The "Extension" of the Roman Criminal Law in Today's Macedonian Criminal Laws

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Abstract

The purpose of this article is to make an attempt to show the relation, impact and "extension" of the antic Roman criminal law in today's criminal (both substantive and procedural) laws in Macedonia. One of the purposes is to show that the Roman law is not just a legal history, but it still represents a solid ground on which modern laws are created as well as that this legal system still has a dominate influence over the creation of todays legislative. Bearing in mind the specificity of the issue that we'll elaborate in this paper as well as the fact that we research a legal system that formally does not exit, the basic method of our research we'll be the historical method. Also for the purpose of this paper, we will use the legal, sociological, comparative and dialectic method. The final conclusion to which we came is that there is undoubtedly huge influence in our legal system in a way that the basic principles from roman criminal law have shown themselves as eternal and are integrated in Macedonian criminal laws and in the criminal theory.

Keywords: *Roman law, criminal law, criminal procedure, Macedonia, principles.*

1. Introduction

The main purpose of this article is to show the relation and "extension" of the antic Roman criminal law in today's criminal (both substantive and procedural) laws in Macedonia. Through this article, we'll try to show that the Roman law is not just a legal history, but it still represents a solid ground on which modern laws are created as well as that this legal system still has a dominate influence over the creation of today's legislative.

The debt of modern law jurisprudence to Roman law can be revealed by a systematic study of Roman law with simultaneous comparative study of modern laws. Roman law has become the one for "all nations" in Europe, America and parts of Asia and Africa. Therefore, it is an undisputable fact that the Roman law is in the basics of every legal system in the world and it represents a fundamental source of legal learning. One of the great theoreticians of Roman law, Burdick said: *For this law is the "parent" of the present laws of most of continental Europe, of the Latin countries of the western hemisphere, and of the modern codes of Turkey, China and Japan, as well as it is a cornerstone of the law in United States (*Burdick, 1938: 8). Professor Vinogradoff states *that the story about the Roman law is more like a ghost story because it treats a second life of the Roman law after the demise of the body in which it first saw the light* (Vinogradoff, 1909: 4).

In the Macedonian legal theory about the emergence of the Macedonian legal system very little is said about the obvious resemblance between the Macedonian criminal legislation and the antic Roman law. The theory is very extensive about the origins of the civil legal system and every institution of this system is elaborated broadly and connected to its roman origins. But when it comes to the criminal legislation and its comparison to the antic Roman laws it's almost like this is avoided. Therefore this article is an attempt to show that not only the civil legal system originates from the Roman one and that Roman law is not a 'synonym' for the civil law because undoubtedly the criminal legal system has its origins

in Roman law as well.

2. Research Methods

Baring in mind the specificity of the subject that we'll elaborate in this paper as well as the fact that we research a legal system that formally does not exit, the basic method of our research we'll be the historical method. Also, for the purpose of this paper, we will use both the legal method in order to analyze the 'letter of the laws' that are taken in consider, and sociological method in order to analyze the strengths and weaknesses of the provisions of this legal system and to analyze their integration into our legal system. For the comparing of the two legal systems will use the comparative method in order to show the obvious resemblance between the two. Well use the descriptive method for the descriptive analysis of the laws. And finally, for the summing and analyze of the data from our research, we'll use the dialectic method. The purpose of this methodology is to get relevant information in order to confirm our thesis of this research that the Roman criminal law is the basic of the Macedonian criminal law and that the resemblances of the roman legal system with our legal system exceeds their differences.

3. The Concept of the Roman Criminal Law

The evaluation of the progress of one country is given with the accordance of the progress of its law system and especially with the progress of the criminal law, because it concerns basic rights and freedoms. The Roman law is a systematic legal structure that was organized seamlessly and conceptually. The importance of the Roman legal system can be seen in the fact that it was the first complete, comprehensive, wide-ranging antic legal system that was elaborated into a huge number of codes. Also, bearing in mind that the Roman Empire was spread on the territory of almost whole continental Europe, the reception of Roman law was inevitably. With the great concurs of the "new world" by Spain, this law stepped into the systems overseas. These countries, today function on the basis of the modifications of the Roman law and roman principles.

