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SEVERAL REMARKS ON *LEX SERVILIA CAEPIONIS* OF 106 BC IN THE LIGHT OF THE FRAGMENT OF CIC. *PRO BALBO* 24. 54

Abstract. This paper includes an analysis of a fragment of Cicero's address in pro Balbo 24.54, which contains interesting, yet highly laconic information regarding one of the *leges de repetundis* – i.e. *lex Servilia Caepionis*. The analysis of the fragment led to the determination that the basic purpose of issuing that act was to cover the issue of changing the personal composition of judges sitting on the *de reptundis* tribunal. Apart from that, it seems that the genesis of the institution of *divinatio* can also be found in that statute.

Keywords: Roman law, *quaestio perpetua*, *crimen repetundarum*, *lex Servilia Caepionis*.

1. Introduction

Along with the territorial development of the Roman Republic by way of military conquest, the need to manage the new lands through the agency of officials arose. The provinces they were responsible for provided a tremendous temptation to perpetrate misappropriations of funds. Financial coercions committed on the inhabitants of the given province were defined by Romans as extortions (*crimen reptundarum*). Reprehensible practices of administrators had to be meet with a harsh reaction on the part of Republican Rome. Starting from the second half of the second century BC, attempts were taken to limit that reprehensible phenomenon by way of enacting proper *leges* regulating the objective and subjective scope of *crimen repetundrum*.

Crimen repetundarum was widely covered in the literature (cf. Venturini 1979; Mossakowski 1993; Trisciuoglio 2017). This paper attempts to analyse a fragment from Cicero's, *pro Balbo*, in terms of information regarding one of the *leges de repetundis* – i.e. *lex Servilia Caepionis*.

2. The Scope of the *lex Servilia Caepionis*

It needs to be pointed out that no direct information on the said act has survived (Mantovani 1989: 71). The only accounts regarding *lex Sevilia Caepionis* can be found in non-legal literature. Therefore, the reconstruction of its provisions will be very modest out of necessity. From the vantage point of research, the most valuable source is the following fragment from a work by Cicero:

> **Cic., *pro Balbo*, 24, 54**: *quod si acerbissima lege Servilia principles viri ac gravissimi et sapientissimi cives hanc Latinis, id est foederatis, viam ad civitatem populi iussu patere passi sunt, neque ius est hoc reprehensum Licinia et Mucia lege, cum praesertim genus ipsum accusationis et nomen et eius modi praemium quod nemo adsequi posset nisi ex senatoris calamitate neque senatori neque bono cuiquam nimis iucundum esse posset, dubitandum fuit quin, quo in genere iudicum praemia rata essent, in eodem iudicia imperatorum valerent?* [...]

The initiator of that *lex* was consul *Q. Servilius Caepio* (Niccolini 1934: 188; Broughton 1951–1952: 553), and it was enacted in 106 BC (Broughton, 1951–1952: 553; Pontenay de Fontette 1954: 73; Nicolet 1966: 531; Serrao 1974: 216; Gruen 1968: 157ff.; Gruen 1969: 8–11; Eder 1969: 140 footnote 2; Griffin 173: 123–126; Jones 1972: 53; Venturini 1979: 4; Lintott, 1981: 186; R. Rilinger 1988: 220; Mantovani 1989: 71; Giuffré, 1993: 67; Petrucci 2008: 196; Kołodko 2012: 171)[1]. Nevertheless, it cannot be unquestionably proven whether Cicero's utterance quoted above refers to that *lex Servilia*. The resident of Arpinum used only the first segment of the name, which allowed Romanists to create two contradictory hypotheses in that matter. The proponents of the first concept (Badian 195: 101–102; Nicolet 1966: 535; Sherwin-White 1972: 96; Griffin 1973: 123ff; Lintott 1978: 136 footnote 60; Lintott 1981: 186–188; Santalucia 1994: 193) assume that Cicero is speaking here about *lex Servilia Caepionis*; the other group of researchers, also numerous (Levick 1967: 256–258; Eder 1969: 142; Serrao 1974: 260; Mattingly 1975: 164–165; Mattingly 1983: 300–310; Venturini 1979: 33 footnote 124), sees references to *lex Servilia Glauciae* in that passage. It seems that a stance on this matter can be taken after the interpretation of the fragment by Cicero.

