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I N D E X

THE ROMAN SENATE AND CRIMINAL JURISDICTION DURING THE ROMAN REPUBLIC

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The senatorial criminal jurisdiction of the Empire has been dealt with in several studies.[1] The discussions about the origins of this practice have been based on the sources reporting the "causes célèbres" of the immediately preceding epoch i.e. of the late Republic.[2] It has, however, been noted that these trials connected with the Gracchi, Saturninus and the followers of Catilina cannot be considered normal,[3] because pronouncements of the *senatus consultum ultimum* had been passed on each occasion.[4] Consequently it has been argued that the Senate had had no right to criminal jurisdiction during the Republic and that it acquired it only in the

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1 A.H.M. Jones, Imperial and Senatorial Jurisdiction in the Early Principate, Historia 3 (1954) 464-488; Franca de Marini Avonzo, La Funzione Giurisdizionale del Senato Romano, Milano 1957; Jochen Bleicken, Senatsgericht und Kaisergericht, Abhandlungen der Akademie der Wissenschaften in Göttingen, Phil.-hist. Klasse, 3 Folge, 53 (Göttingen 1962); Wolfgang Kunkel, Ueber die Entstehung des Senatsgerichts, Kleine Schriften, Weimar 1974, 267-323.

2 See especially Bleicken 17-29.

3 Avonzo 5ff.; Mommsen, Strafrecht 252; Kunkel 268ff. These S.C. have been studied in great detail by J. Ungern-Sternberg von Pürkel, Untersuchungen zum Spätrepublikanischen Notstandrecht, Vestigia 11 (1970).

4 J. Lengle, however, thinks that the 'konsularisch-senatorische' processes of the Empire were initiated by Cicero, i.e. were based on the example of the consul seeking the help of the Senate in the trial against Catilina and his followers, Römische Strafrecht bei Cicero und den Historikern, Leipzig und Berlin 1934, 61ff.

Empire.[5] The *S.C. Calvisianum*[6] of the year 4 B.C., whereby the Senate was given the right to elect a commission from among its members to investigate certain cases of *crimen repetundarum*, has also been regarded as evidence of the fact that the Senate had not been able to exercise criminal jurisdiction before that date and was even now granted it only in a limited way.[7] This interpretation of the *S.C. Calvisianum* is, however, not water-tight.[8] Moreover this *S.C.* on *crimen repetundarum* does not, of course, preclude the possibility that the Senate could have exercised criminal jurisdiction in other kinds of cases, and there are, indeed, quite a number of sources showing earlier cases of senatorial jurisdiction which have been ignored so far.

The references to the oldest cases of Republican senatorial jurisdiction that we possess date from the early 5th century. In 499 B.C. the Senate decreed that the conspirators who had wanted to restore Tarquinius Superbus as King should be sought and put to death provided that the populace also deemed it so.[9] This provision was necessary because, according to the Twelve Tables Law, free Roman men had the right to appeal to the populace when the death sentence was pronounced on them.[10]

Some thirteen years later the consul Spurius Cassius was accused of aspiring to the monarchy. There are two versions of his trial and death. According to one account he was condemned to death

5 Avonzo 7ff., 20; Kunkel 267ff.; P. Willems, Le Sénat de la République Romaine II, Louvain 1883, 279. According to Kunkel the senatorial jurisdiction began properly only under Tiberius, but in the review of Bleicken's book, Kl. Schriften 328, he admits that three cases of senatorial jurisdiction under Augustus were, nevertheless, 'echte Senatsprozesse'.

6 FIRA I^2 403ff.

7 Avonzo 8; cf. Kunkel 284ff. and J.G.C. Andersen, Augustan Edicts from Cyrene, JRS, 17 (1917) 46ff.

8 Jones, op.cit. 480 and ibid., The Criminal Courts of the Roman Republic and Principate, Oxford 1972, 92.

9 Dion. Hal. 5,27,3. Cf. Dio Cass. 39,61,3f. according to whom the Senate decreed in 54 B.C. that the populace and magistrates should punish Gabinius most severely, i.e. he was to be put to death.

