REVISTA DIÁLOGOS MEDITERRÂNICOS
ISSN: 2237-6585

CONFISCATION OF ASSETS AS AN ACCESSORY PENALTY

ANA B. ZAERA GARCÍA
University of Salamanca

ABSTRACT

Confiscation of property was applied under Roman law to enemies of Rome. However, under Republican law it was initially imposed as an accessory to penalties for specific crimes. It was usually enforced alongside offences punishable with death, although from Sulla's time it became an additional penalty when a person was sentenced to *aqua et igni interdictio*.

KEYWORDS: MIDDLE AGES, BIOGRAPHY, INTERDISCIPLINARITY, WILLS.

Throughout the history of Roman law, different sources use a number of expressions to refer to confiscation of property and assets, *consecratio bonorum, publicatio bonorum, ademptio bonorum* and *proscriptionem*. The different terms depend on their specific nature and the procedures in which they were involved.

Notwithstanding, the basis for *publication bonorum* can be found in *consecratio bonorum*. This is the oldest manifestation of confiscation of property and goods. *Consecratio bonorum* was an act that has social, political and legal implications in which a thing or an actual physical person was removed from the sphere of human relations and consecrated to the cult of the gods[1]. To single out the declared *homo sacer*[2] or the accursed or sacred man, and dedicate him to the deity, when he has committed an act that is contrary to the sacred interests of the community, is a direct consequence of the loss of *civitas* and freedom[3]. Fiori holds that the *homo* who was neither *civis* nor *liber*, ¡was therefore banished from this group[4]. As a result, this led to the loss of all rights as a citizen, including removal from the census and the confiscation of all their goods and property[5].

The property was dedicated as a means of purification and expiation, thus pacifying the gods. This same idea is found in declaring the *homo sacer*, in which, in addition to the fact that the outlawed person may be killed with impunity, the penalty was also accompanied by *consecratio bonorum*, namely confiscation of their property, which was presented to the deity. There then followed a ritual in which the *bona sacrata* were attributed to the deity who had been offended by the behaviour[6]. In this way the *res* acquired a sacred nature, rendering it *extra commercium* and therefore *res divini iuris* (*res sacra*) that is, sacred to the gods. Also, when the *consecratio* was carried out ex *auctoritate populi romani*, either by law or as a result of *senatus consultum*, the seized assets were dedicated to the temples, becoming *res divini iuris* through intervention of the pontiff who consecrated them to

[1] LUZZATTO, G., s.v. *consecratio*, NNDI, Torino, Unione tipografico editrice torinese, 1957, pp.110-111.
[2] The study of the declaration of *homo sacer*, has been excluded from this paper, therefore we will only be studying the *consecratio bonorum*, which was a direct consequence of that declaration. See in this regard: FIORI, R., *Homo sacer. Dinamicaa político-costituzionale di una sanzione giuridico-religiosa*, Jovene Editore, Napoli, 1996, pp. 50-66; CANTARELLA, E., "La sacertà nel sistema originario delle pene. Conseracione su una recente ipotesi", A. Maffi e L. Gagliardi eds, *Eva Cantarella. Diritto e Società in Grecia e a Roma. Scritti scelti*, Giuffrè, Milano, 2011, pp. 597-599.
[3] CANTARELLA, E., *Los suplicios capitales en Grecia y Roma: orígenes y funciones de la pena de muerte en la antigüedad clásica*, translation. M.P. Bouyssou and M.V. García Quintela, Akal, Madrid, 1996, pp. 269-283.
[4] FIORI, R., *Homo sacer* cit., pp. 62-63, in this regard states "le testimonianze circa i più antichi casi di *sacratio* non parlano mai de *sacratio capitis et bonorum*, ma sempre semplicemente di *sacer esto*".
[5] Liv. 3.57 1
[6] LUZZATTO, G., s.v. *consecratio*, cit., p. 111, admits that in the case of lighter offences, it was possible to dedicate specific assets without the need to take all the property.

the gods[7]. The act of *sacrum facere* required the decision of the *populous*, and was carried out in accordance with an invariable ritual, also when it was made by the plebeian tribune of the people[8].

This was still an era when the law and religion were inextricably linked, and therefore criminal law was still very much influenced by religious factors. However, despite the scarcity of ancient sources available and the gaps in reconstructing this period, there is no question that the c*onsecratio bonorum* has been identified as the most archaic reference to property. At that time, the penalty was seen as an expiatory sacrifice and the community needed to be purified to expiate the harm done by the guilty party as member of that group, and as result, all the goods and property of that person were offered to the gods[9].

It was later, during the Republican period, that express reference to *consecratio bonorum*[10] appeared in the reference sources. From that time, *consecratio bonorum* became an entity in itself, and it was to endure throughout the Republican period, during which, as has been reiterated on several occasions in the Livian tradition or in Dionysus of Halicarnassus, with the passage of time it acquired political connotations[11]. In this regard, Livy states: *sacrando cum bonis capite*[12].

For Fiori, the conceptual change that arose with the concept of *caput,* operated through the *interpretatio* of the pontiffs, and from which it came to be considered as "complex of laws of the *civis* and the *homo liber*", which meant that all the liability of the *homo sacer* fell solely to the convicted person rather than affecting the whole family[13]. And it is probably from this moment that the distinction was made between the punishment of the convicted person and their *bona*.

From the 4th century onwards, Giuffrè holds that confiscation of property was linked to the conflict between two social orders and the attempt to establish Rome's supremacy, both in Lazio and throughout the Italian peninsula"[14]. However, the *sacertas* was maintained throughout the Republican

[7] Gai, *Inst*., 2. 4-5; D. 1.8.6.3 (Marcian. 3 *inst*.).
[8] Varr., *ling., lat*., 6.7.54; Cic., *de dom*., 17.44; See, BERTHELET, Y., "La *consecratio* du terrain de la *domus* palatine de Cicéron", Ecole Francaise, Roma, MEFRA 128-2, 2016, p. 458., the author states that Clodius creates a completely different procedure, deviating from the norm, when he carries out the ritual of the *consecratio* of the land where Cicero's house was sited.
[9] BRASIELLO, U., *La repressione penale in diritto romano*, Jovene, Napoli, 1937, p. 106.
[10] Liv. 2.8.2; 3.55.7; 3.58.9.
[11] MOMMSEN, Th., *Derecho penal romano* I, translation P. Dorado Montero, Ediciones Olejnik, Santiago de Chile, 1905 (reprint 2019), p. 36, for the author, the tribunes could impose confiscation of property to the benefit of a divinity without the need for a trial of any kind.
[12] Liv. 2.8 4.
[13] FIORI, R., *Homo sacer* cit., pp. 64-65, for the author, punishing the whole family and not just the guilty party, was due to the kin-based society where the legal existence of the condemned party was linked to the fact that they belonged to family groups. However, in the *civitas* system every *civis* has their own legal existence, therefore, personal liability was activated in the case of crimes committed. Dion. Hall. 8.80 1
[14] GIUFFRÈ, V., *La repressione criminale nell'esperienza romana* 4 ed., Jovene Editore, Napoli, 1997, p. 128.

period and it was imposed in particular on those who were tempted to try and restore the monarchy or to contest the inviolability of the plebeian tribunes, thus assuming a political rather than a religious nature[15]. The declaration of the *sacertas* pronounced in the plebeian assembly resulted in the prisoner being outlawed, the effect of which was the death sentence[16]. From Sulla[17] onwards, *consecratio bonorum* was used as an additional instrument to proscriptions in political struggles[18].

