[H]JUDICIAL FINES AND IMPRISONMENT PENALTY IN ROMAN LAW

Prof. Dr. H. Gökçe TÜRKOĞLU[*]
Assoc. Prof. Dr. Burcu DÖNMEZ[**]

Abstract

This article examines the judicial fines and imprisonment penalty in ancient Rome. Studying Roman punitive sanctions may be considered as less important since human rights were not taken into consideration in this system and torture was legal in Roman law. But still it is clear that Roman criminal law had influence on modern legal systems. In order to practice criminal rules efficiently, punitive sanctions are brought due to the needs of the communities. Hence punitive sanctions change with time and place. In ancient Rome, judicial fines were commonly used. In the earliest days, judicial fines were to be paid by sheep or ox. Later, fixed judicial fines were demanded by civil actions granted by a praetor or by actions tried by tribunal and unfixed fines were decided by magistrate like pontifex, tribunus plebis or aedilis curulis. Unlike judicial fines, imprisonment penalty, especially in the early days, was not very common. Most of the prisoners in Rome led miserable lives. Human rights were not taken into consideration in Roman prisons. This article enlightens how punitive sanctions have developed in time according to the needs of the communities and how Roman criminal law rules had influence on modern legal systems.

Keywords

Capital penalties, Non capital penalties, Libera custadia, Imprisonment for debt, Multa, Carcer privatus

---

H Hakem incelemesinden geçmiştir.

* Yaşar Üniversitesi Hukuk Fakültesi, Roma Hukuku ve Hukuk Tarihi Anabilim Dalı Öğretim Üyesi (e-posta: halide.turkoglu@yasar.edu.tr) ORCID: https://orcid.org/0000-0003-2896-2204 Makalenin Geliş Tarihi: 26.03.2018) (Makalenin Hakemlere Gönderim Tarihleri: 28.03.2018-02.05.2018/Makale Kabul Tarihleri: 21.04.2018-11.05.2018)

** Yaşar Üniversitesi Hukuk Fakültesi, Ceza ve Ceza Muhakemesi Hukuku Anabilim Dalı Öğretim Üyesi (e-posta: burcu.donmez@yasar.edu.tr) ORCID: https://orcid.org/0000-0002-5600-2895 (Makalenin Geliş Tarihi: 26.03.2018) (Makalenin Hakemlere Gönderim Tarihleri: 28.03.2018-02.05.2018/Makale Kabul Tarihleri: 21.04.2018-11.05.2018)

ROMA HUKUKUNDA PARA VE HAPİS CEZALARI

Öz

Bu çalışmada, antik Roma'da geçerli olan para ve hapis cezaları incelenmektedir. Esasen Roma hukukunda uygulanan cezaları ve daha genel olarak, Roma ceza yargılama sistemini incelemek, Roma hukukunda insan haklarını kavramının çok da büyük önemi olmaması ve işkencenin Roma ceza hukukunda yasal olarak yerinin bulunmasından ötürü, değersiz gibi düşünülebilir. Ancak, Rona ceza hukukunun, modern hukuk sistemleri üzerinde etkisinin olduğu aşikardır. Cezai yaptırımları, ceza hukuku kurallarının etkin biçimde uygulanabilmesi için, geçerli oldukları toplumların ihtiyaçlarına göre belirlenir. Bu bakımdan cezai yaptırımlar zaman ve mekana göre değişikliklere uğrar. Roma devletinde, para cezaları sıklıkla uygulanmaktaydı. Hatta ilk dönemlerde, para cezaları koyun ya da öküz ile ödenmekteydi. İlerleyen zamanlarda ise, para cezalarına praetor tarafından tanınmış olan davalarda, ya da tribunal'ın gördüğü davalarda hükmedilmesi söz konusu olmuştur. Pontifex, tribunus plebis veya aedilis curulis gibi magistra'ların da para cezasına hükmetme yetkileri vardı. Para cezalarında farklı olarak, Roma'da özellikle de ilk dönemlerde, hapis cezası çok da yaygın değildi. Az sayıda olmakla birlikte, hapis cezasına çarptırılmış kişilerin büyük kısmı, insan haklarına dair hiç bir kural göz önünde bulundurulmadığından, son derece kötü şartlar altında, oldukça acınası hayatlar sürdürmekteydiler. Bu çalışma, cezai yaptırımların, uygulandıkları toplumların ihtiyaçlarına göre, nasıl zaman içinde geliştiğine ve Roma ceza hukuku kurallarının nasıl günümüz hukuk sistemlerine etki ettiğine ışık tutmaktadır.

Anahtar Kelimeler

Capital cezalar, Non capital cezalar, Libera custadia, Borç için hapis cezası, Multa, Carcer privatus

I. INTRODUCTION

Criminal law can be considered as one of the oldest law subjects in the history. Over time, crimes and penalties changed and developed. Needless to say that each community has arranged types of crime to conform with its culture and brought best fit sanctions to these crimes. Today modern criminal law system is based on the notion of both actus reus (the physical act) plus men's rea (the intent or lack thereof). The sanctions are arranged with a dual system that considers human dignity as its priority. This dual system consists of penalties and protection measures. A crime is any typical defective act or omission in violation of a public law forbidding or commanding it. According to its definition, a crime must be a typical, unlawful, defective act or omission, which is to be penalized. If the act or the omission is not defective, it cannot be penalized. The ones that are not defective come within the scope of protection measures. According to this, in order to put a penalty as a sanction, the act must be defective. Penalties have many types varying from country to country. Nevertheless, when we examine modern criminal law systems in principle, we see that many countries adopt judicial fines and imprisonment as penalty. Most countries have sought to abolish the death penalty. But in Roman times, the death penalty remained.

The aim of this study is to give brief information on both fines and imprisonment penalties in Roman law and to relate the effects of these sanctions to modern day penalties such as judicial fines and imprisonment penalty.