4. Defining Crime in Roman Law and into the Macedonian Legal System

For the purpose of comparing these two legal systems, we find that at first we must compare the institution of *crime* into the two legal systems, because the main object and purpose of the criminal procedure is crime.

Roman law defined "crime" as an offence subjected to a public legal process *iudicium publicum*, while treating some offences as private wrongs (*delicta or delictum*) subject to the civil penal process and some as torts - maleficium. These processes had in common that they were concerned with "wrongdoing" and condemnation incurred in a form of a penalty (poena), which distinguished them from the civil processes designed merely for the adjudication of disputes (Harries, 2007: 4-7, Robinson, 2007). This is also the case with Macedonian criminal law. According to our law, offences can be crimes (wrongdoings defined below) – that are subject to criminal procedure in criminal courts, misdemeanors – that are subject to a misdemeanor procedure also in criminal courts. The delictes in obligations – usually disputed by the civil court after predetermined guilt from the criminal court are identical with the private wrongs defined in Roman law.

According to Roman law, for one act to be considered as a crime – crimen or delictum or maleficium (Buckland, McNair, 1952: 345), it must fulfill the following terms cumulatively:

a) To be committed with an action (delicta in commissione) or by omission of an action that one was obliged to undertake (delicta omissione).[1] The pure intention to undertake or to miss an action that one was obliged to do, was not consider as a crime (cogitationis poenam nemo patitur)[2]. If the intention was announced or realized then it was considered as a punishable act (Marjanovik, 1998: 100, Puhan, 1972: 387)
b) The criminal act has to result with a consequence. Also, the act had to be prior the consequence. If there isn't any consequence then the act was not considered as a crime. Also if the consequence was prior the act, then that act did not cause that consequence.

[1] *This was later provided. At first crime could been only committed with an action.*

[2] *Cogitationis poenam nemo patitur" means that "no one suffers punishment for mere intent." No one is punished for merely thinking of a crime. But, if the crime is followed up by some act, both the action and intention is punishable. If the act does not happen and there is a mere attempt, the attempt to commit the crime is also punishable. If the act does not happen and there is a mere attempt, the attempt to commit the crime is also punishable. General rule is that, when an act is criminal, the intention is also criminal. However, intention alone without any action according to the intention is not punishable.*

c) The act and the consequence must be in a causal link. This means that there has to be link between the act and the consequence in a way that only that act can cause that consequence and only that act can be considered as a reason for that consequence.
d) The action or omission to be unlawful and the consequence of the criminal act is causing harm to someone. But if the action was taken in cases of self-defense or in cases of emergency, then even though there was an action and a consequence, the unlawful condition was excluded (inculpata tutela).
e) The offender of the criminal act had to be aware or at least, to be able to be aware of the consequences of his criminal action. In other words, for one act to be considered as a crime, there must be guilt as a ground of responsibility of the offender for his actions **– nullum crimen nulla poene sine culpa**[3]. This principle is the cornerstone of every legal system in the world. The degrees of responsibility were the following ones: *dolus* or intention and *culpa lata* – hard negligence or *culpa levis* – easy negligence. The *dolus* or intention could have been *dolus directus* as intention to commit the crime and to produce the hurtful consequence and *dolus eventualis* intention to commit the crime but with reckless confidence that the consequence will not appear or that he will prevent it from happening. But we have to emphasize that the Roman law also had the so called objective responsibility that required responsibility and liability for act caused by others (Gurkova2010: 18-23).
f) The last element for one act to be considered as crime was the sanction that meant that the legislator must impose a penalty for the ones that have broken the law. If the crime was *delicta publica* then the penalty was either a physical punishment or a fine that the offender had to pay on behalf of the Treasury. If the crime was *depicta private* then the punishment was either compensation or a fine that the offender had to pay on behalf of the victim (Puhan, 1973: 387-402).