Publicatio bonorum acquired a different nature. This concept illustrates the profound transformation in the nature of the sanction, which from being an instrument of religious reparation, came to be a social requirement of justice. This change came about during the Republican period, having progressed from the archaic legal and sacred system prevalent when the first attempts at criminal repression were introduced, in the 4th century BCE, when the conditions were appropriate, for the confiscation of property divested of its religious connotations of *consecratio bonorum*[19].

Publicatio bonorum was the expression used to refer to confiscation of assets and property[20]. *Publicatio bonorum* originated in the confiscation of the assets of Rome's enemies[21], an habitual practice that was subsequently extended to those convicted of more serious crimes[22]. According to Brasiello, by applying *quaestiones perpetuae* to all *crimina* in Roman criminal procedure and, in particular, by replacing the death penalty with *aqua et igni interdiction,* confiscation of property became part of the penalty imposed [23]. However, *publicatio bonorum* was not identified with *aqua et igni interdictio* until it became a penalty with the law of Sulla regulating *quaestiones perpetuae[24]*, as

[15] SALERNO, F., *Dalla «consecratio» alla «publicatio bonorum». Forme giuridiche e uso político dalle origini a Cesare*, Jovene Editore, Napoli 1990, pp. 88-90.
[16] PESARESI, R., *Studi sul proceso penale in età republicana*, Jovene Editore, Napoli, 2005, p. 166.
[17] Vid., HINARD, F. *Les proscriptions de la Rome républicaine*, Publications de l'École Française de Rome, Roma, 1985, pp. 77-82.
[18] Cicero's work *de Domo sua* provides more detailed information on the procedure used for declaration of the *consecratio*. A significant example of the political use made of this concept in the last Republican phase can be found in Clodius' declaration of consecratio on the Palatine house of Cicero. Cic. *dom*. 47.123. See in this regard FIORI, R., *Homo sacer* cit., pp. 445-450; BERTHELET, Y., "La *consecratio*, cit…", pp. 459-462; BATS, M. "La publicatio bonorum dans le Domo sua de Cicéron", Ecole Francaise, Roma, MEFRA 128-2, 2016, pp. 440-445.
[19] SALERNO, F., *Dalla «consecratio»* cit., pp. 91-95.
[20] BRASIELLO, U., s. v. *publicatio bonorum*, NNDI, Unione tipografico editrice torinese, Torino, año1982, p. 585, according to the author the term *confiscare* appears solely in two sources and this is due to the fact that the Romans in cases of vacant assets, or assets of those condemned to death, speak of subjection to *ad populum.*
[21] Cic., *ad fam.*, 10.21.1: *tot civibus pro patria occisis, hostibus denique omnibus iudicatis bonisque publicatis.*
[22] BRASIELLO, U., *La repressione* cit., p. 111, according to the author, it would seem that *publicatio bonorum* was originally applied solely to those condemned in *perduellio,* however subsequently it was extended to crimes punished by the death penalty and citizenship. See PINO ABAD, M., *La pena de confiscación de bienes en el derecho histórico español*, Servicio de Publicaciones de la Universidad de Córdoba, Córdoba, 1999, pp. 64-76, where the author analyses the different crimes punished by confiscation throughout the period of Roman law.
[23] BRASIELLO, U., s.v. *publicatio* cit., 585,
[24] See PESARESI, R., *Studi sul proceso* cit., pp.128-136; conversely KUNKEL, W., s.v. Quaestio, Real-Encyclopädie der Classischen Altertumswissenschaft 47, Alfred Druckenmüller, Stuttgart, 1963, pp. 766-768 for whom this development does not occur until several years later, towards the end of the Republican period.

the prohibition that applied to those who chose voluntary exile in order to avoid the death penalty and were relegated to a place with which Rome had no treaty, did not include confiscation of their property[25]. In this case, the exiled person could voluntarily take into exile all the assets that they could, and their property would only be taken should they have failed in their obligations as citizens, but not because the interdiction entailed property confiscation, as was the case when it came to be a penalty used as a punishment for specific crimes[26].

Due to the fact that capital punishment and the penalty of banishment meant cancellation of citizenship within the *civitas*, they lost all their rights, in addition to their property. In this case, the property was confiscated because the penalty had been imposed, but it was not an independent penalty. The property was confiscated once the death sentence or interdiction has been passed.

> D.28.1.8.1 (Gai. 17 ed. prov.): (Gai. 17 ad ed. provinc.) Si cui aqua et igni interdictum sit, eius nec illud testamentum valet quod ante fecit nec id quod postea fecerit: bona quoque, quae tunc habuit cum damnaretur, publicabuntur aut, si non videantur lucrosa, creditoribus concedentur.

As a result, when the penalty was *aqua et igni interdictio,* there was no need to rule on confiscation of property. The individual's alienation from society as a result of the sentence was total. The convicted person lost their rights as a citizen, due to *capitis deminutio* and, as a consequence, their property was confiscated: *Damnatione bona publicantur, cum aut vita adimitur aut civitas, aut servilis condicio irrogatur*[27].

The reason for this is that the convicted person was deemed to be an enemy of Rome, and therefore, they were no longer protected as a citizen and thus all their property and assets passed to

[25] See ZAERA, A., "El exilio y la *aqua et igni interdictio* en la República", *Movilidad forzada entre la Antigüedad Clásica y Tardía*, Vallejo, Bueno and Sánchez Moreno, eds, Universidad de Alcalá, Alcalá de Henares 2015, pp. 22-26; Id., "El exilio voluntario en Polibio 6.14.7", *Scritti per Alessandro Corbino* 7, Libellula, Lecce, 2016, pp. 609-619. Conversely, KELLY, G. P. *A history of exile in the Roman republic*, Cambridge University Press, Cambridge, 2006, p. 33, believes that banishment was imposed on the condition that exile took place. Also, for part of the doctrine *aqua et igni interdictio* entails the loss of citizenship thus: GIOFFREDI, C. "*Aqua et igni interdictio* e il concorso privato alla prepressione penale", *Archivo penale* 3, Bulzoni Editore, Roma, 1947, p. 334; BRASIELLO, U., *La repressione* cit., pp. 809-811; SANTALUCIA, B., *Diritto e processo penale nell'antica Roma*, Giuffrè, Milano, 1989, p. 88.