10 Cic. de leg. 3,11.

by the populace and then hurled down from the Tarpeian Rock by the quaestors.[11] According to the other record his own father accused him in the Senate and after the Senate had found him guilty the father put him to death.[12]

According to Cincius Alimentus and Calpurnius Piso, a rich plebeian *eques*, Spurius Maelius, another aspirant to the monarchy, was put to death in 439 B.C. after the Senate had discussed the matter and being convinced of his guilt had appointed Servilius Ahala to perform the task.[13] This means, if true, that the Senate violated the Twelve Tables Law. On the other hand it could have been argued that Maelius had been caught in the act of bribing the plebs to further his cause and consequently it was permissible to slay him without a trial.[14] Livy and Dionysius of Halicarnassus, however, record quite a different version of Maelius' death. According to them the Senate caused T. Quinctius Capitolinus to be elected Dictator in order to deal with Maelius. The Dictator for his part chose Servilius Ahala as his Master of Horse. When Servilius then went to call Maelius to the Dictator and he refused to follow him Servilius slew him on the spot.[15] So Maelius died, his property was confiscated and his house razed to the ground, but was he killed by Servilius the Master of Horse or Servilius, a private citizen who was executing the sentence of death decreed by the Senate? The latter possibility is probably the correct one; the evi-

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11 Livy 2,41,11f., Dion. Hal. 8,77,1f.

12 Dion. Hal. 8,79,1f., cf. Livy 2,41,10. The custom that the father could take justice into his own hands in the case of an offending magistrate still survived in the second century B.C. According to Livy, Per. 54, praetor D. Iunius Silanus was accused by Macedonian envoys of bribery and plundering of the province in 141 B.C. When the Senate was about to investigate the case his father asked for the right to conduct the *cognitio* himself. This was granted and having found his son guilty he banished him. The ex-praetor duly hanged himself, cf. Val. Max. 5,8,3, who tells the story in a slightly different way.

13 *Ap.* Dion. Hal. 12,4,2. This tradition is also followed by Plut. Brut. 1,3.

14 Cf. Sall. Cat. 52,36, App. BCiv. 2,6 and Mommsen, Strafrecht 256f.

15 Livy 4,13,1-16,8, Dion. Hal. 12,1,1-4,6.

dence of Cincius Alimentus and Calpurnius Piso must anyway be considered more credible than that of Livy.[16]

The conflicting stories about the death of the *legatus* Q. Pleminius seem also to offer an example of capital jurisdiction by the Senate. In 204 B.C. Pleminius was sent, under arrest, to Rome because he had committed great outrages at Locri.[17] Many senators were intent on having him put to death,[18] but the populace who alone could have condemned him to death, seemed willing to acquit the man.[19] Before the investigations were completed Pleminius was, however, reported to have died in prison and the Senate confiscated his property.[20] Yet according to Clodius Licinus, Pleminius was sent to Tullianum, i.e. put to death, *ex senatus consulto* in 194 B.C., eight years later, after he had tried to escape from the prison.[21] If Clodius Licinus, himself a senator, is to be trusted in this matter,[22] it seems probable that the Senate had fabricated the intelligence concerning Pleminius' death in 204 B.C. in order to prevent his acquittal by the populace. Then when he tried to escape from the prison he could be put to death without further ado, because the

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16 See Münzer, RE 2,2, nr. 32 C. Servilius Ahala, 1768f.
17 Livy 29,16,4-20,11, Diod. 27,4ff.
18 Livy 29,19,3-20,3.
19 Livy 29,22,8. Note that in 329 B.C. when the Senate had decreed that Vitruvius was to be scourged and put to death he was kept imprisoned until the consul returned to Rome, i.e. the Senate waited for the consul to preside over the comitia where the populace would confirm the death sentence, Livy 8,20,7 and 10. This was obviously also the reason why the Senate expressly instructed the magistrates of Ardea not to allow Minius Cerrinus, one of the three leaders of the Bacchanalian conspiracy, to commit suicide, Livy 39,19,2. His death sentence is not recorded in our sources, but there is no doubt about it, because hundreds, perhaps thousands of people who had taken part in the Bacchanalian rites were executed, cf. Livy 39,17,6 and 18,4f.
20 Livy 29,22,9 and Diod. 27,4,7.
21 *Ap.* Livy 29,22,10f. and 34,44,6ff., cf. App. Hann. 55.
22 F. Münzer, Die Todesstrafe Politischer Verbrecher in der Späteren Röm. Republik, Hermes 47 (1912) 162-166, suggests that Clodius' record may be fictional, but the above interpretation of the sources is equally possible.

attempt to escape could be regarded as a fresh criminal act in which he had been caught and it was therefore permissible to put him to death without a trial.[23]