The quoted fragment by Cicero pertains first and foremost to awarding the prize in the form of citizenship to the prosecutor whose petition directed to *quaestio perpetua* against an official committing *repetundae* contributed

to the issuance of a convicting sentence. The literal interpretation of the text suggests that such a *praemia* applied only to the Latins (or wider: *foederati*) – cf. Mantovani 1989: 72. It seems, however, that it is more justifiable to accept that the Latin victors and prosecutors listed by Cicero several verses earlier (Cic., *pro Balbo* 23. 53) served as a good *exemplum* because Cicero could not prove other effective prosecutors from *civitates foederatae* (Lintott 1981: 188; Sherwin-White 1972: 97; cf. Mattingly 1983: 302)[2]. Therefore, the *lex Servilia* mentioned in *pro Balbo* is stricter in the awarding of prizes than *lex Acilia repetundarum*. Even though the cited passage does not indicate whether *socii* who were not Latins could be prosecutors under the said act, it seems that in reality it would be very difficult for them to press charges (Lintott 1981: 188). It would lead to the fact that Cicero clearly narrowed the catalogue of entities allowed to be prosecutors (*Latini, id est foederati*), and so prospective beneficiaries of the Roman citizenship. It might be assumed that if *lex Servilia* had shaped a more numerous circle of prosecutors, Cicero's statement would have taken that into consideration. It seems, then, that the adjective of *acerbissima* appearing in the source fragment most probably refers to that exact issue and, in turn, *lex Servilia* underspecified in the source is actually *lex Servilia Caepionis* (Badian 1954: 101–102; Sherwin-White 1972: 97; Griffin 1973: 123–125; Lintott 1981: 188)[3].

It needs to be underscored that the above mentioned attempt at the interpretation of Cicero's fragment in the context of *lex Servilia Caepionis* is merely one of the possibilities (Kołodko 2012: 174). The other concept has its proponents as well, one that regards the fragment of *pro Balbo* 24.54 as a reference to *lex Servilia Glauciae*, where the essential argument is to be the key word of the entire passage – *acerbissima* (cf. Ferrary 1979: 86ff.). Without doubt, that notion is pejorative (Levick 1967: 257)[4]. One of the basic difficulties lies in its precise and indisputable interpretation in the light of the entire quoted fragment. The combination of that term with the adjective of *sapientissimus* mentioned in the source, which frequently appears in the letters of Cicero[5] as a description of two consuls – *L. Licinius Crassus* and *Q. Mucius Scaevola*, the initiators of the *lex Licinia Mucia*[6] mentioned in the quoted source, may be a trail allowing one to assume that Cicero referred there to *lex Servilia Glauciae* (Levick 1967: 257). It cannot be excluded that such an interpretation of the quoted fragment of *pro Balbo* is admissible. On the other hand, it seems that if Cicero had made a reference to the said act, he would have used a simpler language (Lintott 1981: 188)[7] and enter a direct reference to its initiator. It needs to be stated that both concepts take root in different interpretations of the sources, and it is hardly probable that any of the two will become dominant. The first hypothesis,

however, seems more convincing, and the adjective of *acerbissima* describing *lex Servilia* refers to the limitations in the acquisition of the Roman citizenship by the winning prosecutors.

The absence of any preserved source providing us with only even fragments of *lex Servilia Caepionis* makes it more difficult to learn the entire scope of that regulation. The only non-legal information that can be used to reconstruct the act in question show it as *lex iudiciaria*[8] as it excluded the equites from *quaestio repetundarum* as independent *iudices* and added them to the composition of judges-senators. It is worth emphasising that it is not entirely clear whether the statute set forth that it was the judiciary composition of sole senators or a mixture of equites and senators because the preserved sources are not unanimous in this matter (Tibiletti 1953: 83, 97; Pontenay de Fontette 1954: 74; Nicolet 1966: 531; Lintott 1981: 186; Mantovani 1989: 75; Lintott 1993: 27; Riggsby 1999: 122). The assumption that the judiciary composition was dominated by senators only would be a radical turn in terms of the compositions of judges adjudicating in *de repetundis* trials compared to what *lex Acilia repetundarum* offered in this field. One should rather turn towards the mixed judiciary composition as such a radical reform ultimately excluding equites as *iudices* in the *de repetundis* trials would meet with a harsh resistance of that social layer, which would have surely be reflected in the sources. It is hardly probable for the equites, who had been the core of judges in cases of extortion, to resign from that "haul" for the benefit of senators over less than 20 years.

