse defensio, si alia non suppetit, fugisse manu telum, magis quam voluerit iecisse, ut non voluntati, quae condemnatur in culpis, sed ignorantiae factum tribuatur.* Quoted after: Eduard Osenbrüggen, *Das altrömische Parricidium* (Kiel, 1841), 27.

[29] This is neither the first nor the last coincidence of this kind. The considerations of the bishop of Hippo contained in the study *On Two Souls* (*De duabus animis* 14.2) became the basis for the forging of this widely known maxim: *audiatur et altera pars*. See: Maciej Jońca, *Prawo rzymskie. Marginalia* (Lublin: Wydawnictwo KUL, 2015), 57–71; Andreas Wacke, "Audiatur et altera pars. Zum rechtlichen Gehör im römischen Zivil- und Strafprozeß," in *Ars boni et aequi. Festschrift für Wolfgang Waldstein zum 65. Geburtstag*, ed. Wolfgang Waldstein, Martin Schermeier, and Végh Zoltán (Stuttgart, Steiner 1993), 369–399.

[30] See: Ignác Antonín Hrdina: "Římské právo a kanonické právo," Studia theologica 22, no. 1 (2020): 61–88. The "rigid" Roman solutions were approached with extreme caution by the telogogues. See: Maciej Jońca, "The Last Judgement as Ordalium. Hans Memling's Vision," *Studia Prawnicze KUL* 80, no. 4 (2019): 75–89.

important role was played by the excommunication (*excommunication*). In order to avoid it, one should often subject himself to the penance imposed by the Church."[31] Therefore, the Church needed a clear doctrine related to the theory of guilt, as this issue was crucial not only for maintaining order and executing justice, but also for the administration of the sacrament of penance. The problem was serious and the stakes were high. The spilling of blood, especially Christian blood, was perceived as an unacceptable act. Homicide excluded the perpetrator from receiving sacraments – temporarily or permanently – which as a result could entail eternal damnation for his soul.

While building its own doctrine of guilt, canon law relied heavily on Roman law as well as the New Testament and the writings of early Christian authors. The Old Testament was used as a reference to a lesser degree.[32] This is because in the Old Testament reality was connected more with the idea of a ritual impurity and not with intentional or unintentional responsibility for an action.[33] From the very beginning of Christianity there existed a principle according to which moral responsibility was dependent on the moral guilt of the perpetrator and not on the effect, whereas the former was dependent on man's free will.[34] The fact that the emphasis was placed on the free will and that it was combined with morality constitutes a significant import of Christianity into the study of guilt and responsibility for the crime.[35] As Zdzisław Papierkowski explains, "the factors that contributed to such a situation include the attitude of the Church law to Roman law, which is expressed in the words: *Ecclesia vivit lege Romana* (the Church lives by Roman law) and, additionally, a specific character of the crime demanding the strongest emphasis on the spiritual and ethical elements. Just as in Roman law we could observe the influence of Greek ethics on the subject of guilt, in the same way in the medieval canon law there exists a process of 'ethization' of criminal law, but in this case the difference lies in the source of this process. In this instance, it was not

[31] Makarewicz: *Wstęp*, 119.

[32] More on the topic: Richard H. Helmholz, "The Bible in the Service of the Canon Law," *Chicago Kent Law Review* 70, no. 1557 (1995): 1557–1581.

[33] James Q. Whitman, *The Origins of Reasonable Doubt. Theological Roots of the Criminal Trial* (New Heaven: Yale Univeristy Press, 2008), 32–33. The *Old Testament* in turn provided numerous solutions for the cases of killings committed with premeditation: Greta Austin: *Shaping Church Law Around the Year 1000: The Decretum of Burchard of Worms* (Aldershot: Ashgate, 2009), 170.

[34] Marian A. Myrcha, "Problem winy w karnym ustawodawstwie kanonicznym," *Prawo Kanoniczne* 14, no. 3–4 (1971): 80.

