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**IN IUDICIO CONVENIRE (CIRCUMVENIRE): JUDICIAL CRIMES ACCORDING TO THE
LEX CORNELIA DE SICARIIS ET VENEFICIS (81 BC)**

Under this stipulated title which means, simplistically, a „fraud“, „conspiracy“ made at a trial, there are hidden in fact several states of affairs. In the present article I will try to enumerate them at length and point to the reasons which directed the Legislator when he combined them in one statute together with such offences as: *crimen inter sicarios*, *veneficium*, or *incendium*

Regulations dealing with passing sentences by corrupted judges have a legislative tradition going back to at least the times of the Twelve Tables,¹ but we will be interested only in the legislation of Gaius Gracchus.² It will be especially interesting to have a look at his statute and this is due to two reasons. First, because the *lex Cornelia de sicariis et veneficis* within the range of crimes described in here, is to be a true repetition of the *lex Sempronia*:³

(CIC., pro Cluentio 154): Illi non hoc recusabant, ea ne lege acusarentur, qua nunc Habitus accusatur, quae tunc erat Sempronia, nunc est Cornelia: intelligebant enim, ea lege equestrem non teneri: sed ne nova lege alligarentur, laborabant.

Second, because of the fact that the hypothesis on the existence of *lex Sempronia de sicariis et veneficis*,⁴ only the part of whose were to be the notes on the bribery of judges, is still tempting.

A) Lex Sempronia and lex Cornelia:

the tradition of regulations on the judicial conspiracy and bribery of judges in Gracchus' legislation.

The apparent bribery of Iunius' tribunal by Cluentius took place in the year 74 BC:

¹ G.D. MACCORMACK, *The liability of the judges in the Republic and Principate* /in:/ ANRW II,14(1982), pp.4-6.

² Before Sulla existed Livius Drusus' Statute from 91 BC dealing with the liability of equites for taking bribes, but it survived only for a short period of time. Cf. CIC., *pro Rabirio Postumo* 7, 16.

³ G. WOLF, *Historische Untersuchungen zu den Gesetzen des C.Gracchus*, München 1972, pp.42-43.

⁴ Cf. E.g.: G. ROTONDI, *Leges publicae populi Romani*, Milano 1912, p.310; U. EWINS, *Ne quis iudicio circumveniat*, JRS 50, 1960, p.95. Unquestionably, the operating before Sullae of *quaestio de sicariis* as well as of separate *quaestio de veneficiis*, if only in the form of occasional trials, suggests a view that they had to be created by some statutes (the Statute?). On the other hand, there is the lack of any sources to support the thesis.

(CIC., *pro Cluentio* 90): *Putabe fuisse: dicat, qui vult hodie de illo populo concitato, cui tum mos gestus est: qua de re iunius causam dixerit. Quemcumque rogaris, hoc respondebit, quod pecuniam acceperit, quod innocentem circumveniret. Est haec opinio.*

Cluentius was an equit, not a senator, that is why Cicero had to convince judges that the *lex Cornelia* dealt only with judicial crimes committed by senators. Thus, many times the speaker recurses to the regulations of the *lex Sempronia ne quis iudicio circumveniat* (*de capite civis Romani*)⁵. The *lex Sempronia*, as was obvious to everyone was issued for political reasons only against senators - opponents of equits in the fight for survival.

At the same time Cicero seems to be true to the original version of Gracchus' statute, issued probably around 123 BC.⁶

(CIC., *pro Cluentio* 151): *Atque, ut omittam leges alias omnes, quibus nos tenemur, ceteri autem sunt ordines liberati: hanc ipsam legem, „ne quis iudicio circumveniretur“, C. Gracchus tulit: eam legem pro plebe, non in plebem tulit. Postea L. Sulla homo a populi causa remotissimus, tamen, quum eius rei quaestionem hac ipsa lege constitueret, qua vos hoc tempore indicatis, populum Romanum, quem ab hoc genere liberum acceperat, alligare novo quaestionis genere ausus non est.*

At the same time from the text we learn that Sulla did not dare to extend the *lex Sempronia* to cover equits.

