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***SEVERITAS AND CLEMENTIA IN PUNISHING
THE CRIMEN MAIESTATIS FROM PRINCIPATE
TO DOMINATE***

In this paper, the image of immense cruelty of emperors and their officials under the Dominate, presented with lots of details by Ammianus Marcellinus, will be discussed as an aspect of the emperors' attitude towards the law in political charges evolving from the Principate to the Dominate. Using the example of judicial torture which should have been excluded in criminal trials of free citizens until the late Principate, and of trials mostly concerning political magic that supplied one of the most questionable sort of charges during the Dominate, the paper endeavors to demonstrate that atrocities formed part of the criminal investigation already under the Principate while death was not the only punishment for crimes associated with politics under the Dominate, even though the law recommended it.

Key words: political trials, *crimen maiestatis*, torture, death sentence, Principate, Dominate

Literary sources from the period of the Dominate provide us with abundant examples of judicial atrocities implemented by order of the emperors and their officials within trials concerning *maiestas* – especially Ammianus Marcellinus emphasizes excessive cruelty of political trials in the 4th century A.D. However, we know from earlier historians that some emperors of the Principate took extreme measures as well, though it was usually only in the case of emergency. Mainly by examining the cases of *maiestas* from the Principate in which the torturing of free (high-born) citizens either as witnesses or defendants¹ is suspected, and sentences in the political trials under the Dominate, we should observe that *clementia*, i.e. milder treatment of citizens, did not apply only to the Principate. We will take no account of the extent of use of judicial torture under the Dominate, for there is an excellent recent study available on this topic.²

¹ The sources not always enable us to discern between these two categories.

² ANGLIVIEL DE LA BEAUMELLE (1992). He also concludes that the political reality of

A free citizen and judicial violence

Due to doubts about the *leges Iuliae de maiestate* related to the author and content in certain period, the only means in trying the *crimen maiestatis* that can be considered absolutely illegal (therefore an example of severity of an emperor) is the torture of free citizens. As a part of the *imperium* possessed by higher magistrates in the eldest Republican times, a citizen could be scourged (*verberatus*) or sent to death, but he also had the right to appeal against all kinds of physical violence (which was considered shameful) intended by the magistrates, that had been given to him by a series of *leges* starting with the *leges Valeriae* (issued during the years from the legendary *lex Valeria* of P. Valerius Publicola in 509 B.C. and *lex Valeria Horatia* in 449 up to the only authentic one, the *lex Valeria*, issued in 300/299 B.C.). These were probably not as effective as they should have been, because the enactment had to be repeated by the three *leges Porciae* (first of them issued in 199 B.C., the last in 184 B.C.), that implemented sanctions against magistrates unwilling to obey the *leges Valeriae* and extended the right of *provocatio* to the citizens outside Rome in Italy and provinces (the trials indeed still took place in Rome).³ The *ius provocationis* was in force under the Principate, too, although in a different form (there was an emperor), for it was restored by the *Lex Iulia de vi publica*.⁴

Torture and *maiestas* during the Principate

There are many examples of judicial torture attested by literary sources, although they do not allow us to determine if all the cases were of free or even high-born citizens. Though some of the testimonies – usually of conspiracies, revealed or supposed – do not contradict this: we are told by Cassius Dio that the Emperor Tiberius subjected a friend of the senator Asinius Gallus to horrible tortures and then sent him to execution⁵ (Gallus himself had been mistreated by hunger for a long time before he was executed,

the Dominate described by Ammianus was basically controlled by law and justice, no matter how cruel it became and Ammianus presents it.

³ BAUMAN (1973); CAH 7, 2 (2006: 219–220); LINTOTT (1999: 33, 37–38).

⁴ Cit. Ulp. in *Dig.* 48.6.7: *lege Iulia de vi publica tenetur, qui, cum potestatem imperiumve haberet, civem Romanum adversus provocationem necaverit verberaverit iussurive quid fieri aut quid in collum iniecerit, ut torqueatur.*

⁵ ...πάνυ ισχυρῶς βασανίσας (DIO CASS. 58.3.7)

too). Gaius Caligula used torture against a son of a senator, Sex. Papinius,⁶ and a mistress of another one, Q. Pomponius Secundus,⁷ suspected of participating in a conspiracy that had been revealed. Claudius in spite of the declaration made at the beginning of his reign that he would torture no free man⁸ is said to have tortured citizens and foreigners, among whom there were some senators and equestrians, which is to be ascribed, according to ancient historians,⁹ to the bad influence of his infamous wife Messalina and the freedman Narcissus. It should be noted, that he did it while investigating a conspiracy in A.D. 42.

