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Immediacy principle in the Roman criminal procedure

Abstract

In analysing the historical development of the Roman criminal procedure it should be observed that it followed the immediacy principle from the earliest times until the Justinian period. Adherence to this rule is best confirmed by the manner in which particular evidence was taken in the Roman criminal procedure, as well as by its judicial evaluation. The significance attached by Romans to the principle in question is corroborated primarily by an example of evidence obtained from a witness's testimony. Already in the Republic period, testimony given personally by a witness before the court was preferred to testimony in the form of a document. Adherence to the immediacy principle in the Roman criminal procedure was manifested by the fact of preparing reports, initially comprising only certain decisions, e.g. judgements, and later all procedural actions.

In the Empire period, the Roman criminal procedure was also dominated by the immediacy principle. The fact that the principle was adhered to is explicitly confirmed by the rescripts issued by Emperor Hadrian, expressing the demand that direct evidence be taken before the court, the reform of the irenarchae's office implemented by Antoninus Pius, as well as a ban on legal assistance in criminal cases, confirmed by Justinian. Certain exceptions to the immediacy principle were allowed, such as submitting at a trial written laudationes prepared out of court and reports on interrogation of witnesses compiled during the proceedings, as well as admissibility of circumstantial evidence.

Keywords: Roman criminal procedure, immediacy principle, evidentiary proceedings, witness, defendant, testimony, explanations, interrogation report

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Zasada bezpośredniości w rzymskim procesie karnym

Streszczenie

Analizując historyczny rozwój rzymskiego procesu karnego, należy stwierdzić, iż zasada bezpośredniości towarzyszyła mu niemalże od najdawniejszych czasów, aż do Justyniana. Fakt przestrzegania tej zasady najlepiej potwierdza zarówno sposób przeprowadzania określonych dowodów w rzymskim procesie karnym, jak również ich sądowa ocena. O tym, jak dużą wagę przywiązywali Rzymianie do omawianej zasady, może świadczyć przede wszystkim przykład dowodu z zeznań świadka. Zeznania składane osobiście przez świadka przed sądem były już w czasach republiki przedkładane ponad zeznanie złożone w postaci dokumentu. Wyrazem przestrzegania zasady bezpośredniości w rzymskim procesie karnym był fakt sporządzania protokołów, początkowo jedynie z określonych rozstrzygnięć np. wyroków, a w późniejszym okresie już z wszystkich czynności procesowych. Także w okresie cesarstwa rzymski proces karny był zdominowany przez zasadę bezpośredniości. Fakt przestrzegania tejże zasady w wyraźny sposób potwierdzają zarówno reskrypty wydane przez cesarza Hadriana, wyrażające postulat bezpośredniego przeprowadzania dowodów przed sądem, reforma urzędu *irenarchae* dokonana przez Antoninusa Piusa, jak również potwierdzony przez Justyniana zakaz pomocy sądowej w sprawach karnych. Dopuszczalne były pewne wyjątki od zasady bezpośredniości, zwłaszcza przedstawianie podczas rozprawy przygotowanych poza procesem pisemnych *laudationes* oraz sporządzonych w trakcie postępowania protokołów przesłuchań świadków, jak również możliwość wykorzystywania dowodów poszlakowych.

Słowa kluczowe: rzymski proces karny, zasada bezpośredniości, postępowanie dowodowe, świadek, oskarżony, zeznania, wyjaśnienia, protokół przesłuchania

 DOI: 10.7206/kp.2080-1084.106

The immediacy principle, discussed in this paper, is currently one of the most important, primary rules of the criminal procedure, and specifically of evidentiary proceedings in criminal matters.[2] Generally speaking, the principle in question pertains to the way of taking evidence before the court.[3] Nowadays, understood *in concreto* as a certain general norm, this principle provides that during a trial before the court all evidence ought to be taken in such a way so that both the court and the parties have direct contact with the original source of evidence (e.g. defendant, witness, material evidence).[4] Furthermore, this principle imposes on the court the obligation to limit the use of secondary sources of evidence, especially reports on interrogation of witnesses and defendants, solely to these cases when it proves necessary due to impossible or considerably restricted access to the original source of evidence.[5]

In analysing the historical development of the Roman criminal procedure it should be observed that it followed the immediacy principle almost from the earliest times, while definitely and evidently from the beginning of the Republic.[6] Adherence to this rule is best confirmed by the manner in which particular evidence was taken in the Roman criminal procedure, as well as by its judicial evaluation.