[35] However, cf.: Makarewicz, *Wstęp*, 62: "Nevertheless, in human society we are dealing not with souls, but human actions, which should be adjudicated. On the other hand, the study of morality cannot impose ready-made axioms, but should draw its own conclusions from observations. On the grounds of systematic observations and everyday experiments there is one thing that can be stated without a doubt: good will is not the essence of morality."

the natural ethics of Aristotle but the religious morality of the Catholic Church comprised in the Gospel."[36]

Nevertheless, there were exceptions to this principle. In the case of the heaviest crimes, and homicide was always considered as such, the perpetrator was almost invariably responsible for the effect.[37] According to Makarewicz: "the idea of impurity, being a result of the effect of an act (regardless of the attitude of the perpetrator) is so strong that it permeated even progressive religions based on strongly developed subjectivity. Despite the ideal value of the widow's last coins, despite the elevated teaching of the Fathers of the Church about guilt, the question of responsibility for the effect is still very much alive."[38] Bernard of Pavia explains this phenomenon in the following way: "A person committing a criminal offence often has to bear the brunt of being assigned responsibility for all the consequences of the crime."[39] Therefore, one could not leave homicide without sacral consequences, even if there was no ill intent on the side of the perpetrator.

In the penitential books created since the 6th century, one can notice that there is a clear and consistent differentiation of responsibility for intentional and unintentional homicide. The consequences of the latter would be milder, but they still were there.[40] Revolutionary in this field turned out to be the activities of Pope Nicholas I, as well as the resolutions of the Synod of Worms (868) and Synod of Trier (895).[41] Indeed, it was decided there that only a homicide committed in premeditation (*ex voluntate*) or as a result of negligence (*ex negligentia*) deserves punishment. An act of killing committed accidentally (*casu*) was to remain without consequences. However, the subsequent centuries brought about a departure from this concept. An expression of deep conviction that unintentional killing – even though committed without malicious intent – still deserves a punishment, albeit a milder one, can be found for instance in the sixth book of the *Decretum* by Burchard of Worms.[42]

This is why the judges adjudicating in such cases often had justifiable doubts whether perhaps by ruling a death sentence they commit a mortal sin themselves. It might have been exacerbated by the doubts regarding the accuracy of the judgement and the risk of sending an innocent person to death. "Those who believe that only those are murderers who kill with their own

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[36] Zdzisław Papierkowski, "Wina jako problem prawa karnego," *Zeszyty Naukowe KUL* 5, no. 2 (1962): 5.

[37] Myrcha, "Problem winy," 85.

[38] Makarewicz, *Wstęp*, 392.

[39] *Versanti in re illicita imputatur omnia, quae sequuntur ex delicto*. Quoted after: Myrcha, "Problem winy," 83.

[40] Collected sources by: Myrcha, "Problem winy," 87–90.

[41] Myrcha, "Problem winy," 94.

[42] For further notes on this subject, see: Austin, *Shaping Church Law*, 166 sq.

hands and not those who might advise, deceive or encourage the end of somebody's life deceive themselves in a very risky manner." We can read those words in the above-mentioned *Decretum* by Burchard of Worms.[43] The doubts of the judges could be mitigated to some degree by resorting to the practice of trial by ordeal. However, *ordalia* would not bring answers to all the questions. In fact, the problem was not new. Even though Saint Ambrose would exclude from the communion of the faithful anyone who passed death sentences or ordered tortures, still, as it were, Saint Jerome took an entirely different stance: "The punishment of murderers, blasphemers and poisoners is not a spilling of blood, but a service to the law."[44] Saint Augustine would second him in the above-mentioned fragment: "When a man is killed in accordance with the law, it is the law that deprives him of life, not you."[45] The opinion of the Father of Church was widely used in the process of calming down the consciences of medieval judges. It was due to an accident that it was placed near the fragment devoted to the weapon "slipping" from the hand.

