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PECULATUS – SEVERAL REMARKS ON THE CLASSIFICATION OF THE OFFENCE OF EMBEZZLEMENT OF PUBLIC FUNDS IN ROMAN LAW

The Roman criminal law may interest the contemporary researcher due to the Roman legislator's original approach to the issue of the classification of types of criminal offences (*crimina*). The offence of embezzlement of public funds – *peculatus*¹ – is an interesting research subject matter in this respect. The origins of this act being formally recognised as a criminal offence may be traced to the Law of the Twelve Tables². However, it is *lex Iulia de peculatus* by Emperor Augustus that seems to be the most important law concerning *peculatus*³. Probably passed in 8 B.C.⁴, it was then incorporated in the *Corpus Iuris Civilis*, providing changes in its interpretation which had been extended by various legislative factors over several hundred years⁵. Over that period of time some changes occurred in the originally defined scope of formal features of this criminal offence, which remained in constant concurrence with such criminal offences as *crimen falsi* or *crimen furti*. The importance of the crime of embezzlement of public funds within the system of the Roman public law is testified to by the appointment of a separate permanent court

¹ The only extensive work on *peculatus* is still the monograph by F. GNOLI, *Ricerche sul crimen peculatus*, Milano 1979. See also: IDEM, *Sulla repressione penale della ritenzione di 'pecunia residua' nella 'lex Iulia peculatus'*, RIL.CLSMS 107, 1973, p. 437–472 and: IDEM, *Cic., Nat. deor. 3,74 e l'origine della „quaestio perpetua peculatus”*, RIL.CLSMS 109, 1975, p. 331–341. On the *lex Iulia peculatus* cf. also H.-D. ZIEGLER, *Untersuchungen zur Strafrechtsgesetzgebung des Augustus*, München 1964, p. 33.

² Cf. the basic non-legal sources on *crimen peculatus* in the time of the Republic: CICERO, *De officiis*, III, 18, 73; TITUS LIVIUS, *Ab Urbe Condita*, I, 37; XXV, 37; XXXVII, 58; AULUS GELLIUS, *Noctes Atticae*, VII, 19. In the time of the Republic, cases of *peculatus* were tried first by the *comitia* and the Senate, cf. TITUS LIVIUS, V, 32; XXXVII, 51; XXXVIII, 54, and then by the *quaestiones perpetuae*, cf. CICERO, *Pro Cluentio*, 53, 147; *pro Murena*, 20, 42. The predecessor of the *lex Iulia peculatus* may have been the *lex Cornelia de peculatu*, although its name is not mentioned in the sources.

³ The law may also have been passed by Julius Caesar.

⁴ F. GNOLI, *Sulla paternità e sulla datazione della 'lex Iulia'*, SDHI 38, 1972, p. 328–338.

⁵ Basic sources: *Digesta* XLVIII, 13 (*Ad legem Juliam peculatus et de sacrilegis et de residuis*), rec. T. MOMMSEN, [in:] *Corpus Iuris Civilis*, vol. I, ¹⁰Berolini 1906 (cetera: Dig.); *Codex Iustinianus*, IX, 28 (*De crimine sacrilegii*), ed. P. KRUEGER, [in:] *Corpus Iuris Civilis*, vol. II, Berolini 1954 (cetera: C); *Institutiones*, IV, 18, 9; *Pauli Sententiae*, V, 27.

of justice (*quaestio perpetua*) already in the time of the Roman Republic⁶. What also draws attention is the multitude of penalties imposed by the court, ranging from the death penalty, through the penalty of banishment, to fiscal penalties enriching the state treasury, i.e. fines and property confiscation.

The present paper aims to present Roman regulations concerning *peculatus* from the perspective of the methods of classifying its features as adopted by the compilers, taking into account both the normative contents of original laws (created by the original authors of these laws), as well as those added by later legislative factors: emperors, the senate and jurisprudence.

1. *Peculatus* – the basic type of the offence of embezzlement of public funds

The study of the Julian law on embezzlement of public funds may be conducted following the Justinian compilers' order of discussion of jurists' works as adopted in *Ad legem Iuliam peculatus et de sacrilegis et de residuis* (*Dig.*, XLVIII, 13). The work begins with a passage by Ulpian:

Dig., 48, 13, 1 (*Ulpianus libro 44 ad Sabinum*): Lege Iulia peculatus cavetur, ne quis ex pecunia sacra religiosa publicave auferat neve intercipiat neve in rem suam vertat neve faciat, quo quis auferat intercipiat vel in rem suam vertat, nisi cui utique lege licebit: neve quis in aurum argentum aes publicum quid indat neve immisceat neve quo quid indatur immisceatur faciat sciens dolo malo, quo id peius fiat.

Unlike in the case of *maiestas*, Ulpian did not undertake here to define the offence and create a comprehensive and abstract formula for it. He clearly limited himself to a literal account of the former law's contents. With regard to the offence of *peculatus*, the Julian law stipulated that no one was allowed to illegally lay hands upon, remove or move money designated for sacral, religious or public purposes, or convert it for his own use, or enable another person to lay hands upon, remove, move or convert it for his own use, unless he was entitled to do so under the law. Similarly, no one is allowed to add anything to, or mix with, gold, silver or copper being property of the state treasury, with the intent of reducing its value, or knowingly and maliciously enable another person to do so.