The significance attached by Romans to the principle at issue is corroborated primarily by an example of evidence obtained from a witness's testimony. As early as in the Republic period, the personal testimony of a witness before the court (*testimonia a praesentibus*) was preferred to testimony in the form of a document (*testimonium per tabulas*).[7] The opinion on low credibility of written *testimonia* was most fully expressed by Quintilian in *Institutio oratoria* in the following passage:

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2 See: R. Kmiecik (ed.), *Prawo dowodowe. Zarys wykładu*, 3rd edition, Warszawa 2008, pp. 68, 80. More in: T. Nowak, *Zasada bezpośredniości w polskim procesie karnym*, Poznań 1971, passim.

3 Cf. A. Murzynowski, *Istota i zasady procesu karnego*, 3rd edition, Warszawa 1994, p. 311.

4 R. Kmiecik (ed.), op. cit., p. 81.

5 Ibidem.

6 Cf. W. Litewski, *Rzymski proces karny*, Kraków 2003, p. 118.

7 Th. Mommsen, *Römisches Strafrecht*, Leipzig 1899 (reprint Graz 1955), p. 441; W. Rozwadowski, *Ocena zeznań świadków w procesie rzymskim epoki republikańskiej*, "Czasopismo Prawno-Historyczne" 1961, 13, 1, pp. 23–24; cf. K. Amielańczyk, *O kształtowaniu się niektórych zasad procesowych w rzymskim postępowaniu karnym okresu pryncypatu*, "Studia Iuridica Lublinensia" 2007, 10, p. 24.

Quint., *Inst. orat., V, 7, 1: Ea dicuntur aut per tabulas aut a praesentibus. Simplicior contra tabulas pugna.*

According to the author's account, at a trial it is far easier to handle *per tabulas* testimony than oral testimony (*testimonia a praesentibus*). The witnesses' obligation to give testimony personally before the court, and thus the existence of the immediacy principle, particularly in the Roman criminal procedure, is best confirmed by Tacitus' statement in *Dialogus de oratoribus*:

Tacitus, *Dialog., 36: cum testimonia quoque in iudiciis non absentes nec per tabellam dare, sed coram et praesentes dicere cogerentur.*

In accordance with the historian's account, *testimonia* could be given neither by an absent person nor in a written form, but it was an obligation of a *testis* to be present at a trial and to give testimony personally. Certainly, the opinion expressed by Tacitus cannot be treated as a generally binding rule in the Roman criminal procedure.[8] However, his account clearly confirms the significance attached to *testimonia a praesentibus* within the broadly understood *iudicium publicum*.

Without doubt, the obligation of personal testimony before the court, imposed especially on witnesses summoned by the prosecutor, was a manifestation of adherence to the immediacy principle, especially in proceedings before *quaestiones perpetuae*.[9] Certainly, a witness appointed by the *accusator* could be heard by him also out of trial and the witness's testimony could then be submitted to the court in a written form. However, a *testis* could not be forced to give testimony in this form[10]. The prosecutor had to take into account that such a "report" on interrogation of a witness would not have significant evidentiary value for the court. Definitely, the obligation to testify, imposed on prosecution witnesses, resulted primarily from the role fulfilled in the proceedings by the *accusator*, who, in order to effectively

8 Tacitus' opinion does not mean that the use of written testimony was prohibited in the criminal procedure. If it was, Quintilian would surely mention this – see: A.W. Zumpt, *Der Kriminalprozess der Römischen Republik*, Leipzig 1871 (reprint Aalen 1993), p. 292, footnote 1.

9 Quint., Inst. orat., V, 7, 9: *Et quoniam duo genera sunt testium, aut voluntariorum aut eorum quibus in iudiciis publicis lege denuntiari solet, quorum altero pars utraque utitur, alterum accusatoribus tantum concessum est*.

10 Quint., Inst. orat., V, 7, 2: *nemo per tabulas dat testimonium nisi sua voluntate*; Cic., p. Mur., 24, 49; see: A.H.J. Greenidge, *The Legal Procedure of Cicero's Time*, New York 1971, p. 488.