[26] This may be deduced from Liv. 25.4.9: ...*Postumius vadibus datis non adfuit. tribuni plebem rogauerunt plebesque ita sciuit, si M. Postumius ante kalendas Maias non prodisset citatusque eo die non respondisset neque excusatus esset, videri eum in exsilio esse bonaque eius uenire, ipsi aqua et igni placere interdici*. See MONACO, L. "Nota critica sul carattere gentilizio dell'antico exilium", *Ricerche sulla organizzazione gentilizia romana*, Jovene Editore, Napoli, 1988, p. 123.

[27] D. 48.20.1.pr (*Call. 1 de. iur. fisc. et pop.*) y D.4.5.5. pr. (*Paul. 11 ad ed.*): *amissione civitatis fit capitis minutio, ut in aqua et igni interdictione.*

the *populus romanus*[28]. It amounted to annulment of the citizen, and to a certain degree, this situation affected the heirs of the person condemned to death[29].

In this regard, Alfenus Varus held that anyone who lost their citizenship was depriving their descendants only of that which would have been their due:

> D. 48.22.3(1.1 ept.): Eum, qui civitatem amitteret, nihil aliud iuris adimere liberis, nisi quod ab ipso perventurum esset ad eos, si intestatus in civitate moreretur: hoc est hereditatem eius et libertos et si quid aliud in hoc genere repperiri potest. quae vero non a patre, sed a genere, a civitate, a rerum natura tribuerentur, ea manere eis incolumia. itaque et fratres fratribus fore legitimos heredes et adgnatorum tutelas et hereditates habituros: non enim haec patrem, sed maiores eius eis dedisse.

The fact that the convicted person's assets were confiscated, even when they had children in their care, according to Brasiello shows that said property was given to the *populus* as if it were a case of ownerless assets[30]. The loss of status *civitatis* implied the loss of their rights as a citizen and as a result, the assets of that person no longer belonged to anyone.

The *publicatio bonorum* implied a total loss of property. The sentence of banishment presupposed that whoever went into exile would do so having been stripped of their property and assets: *item cum civitas amissa est, nulla restitutionis aequitas est adversus eum, qui amissis bonis et civitate relicta nudus exulat*[31]. However, according to Santalucia, until Caesar's time, someone who had been sentenced to *aqua et igni interdictio* was obliged to leave Rome, but was allowed to take their assets with them, although Caesar could confiscate all their property at will [32].

---

[28] DE RUGGIERO, E., *Dizionario epigrafico di antichità romane*, L'Erma di Bretschneiders, Roma, 1961, v. *bona damnatorum*, the term refers to the property confiscated from condemned prisoners for one of the capital sentences imposed, such as death, exile or deportation, which, in the Republic and the early years of the Empire, were placed under the administration of the treasury as the responsibility of the *quaestors.*

[29] The fact that the offspring were seen to be affected in terms of property with the loss of the inheritance due to them from their father, is the direct consequence of *capitis deminutio*, but under no circumstances did it entail the transfer of criminal actions, as in Rome these were governed by the principle of personality of the sentence, therefore no one would inherit another's crime: D.48.19.26 *(Call.1 de cognit.*) *Crimen vel poena paterna nullam maculam filio infligere potest: namque unusquisque ex suo admisso sorti subicitur nec alieni criminis successor constituitur, idque divi fratres hierapolitanis rescripserunt.* See BLANCH NOUGUÉS, J.M. *La intransmisibilidad de las acciones penales en Derecho Romano*, Ediciones de la Universidad Autónoma de Madrid: Dykinson, Madrid, 1997, pp. 53-54.

[30] BRASIELLO, U., *La repressione* cit., p. 115. Conversely, CRIFÒ, G. *L'esclusione dalla città. Altri studi sull'exilium romanono*, Pubblicazioni della Facoltà di Giurisprudenza. Università di Perugia, Perugia, 1985, p.79, does not consider that the *publicatio* of assets was an automatic consequence of banishment, quite the reverse; it was imposed only when it was established in the law that sanctioned the crime.

[31] D. 4.5.7.3 (Paul. 11 ad ed.).

[32] SANTALUCIA, B., "La situazione patrimoniale dei deportati in insula", *Iuris Vincula. Studi in onore di Mario Talamanca*, Jovene Editore, Napoli 2001, p. 178, for whom, given the state of the sources it was not possible to claim with exact assurance that the measure was taken, there is no question that in the time of Alfenus Varus, who was consul in 39 BCE, this disposal was already in force, as he writes in his Digest that the loss of citizenship prevented the children of the condemned person from receiving what would have been their due, in intestate succession if their father had died *intestatus in civitate* (D.48.22.3). This situation is confirmed by Dionysius Cassius (53.23.5-7) when recalling in respect

However, the fact that *publicatio bonorum* implies total confiscation of the convicted person's assets did not preclude the fact that in exceptional cases, they could be granted *viaticum*, or their children could be given *portiones* to ensure their continued survival[33]. Brasiello holds that such cases constituted an extraordinary concession, of a special nature rather than recognition of a right. Concession of *viaticum* proceeded from the magistrate's *imperium*, and did not imply that the *publicatio bonorum* could be considered partial confiscation of property; this should simply be seen as an exceptional measure so that the convicted person or members of their family could make use of part of those assets in order to live[34]. This meant that the convicted individual could take some of their property with them to cover their needs in their place of exile, or for their children to be accorded some of the assets so that they would have sufficient to live[35].

With the onset of the Principate, the nature of the *publicatio bonorum* underwent a profound transformation. In 18 BCE, for the first time, *lex Iulia de adulteriis coercendis*, established confiscation of assets as a punishment. The law castigated a woman convicted of adultery with confiscation of half her dowry and a third of her possessions as a wife, and in the case of a man, half of his property and assets[36]. Augustus himself imposed partial confiscation of assets in crimes of violence and damage to public institutions with promulgation of the *lex Iulia publica et privata* in 17 BCE[37]. As a result, *publicatio bonorum* became a penalty in itself, and no longer an ancillary consequence of a sentence of banishment associated with more serious crimes, but instead the attachment of property, or a part of it, was expressly imposed as a penalty for specific crimes, including as a separate independent punishment [38].