II. CLASSIFICATION OF CRIMES AND PENALTIES IN ROMAN LAW

Roman law underwent significant changes in time as it was carried out for centuries. These changes can be overviewed in the area of penalties because in Roman history different types of penalties like death, slavery (*servitus*), fines (*damnun* or *duplum*), infamy (*infamia*), stripes (*verbera*), retaliation (*talio*), bonds (*vincula*) andexile (*exilium*) were carried out. In addition, there were various methods of execution of the death penalty such as crucifixion, drowning, beating to death or even burning alive[1].

As Roman law had its real success in practice rather than in the area of theory, there is an absence of classification of crimes and penalties. However, some Roman lawyers managed to categorize some of the penalties for some crimes. Among these categorizations, the most important one is probably, the

---

[1] **Kayak**, S.: Roma Ceza Yargılama Hukukunda Sorgulama ve Cezalandırma Yöntemleri*, Prof. Dr. Belgin Erdoğmuş'a Armağan*, (2011), 177; C.L. Von Bar and Others, *A History of Continental Criminal Law,* Boston, 1916, 6.

categorization made by Claudius Saturninus. Claudius Saturninus, classified penalties according to their types and characteristics as follows:

- Penalties for the things that have been done;
- Penalties for the things that have been said;
- Penalties for the things that have been written and
- Penalties for the plans that have been made.

In addition, Saturninus analysed this quartet under seven subtitles as follows:

- Causa;
- Person;
- Place;
- Time;
- Quality;
- Quantity and
- Result[2].

Saturninus examined all these factors in details and made specific classifications. For example, under "quantity" subtitle, stealing only one pig was considered as different from horse theft[3]. In other words, in determining the type of the crime and its penalty, these factors played an important role.

Another classification of penalties was made by Callistratus. Callistratus, preferred considering harshness of the penalties while classifying the penalties and he gathered the penalties under two titles such as *capital* penalties and *non capital* penalties. This classification of Callistratus is mainly approved by Roman lawyers.

Death penalties, penalties that deprive of freedom (slavery) and penalties that deprive of Roman citizenship were considered as *capital* penalties. So,*poena capitalis* did not only mean death penalty. For example, penalties

---

2 **Aston**, W. D.: 'Problems of Roman Criminal Law', *Journal of the Society of Comparative Legislation* 13/2 (1913), 220.

3 D. 48.16.7 Claudius Saturninus libro singulari de poenis paganorum*"Quantitas discernit furem ab abigeo: nam qui unum suem subripuerit, ut fur coercebitur, qui gregem, ut abigeus."*; While Claudius Saturninus was forming these detailed analysis and distinctions, he didn't hesitate to refer different sources including literary works. For example while he was explaining the characteristic features of *iniura*, he quoted from Demosthenes and explained the consequences of negligently killing using the passages from Homerius. D. 48.16.6. pr. Paulus libro primo sententiarum "*Ab accusatione destitit, qui cum adversario suo de compositione eius criminis quod intendebat fuerit locutus"*. **Aston**, 220.

causing c*apitis deminutio maxima* or *capitis deminutio media*[4], were *capital* penalties according to Roman law[5]. Conviction of working in mines and deportation were *capital* penalties other than death penalty[6]. They are the examples of liberty binding penalties on the ground of labour and penalties that impose restrictions to freedom of travel.

Penalties apart from the above ones were considered as *non capital* penalties[7]. For example, penalties that affect convict's name or reputation (*existimatio*), loss of status, whipping were *noncapital* penalties according to Roman law[8].

In Roman criminal law death penalties were frequently used and executed by many different methods: Firstly, we can mention about *furca*. In this type of execution of death, the malefactor was tied to a dry wood and whipped to death (*summum supplicium*). Crucifixion (*crux*) and damnation to beasts (*damnatio ad bestias*) were popular methods of execution of death in Rome[9]. *Vivicombusitio* was execution of death by burning alive. Beheading (*percussion securi*), strangling in prison (*strangulatio*), throwing from the prison (*precipitation de robore*), throwing from the Tarpeian rock (*deiectio e rupe Tarpeia*), interdiction from water and fire (*aquae et ignis interdictio*) were other common executions of death in Roman law.

It should also be mentioned that, in Roman criminal law, penalties other than death penalty were not explained clearly and in details. The Roman legislators imposed many different penalties like *infamia*, prohibition of public services, restriction of suffrage, judicial fines, exile or confiscation on many different types of crimes.

---

4 *Capitis deminutio,* means diminishing in capacity to acquire rights. In other words, physical existence was continuing but legal existence was partly or completely removed. *Capitis deminitio maxima* means losing freedom, *capitis deminutio media* means losing citizenship, *capitis deminutio minima* means losing the status of being *sui iuris*. **Karadeniz-Çelebican**, Ö.: *Roma Hukuku Tarihi Giriş-Kaynaklar Genel Kavramlar- Kişiler Hukuku Hakların Korunması*, Ankara, 2014, 178.

5 Umur, Z.: *Roma Hukuku Lügatı,* İstanbul, 1975, 163.

6 **Garnsey**, P. and **Saller**, R.: *The Roman Empire: Economy, Society and Culture,* New York, 1987, 128.

7 D. 48.19.2 pr. Ulpianus libro 48 ad edictum "*Rei capitalis damnatum sic accipere debemus, ex qua causa damnato vel mors vel etiam civitatis amissio vel servitus contingit.";* **Aston**, 219.

8 D. 48.19.28 pr.; Callistratus libro sexto de cognitionibus *"Capitalium poenarum fere isti gradus sunt. Summum supplicium esse videtur ad furcam damnatio. Item vivi crematio: quod quamquam summi supplicii appellatione merito contineretur, tamen eo, quod postea id genus poenae adinventum est, posterius primo visum est. Item capitis amputatio. Deinde proxima morti poena metalli coercitio. Post deinde in insulam deportatio.";*PS. 5.23.1; PS 5.23.17; PS 5.25.1. This classification made by Callistratus has been verified in Sententiae.