Several significant observations concerning the Roman method of classification stem from the analysis of Ulpian's text. Some terms denoting criminal acts are closely related, if not synonymous. The verb *aufero* means 'illegally carry away, gain, receive, remove or steal'⁷, whereas the term *intercipro* – 'carry away, intercept, steal,

⁶ According to F. GNOLI, *op. cit.*, p. 331 the account *Cic. nat. deor.* supports the hypothesis of the first permanent *quaestio* for *peculatus* cases, being appointed prior to the period of Sulla's criminal legislation, as opposed to the opinion of some scholars who claimed it was Sulla who first appointed the *quaestio perpetua* in a *peculatus* case.

⁷ J. SONDEL, *Słownik łacińsko-polski dla prawników i historyków*, Kraków 1997, p. 93.

reduce, remove⁸. Now, therefore, why is the same criminal act denoted by two terms? Moreover, concerning the interpretation of the further part of the law, if a perpetrator converts public funds for personal use, he indeed also carries away, removes, appropriates or simply embezzles them. Converting public money for personal use is merely a logical consequence of its earlier appropriation. Why, then, is it also mentioned?

On the one hand, such a wording of the regulation reflects care for the proper understanding of the legislator's will by the addressees of the regulations. The indicated variants of behaviour (in fact, not much, if at all, different from one another) suggest a consciously intended 'precision' of regulation. On the other hand, however, such a regulation also in fact shows a lack of trust towards the judges applying the law. The Roman legislator does not aim at a model of the most comprehensive and abstract norm that would provide the widest range of factual circumstances, the subsumption of which could be left to independently thinking judges.

The necessity to define specific forms of behaviour recognised as *peculatus* made the Roman legislator enter the sphere of *falsum*. The act of alloying something with gold, silver or copper is, indeed, an act of counterfeiting coins, which is liable to punishment under *lex Cornelia de falsis (nummaria)*. This, therefore, resulted in a concurrence of regulations of two different laws with regard to one criminal act⁹. An obvious question arises how the problem of such a concurrence of regulations would be solved. A rule which seems to have operated in practice was one that could be called 'the rule of gaining independence' by a new type of offence, by isolation of independent and separate factual circumstances, so that the normative distinction of a specific feature of the offence would determine the establishment of a new type of offence. In this way, the offence of counterfeiting money belonging to the state treasury was separated from the sphere of *falsum*, which originally was a type of the offence of forgery with its multiple forms, involving different factual circumstances. *Peculatus* became an independent type of offence (and not a graded type of *falsum*) as a result of being regulated by an independent criminal law. Most probably, neither of the laws specified the manner in which the court would deal with the concurrence thus created. The offence was probably classified based on a simple reasoning that the criminal act of *peculatus*, involving counterfeiting money belonging to the state treasury, being handled by a separate law, was no longer considered as *falsum*. In fact, to the Romans the problem of the concurrence of regulations may have not, in fact, existed at all.

Let us also investigate a procedure of legislative technique that is known from many other Roman criminal acts, namely the one of applying quite a broad formula which would include both 'directing of the commission of a criminal offence',

⁸ *Ibidem*, p. 509.

⁹ Another frequent problem of the Roman criminal law could be a situation where one act was classified as two separate criminal offences at the same time (the so-called concurrence of criminal offences). Just to give one instance: the act of killing a person could be at the same time classified both as the offence of homicide (*homicidium*) and the offence of public violence (*vis publica*).

as well as being an accomplice, an abettor or an accessory in the commission of the felony. Thus, every offender who enabled the commission of prohibited acts previously specified by the law was subject to criminal prosecution. The Roman legislator seems to have supported the view that the defendant who, for instance, opened the door of the treasure house and let another person in so that that person committed a theft did not 'steal' or 'misappropriate' himself, yet could be said to have been responsible for *peculatus*. Today, such an act would be classified as complicity, without necessitating a separate specification from the legislator. Similarly, the same would apply to the act of directing the commission of a criminal offence or other forms of committing a felony. Thus, the above reveals the drawbacks of the Roman theoretical thought. The procedure seems, however, to give a kind of beginning to a theoretical distinction, which, nevertheless, has nothing to do with the forms of committing a crime. It should rather be linked to the Romans' intuitive understanding of causality as the relationship between the offender's action leading either directly or indirectly to the criminal effect, and this criminal effect itself. The Romans perfectly understood the essence of causality, which can be proved based on the *legis Aquiliae* regulations.

The construction of the regulations on *peculatus* would thus involve making a distinction between a situation where the offender directly committed an offence (direct causal link), and one where the offender only created an opportunity for committing a criminal offence, 'contributing' to it in some indirect manner (indirect causal link). Such an act would be a *causa criminis*, although at the same time being a criminal offence in itself according to the legislator's will.