The accounts about conspiracies seem to support the theory that some *principes* dared to use the military power included in their *imperium*,¹⁰ e.g. this is the case of Claudius' interrogations of those charged with *maiestas* behind closed door or Nero's immediate executions of conspirators in 65.

Thanks to Tacitus, we can presume the use of torments in investigation of the Pisonian conspiracy against a larger group of people of higher social status, from which we know namely the senator Afranius Quintianus, the equestrian Claudius Senecio and M. Annaeus Lucanus, who are said to have confessed and offered extensive testimonies after concealing them for a long time.¹¹ Another equestrian, Antonius Natalis, and a senator, Flavius Scaevinius, confessed probably after facing the threat of being tortured.¹² It was not surprising, because the Emperor decided to apply the authority pertaining to the military scope of his *imperium* toward civilians and *intra pomerium*. From the two freedmen who stood at the beginning of the revealed plot, the woman Epicharis, praised by Tacitus for her persistence, was tortured with immense cruelty to death,¹³ but the freedman Milichus was most likely questioned in the usual way.¹⁴ We know Nero was convinced about legality

⁶ Σέξτον Παπίνιον ἐβασάνισε (DIO CASS. 59.25.5^b). The father was a *consularis* (PIR² P 101).

⁷ ...ὅτι βασιανισθεῖσα οὐδὲν ἐξεῖπτεν (DIO CASS. 59.26.4). Pomponius was a *consul suffectus* in A.D. 41 (PIR² P 757).

⁸ ...ὁμόσαντος μηδένα βασανιεῖν ἐλεύθερον (DIO CASS. 60.15.6)

⁹ Not by modern scholars, cf. MCALINDON (1956).

¹⁰ HAMMOND (1933: 185; 315, note 88). The *imperium* the Emperor held was according to HAMMOND (1933: 25–47, esp. 31) both *consulare* and *proconsulare*.

¹¹ ...*diu abnuere* (TAC. *ann.* 15.56.4).

¹² ...*et tormentorum adspectum ac minas non tulere* (TAC. *ann.* 15.56.1).

¹³ TAC. *ann.* 15.57.1.

¹⁴ ...*dum auditur Milichus* (TAC. *ann.* 15.59.1).

of his interrogations to such an extent that after the conspiracy had been suppressed, he made all the records accessible to the public.¹⁵

There are several other notes in Suetonius and Dio which do not allow us to presume with full certainty the torture of free citizens, though it cannot be completely excluded. Dio tells us that the torture belonged to common practices of the *praefectus praetorio* Q. Naevius Cordus Sutorius Macro, the successor of L. Aelius Seianus, since it helped him in procuring evidence against inconvenient senators: in 34, against those who were to fall victims of the twentieth anniversary of Tiberius' reign,¹⁶ and in 37, some time before Tiberius' death which, along with the nature of testimonies, was the reason why the Senate postponed the condemnations.¹⁷ Suetonius indicates Claudius let persons convicted of murder of a relative (*parricidae*) torture in his presence, he does, however, not mention their status.¹⁸

Septimius Severus used to hire senators as informers to supply testimonies against their colleagues under the promise of impunity: perhaps not only the information of the denunciator Iulianus were being confirmed by tortments.¹⁹ Persons of unknown status were subjected to torture during investigations of the senator's Appronianus' case in 205 under the same Emperor.²⁰ Finally, Dio's characteristic of the hatred Severus' son Caracalla kept for the Senate includes Caesar's habit of torturing all who were in prison, whether they were slaves, freedmen, or friends of senators in order to expose the senators' true opinion about himself.²¹

Maiestas and punishment under the Dominate

For Ammianus Marcellinus, the trials connected to *maiestas* served as a convenient means to demonstrate the excessive severity of judiciary under the reign of the emperors in the 4th century. However, leaving aside the problem of *humiliores* who could be punished with more severity from the

¹⁵ TAC. *ann.* 15.73.1.

