The Introduction of an Interdiction of Oral Accusation in the Roman Empire

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Of many breakthroughs in the history of the Roman criminal law, the introduction of an interdiction of oral accusation (*inscriptio*) (1), I believe, deserves special attention. A criminal charge (*accusatio*) (2) was brought in by virtue of the *lex Calpurnia de repetundis* (3) in 149 BC in respect of the formation of a standing, ordinary, collegiate criminal tribunal for cases of extortion. We can assume that in 149-81 BC the Romans formed at least seven of such standing criminal tribunals (*quaestiones*

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1) J. PFAFF, s.v. *Inscriptio in crimen*, *RE*, Stuttgart 18 (1916), slip 1561-1562.

2) A. BERGER, *Encyclopedic Dictionary of Roman Law*, Philadelphia 1953, s.v. *Accusatio*, p. 340; C. GIOFFREDI, *I principi del diritto penale romano*, Torino 1970, p. 17; R. LEONHARD, s.v. *Accusatio*, *RE*, Stuttgart 1 (1893), slip 151-153; Th. MOMMSEN, *Römisches Strafrecht*, Leipzig 1899, p. 340 ff.

3) G. ROTONDI, *Leges publicae populi Romani*, Milano 1912, repr.: Hildesheim 1962, p. 292.

perpetuae) (4), providing the grounds for the comprehensive shaping of an oral, direct, contradiction-based and open trial (5).

Initially, still in the period of the Republic an accusation (6) was brought orally (7) to a praetor, who headed (8) one of the *quaestiones*. In the epoch of the Empire a practice of the oral bringing of a criminal charge (*inscriptio*) emerged. The second title of book XLVIII of the Justinian Digests: "*De accusationibus et inscriptionibus*" (9) and the later history of *inscriptio* (10) testified to the gradual introduction of a written charge besides an oral charge to a Roman criminal lawsuit. In 320 Emperor Constantine the Great issued a constitution which expressly forbade oral accusation, and at the same time commanded that the written form of an accusation is obligatory.

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4) Th. MOMMSEN, *op. cit.*, p. 804, but W. KUNKEL, s.v. *Quaestio*, *RE*, Stuttgart 47 (1963), slip 746 says about 6 *quaestiones*.

5) Th. MOMMSEN, *Abriß des römischen Staatsrechts*, Leipzig 1907, p. 250 ff.

6) In the juridical sources we can find the term : '*nominis delatio*' - *Lex Acilia repetundarum*, L. 4 and 6; see: A. BURDESE, *Manuale di diritto pubblico romano*, Torino, 2 ed. rist.: 1982, p. 244; H.F. HITZIG, s.v. *Delatio nominis*, *RE*, Stuttgart 8 (1901), slip 2425-2427; and also the terms: '*postulatio*', '*petitio*'.

7) R.L. TUCCI, *Lineamentos do processo penal romano*, São Paulo 1976, p. 151. Similarly in civil proceedings: W. LITEWSKI, *Rzymskie prawo prywatne*, Warszawa, 2 ed., 1994, p. 350.

8) *Lex Acilia repetundarum*, L. 12; G. WESENER, s.v. *Quaesitor*, *RE*, Stuttgart 47 (1963), slip 720.

9) D. 48,2. See also footnote 12.

10) W. KUNKEL, *op. cit.*, slip 758 suggests the term '*inscribere*' was unknown in the Roman Republic.

The constitution was accepted by the *Codex Theodosianus* (11), whereas Emperor Justinian did not allow for this constitution in his Code. Interestingly enough, in the Theodosian Code, Digests, and the Justinian Code, a criminal charge is basically set forth in the fragments mustered under identical titles: "*De accusationibus et inscriptionibus*" (12). Before Emperor Constantine's rule, both forms had been used: *accusatio* and *inscriptio* (13). In my opinion, it was the above-mentioned constitution of 320 that suppressed the hitherto status quo, by introducing a radical interdiction of the oral bringing of an indictment. It was a severance with the hitherto Roman tradition recognizing the oral form of a trial.

I will now move on to analysing Emperor Constantine the Great's constitution dated 22 May 320 (C.Th. 9,1,5).

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11) C.Th. 9,1,5.

12) The same title: C.I. 9,2, but: C.Th. 9,1 uses the words: "*De accusationibus et inscribtionibus*".

13) R. BONINI, *Ricerche di diritto giustinianeo*, Milano 1968, p. 61.

C.Th. 9, 1, 5 22 Mai 320 (326) AD

IMP. CONSTANTINUS A. AD MAXIMUM PRAEFECTUM URBI

Quodam tempore admissum est, ut non subscribtio, sed professio criminis uno sermone ex ore fugiens tam accusatorem quam reum sub experiendi periculo de patria, de liberis, de fortunis, de vita denique dimicare cogeret.