Thus it is vital to determine the function of the *sciens dolo malo* clause added in the last sentence of the passage, particularly as it was not added with the previously described factual circumstances. The *sciens dolo malo* clause, as well as its shortened version *dolo malo*, quite regularly occurs in Roman *leges iudiciorum publicorum*, reminding – often too frequently – that the Roman *crimina* required the intent of the offender's actions. Sometimes it even seems useless, when a given type of criminal offence, in its nature, requires the offender's intent, and cannot be committed unintentionally. This must have been the case concerning the regulations on *peculatus* – a criminal offence most usually committed by direct intent. The misappropriation of public money must have, in principle, been intentional. However, as regards the regulation on *peculatus* committed 'indirectly', the inclusion of the clause was naturally most legitimate. It is not difficult, indeed, to imagine a whole range of factual circumstances where a person unintentionally allowed another person to have access to public money, without even realising that person would commit the act of embezzlement. Thus, being in accordance with the style of the normative language of Sulla and Augustus's systemic legislation, the whole of Ulpian's speech may be recognised as faithful to the law's original wording.

The type of the offence of embezzlement of public funds was subject to historical evolution as a result of the interpretation or even legislative interpretation

by emperors, the senate and jurists. a good example of the latter are the imperial constitutions by Trajan and Hadrian:

Dig., XLVIII, 13, 5, 4 (*Marcianus libro 14 institutionum*): Sed et si de re civitatis aliquid subripiat, constitutionibus principum divorum Traiani et Hadriani cavetur peculatus crimen committi: et hoc iure utimur.

As the offence of *peculatus* involved broadly-understood public funds, the legal regulations adopted by emperors may tell us a lot not only about their fiscal policy in the criminal law, but also, more broadly, about the management of the state's finances. It can be inferred from the passage that under the *lex Iulia de peculatus*, passed in 8 B.C., the offence of embezzlement of public funds was recognised as *crimen* only with reference to the city of Rome, whereas in other cities it was treated as *furtum* (theft). Yet even Papinian (*Dig.*, XLVII, 2, 82), several dozen years after Hadrian's time, said: *Ob pecuniam civitati subtractam actione furti, non crimine peculatus tenetur*. According to the jurist, the theft of public money provided grounds for a civil complaint, and not a charge of the offence of embezzlement of public funds.

Meanwhile, first Trajan and then Hadrian followed the example of their predecessor, and passed constitutions under which they extended the force of Augustus's criminal law to all cities of the empire. In this way they wanted to protect local finances more effectively. Most certainly, the threat of banishment to the island coupled with the loss of citizenship and the confiscation of all property acted as a more preventive measure than the traditional fines for *furtum* in private prosecution proceedings.

It cannot be explicitly established why Papinian, not recognising the theft of public money as a criminal offence, put forward a thesis that is contrary to Trajan's and Hadrian's constitutions. It is difficult to agree with B. d'Orgeval's opinion that this contradiction is only apparent, as Marcian talked about 'the factual situation' in force in most cities as a result of imperial constitutions directed to them, whereas Papinian – about the legislative situation¹⁰. It is contradicted both by Marcian's approval of the constitution (*et hoc iure utimur*) and by the significance of imperial constitutions as the law in force throughout the whole empire. It would sooner be possible to assume that subsequent emperors could demonstrate various activity within the sphere of protection of local finances against the designs of provincial officials and not pass similar constitutions anymore, or on the contrary, confirm them by new constitutions. There were several dozen years of history between Papinian and Marcian, and they were active during the reigns of numerous emperors of the Antonine and Severan dynasties, which are sufficient reasons for the views on the legislative situation as expressed by both jurists to differ. The legislative situation as regards the prosecution of the offence of embezzlement of public funds in the provincial cities of the empire changed depending on the activity of a given

¹⁰ Cf. B. D'ORGEVAL, *L'empereur Hadrien. Oeuvre législative et administrative*, Paris 1950, p. 319.

emperor. Hadrian, and earlier Trajan, were the emperors who adopted a stricter policy of repressing dishonest officials, by imposing severe penalties for the acts of embezzlement, which included banishment and confiscation of property, in *ex officio* proceedings. It was a complete novelty. It was the first time since the passage of *lex Iulia de peculatus* that the scope of the law had changed, and to a very significant extent. Hadrian thus proved that he did not attempt to strengthen the empire by more conquests, but rather wished to focus on activities consolidating the condition of the state in its current shape¹¹.

Despite being quite precisely defined by the law, the type of the offence of embezzlement of public funds, must have raised doubts when it came to applying the law, in cases where the act the offender was charged with came close to theft (*crimen furti*) or forgery (*crimen falsi*). Such doubts, manifesting how particular types of Roman criminal offences could concur, are expressed in Ulpian's passage:

Dig., XLVIII, 13, 8 pr.-1 (Ulpianus libro septimo de officio proconsulis): Qui, cum in moneta publica operarentur, extrinsecus sibi signant pecuniam forma publica vel signatam furantur, hi non videntur adulterinam monetam exercuisse, sed furtum publicae monetae fecisse, quod ad peculatus crimen accedit. 1. Si quis ex metallis caesarianis aurum argentumve furatus fuerit, ex edicto divi Pii exilio vel metallo, prout dignitas personae, punitur. Is autem, qui furanti sinum praebuit, perinde habetur, atque si manifesti furti condemnatus esset, et famosus efficitur. Qui autem aurum ex metallo habuerit illicite et conflaverit, in quadruplum condemnatur.