9 Magicians were sentenced to fight with wild animals (*crux/damnatio ad bestias*). **Adkins**, L. and **Adkins**, R. A.: *Handbook to Life in Ancient Rome,* New York 2004, 211.

In this study, we are going to focus on judicial fines and prison penalty in Roman criminal law. So, other types of non capital penalties like scourging, retaliation, infamy, confiscation will not be examined here.

A. Judicial Fines

At the early stages of Roman criminal law, many types of crime were to be punished by fines. In fact, at those times, due to the difficulty in finding monetised coins, fines were paid by cattle.

The main rules on judicial fines in Roman criminal law were prepared under the influence of Greek law. Relating with this subject, it is possible to say that Greeks were one step ahead of the Romans. Before the Solonian Constitution dated c. 590 BC, Draco laid down the first written constitution of Athens called Draconian Constitution in 622 or 621 BC[10]. In Draconian Constitution, sheep and cattle were accepted as means of payment. One of the reforms that was advocated by Solon in Solonian Constitution, was to enable payment with coins, instead of sheep or cattle. Respecting the success of the Greeks in this field, the Romans sent three delegates to Athens to study the *Athenian* laws in 455 BC and according to the information gained in Athens, the Romans enacted *lex Aternia- Tarpeia*in 454 BC[11].

Before the enactment of *lex Aternia- Tarpeia*, judicial fines were to be paid by sheep or ox in Rome. But the highest fine was fixed at two sheep or thirty oxen[12]. For misconducts that were not excessive, the payment was made by two sheep and for excessive misconducts; the payment was made in thirty oxen (*multa suprema or maxima*)[13]. These kind of legal arrangements can be considered as the basis of the feature of certainty which is one of the most important elements of the principle of legality of crimes and penalties of modern criminal law systems. The requirement of all law to be clear, ascertainable and non- retrospective reached from Roman law to our current law systems[14].

---

10 Draconian laws were very harsh. They were said to have been written not in ink but in blood. Death was the penalty for almost all criminal offenses. Solon revised all statutes except that on homicide. With his revisions, Athenian laws became more humane. Solon's code underlined the Athenian laws until the end of 5th century. http://history-world.org/draco_ and_solon_laws.htm

11 **Crawford**, M. H.: *Coinage and Money Under the Roman Republic: Italy and the Mediterranean Economy*, London, 1985, 19.

12 There is no definite decision about the amount of the highest fine. Some authorities think it was two sheep or thirty oxen, while the others think it as two oxen and thirty sheep. Cic. De Rep II. 35; Dionys. X.50; Gell. XI.1; Festus, s. vv. Multam, Ovibus, Peculatus, **Niebuhr**, *History of Rome*, V. II, 300.

13 Cic. Rep 60.2-3; DH. 10.50; According to Aulus Gellius, the number of the sheep in Italy were less than the oxens so that sheep was more valuable than the oxen. G. NA 11.1

14 The famous Latin phrase "*Nullum crimen sine lege, nulla poena sine lege*", can be translated as "no crime nor punishment without law". This means that criminal liability and punishment

Just like in Greek criminal law, with *Lex Aternia-Tarpeia*, fines that were to be paid by sheep and cattle, could be paid by copper *asses* and with this progress, coins became the means of payment for the Romans[15].

Roman currency unit *aes* or *as* was stamped as copper bullion and over time, due to copper's decrease in value, different precious metals took its place. According to *Lex Aternia*, an ox worth 100 and a sheep worth 10 copper *as.* Later on, the amount of the fines were limited to 3020 *as* in Roman criminal law. The transfer to metal coins by means of payment was also supported by the Law of Twelve Tables (*Leges Duodecim Tabularum*). In the Law of Twelve Tables, it was decided that the payment of the fines should be made in copper or gold bullion[16].

In fact, when we compare the Romans with the other ancient Mediterranean civilizations, we see that the Romans used payment by cattle more than the others. We can even understand this by looking at the cattle figure stamped on the first Roman copper coin[17]. Because of such traditions, Roman society needed some legal regulations that supported the acceptance of coin as the real means of payment[18]. One of those legal regulations was *Lex Iulia-Papiria* which was enacted in 430 BC- approximately 20 years later than *Lex Aternia*. *Lex Iulia- Papiria* made payment in coins compulsory, while abrogating payment by cattle[19].

Fixed judicial fines which were called *poena* or *multa* were demanded by civil actions granted by a *praetor* or by actions tried by *tribunal* in *municipia*[20]. *Multa* demanded by a civil action, was to be paid to State treasury. The plaintiffs

---

must base upon a prior enactment of a prohibition which is expressed with precision and clarity. http://defensewiki.ibj.org/index.php/Legality_Principle

15 *Multa maxima (festus ad voc.)* or *multa suprema (Lex Acilia verse 45)* fines established by Plutarch. Firstly it was composed of two sheep and five cow then it was expanded to two sheep and thirty cows**. Mackenzie**, I.: *Studies in Roman Law with Comparative Views of the Laws of France, England &Scotland,* Edinburgh 1862, 352.

16 Another important reason for Romans to use coins was the need to pay the salaries of soldiers and expensive State costs. Greeks were using coins since 8th century B.C. They started to print banknotes in the last decade of 7th century **Scheidel**, B. C. W.: 'The Monetary Systems of the Han and Roman Empires', (Princeton/Stanford Working Papers in Classics), 2008, available online at: https://www.princeton.edu/~pswpc/pdfs/scheidel/020803.pdf

17 In the ancient times of Roman Law certain fines were arranged, then in the Republican period this system changed. Starting from that period, judges had judicial discretion while determining the amount of the fines. They were taking in to consideration of many things such as the quality of the committed crime and social statute of the offender. (*multa dicti-multa irrogatio*). D. 50.16.131; D. 50.16.244; **Thomsen**, R.: *Early Roman Coinage: A Study of the Chronology,* vol. I. (1957), 229.