A New Life of the Metaphor

The concepts of Saint Augustine, including the one referring to the intentional responsibility for the committed act, had a significant influence on the development of European law. However, the metaphor with the weapon "slipping" from the hand did not enter the early medieval penitentials or the documents published by the popes until the 12th century. As was already suggested above, penitential books do indeed raise the subject of differentiating responsibility for the intended and unintended sin. Nevertheless, a much more popular metaphor than the one with the "slipping" weapon is the story of two brothers cutting down a tree: "If two brothers are cutting down a tree in a forest and noticing a falling tree one brother shouts to the other 'watch out!' and if the latter attempting to escape, nevertheless dies under the trunk of the fallen tree, the one who survived is not guilty of his brother's death."[46]

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[43] Burchardus Wormatiensis, *Decretum* 6.31: *Periculose se decipiunt, qui existimant eos tantum homicidas esse qui manibus hominem occidunt, et nonpotius eos per quorum consilium et fraudem et exhortationem homines extinguntur.*

[44] Hieronymus Stridonensis, *Commentarii in Hieremiam prophetam* 4.35: *Homicidas enim et sacrilegos et venenarios punire non est effusio sanguinis, sed legum ministerium.*

[45] Augustinus Hipponensis, *De libero arbitrio* 1.4: *Cum homo iuste occiditur, lex eum occidit, non tu.*

[46] See: *Concilii Triburiensi can. 18*: *Si duo fratres in silva arbores succiderint et appropinquante caesura unius arboris frater fratri, cave, dixerit, et ille fugiens in pressuram arboris*

It also happens that in the penitentials there is mention of objects which, when dropped or thrown away may contribute to somebody's death. In the 9th-century collection *Valicellanum II* one can find a distinction between seven types of killings committed without premeditation. One of them is the following: "Sixth, if somebody threw a stone or shot an arrow at a wild animal, bird or something similar, and as a result brought harm onto a human being, he is to atone for it for one year by living merely on bread and water, as the accident was the result of a chance."[47] A similar theme appears in another penitential book – *Poenitentiale Arundel* – (written shortly after 895). Its canon ten stipulates a yearly atonement for a person who "while performing work, kills a man by slipping a tool from his hand."[48] The problem returns in *Valicellanum III*: "If somebody kills a man by accident and without any malicious intent, as it often happens during hunting, where a human being dies instead of an animal; or during shows, when somebody throws a stone or some other hard object to show off, and it kills a man ricocheting; or as it oftentimes happens when felling down trees when an axe or other iron tip detaches from the handle and kills a man [...]"[49]

In the abovementioned examples, even though the problem concerns responsibility for an unintentional act, it is hard to find any semantic parallel with the formula established within the framework of ancient Roman law. In this matter, canon law let itself be overtaken by lay compilations. The first legal act which contains an indirect reference to the concept of Saint Augustine and, as a consequence, to the Law of the Twelve Tables, is *lex Frisionum*. It was written down after a Frisian tribe was conquered by Charles the Great in the year 758.[50] A lot of attention is devoted in the law to the responsibility for killing and causing injury, while taking into account the status of both the perpetrator and the victim. One of its provisions states the following: "If

inciderit et mortuus fuerit, vivens frater innocens de sanguine germanii diiudicetur. Cf. Stephan Kuttner, *Kanonistische Schuldlehre von Gratian bis auf die Dekretalen Gregors IX: Systematisch auf Grund der handschriftlichen Quellen dargestellt* (Città del Vaticano: Biblioteca Apostolica Vaticana, 1935), 202, 206, 214.

[47] *Poenitentiale Valicellanum* II*, can.* 8: *Sextum cum quis forte ad bestiam aut avem vel aliquid simile lapidaverit vel sagitaverit, et exinde omnino improviso homo periclitaverit, factor eius I annum in pane et aqua peniteat eo, quod casu hoc accidit periculum*.

[48] *Poenitentiale Arundel*, *can.* 10: *operi insistens instrumento de manus eius evanescente occiderit*.