 DOI: 10.7206/kp.2080-1084.106

investigate the charges filed, was equipped with special procedural rights towards people summoned by him as witnesses.[11]

On the other hand, the situation of defence witnesses in proceedings before *quaestiones perpetuae* was similar to the situation of witnesses testifying in the civil procedure.[12] They were not obliged to testify, and if they wanted to give testimony in a particular case, they could do it personally before the court or out of trial in a written form.[13] Owing to the fact that written testimony could in general be given voluntarily, in the proceedings it only constituted a certain "substitute" for *testimonia a praesentibus*.[14] According to A.H.J. Greenidge, in exceptional cases *testimonia per tabulas* were given by witnesses who were obliged to testify and who, due to justified reasons, could not appear in court, or typically by "volunteer witnesses" who wished to testify but did not want to appear in court.[15]

Despite the fact that *testimonia per tabulas* were made out of trial, their submission to the court was conditioned on the fulfilment of special requirements which, to a certain extent, formed a substitute for the immediacy principle in the criminal procedure. During an out-of-trial interrogation, the court was replaced by seven *signatores* in whose presence the witness gave testimony which was then written down and signed by them with an impression of a seal (*signa*) on the interrogation report.[16] According to A.W. Zumpt, the abovementioned requirement that testimony given out of trial should be certified by *signatores* did not pertain to written laudatory addresses (*laudationes*).[17]

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11 A.W. Zumpt, op. cit., p. 184; W. Mossakowski, *Accusator w rzymskim procesie "de reptundis" w okresie republiki rzymskiej*, Toruń 1994, p. 51.

12 Cf. U. Vincenti, *Duo genera sunt testium. Contributo allo studio della prova testimoniale nel processo romano*, Padova 1989, p. 96.

13 See: M. Kaser, s.v. *testimonium*, [in:] *Paulys Realencyclopädie der classischen Altertumswissenschaft. Neue Bearbeitung. Unter Mitwirkung zahlreicher Fachgenonssen herausgegeben von G. Wissowa*, Vol. 9, A II, Stuttgart 1894, p. 1050; U. Steck, *Der Zeugenbeweis in den Gerichtsreden Ciceros*, Frankfurt am Main 2009, p. 90.

14 Quint., Inst. orat., V, 7, 2: *nemo per tabulas dat testimonium nisi sua voluntate*.; A.H.J. Greenidge, op. cit., p. 488; M. Kaser, op. cit., p. 1052.

15 A.H.J. Greenidge, op. cit., p. 488. According to a widespread opinion, there was no obligation to give written testimony either in the Republic or in the Empire period – cf. above: Quint., Inst. orat., V, 7, 2; see: A.W. Zumpt, op. cit., p. 291; Th. Mommsen, *rec. J.H.A. Escher, De testium ratione quae Romae Ciceronis aetate obtinuit, Turici 1842*, [in:] *Gesammelte Schriften. Juristiche Schriften*, Vol. III, Berlin 1907, p. 501; U. Steck, op. cit., p. 93.

16 See: Quint. Inst orat., V, 7, 1: *nam et minus obstitisse videtur pudor inter paucos signatores et pro diffidentia premitur absentia. Si reprehensionem non capit ipsa persona, infamare signatores licet*; G. Geib, *Geschichte des römischen Criminalprozesses bis zum Tode Iustinians*, Leipzig 1842, p. 343; A.W. Zumpt, op. cit., p. 271; W. Rozwadowski, *Ocena zeznań świadków w procesie rzymskim epoki republikańskiej...*, op. cit., pp. 23–24.

17 A.W. Zumpt, op. cit., p. 301.

Among written types of testimony (*testimonia per tabulas*), we should distinguish testimony about the facts connected with the object of the pending proceedings, that is the circumstances related to a crime committed, which can be described as *testatio or testificatio*.[18] On the other hand, there were so-called *laudationes*, or laudatory addresses, that is testimony *sui generis*, sometimes given in a written form by laudators (praisers)[19] in which they testified about the defendant's morality or way of life.[20]

Unlike *laudationes*, *testationes* were not common evidentiary measures in the judicial practice of the Republic period, either in criminal procedure or in private prosecution.[21] J.H.A. Escher mentioned only two cases among Republican criminal proceedings known to us, in which such testimony was given.[22] One of them pertains to the trial of Verres, who after an unsuccessful expedition against pirates, ordered captains of ships from the Sicilian fleet to prepare written *testationes* about the number of soldiers who were on ships during the lost battle against corsairs, with the intention of using this testimony should charges be brought against him in the future.[23] The other case quoted by Escher is the written testimony of witnesses, made during preparation of the indictment against Murena by prosecutor Servius Sulpicius.[24] What is interesting, both situations occurred before commencement of proper proceedings, not during them.

On the other hand, written *laudationes* were quite popular evidentiary measures in the Roman criminal procedure.[25] However, as it has already been mentioned, laudators were not witnesses of facts, but primarily of the defendant's morality.[26]

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18 Cf. Th. Mommsen, *Römisches...*, op. cit., p. 411; see also: W. Mossakowski, *Laudatores w procesie rzymskim*, "Zeszyty Prawnicze UKSW" 2001, 1, p. 169.