Comparing these elements with the elements of the crime according to todays Macedonian criminal Code, we can only conclude that they are more a like then different. According to article 7 from the Macedonian criminal code a crime is an unlawful act that by law is prescribed as a crime and whose features are provided by law (Kambovski, 2008: 31). Hence, the essential elements of crime according to our legislative are:

a) The criminal act is committed by human in a form of activity (action) or passiveness (omission) in cases were the law requires activity.

This element is identical with the first element of criminal act according to the Roman criminal law. According to article 29 from the Macedonian criminal code, the criminal act can be committed with action and omission. The crime is committed with omission only in cases when the offender was obliged by law to action, and his omission has caused the consequence of the crime (Marjanovik, 1998: 82-83)

b) The criminal act is unlawful act that causes harm or loss for someone.

This element is also in accordance with Roman law and is arranged exactly the same.

c) The crime is provided by law as a crime.

This element derives from the principle of legality that also has its first origins in Roman law. Even though, only rudimentary features of the legality can be found in Roman law, still the basic concept of this principle can be tracked back to Cicero (Jerome, 2005: 28-32). On the grounds laid by Cicero, later in the period of Enlightenment and the social contract doctrine, the comprehensive principle of legality emerged as *nullum crimen nulla poena sine lege previa*.[4] With this principle, that is the cornerstone of all legal systems, was introduced the legal construction of the incriminations. By this means, a crime is the one act that the law prescribes it like a crime.

d) There must be guilt as a ground of responsibility of the offender for his actions.

This element is according to the principle nullum crimen nulla poena sine culpa. This is the most legendary principle that trough the "reception" of the Roman law was introduced into the legal systems in the whole world. By this principle is provided that guilty is the person who is sane (guilty mental state – mens rea), who has committed the crime with intention or by negligence and at the time of committing the crime he was aware or he could have been aware that his act is a crime (Article 11 from Macedonian Criminal Code, also Kambovski, 2006: 374-454).

e) There must be a sanction provided by law.

According to the Roman legal system it was also provided that nullum crimen sine poena or the criminal act cannot be consider if there isn't a penalty provided by law for the same. This element is also taken from the Roman legal system with the difference of its modernization in a way to make it applicable in modern circumstances.

From the elaboration of the basic elements of *crime* in Roman and Macedonian law we can, once again, see the

[3] *There is no crime, nor sanction without guilt.*
[4] *Although the most famous representatives of this doctrine were Montesquieu and Beccaria, the Latin adagium nullun crimen nulla poena sine lege was coined by Feurbach.*

resemblance between the two, and even though the first is antic and the second is a modern, we can conclude that the basic of our criminal law, in this part, derives from the Roman law.

5. The Basic Principles of the Roman Criminal Law Implemented in Macedonian Criminal Law

The Roman procedure was established on objective and rational principles that had and still have universal authority. The basic, rational principle that derives from the Roman law is the presumption of innocence or innocence until proven guilty. Instead of the objective responsibility that was main characteristic of the previous legal systems (including the Greek legal system), the Romans required for subjective responsibility. The introduction of the (subjective) guilt as a basic institution in criminal law resulted with more than one principles that are fundamental for the criminal law and procedure. These principles are: the principle of presumption of innocence also known as innocence until proven guilty, from this principle derived the principles of the burden of a proof also called accusatorial principle, the principles of a fair trial, principles of public, the principle of immediacy, contradiction and etc. All of these principles are implemented in our law and they are *condition sine qua non* for one modern criminal procedure. They are also a part of many Charters, Declarations, International Agreements, Framework Decisions and other instruments that represent a source of law.