In publications there has been going on for a long period of time a discussion on the meaning (aim) of G. Gracchus' statute and on its position with respect to the remaining part of Gracchan legislation. Among others, it is worth noting that N.J.Miners revived Th.Mommsen's conception, who identified the *lex Sempronia* with the statute *de provocatione* which forbade the creation of extraordinary tribunals (*quaestiones extraordinariae*) empowered with the right to pass death sentences.⁷ The issued regulations were retroactive⁸ in character. On the one hand, they forbade the *quaestiones extraordinariae* that were established without people's content, and on the other one, secured Gracchus himself from possible (unjust) accusations in the future, if suddenly the political card turned. Since the danger came from the senators, the statute was passed only against them. N.J.Miners at the same time rejected the view that the *lex ne quis iudicio circumveniat* joined directly with the reform of *quaestio de repetundis*, being its first stage which was based on an attempt to limit corruption with this *quaestio*, before senator judges had been removed from it.⁹

The main argument against this competitive view, as seems, is the notice that discharging sentences passed by judges in cases for extortion before *quaestio de repetundis* were scandalous, and not the ones which sentenced the innocent

⁵ ROTONDI, *op.cit.*, p.309.

⁶ Cf. also CICERO, *pro Cluentio* 150 and 152.

⁷ N.J. MINERS, *The Lex Sempronia ne quis iudicio circumveniat*, *CQ* 52, 1958, pp.241-243.

⁸ This is also shown by the form of a past tense in the words: „collit“, „convenerit“ taken over from the *lex Sempronia* in comparison with the further part of Cic., *pro Cluentio* 148 dealing with *veneficium*, which is in present tense. Cf. MINERS, *op.cit.*, p.241; EWINS, *op.cit.*, p.97.

⁹ This is LAST's theory. After MINERS, *op.cit.*, p.243.

defendants.¹⁰ The *lex Sempronia ne quis iudicio circumveniat*, however, was to counter act unjust sentences finding defendants guilty.¹¹

Gracchus' statute used the verb „*circumvenire*“ (encircle, trick, deceive). The word appears several times,¹² always with the meaning: „ensure sentencing (of an innocent) defendant for corruption“. The same meaning has the phrase „*colerit ... convenerit quo quis iudicio publico condemnaretur*“ in the fragment of CIC., *pro Cluentio* 148, which refers already to the *lex Cornelia*.

We should remember that Cicero's line of defence in Cluentius' trial was aimed to find him not guilty of handing over a bribe (and not of taking it) in Oppianicus case, so we should assume that the very often resorted to, as the prototype of Sulla's statute, the *lex Sempronia ne quis iudicio circumveniat* did not deal only with accepting bribes by judges but also with „active bribery“ of people who bribed the tribunal (i.e. mainly the defendant and the prosecutor),¹³ so it covered everybody who conspired in order to sentence the defendant in the capital trial, of course the one being a senator. Whereas in general taking bribes was subject to the *lex* and *quaestio de repetundis*, in the case when it dealt with a trial with a possible capital punishment, the procedure „*ne quis iudicio circumveniat*“ was employed.¹⁴

B) Conspiracy aimed to sentence an innocent person in the *lex Cornelia de sicariis et veneficiis*..

As we have already mentioned, the regulations of the *lex Sempronia* in the range that interests us were included into the *lex Cornelia de sicariis et veneficiis*. Cicero's speech includes several parts where they are cited directly. Here is the first one:

(CIC., *pro Cluentio* 144): *Quid ergo est? Quaeret fortasse quispiam, displiceante mihi, legum praesidio a capite periculum propulsare? Mihi vero, indices, non displicet: sed utor instituto meo. In hominis honesti prudentisque iudicio non solum meo consilio uti consuevi, sed multum etiam eius, quem defendo, et consilio et voluntati obtempero. Nam, ut haec ad me causa delata est, qui leges eas, ad quas adhibemur, et in quibus versamur, nosse deberem: dixi habito statim, de eo, „qui coisset, quo quis condemnaretur“, illum esse liberum: teneri autem nostrum ordinem.*

„*Qui coisset quo quis condemnatur*“ means: *conspire*, unite in order to sentence someone. The regulation dealt only with senators.

Let us have a look at another part, in which Cicero gives us a little more information:

¹⁰ EWINS, *op.cit.*, p.94; MINERS, *op.cit.*, p.242.

¹¹ J.M. KELLY, *Roman litigation*, Oxford 1966, p.335.

¹² CIC., *pro Cluentio* 146, 151, 191 and 9, 30, 79, 90. Cf. also CIC., *Tusc. disp.* 1,98: *Palamedem ... Aiacem ... alios iudicio circumventos*.

¹³ Cf. G.D. MACCORMACK, *op.cit.*, p.101.

¹⁴ Before „*quaestio de iudicio circumvento*“ - cf. A. JOHNSON (et. al.), *Ancient Roman Statutes*, Vol.2, pp.65, 6.