18 **Harl**, K. W.: *Coinage in the Roman Economy, 300 B.C. to A.D. 700*, Baltimore and London, 1966, 17.

19 Actually, the real reason of the acceptance of this code was *censor*'s cruel punishments. **Harl**, 21.

20 D. 47.23.4.

of these actions were the representative anyone whose interests were affected. Because of this, the plaintiff could be a magistrate or an ordinary Roman citizen and such actions were called as *actio popularis*[21]. For example, in case of destruction of houses, the litigant of *actio popularis,* had to pay a fixed fine, if found guilty. Similarly, someone damaging graves could be sued by any Roman citizen and again the condemnation would be a fixed fine[22].*Actio popularis* could also be sued against people who violate the agrarian laws by changing the places of border stones. The condemnation, as stated above, would be a fixed fine paid to State treasure[23]. We must emphasize that the payment of fines to State treasury still continues.

Unfixed fines called *multa irrogatio* were decided by magistrate like *pontifex, tribunus plebis* or *aedilis curulis* according to their discretionary jurisdiction based on the related case. The most common reason for *multa irrogatio* was to punish someone who was found guilty of infringement of the sacred values in an action tried by *tribunus*[24]. Even though there was no fixed amount of payment, *multa irrogatio* did not mean that the judge was completely free to decide on the amount of the payment. Judges deciced on the amount of the payment according to their discretionary jurisdiction and these decisions were controlled and delimited by people's assembly thereafter. Hence, fines more than certain amount were always re-examined by people's assembly. The limit was sometimes accepted as half of the accused person's assets and sometimes as the highest amount of payment shown in the related law[25]. According to this, the only limitation that *magistra* had to face while deciding on the amount of the payment was not the re-examination of the people's assembly. Another limitation was the clause "*in sacrum iudicare*" that can be seen in some of the Roman codes. For example, a superior limit was brought to

---

21 It was accepted that public crimes interfere society. For this reason, they could be sued by the State or by any Roman citizen in person with the case named as *actiones populares*. **Koschaker**, P. & **Ayiter**, K.: *Modern Özel Hukuka Giriş Olarak Roma Özel Hukukunun Ana Hatları.* İzmir 1999, 257. For more information on *actiones populares* see Küçük, E.: *Roma Hukuku Davalar Sisteminde Actio Popularis*, Ankara, 2013.

22 In this case, it was accepted that there was *iudicium dabo.* If the *praetor* was expanding or fixing a pending case in Roman law then it would be correct to exercise the *actio* expression to describe these activities. But if it was a new case which did not exist in Roman Civil Law before, then it would be appropriate to call *praetor*'s activity as *iudicium dabo*. (Like *actio doli*. D. 4.3.1.1) **Buckland**, W. W. & **Stein**, P.: *A Text-Book of Roman Law from Augustus to Justinian,* UK 1963, 718; **Schiller**, A. A.: *Roman Law Mechanisms of Development,* New York, 1978, 412.

23 D. 47.21.3; The cases against Sulla Codes which was about *Tribunus*' *intercessio* were exercised by *praetor urbanus* and at the end of such cases, legal pecuniary penalty could be applied. Cic. Verr 1.60.155 "*multa petito est apud istum praetorum*".

24 **Von Bar**, 16.

25 **Strachan-Davidson**, J. L.: *Problems of the Roman Criminal Law,* Oxford, 1912, 179. See *provocatio adpopulum* part.

the punishment of leaving the property to Gods in the codes. The differentiation mainly grounded on the institution that received the fines. *Multa* was received by State Treasury while *in sacrum iudicatum,* was offered to the service of Gods or temples[26].

We can certainly notice that the modern Continental European legal system mainly follows the Roman law principles on judicial fines. The principle of clarity and definiteness, which is the main factor of the principle of legality, finds its sources in Roman law. Roman law and modern Continental European legal system, again match up with each other on the points like judicial fines being fixed or unfixed, unfixed fines being determined by the judicial discretion and the payment being accepted as an income of State Treasury. Furthermore, similarities can be found between the fines that were offered to the services of Gods or temples and the new alternative penal sanctions and institutions like settlement. For while reaching a settlement, with the request of the injured party and the acceptance of the defendant, a certain amount of money can be paid to a public body. As a conclusion, we can say that the judicial fines in Continental European legal system based on the legislative regulations about judicial fines made in the Roman world.

B. Imprisonment Penalty

Prisons in Rome were spaces either used to guarantee the defendant to appear in court on the trial day (*publica custodia*) or to execute the imprisonment[27]. But it should be kept in mind that the imprisonment penalty was not frequently used in ancient Rome. Because at the early periods of Rome, imprisonment was not accepted as a penalty in real terms[28]. It was considered as an administrative measure used to discipline people who do not obey the rules of the *magistra* during the Republic Period[29]. After the establishment of the Roman

---

[26] For example in the *lex Silia de ponderibus*, there is an expression as "*eum quis volet magistratus multare ….liceto, sive quis sacrum iudicare voluerit, liceto*". According to this, the properties of the ones who committed treason were expropriated *(publicatio*). These offenders were accepted as community enemies. In time, important alterations were made and it was accepted to serve *homo sacer*'s property to Gods. There was a similar provision in *Lex Valeria* 509 B.C. "*de sacrando cum bonis capite eius qui regni occupandi consilia inisset*". Due to the effects of secularism in Roman law, the exercise of this practice was diminished. **Von Bar,** 18.

[27] In D. 4.6.10 Ulpianus determined the ones who have right to catch and prison people. According to this, Roman soldiers, military stuff who were called *statores* and public officers who were responsible from public security had the right to capture the ones who did not adhere trials.

[28] D. 48.19.8.9 Ulpianus libro nono de officio proconsulis*" Solent praesides in carcere continendos damnare aut ut in vinculis contineantur: sed id eos facere non oportet. Nam huiusmodi poenae interdictae sunt: carcer enim ad continendos homines, non ad puniendos haberi debet."*

[29] **Kayak**, 180.