5.1 The basic principle of presumption of innocence – innocence until proven guilty

As we stated above, this principle that is the "mother" of all principles in criminal procedure, derives from Roman law, in its rudimentary form. But, however, we must emphasize that this presumption was a part of the roman legal system only in the accusatorial period. The later, period of inquisition, characterized itself with presumption of guilt rather than innocent and applied rules that include self-incrimination. The essence of the modern principle of presumption of innocence is *Everyone charged with a penal offence has the right to be presumed innocent until proven guilty according to law in a public trial at which he has had all the guarantees necessary for his defense* (Article 11 from the Universal Declaration of Human rights, also Article 6 of the Convention for Protection of Human rights and Fundamental Freedoms of the Council of Europe and etc.). This principle is a part of the Macedonian Constitution and both Criminal Code and Criminal Procedure Code (Kalajdziev, 2006: 15-30).

5.2 The accusatorial principle or ei incumbit qui dicit, non qui negat

According to this principle in Roman law, the burden of the proof rested with the accuser rather than the accused (Gurkova, 2010: 117-127). *Ei incumbit qui dicit, non qui negat* (Watson, 2011: 189) meant that proof lies on him who asserts, not on him who denies. This principle represents the basis of the accusatorial procedure. Although the burden of proof rested on the accuser, in cases when the accused had made a confession or admitted in open court his guilt, the accuser did not have to proceed further with his case (Esmein, 2000: 24). The accusatorial procedure is accepted and applied into Macedonian criminal procedure. Hence, with the amendments of the Criminal Procedure Code (hereafter CPC), our procedure has strengthened its accusatorial elements than ever before (CPC, Official Gazette of Macedonia No.150/2010, also Koshevaliska, Ivanova 2014: 1-15). In Macedonian CPC the accusatorial principle means that the burden of the proof lies on the accuser and that he is basically the *dominus* of the procedure. (Buzarovska, Matovski, Kalajdziev, 2011: .21-24, 65-66). With this principle, it is also guaranteed that the procedure will be conducted only against the person to whom the accusation is filed, and only for that crime that is described in that accusation. Our new CPC introduced the institutes confession of guilt and guilty plea in a modern sense (Buzarovska, Misoski, 2009: 1-29), that in a way can be partially recognized in the Roman law.

5.3 The principle of equity and fair procedure

Ulpian cites a rescript of the emperor Trajan declaring that no one in a criminal case should be condemned in his absence, and that it were better for a guilty man to go unpunished than for an innocent man to be condemned (Burdick, 1938: 693). This is the fundamental principle of our Law for Criminal procedure. Hence, according to article 1:

This law sets the rules that guarantee than no innocent men shall be condemned, the guilty will be punished and the court will impose a sanction in accordance with the Criminal code in a lawful and fair procedure (CPC, article 1, also Buzarovska, Matovski, Kalajdziev 2011: p.55-65, Matovski, 2004: 55, Kalajdziev, 2004: 49-52, Kalajdziev, 2007: 1-10, Kalajdziev, Tumanovski, Ilic, 2008: 20-40)

5.4 The principle of public trail

Trials in Rome were open to the public – publicum judicium (Sherman, 1922: 487) that referred to the subject of the procedure (accused and accuser) but also to the wider public. If the accuser failed to appear, the accused was immediately discharged and the case was withdrawn from the record of the court. In the Macedonian criminal legislative the principle of public hearing is the very similar to the Roman law. In narrow sense, it means the right to attend to the proceedings and actions of the trial of all the parties and their representatives (parties public) as well as of all third parties (general public) that are interested in the outcome of the procedure (Buzarovska, Matovski, Kalajdziev, 2011:79). The general public can be excluded in cases provided with the CPC.