19 See: E. Weiss, s.v. *laudatores*, [in:] *Paulys Realencyclopädie der classischen Altertumswissenschaft. Neue Bearbeitung. Unter Mitwirkung zahlreicher Fachgenonssen herausgegeben von G. Wissowa*, Vol. 12.1, Stuttgart 1894, p. 994; A. Berger, s.v. *laudatores*, [in:] *Encyclopedic Dictionary of Roman Law*, Philadelphia 1953, p. 538.

20 As rightly noted by W. Mossakowski, "the term *testatio* was understood as an account of facts or confirmation of a legal action (e.g. *per aes et libram*), and not as giving evidence, literally: »testifying« about the defendant's morals and way of life" – W. Mossakowski, *Laudatores...*, op. cit., p. 169; cf. J. Sondel, *Słownik łacińsko-polski dla prawników i historyków*, 2nd edition, Kraków 2005, p. 941.

21 A.W. Zumpt, op. cit., p. 291; Th. Mommsen, *Römisches...*, op. cit., p. 411; M. Kaser, op. cit., p. 1052.

22 J.H.A. Escher, *De testium ratione quae Romae Ciceronis aetate obtinuit*, Turici 1842, p. 89.

23 Cic., In Verrem, V, 39, 104.

24 Cic., p. Mur., 24, 49.

25 Cic. p. Font., 6, 14; 9, 20; Cic. p. Cluent., 69, 195; Cic. p. Flacco, 26, 61; 63; 40, 100; Cic. p. Balbo, 18, 41; cf. A.W. Zumpt, op. cit., p. 291; Th. Mommsen, *Römisches...*, op. cit., p. 441; W. Mossakowski, *Laudatores...*, op. cit., p. 170.

26 Cf. W. Mossakowski, *Laudatores...*, op. cit., p. 170; L. Loschiavo, *Figure di testimoni e modelli processualii tra anitichità e primo medioevo*, Milano 2004, p. 25 et seq.

 DOI: 10.7206/kp.2080-1084.106

The preserved sources concerning criminal proceedings from the late Republic period contain no indication that during a trial witnesses read out their own testimonies prepared beforehand in a written form, either as *testationes* or *laudationes*.[27] Certainly, as an exception to the immediacy principle, it was admissible to present during a trial written *laudationes* prepared out of court (especially by Roman *civitates*) and to read out reports on the interrogation of witnesses (compiled during the proceedings) in their presence. Nevertheless, as confirmed by the sources, the Roman criminal procedure in the Republic period was dominated by testimony given by witnesses personally before the court in the oral form, while testimony in the written form was used exceptionally, as a subsidiary measure.[28] Undoubtedly, the possibility to give testimony in the written form was justified by some impediments, especially in transportation: e.g. a long distance between Rome and a witness' place of residence. However, it seems that the form of testimony depended largely on the evidentiary value of the testimony itself, namely on what circumstances important from the perspective of the subject matter of the trial were to be certified by the witness. The best example was the abovementioned custom of presenting written *laudationes* in court.

In analysing the adherence to the principle in question on the grounds of the Roman criminal procedure, the special status should be noted of evidence obtained by hearing a slave, and specifically the manner of taking this evidence in the criminal procedure. *Servi*, devoid of the right to testify before the court, were forcibly interrogated with the use of torture (*quaestio per tormenta*) out of court.[29] In this case, *quaestio* was conducted not by the judicial tribunal, but by a so-called *quaesitor*.[30] On the basis of such an interrogation a report was made, referred to as *tabella*, which was read out and, similarly as in the case of *testationes*, stamped by people present during *quaestio* and then submitted to court.[31] Reports on the interrogation of slaves had characteristic content, namely a very detailed description of the course

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27 A.W. Zumpt, op. cit., p. 292.

28 Th. Mommsen, *Römisches...*, op. cit., p. 411; W. Mossakowski, *Laudatores...*, op. cit., p. 171.

29 A.W. Zumpt, op. cit., p. 255; Th. Mommsen, *Römisches...*, op. cit., p. 412; A.H.J. Greenidge, op. cit., p. 491; cf. W. Waldstein, *Quaestio per tormenta*, [in:] *Paulys Realencyclopädie der classischen Altertumswissenschaft. Neue Bearbeitung. Unter Mitwirkung zahlreicher Fachgenonssen herausgegeben von G. Wissowa*, Vol. 24, Stuttgart 1894, pp. 786–787.

30 A.W. Zumpt, op. cit., p. 324 et seq.; U. Steck, op. cit., p. 156; M. Brutti, *La tortura e il giudizio*, "Index" 2010, 38, p. 50.