It is difficult to pinpoint the purpose of the reform of the judiciary composition introduced under *lex Servilia Caepionis*. It might seem that it be affected by a shower of prosecutions regarding *crimen repetundarum* directed against *magistratus populi Romani*, but the preserved sources contradict that thesis[9]. It is more reasonable to assume that the senators sitting on *quaestio repetundarum* wanted to have the activity of that tribunal – which *de facto* usually judged the representatives of the same social group as *patres* – "under control" in some sense. In this context, the figure of the initiator of that regulation (consul *Q. Servilius Caepio*) is not surprising: he was probably a spokesman for the senator class in terms of forcing through a statute granting senators the status of judges in *quaestio repetundarum*. Characteristically, the initiator of *lex Acilia* was a plebeian tribute and only a dozen years later the initiative in that respect was taken over by a consul forcing a new legal regulation (Kołodko 2012: s. 176). It seems, therefore, that the representatives of the most affluent social layer of ancient Rome did not want to leave the *de repetundis* judiciary to the equites only, and if they could not discredit the already functioning *quaestio repetundarum*,

they at least strived for it to include *iudices* coming from *patres*. Due to this, *populus Romanus* did not have any argument to accuse senators of the willingness to appropriate the *de repetundis* judiciary for themselves or of an attempt to depreciate that tribunal and the *patres* obtained a lot – the adjudicated along with the equites on the guilt of men charged with *crimen repetundarum*.

Please note too that there are no sources indicating that *lex Servilia Caepionis* introduced new norms regarding the selection of the judiciary composition compared to the content of the earlier *lex Acilia repetundarum*. Therefore, it might be tempting to put forward a thesis that the selection of the judges did not change and, in such a case, one cannot also exclude that senators were included in the judiciary composition because they were more "favourable" to the defendant compared to when the panel consisted of only equites. However, it is immensely difficult to verify the legitimacy of this argument. Therefore, one should approach this suggestion with a dose of caution.

Even though the preserved sources do not include direct references to the other innovations introduced by that act, it seems that *lex Servilia Caepionis* introduced the institution of *divinatio* (Lintott 1981: 18; cf. Sherwin-White 1972: 98 footnote 90). It consisted in the following: out of several entities pressing charges against the a former *magistratus populi Romani*, accusing them of committing *crimen repetundarum*, one entity was to be selected who would be the formal prosecutor in the trial. It was this way as it was inadmissible to have numerous entities as persecutors in one proceedings. Only one such selected entity could proceed to conduct *nominis delatio* before the praetor and appear in further stages of the trial as the prosecutor.

Ascribing the introduction of that institution to *lex Servilia Caepionis* is justified in that it does not seem that the new *de repetundis* statute partially amending *lex Acilia* contains only a modification in terms of the judiciary composition. If it is accurate that the legal regulation preceding *lex Servilia Caepionis* did not contain a norm establishing *divinatio* and the practice of processes in the period from 123 to 106 BC would show difficulties arising from the multitude of entities pressing charges, the new act introducing *divinatio* as the preliminary process of establishment of the prosecutor would meet these issues halfway (Humbert 1982: 319; Hitzig 1903: 1234–1236; Brasiello 1960: 32–33)[10]. Dueto this, the reform introduced by consul Q. Servilius Caepio would be seen as a significant element modifying the penal procedure. However, the accuracy of this thesis needs to be approached with some cautioneven though it seems that it is justified in the addresses of Cicero.

Moreover, sources do not mention anything about innovative substantive law regulations[11], particularly about the appearance of an expanded definition of *crimen repetundarum*, or its further specification. It seems, therefore, that the thesis that in this aspect *lex Servilia Caepionis* did not change anything is legitimate and, in turn, *lex Acilia*, its precedent, was not derogated fully, but only these provisions that resulted from the entry into force of the new *lex de repetundis* were revoked. The definition of *crimen repetundarum* determined in *lex Acilia* was so broad-ranging and precise that it did not require any expansion. It might be expected that *Q. Servilius Caepio* would try to narrow the perception of *crimen repetundarum* in the act being initiated, thus acting in the interest of the *patres*, but the silence even of the sources that are the most sparing with words seems to speak for the absence of such an initiative. On the other hand, it should come as no surprise as such a step would probably meet with strong resistance on the part of *populus Romanus* voting for the adoption of the act at *comitia*.

The deliberations presented in this paper allow several conclusions to be drawn. Undoubtedly, a thorough analysis of *lex Servilia Caepionis* is made difficult due to the shortcomings in the source materials. However, the fragment of Cic. *pro Balbo* 24. 54 allows one to grasp the direction of changes in the *de repetundis* legislation.

The leading issue is to determine the changes in the personal composition of judges sitting on *quaestio perpetua* adjudicating *crimen reptrundarum*. *Lex Acilia* relied on judges coming from the equites. On the other hand, *lex Servilia Caepionis* promoted the mixed composition. Probably, it was related to the fact that the *patres* wanted to have an impact on the course of the *de repetundis* trial. It needs be remembered that rather influential Romans being members of the group of *nobilitas* were charged with extortion (*crimen repetundarum*). Drawing the composition of judges gave some chance that it would include more judges lenient towards the defendant, ones coming from the circle of senators, not judges from the equites. It might be a good way to explain a personnel change among the composition of judges compared to what was provided for by *lex Acilia repetundarum*, enacted nearly twenty years earlier.