In 414 B.C. a military tribune - with consular power - was accidentally stoned to death and his colleagues asked the Senate to hold a *quaestio* about this matter. This was, however, prevented by the veto of the tribunes of the plebs who seemed to fear that the Senate would not pass an impartial verdict.[24]

In cases where the crimes committed did not require capital punishment the Senate had obviously a free hand to inflict various penalties. Thus during the Second Punic War the Senate condemned the banker L. Fulvius to imprisonment because he had worn a chaplet of roses in the daytime. The crime seems to have been considered very serious as Fulvius was obviously imprisoned for several years.[25] At that time the Senate also punished an aedile with a fine for making sexual advances to the son of Marcus Claudius Marcellus.[26] At an earlier date the Senate had punished a slave-master - probably with a fine too - for scourging his slave in the circus before the beginning of the Great Games.[27] In 180 B.C. the Senate banished Marcus Fulvius Nobilior,[28] a tribune of the soldiers, to Farther Spain, because he had dismissed the second legion stationed at Pisa during his period of command. It is noteworthy that this officer was not punished by the consul. It was the Senate who decided the fate of Fulvius at the express wish of the consul Aulus Postumius, though he himself undertook to punish and bring back to Pisa all the common soldiers whom he could seize.[29] Very probably Postumius delegated

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23 See above n. 14.
24 Livy 4,50,5f.
25 Pliny, nat. 21,8.
26 Plut. Mar. 2.
27 Dion. Hal. 7,69,1 and 7,73,5, Cic. de div. 1,55, Livy 2,36,1f.
28 See Broughton MRR I 391 n. 3 about the identity of this man.
29 Livy 40,41,8-11, cf. Val. Max. 2,75. Mommsen seems to have turned a blind eye to this piece of evidence, because he writes that cases of military jurisdiction were never brought before the Senate, Strafrecht 252.

the case to the Senate in order to avoid incurring the resentment of the other tribunes and the influential relatives of Fulvius.

On considering the above cases there seems to be one characteristic common to them all. The persons accused were clearly guilty and the Senate did not need to hold long investigations. A large number of more complicated criminal cases were also brought before the Senate, but they were regularly delegated to the consuls, praetors or special commissions.[30] This was, indeed, unavoidable anyway if they had taken place elsewhere in Italy or in the provinces. Yet, on two occasions the Senate itself meted out punishments to large numbers of Roman citizens who lived outside Rome. In 391 B.C. the Senate punished the inhabitants of Satricum for siding with the Latins,[31] and in 210 B.C. the Senate inflicted very detailed punishments on the Capuans who had sided with Hannibal.[32] In general it seems, however, that for the sake of expediency the Senate as a body judged only those cases in which the trial was not likely to take much time.[33]

According to Polybius the crimes that expressly belonged to the sphere of senatorial jurisdiction were treason, conspiracy, poisonings and assassinations.[34] A little later he added, however, that the Senate could not investigate capital crimes even if directed against the State without permission from the populace.[35] This obviously refers to the *ius provocationis* granted by the Twelve Tables Law.[36] The cases of the slave-master, Marcellus' son, and the Fulvii show, however, that the Senate could and did also take

30 See e.g. Livy 8,20,7; 9,26,20; 10,13; 28,10,4; 29,14,6; 29,20, 4f.; 29,36,10; 31,12,3f.; 32,26,10-18; 39,3,2f.; 39,14,6; 40,37, 4.
31 Livy 26,33,10.
32 Livy 26,34,1-13.
33 See Pol. 33,1,3 about the senatorial voting system in criminal cases.
34 6,13,4. Ὁμοίως καὶ ὅσα τῶν ἀδικημάτων τῶν κατ' Ἰταλιαν προσδεῖται δημοσίας ἐπισκέψεως, λέγω δὲ, οἷον προδοσίας, συνωμοσίας, φαρμακείας, δολοφονίας, τῇ συγκλήτῳ μέλει περὶ τούτων.
35 6,16,1f.
36 Cic. de leg. 3,11.