[49] *Poenitentiale Valicellanum* III, *De homicidio casu*: *Si quis casu et nulla animi affectione homicidium perpetraverit, sicut saepe accidit in venatione, ubi homo pro fera occiditur et in ludis, dum quis petram sive aliquod diacolium dirigit ad signum et inde resiliens hominem perimit; saepe etiam accidit in incendendis arboribus ut securis sive quod libet ferrum de manubrio fugiens hominem interficiat*.

[50] For further considerations, see: Nikolaas E. Algra, "The *Lex Frisionum*. The Genesis of a Legalized Life," in *The Law's Beginnings*, ed. Ferdinand J.M. Feldbrugge (Leiden-Boston: Brill 2003), 77–92.

somebody who is *holding a weapon in his hand* causes injury to the other by accident against his will, he is to pay a standard amount corresponding to the type of the injury."[51] The phrase *telum manu tenens* constitutes a rather obvious reference to the ancient Roman formulas, which is indeed further underscored in the commentaries to the act.[52] In spite of the fact that there is no mention of the weapon "slipping" from the hand, it is hard not to have such an impression since the provision under discussion, albeit not devoted to unintentional killing, still focuses on the issue of the perpetrator's liability for a tort or delict committed without premeditation.[53]

Augustine's and, in fact, Roman concept was used in a more complete way in the law established in England by the son of William the Conqueror, Henry I, in the year 1051. One can find there a chapter entitled "Definition of homicide" in which we read: "Homicide is committed in different ways and there is a great variety with regard to both motives as well as perpetrators. Sometimes the killing is done because of greed or in an instantaneous conflict, sometimes under the influence of alcohol or at somebody's order, but also in self-defence and while administering justice which is what the blessed Augustine remembers in the following words: 'If *homicidium* denotes the killing of man, it may be sometimes committed without a sin. Indeed, a soldier killing his enemy and a judge or his subordinate killing a criminal and *he who, against his will and due to carelessness lets his weapon slip from his hand* – does not seem, in my opinion, to be committing a sin in killing a human being.'"[54] The legislator included a fragment of the treatise *On Free Will* into his regulation almost *verbatim*. While enumerating the perpetrators of killings which were committed unintentionally, he disregarded the judge's assistant.

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[51] *Lex Frisionum* 20.69: *Si homo quislibet telum manu tenens, et ipsum casu quolibet inciderit super alium, extra voluntatem ejus, qui illud manu tenet, in simplo juxta qualitatem vulneris componatur.*

[52] See, e.g.: *Lex Frisionum sive antiquae Frisiorum leges a reliquis veterum Germanorum legibus separatim editae et notis illustratae*, ed. Sibrandus Siccama and Carl Wilhelm Gaertner (Lipsiae: Lipsiae: Impensis Haered. Lanckisianorum, 1730), 130–131. On the topic of the influences of the Church legislature on the *lex Frisionum*, see: Algra, "The *Lex Frisionum*," 83.

[53] Wilhelm Eduard Wilda, *Geschichte des deutschen Strafrechts: das Strafrecht der Germanen* (Halle: Schwetschke, 1842), 547.

[54] *Homicidium fit multis modis, multaque distancia in eo est, in causa, et in personis. Aliquando etiam fit per cupiditatem, vel contencionem temporalium, fit etiam per ebrietatem, fit per jussionem alicujus, fit etiam pro defensione et justicia de quibus ita meminit beatus Augustinus: "si homicidium est hominem occidere, potest aliquando accidere sine peccato; nam miles hostem, et iudex nocentem, et cui forte invito vel imprudenti telum manu fugit, non mihi videtur peccare, cum hominem occident."* Quoted after: Benjamin Thorpe, *Ancient Laws and Institutes of England*, Volume 1 (London: Printed Under the Direction of the Commissioners of the Public Records of the Kingdom, 1840), 577.