According to the jurist, workers of a public mint who minted coins for their own use using the public die, or stole already minted coins, did not commit the offence of *peculatus*. Neither did they commit the offence of *falsum* in the form of coin counterfeiting. Ulpian recognised them to be guilty of the charge of *furtum*, i.e. the theft of public money, which according to him was only similar to the charge of embezzlement of public money. What determined such a classification of the act? The passage does not provide the jurist's reasoning, i.e. the justification for the above. It can only be inferred that the act could not be treated as *falsum* as money was not forged. On the contrary, it was properly minted, though outside the legal procedure of minting coins in the mint, and then misappropriated against the law. As it seems, the act was not to be considered as the offence of *peculatus* as it was not committed by a public officer and not while performing a public duty, but by an ordinary worker employed at the mint for performing purely technical tasks. It was a form of *crimen furti*, i.e. a theft prosecuted *extra ordinem* under imperial constitutions, probably in the same manner as in the case of *furtum*, involving the theft of ore from a mine, to be discussed below.

Namely, when a person stole gold or silver from an imperial mine, he was convicted of theft under the edict of Emperor Antoninus Pius, and sentenced to banishment or labour in a mine, depending on his social status. Conversely, a per-

¹¹ Cf. A.R. BIRLEY, *Hadrian. The Restless Emperor*, London 1997 (Polish edition: *Hadrian. Cesarz nies-trudzony*, trans. R. WIŚNIEWSKI, Warszawa 2002), p. 173, 180, 204.

son who gave shelter to a thief was subject to the same liability as an offender convicted of aggravated larceny, and gained infamy. Any person in illegal possession of gold from a mine and smelting it was sentenced to a fine of quadruple the value of the gold.

Gradually, however, there could occur a tendency for a looser and looser interpretation of the borders of the *peculatus* type of offence, which could be inferred from a single record by the late-classical-period jurist Modestine, who classified the theft of spoils of war as the offence of *peculatus* as well:

Dig., XLVIII, 13, 15 (*Modestinus libro secundo de poenis*): *Is, qui praedam ab hostibus captam subripuit, lege peculatus tenetur et in quadruplum damnatur.*

It seems unlikely for the Julian law on embezzlement of public funds to have described the theft of spoils of war as *peculatus*: not only did none of the earlier jurists ever mention such a crime, but also according to Modestine, it would allegedly be liable to a fine of quadruple the value, which, as already mentioned, was rather imposed for the offence of theft (*crimen furti*), as distinguished from *peculatus*.

Imperial constitutions as well as the jurist's legal opinion providing proper interpretation of the regulations, as included in the *de officio proconsulis* treatise directed at magistrates, contributed to making the definition of the *peculatus* type of offence mentioned by the Julian law more precise, which was certainly expected by the courts of law.

In the time of Augustus, two separate types of the offence got isolated from *peculatus*, which were *sacrilegium* (probably within one law – *lex Iulia peculatus*) and the embezzlement of a specific kind of money, i.e. *pecunia residua* (probably within a separate law – *lex Iulia de residuis*).

2. Embezzlement of *res sacrae* (*sacrilegium*) – a graded type of the offence of embezzlement of public funds (*peculatus*)

In his *Institutions*, the jurist Marcianus referred to the content of the *lex Iulia peculatus* regulations concerning the graded type of the offence of embezzlement of public funds, which was *sacrilegium*¹²:

Dig., XLVIII, 13, 4 pr.–1 (*Marcianus libro 14 institutionum*): *Lege Iulia peculatus tenetur, qui pecuniam sacram religiosam abstulerit interceperit. Sed et si donatum deo immortalis abstulerit, peculatus poena tenetur.*

¹² On *sacrilegium* see the work by A. DĘBIŃSKI, *Sacrilegium w prawie rzymskim*, Lublin 1995, as well as the literature discussed there (p. 21sq), and F. GNOLI, 'Rem privatam de sacrosurripere' (*contributo allo studio della repressione del 'sacrilegium' in diritto romano*), *SDHI* 40, 1974, p.151–204; R. BAUMAN, *Tertullian and the Crime of Sacrilegium*, *JRH* 4, 1967, p. 175–183.

Under the Julian law on the embezzlement of public funds, any person is liable for *sacrilegium* who carried away or intercepted any money set aside for sacral or religious use, or anything else consecrated to gods. The stipulation that a perpetrator of such acts was liable to punishment for *peculatus* meant that *sacrilegium* was a type (graded type) of *peculatus*.

The mechanism of the isolation of *sacrilegium* from *peculatus* can best be followed based on a passage by Paulus:

Dig., XLVIII, 13, 11, 1 (*Paulus libro singulari de iudiciis publicis*): Sunt autem sacrilegi, qui publica sacra compilaverunt. At qui privata sacra vel aediculas incustoditas temptaverunt, amplius quam fures, minus quam sacrilegi merentur. Quare quod sacrum quodve admissum in sacrilegii crimen cadat, diligenter considerandum est.