(CIC., *pro Cluentio* 148 and 149): *Quid eadem lex statim adiungit? Recita. „Deque eius capite quaerito“. Cuius? qui coierit? non ita est. Quid ergo est? dic. „Qui tribunus militum legionibus quattuor primis, quive quaestor tribunus plebis.“ Deinceps omnes magistratus nominavit. „Quive in senatu sententiam dixit, dixerit.“ Quid tum? „Qui eorum coit, coierit, convenit, convenerit, quo quis iudicio publico condemnaretur.“ ... Si item de coitione voluisset: adiunxisset, „quive coierit“. Nunc ita est, „deque eius capite quaerito, qui magistratum habuerit, quive in senatu sententiam dixerit: qui eorum coit, coierit.“ Num is est Cluentius? certe non est.*

In this part the orator describes in detail the range of people subject to the statute. They are all magistrates (enumerated only as an exemplification) and senator judges. Subject to capital punishment are those who conspire in order to sentence someone by *judicium publicum*, i.e. *quaestio* empowered to pass death sentences. Rather unimportant is the act that in the text there appears the term „*condemnaretur*“ as separate from the term cited in CIC., *pro Cluentio* 151 „*circumveniretur*“; the latter should be, in my opinion, combined only with the *lex Sempronia*. This can only show some stylistic changes made at the time of incorporating Gracchus' regulations into Sulla's statute.¹⁵ We may notice aside, that this part gives some other, more general information: at least from Sulla legislation's times the norm on judicial conspiracy constitutes an integral part of the *lex de sicariis et veneficis*.¹⁶

The above texts can be joined by another:

(CIC., *pro Cluentio* 157): *Hic nunc est quiddam, quod ad me pertineat, de quo ante dixi, quod ego populo Romano praestare debeam, quoniam is meae vitae status est, ut omnis mihi cura atque opera posita sit in omnium periculis defendendis. Video, quanta et quam periculosa et quam infinita quaestio tentetur ab accusatoribus, quum eam legem, quae in nostrum ordinem scripta sit, in populum Romanum transferre conentur. Qua in lege est, „qui coierit“: quod quam late poteat, videtis. „Convenerit“: aequae infinitum et incertum est. „Consenserit“: hoc vero quum incertum et infinitum, tum obscurum et occultum est. „falsumve testimonium dixerit“.*

This part constitutes a basis for the supposition that the range of punishable deeds by the *lex Cornelia* (and before that the *lex Sempronia*) was wider than it might appear from CIC., *pro Cluentio* 148. Moreover, there appear behaviours described by words: „*consenserit*“ and „*falsumve testimonium dixerit*“. The first one means rather „agreeing to“ a conspiracy than a direct participation in it, especially in the context of the aforementioned „*coierit*“. The later expression departs in its meaning from the previous ones and should be translated as „giving false evidence“, although in my opinion there is no doubt concerning the fact that the behaviour should be viewed in direct connection with the conspiracy to sentence someone in the capital trial.¹⁷

¹⁵ EWINS, *op.cit.*, p.95.

¹⁶ *Ibid.*,

¹⁷ Cf. *D.* 48,8,1 pr., 48,8,3,4,.

From several other notes of Cicero, which are supported by time-distinct Iustinian's Digests, there appears that Sulla's statute dealt with making conspiracy only against an innocent person, in order to sentence him to death:

(CIC., *pro Cluentio* 9): *innocentem pecunia circumventur* (D. 48,8,1, *pr. Marcianus libro quarto decimo institutionum*): *ut quis innocens conveniretur condemnaretur*

(CIC., *pro Cluentio* 30): *iudicio oppressum et circumventur esse innocentem* (D. 48,8,3,4, *Marcianus libro quarto decimo institutionum*): *falsa indicia confessus fuerit confitendare curaverit, quo quis innocens circumveniretur*

(CIC., *pro Cluentio* 90): *quod innocentem circumveniret*

(CIC., *pro Cluentio* 131): *pecuniam accepisset quo innocentem condemnaret*

It is quite probable that the limitation and at the same time pressure put on the element of defendant's innocence is the idea of Sulla himself and that the *lex Sempronia* punished all conspiracies against every defendant.¹⁸ It is also comprehensible: the discussed judicial crimes were included in the *lex Cornelia de sicariis et veneficiis* as we will talk about it in a moment only for this reason that they endangered the life of their victim - on principle innocent - by the sentence of death. Thus, maybe also the limitation from the subject side to the very conspiracy in order to sentence to death is made by Sulla himself and the *lex Sempronia* had in here a wider range of application.