The Decretum Gratiani

Augustine's reflections from his treatise *On Free Will* were incorporated into his *Decretum* by Ivo of Chartes.[55] The real "career" of the phrase *telum manu fugit* began with the moment of writing the *Decretum Gratiani* around the year 1140.[56] Augustine's argument was included there in its entirety.[57] On its basis, medieval canon law succeeded in building a coherent doctrine on situations in which responsibility for the death of a person managed to be removed from the perpetrator and transferred to another object.[58]

It is worth reminding here that the *Decretum* also adopted the Augustinian concept of sin: "sin means restraining oneself or achieving something, which is forbidden by justice."[59] Moreover, Augustine is the author of a definition of crime that was exceptionally popular in the Middle Ages: "crime is a mortal sin, deserving accusation and punishment by all means."[60] The relation between

[55] Szabolcs Anzelm Szuromi, "Some Witnesses on the Gradual Evolution of the Ivonian Textual Families," *Ius Canonicum* 50 (2010): 209: "St. Augustine's basic philosophical work *On Free Will* was written between 391 and 395, and it became one of the most important sources for many medieval canonical collections because its clear conception of morality, conscience, and law could substantiate the disciplinary argumentation of the Church. Among such collections, we can mention the Ivonian *Decretum*, which quotes long passages of this Augustinian work."

[56] On the subject of dating the collection, see: Gérard Fransen, "La date du Décret de Gratien,*" Revue d'histoire ecclésiastique* 51 (1956): 521–531. See also: Anders Winroth, *The Making of Gratian's Decretum* (Cambridge: Cambridge University Press, 2000). Some remarks on the subjective side of the crime in *Decretum Gratiani*: Wacław Uruszczak, "Podmiotowa strona przestępstwa w Dekrecie Gracjana (1140). Przyczynek do genezy zasady: *nullum crimen sine culpa*," in *Opera historico-iuridica selecta. Prawo kanoniczne – nauka prawa – prawo wyznaniowe*, ed. Krzysztof Fokt, Kacper Górski, Anna Karabowicz, Grzegorz Kowalski, Katarzyna Krzysztofek, Izabela Lewandowska-Malec, Jakob Maziarz, Maciej Mikuła, Władysław Pęksa, Jakub Pokoj, Marek Strzała, Piotr Suski, Jacek Wilk, and Zdzisław Zarzycki (Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego, 2017), 471–480.

[57] *Decretum Gratianii* C.23. q.5. c. 41*: Si homicidium est hominem occidere, potest accidere aliquando sine peccato. Nam et miles hostem, et iudex vel minister eius nocentem, et cui forte invito atque inprudenti telum manu fugit, non mihi videntur peccare, cum hominum occidunt. Sed nec etiam homicidae isti apellari solent. Item in questionibus Levitici: Cum homo iuste occiditur, lex eum occidit, non tu*. For further notes on the components of the *Decretum* see: Jean Gaudemet, "Les sources du Décret de Gratien," *Revue de droit canonique* 48, no. 2 (1998): 247–261.

[58] Cf.: Sara Menzinger, "Finzioni dei canoni. Natura, realtà e finzione nella canonistica del XII secolo," *Reti medievali* 21, no. 1 (2020): 225–226.

[59] Augustinus Hipponensis: *Retractationes* 1.15: *Peccatum est voluntas retinendi vel consequendi quod iustitia vetat*.

[60] Augustinus Hipponensis: *Tractatus in Evangelium Ioannis* 41.9: *Crimen est autem peccatum grave, accusatione et damnatione dignissimum*.

sin and crime was a very close one. Each crime was a sin even though not every sin was qualified as crime.[61] Treatises devoted to moral responsibility for sin were often copied and used in the line of jurisprudence of criminal courts. While incorporating the extract devoted to the "slipping" weapon into the *Decretum*, medieval canonists understood the term *peccatum* in a different way than the Father of the Church.