Empire and especially after conversion to Christianity, the application of imprisonment penalty became much more widespread[30].

In the early times of Roman law, a person who was accused of committing a crime, might be put in prison (*carcer*) until he appeared before the court. In order to prevent this, he had to guarantee that he would appear before the court on the trial day, when he denied the charges against himself. Because it was very likely in ancient Rome especially in the Empire period that the trial date was set at a later date[31]. Most of the time, to fulfil this guarantee requirement, a trustworthy Roman citizen had to come forward as a surety that the defendant would appear before the court on the trial day[32]. When no surety was provided or when law does not accept providing a surety, the defendant would be put in prison in order to guarantee his appearance before the court. But even under circumstances where no surety was accepted by law, there was a chance for the defendant to escape from being kept in prison. This was called *libera custadia* and it simply meant to put the defendant under the responsibility of a high-ranking *magistra*. Thus, the high-ranking *magistra* guaranteed the defendant's appearance before the court, according to *libera custadia*[33]. This type of imprisonment in Roman law might correspond to the detention of a person as a measure of precaution at the present time. Indeed, contemporary criminal procedure law applies detention as the last option and tries to reach the goals of detention by alternative options like release on bail, probation or parole, international travel ban[34]. So it would not be too assertive to say that all these practises find their roots from Roman law.

We can find some primitive regulations on imprisonment penalty in the Law of Twelve Tables and in the Digest[35]. As mentioned above these

---

30 **Mackenzie**, 352.

31 Latency for trail (for impeached person) was long. The principle of reasonableness of the length of the proceedings was not accepted as a rule in Roman criminal law. Especially on the trials about political crimes, high ranking people were tried after months or a year of their seizure. **Abbott**, F. F.: *A History and Description of Roman Political Institutions,* Boston, 1901, 250.

32 Both criminal and civil courts were exercising this process. If it was impossible for the summoned person to appear before the court on the designated date, then he had to appoint someone as his guarantor. This guarantor was called *vindex*. In the early times, *vindex* and the summoned person had to be in the same *gens* which meant that there had to be a legal connection between them. But later, this rule was abandoned and any honest trustworthy Roman could act as a *vindex.* **Karadeniz-Çelebican**, 314.

33 **Karadeniz-Çelebican**, 314.

34 **Yenisey**, F. & **Nuhoğlu**, A.: *Ceza Muhakemesi Hukuku*, Ankara, 2017, 366; **Centel**, N. & **Zafer**, H.: *Ceza Muhakemesi Hukuku,* Istanbul, 2015, 415; **Öztürk**, B. and **others**, *Nazari ve Uygulamalı Ceza Muhakemesi Hukuku*, Ankara, 2015, 483.

35 **Millar**, F.: 'Condemnation to Hard Labour in the Roman Empire, from the Julio-Claudians to Constantine', in H. M. Cotton and G. M. Rogers eds, *Rome, the Greek World and the East Society and Culture in the Roman Empire*, North Carolina, 2004, 130.

regulations did not cover the exact imprisonment penalty of today. On the contrary they were about execution against a debtor's body (*secare partis* –a practice in the first days of ancient Rome)[36]; enchainment punishment mainly inflicted to slaves (*vincula publica*) and hard labour punishments like life time labour in a mine or quarry[37]. Slaves and members of lower classes of Roman society were kept in prison camps when sentenced to hard labour punishments[38]. In Roman law, prison penalty also used as a private law sanction by creditors. In such cases, imprisonment ended when the obligation was fulfilled.

With the enlightment movement beginning in the late 1700's, Europe started to combat against the punishment of imprisonment for not fulfilling contractual obligation. Towards the end of the 18. Century, Austrian laws allowed the punishment of imprisonment on the ground of inability to fulfil a contractual obligation only under very limited circumstances. In Italy at that same time, law stated that, if debtor had transferred all his property voluntarily to his creditors (*cessio bonorum*)[39], he could not be sentenced to imprisonment. In France, after French Revolution, the punishment of imprisonment for not fulfilling contractual obligation was abrogated in 1793, but in 1997 it was applied again for some specific circumstances. Shortly, it was in the second half of the 19. Century that Continental Europe abandoned the prison penalty on the ground of inability to fulfil a contractual obligation[40].

Since Turkey enacted its Bankruptcy and Enforcement Law in 1929 (mainly by adopting Switzerland Federal Bankruptcy and Enforcement Law) the imprisonment punishment for not fulfilling contractual obligations no longer

---

36 The creditor could be capable of seizing the debtor who did not pay his debt and he could declare this debtor as his slave. Personal execution was exposed to the ones who were attached to their creditor by a *nexum* contract and to the ones whose debts finalized by a court decision *(addicti*). If a *nexal* debtor did not fulfil his obligation arising from *nexum* in time, there was no need for a court decision. The creditor could seize the debtor directly. **Türkoğlu Özdemir**, G.: 'Roma İcra Hukuku'*,Gazi Üniversitesi Hukuk Fakültesi Dergisi,* vol.VIII, 1-2, (2004), 132; **Karadeniz**, Ö.: *Iustinianus Zamanına Kadar Roma'da İş İlişkileri,* Ankara, 1976, 69. For more information on *nexum* see, **Atak**, A. S.: Roma Hukukunda Tüketim Ödüncü Sözleşmesi (Karz-MutuumUnpublished Doctorate Thesis, Dokuz Eylül Unv. Sosyal Bilimler Inst., Izmir, 2014.

37 **Peters**, E. M.: 'Prison before the Prison: The Ancient and Medieval Worlds',in Morris N and Rothman DJ eds., *The Oxford History of the Prison: The Practice of Punishment in West Society*, New York and Oxford, 1998, 14.