At one time it was permitted that an accusation of crime instituted not by an inscription [*subscriptio*] but by a declaration of the crime escaping from the lips in speech only would compel the accuser as well as the accused, under peril of trial, to contend for his rights as a citizen, his children, his fortunes, and, finally, for his life.

Ideoque volumus, ut remota professionis licentia ac temeritate ad subscribtionis morem ordinemque criminatio referatur, ut iure veteri in criminibus deferendis omnes utantur, id est ut sopita ira et per haec spatia mentis tranquillitate recepta ad supremam actionem cum ratione veniant adque consilio.

It is Our will, therefore, that the license and rashness of such declarations shall be abolished and a charge of crime shall be brought according to the customary form and order of inscription, that everyone shall use the ancient law in bringing criminal charges, that is, that when anger has been soothed and tranquillity of mind restored by the lapses of time, they shall come to the final action with reason and counsel.

The linguistic (semantic and grammatical) interpretation of the aforesaid fragment of the Theodosian Code leads to the emergence of a few issues, essential for comprehending the legal regulation discussed:

1. The issues of the creation of a criminal charge.
2. The issue of the scope of the employment of a criminal charge.
3. The introduction of an interdiction of bringing an oral criminal charge.
4. *Ratio legis* stated in the constitution.

Expanding on that issue, one should state that:

1. In the first sentence, the constitution uses the words: *Quodam tempore admissum est, ut non subscribtio, sed professio criminis uno sermone ex ore fugiens...* — when translated: "At one time it was permitted that an accusation of crime instituted not by an inscription but by a declaration of the crime escaping from the lips in speech...", and in the next sentence: *ut iure veteri in criminibus deferendis omnes utantur...* — when translated: "that everyone shall use the ancient law in bringing criminal charges...". I suspect that we deal here with an abridged thought, since it is known for certain that *veteres* made use of oral charges, and a memory of that would have never died in Rome, as the term 'accusation' survived as the general and typical designation of a criminal charge. The dualism or differentiation between the terms '*accusatio*' and '*inscriptio*' witnesses their historical and conceptual development.

2. In this constitution, the scope of the application of a criminal charge was not covered exhaustively. For the record, I must quote a fragment of a legal utterance determining the scope of the application of a criminal charge: *sub experiendi periculo de patria, de liberis, de fortunis, de vita denique dimicare cogeret.* — when translated: "under peril of trial, to contend for his rights as a citizen, his children, his fortunes, and, finally, for his life". Apart from the scope in question, it should be added that oral accusation corresponded with the oral lawsuit activities of the accused: *...tam accusatorem quam reum.*

3. *Novum* introduced by Emperor Constantine in respect of the hitherto regulation manifested itself in the words: *Ideoque volumus... ad subscribtionis morem ordinemque criminatio referatur...* — when translated: "It is Our will, therefore... charge of crime... shall be brought according to the customary form and order of inscription...". This expression may come to seem more comprehensible if collated with the contents of another passage of this constitution: *Quodam tempore admissum est* — when translated: "At the time it was permitted...".

The introduction of an interdiction of oral accusation was therefore a novelty. The other sources, particularly those included in constitutions and covered in the title "*De accusationibus et inscribtionibus*" of the Theodosian Code, indicate that after the oldest period of oral accusation (*accusatio*), an optional form of bringing a written accusation (*inscriptio*) appeared. Afterwards, probably on 22 May 320 an analysed constitution was issued

which outright forbade oral indictment, and made '*inscriptio*' obligatory.

4. The *ratio legis* mentioned in the imperial constitution seems unconvincing to me: *...in criminibus deferendis omnes utantur, id est ut sopita ira et per haec spatia mentis tranquillitate recepta ad supremam actionem cum ratione veniant adque consilio* — when translated: "...in criminal charges... when anger has been soothed and tranquillity of mind restored by theses lapses of time, they shall come to the final action with reason and counsel". Further, I shall cite here the beginning of the second sentence of the constitution: *Ideoque volumus, ut remota professionis licentia ac temeritate ad subscribtionis morem ordinemque criminatio referatur* — when translated: "It is Our will, therefore, that the license and rashness of such declarations shall be abolished and charge of crime shall be brought according to the customary form and order of inscription...". Constantine gives the reason for the introduction of this fundamental solution. The reasons were of psychical nature (the antagonism of reason and affection), e.g. 'license', 'rashness', failure to grasp the actual and legal status of the case by the accuser. The Emperor's suggestion aims to show that the application of a written form will coerce the active side of a lawsuit to greater accuracy in action and able conduct of the case. Oral *accusatio* ancient is deemed by Constantine (*ut iure veteri*), though he refers to it with contempt, designating its results: *licentia ac temeritate*. It could seem that nowadays it would be too difficult to detect the real *ratio legis* of the constitution, specially because the reasons given by the Emperor can be viewed as almost authentic interpretation. However, one

may draw another interpretation from the entirety of legal sources, at which I aim below, which does not contradict the official imperial version. I believe it is worthy of hardship to dig out the real reason for the obligatory introduction of *inscriptio* in 320.