C) Bribery bein the basis of conspiring against the life of the defendant.

The corruption of judges, as we known, was a sickness that befell on the organism of Roman administration of justice. It was the direct and as it seems the main reason for conspiracy (intrigues) in courts. In general the crime of taking bribes belonged to the group of deeds known as „*repetundae*“ (extortion) and was the subject of investigation before *quaestio de repetundis*.¹⁹ I have mentioned difficulties that are connected with the interpretation of the *lex Sempronia ne quis iudicio circumveniat* against the background of senator courts' activities and legislation *de repetundis* at the times of Gracchus. The thesis raised there on the separation of the two ways of legislation maintains its fully validity at Sulla times, at the end of the Republic. For sure, at Sulla times there operated a separate statute *de repetundis* and most probably it was the *lex Cornelia de repetundis*:²⁰

(CIC., *pro Rabirio Post.* 8.9): *iubet lex Iulia persequi ab eis, ad quos ea pecunia, quam is ceperit, qui damnatus sit, pervenerit ... sin hoc totidem verbis translatum caput est, quod fuit non modo in Cornelia, sed etiam ante in lege Servilia.*

¹⁸ EWINS, *op.cit.*, p. 96.

¹⁹ Cf. C. VENTURINI, *Studi sul crimen repetundarum nell'età repubblicana*, Milano 1979, pp. 376-384.

²⁰ E.S. GRUEN, *Roman politics and the criminal courts 149-78 B.C.*, Toronto 1968, pp. 258ff., MACCORMACK, *op.cit.*, p. 8.

Only senators were subject to this statute, which shows its Gracchian tradition:

(Cic., *pro Cluentio* 104): *Qua lege in eo genere a senatore ratio repeti solet, de pecuniis repetundis, ea lege accusatus honestissime est absolutus.*

It is difficult to say whether the *lex Cornelia de repetundis* had a separate (specific) regulation dealing with taking bribes by judges. I think that rather this crime was included in the notion of a large sense bribery. Unlike the *lex Cornelia de sicariis et veneficis* this statute did not limit its range to the cases of sentences and at capital trials. The case of Falcula, Iunius' tribunal judge who voted for sentencing Oppianicus, and against whom there was going the *de repetundis* procedure does not prove the narrow application of the statute.²¹ Quite immediately issuing of another statute on cases of extortion - the *lex Iulia de repetundis* from 59 B.C., which also included regulations on the corruption of judges,²² shows the fully independent way of development of legislation of this kind. On the other hand, the *lex Cornelia de sicariis et veneficis* had also regulations in which it clearly talks of bribery. The regulations constituted a sort of *lex specialis* with respect to the *lex Cornelia de repetundis* in the sense that they dealt only with such a corruption which led to passing an unjust condemning sentence in a capital trial. I did not use the term „a sort“ without purpose - as a matter of fact bribery (corruption) is not in the *lex Cornelia de sicariis et veneficis* an independent crime but rather one of signs describing the motive for conspiracy to sentence a man to death.

The problem that should be soled now is connected with the question whether the statute punished both active and passive bribery?

The speech „*pro Cluentio*“ seems to prejudge that the *lex Cornelia de sicariis et veneficis* provided for the punishability of giving bribes in order to gain a condemning sentence as it was the accusation of active bribery that Cicero defended Cluentius from. Moreover, the deed of Cluentius, of course if he had been a senator, could be subject only to the *lex Cornelia de sicariis et veneficis* since the *lex de repetundis* dealt only with accepting bribes, and not giving them.²³

A much more difficult problem is the relation of the norm on passive bribery in the *lex Cornelia de sicariis et veneficis* to the parallel operating *lex Cornelia de repetundis*. We know from many sources, both Ciceronian and post-classical, of which I will present a few, that our statute did in fact deal with accepting bribes by judges.

From all the judges of Iunius' tribunal only two, i.e. Iunius himself and P. Septimius Scaevola were tried only according to the formula „*ne quis iudicio circumveniatur*“.²⁴ The others: C. Aelius Staienus, Bulbus, P. Popilius, Ti. Gutta and C. Fidiculanus Falcula²⁵ faced first of all the following charges: *maiestas*, *ambitus*, *crimen repetundarum*, although the accusation of sentencing Oppianicus could be additionally added. Let us first take a look at Iunius' case:

²¹ *Ibid.*

²² E.S. GRUEN, *The last generation of the Roman republic*, Berkeley 1974, pp.293ff.

²³ EWINS, *op.cit.*, p.99.