5.5 Principle of contradiction or audiatur et altera pars

According to this principle, the court and the other competent public authorities in the criminal procedure are obliged to hear both sides of the criminal dispute – *audiatur et altera pars*. This principle is especially apparent on the main hearing. The trial began by the accuser making an opening address, in which he stated and outlined the charge against the accused. Then followed the opening address of the accused. The next step was taking of the evidence, which might be documentary (written) or oral and thus the principle of written and oral evidence was included in the main hearing. Witnesses were examined first by the party summoning them and then by the opposite party. This system generally was similar to the direct and cross examination of Anglo – American law. (Sherman, 1922: 487, Esmein, 2000: 24) Both the accuser and the accused could question each other. The judge did not question the accused. After the evidence was conclude, influential citizens could make laudatory speeches. Then both the accuser and the accused could briefly attack the argument of the opposing side in order to display weaknesses and to fortify their own evidence, which is the essence of this principle.

The principle of contradiction is recognized in our criminal procedure. This principle derives from the right to fair trial and equity of arms. Every side has the right to opposite to the allegations on the other side of the dispute (Buzarovska, Matovski, Kalajdziev, 2011: 73-76). The previous elaboration of the essential outlines of the main hearing in Roman criminal procedure was deliberate in order to show the resemblance with our *new* procedure (CPC from 2010 that entered into force in 2013), that made our criminal procedure even more matching with the accusatorial procedure of the Romans. In a word, the introduction and final speeches, the evidence procedure especially direct and cross examination are now part of the Macedonian criminal procedure.

5.6 The principle of immediacy

Evidence in the Roman criminal law could have been oral as well as written. This refers only to the accusatorial procedure. In the inquisition procedure, all evidence could have been only written. In cases of oral evidence meant that testimonies are took out in the open, in the presence of the adverse party and the court. The principle of the immediacy preserves the integrity of judgment by ensuring that arguments and evidence are put to the judge and the jury in the most direct manner possible. By thus it is fulfilled that there be direct contact between decision makers and their sources of information (Damaska, 1992: 446). The law demanded that evidence be presented to the full court, and witnesses appear personally.

The principle of immediacy is also a main principle of our criminal procedure and its contents is the same with the one in the Roman criminal procedure.

5.7 The principle of double jeopardy or non bis in idem

This principle has its origins in the Roman civil law, but it was also applied in criminal law, but with many inconsistences (Rudstein, 2005: 196-199). The Roman law contained the maxim *nemo debet bis puniri pro uno delicto* that is “no one ought to be punished twice for the same offence.” The digest of Justinian provided that “the governor must not allow a man to be charged with the same offences of which he has already been acquitted”, and that “a person cannot be charged on account of the same crime under several statutes.” (Rudstein, 2005: 196). This principle normally, is and has always been applied into Macedonian criminal procedure. In our procedure by this principle it is recognized that no legal action can be instituted twice for the same crime.

6. Conclusion

From all of the above we can once again conclude that the Roman criminal law has undoubtedly influenced the development of our criminal law system, which we can also see from the presence of the accusatory and inquisition elements that derived from the roman legal system. In this way we have shown that recognized utilities arising from the repetition of showing that a principle or doctrine of the Roman law is also generally contained in modern system jurisprudence, particularly in Macedonian legal system.

In context of the general influence of the Roman criminal law we can say that quotations from the legal literature of the Roman Criminal law are still used in order to explain some institute or to show its origins and originality (Robinson, 1905: 5-7). Roman law represents solutions to a modern problem (Metzger, 2004: 2). Some say that modern philosophy can be taught without absolving of the ancient Greek philosophy, but we say that modern law can be taught without previous absolving of the Roman law. So we can say that Cicero was in right when he highlighted that:

> *"There shall not be one law in Rome, and another at Athens, one now and another hereafter, but the one eternal and immutable law shall sway all nations for all time and be the common law and master of all." "Nee erit alia lex Romae, alia Athenis, alia nunc, alia posthac; sed et omnes gentes, et omni tempore, una lex et sempiterna et imrnutabilis continebit, unusque erit communis quasi magister et imperator omnium deus" (Cicero, De Republica, in Sherman, 1922: 33-34)*

The principles of Roman law are all taken, at first hand, from the authoritative Latin texts, including Institutes of Gaius, the Sententiae of Paulus, the writings of Cicero, and various other jurist and authors who preceded Justinian, as well as the Justinian Codification, the Corpus Juries Civilis. These principles are the basic from which derived today's modern criminal legal systems.