---

of the prefect of Egypt, Cornelius Gallus who in 26 BCE, was accused of serious crimes before the Senate, that only suicide could prevent exile and confiscation of all assets to the benefit of the *populus*.

[33] BERGER, A., *Encyclopedic dictionary of Roman law*, American Philosophical Society, Philadelphia, 1953, s. v. *viaticum*, *viaticum* refers not only to travel costs but also the amount of money which the exiled person could take with them.

[34] BRASIELLO, U., *La repressione* cit., pp. 112-113 y 117-119.

[35] SANTALUCIA, B. "La situazione, cit.," pp. 182-186, for the author the concept of *viaticum* loses its original meaning due to the distorted use that many condemned criminals made of it Many convicted criminals used this possibility to take a considerable portion of their property with them. Abuse of this concept led to Augustus' attempt to restrict it, and Tiberius' provision 23 in which, in order to prevent fraud perpetrated on the property of the *populus*, it was established that anyone exiled by banishment was downgraded to the status of *perigrini nullius civitatis*, to whom all capacity was denied in private Roman law and therefore they could not bequeath to their heirs the goods that they would have acquired in the place of exile and their assets should be paid to the treasury

[36] See, WOLF, J.G. "Die lex Iulia de adulteriis coercendis", Jovene Editore, Napoli, IVRA 62, 2014, pp. 57-61.

[37] D. 48.7.1pr. (Marc.14 inst.) *De vi privata damnati pars tertia bonorum ex lege iulia publicatur et cautum est*, ...(1) *Eadem poena adficiuntur, qui ad poenam legis iuliae de vi privata rediguntur, et si quis ex naufragio dolo malo quid rapuerit*; I.J. 4.18.4 *Item lex Iulia de adulteriis coercendis, quae non solum temeratores alienarum nuptiarum gladio punit, sed etiam eos qui cum masculis infandam libidinem exercere audent. sed eadem lege Iulia etiam stupri flagitium punitur, cum quis sine vi vel virginem vel viduam honeste viventem stupraverit. poenam autem eadem lex irrogat peccatoribus, si honesti sunt, publicationem partis dimídiae, bonorum, si humiles, corporis coercitionem cum relegatione*.

[38] FUHRMANN, M., s.v. *publicatio bonorum*, *Real-Encyclopädie der Classischen ltertumswissenschaft*, 23, Alfred Druckenmüller, Stuttgart p. 2491, *publicatio* appears as an autonomous penalty towards the end of the Republic.

Added to this conceptual change to the penalty of *publicatio* was the fact that it no longer implied the confiscation of all property, but rather the law would determine the amount confiscated, defined by the expression *popolo inferre iubeto* referring to the portion of assets.

From the Principate onwards, and linked to *cognitio extra ordinem* and the Prince's powers, the *portiones concesae* became a more frequent practice, while at the same time, *viaticum* came to be more restricted. Based on his own judgment, the emperor would grant a part of the confiscated property so that those affected by the *potestas* of the convicted *paterfamilias* would have enough resources to survive.

> D.48.20.7.pr. (Paul. l.S. de port., q. lib. dam.) Cum ratio naturalis quasi lex quaedam tacita liberis parentium hereditatem addiceret, velut ad debitam successionem eos vocando (propter quod et in iure civili suorum heredum nomen eis indictum est ac ne iudicio quidem parentis nisi meritis de causis summoveri ab ea successione possunt): aequissimum existimatum est eo quoque casu, quo propter poenam parentis aufert bona damnatio, rationem haberi liberorum, ne alieno admisso graviorem poenam luerent, quos nulla contingeret culpa, interdum in summam egestatem devoluti. quod cum aliqua moderatione definiri placuit, ut qui ad universitatem venturi erant iure successionis, ex ea portiones concessas haberent[39].

As the *publicatio bonorum* of their father's property entailed the loss of assets by those who would have inherited them on succession, but bearing in mind that all the family assets were owned by the *pater*, and in order to ensure that those subject to his *potetas* were not reduced to poverty and destitution, portions of the convicted person's assets were granted to his children. This was not a case of referring to the father's succession or providing them with what would have corresponded to them, even when the number of children involved and awarded a portion meant that this would account for the entirety of the confiscated assets.[40] It was simply used as a discretionary measure.

The granting of *portiones* was implemented with the conceptual change of punishment and criminal procedure that took place with introduction of the *cognitio extra ordinem*. The new procedure entailed a change in the penalty, which, as Giffré states, was established in "flexible terms". The punishment could vary, based on the convicted person's circumstances and a set of objective and subjective specific situations would be taken into account - their personal and social status - which

[39] There are considerable doubts regarding possible interpolations of the text especially the assimilation of the effects of the litis *contestatio* and the judgment. See U. Brasiello, *La repressione* cit., pp. 331 and 340; DE CASTRO, R. *El "crimen maiestatis" a la luz del "Senatus consultum de Cn. Pisone Patre"*, Ed. Universidad de Sevilla, Sevilla 2000, pp. 82-83.

[40] D. 48.20.7.3 (*Paul. l.S. de port., q. lib. dam.*) *Si plures filios damnatus habeat, feruntur exempla, per quae pluribus liberis omnia bona damnati concessa sunt. sed et divus hadrianus in hac sententia rescripsit: " favorabilem apud me causam liberorum albini filiorum numerus facit, cum ampliari imperium hominum adiectione potius quam pecuniarum copia malim: ideoque illis paterna sua concedi volo, quae manifestabunt tot possessores, etiamsi acceperint universa".* See, BRASIELLO, U., *La repressione* cit., pp. 118-119, for whom this is simply a gracious concession made by the emperor such as that which took place with the *restitutio* or which left part of the property to those who have been condemned to *deportatio* (D. 48.22.16).

hitherto had not been considered in ordinary proceedings.[41]. The discretional powers accorded to the magistrate, and the emperor in the ultimate instance, made it possible in some cases for children to be granted part of their father's assets to prevent them from becoming destitute. Santalucia notes that this change, which was introduced to imperial constitutions from the 2nd century CE onwards, reduced the rigour employed in confiscating property with respect to the children who would suffer the consequences of their father's punishment. A new, more indulgent course of action was followed which considered it fair that a descendant should receive part of the paternal property that was their right under the law of succession.[42] This led to a new attitude, resulting in a more flexible interpretation of the *publicatio bonorum* with respect to descendants. This new trend led Hadrian to establish that the children of banished criminals were entitled to a tenth part of the father's assets[43]. Although under no circumstances were the father's assets established as the children's right, because granting this was an indulgence that remained at the discretion of the emperor, who retained the power to decide whether or not to mitigate the serious situation in which the children might find themselves. The jurist Paulus held that, in this way, those who were not involved in the crime were not obliged to suffer the severity of the sentence imposed on their *paterfamilias*, to the point where they could possibly be left destitute[44]. This practice of leaving part of the proscribed assets to the children became more firmly established until, by 426, in the constitution of Theodosius and Valentinian[45] it was enshrined in law. The provision established that both in cases of the death penalty and deportation, all property would be confiscated except where the criminal had children, in which case they would be awarded half of the father's property and assets unless the punishment was for *crimen maiestatis*:

> CJ. 9.49.10: Quando quis quolibet crimine damnatus capitalem poenam vel deportationem sustineat, si quidem sine liberis mortuus sit, bona eius ad fiscum perveniant: si vero filii vel nepotes ex defunctis filiis relicti erunt, dimidia parte aerario vindicata alia eis reservetur. idem est et si postumos dereliquerit… Excepta sola maiestatis quaestione: quam si quis sacrilego animo adsumpserit, iuste poenam ad suos etiam posteros mittit.

[41] GIUFFRÈ, V., *La repressione criminale* cit., pp. 110-111.
[42] SANTALUCIA B. "La situazione, cit.," pp. 188-190.
[43] *Hist. Aug*., *Vita. Hadri*. 18.3.
[44] D. 48.7.20.pr. (*Paul. l.S. de port., q. lib. dam.*) *Cum ratio naturalis quasi lex quaedam tacita liberis parentium hereditatem addiceret, velut ad debitam successionem eos vocando (propter quod et in iure civili suorum heredum nomen eis indictum est ac ne iudicio quidem parentis nisi meritis de causis summoveri ab ea successione possunt): aequissimum existimatum est eo quoque casu, quo propter poenam parentis aufert bona damnatio, rationem haberi liberorum, ne alieno admisso graviorem poenam luerent, quos nulla contingeret culpa, interdum in summam egestatem devoluti. quod cum aliqua moderatione definiri placuit, ut qui ad universitatem venturi erant iure successionis, ex ea portiones concessas haberent.*
[45] CJ.9.49.8pr. *Imperatores Gratianus, Valentinianus, Theodosius. Si deportatus suos et emancipatos filios habuerit, pars, quae ex bonis eius liberis concessa est, ad eos tantum qui in potestate erant transferatur, si emancipati ea, quae consecuti erant emancipationis tempore, damnose existimant conferenda. (1) Sin autem confusionem bonorum et donationis elegerint, omnia ea, quae fiscus liberis damnati concedit, aequae divisionis partibus sortiantur.*(a 380); C.Th. 9.42 8

Justinian definitively settled the question by considering that it was not the property that had acted unlawfully, but those who possessed it, namely the convicted person[46]. Justinian protected the convicted criminal's family and in doing so avoided the disastrous situations that confiscation of property would have meant. Thus, it was established that children would only be deprived of their inheritance in cases of *crimen maiestatis*.

Although it was not until introduction of the *ademptio bonorum* that property confiscation underwent real change. This new form of confiscation of assets appears to be linked to *cognitio extra ordinem*. This was a case of extraordinary confiscation, approximating more to the idea of a fine, than actually confiscating goods, and which could even be considered to be in opposition to the *publicatio*[47]. While the *publicatio* was circumscribed by the law, and was applied solely in those cases for which it was established, linking it to the *damnatio*, conversely, the *ademptio* remained at the discretion of the magistrate, who could impose it as a special punishment in cases that did not entail property confiscation[48]. In a way, it enabled the rigour of the *publicatio* to be mitigated to a degree and permitted the imposition of a specific amount.

The difference between both concepts is confirmed by available sources where, for example, it is possible to read: *Lege Fabia tenetur… Et olium huius legis poena numemaria erat, sed translata est cognitio in praefectum urbis, itemque praesidis provinciae extra ordinem meruit animadversionem. Ideoque humiliores… honestiores adempta demidia parte bonorum in perpetuum relegatio*[49].

For Brasiello, the fact that the technical term for this new form of property confiscation was *ademptio bonorum* was in response to the fact that it was no longer possible to talk of publication, or *poena nummaria*, as now, terms such as *ademptio* (D. 48.19.38.8), *adimere* (48.19.7.4 C.J 7.66.3), *auferre* (D. 48.10.21) would be used, and even generic expressions such as *amissa parte bonorum* (48.19.38.5)[50].

This new terminology implied more than just a name change in respect of *publicatio bonorum*, as there was also a difference in concept. This is a punishment involving the removal of property

[46] Nov. 12.17: *Oportet autem te et in hoc omnem ponere providentiam, cum aliquis dignus apparuerit poena, illum quidem punire, res autem cuis non contingere, sed sinere eas generi et legi, et secundum illam ordini. Nom enim res sunt, quae delinquunt, sed qui res possident; at illi reciprocant ordinem, eos quidem, qui digni aunt poena, dimittum, illorum autem auferunt res, aliois pro illia punientes, quos lex forte ad illorum vocavit auccessionem.* Vid., FERRINI, C. *Diritto penale romano. Esposizione storica e dottrinale*, "L'Erma" di Bretschneider, Roma rist. 1976, pp. 160-161. Justinian even considers the expectant rights of the woman and grants the rights in her dowry.
[47] D. 48.20.8.3 (*Marc. public. iudic*.) *Relegati bona per sententiam specialem publicari poterunt…*
[48] C.J. 9.6 6.
[49] Paul. Sent 5.30.b.1. In this same sense: D. 48.21.3.1 (*Marc. lib. sing. Del*.) and D. 49.14.45.2-3 (*Paul. sent.* 5)
[50] BRASIELLO, U.*La repressione* cit., p. 324.

linked to specific penalties, *relegatio* and *deportatio* in the main. In this regard, a significant difference is noted in this new concept which is linked to the *deportatio* and the *relegatio* as opposed to exile[51]. While exile was identified with the denial of all life's essentials and therefore entailed confiscation of assets owned by the *damnatio*; on the contrary, the *ademptio bonorum* was configured as an accessory penalty, required by a *sententia specialis*. Therefore, in the *relegatio*[52] we note how in some cases, it was at the discretion of the emperor to determine that property should be confiscated, a situation which was restricted by Trajan, whereas it was considered implicit in the *deportatio*[53].