Like Ulpian in his discussion of *maiestas*, the jurist begins his discussion of *sacrilegium* with an attempt to provide his own definition of the offence, creating a possibly comprehensive and abstract formula for it. Thus, *sacrilegium* (sacrilege) was a theft of sacred things (*res sacrae*) belonging to the Roman people. Stealing such things from private individuals was not considered as the offence of *sacrilegium*, as such an act was recognised as a theft – *crimen furti*, though of a particular kind. Those who stole *res sacrae* from private individuals, or robbed (private) unguarded sanctuaries of little significance, were liable to a more severe punishment than ordinary thieves, yet a milder one than the one imposed on perpetrators of *sacrilegium*. Being aware of the difficulties involved in the interpretation of the law, Paulus advised a careful interpretation of the nature of a sacred place, or an act resulting in the charge of *sacrilegium*.

Subsequently, Paulus referred to and endeavoured to discuss the definition of the offence of *peculatus* created by another great jurist, Labeo:

Dig., XLVIII, 13, 11, 2–3 (*Paulus libro singulari de iudiciis publicis*): Labeo libro trigensimo octavo posteriorum *peculatum* definit pecuniae publicae aut sacrae furtum non ab eo factum, cuius periculo fuit, et ideo aedituum in his, quae ei tradita sunt, *peculatum* non admittere. Eodem capite inferius scribit non solum pecuniam publicam, sed etiam privatam *crimen peculatus* facere, si quis quod fisco debetur simulans se fisci creditorem accepit, quamvis privatam pecuniam abstulerit.

Labeo defined *peculatus* as the theft of public money or money consecrated to gods, committed by individuals not responsible for guarding it. Therefore, according to Labeo, a guard watching a temple, could not commit the offence of *peculatus*. Later in the passage, Labeo said that it was not only public, but also private money that could be the subject of the charge of *peculatus*, if a person, with the intent of the acquisition of a claim against the state treasury, received money due to the treasury, even if the money he received was private¹³. Thus, the features

¹³ A similar interpretative issue was discussed by Marcellus: *Dig.*, XLVIII, 13, 14 (*Marcellus libro 25 digestorum*): *Peculatus nequaquam committitur, si exigam ab eo pecuniam, qui et mihi et fisco debet: non enim*

that distinguish the offence of *peculatus* are the personal features of the perpetrator (the clerical function) and the damage caused to the treasury by any abatement of its property. In the case of *sacrilegium*, however, the distinguishing feature of this criminal offence was only the feature of the subject of the offence. It was enough for an apparently ordinary theft to involve an item of *res sacrae* (or *religiosae*) to be recognised as the offence of *sacrilegium*:

Dig., XLVIII, 13, 12, 1 (*Marcianus libro primo iudiciorum publicorum*): Divus Severus et Antoninus quendam clarissimum iuvenem, cum inventus esset arculam in templum ponere ibique hominem includere, qui post clusum templum de arca exiret et de templo multa subtraheret et se in arculam iterum referret, convictum in insulam deportaverunt.

Dig., XLVIII, 13, 13 (*Ulpianus libro 68 ad edictum*): Qui perforaverit muros vel inde aliquid abstulerit, *peculatus* actione tenetur.

In the above passages, the jurists discussed two cases presenting the essence of the isolation of a graded type of the criminal offence of embezzlement of public money, i.e. *sacrilegium*. In the former case, Marcianus informed about the imperial rescript by Septimius Severus and Caracalla, accepting the sentence of banishment to an island imposed on a young Roman man of noble birth, for placing in a temple a little chest with a man hidden inside, who, when the temple was closed, got out of the chest, robbed the place of numerous items and hid in the chest again. The whole thing was discovered, and the young man who had planned the theft was named as a perpetrator of *sacrilegium* (today we would say he was the instigator of the crime). Ulpian, in turn, probably having some specific case in mind, also mentioned the criminal liability for *peculatus* of a person who made a hole in a temple's wall (attempted theft), or robbed the temple in that way.

The type of the offence which *sacrilegium* was was probably an incentive to extend the application of the law to another group of factual circumstances. It cannot be unambiguously determined who the author of this extension was, though it is quite probable that it was introduced by the senate. Anyway, it is highly improbable for such a regulation to have been included in the original version of the law. It is only known from a passage by Venuleius Saturninus:

Dig., XLVIII, 13, 10 pr.–1 (*Venuleius Saturninus ex libro tertio iudiciorum publicorum*): Qui tabulam aeream legis formamve agrorum aut quid aliud continentem refixerit vel quid inde immutaverit, lege Iulia *peculatus* tenetur. 1. Eadem lege tenetur, qui quid in tabulis publicis deleverit vel induxerit.

pecunia fisci interceptitur, quae debitori eius aufertur, scilicet quia manet debitor fisci nihilo minus. According to the jurist, the offence of *peculatus* was not, nonetheless, committed by a person who demanded money from another person who was at the same time a debtor to the state treasury, as a debtor did not stop to be one to the state treasury by the very fact that he paid money to a creditor who demanded it. It is difficult to determine to what extent the opinions of the two jurists are contradictory to each other, due to too little information available as regards both factual situations.