It is significant that the Gratian's *Decretum* contains a faithfully cited fragment of the Augustinian treatise. It is well known that, following in the footsteps of the Justinian codifiers, also the creator(s) of the *Decretum* took the liberty to include more or less significant editorial corrections.[62] From today's perspective, leaving in the text a rather vague metaphor devoted to a "slipping" weapon might raise doubts. It seems it would have been much more rational to resort to the terminological apparatus offered by, for instance, penitential books, where the terms concerning the intended and unintended criminal actions are used in a much greater general sense. As Marian A. Myrcha observes: "Penitentials differentiate between intentional crimes (*voluntaria*) and unintentional ones (*non voluntaria*). To describe the former, the following terms are used: *de industria, sponte, animi affectione*; the latter are described with the following words: *non de industria, non sponte, nulla animi affectione, ignoranter, casu*."[63]

Scholars of the *Decretum* devoted a lot of space to the relations between free will, sin and responsibility. A weapon which "slips" from the hand was not a subject of any extensive studies, but since this motif made its way into the *Decretum*, it should have been responded to. Bernard of Pavia postulated in his *Summa* to thoroughly investigate whether the perpetrator committed the killing during the performance of his duties and whether he made sufficient effort to act with due diligence. If so, he should be found not guilty and should be freed. If the opposite was the case, he should be convicted. The author supported his argumentation with the following rhyme:

> *Si licitus, cautus, non est culpabilis actus.*
> *In reliquis culpam reor et pro crimine mulctam.*

Right after that, Bernard concisely referred to the appropriate section of the *Decretum Gratiani*: "Just as in the case of other circumstances, somebody who against his will and due to carelessness lets a weapon slip from his hand and

[61] For an extensive study on the subject: Marian A. Myrcha, "Problem grzechu w karnym ustawodawstwie kanonicznym," *Prawo Kanoniczne* 14, no. 3–4 (1971): 43–80.

[62] See, e.g.: Peter Landau, "*Gratian und Dionysius Exiguus. Ein Beitrag zur kanonischen Interpolationenkritik*," *Studia Gratiana* 27 (1996): 271–284.

[63] Myrcha, "Problem winy," 87.

kill another man, should not be blamed for the act, as is stated under C.23 q.5 *Si homicidium*."[64]

Considerations on the subject of responsibility for an unintentional crime took on particular significance after 1215 in which the provisions of the Lateran Council IV entered into force. One of the rules was a prohibition from participating in trials by ordeal (or blessing them), which was imposed on the clergy.[65] Thus, a situation was created in which it was not God – as until then – but the judge who took upon himself the full moral responsibility for the issued judgement. Augustine's theory, in accordance with which in certain circumstances a soldier, judge and his assistant, as well as someone who puts the other to death without premeditation, do not commit a sin (*peccatum*), found a broad application in the jurisprudence of the European tribunals. Although for the judges adjudicating in criminal cases it was essential to avoid sin and protect the salvation of the soul, the term *peccatum*, as pointed out above, was still associated with a crime in a criminal sense.[66] At the same time, the *Decretum* stated that it was not committed by the one who "who, against his will and due to carelessness lets his weapon slip from his hand," and when a "man is killed in accordance with the law, it is the law that deprives him of life, not you."[67]

It may come as a surprise that the Augustinian excerpt was not literally incorporated into the work which exerted a massive impact on the shaping of the intellectual landscape of the medieval period, namely on Saint Thomas Aquinas's *Summa Theologiae*, even though the Doctor of the Church is wondering in his text whether "somebody who kills a man by accident brings upon himself liability for the crime of homicide" (*Utrum aliquis causaliter occidens hominem incurrat homicidii reatum*).[68] However, the "slipping" weapon appears in the commentaries to the *Summa Theologiae*. The author of one of them is Italian Dominican Antonin Pierozzi.[69]

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[64] Bernardus Papiensis, *Summa decretalium* 5.10.§5: *Item si sine ullo opere alicui invito et imprudenti telum manu fugit et alium peremit non est ei imputandum, ut C. XXIII qu.5 Si homicidium*. Quoted after: *Bernardi Papiensis Summa Decretalium ad librorum manuscriptorum fidem cum aliis eiusdem scriptoris anecdotis* (Ratisbonae: Apud G. Iosephum Manz, 1860), 222. A summary of Bernard's views on the issue of criminal liability for manslaughter: Krzysztof Burczak, *Quinque compilations antiquae przykładem systematyki oraz współpracy ustawodawcy, sądów i uniwersytetu* (Lublin: Wydawnictwo KUL, 2020), 373–378.