²⁴ *Ibid.*,

²⁵ Falcula was the only judge that was charged solely on the basis of Oppianicus case, but probably he was tried by the court *de repetundis*: Cic., *pro Cluentio* 104: *Qua lege ... absolutus.*

(CIC., *pro Cluentio* 90): *Quid? illa tandem quaestio, aut disceptatio, aut iudicium fuit? Putabo fuisse: dicat, qui vult hodie de illo populo concitato, cui tum mos gestus est: qua de re Iunius causam dixerit. Quemcumque rogaris, hoc respondebit, quod pecuniam acceperit, quod innocentem circumvenerit. est haec opinio. At, si ita esset: hac lege accusatam esse oportuit, qua accusatur habitus. At ipse ea lege quaerebat.*

The case of Iunius can be exceptional. We should remember that he was the chairman of the tribunal and not an ordinary judge. This fact needs special consideration, especially in the context of the form of post-classical norms of the *lex Cornelia de sicariis et veneficiis*.

(D. 48,8,1 *pr. Marcius libro quarto decimo institutionum*): ... *quive, cum magistratus esset publicove iudicio praesesset, operam dedisset, quo quis falsum iudicium profiretur, ut quis innocens conveniretur condemnaretur.*

(D. 48,8,1 *Marcius libro quarto decimo institutionum*): ... *quo quis publico iudicio rei capitalis damnetur: quive magistratus iudexve quaestionis ob capitalem pecuniam acceperit ut publica lege reus fieret.*

Sources combined in this way seem to suggest that the liability to Sulla statute was restricted only to the chairperson of the tribunal, i.e. magistrate or *iudex quaestionis*. The latter in the Republic was mainly an ex-edile who presided over *quaestiones* when praetor was missing.²⁶ Since after Augustus the office of *iudex quaestionis* disappeared we may wonder what led the compilers when they decided not to remove the term from Marcius' script. With an apparent help comes Paulus who quite firmly states that for taking bribes is liable every judge and irrespectively of the fact whether the trial is capital:

(P. 8,5,23,11): *iudex qui in caput fortunaeque hominis pecuniam acceperit, in insulam bonis ademptis deportatur.*

But does Paulus mean by the term „*iudex*“ also a member of *consilium*, by whom in principate an imperial officer was surrounded? It is difficult to give a clear answer to that but we should rather assume that the term „*iudex quaestionis*“, a bit like its original meaning, was understood by Justinianus as „presiding judge“, as it would be difficult to call members of the presidium judges.

But was the *lex Cornelia de sicariis et veneficiis*, in the form in which it operated at the end of the republic and within passive bribery, not aimed also against other judges of the tribunal, not only against its chairperson? G.D.MacCormack thinks²⁷ that against all judges who were senators. And in fact, in the above cited texts: CIC., *pro Cluentio* 144 and 157 („*nostrum ordinem*“) and 148 („*quive in senatu sententia dixit*“) seem to support this view.

The case of another judge of Iunius' tribunal - P.Septimius Scaevola, this time an „ordinary“ judge can be also a support for this position:

(CIC., *pro Cluentio* 116): *In litibus aestimandis fere iudices, aut, quod sibi eum, quem semel condemnarunt, inimicum putant esse, si qua in eum lis capitis illata est, non admittunt: aut, quod se perfunctos iam esse arbitrantur, quum de reo iudicarunt, negligentius attendunt cetera. Iraque et maiestatis absoluti sunt permulti, quibus damnatis, de pecuniis repetundis, lites essent aestimatae: et hoc quotidie fieri videmus, ut, reo damnato de pecuniis repetundis, ad quos pervenisse pecunias in litibus aestimandis statutum sit, eos illi iudices absolvant: quod quum fit, non iudicia rescinduntur, sed hoc statuitur, aestimationem*

²⁶ MACCORMACK, *op.cit.*, pp.11-12.

²⁷ *Ibid.*

litium non esse iudicium. Scaevola condemnatus est aliis criminibus, frequentissimis Apuliae testibus. Omni contentione pugnatum est, ut lis haec capitis aestimaretur. Quae res si rei indicatae pondus habuisset: ille postea vel iisdem, vel aliis inimicis, reus hac lege ipsa factus esset.