¹⁶ ...ἐκ τῶν τοῦ Μάκρωνος βασάνων (DIO CASS. 58.24.2)

¹⁷ ...καὶ ἐγκλήματα καὶ βασάνους κατ'αὐτῶν ἐσκευωρημένοις (DIO CASS. 58.27.2).

¹⁸ ...*tormenta quaestionum poenasque parricidarum repraesentabat exigebatque coram* (SUET. *Claud.* 34.1).

¹⁹ ...ταῖς γὰρ δὴ βασάνοις ἰσχυρῶς πάντα ὑπ'αὐτοῦ ἠκριβώσεν ἐν οὐδενὶ λόγῳ τὸ ἀξίωμα τὸ τότε αὐτῷ ποιησάμενος (DIO CASS. 74.9.6).

²⁰ DIO CASS. 76.8.2.

²¹ DIO CASS. 78.2.

Late Principate on (death instead of banishment, death sentence *ad metalla, ad bestias, cruci* etc.),²² we have to notice that already according to the laws of Constantinus I. in *Cod. Iust.* 9.8.3pr. (A.D. 314),²³ and *Cod. Theod.* 9.1.1 (A.D. 317),²⁴ nobody could rely on his privileges given by the rank anymore – the former states that, because nobody is protected by the *privilegium dignitatis* in trials regarding *maiestas*, the accuser whose indication is not proved valid should *also* be subjected to torture, the latter deprives the *honorati* of their rights whenever a *criminal* case is tried. Thus we can deduce that judicial torture was perfectly legal at least in the cases of *maiestas* from the beginning of the 4th century.²⁵ Although its use was generally subject to emperor's will in the case of people of high status, the judge was not obliged to ask an emperor when *maiestas* was tried on the basis of the law issued by Valentinianus I., Valens and Gratianus in A.D. 369 (*Cod. Iust.* 9.8.4).²⁶

It follows that for another example of cruelty we could take the amount of punishment. *Crimen maiestatis* belonged to the most serious crimes, constituting one of those exempted from the solemn Easter and other amnesties,²⁷ thus we can infer that the punishment was equally severe,²⁸ though during the most part of the Principate the legal punishment was *aquae et ignis inter-*

²² Cf. GARNSEY (1970); RILINGER (1988).

²³ Ad Maximum pr. U.: *si quis alicui maiestatis crimen intenderit, cum in huiusce modi re convictus minime quisquam privilegio dignitatis alicuius a strictiore inquisitione defendatur, sciat se quoque tormentis esse subdendum, si aliis manifestis indicis accusationem suam non potuerit comprobare.*

²⁴ *...omnem enim honorem reatus excludit, cum criminalis causa et non civilis res vel pecuniaria moveatur.*

²⁵ As COŞKUN (2000), proves, too. Cf. etiam *Cod. Theod.* 9.16.6 (Constantius II., A.D. 358) about torturing *corpora honoribus praedictorum* in the imperial *comitatus* for magical practices for they *ipsam pulsant propemodum maiestatem*.

²⁶ Valentinianus, Valens and Gratianus ad Olybrium pr. U.: *nullus omnino, cui inconsultis ac nescientibus nobis fidicularum tormenta offerentur, militiae vel generis aut dignitatis defensione uti prohibeatur; excepta tamen maiestatis causa, in qua sola omnibus aequa condicio est.* We could note that the law refers to the Senate (since it is addressed to the *praefectus Urbi*), as well as the one sub nota 23 about torturing false accusers.

²⁷ Valentinianus (Valens and Gratianus) in a decree from A.D. 367/9 (*Cod. Theod.* 9.38.3f) and Theodosius (Gratianus and Valentinianus II.; A.D. 384) name also murder (*homicidium*), poisoning (*veneficium*), incantation (*maleficium*), rape (*stuprum*) and adultery (*adulterium*), sacrilege (*sacrilegium*), violation of a tomb (*reus in mortuos/sepulchri violatio*), robbery/abduction (*raptus*), and counterfeiting of coins (*monetae adulterata figuratio*; the last only in *Cod. Theod.* 9.38.7). *Maiestas* is mentioned as first. Constantinus I. in A.D. 322 (*Cod. Theod.* 9.38.1) acknowledges only *veneficos, homicidas, adulteros*.