[65] For an extensive study on the topic, see: Whitman, *The Origins*, 52–90.

[66] A similar phenomenon can be observed in the late-antique Roman legal texts, especially in the *Theodosian Code*. See: Emilio Albertario, *Delictum e crimen nel diritto romano classico e nella legislazione giustinianea* (Milano: Vita e pensiero, 1924), 9; Theodor Mommsen, *Römisches Strafrecht* (Berlin: Duncker & Humblot, 1899), 9, footnote 4.

[67] Whitman, *The Origins*, 112.

[68] *Summa Theologiae* 2a2ae. 64.8.

[69] *Antonini archiepiscopi Florentini ordinis praedicatorum Summa Theologica in quatuor partes distribute*. vol. 2 (Veronae: Apud Augustinum Carattonium, 1740), 861.

Neither did the antique formula find its place in the *Decretals* of Gregory IX, promulgated on 5 August 1234. As was the case with the above-mentioned *Summa*, a reference to it appears in the commentary which was drafted in the 17th century by Emanuel Gonzales Tellez. While discussing Chapter V of the *Decretals*, to Title XII *De homicidio* (*caput* XI), the author makes a reference to the fragment of Gratian's *Decretum*, as well as to the Law of the Twelve Tables. This commentary was made with exceptional care, as it includes references to Cicero, Boethius and Cujas. The argument ends with the following conclusion: "Naturally, in the case of an unintentional homicide perpetrated without premeditation, such a heavy punishment as not allowing one to be ordained should not be imposed."[70]

Conclusion

The considerations devoted to the weapon which "slipped" from the hand had a significant impact on the crystallization of the learning on the subject of guilt and criminal liability. Canon law played a crucial role here.[71] As James Q. Whitman rightly points out: "canon law is the law of the Church, but it is not merely limited to the matters of the Church. It is a legal construct, which is intended to bring all areas of life under its jurisprudence."[72] This apparently insignificant fragment of Saint Augustine's writings saved the old Roman concept from oblivion and endowed it with a new meaning. Theoreticians of law were left behind in this respect. Neither will we find in-depth considerations on the subject of the "slipping weapon" in the writings of glossators. This is understandable, since it was possible to reconstruct the specific provision of the Law of the Twelve Tables not on the grounds of *Corpus Iuris Civilis*, but on the basis of Cicero's and Servius's writings. Still, it came under scrutiny only in the times of the Renaissance. Such renowned Romanist scholars as, for instance Cujas,[73]

[70] Emanuelis Gonzalez Tellez, *Commentaria perpetua in singulos textus quinque librorum Decretalium Gregorii IX*. vol. 4 (Venetiis: Apud Haeredes Balleonios, 1766), 165: *Igitur ob homicidium causale, et involuntarium comissae non debet tam gravis poena, irregularitatis videlicet, imponi*.

[71] Makarewicz, *Wstęp*, 120: "The fact that the *jus canonicum* was in force for a thousand years as a self-contained source of law remains uncomfortable for those who believe the state to be the only source of law."

[72] Whitman, *The Origins*, 46.

[73] Jacques Cujaccius, *Opera ad parisiensem Fabrotianam editionem*. vol. 1 (Prati: Giachetii, 1836), 850.

Godefroy[74] or Grotius[75] took a stance on the subject of this ancient regulation basing their opinions on the findings made by Augustine and the canonists.