38 Gladiator schools can be given as an example to these camps. **Millar***,* 123.

39 Under *cessio bonorum*, debtors transferred all their properties to their creditors regardless of the amount of their debts. But such a transfer could avoid personal execution. **Umur**, *Roma Hukuku Lügatı*, 36.

40 **Murdock**, J.: *The Treatment of Prisoners European Standards,* Strasbourg, 2006, 203. In Ireland, imprisonment for debt was abolished by the Ireland Debtors Act (1872) and in Scotland by the Scotland Debtors Act (1880). Imprisonment for debt was abolished in England by the Debtors Act 1869, except in cases of default of payment of penalties, default by trustees or solicitors and certain other cases.

exists in Turkey. This is in alignment with other modern legal systems[41]. Nonetheless, it is still possible for a debtor who does not fulfil his contractual obligations to be exposed to some sanctions. For example, under Turkish Bankruptcy and Enforcement Law Article 76, someone who deliberately lies and perjures himself by not declaring all his property can still be sentenced to prison[42]. According to the annex added by the law No 4709 in 03. 10. 2001 to the sub-article of Turkish Constitution Article 15; imprisonment on the ground of inability to fulfil a contractual obligation is restricted. Until this change, in order to cause the fulfilment of a debt, it was possible to sentence people who do not declare their property, to ten-day imprisonment. Under European Convention on Human Rights Protocol No. 4 Article 1 "No one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation". Turkey supplemented exactly the same rule to its Constitution. However, this amendment increased the number of bounced check use in time; and infringed the public and economic order. Then the legislator made an amendment to fix this corruption and on the 15th day of August, 2016, made a new code of amendment called numbered code 6728. Within this code 'arranging bounced check' became an offence again. It regulated fines as a penalty, but also provided the possibility of turning unpaid fines into an offence punishable by imprisonment up to five years.

Now back to Roman law. According to the rules of execution that could be found on the third table of Law of Twelve Tables (450 BC.), for pecuniary debts finalized by court orders (*iudicatus*) or accepted by debtors before the *magistra* (*confensus*), debtors were given thirty days' time in which to pay their debts. At the end of this time, condemned debtors who did not pay their debts were captured (*manus iniectio*) and brought before the *magistra* (*in ius ducere*). If the debtor did not pay his debt at this stage or if the *vindex* did not undertake to pay the debtor's debt or if he did not object (*manum depellere*) and defend the debtor, then it was compulsory to hand the debtor in to his creditor (*addictio*). With this handing in took place, not only the debtor himself, but also his whole asset passed to the creditor[43]. Rich, noble Romans owned private prisons next to their houses[44]. So, the creditor could imprison the debtor who was enchained with a chain weighing at the most fifteen *libra* (approximately 7.5 kilograms), in his private prison (*carcer privatus*)[45]. The imprisoned debtor could survive in this prison with his own facilities. If this was not possible, then the creditor had

---

41 **Pekcanıtez**, H. & **Atalay**, O. & **Sungurtekin**, M. Ö.: *İcra ve İflas Hukuku Ders Kitabı,* Ankara, 2015, 42.

42 Also see Turkish Bankruptcy and Enforcement Law Article 332 & Article 343.

43 **Tahiroğlu**, B. & **Erdoğmuş**, B.: *Roma Hukuku Dersleri*, *Tarihi Giriş, Hukuk Tarihi, Genel Kavramlar, Usul Hukuku,* İstanbul, 2009, 16.

44 C.Th. 9.11.1; C.Iust. 9.5.

45 **Umur**, *Roma Hukuku Lugatı*, 17

to give him everyday at least one libra of flour. Such imprisonments could last for 60 days at most. In the meantime, the creditor must bring the debtor to the marketplace for three times and must declare his indebtedness. After all this, if the debtor himself or someone else did not pay the debt, it was possible the the creditor to kill the debtor or sell him as a slave on the other side of river Tiber (*transtiberium*)[46]. As can be understood, this regulation cannot be considered within the criminal law. Here, there is an imprisonment that serves to the payment of the debt. In other words, this type of imprisonment coerced the debtor into paying.

Even though, enchainment (*vincula publica*) was mainly practiced to slaves[47], in reality, most of the prisoners were kept enchained in prisons in Roma[48]. Enchainment punishment could be practiced for a specific or for an indefinite period of time (*perpetua vincula*). However, enchaining free men who were born free (*ingenui*) for an indefinite period of time was not accepted in Roman law[49]. Prison conditions in ancient Rome cannot be compared with the present day. Needless to say that imprisonment in Roman dungeons posed health risks and nothing like basic human rights that we take for granted today (such as habeas corpus and right to a prompt trial without delay) did not exist for the majority of prisoners. For these reason, the imprisonment penalty in Rome turned out for many to be a lengthened death penalty. Because many prisoners could not stand the circumstances in those prisons and dungeons and died in a short time. In short, the imprisonment penalty in Rome was not aimed at any sort of rehabilitation and reintegration of the prisoners.

While there was not a legal difference between the conditions of the prisoners and the arrestees in Roman prisons, in reality prisoners lived under completely different conditions in prisons and dungeons. Some prisoners led miserable lives and they were belittled all the time while the others enjoyed a luxurious and comfortable prison life[50].

It was very common in Rome to keep prisoners in dungeons that were underground. While most of the dungeons were big enough for only one person

---

46 Trading a Roman citizen as a slave in the territory of Rome was prohibited under Roman law. That was why creditors sold their debtors on the other side of Tiber. According to Twelve Table Law, if the number of the creditors of the debtor were more than one, then they had right to divide the body of the debtor into pieces. **Buckland & Stein**, 170.

47 **Millar**, 131.