31 Cic., p. Cluent., 65, 184; A.W. Zumpt, op. cit., p. 329; cf. W. Stroh, *Taxis und Taktik. Die advokatische Dispositionskunst in Ciceros Gerichtsreden*, Stuttgart 1975, p. 260; L. Schumacher, *Servus index. Sklavenverhoer und Sklavenanzeige im republikanischen und kaiserzeitlichen Rom*, Wiesbaden 1982, p. 81; U. Steck, op. cit., p. 152.

of the interrogation. According to A.W. Zumpt, *tabella* most probably gave a "word for word" account of every question the slave was asked during *quaestio* and every answer given.[32] Furthermore, it was noted in the report whether the slave told the truth right away, did it during torture, withdrew earlier testimony or upheld it.[33] Certainly, such a way of testimony reporting was supposed to somewhat compensate for the indirectness, imposed by law, of taking this evidentiary measure. Besides, it is worth noticing that such a method of testimony reporting was most probably practiced also during cross-examination of witnesses.[34]

Without doubt, the adherence to the immediacy principle in the Roman criminal procedure was best manifested in the fact of making reports, initially comprising only certain decisions, e.g. judgements, and later all procedural actions.[35] The obligation to prepare reports resulted from the predominantly oral character of the Roman criminal procedure.[36] In the Republic period, the duty to record procedural actions appeared in the proceedings before *quaestiones perpetuae*.[37] According to A.W. Zumpt, a written report on the whole proceedings was compiled, which was then stored by an official who presided over these particular proceedings.[38] During the Republic period, it was called *tabula publica*.[39] It contained mostly the results (records) of oral interrogation of witnesses, sometimes referred to in the sources as *testium dicta*.[40]

A certain departure from the immediacy principle in the Roman criminal procedure was the possibility to read out at a trial the content of witnesses' testimonies recorded in the proceedings during which they had been interrogated earlier. From Cicero's accounts it follows that such a situation occurred when a defence lawyer who participated in the proceedings, while presenting his arguments during a speech, wanted to refer to witnesses' testimonies given earlier

32 A.W. Zumpt, op. cit., pp. 328, 337.

33 Quint., Inst. orat., V, 4, 2; A.W. Zumpt, op. cit., p. 329.

34 See: Cic. in Verrem, IV, 12, 27; A.W. Zumpt, op. cit., p. 337.

35 See: Th. Mommsen, *Römisches...*, op. cit., p. 448; W. Litewski, op. cit., p. 21.

36 See: W. Mossakowski, *Laudatores...*, op. cit., p. 172; K. Amielańczyk, *O kształtowaniu się niektórych zasad...*, op. cit., p. 28.

37 W. Litewski, op. cit., p. 21.

38 A.W. Zumpt, op. cit., p. 337. Sceptically about this issue – W. Litewski, op. cit., p. 21.

39 Cic., p. Cluent., 23, 62; see: D Mantovani, *Aspetti documentali del processo crimnale nella repubblica. Le tabulae publicae*, "Mélanges de l'École française de Rome: Antiquité" 2000, 112, p. 651 et seq.

40 Cic. p. Cluent., 23, 62; p. Rab. Post., 11, 30; Ascon, in Milon., 40.

 DOI: 10.7206/kp.2080-1084.106

which corroborated the theses put forward by him during the speech. Such cases are mentioned e.g. in Verres'[41] or Caelius' trials.[42]

Reading out witnesses' testimonies during defence speeches was also possible when *testes* were present at the trial. Such a case is mentioned by Cicero in his speech *pro Cluentio*. According to this account, the testimony of an elderly man concerning death of his son was read out at the trial during Arpinate's defence speech.[43] However, the father present during this procedural action had to stand up when his testimony was read out.[44] According to A.H.J Greenidge, such a departure from the rule was justified by the sensitive character of the case and respect for the father's feelings, who was definitely spared painful experiences of giving testimony about his son's death once again.[45]

Such reports could be used both in these proceedings for which they were prepared and in other proceedings as public (official) documents.[46] For instance, such a situation occurred during Verres's trial, when Cicero in his speech against the accused governor, cited his testimony given as a witness at the trial of Philodemos of Lampsacus.[47]

Another departure from the immediacy principle in the Roman criminal procedure was the possibility to use circumstantial evidence, similarly as it happens today.[48] The fact that circumstantial evidence constituted a well-known category of evidentiary measures, used already in the Republic period, is confirmed by its presence as an object of deliberations in the writings of orators of that time.[49] What