Gratian's *Decretum* was included in the *Corpus Iuris Canonici*.[76] The provisions contained in this collection, including the regulation concerning unintentional homicide, once illustrated by Augustine with the antique phrase *telum manu fugit*, remained in force until the year 1918, when it was replaced with the first Code of Canon Law.[77]

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[74] Jacobi Gothofredus, *Opera juridico minora sive libelli, tractatus, orationes et opuscula rariora et praestantiora, quibus continentur selectae, non modo in jure, sed et omni antiquitate Romana et Graeca, jus antiquum inlustrante, materiae* (Lugduni Batavorum: Apud Ioh. Arnold. Langerak, 1733), 1020.

[75] Hugo Grotius, *De jure belli ac pacis libri tres in quibus jus naturae gentium, item iuris publici praecipua explicantur*, vol. 1 (Amstelaedami 1735), 726.

[76] Peter Landau, "Gratian and Decretum Gratiani," in *The History of Medieval Canon Law in the Classical Period, 1140–1234: From Gratian to the Decretals of Pope Gregory IX*, ed. Wilfried Hartmann and Kenneth Pennington (Washington: Catholic University of America Press, 2008), 23.

[77] It was promulgated under a bull decree by Pope Benedict XV *Providentissima Mater Ecclesia*, which entered into force on 19 May 1918.

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Telum manu fugiens und unvorsätzlicher Mord im mittelalterlichen kanonischen Recht

Schlüsselwörter: Schuld, *culpa*, *casus*, Römisches Recht, kanonisches Recht, *Decretum Gratiani*

Zusammenfassung: Den mittelalterlichen Juristen gelang es, die ersten Versuche zu unternehmen, die es dann ermöglichten die Schuldgrade wie folgt zu ordnen: *dolus – culpa – casus*. Das römische Recht behandelte Fälle von unbeabsichtigten Straftaten in einer beschreibenden Weise. Im Falle des Totschlags wurde eine Waffe beschrieben, die jemandem aus der Hand gerutscht war und den Tod verursacht hatte. Eine Regelung dieser Art war bereits im Zwölftafelgesetz enthalten. Der Topos von einer Waffe, die die einem Menschen von selbst aus der Hand gleitet, wurde auch von frühchristlichen Schriftstellern verwendet. Von dort fand er seinen Weg in die mittelalterlichen Kompilationen des kanonischen Rechts.

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Telum manu fugiens and Involuntary Homicide in Medieval Canon Law

Keywords: guilt, *culpa*, *casus*, Roman law, canon law, *Decretum Gratiani*

Summary: Medieval jurists succeeded in making the first attempts, which then made it possible to rank the degrees of guilt as follows: *dolus – culpa – casus*. Roman law addressed cases of unintentional crimes in a descriptive manner. For the manslaughter situation, they used the description of a weapon that escaped someone's hand on its own and caused a someone's death. A regulation of this kind has already appeared in the Law of the XII Tables. The topos of a weapon that itself escapes from a man's hand was also used by early Christian writers. From there it made its way into medieval compilations of canon law.

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Telum manu fugiens i zabójstwo bez premedytacji w średniowiecznym prawie kanonicznym

Słowa kluczowe: wina, *culpa*, *casus*, prawo rzymskie, prawo kanoniczne, *Decretum Gratiani*

Streszczenie: Średniowiecznym jurystom udało się podjąć pierwsze próby, które następnie umożliwiły uporządkowanie stopni winy w następujący sposób: *dolus* – *culpa* – *casus*. Prawo rzymskie traktowało przypadki przestępstw nieumyślnych w sposób opisowy. W przypadku nieumyślnego zabójstwa opisywano broń, która wyślizgnęła się komuś z ręki i spowodowała śmierć. Przepis tego rodzaju znajdował się już w Ustawie XII Tablic. Topos broni samoistnie wyślizgującej się z ręki był również używany przez pisarzy wczesnochrześcijańskich. Stamtąd trafił do średniowiecznych kompilacji prawa kanonicznego.