According to the jurist, other acts considered as the offence under the Julian law on embezzlement of public funds included removing bronze plaques with the text of the law, or an official agrarian map, or a plaque inscribed with any other information, or introducing changes to any of their parts, as well as removing public notations or lawlessly adding anything to them. It may be doubted whether the above criminal acts were actually included in the original Julian law. What is more likely, they would have rather been introduced by the Senate and expanded the type of the offence of *peculatus* at a later time:

Dig., XLVIII, 13, 11, 5 (*Paulus libro singulari de iudiciis publicis*): Senatus iussit lege *peculatus* teneri eos, qui iniussu eius, qui ei rei praeerit, tabularum publicarum inspiciendarum describendarumque potestatem fecerint.

It can be inferred from the passage by Paulus that the scope of the application of the Julian law was thus subject to quite a surprising extension that was contrary to the hitherto noticed assumption (particularly well-seen in Ulpian, *Dig.*, XLVIII, 13, 1) that the subject of the offence was *pecunia*, whereas the offender's actions should consequently involve its 'embezzlement' (*peculatus*). The broadening in question is also far from the essence of *sacrilegium*, which in its nature involved sacred things or those connected with the religious cult. Nonetheless, it must have been a *per analogiam* approach on the part of the legislators to extend the same protection as in the case of *res sacrae* and *res religiosae* to some public things (*res publicae*) as well. As a matter of fact, the acts described by Venuleius Saturninus and Paulus deserved to be recognised as a separate type of offence, yet the crime was never given an independent name.

As in the case of the basic type of the offence of *peculatus*, the obstacle preventing the proper qualification of the act as the offence of *sacrilegium* may have also been the similarity to the offence of *furtum* – ordinary theft. The proper qualification could have been facilitated by the imperial constitutions:

Dig., XLVIII, 13, 6 (*Marcianus libro quinto regularum*): Divi Severus et Antoninus Cassio Festo rescripserunt, res privatorum si in aedem sacram depositae subreptae fuerint, furti actionem, non sacrilegii esse.

The passage refers to the text of Emperors Severus and Antoninus's (i.e. Septimius Severus and Caracalla's) rescript issued to Cassius Festus, in which they replied to his inquiry whether the theft of private items placed in a temple was considered to be the offence of *sacrilegium*. The negative reply to the above, in which the emperors decided that the act was to be treated as an ordinary theft which was merely liable to the *actio furti*, indicates that the distinguishing feature of the offence of *sacrilegium* was the kind of the item stolen and not the place from which it was stolen. a similar manner of classification as in the case of *res sacrae* was imposed by the emperors with respect to *res religiosae*:

Dig., XLVIII, 13, 5, 3 (*Marcianus libro 14 institutionum*): Non fit locus religiosus, ubi thesaurus invenitur: nam et si in monumento inventus fuerit, non quasi religiosus tollitur. Quod enim sepelire quis prohibetur, id religiosum facere non potest: at pecunia sepeliri non potest, ut et mandatis principibus cavetur.

On this occasion the interpretation of the Julian law regulations was included in the imperial mandates. A treasure was not considered to be *res religiosae* just because of the place where it was found. Thus, no money placed in a tomb was treated as such unless it was among the things the burial involved. Therefore, it must be assumed that the Romans would consider the theft of money from a tomb to be the offence of *furtum* and not *sacrilegium*.

In the post-classical period, the offence of *sacrilegium* gained new meanings apart from the one of ‘sacrilege’ (theft of *res sacrae*) that was known from the Julian law. Some of them were less and others more remote from the original sense. They included: lawless acts against the ruler, particularly disobeying imperial constitutions, and acts against the religion accepted by the state¹⁴.

3. Embezzlement of *pecunia residua* (*crimen de residuis*) – a graded type of the offence of embezzlement of public funds (*peculatus*)

The Latin term *residuum* meant outstanding (embezzled) money, or more precisely, the part (remainder, residue) of money¹⁵ which was unlawfully appropriated by a person handling public money. *Residua pecunia* is the money thus embezzled (misappropriated) by an official. In yet other words, there is a cash shortage in an official’s purse after the settlement of public expenses.

The thirteenth title of Justinian’s *Digest* could suggest that emperor Augustus passed one law on ‘*peculatus, sacrilegium and residuum*’. However, there may have originally been more laws, which may be inferred from the consistent records by Marcianus and Paulus in which they referred to the *lex Iulia de residuis*:

Dig., XLVIII, 13, 5 pr.–1 (*Marcianus libro 14 institutionum*): Lege Iulia de residuis tenetur is, apud quem ex locatione, emptione, alimentaria ratione, ex pecunia quam accepit aliave qua causa pecunia publica resedit. 1. Sed et qui publicam pecuniam in usu aliquo acceptam retinuerit nec erogaverit, hac lege tenetur.

Dig., XLVIII, 13, 2 (*Paulus libro 11 ad Sabinum*): Lege Iulia de residuis tenetur, qui publicam pecuniam delegatam in usum aliquem retinuit neque in eum consumpsit.