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41 Cic. in Verrem, I, 49, 128: *Dixit Cn. Fannius, eques Romanus, frater germanus Q. Titini, iudicis tui, tibi pecuniam se dedisse. Recita. Cn. Fanni testimonium.*

42 Cic. p. Caelio, 22, 55: *Ipsius iurati religionem auctoritatemque percipite atque omnia diligenter testimonii verba cognoscite. Recita. L. Luccei testimonium.*

43 Cic. p. Cluent., 60, 168: *Quis huic rei testis est? Idem qui sui luctus, pater – pater, inquam, illius adulescentis; quem propter animi dolorem pertenuis suspicio potuisset ex illo loco testem in A. Cluentium constituere, is hunc suo testimonio sublevat; quod recita.* In Cluentius' trial, a summoned witness was Balbutius' father. In his testimony, the elderly man explained the cause of his son's death, thus freeing Cluentius from the charge of poisoning him – see: U. Steck, op. cit., p. 78.

44 Cic. p. Cluent., 60, 168: *Tu autem, nisi molestum est, paulisper exsurge; perfer hunc dolorem commemorationis necessariae, in qua ego diutius non morabor, quoniam, quod fuit viri optimi, fecisti ut ne cui innocenti maeror tuus calamitatem et falsum crimen adferret.*

45 A.H.J. Greenidge, op. cit., p. 489.

46 See: Cic. p. Cluent., 23, 62: *Exstat memoria, sunt tabulae publicae: redargue me, si mentior: testium dicta recita: doce in illorum iudiciis quid praeter hoc venenum Oppianici non modo in criminis, sed in male dicti loco sit obiectum*; A.W. Zumpt, op. cit., p. 337.

47 Cic. in Verrem, I, 33, 84.

48 A.W. Zumpt, op. cit., p. 342, Th. Mommsen, *Römisches...*, op. cit., p. 442; Z. Papierkowski, *Dowód pośredni w starożytnym procesie karnym*, "Roczniki Teologiczno-Kanoniczne KUL" 1963, 10, 4, p. 106.

49 Auct. ad Her., 2, 2; Cic. De invent. 2, 4; De part. orat. 32, 110; Quint. Inst. orat., V, 8.

is most important is that circumstantial evidence was the basis of judicial decisions in certain criminal proceedings, which is corroborated by source materials. One of these cases was cited by Cicero in his speech *pro Roscio Amerino*. It pertained to the crime of *parricidium* committed against T. Cloelius of Terracina by his two sons accused of suffocating him.[50] Without doubt, the most famous trial based on circumstantial evidence in the Republic period was the case of Milo charged with murdering Clodius.[51] Moreover, the trial of senator L. Sestius had a similar character: as a result of a corpse being found in his house he was brought to court – the Concilium Plebis.[52]

During the Empire period, the Roman criminal procedure was also dominated by the immediacy principle. Adherence to this rule is clearly confirmed, especially by rescripts issued by Emperor Hadrian. In the rescript addressed by the Emperor to Iunius Rufinus, proconsul of Macedonia, we can encounter a stipulation that evidence from a witness' testimony should be taken directly before the court:

> D. 22, 5, 3, 3 *(Callistratus libro quarto de cognitionibus): Idem divus Hadrianus Iunio Rufino proconsuli Macedoniae rescripsit testibus se, non testimoniis crediturum. Verba epistulae ad hanc partem pertinentia haec sunt: „Quod crimina obiecerit apud me Alexander Apro et quia non probabat nec testes producebat, sed testimoniis uti volebat, quibus apud me locus non est (nam ipsos interrogare soleo), quem remisi ad provinciae praesidem, ut is de fide testium quaereret et nisi implesset quod intenderat, relegaretur".*

According to Callistratus, prosecutor Alexander, who tried to prove that defendant Aper was guilty but did not summon witnesses to court in order to hear them personally and limited the evidence presented by him only to written testimonies, should be sentenced to relegation, in Hadrian's opinion.[53] Moreover, the Emperor emphasized that when he himself adjudicated on certain cases before his tribunal he had a habit of hearing witnesses during trial.[54] Certainly, this information should not be interpreted as a general ban on using written testimony in

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50 Cic. p. Sex. Rosc., 23, 64.

51 Cic. p. Milone; see: K. Amielańczyk, *Milo's Criminal Trial*, "Orbis Iuris Romani, Journal of ancient Law Studies" 1997, 3, p. 5 et seq.

52 Cic. De re publica, II, 36; Liv. Ab urbe, 3, 33; Z. Papierkowski, op. cit., p. 108.

53 K. Amielańczyk, *Rzymskie prawo karne w reskryptach cesarza Hadriana*, Lublin 2006, pp. 206–207; idem, *O kształtowaniu się niektórych zasad...*, op. cit., p. 24.