P. Septimius Scaevola was found guilty of extortion at Apulia,²⁸ but *litis aestimatio* was added the accusation of taking money to sentence Oppianicus. Cicero says that it was done to introduce „*lis capitis*“. This is understandable if we take into consideration the fact that the procedure *de repetundis* never led to the capital punishment. The expression „*hac lege ipsa*“ should be thus referred to the *lex Cornelia de sicariis et veneficis* and in particular to its clause „*ne quis iudicio convenire*“. Thus, we have here a case of not of giving but taking bribes by an ordinary judge, although tried not by *quaestio de sicariis et veneficis*, but according to its regulations.²⁹

From these considerations we should draw the following conclusion: *the lex Cornelia de sicariis et veneficis* provided for punishing a judicial conspiracy and not directly bribery. The latter was left for the *de repetundis* legislation. Handing a bribe on the one hand, and accepting it on the other one, constituted acts which could only then become subject to the *lex Cornelia* when they constituted the powering force of a conspiracy organised to sentence an innocent defendant and then they were only investigated by *quaestio de sicariis et veneficis*.

The above view is in accordance with the claim of Cicero that the statute was restricted to senator judges, constituting *iudicium publicum*, who as a result of bribery conspired (allied) to sentence an innocent defendant.³⁰

(CIC., pro Cluentio 136): At enim Senatus universus indicavit, illud corruptum esse iudicium. Quomodo? Suscepit causam. An potuit rem delatam eiusmodi repudiare, quum Tribunus plebis, populo concitato, rem paene ad manus revocasset: quum vir optimus, et homo innocentissimus, pecunia circumventus esse diceretur: quum invidia flagraret ordo Senatorius? potuit nihil decerni? potuit illa concitatio multitudinis sine summo periculo reipublicae repudiari? At quid est decretum? quam iuste! quam sapienter! quam diligenter! „Si qui sint, quorum opera factum sit, ut iudicium publicum corrumpetur“. Utrum videtur Senatus id factum indicare: an, si factum sit, moleste graviterque ferre? Si ipse A. Cluentius sententiam de iudiciis rogaretur, aliam non diceret, atque ii dixerunt, quorum sententiis Cluentium condemnatum esse dicitis.

²⁸ CIC., *pro Cluentio* 115.

²⁹ EWINS, *op.cit.*, p.99.

³⁰ MACCORMACK, *op.cit.*, pp.11-12

We are left to consider the question of the range of the *lex Cornelia de sicariis et veneficiis* in the situation when Iulius Caesar issued his *lex Iulia de pecuniis repetundis* in 59 BC.³¹ A report on the statute, which seems to be truthful to the original,³² is supplied by Macer:

(D. 48,11,3 Macer libro primo publicorum): Lege Iulia repetundarum tenetur, qui cum aliquam potestatem haberet, pecuniam ob iudicandum vel non iudicandum decernendumve acceperit.

(D. 48,11,7, pr. Macer libro primo publicorum): Lex Iulia de repetundis praecipit ne quis ob iudicem arbitrumve dandum mutandum iubendumve ut iudicet: neve ob non dandum non mutandum non iubendum ut iudicet: neve ob hominem in vincula publica coiciendum vincendum vincirive iubendum exve vinculis dimittendum: neve quis ob hominem condemnandum absolvendumve: neve ob litem aestimandam iudiciumve capitae pecuniae faciendum vel non faciendum aliquid acceperit.

Thus, Caesar's statute dealt with people who accepted money in turn for sentencing or discharging defendants in all possible cases, also in the ones in which defendant's life was a stake (capital trials).

The *lex Iulia* reached with its regulations further. It punished also such cases where the judge was not in fact bribed but nonetheless he passed an unjust death sentence:

(D. 48,11,7,3, Macer libro primo publicorum): Hodie ex lege repetundarum extra ordinem puniuntur et plerumque vel exilio puniuntur vel etiam durius, prout admiserint, quid enim, si ob hominem necandum pecuniam acceperit? vel, licet non acceperint, calore tamen inducti interfecerint vel innocentem vel quem punire non debuerant? capite plecti debent vel certe in insulam deportant, ut plerique puniti sunt.