Another innovation in terms of the penal procedure, probably introduced by *lex Servilia Caepionis*, was the institution of *divinatio*. It aimed to order the *de repetundis* trial and, first and foremost, eliminate the multitude of prosecutors. They were vividly interested in the convicting judgment for the person charged with extortion (*crimen repetundarum*) as it paved their way to *praemia* assuming the form of Roman citizenship. Even though the

very fragment of Cic. *pro Balbo* 24, 54 does not mention *divinatio*, there are no significant obstacles to subscribe to the opinion of Romanists seeing the genesis of *divination* in *lex Servilia Caepionis*.

3. Conclusion

The above deliberations about *lex Servilia Caepionis* are exceptionally scarce due to the gaps in the research material. Even though the quoted sources do not allow the reconstruction of its provisions, it seems clear that *lex Servilia Caepionis* can be included in the catalogue of the *de repetundis* legislation.

NOTES

[1] A different view on the dating of *lex Servilia* is presented by: Rotondi 1912: 322; Berger 1925: 2414–2415; Longo 1961: 822), who indicated 111 BC as the date and *C. Servilius Glaucia* as the initiator.

[2] Cf. Mattingly, who thought earlier that the Latins were the only beneficiaries of that *praemia* – Mattingly 1975: 164–168). Thus, he subscribed to the view of Th. Mommsen (Mommsen 1904: 19, 61) and E. Badian (Badian 1954: 101).

[3] The Argument which also speaks for the identification of *lex Servilia* in Cicero's statement from *lex Servilia* is the phrase of *populi iussu* appearing in it – see Sherwin-White 1972: 97; por. Lintott 1981: 188. A contrary opinion was expressed by Levick 1967: 257.

[4] Cf. Mattingly 1983: 307 footnote 21, where the author indicated the context in which that word appears in the letters of Cicero,

[5] Cf. list of sources compiled by Badian 1954: 101, footnote 6, which is also referred to by Levick 1967: 258.

[6] The proper name is *lex Licinia Mucia de civibus redigundis* dated 95 BC, which introduced limitations in the acquisition of the Roman citizenship – a list of the sources regarding that act was compiled by Rotondi 1912: 335.

[7] In the context of a dispute on whether it is *lex Servilia Caepionis* or *Servilia Glauciae* that is mentioned in *pro Balbo*, it is worth invoking the position of Eder (Eder 1969: 142), who claims that it is *lex Servilia Glauciae* that is mentioned, but who also claims that "*... Dieses Gesetz könnte sehr gut das des Caepio gewesen sein ...*".

[8] Cf. Cic., *Brut.* 44, 164; Cic., *pro Clu.* 140; Cic. *de Inv.* 1, 92; Cic., *de Or.* 1, 52, 225; 2, 48, 199; Cic. *pro Scauro* 1, 2. The proponents of treating *lex Servilia Caepionis* as *lex iudiciaria* are as follows: Mommsen 1907: 342; Levick 1967: 258); Pińeiro 2000: 259, who claim that none of the preserved sources define the act as *lex de repetundis*. Pontenay de Fontette 1954: 74 seems more cautious in this respect. On the other hand, one needs to remember that the characteristic feature of the *de repetundis* legislation is the *praemia* offered to the winning prosecutors, which is evidently laid down in the act. It seems that this element speaks in favour of treating *lex Servilia Caepionis* as one of the *de repetundis* statutes. Cf. Lintott 1981: 187.

[9] Alexander (1990: 32–33) indicated two trials probably held under *lex Servilia Caepionis*.

[10] For more extensive deliberations on the role and magnitude of *divinatio* in the *de repetundis* trial, see Mossakowski 1994: 48–50.

[11] The preserved sources do not contain any mention of sanctions provided for in that act and one does not know whether *lex Servilia Caepions* introduced any significant modification compared to its predecessor, *lexAcilia*. On the other hand, it is not very probable that it was *lex imperfecta* as *ratio legis* of such a solution in the *de repetundis* legislation would be pointless. If *lex Servilia Caeponis* did not introduce anything new in this matter, it would probably uphold penal sanction in the shape set forth in *lex Acilia*. It seems that G. Tibiletti (*op. cit.*, p. 97) accurately specified why *lex Servilia Caepionis* did not deal with that issue: "*...se la legge di Cepione inasprisse le pene è incerto, ma potrebbe essere, pur trattandosi di una legge filo-senatoria: ragioni tatiche potrebbero aver consigliato di dare un'apparenza severa a questa legge prosenatoria, e d'altronde le pene ai condannati erano perfino un elemento secondario, rispetto alla composizione della corte, da cui dipendeva l'andamneto dei processi ...*".

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