54 G. Pugliese, *La preuve dans le procès romain de l'Epoque classique*, [in:] *Recueils de la société Jean Bodin pour l'histoire comparative des instutions. La Preuve, première parie Antiquité*, Brüssel 1964, p. 318; K. Amielańczyk, *Rzymskie prawo karne...*, op. cit., p. 207; cf. U. Vincenti, op. cit., p. 140.

 DOI: 10.7206/kp.2080-1084.106

the Roman criminal procedure.[55] Nevertheless, it should definitely be regarded as an act aimed at standardisation of adherence to the immediacy principle[56] in the Roman criminal procedure, and especially in its provincial form executed by governors.

The aforementioned regulation is closely connected with another Hadrian's rescript addressed to Gabinius Maximus:

> D. 22, 5, 3, 4 *(Callistratus libro quarto de cognitionibus): Gabinio quoque Maximo idem princeps in haec verba rescripsit: „Alia est auctoritas praesentium testium, alia testimoniorum quae recitari solent: tecum ergo delibera, ut, si retinere eos velis, des eis impendia".*

In this rescript, the Emperor points to the difference in credibility between testimonies given orally by witnesses at a trial and those prepared out of court in writing.[57] Highlighting this difference, Hadrian emphasized a higher evidentiary value of oral testimony as compared to written one, which – according to the rescript – is only read out during a trial.[58]

Without doubt, Hadrian's rescripts cited above (D. 22, 5, 3, 3; 22, 5, 3, 4) should be regarded as the Emperor's instruction promoting the immediacy principle, adherence to which could positively contribute to the elimination of possible erroneous judicial decisions, sometimes based on dubious written testimonies.

The following statement of Marcianus, concerning the reform of the *irenarchae* office, testifies to the fact that the immediacy principle was adhered to in the Roman criminal procedure, and this principle was the supreme rule as regards the manner of taking evidence, pertaining not only to evidence of witnesses but *de facto* to all evidentiary measures used in the proceedings, especially those coming from personal evidentiary sources:

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55 K. Amielańczyk, *Rzymskie prawo karne*..., op. cit., p. 207. It should be emphasized that in the Dominate period the use of such testimony acquired the status of a class privilege granted to *honestiores* – Th. Mommsen, *Römisches*..., op. cit., p. 411, footnote 5.

56 Cf. U. Zilletti, *Sul valore probatorio della testimonianza nella cognitio extra ordinem*, "Studia et Documenta Historiae et Iuris" 1963, 29, p. 134.

57 K. Amielańczyk, *Irenarchae. Reforma sądowej policji śledczej za panowania Hadriana i Antonina Piusa*, [in:] A. Dębiński, H. Kowalski, M. Kuryłowicz (eds.), *Salus rei publicae suprema lex. Ochrona interesów państwa w prawie karnym starożytnej Grecji i Rzymu*, Lublin 2007, p. 18. Cf. U. Zilletti, *Sul valore probatorio*..., op. cit., p. 137.

58 U. Zilletti, *Sul valore probatorio*..., op. cit., p. 135. Cf. W. Rozwadowski, *Ocena zeznań w procesie rzymskim epoki Pryncypatu*, "Czasopismo Prawno-Historyczne" 1964, 16, 1, p. 175; U. Vincenti, op. cit., p. 140; K. Amielańczyk, *Rzymskie prawo karne*..., op. cit., p. 208; idem, *O kształtowaniu się niektórych zasad*..., op. cit., p. 25.

D. 48, 3, 6, 1 *(Marcianus libro secundo de iudiciis publicis): Sed et caput mandatorum exstat, quod divus Pius, cum provinciae Asiae praeerat, sub edicto proposuit, ut irenarchae, cum adprehenderint latrones, interrogent eos de sociis et receptatoribus et interrogationes litteris inclusas atque obsignatas ad cognitionem magistratus mittant. Igitur qui cum elogio mittuntur, ex integro audiendi sunt, etsi per litteras missi fuerint vel etiam per irenarchas perducti. Sic et divus Pius et alii principes rescripserunt, ut etiam de his, qui requirendi adnotati sunt, non quasi pro damnatis, sed quasi re integra quaeratur, si quis erit qui eum arguat. Et ideo cum quis anakrisin faceret, iuberi oportet venire irenarchen et quod scripserit, exsequi: et si diligenter ac fideliter hoc fecerit, collaudandum eum: si parum prudenter non exquisitis argumentis, simpliciter denotare irenarchen minus rettulisse: sed si quid maligne interrogasse aut non dicta rettulisse pro dictis eum compererit, ut vindicet in exemplum, ne quid et aliud postea tale facere moliatur.*