48 Sometimes the prisoners were bribing officials for not to be enchained. D. 48.3.8.

49 D.48.19.35.

50 While Perdeus Macedon, a war prisoner was kept in dirty and crowded dungeon of Alba Fucens, another war prisoner, son of Tigranes was treated like a guest. He went to home parties of the *praetor* at nights in Rome. Tatum, W. J.: *The Patrician Tribune: Publius Clodius Pulcher*, Washington D.C, 1999, 170. Death penalties of the commanders of the enemy armies and pirates were executed in the prison of *Tullianum*. **M. Beard**, *The Roman Triumph*, New York, 2007, 107.

to fit in, there were also bigger dungeons so two or three prisoners could stay together[51]. Undoubtedly, prisoners that were kept in such dungeons had to face inhuman treatments[52]. Some of the prisoners were kept enchained in the dungeons. The weight of the chains depended on the prisoner's crime. Enchained prisoners had to live with chains tied around their ankles, hands or necks that run down to their feet[53]. As mentioned above, the main purpose of the imprisonment penalty in Rome was to give the prisoner a more agonizing death rather than rehabilitate and isolate him. This type of penalty was extremely frightening and deterrent enough for people not to commit the crime. Although it would serve the general purpose of crime prevention, this penalty obviously had serious errors and omissions to the modern observers[54].

In Rome, usually prison guards administered the prisons. Most of the prison guards were veterans. As being a prison guard was not a preferred job, only the poor veterans accepted employment to be a guard. In order to make prison guards work carefully and not let any prisoner escape, a harsh rule was brought in Rome[55]. This rule stated that, if a prisoner escaped, the prison guard who administered that prison was sentenced to death. To be able to prevent prisoners' escape, some of the prison guards acted cruelly against vulnerable prisoners. Among all the prisoners, slaves and non-Roman citizens were in the worst situation. To control the prison guards, they were made to keep prisoners lists. These lists were summited to *Triumviri Capitales* every month. Let alone the conditions of the prisoners, even the visitors who came to prisons to visit a prisoner were not safe in Rome. Visiting prisoners might be very dangerous. Anyone could accuse the visitor of committing the same crime with the prisoner he visited. The risk was higher if the visitor was a slave. A slave who visited a prisoner condemned as a rebellious might be expected to explain every detail of the conversation between him and the prisoner to the officers. But the worst part was that, he had to make this explanation under torture. Because it was believed

---

51 It was possible to obtain water, food, cloth and blanket by bribing guardians in Roman dungeons. The prisoners who had this opportunity were luckier than the others. They also had the chance to throw out their own excretion from their dungeons unlike most of the prisoners. **Von Bar**, 36.

52 Some prisoners were kept in dungeons called "the house of darkness" under market places in Alba, a colony of Rome. Rain water, all the mess of the market place including animal excretion were poured out these dungeons. **Peters**, 17.

53 Enchainment could be permanent or temporary depending on the type of the crime. If the length of the chain was short, the prisoner had to stand straight all the time, on the other hand if the chain was longer, he could sit, sleep and walk a few steps. **Kayak**, 181.

54 The oldest prison known in ancient Rome was Mamertine prison (*Tullianum*). It was in *comitium,* northeast of Capitoline hill. It was thought to be named after the Roman kings *Tullus Hostilius* or *Servius Tullius.* Another theory is that the prison was first constructed as a water reservoir (*tullius*), so its name might come from this word. **Beard**, 108.

55 **Von Bar**, 35.

in Rome that a slave would not tell the truth unless he was under torture. Deposition of slaves were not considered unless the slaves were tortured[56].

In short, the imprisonment penalty in Rome did not only have an effect upon the prisoner, but also it was used to lure out accomplices. Hence the guards and other authorities highlighted this aim of the imprisonment penalty. While they were trying to legalize and mitigate their inhuman acts of detaching the prisoner from society and preventing him from seeing his relatives and friends.

III. CONCLUSION

Even though Roman criminal law never lasted into modern times like Roman civil law did, it does not mean that Romans did not give importance on criminal law. Forming the basis of legal thinking, Romans supported their brilliant success on civil law, with their studies on criminal law. According to Roman criminal law, crimes were considered as infringement of legal order and penalties as respond of the State against crimes. With this point of view, Romans classified the crimes as "crimes against the State and crimes against individuals" and this classification brought Roman criminal law into its final form. Another significant point about Roman criminal law was that criminal attempt and complicity were to be punished.

Roman official authorities always gave great importance to criminal legislative regulations. This may be because Roman politics and criminal law were connected with each other. Roman administrators used criminal law as a weapon against their political rivals. Owing to the improvements made by Sulla in B.C 674-673, the deficiencies in the criminal law were filled majorly. And many more improvements followed in time. Roman lawyers never quitted studying on Roman criminal law.

The interaction between the mediaeval Roman law and canon law changed Roman criminal law radically. Humanism movement and the Renaissance spreading throughout Europe, lay the foundations of human rights and fundamental rights and liberties. Therefore, Roman criminal law continued its existence under the name of common law until the 18. Century.

---

[56] It was possible to obtain water, food, cloth and blanket by giving money to guardians in Roman prisons. The prisoners who have this opportunity were luckier than the others, they have also chance to throw out their own excretion from dungeon. But most of the prisoners did not have the chance to do it. **Von Bar**, 36.

In the first years of Christianity, the ones who accepted this religion obliged to big press and torture. Some of them had been put into dungeons and exposed to hard days. Because the Christianity spread firstly between slaves, the slaves who wanted to visit their friends for giving food and cloth experienced many difficulties. When Saint Paul had captured to dungeon, his slave Onesimus who came to visit him, envisaged so many dangers. He had been hanged down to dungeon with a rope and waited for the guardians' discretion to take him up. **Barnes**, 38.

Yet, it is obvious that the practice of execution system and criminal penalty system changed intensely since Roman era to present day. Relating with our topic, it was normal for Romans to accept death penalty and torture and sometimes judicial fines as alternatives to prison penalty. Due to the human rights movements, prison penalty became more than a tool used to cause suffering and pain. The thought of every human is valuable and the need to bring prisoners back to society improved the quality and the nature of prisons. Modern criminal law practices sanctions are appropriate to human dignity and aims to reintroduce criminals to society. But unfortunately it is crucial to state that even though centuries have passed from the Roman era, some things stay the same. We still see that criminal law is used as a weapon by politicians in some anti- democratic countries like it used to be in ancient Rome and we hope this practice ends as soon as possible.