References

Buckland, W.W, McNair, A. (1952). Roman law & common law: A comparison in Outline. CUP Archive, pp. 345;
Buzarovska, G. Misoski, B. (2011). Plea Bargaining in the New Law on Criminal Procedure in Republic of Macedonia. Iustinianus Primus Law Review, Vol.2 Skopje, p.1-16;
Burdick, W.L. (1938). The principles of Roman law and their relation to modern law, New York;
Damaska, M. (1992). Of Hearsay and Its Analogues. Yale Law School Legal Scholarship Repository, Faculty Scholarship Series. Paper 1580, p.446;
Esmein, A. (2000). A History of Continental Criminal Procedure with Special Reference to France, The Lawbook Exchange, p.23;
Gurkova, O. (2010). *Влијанието на римскиот казнено правен систем врз модерните казнени системи.* Годишен зборник на Правен факултет, 2 (1). pp. 117-127
Harries, J. (2007). Law and Crime in the Roman World. Cambridge University press, Cambridge, p.4-7;
Jerome, H. (2005). General Principles Of Criminal Law. The Lawbook Exchange, New Jersey, Edition II, p.28-32;
Kalajdziev, G. (2004). Efficiency and fair trial in criminal proceedings. Macedonian Review of Criminal Law and Criminology, Skopjem No.3, p.49-52;
Kalajdziev, G. (2006). Presumption of innocence. Yearbook of the Faculty of Law Justinianus Primus, Skopje, No.41;
Kalajdziev, G. (2007). The Function of fair trial. Yearbook of the Police Academy;
Kalajdziev, G., Tumanovski, D. Ilic, D. (2008). Fair trial and equity of arms in the new CPC. Macedonian Review of Criminal Law and Criminology, Skopje, No.4, p.20-40;
Kambovski, V. (2008). Criminal Code - integral text with short explanations. Official Gazette of RM;
Koshevaiska, O., Ivanova, E. (2014). Зајакнување на акузаторните елементи преку новиот концепт на главната расправа во кривичната постапка на РМ. Yearbook of Faculty of Law, UGD, Stip, p.1-15;
Metzger, E. (2004). RomanJudges, Case Law, and Principles of Procedure. Law and History Review. 22/2, p.2;
Robinson, J.J (1905). Selections from the Public and Private law of the Romans. New York, p..5-7;
Robinson, O. (2007). Penal Practice and Penal Policy in Ancient Rome. Routledge, London;
Rudstein, D. (2005). A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy. 14 Wm. & Mary Bill Rts. J. 196-199;
Sherman, C. (1922). Roman law in the modern world – Manual of Roman law illustrated by Anglo – American law and the modern codes. Vol. II, New Heaven Law book, London;
Vinogradoff, P. (1909). Roman law in Mediaeval Europe. Harper & Brothers, p.4;
Watson, A. (2011). The Digest of Justinian. University of Pennsylvania Press, p.189;
Пухан, И. (1973). Римско право. Скопје, Глава XII : Деликти како извор на облигации, p.387-402

Laws and Other Legal Instruments

Universal declaration of Human Rights (UDHR), adopted by the United Nations General Assembly on 10.12.1948;
Convention for Protection of Human rights and Fundamental Freedoms of the Council of Europe, from 1950;
Criminal Procedure Law, Official Gazette of Macedonia No.150/2010;
Constitution of Macedonia (Constitution and the amendments of the Constitution No. I, II, III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX, XX, XXI, XXII, XXIII, XXIV, XXV, XXVI, XXVII, XXVIII, XXIX and XXX)