According to the jurist's account, Antoninus Pius, governor of Asia at that time, decided in an edict that in the case of *latrones* being arrested by summoned officials, the latter are obliged to hear the criminals about the existence of their potential accomplices (*sociis*) and people who harboured them (*receptatoribus*).[59] Then, *irenarchae* should make a report on the interrogation of *latrones* and seal it. Next, the officials should take the suspects to court and submit also the interrogation report. Subsequently, after the perpetrators are brought to court by *irenarchae*, the court should first verify the content of the submitted report, by hearing the suspects.[60]

On the one hand, the directive formulated by the governor which obligated judges to verify the truth of recorded explanations of suspects by hearing them personally before adjudicating on a given case, was aimed primarily at eliminating potential mistakes and abuse frequently committed by Emperor's officials during investigations.[61] On the other hand, the solution put forward by Antoninus Pius reinforced the adherence to the immediacy principle as regards personal evidentiary measures in the Roman criminal procedure.

The fact that the criminal procedure throughout the whole period of existence of the Roman state was dominated by the principle in question, is explicitly corrobo-

59 K. Amielańczyk, *Irenarchae*..., op. cit., p. 10.

60 Ibidem. Cf. G. Zanon, *A proposito di D. 48.3.6 (Marcian. 2 "de iudic. publ.")*, "Index" 1998, 26, p. 170.

61 K. Amielańczyk, *Irenarchae*..., op. cit., p. 10.

 DOI: 10.7206/kp.2080-1084.106

rated by the ban on legal assistance in criminal matters, effective until Justinian's times.[62] This ban was confirmed by the Emperor in Amendment 90:

> Nov. 90, c. 5: *Atque haec omnia de quaestionibus pecuniariis intellegantur: in criminibus enim, ubi de maximis rebus est periculum, necesse est omnibus modis testes prodire ad iudices quaeque comperta habent edocere.*

In accordance with the cited passage, Justinian decided that in all criminal cases, where adjudication was connected with greater "danger" than in civil cases, it was necessary for witnesses to be at full disposal of the judges.[63] According to this rule, the evidence obtained from a witness's testimony could only be taken before the very judge who was supposed to deliver a judgement on the case.[64]

It is worth asking here what was the legislator's intention, expressed in the following words: *in criminibus enim, ubi de maximis rebus est periculum*? It seems that in this case the Emperor, speaking about the existence of a greater danger in criminal matters, probably meant the negative effects of potential incorrect evidentiary findings of the court which could occasionally lead even to conviction of an innocent person to death. However, the cited amendment focuses primarily on the "supremacy", emphasized already in the Republic period, of public proceedings over private proceedings.[65] Owing to the fact that in the criminal procedure "more serious" (*gravius*) matters were resolved, i.e. those concerning "the most important values" of an individual (e.g. human life) and of the general public (e.g. safety of the state), in the case of broadly understood *iudicium publicum* the judge could not afford to commit a mistake.[66] The correctness of evidentiary proceedings should by ensured by the immediacy principle, commonly present and adhered to in the Roman criminal procedure.

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62 U. Zilletti, *Studi sulle prove nel diritto giustinianeo*, "Bulletino dell'Istituto del Diritto Romano e dei Diritti dell'Orientale Mediterraneo" 1964, 67, p. 203; W. Rozwadowski, *Ocena zeznań świadków w procesie rzymskim epoki republikańskiej,* op. cit., footnote 99 p. 23; U. Vincenti, op. cit., p. 208. Cf. C. 4, 20, 16.

63 Cf. U. Vincenti, op. cit., p. 208; see: U. Zilletti, *Studi sulle prove...,* op. cit., p. 203.

64 U. Zilletti, *Studi sulle prove...*, op. cit., p. 203.

65 Cf. W. Rozwadowski, *Ocena zeznań świadków w procesie rzymskim epoki republikańskiej*, op. cit., p. 11.

66 See: Cic., p. A. Cecina, 2, 6–7: *ideo quod omnia iudicia aut distrahendarum controversiarum aut puniendorum maleficiorum causa reperta sunt, quorum alterum levius est, propterea quod et minus laedit et persaepe disceptatore domestico diiudicatur, alterum est vehementissimum, quod et ad graviores res pertinet et non honorariam operam amici, sed severitatem iudicis ac vim requirit. [7] Quod est gravius, et cuius rei causa maxime iudicia constituta sunt, id iam mala consuetudine dissolutum est.*

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