> C.J.7.66.3 (a. 222) Si is, qui ademptis bonis in exilium datus appellaverit ac pendente provocatione defunctus est, quamvis crimen in persona eius evanuerit, tamen causam bonorum agi oportet. nam multum interest, utrum capitalis poena inrogata bona quoque rei adimat, quo casu morte eius extincto crimine nulla quaestio superesse potest, an vero non ex damnatione capitis, sed speciali praesidis sententia bona auferantur: tunc enim subducto reo sola capitis causa perimitur bonorum remanente quaestione.

It is clear that there were two different types of property confiscation; whereas *publicatio* was linked to the main penalty, and when this was extinguished, the property was no longer confiscated; the *ademptio* was in itself a second penalty, which was special and independent, and therefore, it was in no way linked to a main punishment and it could be maintained in force even when the prisoner had died[54].

The fact that it was a special and independent penalty meant that assets could be partially confiscated rather than totally, as with the original *publicatio*. However, in addition, this also meant that the penalty did not end with the death of the convicted person, as in the case of *publicatio bonorum* which, as auxiliary penalty was linked to the punishable crime, therefore, when the prisoner died, the crime ceased to exist, and with it application of the penalty. However, in cases in which *ademptio bonorum* was applied when the prisoner died, only the procedure relating to the crime came to an end, but not the *ademptio*, as it was a different penalty from that imposed for perpetration of the

[51] SÁNCHEZ-MORENO ELLART, C., "La *relegatio in insulam* y su progresiva definición durante el Principado", *Movilidad forzada…* cit., pp. 33 ss.
[52] D. 48.22.7.3-4 (*Ulpianus 10 de off. procons.*) *Sive ad tempus sive in perpetuum quis fuerit relegatus, et civitatem romanam retinet et testamenti factionem non amittit.* (4) *Ad tempus relegatis neque tota bona neque partem adimi debere rescriptis quibusdam manifestatur, reprehensaeque sunt sententiae eorum, qui ad tempus relegatis ademerunt partem bonorum vel bona, sic tamen, ut non infirmarentur sententiae quae ita sunt prolatae.* Similarly D. 48.20.1 (*Pomp. 4 ad Sab*).
[53] SANTALUCIA, B., *Diritto e processo* cit., p. 2.
[54] BRASIELLO, U,. *La repressione* cit., p. 331.

crime, therefore the penalty relating to confiscation of assets continued, and it was up to the heirs to continue with the appeal to prevent enforcement of the sentence[55]:

> D.49.13.1 (Marcer.II apell.) … nam si ademptis bonis relegatus vel in insulam deportatus vel in metallum datus provocatione interposita decesserit, imperator noster alexander plaetorio militi ita rescripsit: " quamvis pendente appellatione morte rei crimen extinctum sit, data tamen etiam de parte bonorum eius sententia proponitur, adversus quam non aliter is, qui emolumentum successionis habet, optinere potest, quam si in reddendis causis appellationis iniquitatem sententiae detexerit".

This was yet another consequence of the independent nature acquired by *ademptio* in respect of *publicatio*. In ordinary proceedings, when the prisoner died, the procedure could no longer continue, except in the case of political crimes of *maiestas*, the peculiarities of which, as will be seen, surpass ordinary operations. Conversely, in extraordinary repression when the prisoner died pending appeal, it fell to his heirs to continue the proceedings in an attempt to revoke the enforcement of property confiscation as a consequence of the *ademptio*.

Early in the Principate there was some confusion with the two concepts as to how the assets were disposed of in the final instance. Thus, while in principle, the confiscated property under *publicatio bonorum* was assimilated with *bona vacantia* and was delivered to the *populus* and paid into the *erario* or public treasury; in contrast, the *bona adempta* was paid to the tax office, and the imperial treasury[56]. The original sources attest to how the *bona damnatorum* were claimed by the tax authorities[57]. Although, this difference cannot be made in the late period, as by then both concepts had become assimilated.

---

[55] On the non-transferability of criminal actions: D. 48.19.26 (Call. 1 de cognit.) See BLANCH NOUGUÉS, J.M., *La intransmisibilidad* cit., pp. 53-54, the principle of personality of the penalty determined the rule of non-transferability applied to criminal actions except those deriving from perpetration of a political crime in which case the principle did not apply.

[56] Tac. *ann*. 4.20 and 6.2. Vid., MILLAR, F., "The *fiscus* in the first two centuries", *Journal of Roman Studies* 53, Society for the Promotion of Roman Studies, London, 1963, pp. 29-36, believes that the term *fiscus* refers to the emperor's property rather than it being created as an institution, therefore, in literary sources expressions such as *res familiaris* or *res domestica* are synonymous with the tax authority. Thus we read in Tacitus. ann 4.20.20 and 6.2.15; similarly GALEOTTI, S., "Ex fisco principis nostri: l'amministrazione finanziaria del principato da Augusto a Tiberio (note sul Sc. de Cn. Pisone patre)", https://www.teoriaestoriadeldirittoprivato.com, 10, 2017, pp. 5-15, considers that Augustus "non avrebbe bisogno di una cassa distinta dall'aerarium: basterebbe l'organizzazione finanziaria del suo patrimonio"; by contrast: BRUNT, P. A., "The fiscus and its development", Journal of Roman Studies 56, Society for the Promotion of Roman Studies, London, 1966, pp. 80-81, believes that that the fiscus cannot be equated with the emperor's private property. In actual fact the confusion is due to the fact that the erario was administered by the Príncipe; see also DE CASTRO, R., *El "crimen maiestatis* cit.", p.87. Regarding Augustus' control of the *fiscus* vid., ARCARIA, F., L'amministrazione finanziaria e fiscale, *Storia giuridica di Roma in età imperiale*, N. Palazzolo ed., Margiacchi-Galeno ,Perugia 1995, pp. 61-65; LO CASCIO, E., "Fiscus principis nostri (Sc. de Cn. Pisone patre, ll. 54-55): ancora sulla configurazione giuridica del fisco imperiale", *Il princeps e il suo impero. Studi di storia amministrativa e finanziaria romana*, Elipuglia, Bari 2000, pp. 168-170.

[57] D. 48.2.20 (Call. *2 poen.*)…*ut bona eorum fisco vindicentur*. On the possible interpolations of the text see , BRASIELLO, U. La repressione cit., pp. 126-127 y 340-341.