The basic collation of the concepts '*accusatio*' - '*inscriptio*' did not lead to opposing them. This position results from the adopted systematics of the aforementioned title of the Codes: Theodosian and Justinian, as well as Digests, because in the title "*De accusationibus et inscriptionibus*" (14) the two notions mentioned occur coordinately. The Justinian codification did not take over the discussed constitution of Constantine. Yet the contents of the regulations of a criminal charge indicate categorically the institution of the written form of a charge via *inscriptio*. It is interesting that the Justinian law equally adopted the notions *accusatio* and *inscriptio*. It was only the matter of continuing the legal-criminal tradition of Rome. Rather, I assume that the word '*accusatio*' has a broader conceptual scope than the word '*inscriptio*'. Accusation denotes first of all a charge of the public law, and *inscriptio* denotes the written form of a charge (15). This is where, I think, the dualism of the concepts comes from.

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14) G.F. FALCHI, *Diritto penale romano*, vol. 3, Padova 1937, p. 17.

15) See: Th. MOMMSEN, *Römisches Strafrecht*, Leipzig 1899, p. 385.

The further post-Roman fate of *accusatio* in the Middle Ages and contemporary times combine the term with a model (type) of a charge process ([16]), by contrasting it with the term "*inquisitio*" ([17]), to designate the type of a lawsuit (inquisitory lawsuit) being fundamentally different from those which were carried on in Rome. The breakthrough made by Constantine was not aimed at 'planning' such a development of a criminal procedure. No waiver of the oral form of a trial was brought in ([18]). After all, it is difficult to verify any element of the written form of a trial from the *lex Calpurnia* to the Justinian codification. The principle of the oral nature of a lawsuit did not imply the form of a criminal charge, as the Romans discriminated between *accusatio* and trial (*actiones*: *prima*, *secunda*) ([19]). Oral form, as a characteristic feature of a Roman criminal lawsuit, did not mean that writing was not used for the lawsuit purposes. Recording the testimonies of witnesses during an investigation (*inquisitio*) ([20]), next taking minutes of them, and also perhaps writing a short account of a suit and voting with plates by *iudices* of a given *quaestio* ([21]) testify to the use of written form in lawsuit. Yet the elements of

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16) N.T. GÖNNER, *Handbuch des deutschen gemeinen Prozesses in einer ausführlichen Erörterung seiner wichtigsten Gegenstände*, Graz 1804, p. 183.

17) See also: A. BERGER, *op. cit.*, s.v. *Inquisitio*, p. 503.

18) The trial was still an oral one: C.Th. 2,18,1.

19) So: W. KUNKEL, *op. cit.*, slip 765, but A.W. ZUMPT, *Das Criminalrecht der römischen Republik*, Berlin 1868, vol. 2, p. 210, says about '*actio prima*' and '*altera actio*'.

20) Cic., *In Verr.* II-a 2, 8; II-a 3, 34; II-a 1, 21.

21) W. KUNKEL, *op. cit.*, slip 765-766.

written form have never breached, I think, the oral form of a lawsuit. *Accusatio* as a central lawsuit institution, since the outset of the history of a criminal lawsuit, had an oral character. However, in the period of the Empire (Principate) written indictment started prevailing. And, as I believe, on the grounds of the abovementioned constitution, in spite of the predominance of the written form of an accusation in a certain period, oral form did not disappear, but — perhaps — started to threaten a tendency to written form in the court practice. Hence that relationship of Emperor Constantine, who does not deny that the Roman tradition was linked with oral accusation (*ut iure veteri*). The dispute over oral or written form was severely cut by Constantine introducing an obligation to employ the written form of a criminal charge. Initially, in the period of the late Republic, still before the emergence of *inscriptio* the marginal institution *subscriptores* (22) was known, i.e. coprosecutors or assistants to the prosecutor appearing on their behalf. *Subscriptor* was the one signing or perhaps the one entered into the Praetor's register who headed the *quaestio*. Yet, the prosecutor (*accusator*) did not put his signature in the minutes, nor submitted any letter. So, *subscriptio* was only of technical import and was confined to the act of taking minutes when bringing a case.