action in less serious criminal cases. The offenders brought before the Senate can also equally well have been private citizens or magistrates, though in principle a Roman magistrate could not be prosecuted during his year of office. The Senate had, however, various means of punishing recalcitrant magistrates such as banishment,[37] imprisonment,[38] and the withdrawal of the magistrature.[39] If the consuls and praetors were unwilling to bring such matters before the Senate it could in an extreme case resort to the help of the tribunes of the plebs.[40] *De iure* the Republican Senate could, indeed, deal with only such cases which the consuls or praetors presented to it. Yet if it was intent on undertaking action in a certain case it seems always to have managed to persuade either one of the magistrates to present this case to it or the populace to pass a plebiscite according to which the case was to be brought before the Senate.[41] On the other hand a magistrate could hasten to take action against somebody while the Senate was still considering the best means of doing it.[42] It is also noteworthy that the Senate could refuse to take action in some cases presented to it. This was certainly not common, but on occasion it seems to have happened, because the Senate feared that the pronouncements of judgement on certain cases would have led to unpleasant consequences either for the populace or for the Senate itself.[43]

It is difficult to say anything definite about the age of senatorial jurisdiction. In fact Dionysius of Halicarnassus states that it was Romulus himself that gave the senators the right to judge -

37 App. Reb. Syr. 51, Livy 40,41,8-11.
38 Dio Cass. 40,55,1f. Imprisonment, instead of capital sentence, was also the punishment that Caesar advised the Senate to inflict on Catilina's followers, ibid. 37,36,2f. and Sall. Cat. 51,43.
39 Dio Cass. 37,34,2, cf. Livy 3,54,5f.
40 Livy 42,21,1-5ff., cf. 26,33,13f.
41 Livy 42,3,5ff., cf. 26,33,13f.
42 Diod. Sic. 31,9,1.
43 Livy 5,20,9 and 25,3,12, cf. Suet. Caes. 23, the Senate was obviously afraid of taking action against Caesar.

nota bene - minor criminal cases,[44] and according to Zonaras, certainly on the authority of Dio Cassius, the Senate investigated into the assassination of Tarquinius the Elder and condemned the culprits to death.[45] It is, indeed, quite possible that the Senate was used as a court of justice during the period of the Kings when Rome was still a very small town without proper judicial magistrates. References to jurisdiction by the *decuriones* and *conscripti* in small communities survive even from a much later period.[46] The concrete examples of senatorial jurisdiction from the Republic are, however, too few to allow any conclusions about the development of this practice. The statements of Polybius suggest, however, that senatorial criminal jurisdiction was considered to be an established institution during the Mid-Republic. The several cases brought before the Senate by Augustus seem also to confirm this view,[47] for he made a show of following good Republican precedents with painstaking conscientiousness.[48] The reasons why senatorial jurisdiction began to flourish in the first century A.D. are certainly manifold, and we must not forget the fact that its thriving appearance in comparison to the picture that we have of it during the Republic is, no doubt, partly due to the far more abundant sources. Many a Republican senatorial trial may not be mentioned in our scanty sources at all. The main reason for the Emperors to bring cases before the Senate was certainly that it gave the trials an outward show of impartiality.

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44 2,14,1.
45 Zon. 7,9.
46 Cf. Cic. Clu. 41: *Illum tabulas publicas Larini censorias corrupisse decuriones universi iudicaverunt*. FIRA I^2, Lex Municip. Malacit. p. 217, c. 66, line 7f.: *de ea ad decuriones conscriptosue referatur, de ea decurionum conscriptorumue iudicium esto.*
47 See Avonzo 21-24, Bleicken 30-35, Jones, Historia 480, Kunkel 275-284, 294-300 for the sources and discussion.
48 Also Cicero referred to senatorial jurisdiction as an old custom, de Domo 13,33. In general this passage has, however, been understood to be only an attempt to defend the Senate's decision to put Catilina's followers to death without giving them the possibility to use the right of *provocatio*.

That is why in 29 B.C. Maecenas expressly advised Augustus to have the senators and their families condemned in the Senate.[49] The guilty would be punished - the Senate was sure to know the will of the Emperor and judge accordingly - and yet Augustus himself would remain without blame. Another reason for senatorial jurisdiction in the Empire was surely that there were no proper consuls to whom the Senate could have delegated the investigations of criminal cases as there had been during the Republic. The consulate had rapidly deteriorated into a short-term nominal office to which the Emperor, his relatives and friends were usually appointed, and the praetors' competence was also declining. So the Senate was obliged to undertake the investigations itself and as it had been deprived of many of its governmental functions it certainly had time for this kind of task.[50]

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49 Dio Cass. 52,31,3.

50 Some cases concerning the relatives and friends of the Imperial family were surely also best judged in the Senate rather than publicly in the Forum, thus Kunkel 297ff. See ibid. 320-323 and Bleicken 44ff. for further discussion.