The Julian law on outstanding money imposed criminal liability on a person who appropriated any public money he was obliged to use for a specific purpose, yet failed to act accordingly. As examples of this type of embezzlement, Marcianus

¹⁴ See extensively on the subject A. DĘBIŃSKI, *op. cit.*, p. 111sqq.

¹⁵ J. SONDEL, *op. cit.*, p. 840.

mentioned the acts of misappropriation committed on the occasions of lease or purchase agreements, or delivery of supplies (food rationing).

The type of offence discussed by both jurists could be described as ‘not accounting for the remaining state money not used for the intended public purpose, and its misappropriation’. The appropriation of *residua pecunia* was thus the act of retaining a part of the money in the purse, instead of using it for the specific purpose. Here, unlike in the case of *sacrilegium*, a graded type of the offence of *peculatus* was isolated due to its special distinguishing feature, which was the offender’s manner of action. Although in this case public money is called *pecunia residua*, it still remains the same subject of protection under this law. It is only the offender’s manner of action that is slightly different in this case, namely he did not quite ‘remove’ money from the state treasury, but rather caused a cash shortage in the public purse. As regards the income and expenditure accounts, a part of the money the official was trusted with was not accounted for in the public expenditure account¹⁶.

What may also testify to a probably independent existence of *lex Iulia de residuis* is Labeo’s view as presented by Paulus:

Dig., XLVIII, 13, 11, 6 (*Paulus libro singulari de iudiciis publicis*): Eum, qui pecuniam publicam in usus aliquos retinuerit nec erogaverit, hac lege teneri Labeo libro trigensimo octavo posteriorum scripsit. Cum eo autem, qui, cum provincia abiret, pecuniam, quae penes se esset, ad aerarium professus retinuerit, non esse residuae pecuniae actionem, quia eam privatus fisco debeat, et ideo inter debitores eum ferri: eamque ab eo is, qui hoc imperio utitur, exigeret, id est pignus capiendo, corpus retinendo, multam dicendo. Sed eam quoque lex Iulia residuorum post annum residuam esse iussit.

Having first mentioned the already known definition of the graded type of the offence of embezzlement of public money involving *pecunia residua*, Paulus then claimed, referring to Labeo’s view, that a person was not liable to punishment under the Julian law if he kept (appropriated) the money when he no longer served as a public officer, but, as being a private individual then, he became an ordinary debtor to the state treasury. Therefore, his successor to the office was expected to enforce the claim by demanding a security, retaining the debtor, or imposing a fine. However, as the jurist finally states, after one year, the money misappropriated in the above way came to be considered as *pecunia residua* anyway.

As can be inferred from the above passage, in the case of this type of *peculatus* as well, at least in principle, the basic feature of the offence was the feature of the offender, i.e. he had to be a public officer at the time of committing the offence. The law’s inconsistency is probably only apparent: the possession of public money

¹⁶ Cf. also *Dig.*, XLVIII, 13, 12 pr. (*Marcianus libro primo iudiciorum publicorum*): Hac lege tenetur, qui in tabulis publicis minorem pecuniam, quam quid venierit aut locaverit, scripserit aliudve quid simile commiserit.

by a former public officer for a year after leaving the office made him a perpetrator of embezzlement. It seems that the evidence of the commission of the offence of misappropriation was not quite in that he committed the offence of embezzlement after a year after leaving the office, but rather in the fact that he did not return the money to the state treasury for such a long time.

4. Embezzlement of public funds – criminal sanctions and prescription of the offence

Particular types of the offence of embezzlement of public funds were connected with various penalties. The basic type of the offence of *peculatus* was punished by banishment, which derived from the *aquae et ignis interdictio* (prohibition of water and fire) originally supplied by the law, loss of citizenship and confiscation of property¹⁷. The embezzlement of *pecunia residua* was punished with a lighter penalty, i.e. a fine of one third the amount due to the state treasury¹⁸. With respect to the commission of the offence of *sacrilegium*, the penalty was to be imposed *extra ordinem*. It was determined by some unspecified imperial mandates (and perhaps other constitutions as well), obliging the imperial governors to absolutely prosecute perpetrators of acts of sacrilege, and punish them in proportion to the gravity of the offence they committed¹⁹. The details concerning the *extra ordinem* moderation of punishment, are provided by the following passage by Ulpian:

Dig., XLVIII, 13, 7 (*Ulpianus libro septimo de officio proconsulis*): Sacrilegii poenam debet proconsul pro qualitate personae proque rei conditione et temporis et aetatis et sexus vel severius vel clementius statuere. Et scio multos et ad bestias damnasse sacrilegos, nonnullos etiam vivos exussisse, alios vero in furca suspendisse. Sed moderanda poena est usque ad bestiarum damnationem eorum, qui manu facta templum effregerunt et dona dei in noctu tulerunt. Ceterum si qui interdium modicum aliquid de templo tulit, poena metalli coerendus est, aut, si honestiore loco natus sit, deportandus in insulam est.