I think it vital to search for a historical moment when the antagonization of the forms of bringing an accusation occurred. I suppose the practice of the law office, formed by Emperor

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22) U. BRASIELLO, s.v. *Processo penale*, *Novissimo Digesto Italiano*, Torino 1966, vol. 13, 1.153, n. 3.

Hadrian ([23]), led probably to the separation of the issue of bringing a case (*per rescriptum*) ([24]) from its court settlement (both by the emperor, and by imperial judges). It is difficult to follow in depth the mechanism of the arousal of this separation, but it seems certain that the separation of bringing (filing) and preparing a lawsuit from conducting it in the mode of trial (*actio*) led to the recognition of the necessity to consolidate the constituent parts of the *accusatio*. In the practice of the Great Empire, on dissemination of a Roman citizenship among free provincials by the *Constitutio Antoniniana* ([25]), the necessity appeared to implement authorization to protect in court the populace of the areas of the entire Empire. The modification of the system did not cover a trial, but only the consolidation of the actions of *accusatio*. In rescriptive proceedings, and later in lawsuits conducted before a senior imperial judge, it became necessary to accurately report on the statements of the prosecuting side, hence a need arose for making up an accusation in writing (*inscriptio*). At last the reform of the state ([26]) initiated by Emperor Diocletian triggered the necessity to fix in writing the most important lawsuit deeds (*libellus accusatorius* ([27]), *libellus*

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23) W. BOJARSKI, *Prawo rzymskie*, Toruń 1994, p. 27.

24) C.Th. 1,2,2; 1,2,11; C.I. 1,14,2; 1,14,3; and also: C.Th. 12, 1,137.

25) L. HOMO, *Les institutions politiques romaines*, Paris 1927, ed. 1970, p. 380. See also: J.A.C. THOMAS, *The Development of Roman Criminal Law, The Law Quarterly Review*, London 1963, vol. 79, p. 236.

26) Th. MOMMSEN, *Abriß des römischen Staatsrechts*, Leipzig 1907, p. 347 ff.

27) A. BERGER, *op. cit.*, s.v. *libellus accusatorius*, p. 561. See also: D. 48,2,3.

contradictionis (28), *libellus appellationis*). The division of court powers according to the territorial and hierarchical system introduced implied passing cases on as *per instantiam* (29). Reporting on a case could only suffice for a simple procedure *per rescriptum* (30), but in the expanded and permanent instance system (31) any higher court had to directly familiarize with the status of a case, which was the subject of settling by a lower instance. Hence a necessity to furnish the accuser's *inscriptio* (and for certain — a judgment [*decretum*] of a lower court). The law of the Justinian epoch had not known another manner of accusation in criminal cases as by *inscriptio*. But the basic and radical change of the complete riddance of the oral form of bringing an accusation was carried out by Emperor Constantine (32). Constantine's work survived centuries, for the law of the

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28) A. BERGER, *op. cit.*, s.v. *libellus contradictionis*, p. 561.

29) G. PUGLIESE, *Diritto criminale romano. Guida allo studio della civiltà romana antica*, Roma 2 ed., I (1959), p. 469; A. WILIŃSKI, *Das römische Recht. Geschichte und Grundbegriffe des Privatrechts mit einem Anhang über Strafrecht und Strafprozeß*, Leipzig 1966, p. 91. See also: M. LAURIA, *Accusatio - Inquisitio, Atti R. Accademia Scienze Morali e Politiche di Napoli*, 1934, vol. 56, p. 365.

30) M. KASER, *Das römische Zivilprozeßrecht*, München 1966, pp. 520-523.

31) G. GROSSO, *Lezioni di storia del diritto romano*, Torino 1960, p. 489.

32) Very important is the opinion of the glossatores (*interpretatio*) - L. WENGER, *Die Quellen des römischen Rechts*, Wien 1953, p. 537, of analysing constitution. See also: R.L. TUCCI, *op. cit.*, p. 176. Opposite opinion: J.L. STRACHAN-DAVIDSON, *Problems of the Roman Criminal Law*, vol. 2, Oxford 1912, p. 164, who speaks about non-verbal but rather 'inquisitory system', illustrated with sources: C.Th. 9,1,5; C.Th. 2,18,1; however: G.F. FALCHI, *op. cit.*, p. 28, says that the procedure of '*magna crimina*' was 'formale e scritto'.

Justinian epoch did not provide for any other mode of accusation in criminal cases as by written *inscriptio*. Emperor Justinian did not incorporate in his codification the analysed constitution of Emperor Constantine, which testifies to the fact that *inscriptio* had already been a well-rooted lawsuit institution, though the memory of the original *accusatio* did not die.