²⁸ Vide *Cod. Theod.* 9.14.3pr.: *utpote maiestatis reus gladio feriat*ur (Arcadius and Honorius, A.D. 397; the so-called *lex Quisquis*).

dictio rather than death.²⁹ The decree of Constantius II. from A.D. 353 (also dealing with amnesties) includes *crimen maiestatis* in five crimes punishable by death, *quae capite vindicantur*.³⁰ Based on the law from A.D. 358, death should be henceforth the penalty for all kind of vaticination which used to be very closely connected to politics.³¹ But the death sentence for *malefici* was legal only if they confessed, were convicted by a univocal evidence or conclusively apprehended in the act by the law of Constantinus I. from A.D. 314.³²

Ammianus, who criticizes the situation very strictly, presents us with cases of nobles in which the sentence was mere banishment (which was in force during the Principate, in the later Principate only for the *honestiores*), even when the accusation was of *maiestas* or magic and *maiestas*,³³ and the defendant confessed.³⁴ It can be observed that some cases of *maiestas* were tried by the Senate and not always to the Emperor's complete satisfaction.³⁵

²⁹ Cf. the debate in ALLISON – CLOUD (1962).

³⁰ *Cod. Theod.* 9.38.2.

³¹ Soothsaying seizes to be perceived as a political crime gradually during the 4th c. A.D.: in 371 Valentinianus I. and Valens exempted haruspicy exercised with good intentions from prohibited magic arts as a part of religion of the ancestors (*Cod. Theod.* 9.16.9), and in 392 the Emperor Theodosius I. banned pagan sacrifices together with all kinds of examining the *exta* as *maiestas*, even if the person did not do that to search for the Emperor's fortune (*etiamsi nihil contra salutem principum aut de salute quae-sierit. sufficit enim ad criminis molem naturae ipsius leges velle rescindere...*; *Cod. Theod.* 16.10.12.1).

³² *Cod. Theod.* 9.40.1.

³³ *Ex duce Phoenices* Serenianus (later *comes domesticorum*; AMM. 14.7) was tried and absolved (A.D. 354) for political magic by Caesar Gallus (he is said to have sent his slave with a hat enchanted *vetitis artibus* to an oracle to ask whether he would gain a firm and safe reign), he later became one of his executioners by order of Constantius II. During the fury of *notarius* Paulus Catena in Scythopolis (A.D. 358) Simplicius, a son of the *praefectus praetorio* Flavius Philippus (PLRE I, Simplicius, 843), and the *ex praefecto Aegypti* Parnasius (PLRE I, Parnasius, 667–8) were sentenced to exile (AMM. 19.12.9–10). The *ex vicario Britanniarum* Alypius was exiled and his property confiscated during the trials of Valens in 371–2, his son Hierocles had been sentenced to death but was later pardoned, probably both being guilty of poisoning/magic (*venefici*; AMM. 29.1.44).

³⁴ Having been beaten by rods, the *consiliarius* of the African proconsul Hymetius Frontinus was sent to exile for assisting in some nefarious sacrifices of the proconsul (AMM. 28.1.21).

³⁵ The *ex proconsule Africae* Hymetius was sentenced by the Senate into exile for some invective in a letter and sacrifices for placating Valentinianus I., though the Emperor who had passed the case to the Senate himself wished death sentence for him (Hymetius was pardoned after Valentinianus' death; AMM. 28.1.17–23).

An appeal to an emperor could also be invoked, sometimes to a better result, sometimes not.³⁶ There are even instances where confiscation alone was implemented.³⁷ It is true, of course, that some of the accused used the help of friends or bribes to evade more severe sentence.³⁸

Many were sent to exile by Iulianus, including soldiers,³⁹ which was a mild punishment considering that the Emperor was in fact disposing of all people connected to the odious old regime.⁴⁰ The same can be said about the penalty for the tribune Claudius of the *Ioviani* (in 370's), a suspected supporter of the usurpator Procopius (d. 366) under Valentinianus, who was afflicted by *deportatio*.⁴¹

³⁶ Supra mentioned Hymetius appealed before tried by the *praefectus Urbi* Ampelius and *vicarius* Maximinus and was protected in custody until the Emperor passed the judgment to the Senate. At the same time a son of the *ex praefecto Urbis* Lampadius (= C. Ceionius Rufius Volusianus; PLRE I, Lollianus, 511–2) Lollianus had been sentenced to exile for copying a book on magic, but on the advice of his father he appealed unto the Emperor who sent him to execution (AMM. 28.1.26).