Notwithstanding, we note that in the post classical imperial constitutions, property confiscation maintained the meaning of *ademptio*, although frequently, the term *proscriptio* was used. Thus, it is possible to read in the Theodosian Code: *proscriptione omnium facultatum* (C.Th. 6.30.17.) or *bonorum pr et perpetum exlium* (C.Th.16.8.26), and many other texts. A term which, according to Brasiello, was introduced to legal language from literature[58]. In all cases, we find that confiscation of property was mainly linked to *deportatio* and *exilium*, although it is important to point out that in post classical law, rarely were property and assets confiscated in full, and gradually, the rigour of confiscation was mitigated, except in the case of political crimes. We have seen that Valentinian and Valens in 364 (C Th. 9.42.6) intended the assets of convicted persons except in the case of *maiestas*, and in fact, at a later date Gratian, Valentinian and Theodosius, permitted not only the family, but also the convicted person to keep a part of their property[59]. Although again in 423, Honorius and Theodosius reinstated the former legal provisions and only ascendant and descendant relatives could benefit from the property. (C.Th. 9.42.23).

However, the confusing terminology of post classical law tends to muddle the different concepts referring to confiscation of property, therefore in Justinian law there cannot be said to be any difference between the *publicatio* and *ademptio*.

Given the confusion existing with the innumerable constitutions of his predecessors, Justinian endeavoured to create some order, and he initially established that half the assets would be destined for the descendants or ascendants[60], but he was to definitively settle the question in 556 by establishing that all the goods and property would be allocated to descendants and ascendants, except in the case of *crimen perduelles*. Therefore, confiscation was confined to those guilty of political crimes or cases in which the convicted person had no family ties, which led to substantial changes in matters of property confiscation.

> Nov. 134. c. 13. 2: Ut autem non solum corporales poena, sed etiam pecuniariae mediacriores fiant, sanciamus eos qui in criminibus accusentur in quibus leges mortem aut proscriptioenem definiunt, si convincantur aut condemnentur, eorum substantias non fieri lucrum iudicibus aut eorum officiis, sed neque secondum veteres leges fisco eas applicari: sed si quidem habeant descendentes, ipsos habere substantiam; si vero non sint descendentes, sed ascendentes usque ad tertium gradum, eos habere. (3) Si vero mulieres habeant…Si vero nemo praedictorum habeant qui delinquit, tunc vero fisco sociari eius substantiam. In maisestatis vero crimene condemnatis veteres leges servari iubemus.

[58] BRASIELLO, U. *La repressione* cit., p. 465.
[59] C. Th. 9.42.8 y CJ.9.49.8.
[60] CJ. 9.49.10, *infra* p. 11.

We have seen how it was common practice from the time of classical law to grant exceptionally a part of the convicted person's assets to the descendants, a practice that was enshrined in the laws of different post classical constitutions, inspired by *humanitas*[61], until Justinian definitively regulated the system of property confiscation.

It was clear that confiscation of property was treated differently in crimes of high treason– *maiestas* or *perduellio*– given the specific characteristics of this type of crime. We note that, in addition to the fact that considerable use was made of this concept in political conflicts from the Republican era onwards, in the case of political crimes, confiscation acquired features which differentiated it from ordinary property attachment. In the late Republican era, property was confiscated in political conflicts and was used as a tool to defeat adversaries and to favour the interests of certain persons. By the time of the Principate, it continued to revolve around the senatorial *nobilitas* close to the Emperor, and this persisted until the Late Empire.

Since the time of the archaic laws, the confiscation of property has been associated with acts designed to disrupt the established political order. the *perduellio*, the *crimen maiestatis* and any act that contravened the tribunes of the plebe.

Confiscation of assets from the time of the Regal period was associated with political crimes[62]. By 509 BCE, Valerian law was punishing with *consecratio capitis* and *bonorum* those who contested the sacrosanct power of the tribune, giving rise to political use of the concept, especially in the case of the patrician-plebeian conflict[63]. The *consecratio bonorum* was used to ensure respect for the plebe and their magistrates, and also accorded them considerable political force. F. Salerno states that insofar as in the 5th Century BCE capital procedures and therefore the *acratio bonorum* were imposed by the pleheian assembly, the *sacratio* assumed the nature of a political act, the dimension of which appears repeatedly in the sources[64]. This is the case of Spurius Cassius who, according to Livy (2.41.9-12), was accused and found guilty of tyranny, resulting in the destruction of his house, and his property was dedicated to the goddess Ceres.

Around the time of the 4th century BCE, the *publicatio bonorum* gained a more markedly secular nature. This instrument was used by Rome in respect of neighbouring communities

[61] See VALDITARA, G., *Riflessioni sulla pena nella Roma republicana*, Giapichelli, Torino, 2015, p. 68; SANTALUCIA, B., "Dibattito", Il problema della pena criminale tra filosofía greca e diritto romano. *Studi económico-giuridici della Università di Sassari* 54. Atti del deuxieme colloque de philosophie penale, Cagliari, 20-22 aprile 1989, Joven, Napoli, 1991-1992, p. 417-419.
[62] Dion. Hal. 2.74 3.
[63] Liv. 2.8.2; 3.35.6-7; Dion. Hall. 4.15.6
[64] SALERNO, F., *Dalla «consecratio»* cit., pp. 88.

as a reminder of its position of supremacy, according to Cassius Dionysius (7.26.1), it began to be used within the *civitas* as an ancillary instrument in combating the two social orders[65]. Confiscation of assets became an instrument in the hands of the plebeian tribune with the aim of gaining greater political weight[66].

In addition, during difficult moments of the Punic Wars, the *publicatio bonorum* was used against all those who took a stance against Rome's interests'.[67]. This same tendency can be found during the senatorial repression of the Gracos and their supporters[68]. Unquestionably, the political repression of this era was designed mainly to destroy the memory of them all, and for this purpose, the confiscation of assets was presented as an ideal weapon for neutralising the political enemy, or at other times it was used to seek political alliances against common enemies[69].

Use of the concept as a political instrument became even more marked during the civil war in which confiscation of the enemy's assets was a frequently used tool. Innumerable sources illustrate the difficult conflict between followers of Gaius Marius and Sulla, whose political ruses included making use of *publicatio bonorum*. It should be recalled that the house of Sulla was destroyed, but when he entered Rome in 82 BCE he confiscated and auctioned off all the assets of his adversaries[70]. This situation continued in the time of Caesar, as Cicero confirmed to his friend Atticus in a letter[71], where we see how families that were politically connected by tradition, appeared among those whose property had been confiscated. Confiscation of property by means of *consecratio bonorum* or the *publicatio bonorum* was imposed during this period as a means of intimidation and as reprisal against political adversaries, and it had little or nothing to do with the confiscation of property as a result of penalties for common crimes[72]. For Cicero,[73] attachment of assets amounted to public humiliation of the convicted person who, in addition to being deprived of their property, also lost their honour, in that confiscation presupposed a public condemnation of the accused's memory and honour. The Arpinate equated the act of auctioning off the assets with an ignominious funeral. Additionally, there