In his work *De officio proconsulis*, addressed to provincial officers, Ulpian recommended a more sensible and prudent application of their vast authority. Apparently, he must have been concerned about the incoming information concerning the widespread practice of imposing very severe (cruel) types of death penal-

¹⁷ *Dig.*, XLVIII, 13, 3 (*Ulpianus libro primo de adulteriis*): *Peculatus poena aquae et ignis interdictionem, in quam hodie successit deportatio, continet. Porro qui in eum statum deducitur, sicut omnia pristina iura, ita et bona amittit.*

¹⁸ *Dig.*, XLVIII, 13, 5 pr.–2 (*Marcianus libro 14 institutionum*): *Lege Iulia de residuis tenetur is, apud quem ex locatione, emptione, alimentaria ratione, ex pecunia quam accepit aliave qua causa pecunia publica resedit... 2. Qua lege damnatus amplius tertia parte quam debet punitur.*

¹⁹ *Dig.*, XLVIII, 13, 4, 2 (*Marcianus libro 14 institutionum*): *Mandatis autem cavetur de sacrilegiis, ut praesides sacrilegos latrones plagarios conquirant et ut, prout quisque deliquerit, in eum animadvertant. Et sic constitutionibus cavetur, ut sacrilegi extra ordinem digna poena puniantur.*

ties for the offence of sacrilege, such as being devoured by wild animals, burnt alive or speared by a fork. He thus pleaded for the penalty of *damnatio ad bestias* to be imposed only in cases where offenders were members of armed gangs and robbed temples at night, whereas thieves who acted during the day and stole items of little value, were to be sentenced to labour in a mine, or, in the case of persons of a higher social status, exile to an island. It is difficult to determine the extent to which Ulpian's guidelines on penalties reached the consciousness of magistrates. Paulus, indeed, did not hesitate to write straightforwardly: *Sacrilegi capite puniuntur*²⁰. In the time of emperor Justinian, as follows from his *Institutiones*, the penalties for the offences provided by the Julian law were made uniform:

Institutiones, IV, 18, 9: Lex Iulia peculatus eos punit, qui pecuniam vel rem publicam vel sacram vel religiosam furati fuerint. sed si quidem ipsi iudices tempore administrationis publicas pecunias subtraxerunt, capitali animadversione puniuntur, et non solum hi, sed etiam qui ministerium eis ad hoc adhibuerunt vel qui subtracta ab his scientes susceperunt: alii vero qui in hanc legem inciderint poenae deportationis subiugantur.

The embezzlement of public funds was generally punished by death. The penalty was imposed on public officers who were convicted of embezzlement, as well as persons who assisted them or consciously received money from embezzlers. Perpetrators of other offences specified by the law were sentenced to banishment.

Exceptionally interesting information on the criminal liability for the offences discussed, is provided by the following passage by Papinian:

Dig., XLVIII, 13, 16 (*Papinianus libro 36 quaestionum*): Publica iudicia peculatus et de residuis et repetundarum similiter adversus heredem exercentur, nec immerito, cum in his quaestio principalis ablatae pecuniae moveatur.

One principle of the Roman law and criminal procedure was that children were not liable for their parents' offences. However, the above passage seems to indicate an exception to this rule. In cases of *peculatus*, embezzlement of *pecunia residua* or *crimen repetundarum*, if perpetrators of the above offences died prior to the conclusion of criminal proceedings, *iudicia publica* continued against the successors of the offenders. Papinian claimed that the above was not unfounded, as the fundamental subject matter of the proceedings was public money. Yet, the jurist did not mention any details concerning this type of liability. Perhaps it only involved the necessity to return the money misappropriated by the perpetrator of the offence, which upon his death was inherited by his successor. Or, conceivably, the proceedings continued only in cases where the successor did not intend to return the stolen money voluntarily, thus giving rise to a suspicion of being equally guilty of the offence as the perpetrator who had misappropriated the money (when still alive).

²⁰ *Dig.*, XLVIII, 13, 11 pr.

With respect to the liability for *crimen peculatus*, the Julian law specified a short, five-year limitation period:

Dig., XLVIII, 13, 9 (*Venuleius Saturninus libro secundo iudiciorum publicorum*): Peculatus crimen ante quinquennium admissum obici non oportet.

Abstract. The offence of embezzlement of public funds – *peculatus* – is an interesting research subject due to the Roman legislator's original approach to the issue of the classification of types of criminal offences (*crimina*). The paper aims to present Roman regulations concerning *peculatus* from the perspective of the methods of classifying its features as adopted by the compilers, taking into account both the normative contents of original laws (created by the original authors of these laws), as well as those added by later legislative factors: emperors, the senate and jurisprudence. The study of the Julian law on embezzlement of public funds may be conducted following the Justinian's title *Ad legem Iuliam peculatus et de sacrilegis et de residuis* (*Dig.*, 48, 13). *Peculatus* was the basic type of the offence of embezzlement of public funds. In the time of Augustus, two separate types of the offence isolated from *peculatus*, which were *sacrilegium* (probably within one law - *lex Iulia peculatus*) and embezzlement of a specific kind of money, i.e. *pecunia residua* (probably within a separate law - *lex Iulia de residuis*). Despite being quite precisely defined by the law, the type of the offence of embezzlement of public funds must have raised doubts when it came to applying the law, in cases where the act the offender was charged with came close to theft (*crimen furti*) or forgery (*crimen falsi*).

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