³⁷ AMM. 29.2.9, where the charge of political scheming through vaticination was not supported sufficiently by the evidence.

³⁸ A senator who taught his slave magic used bribes in AMM. 26.3.1–4; *protectores* who did not manage to prevent suicide of Marinus, one of the suspects in the affair with the banquet at Sirmio (at the beginning of A.D. 355), evaded due to deprecation of *magister equitum* Arbitio (AMM. 15.3.10–11); a group of senators in AMM. 28.1.27 who stood before the court of the *vicarius* Maximinus for their support of a charioteer suspected of sorcery were acquitted for the lack of evidence and a help of a friend; a schemer Araxius in 366 who had reached the pretorian prefecture during the unstable situation due to the usurpation of Procopius a year earlier was exiled to an island thanks to his son-in-law Agilo (and fled shortly thereafter); the rich *notarius* Bassianus who contended he had asked the oracle about his unborn child, not the Emperor (forgetting that by that time, i.e. in 371/2, any questioning of an oracle had been forbidden), was considerably helped by his friends (AMM. 29.2.5).

³⁹ Tribunes of the first and second division of *scutarii* Romanus and Vincentius (AMM. 22.11.2) for alleged political scheming.

⁴⁰ The former *magister officiorum* Palladius, suspected of having insidiated against Caesar Gallus, the former *praefectus praetorio Italiae* Taurus, the *magister officiorum* Florentius, the *comes rei privatae* Euagrius, the former *curator palatii* Saturninus, the former *notarius* Cyrinus (AMM. 22.3.3–7).

⁴¹ His fellow Sallustius did not have the same luck, in vain hope for a pardon he was executed (AMM. 29.3.7).

Conclusions

It was not the aim of this paper to disprove exploitation of violence in judicial practice during the Dominate especially in trials concerning *crimen maiestatis*, the increasing severity of the law from the Late Principate on cannot be argued.⁴² The purpose was to point out that it is not only the case of these periods and that instances of milder punishment than the law prescribed can be found even then.

It is well known from narrative sources that already the first successors of Augustus from time to time took stricter measures whose legality can be at least questioned. It can be objected that the emperor possessed all the power and he was the source of the law, however, the concept of civic society was alive long after the end of the Republic. On the other hand, although one could expect with respect to the laws that only death penalty was in force for all crimes connected with *maiestas* for all, disregarding the social status, under the Dominate, even so biased authors like Ammianus attest that many *honestiores* were still sentenced to exile, as it had been usual for the Principate, including suspected supporters of usurpers, infamous henchmen of previous emperors, or persons accused of hazardous magic practices. Of course we have to take into account the characteristics of the work of Ammianus, especially his selective method in drawing the images of emperors. For instance, he purposely tries to avoid any mention of the use of torture during the reign of Iulianus to prove that the Emperor always knew when *severitas* and when *clementia* was needed.

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⁴² Cf. LIEBS (1985).

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RESUMÉ

Na příkladu použití různých měřítek při vyšetřování a trestání zločinu urážky majestátu si studie všímá některých aspektů přístupu římského císaře k zákonům. Přestože konkrétní podobu zákona o urážce majestátu pro konkrétní období principátu neznáme, a i když připustíme, že císař od začátku disponoval privilegovaným postavením vůči zákonům, k počinům, jejichž legalita je přinejmenším sporná, můžeme počítat mučení občanů při vyšetřování, ať už jako svědků nebo obviněných, neboť šlo o porušování ochrany před tělesným trestem, která byla jednou z hlavních devíz římského občana od nejstarších dob. Naopak vzhledem k zvyšující se ukrutnosti legislativy vůči všem vrstvám obyvatelstva a zvláště v případě politických zločinů překvapí některé případy trestů za *crimen maiestatis* z období dominátu, kdy se vedle zákonného trestu smrti ve formě popravy pro privilegované objevuje jeho starší varianta, vyhnanství.