The reason for passing an unjust sentence is malice, anger (*calor*). There arises a question whether it is the sole motive or was it just mentioned as an example? If so, the *lex Iulia* would punish all cases of unjust sentences. Since the text of Macer deals with capital punishment, probably only the ones passed at capital trials.³³

The assent with the hitherto range of punishability by the *lex Cornelia* is thus considerable and directs us to the hypothesis that the issuing of the *lex Iulia de pecuniis repetundis* could be accompanied by limiting the range of operation for our statute to cases, probably quite rare, when the conspiracy (intrigue) to sentence an innocent defendant in the capital trial was organised without a bribe. In other cases, if the unjust death sentence was passed on purpose (especially as the result of bribery) the *lex Iulia* could be employed, as newer.³⁴ But it could happen, in my opinion, that *the lex Cornelia* was still used, as *lex specialis*, when, first, it was magistrate that committed the crime, or the chairman of *iudex*, second, if the condemning sentence was passed in a capital trial. We cannot be sure, however, of the mutual relation

³¹ ROTONDI, *op.cit.*, p.389, gives the following sources for this statute: CIC., *pro Sestio*135, in *Vatin.* 29, *pro Rabirio Post.* 4,8 AND 5,12, in *Pisonem* 16,37, 21,50, 37,90; VAL. MAX 8,1,10; PLIN., *ep.* 2,11,3, 4,9,9 and *PS* 5,28;*CTh* 9,27; *D.* 48,11; *C.* 27,11, 1,4,18 and others.

³² *MacCormack, op. cit.*, p.12.

³³ *Ibid.*, p.13.

³⁴ So *ibid.*, p.13.

between the two statutes.³⁵

D) *Typology of offences „in iudicio convenire“.*

What follows from the hitherto considerations, is that the existence of the offence of judicial conspiracy could be contributed to a number of elements expressing human behaviour aimed at one goal: sentencing an innocent defendant to the capital punishment. Before I take up the typification of the crime, i.e. complex enumeration of its attributes, I have to ponder on the already signalled question concerning the ratio of including the regulations on judicial conspiracy into Sulla's statute. The key to the, as will turn out, theoretical considerations is, in my opinion, the institution of condemning sentence passed by *iudicium publicum*, an more specifically its effects in the form of endangering the life of the defendant at the tribunal. In fact, it was not the very bribery of judges (active and passive) that was in the direct interest of Sulla: simultaneously was issued the *lex Cornelia de repetundis*, neither giving false testimony at court: there was issued the *lex Cornelia testamentaria (de falsis)*. Although after a superficial reading we might come to the conclusion that bribery (corruption) was a separate type of offence, in fact this behaviour constituted for Sulla only a sign of crime which he wanted to punish: taking part in a judicial conspiracy to endanger the life of the defendant.

I. *Unjust condemning sentence being a threat to human life.*

The *lex Cornelia de sicariis et veneficis* covered, like the *lex Sempronia*, only cases of conspiracy to pass a condemning sentence. From the moment of including the issue „*ne quis iudicio circumvenitur*“ into the statute „*de sicariis et veneficis*“, even if it was Gracchus who did it so first, these cases were limited to the situation when the trial was at „*iudicium capitis*“, i.e. when the „head“ of the defendant was at stake:

(CIC., *pro Cluentio* 192): *Atque his rebus quum instructum accusatorem filio suo Romano ipsa misisset: paulisper, conquirendorum et conducendorum testium causa, larini est commorata: postea autem, quum appropinquare huius iudicium ei nuntiatum est, confestim huc advolavit, ne aut accusatoribus diligentia, aut pecunia testibus deesset, aut ne forte mater hoc sibi optatissimum spectaculum huius sordium atque luctus et tanti squaloris amitteret. Iam vero quod iter Romam eius mulieris fuisse existimatis? quod ego, propter vicinitatem Aquinatium et Venafranorum, ex multis audivi et comperi: quos concursus in his oppidis? quantos et virorum et mulierum gemitus esse factos? mulierem quandam Larino, atque illam usque a mari supero Romam proficisci, cum magno comitatu et pecunia, quo facilius circumvenire iudicio capitis atque opprimere filium possit.*

As it is known, the sentence passed by collegial tribunals which at Sulla times operated permanently, was *poena capitis*, which could be avoided by going into exile (*aquae et ignis interdictio*). This was in fact the capital punishment: either literally physical, if the defendant did not go into exile on his own, or at least legal, if he chose the exile. In each case, no matter

³⁵ The situation is further complicated by the operating of the *lex Cornelia testamentaria nummaria (de falsis)*, which also had regulations dealing with bribery at courts, both passive and active. Cf. *D.* 48,10,1; *PS* 5,25,2.

how we interpret the meaning of this punishment endangered human life. Such a premise can be read also in the text of Ulpianus, included by compilers in Iustinianus Digests:

(D. 48,8,4 Ulpianus libro septimo de officio proconsulis): Lege Cornelia de sicariis tenetur, qui, cum in magistratu est esset, eorum quid fecerit contra hominis necem, quod legibus permissum non sit.