REFERENCES

Books:

Abbott, F. F.: *A History and Description of Roman Political Institutions,* Boston 1901.

Adkins, L. and **Adkins**, R. A.: *Handbook to Life in Ancient Rome,* New York, 2004.

Beard, M.: *The Roman Triumph*, USA, 2007.

Buckland, W. W. and **Stein**, P.: *A Text-Book of Roman Law from Augustus to Justinian,* UK, 1963.

Centel, N./**Zafer**, H.: *Ceza Muhakemesi Hukuku,* Istanbul, 2017.

Crawford, M. H.: *Coinage and Money Under the Roman Republic: Italy and the Mediterranean Economy*, Great Britain, 1985.

Garnsey, P./**Saller**, R.: *The Roman Empire: Economy, Society and Culture*, USA 1987.

Harl, K. W.: *Coinage in the Roman Economy, 300 B.C. to A.D. 700*, Baltimore and London, 1996.

Karadeniz, O. C.: *Roma Hukuku Tarihi Giriş-Kaynaklar Genel Kavramlar-Kişiler Hukuku Hakların Korunması*, Ankara, 2016.

Karadeniz, O.: *Iustinianus Zamanına Kadar Roma'da İş İlişkileri,* Ankara, 1976.

Koschaker, P. and **Ayiter**, K.: *Modern Özel Hukuka Giriş Olarak Roma Özel Hukukunun Ana Hatları,* İzmir, 1993.

Küçük, E.: *Roma Hukuku Davalar Sisteminde Actio Popularis*, Ankara, 2013.

Mackenzie, I.: *Studies in Roman Law with Comparative Views of the Laws of France, England &Scotland,* Edinburgh, 1862.

Murdock, J.: *The Treatment of Prisoners European Standards,* Strasburg, 2006.

Niebuhr, B. G.: *History of Rome,* Cambridge, 1828.

Öztürk, B. and **Tezcan**, D. and **Erdem**, M. R. and **Others**: *Nazari ve Uygulamalı Ceza Muhakemesi Hukuku*, Ankara, 2015.

Pekcanıtez, H. and **Atalay**, O. and **Sungurtekin**, M. Ö.: *İcra ve İflas Hukuku Ders Kitabı,* Ankara, 2015.

Rado, T.: *Roma Hukuku Dersleri, Borçlar Hukuku,* İstanbul, 2001.

Schiller, A. A.: *Roman Law Mechanisms of Development,* New York, 1978.

Strachan-Davidson, J. L.: *Problems of the Roman Criminal Law,* Oxford, 1912.

Tahiroğlu, B. and **Erdoğmuş**, B.: *Roma Hukuku Dersleri*, *Tarihi Giriş, Hukuk Tarihi, Genel Kavramlar, Usul Hukuku,* İstanbul, 2009.

Tatum, W. J.: *The Patrician Tribune: Publius Clodius Pulcher*, USA, 1999.

Thomsen, R.: *Early Roman Coinage: A Study of the Chronology,* 1 vols., Copenhagen, 1957.

Türkoğlu, G. Ö.: *Roma Hukukunda Infamia (Şerefsizlik)*, Ankara, 2008.

Umur, Z.: *Roma Hukuku Lügatı,* İstanbul, 1975.

von Bar, C. L. and **Others**: *A History of Continental Criminal Law,* Boston, 1916.

Yenisey, F./**Nuhoğlu**, A.: *Ceza Muhakemesi Hukuku*, Ankara, 2017.

Chapter in books and periodicals:

Millar, F.: 'Condemnation to Hard Labour in the Roman Empire, from the Julio-Claudians to Constantine', in H. M. Cotton and G.M. Rogers ed. *Rome, the Greek World and the East Society and Culture in the Roman Empire*, North Carolina, 2004, 120-150.

Peters, E. M.: 'Prison before the Prison: The Ancient and Medieval Worlds', in N. Morris and D. J. Rothman ed., *The Oxford History of the Prison: The Practice of Punishment in West Society*, New York and Oxford, 1998, 3-43

Articles:

Aston, W. D.: 'Problems of Roman Criminal Law', *Journal of the Society of Comparative Legislation*, vol. 13(2) (1913), 213-231.

Barnes; R. D.: 'Legislation Against the Christians', *Journal of Roman Studies* 58 (1968), 32-50.

Granger, C. J.: 'Crucifixion in the Mediterranean World'*, Tubingen: Wissenschaftliche Untersuchungen zum Neven Testament* (2014), 327.

Kayak, S.: 'Roma Ceza Yargılama Hukukunda Sorgulama ve Cezalandırma Yöntemleri'*, Prof. Dr. Belgin Erdoğmuş'a Armağan*, (2011), 155-186.

Obenchain, R.: 'The Roman Law of Bankruptcy', *3 The Notre Dame Lawyer A Monthly Law Review,* 4 (1928), 169-200.

Türkoğlu Özdemir, G.: 'Roma İcra Hukuku'*, Gazi Üniversitesi Hukuk Fakültesi Dergisi,* vol.VIII, 1-2, (2004), 17-171.

Unpublished dissertations:

Atak, A. S.: 'Roma Hukukunda Tüketim Ödüncü Sözleşmesi (Karz-Mutuum)*'*, 2014, thesis submitted fort he degree of Doctor of Private Law, Dokuz Eylül Üniversitesi Sosyal Bilimler Enstitüsü, Turkey 2014.

Online Publications:

Scheidel, W.: 'The Monetary Systems of the Han and Roman Empires', (Princeton/Stanford Working Papers in Classics), 2008. Available online at: https://www.princeton.edu/~pswpc/pdfs/scheidel/020803.pdf