[65] Conversely, authors such as Livy, Dionisius or Plutrarch who also narrate the condemnation of Manlio Capitolino, do not refer to the *publicatio bonorum*.
[66] SALERNO, F., *Dalla «consecratio»* cit., pp. 94.
[67] Liv.23.17.1-2.
[68] Cic. *de dom.* 38,102.
[69] JAL, P., "La *publicatio bonorum* dans la Rome de la fin de la République", *Bulletin de l'Association Guillaume Budé Année* 26, Les Belles Lettres, Paris,1967, pp. 422-425.
[70] *App. B.c.* 1.89 407
[71] *Att.* 8.13 1
[72] Also in the case of the crime of *ambitu* the confiscation of property had an important role in establishing sanctions against those who tampered with the electoral process. And in this regard, the seizure of property acquires an important role, since the political campaign is paid for by the candidate. The *publicatio bonorum* was imposed, together with the *aqua et igni interdictio* in the *lex Pompeia de ambitu*, of 52 BCE; however, the *lex Iulia de ambitu*, in which only a monetary sanction was imposed disappeared (Dion. 54.16.1).
[73] *Pro Quinct.* 15.50

were those who took advantage of the *sectiones* of the proscripts for their own personal enrichment, as reflected in the auction of Pompey's property, all of which was awarded to Mark Anthony[74].

This type of crime punished by *aquae et igni interdictio* and as a consequence of the capitis *deminutio* associated with it, entails *publicatio bonorum* which is deduced from the sentence itself, without any need for expressly mentioning it. We see how the importance of the *publicatio bonorum* is even more relevant in crimes of a political nature in the Empire. Thus, Marcus Aurelius promulgated a constitution in which the accusation of *crimen maiestati*[75] continued *post mortem* against the accused, and could even be initiated *ex novo*[76]. In which case, seizure of the property fell to their heirs[77]. This is an exception to the general rule governing criminal Roman law of the principle of personality in which the crime was cancelled out with death: *crimen extinguitur mortalitate*.

However, Marcus Aurelius established that crimes of *maiestas* should be prosecuted following the death of the accused: s*i quis, cum capitali poena vel deportatione damnatus esset, appellatione interposita et in suspenso constituta fati diem functus est, crimen morte finitum est*[78]. A justified measure in this type of crime in general which directly attacked the *populus romanus*[79]. Prosecution fell exclusively on the property designed to ensure *damnatio memoria* of the accused through *purgratio monimis* [80] which entails as Volterra states, "the nullity of actions carried out in life, and the impossibility of anyone legally taking their place, on the basis of which, the possibility of confiscating assets from their heirs was justified, in addition to nullity of all attachments and freedoms granted by the deceased"[81]. Nullity of attachments and freedoms granted –D.40.9.15.pr. – which was considered from the moment of perpetration of the crime, in order to prevent any possible defrauding

[74] Cic. *Phil*. 2.26 65 See, GARCÍA MORCILLO, M. *Las ventas por subasta en el mundo romano: la esfera privada*, Publicacions i Edicions Universitat de Barcelona, Barcelona 2005, pp. 50-52, on abuse of the auction of assets in the later Republican years, to which Caesar was a party.
[75] SOLIDORO, L., "La disciplina del crimen maiestatis tra tardo antico e medievo", *Crimina e delicta nel Tardo Antico. Atti del Seminaio di Studi. Teramo, 19-20 gennaio 2001*. Giuffrè, Milano 2003, pp. 148-152.
[76] C.J.9.8.6…*Post divi marci constitutionem hoc iure uti coepimus, ut etiam post mortem nocentium hoc crimen inchoari possit, ut convicto mortuo memoria eius damnetur et bona eius successoribus eripiantur: nam ex quo sceleratissimum quis consilium cepit, exinde quodammodo sua mente punitus est.*
[77] See, BISCARDI, A., *Aspetti del fenomeno processuale nell'esperienza giuridica romana* 2ª ed., Giufrrè, Milan 1978, pp. 160-161, according to the author, in procedures of concussion and *maiestas*, when the accused died following the *litis contestatio*, their assets were confiscated therefore it did not depend on who had pronounced the sentence.
[78] C J.9.6.6 pr. In this same sense: CJ.9.6.2; 9.6.3.
[79] VOLTERRA, E. "Processi penali contro i defunti in diritto romano", RIDA 3 1949, p.485-486. See Id. "Sui la cofisca dei bieni dei suicidi", *Rivista di Storia del diritto italiano* 4, Fondazione Sergio Mochi Onory per la Storia del Diritto Italiano, Milano 1933, p. 393, cases of suicide of the accused during the proceedings gave rise to confiscation of their assets but this was not a case of an exception such as that activated in Marcus Aurelius' constitution.
[80] BLANCH NOUGUÉS, J.M. *La intransmisibilidad* cit., pp. 53-54, for the author in the *crimen de maiestas* the action of the tax authority is directed against the heirs of the deceased accused party because in these cases, the procedural action and the *post mortem* sentencing are designed to achieve danmatio *memoriae* of the deceased. D. 48.2.20 (Mod. 2 de poen.) *…et maiestatis iudicio, quae etiam mortuis reis, cum quibus nihil actum est, adhuc exerceri plauit…* see *infra* note 58.
[81] VOLTERRA, E., "Processi penali contro., cit.", p. 490.

of the tax authorities. Although in order to proceed to confiscation of assets and nullity of attachments and granting of freedoms, the condemnatory sentence was always mandatory[82].

This exception to the principles of criminal law in crimes of *maiestas*[83], *perduellio* and, at a later date, also applied to heresy, is in Brasiello's view, due to the fact that from that time, the tax authority was responsible for prosecuting these *crimina.*

We note how, throughout the Roman legal experience, the confiscation of property, from its original use as a measure that was associated with the penalty and which followed the same purpose, it went on to become an extraordinary penalty, which did not need to be enshrined in the law, as it relied on the magistrate's or the emperor's discretionary power, thus leading to a use which in many cases was instrumental to their interests, especially in crimes of a political nature, in which the *ratione imperii* was imposed on the principles of law in an attempt to counteract those who sought to disrupt the stability of the Empire.

[82] D.38.16.1.3 and D. 29.2.86.1.

[83] This crime, which was originally an offence against the people of Rome, was gradually transformed to become a crime against the emperor, as to a degree he was personification of the majesty of the state. See MANTOVANI, D. *Il problema d'origine dell'accusa popolare*, CEDAM, Padova,1989, believes that the *crimen maiestatis* proceeds from the union of the *crimen perduellionis* and cases of *proditio*. For this reason, the *crimen maiestatis* became increasingly frequent from 98 BCE.