The action „*contra hominis necem*“ by magistrates³⁶ was mainly passing an unjust sentence, which was equalled to homicide, killing of the defendant.³⁷ Besides, not only passing a death sentence is included in the formula. We can also enumerate all other deeds made in order to conspire between judges and the chairperson of the tribunal, judges and the prosecutor or witnesses, if we adequately refer the text to the specificity of the composition and procedure of *quaestio perpetua* at the end of the republic. All these deeds, including passing the condemning sentence have the same characteristics: they all endanger human life.

Thus, is the offence „*in iudicio convenire*“ included in the conception of legal policy of Cornelio Sulla promoted in the *lex Cornelia de sicariis et veneficiis*? Does it „fit“ its ratio based on protecting public security and order?

I am far from expressing the opinion that the offence of judicial conspiracy is twin, or at least similar, to other crimes included in Sulla's statute. I admit that its difference is significant not only for its aspect of the offence as to the deed, but also to the subject: perpetrators are usually judges - respected (at least in principle) citizens, their criminal action based on (unjust) passing sentences is made look legal, whereas offences such as: *crimes inter sicarios*, *veneficium* or *incendium* were within the category of Roman gangsterism which did not refrain from brutal methods.

Nonetheless, I think that we can accept the position that „*in iudicio convenire*“ agrees with the general goal of Sulla's statute.³⁸ First, because that it is a threat to the life of innocent citizens not in a lesser degree than other offences included in the *lex Cornelia*. The citizen who is aware of the possibility of sentencing him on the basis of a judicial conspiracy against him loses his sense of security and starts to be afraid of his life. This, however, reminds of a situation which emerged after the first proscription lists had been published - death sentences by Sulla. Since for a long period of time the lists were not closed and more and more new names of sentenced people appeared on them, there developed in the society a certain type of psychosis, the feeling of an endangered security which caused that people started to even demand from the dictator to ultimately enumerate all the people whom he wanted to kill, so that the fear and uncertainty of tomorrow could be eliminated. A similar, unbound freedom of deciding on human life, but not on such a scale of course, had always had tribunals. The bribery spreading at frightening rate encouraged judges to abandon the elemental principle of justice. Bribed, not only did they discharged the guilty, but also sentenced the innocent. Such a corrupted activity of the administration of justice, especially when dealt with capital trials where were issued capital sentences, was aimed, as a matter of fact, against public security, since the lives of many

³⁶ At Sulla times by every judge. At Ulpianus times there were no *quaestiones perpetuae*, thus the text deals only with magistrates - an imperial officer.

³⁷ G. PUGLIESE, *Appunti sui limiti dell'imperium nella repressione penale*, Torino 1939, p.49.

³⁸ Of course we cannot rule out the possibility that this offence was „added“ to Sulla's statute between his legislation and the year 66 when its presence was acknowledged by Cicero in his speech defending Cluentius. This would mean that this extension of the statute activity area started already in the late republic.

innocent citizens were endangered by it. The *lex Cornelia de sicariis et veneficis* was to dam this phenomenon.

If we are talking of what connects „judicial conspiracy“ with other crimes of Sulla’s statute, we have to enumerate several other characteristics.

The very terms „*convenire*“ or „*coire*“ point to the element of secrecy, treachery in the deed of the perpetrator. The intrigue, the quiet agreement by people who, as a matter of fact, were to administer law and justice, is an especially malicious method of endangering someone’s life, in practice depriving the victim of a possibility to defend. The intent of the perpetrator is never exposed and this considerably makes it more difficult to sue that person. Due to the characteristic of the crime, without an abuse and exaggeration, we could call its perpetrators, like other perpetrators from the statute, assassins.

The direct result of the crime is the danger of passing death sentence. The very conspiracy is punishable, even if the condemning has not been passed (e.g. not sufficient number of judges were bribed) or if it was passed but the defendant avoided it choosing exilium. Thus, the death of a man is a distant result, and what is most important, not necessary for the occurrence of crime.

Finally, it is indisputable that the intentionality of the judicial conspiracy is invoided - it cannot be committed in some other way than a direct attempt.

II. Typisation of the crime.

Summing up to the hitherto studies we are left with an attempt to collectively enumerate elements forming the type of the offence of judicial conspiracy. The enumeration should be as follows:

Punishable by Sulla’s statute are:

- 1) the chairman and judges of *iudicium publicum*, as well as third parties, e.g. prosecutor or witness who
- 2) being senators
- 3) giving or accepting bribes
- 4) form, participate in or agree to a conspiracy
- 5) based on the possibility (witnesses)
- 6) aiming at killing an innocent defendant.